



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

SUCCESSION CAUSE NO. 328 OF 1998

IN THE MATTER OF THE

ESTATE OF JAIRUS RATEMO NYANDUSI (DECEASED)

BETWEEN

MUSA NYANDUSI RATEMO.....1ST APPLICANT

CADRA MORAA MOKAYA.....2ND APPLICANT

AND

ESTHER NYANGARA RATEMO.....RESPONDENT

RULING

1. This matter concerns the estate of Jarius Ratemo Mokaya (deceased), who died intestate on 5th January 1998. At the time of his death, the **deceased's had two properties: NYARIBARI CHACHE/KEUMBU/1664 and NYARIBARI CHACHE /KEUMBU/ 1665**. The grant of letters of administration in the estate of the deceased was issued to his widow **Esther Nyang'ara Ratemo on 11th December 1998 and confirmed on 11th June 2001. In her application for grant, the respondent listed herself and her children Dalmas Nyandusi, Samson Ongaki, Fanice Nyangeri, Vera Kemunto and Margaret Mwangi as the only beneficiaries of the estate of the deceased.**

2. Musa Nyandusi Ratemo and Cadra Moraa Mokaya filed summons for revocation of the grant on 19th February 2018. The application was based on the grounds that the proceedings to obtain the grant were defective in substance for concealment of material facts to the court. The applicants in their supporting affidavit sworn on 19th February 2018 accused the respondent of failing to disclose that there were other beneficiaries of the deceased's estate. They depose that the deceased had another wife besides the respondent and that they are the children of the deceased from his first wife Rebecca Konga Ratemo. This matter proceeded by oral testimony.

3. Musa Nyandusi Ratemo (PW 1) told the court that the deceased was his father and his mother Rebecca Konga Ratemo was the deceased's eldest wife. He testified that when he was still young his step mother Esther Nyangara Ratemo had transferred the title deed into her name and sold off the land secretly. When he questioned her about the land she denied knowing him. He testified that his uncles had tried to intervene for the land to be divided between the two houses to no avail. He informed the court that the deceased and his mother Rebecca Konga Ratemo had disagreed and when she died in 2007, she was buried in the shamba she inherited from her father. He stated that he had other siblings namely Bosire Kingoina Ratemo, Onderi Ayako Ratemo, Kemunto Ratemo and Cadra Moraa Ratemo.

4. Nemuel Momanyi Mainya (PW 2), the retired Chief of Kegati Location, testified that the deceased had hailed from his location and he had known him personally. He knew that the deceased had two wives. The first one, Rebecca Konga Ratemo, had children with the deceased and went back to her place when she had a disagreement with the deceased. The deceased had then married Esther his second wife and had lived with her until he died. Rebecca returned as a first wife when the deceased died and built a house where PW 1 lived until the house was demolished and he was chased away. He stated that PW 1 is the son of the deceased and was entitled to live on the land. William Ombasa (PW 3), the Assistant Chief Nyosia Sub-location, testified that he knew the deceased personally. He knew for a fact that the deceased had two wives but stated that did not know them very well. He also testified that PW 1 was the son of the deceased.

5. On her part, Esther Ratemo (DW1) stated that she got married to the deceased in 1984. She refuted the claim that the deceased had another wife before her and also denied knowing PW 1 at all. However, on cross examination, she stated that there had been a meeting with PW 1's uncles but no agreement had come out of it. She also testified that the uncles had rejected the applicant's claim that he was the son of the deceased and that the deceased had also not accepted him.

6. Samson Ratemo (DW 2), who described himself as the deceased's second born son, was adamant that PW 1 was not a part of their family. He testified that his father did not tell them he had another wife. He went on to state that when the deceased died, they had had to sell a portion of the deceased's land to cater for the hospital bills of one of his siblings but one of his father's brothers was displeased and had incited the applicants to file this application. He testified that his mother's house had been destroyed and they had to leave in 2004. The applicant had moved onto the land and when they returned in 2011 they found him there. Prior to that, PW 1 had never claimed the shamba or said he was the son of the deceased.

7. Under **section 76(b)** of the **Law of Succession Act ("LSA")** the court may on application or on its own motion revoke a grant of representation on the ground that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law. It is incumbent upon the party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds for the court to revoke the grant of representation.

8. The applicants' case against the respondent is that she failed to disclose that they are the children of the deceased by his first marriage to their mother Rebecca Konga Ratemo. **Section 51 (2) (g)** of the **LSA** is peremptory that every application for a grant of representation shall include information of all surviving children of the deceased in case of total or partial intestacy. Hence, the key question for determination is whether the applicants are the children of the deceased and it is their burden to establish that fact on the balance of probabilities.

9. In order to prove their case, the applicant had to show that they were the deceased's biological children or under **section 3 (2)** of the **LSA** which provides that a child in relation to a male person to mean, "*any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.*" The applicants' position is also dependent on the relationship of the deceased with their mother and whether she was married to the deceased. **Section 3(5)** of the **LSA** deals with the position of the deceased's wife or former wives and it provides;

Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

10. On **section 3(5)** of the **LSA** the court in **In Re Carey Kihagi Muriuki NRB HC Succ Cause 976 of 94 [2000] eKLR** had this to say;

Children of a void or voidable marriage are illegitimate but by S. 3(5), if their mother went through a customary marriage, the children would be deemed legitimate and would be dependants under S. 29(a) LSA.

But there are other classes of illegitimate children as distinct from illegitimate children born out of an invalid marriage. They could be issues of a relationship of a man and woman who do not eventually marry. Those children would not qualify as dependants unless the father had recognized or accepted them as children of his own or he had voluntarily assumed permanent responsibility over them. If he does so, the children rank equally with the legitimate children by virtue of S. 3(3) of LSA and they would qualify as dependants under S. 29(a) of the LSA whether or not they were being maintained by deceased prior to his death.

11. To prove his mother's marriage to the deceased, PW 1 testified that the deceased married her as his first wife and had PW 2 and PW 3 testify in support of this. However, from PW 1's testimony and that of his witnesses it was not clear when and in what way his mother got married to the deceased. They did not speak of the manner in which Rebecca got married or the legal regime under which her marriage to the deceased was contracted.

12. They did not indicate for how long the deceased cohabited with the Rebecca and when she had her children with him. In other words, it is difficult, from the evidence, to establish whether they had lived together as to form the presumption of a marriage by general repute and long cohabitation. No explanation was offered for why Rebecca had not objected to the succession proceedings during her lifetime or even intervened in any fashion to ensure that the deceased's children's inheritance was protected. It was in fact PW 1's testimony that Rebecca was buried in the land she had inherited from her father when she died in 2007.

13. Further, the applicant failed to lead consistent evidence to show the number of children the deceased had with his mother if at all. PW 2 simply testified that he found the deceased living with Rebecca, that they had children together and she left when they disagreed. Other than the 1st applicant, PW 2 did not name other children the deceased had with Rebecca including the 2nd applicant. I also note that PW 2 wrote the original letter to the court dated 5th October 1998 that named the respondent as the only widow of the deceased yet when he came to give evidence he stated that he knew the deceased had two wives. Is he a person to be believed?

14. PW 3's evidence was equally unhelpful. He could not name any of the deceased's wives and other than the 1st applicant, he too could not name other children the deceased had with Rebecca. With the exception of the 2nd applicant, the children PW 1 testified were his siblings were not reflected in the chief's letter attached in support of his application neither were they listed in his supporting affidavit. None of his siblings or uncles were called to testify in support of the deceased's marriage to Rebecca or the fact that they were children of the deceased. I therefore find that the applicants did not prove the subsistence of a marriage between the deceased and their mother Rebecca.

15. The applicants would have led evidence to prove that the deceased had recognized or accepted them as his children or had voluntarily assumed permanent responsibility of them as provided by **section 3(2)** of the **LSA**. **The Court of Appeal in E.M.M v I.G.M & Another CA NRB Civil Appeal No. 114 of 2012 [2014]eKLR** held;

Additionally the definition of a "child" in section 3(2) of the Law of Succession Act includes a child whom the deceased has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. We agree with the respondent that the appellants have to show a reasonable degree of permanency in the responsibility that the deceased

is alleged to have voluntarily assumed over the appellant. Episodic support, as is the case here will not suffice.

16. I have appraised the evidence tendered by the applicants and it is evident that there is no proof that the deceased had any relationship with the applicants. The applicants did not establish that the deceased had recognized or accepted them as his children or had voluntarily assumed parental responsibility over them. It was also not clear whether PW 1 and his siblings had lived on the deceased's land during his lifetime. The applicants did not rebut the assertions by DW 1 and DW 2 that they were evicted from the property of the deceased by his brothers when they sold off a portion of the properties and when they returned in 2011, they found the applicant residing on the land.

17. Having asserted that they are children of the deceased, the applicants bore the burden of proving this fact which I find they failed to discharge. While the evidence points to the likelihood that the parties herein are related, the applicants did not prove that they are children of the deceased.

18. For the reasons given, the summons for revocation of grant dated 19th February, 2018 is dismissed with costs to the respondent.

DATED and DELIVERED at KISII this 20th day of MAY 2019.

D.S. MAJANJA

JUDGE

Applicants and respondent in person.