REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 3304 OF 2004

IN THE MATTER OF THE ESTATE OF DKK (DECEASED)

K K K.....APPLICANT/2ND ADMINISTRATOR

VERSUS

LWK.....RESPONDENT/1ST ADMINISTRATOR

RULING

1. LWK and K K K are personal representatives of the estate of DKK who died on 26th June, 2002. A Grant of representation intestate was made and issued to them on 9th November, 2016.

2. K K K took out summons dated 8th February, 2017 seeking confirmation of the grant made to them. In the affidavit in support of the summons sworn by himself on the same day, it was stated that the deceased had one property forming his estate, namely; Parcel Number Kiambaa/Thimbigua xxxx which had been sub divided into five portions.

Parcel Number and size **proposed heirs and share** Kiambaa/Thimbigua/xxxx M K K

0.047 Ha S G K

(In Equal Shares)

Kiambaa/Thimbigua/xxxx M K K

0.047 Ha S G K

(In Equal Shares)

Kiambaa/Thimbigua/xxxx K K K

0.047 Ha S W K

T W K

H N K,

W W K

C N K

(In Equal Shares)

Kiambaa/Thimbigua/xxxx K K K

2.130 Ha **(1 Hectare)**

S W K

T W K

H N K,

W W K

C N K

(**1.130 Hectares Jointly)**

3. It was stated that the deceased was survived by eight children, two from the first house and six from the second house. It was declared that LWK had been divorced by the deceased and should therefore not receive any share from the estate of the deceased.

4. Attached to the Summons was an alleged last will and testament by the deceased dated 6th February, 2002. The will was said to have been witnessed by Lawrence Mungai and Mbugua Boro. The will provided for the sharing of his property between the deceased's wife H W K and her children as proposed by the 2nd Administrator. The deceased's children not provided for by the will were M K K and S G K. The 2nd Administrator avered that the deceased had intended to distribute two portions of land measuring 50 by 100 each on 15th November, 2011 in a meeting and he attached minutes of the said meeting. It was his proposal that the court adopts this mode of distribution.

5. There is a Response to the said application through an affidavit sworn on 25th May, 2018 by the 1st Administrator LWK. It was her response that the mode of distribution proposed was not acceptable as the 2nd Administrator had excluded some beneficiaries and the distribution was also disproportionate.

6. According to the Respondent, the deceased was in a polygamous marriage and was survived by two wives, herself and HWK (now deceased). That the deceased had two biological children with her. Her eldest son J N K was not the deceased's biological son but had been taken up by the deceased as his own hence he should be considered as a beneficiary. She asserted that she was not divorced by the deceased and denied the allegation that the deceased had a last will and testament. In her view, no reference should be made to the document as it was not the deceased's will.

7. She contended that the deceased was the owner of the Property Titled as No. Kiambaa/Thimbigua/xxx measuring 2.55 Hectares which was subdivided into five parcels being numbers xxxx, xxxx, xxxxx each measuring 0.047Ha (0.1161 acres), xxxx measuring 0.4047 Ha (1 acre) and xxxx measuring 2.130 Ha (5.2632 acres). It was her contention that since the House of HWK had been in sole possession of parcels Nos. xxxx, 3747, 3748 and xxxx for 16 years, they had greatly profited from it including the sale of 3749. She proposed that the said house was therefore entitled to a lesser share thus the division should be done on a Seventy – Thirty (70:30) ratio on the remaining properties.

8. The Applicant/2nd Administrator filed a further affidavit dated 19th September, 2018. It was his averment that the deceased was in a monogamous marriage having married his mother under the African Christian Marriage and divorce Act. He attached a Certificate of marriage issued. He insisted that the deceased had been divorced from his 1st wife the Respondent for over 29 years. During this time, they had been living separately only for the Respondent to come back with three children, 8 months before the demise of the deceased to claim inheritance. In the presence of the elders, the deceased gifted the Respondent's sons with a parcel of land measuring 200 feet by 50 to build upon. A copy of the Deed of Gift was attached.

9. It was the Applicant's proposal that, although the deceased did not provide for the Respondent's two sons in his will, he wanted to honour his wishes and give them the parcel as proposed. He also averred that Parcel no. xxxx had been sold by the deceased during his lifetime and did not form part of the deceased's estate.

10. In response to the further affidavit, the Respondent deponed a further affidavit dated 15th October, 2018. It was her averment that the deceased had no capacity to contract a statutory marriage on 8.7.2000 having been previously married under customary law to her. She insisted that she was still a wife and a dependant of the deceased.

11. On the issue of her 1st child, J N, she contended that it was the 2nd Administrator's own admission that the deceased had accepted him as his own. Further, that in the alleged deed of gift presented by the applicant, J N K was named as one of the children the deceased had gifted property to build on. However she denies that the deceased ever bequeathed any property to her children, and even if he did, 200 by 50 feet out of 6.6 acres of the total acreage was an unjust share. She urged the court to distribute the estate fairly to all beneficiaries.

12. The Court directed that the summons for confirmation of grant do proceed by way of written submissions. Both parties filed their submissions on which the Court has relied to reach a determination.

13. In the submissions for the Applicant/2nd Administrator, he relied on the contents of the supporting and further affidavits to support the proposed mode of distribution advanced. It was submitted that, the deceased never recognized J N as a son since he did not formally adopt or give him his Surname nor provide for him.

14. On the issue of the Respondent's marriage to the deceased, counsel for the Applicant submitted that there had been no attempt by the Respondent to have the deceased's marriage to HWK nullified. Further that, although she was a former wife, the Respondent was not a dependant as she was not being maintained by the deceased prior to his death.

15. On the proposed mode by the Respondent, Counsel for the 2nd Administrator opined that the proposed 70:30 sharing lacked legal and factual basis. It was submitted that the proposal was defeatist since it was the Respondent and her sons who left the deceased's homestead and could therefore not benefit from it. It was the Applicant's prayer that the mode of distribution proposed by him be adopted and the grant confirmed.

16. In his submissions the Applicant averred that, the deceased had two children with his 1st wife M K K and S G K. J N a son to the deceased's 1st wife was born out of wedlock and was never acknowledged as the deceased's son. It was claimed that neither LWK nor J N had a valid claim to the deceased's estate as they were not dependants, the deceased having been survived by only one wife and eight children.

17. In their submissions, the Respondent reiterated the contents of her replying affidavit and further affidavit. In summary, the main issues raised were that the alleged last will and testament of the deceased was not valid, that she was a wife to the deceased, and her son J N was a dependant of the deceased. She prayed that previous benefits should affect the distribution of the estate.

18. It was submitted that the Applicant had failed to discharge the burden of proving that the Respondent had been divorced by the deceased and there existed a valid will. Further, that the Court should recognise the Respondent's eldest son J N as a dependant of the deceased since he had been maintained by him. It was further submitted that the Applicant had admitted in his Replying Affidavit dated 6th June, 2006 that the said J N was a dependant of the deceased.

19. On the distribution of the estate, Counsel submitted that the Court should adopt the equitable approach in distributing the deceased's property. She relied on the case of **Lucy Wambui Nganga & Another vs Francis Munga Ngwiri [2017] eKLR** where the court determined that equal distribution envisaged under Section 38 of the Law of Succession Act was vitiated by previous benefits accrued by some beneficiaries.

20. I have read and carefully considered the pleadings, the written submissions and the authorities relied upon in this matter. The issues to be decided are:-

I. Whether there exists a valid will of the deceased.

II. Who are the beneficiaries of the estate of the deceased.

III. Whether the deceased gifted any property to the Respondents Children.

21. First, I take note that there is a further affidavit by the Respondent dated 26th November, 2018 filed on 28th November 2018. The said affidavit will not be considered in my determination since it was filed out of time and without leave of the Court.

22. The first issue for determination is whether the will dated 6th February, 2002 is valid. A copy of the disputed will was lodged by HWK (now deceased) in Kiambu SPMC Succession Cause No. 176 of 2002 on 4th April, 2003 together with a Protest to the letters of administration sought. The alleged will attached is a handwritten Photostat copy in Kikuyu language. A translation was provided dated 17th January, 2003 and has signatures at its foot.

23. On 1st December, 2004, an application dated 29th October, 2004 was presented before Court by the applicant and the Court in these proceedings ordered that the Principal Magistrate's Court Kiambu file number xxx of the 2002 involving the estate of the deceased herein be availed. The applicant herein had sought for the revocation of the grant issued to the 1st Administrator herein. A compromise was reached on the said application and on 9th November, 2016 the Court issued orders by consent that letters of Administration intestate of all the estate of the deceased be issued to K K K and LWK.

24. In her protest to the confirmation of grant, the Respondent challenged the existence of the will. The law on the validity of written wills and testaments is stated in sections 11 of the Law of Succession Act, Cap 160, Laws of Kenya. Section 11 provides that:

No written will shall be valid unless-

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

25. The validity of the document presented should be tested on the basis of the provisions of Section 11 of the Law of Succession Act. The document bears the names and marks of attestation of two witnesses Lawrence Mungai and Mbugua Boro. The issue raised by the Respondent was that the deceased never wrote a will. It was upon the Applicant to provide evidence through affidavits of either of the

witnesses to the will.

26. I have perused the Court record and found an affidavit sworn by James Njoroge Mungai a.k.a Lawrence Mungai dated 4th June, 2009. In his affidavit, he claims to have witnessed the drawing of the Will by the deceased. He also claims that James Njoroge Mungai and Lawrence Mungai are one and the same person. However on the alleged will, there appears to be no indication that the attesting witness, Lawrence Mungai is also known as James Njoroge Mungai. The court can therefore not make a conclusion on the matter since the evidence was not subjected to cross examination.

27. The will and its contents having been disputed, the onus was on the Applicant to avail the witnesses who attested the will to shed light on its existence and clarify on the two names used in the affidavit presented. In the absence of evidence of the witnesses who attested the will, the Applicant cannot be said to have provided sufficient proof of the validity of the document dated 6th February, 2002 as an authentic will. In any case, the parties themselves agreed by consent to treat the deceased's estate as intestate and a grant was issued to that effect on 9th November, 2016.

28. The 2nd issue for determination as to who the beneficiaries to the estate of the deceased are. In the applicant's proposal he listed eight children of the deceased as the beneficiaries. The Respondent indicated that she was a wife to the deceased and her first born son had been acknowledged by the deceased as his child and dependant thus they were both entitled to a share of the estate.

29. In her response the Respondent averred that she was married to the deceased under Customary Law and had never been divorced. She did not tender any evidence on the formalities that accompanied the specific type of marriage that she alleges to have contracted with the deceased. She also did not provide any independent witnesses who witnessed the ceremony attendant to their marriage if there was any.

30. In the absence of such evidence, the only recourse would be to presume marriage between her and the deceased by cohabitation. In that respect this court fully associated itself with the holding in the **Court of Appeal case of Hortensiah Wanjiku Yawe vs Public Trustee in Civil Appeal No. 13 of 1976** cited by the Respondent. The Respondent and the deceased appear to have lived together for some time but thereafter have been separated for 29 years. This has not been disapproved. Prior to his death, the deceased had not been living with the Respondent. On the record is a valid marriage certificate between the deceased and HW. The existence of a Certificate of marriage is sufficient proof of marriage between the deceased and HW. The Respondent has not provided any evidence as proof of any marriage between herself. I therefore find no basis to deem the Respondent as a wife of the deceased even by dint of cohabitation.

31. The applicant claimed that the Respondent's first child J N was not the deceased's son and had never been acknowledged as such. On the other hand, the Respondent admitted that although he was not sired by the deceased he had been taken into the deceased household, acknowledged and maintained by the deceased.

32. In the interpretation Section of the Law of Succession Act Section 3(2) the term "child" refers to one's natural child including, for a female person, a child born to her out of wedlock, and regarding a male person, a child whom "**he has expressly recognized or infact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility."**

Section 3 (3) goes on to state that:

> **"A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock."**

33. I do not think the occasional references to J N as the deceased's child in a few instances without concrete evidence that, the deceased had expressly recognized and in fact accepted him as his own; that they lived together as father and child; that he was absorbed in the family of the deceased or that the deceased voluntarily assumed permanent responsibility over him, is sufficient to show that he was a dependant of the deceased in such sensitive matters as inheritance. In this case the Respondent has not indicated any such circumstances. Claiming acknowledgment by the deceased is not enough without sufficient proof.

34. Section 29 of the Law of Succession defines a dependant as:

> **(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
>
> **(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**
>
> **(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death**."

35. Proof of dependency is thus a condition precedent for purposes of inheritance. J N was born before his mother came to live with the deceased. Thereafter, his mother was separated from the deceased for a period of 29 years. The burden therefore falls upon the Respondent to prove on a balance of probabilities that her son was a dependant of the deceased. The Respondent merely alleges that the deceased maintained her son without providing any concrete evidence of such maintenance.

36. The Applicants dispute this dependency and there is evidence that J N did not live with the deceased. I note in this regard that the Respondent did in her affidavits admit that her 1st child was not the Deceased's biological child, but she did not provide any additional

evidence of how the Deceased maintained the child or the responsibility he undertook with respect to the said child.

37. On record are two untitled documents referred to by the parties as deeds of gift dated 27th October, 2001 and 15th November, 2001 respectively presented by the Applicant. It cannot escape the court's attention that these proceedings began in Kiambu Magistrate's Court in 2002. The Applicant's mother was cited in 2003 and the Applicant herein took over the proceedings in 2004, yet the said documents were not mentioned at all in any of the documents filed in court. The documents were only introduced as late as June 2009 as attachments to the affidavit of one Bedan Kinuthia Waruingi and James Njoroge Mungai aka Lawrence Mungai, raising doubts as to their authenticity.

38. No explanation was offered as to why it took 5 years for such key documents to be introduced in the court record if at all they were in existence.

39. The documents and their contents were disputed, and it was incumbent upon the Applicant to call the parties who allegedly witnessed the making of the documents and who attested them to shed light on how they came into existence, their contents and the condition of the deceased at the time he is alleged to have drawn the documents. In the absence of such crucial evidence, and considering that no explanation was offered as to why the document was introduced in court five years after the case was filed, it is difficult to attach serious evidential weight to the said documents.

40. It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of **Miller vs Minister of Pensions [1947] 2ALL ER 372,** Lord Denning said the following about the standard of proof in civil cases:-

> **'The standard of proof is well settled. It must carry a reasonable degree of probability…..if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'**

41. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not to exist.

42. I have perused the pleadings and all the documents filed by the parties. Rule 26 of Probate and administration Rules prescribes;

> **1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the name degree as or in priority to the applicant.**
>
> **2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.**

43. From the above provision, I note that when the Applicant filed summons for confirmation of grant he did not file the same together with consent in writing in form 37 of all dependants. The application was not accompanied by consents in writing of all dependants or beneficiaries.

44. In **Re Estate of John Musambayi Katumanga – deceased [2014] eKLR W. Musyoka J,** held that:-

> **"The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is 'equally' as opposed to 'equitably'. This is the plain language of the provisions. The provisions are in mandatory terms – the property "shall … be equally divided among the surviving children." Equal distribution is envisaged regardless of the ages, gender and financial status of the children."**

Being guided by the foregoing, I am of the opinion that the application of Section 40 of the Act will result in equal distribution of the estate among the children of the deceased. Taking that into consideration, the total number of units is eight; four children of HW and LW's two children, the total parcel measures approximately 2.271 Hectares. It would appear, from the proposed mode of distribution by the applicant/2nd administrator that he would get 1 Hectare while the remaining portion is shared among his siblings. The Respondent's children were apportioned 200 by 50 plots. No justification has been made for the extra-large shares given to the Applicant and his siblings. Hence in the exercise of my discretion, to ensure fair and equitable distribution of the estate, I order as follows:

i) The parcel of land known as Kiambaa/Thimbigua/xxxx measuring 2.271 Hectares is to be distributed equally among the eight (8) children of the deceased.

ii) Where a child (beneficiary) is deceased, their respective share shall devolve to their respective beneficiaries.

iii) There shall be no orders as to costs.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 12TH DAY OF MARCH 2019.

.....

L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Applicant

In the presence of .....Advocate for the Respondent