



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO.701 OF 2015

FORMERLY MERU SUCC. CAUSE NO.433 OF 2010

IN THE MATTER OF THE ESTATE OF THE

LATE FRANCIS KIBARA MWIANDI (DECEASED)

MEDRINE MUKWANYAGA THARA.....1ST PETITIONER/APPLICANT

VERSUS

DORIS NCUGUNI MWIANDI.....1ST PROTESTOR

BEATRICE KANYUA JULIUS.....2ND PROTESTOR

BOSCO KIMATHI KIBAARA.....3RD PROTESTOR

J U D G M E N T

1. This cause relates to the estate of the late **FRANCIS KIBARA MWIANDI** (deceased) who died on 29th September, 2003 at Forces Memorial Hospital domiciled in Nairobi but his home was at Chogoria Location. The deceased died intestate and as per the petition filed herein and the Area Chief's letter dated 27th November, 2003 on record, he left the following dependants surviving him namely:-

- (i) Medrine Mukwanyaga - widow
- (ii) Morine Makena - daughter.

2. The petition filed herein listed only one property to wit **L.R. NO. MWIMBI/KIRARO/1298** as comprising the estate. The record of proceedings show that Medrine Mukwanyaga Thara was appointed the administratrix of the estate by this court on 10th March, 2017 and this was after the earlier grants issued on 1st September 2011 and the other one dated 11th October, 2016 were revoked by this court.

3. The appointed administratrix moved this court vide Summons for Confirmation of Grant dated 12th September 2017 for confirmation of the grant issued proposing that the whole estate be distributed to her which proposal was supported by her daughter Moreen Makena through a consent dated 12th September, 2017 filed together with Summons for Confirmation of Grant.

4. Doris Ncuguni Mwiandi, a mother of the deceased and a mother in law of the petitioner filed an affidavit of protest to the proposed mode of distribution as proposed by the administratrix. In her affidavit of protest sworn on 21st September 2017, the 1st protestor stated that the deceased had other dependants who survived him and listed them as follows:-

- (i) Beatrice Kanyua - wife
- (ii) Astrid Karimi - wife (deceased)
- (iii) Bosco Kimathi Kibaara - son

5. The other basis of protest filed herein was that, the petitioner had benefited from Plot No.002 Keeria Market and pension. She accused

the administratrix for non disclosure of material facts in this cause.

6. Beatrice Kanyua Julius, the 2nd protestor, too filed an affidavit of protest claiming that she was a wife of the deceased and reiterated what the 1st protestor stated in her affidavit of protest. Bosco Kimathi Kibaara, 3rd protestor similarly also filed a protest claiming that he is a son to the deceased and should be considered in the distribution of the estate.

7. At the hearing of the protest, the petitioner conceded that Doris Ncuguni Mwiandi is her mother in law and a mother of the deceased. She told this court that she indeed got pension benefit from Kenya Defense Forces where the deceased worked as she was the named next of kin. She further told this court that she handed over Kshs.10,000/- to her mother in law, the 1st protestor and a further Kshs.10,000/- to her father in law. She denied that the plot at Keera Market is part of the estate claiming that the plot is hers having purchased it. She denied knowledge of any other wife stating that when she was getting married in church none of the alleged wives turned up to stop the wedding and none showed up during the lifetime of the deceased at their matrimonial home. She also denied that Bosco Kimathi Kibaara, the 3rd protestor was a son of the deceased stating that the deceased never mentioned to her that he had a son by that name or any other child apart from Moreen Makena.

8. Doris Ncuguni Mwiandi (DW1) on her part testified that the petitioner was her daughter in law on account of being a wife to the deceased herein.

According to her, Beatrice Kanyua was the 1st wife of the deceased. It was her evidence that the petitioner herein was the 3rd wife and named one Astride Kanyua as the 2nd wife of the deceased. She further testified that Bosco Kimathi was a son of Beatrice Kanyua and the deceased herein. She further testified that she had no interest in the estate. She further testified her late son, the deceased herein disagreed with Beatrice Kanyua on account of the deceased bringing another wife Astride Karimi, the mother of Moreen Makena and that later after a few years Astride Karimi died. She told this court that Beatrice Kanyua left the deceased and went to rent a house after the deceased brought Astride Karimi home.

9. Beatrice Kanyua Julius (DW2) testified and supported the sentiments of the 1st protestor. She told this court that she was a wife to the deceased having married him in 1980 under Meru Customary Law. According to her she got married to the deceased after she got pregnant with his child and that dowry was paid to her parents in form of sugar. She further stated that she lived with the deceased until 1985 when she went back to her parents home. She also stated that she had one child with the deceased Bosco Kimathi who was born in January 1985. When put to task during cross examination, she however could not explain the disconnect between the reason she had given for having got married to the deceased (pregnancy) and the fact that the child was born after they had already separated with the deceased.

10. Bosco Kimathi Kibara (DW3) testified and insisted that he was a son to the deceased and produced a birth certificate issued on 18th September, 2018 as proof. The birth certificate was tendered as (D. Exhibit 1) by Samuel Mwaniki (DW4), the County Registrar of births and deaths. The Registrar (DW4) told this court that the 3rd protestor (DW3) went to his office and applied for a birth certificate and presented documents (his mother's ID, school leaving certificate and ID of a witness) in order to be issued with a birth certificate. He further stated that upon checking the details including a National Bureau Print out supplied by the 3rd protestor he issued a birth certificate to him. He also stated that the application for birth certificate was made on 18th September, 2018 and he issued the birth certificate the same day.

11. This court has considered the protests filed in this cause and the submissions made by both counsels. The protestors case rest on the evidence tendered by 1st protestor, the mother of the deceased and a birth certificate tendered as D. Exhibit 1. The 2nd and 3rd protestors have contended that because, the mother to the deceased recognizes them, they should be considered as dependants. The protestors have submitted through counsel that the birth certificate produced by the Registrar of Deaths and Births, is prima facie evidence that the 3rd protestor is a son of the deceased and therefore a direct beneficiary while the 2nd protestor should be considered as a former spouse and a dependant in accordance with the **Section 29 (b)** of the **Law of Succession Act**.

12. There are two issues posed in the protests filed herein which are:-

(i) Whether the 2nd protestor is a dependant within the meaning of **Section 29(b)** of the **Law of Succession Act**.

(ii) Whether the 3rd protestor is a direct dependant within the meaning of **Section 29 (a)** of the **Law of Succession Act**.

13. To begin with the 1st issue, it is quite clear that the question of dependency in respect to the 2nd protestor (Beatrice Kanyua Julius) as I have observed above, is hinged on the evidence of the 1st protestor. This is because there was no other witness called to show or elaborate on whether there was a customary marriage between the deceased and the 2nd protestor. The 2nd protestor stated in her evidence that dowry was paid in form of some sugar but there was no evidence tendered to show that sugar was ever given to the 2nd protestor's parents and if the commodity (sugar) was acceptable as dowry in Meru customary practice.

14. I have also considered the evidence tendered in this cause at some length and have noted from the affidavit by the petitioner sworn on 23rd May 2018 that there are weighty questions posed by the petitioner especially in regard to the evidence by the 1st protestor or the mother of the deceased. The petitioner has contended that the 1st protestor is insincere in her claims that the 2nd and 3rd protestors are dependants because if they were, she could have included them as beneficiaries on behalf of the deceased here, in Succession Cause No.6 of 2016 pending in Chuka Chief Magistrate's Court a cause that relates to the estate of the late husband to the 1st protestor. I have looked at the copy of the petition filed in the lower court and from the affidavit in support of petition for letters of administration of the estate of Mwiandi Ngariria Karaiu alias Mwiandi Ngaria Karatu, the 1st protestor who is the petitioner in the that cause did not include either the 2nd protestor or the 3rd protestor as beneficiaries in that cause. If the 1st protestor herein was genuine in her claims, she should have been candid in the cause pending in the lower court and disclose that her late husband had a son who died but left spouses and children who survived him. Had

she done that, then perhaps this court would have taken her seriously in this court. But saying one thing in another court and something different in this court in my view affects her overall credibility as a witness. Her evidence which in my view is the only evidence being relied by the 2nd protestor does not meet the threshold required to prove a claim in civil cases. The protestors did not call any other family member or clan member of the deceased who might have witnessed the customary engagement or marriage between the deceased and the 2nd protestor. Her claim of dependency in my view is unsustainable in law for lack of sufficient evidence.

15. On the 2nd issue in regard to the dependency of the 3rd protestor, I have considered the question posed by petitioner in her submission and the cited decision in *Priscilla Waruguru Gathigo -vs- Virginia Karungu Kathigo [2004] eKLR* which is whether a birth certificate on its own can be sufficient to prove paternity or dependency under **Section 29 of the Law of Succession Act**. In this cause the 3rd protestor tendered a birth certificate (D.Exhibit 1) through the County Registrar of Births and Deaths (DW4). I have looked at the birth certificate and though the certificate was genuinely issued by the Registrar who vouched for its authenticity in his evidence in court, the details/contents of the birth certificate in my view are suspect for the following reasons:-

(i) The birth certificate indicates that the 3rd protestor was born on 1st January, 1985 yet the mother (2nd protestor) told this court that the deceased herein married her in 1980 because she fell pregnant. Her reason forgetting engaged or married to the deceased was falling pregnant. Although she later clarified that she got her son (the 3rd protestor) in 1985 after separating with the deceased, still I find some inconsistency in her evidence because it is hard believing her that her only reason for engagement with the deceased is something that happened 5 years after they had married.

(ii) Secondly and more importantly is that the birth certificate presented to this court was applied for on 18th September 2018 and apparently with some urgency, the same was issued on the same day on 18th September, 2018 and this after the petitioner had testified on 17th September, 2018. This in my view is a clear indication that the birth certificate was applied for purely to counter the evidence that had been tendered by the petitioner disowning both the 2nd and 3rd protestors perhaps upon realization that they really had no tangible evidence, they thought of adding weight to their protests by getting a birth certificate.

(iii) The documents relied on by the Registrar in issuing the birth certificate in my view has little weight on the question of paternity. The Registrar simply based his decision to issue the birth certificate on the ID of the mother, (2nd protestor) a copy of ID of a witness and alleged data from National Bureau (which data was not availed to this court).

There were no reasons given why the 3rd protestor only thought of getting a birth certificate 33 years after the demise of the deceased and after the trial of the protests had commenced. In the case of *Priscilla Waruguru Gathigo -vs- Virginia Kanugu Kathigo [2004] eKLR* Justice H.M Okwengu when determining a protestor's claim of marriage to the deceased observed as follows:-

"The protestor's attempts to prove the paternity of her children by producing birth certificates was also not convincing at all as these certificates were obtained after the death of the deceased and therefore with this suit in mind. The personal record from the school also contradicted the information on the birth certificate, such that the documents could not be relied on."

Further to the above decision, in the cited case of *Josephat Kola Omino & 3 Others -vs- Morphine Ogweno Ougo & Another [2017] eKLR*, Justice M.W Muigai stated as follows:-

"..... the birth certificate produced by Bernard was obtained after the deceased's death and after the issue of his paternity was raised at the hearing. Although there is nothing in the Births and Deaths Registration Act (Cap 149 Laws of Kenya) that prohibits a birth from being registered at any time, the certificate was obtained long after the deceased's death and no explanation was given for the delay. Bernard did not produce any other documents like birth notification or baptismal card that would corroborate the fact that the deceased was his father. The only inference I can draw particularly in the light of all the other evidence is that it was obtained to support his case."

16. This court has gone through the evidence tendered by the protestors in this cause and there is no other evidence tendered from either the local chief, sub-chief or even village elder to support the fact that the 3rd protestor is a son of the deceased herein. I have also noted from Succession Cause No. 6 of 2016 in the lower court that the 3rd protestor is not recognized as a grandson of the late Mwiandi Ngariria Karatu, the late father of the deceased herein. The petitioner stated in her evidence that the deceased never mentioned to her that he had any other child apart from Maureen Makena. It is a fact that Maureen Makena is a step daughter to the petitioner and that she was married after Maureen had already been born. It therefore follows that if the 3rd protestor was really a son of the deceased, the deceased could have gladly introduced him to the Petitioner particularly given that the petitioner was unable to bear any child of her own. In my view brandishing a birth certificate obtained long after the demise of a deceased without any explanation advanced for the delay is insufficient to prove and establish paternity and dependency under **Section 29 of Law of Succession Act**. In this cause, the 3rd protestor, Bosco Kimathi upon listening to the evidence tendered by the petitioner in this court, apparently made a belated attempt to solidify his case by acquiring a birth certificate. The same in my view is both unconvincing and insufficient in the light of evidence analysed above. I find that protests filed in this cause cannot be sustained in law. The 3rd protestor did not tell this court why he obtained the birth certificate 33 years after he was born.

17. I am also not persuaded that the protestors on the basis of my finding can have any ground to claim that the petitioner had benefited from a previous gift or benefit from the deceased. The petitioner in any event has tendered evidence which shows that the plot at Keera Market is her own property and not part of the estate herein.

In the premises, the grant issued on 10th March 2017 is hereby confirmed as per paragraph 4 of the affidavit in support in view of the consent by Maureen Makena. I shall make no order as to costs.

Dated, signed and delivered at Chuka this 17th day of January 2019.

R.K. LIMO

JUDGE

17/1/2019

Judgment dated signed and delivered in the open court in presence of Mwiti for petitioner and protestors in person.

R.K. LIMO

JUDGE

17/1/2019