



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 943 OF 2001

IN THE MATTER OF THE ESTATE OF MAP (DECEASED)

FSD.....APPLICANT

VERSUS

KP.....RESPONDENT

JUDGMENT

1. The deceased **MAP** died on the **4th March 2001**. On the **19th July 2001** the Respondent **KP** obtained a Grant of Probate of Written Will. The said grant was confirmed on the **12th February 2002** and a certificate of confirmation of grant was issued, it has the following properties listed;

- i. L.R. I mm/[xxxx] Mombasa**
- ii. L.R. 1mm/[xxxx] Mombasa**
- iii. L.R. [xxxx] Nairobi**
- iv. L.R. 209/[xxxx] Nairobi**
- v. V ½ share in L.R. [xxxx]**
- vi. ½ share in L.R. [xxxx] Nairobi**
- vii. Motor vehicles registration numbers, [xxxx], [xxxx], [xxxx] and [xxxx].**

2. On the 1st July 2016 the Applicant filed a Summons for Revocation or Annulment of Grant seeking to have the grant of probate with Written Will. In her application she seeks the following orders;

- i. The grant of probate with Written Will confirmed on the 12th February 2002 be revoked.**
- ii. The Will of the Deceased dated the 20.7.1983 be nullified.**
- iii. The Estate be declared as an Intestate one for purposes of administration and subsequent distribution.**
- iv. The applicant be appointed as the joint administrator of the Estate.**
- v. The proceeds from the sale of L.R. No. [xxxx] Nairobi being held by Shah and Shah Advocates not be released to K P the application is determined.**
- vi. That account number [xxxx]in the name of KP and BWP at I&M Ban Industrial Area branch be frozen until the application is determined.**

vii. That account Number [xxxx] in the name of the deceased at ABC bank be frozen until the application is determined.

3. The Applicant filed affidavits dated, **29/6/2016, 5/9/2016, 19/10/2016** and **5/12/16** in support of her application. At the hearing she adopted the contents of the said affidavits as her evidence. This is her evidence; she is a widow of the late MAP who died on the 4th March 2001. The deceased had 2 wives herself and KP. She got married to the deceased in 1984 and they lived together till his demise in 2001. They were blessed with 3 children namely; SK, YK and SK (deceased). She worked with the deceased at [particulars withheld] (the Company). That the Will in question was written in 1983 and the executor had a duty to disclose to the court all surviving beneficiaries. That she is aware that the executor has started to dispose off some of the properties without involving the beneficiaries. She has sold L.R. No. [xxxx] and that the proceeds of the sale of the said property are still being held by Shah and Shah Advocates awaiting disbursement. The executor has also been collecting rent from some of the properties and accessing the deceased's bank accounts without involving the beneficiaries. That she and her children have been dependants of the deceased since 1984 until his demise in 2001, her salary as an employee of [particulars withheld] Limited, her upkeep with her children were paid through [particulars withheld] Limited Account, her telephone, electricity medical bills and other utilities too. The house she lives in South B was bought by the deceased and the vehicle she drives is still in the name of the deceased. The deceased paid school fees for his children at [particulars withheld] school, [particulars withheld] Girls through the account of the Company. The deceased also took a medical cover with AAR for himself and their children through Kikoni Muslim Association and all employees of the Company knew her as "**mama**" the deceased's wife. That the said insurance continues to be paid by the estate. They used to attend family and friends events together with the deceased as his wife.

4. In her affidavit dated 19/10/2016 she admits being married to NIK with whom she had 2 children SK and AK. The other three children were born after her separation with NIK. That she separated from her former husband in 1984 and later divorced. That the deceased in 991 facilitated through his lawyers B.J. Sarvaiya the divorce proceedings in civil suit No. 93 of 1991 at the Kadhi's Court Nairobi, the said divorce proceedings were concluded in 1995. She denied using her position to enrich herself and that she was a long serving employee enjoying perks just like any other employee. She urged the court to revoke the grant on the basis that it was obtained without full disclosure of material facts and that the Court makes an order of preservation of the estate of the deceased.

5. During cross-examination the Applicant testified that she practices Islam. That she sired children with the deceased S K born in 1988, Y K born in 1993 and S K born in 1991. She admitted that their birth certificates bore the name of NIK. The Company paid the fees for the children. The Will was written before her relationship with the deceased. She refused to give the respondent [xxxx]. She was aware the respondent applied for the grant but kept quiet for the sake of the children for them to go to school. She was aware of the gazette but she kept quiet as she knew her time would come. That the Company could have gone down had she come out then. That the 3 children were the deceased's dependants. In re-examination she stated that the deceased paid dowry to her mother he gave her jewellery and told her mother that he had married her. That she could have had the 3 children with N as he was not in the house. She still earns a salary to date.

6. PW2 **Dhahabu Heri Ali** testified that the Applicant was her employer and A was her husband. She was their cook from 1997 to 1999. They lived in South B. The Applicant and her children lived in the said house. The deceased paid her and gave her shopping money every Saturday. They had Islamic ceremonies held at the said house. During cross-examination she stated that she did not attend the marriage ceremony of the Applicant and deceased and that she could not tell the private affairs. She was a casual worker. Her children called A "baba".

7. PW3 **Khalija Salim Maro** a sheikh testified that he teaches and marries and divorces people. He knows the Applicant she took him to her house and he met the deceased. AP asked them to marry them. By then she had been divorced for a year. She had been given Talak in 1984. The marriage took place in 1986. The dowry was one cent of gold. The Applicant and the deceased used to call him in their house and office in times of prayers and marital guidance in accordance of Sharia Law and Quran. The respondent was also the wife of A.

8. PW4 **Abdullah Mohameed** testified he knew the Applicant and the deceased. They started living together in 1984 and were blessed with 2 daughters and a son. They used to be neighbours with the Applicant in Ngara but after marrying the deceased she moved to the deceased's house in Park Road. He knows that the deceased bought the Applicant a house in South B and that she was called when the deceased died. He visited them as family friends. The Applicant and Respondent were at the funeral of the deceased. He was sent by the deceased to pay his son's fees at [particulars withheld] school. He was informed that the Applicant 3 latter children belong to the deceased. The deceased used to look after them as his own children.

9. PW5 **Fanuel H. Kibathi** testified that the deceased was their boss at the Company. He had 2 wives. The Applicant was his second wife but also an employee at the Company. They had 3 children. They used to call her "mama" as was instructed by Ali. That he is aware that the deceased bought motor vehicle registration no. K** **T and gave it to the Applicant. The Applicant was recognised as a wife at the burial.

10. The Respondent did not testify. By a consent dated the 16/5/2018 the parties agreed to have the affidavits of the Respondent dated the **5/8/2016** and **22/9/2016** to be admitted as her evidence without calling her to testify in court. **B P** testified as her witness. He filed an affidavit dated the 19th April 2017.

11. K P the Respondent depones as follows in her affidavits; the Applicant's application is misconceived, mischievous, in bad faith, frivolous and vexatious. That the Applicant has no *locus standi* to bring the application as she is not the wife of the deceased neither is the deceased the father of her children. She is the only wife to the deceased and her children are the only children of the deceased. The grant was done procedurally without any secrecy. The deceased's death was known to those close relatives and the public, the Applicant was aware of his death and the events thereafter as she works for the Company. After they filed for the Grant of Probate the Applicant did not file any objection. That the Applicant has shown no cause for the inordinate delay in filing the application given that the Grant of Probate was granted over 15 years ago. That her husband did not mention to her or any other family member that he had married. Her late husband lived with her until his demise. That in 2000 he was making plans to retire in the United Kingdom and he began the application process and clearly indicated who his immediate family members were. That the Will is valid and was freely prepared without coercion or undue influence in 1983 when the deceased was fit and healthy. That the Applicant is a stranger and is an employee of the Company. That as an employee she received perks as a long serving employee, her children's fees was paid by the company even after the demise of the deceased. That the Applicant was married to Mr K and was married to Mr K until his death. That the Applicant had 5 children with her late husband SK, AK, SK, SK and YK. YK's birth certificate indicate that NIK is his father. That none of the documents attached to the Applicant's affidavit prove

a marriage between the Applicant and her late husband. That both her late husband and she were members of Kokni Muslim Association whose membership is restricted only to those who are born Kokni Muslims or are married to a Kokni Muslim. That the deceased did not make the Applicant and her children members of the Kokni Muslims Association. The property L.R. 200/[xxxx] was jointly owned by her late husband and his brother, the proceeds from the said sale were released to her on 4th July 2016 before the Applicant served her with the application. That the Applicant is only intent on unjust enrichment and her application should be dismissed.

12. **BP** testified that the deceased was his older brother. They were business partners in the Company and were close. They employed the Applicant in 1984 as a Secretary and she has stayed with them for the last 33 years. The Applicant was a married woman when in their employment. She was married to NIK who died in 1998. That he is aware that the deceased paid fees for the Applicant's son as an employment perk and after the death of his brother he continued to do so. That the Applicant's long service and continued productivity with their Company made her deserving for the perk. That at times she requested the Company to pay her bills and they would oblige because of her long service. Other employees too benefited from the perks. That he knows that his late brother had one wife who is the Respondent herein. He was not aware of any marriage between the Applicant and his brother, for if there was a marriage he would have been informed by his late brother. He knows as a fact that there was never a customary marriage ceremony between his late brother and the Applicant. That in accordance with Islamic beliefs whereas a man can take more than one wife, it is not possible for a woman who is married to enter into a marriage with another man. That the Applicant was formally married to her husband NIK from the year 1981 until the year 1995 when they formally divorced as per the divorce certificate from the Kadhi's Court. She had no capacity to enter into a marriage with his brother or any other man before her divorce was finalised. That he is not aware that his brother had children with the deceased for if he did he would have informed him. That the birth certificates indicate that the father of her children is NIK and all the children were born during the pendency of her marriage with NIK. That when his brother was alive she did not claim that the said children were his brother's children. That his brother did not include the name of the Applicant and her children when he was applying for retirement in the United Kingdom. That the house in Parkroad L.R. 209/[xxxx] is registered in the name of the Respondent. The Applicant has been collecting rent from the said house and remitting it to the rental account held for the property. The Applicant did so until June 2016 when she refused failed or neglected to remit the collected rentals into the property rental account. She has even gone ahead and written letters to the tenants to remit rent to her. That motor vehicle registration number [xxxx] is in the possession of the Applicant but it was bequeathed to the Respondent. That the Applicant was aware of the process of grant that happened in court and she made no claims.

13. During cross-examination he testified that; he did not know if his brother bought the Applicant a house. He admitted that the Company still pays the bills of Y but as a kind gesture. That during the funeral the Applicant sat with the ladies and that she was not involved in the funeral arrangements. He has visited her home after his brother's demise as a friend. That the Applicant used to collect the rent and give it to him before. That they pay for her utility bills. That they tried to get the vehicle from her and there was a tussle. He attended the Applicant's marriage negotiations as a friend.

14. Parties filed written submissions. The Applicant summarized the evidence adduced. The Applicant relied on Sections 26, 28, 29, 76 and 40 of the Law of Succession Act Cap.160 (the Act), submitting that the Applicant had proved her case on a balance of probabilities that her and her children were dependant under Section 29 of the Act. It was submitted that purported Will was made on the 20th July 1983 and the deceased married the Applicant in 1984. The Applicant relied on **P & A Cause No. 29 of 1996 Estate of Ngetich** where Justice Nambuye held that, "Section 26 of the Act (Cap 160) Laws of Kenya stipulates that a will is not absolute where in contention the court can interfere and make provisions." She also relied on the case of **Estate of Magayu alias Peter Magayu Kiama (Deceased) Succession Cause No. 846 of 2011**, where Justice Mshilla held that, "It is trite law that a testator has power to dispose of the rights to his/her property as he so pleases but this freedom is not absolute; the deceased is expected to make reasonable provision for his children..the court finds good reason to interfere with the deceased's freedom to dispose of his property and is satisfied that the **WILL** be varied to make reasonable provision for the disinherited children."

15. It was submitted there is sufficient reason for the Court to interfere with the Will made by the deceased as it fails to make reasonable provisions for the Applicant and her children who are dependants of the estate.

16. The Respondent in her submissions raised 4 issues for determination;

i. Whether the application is bad in law?

It was submitted that the process of obtaining the grant was carried in accordance with the Act and distribution is complete and the assets transmitted to the Respondent as per the Will. The Applicant was aware of the process and that she did not explain why she waited sixteen (16) years to file an application revoking the Grant of Probate.

ii. Whether the Applicant has *locus standi* to bring her application?

It was submitted that the Applicant had documentary evidence which showed that she was married to NIK on 8th May 1981 and she remained married to him till 1985 when the divorce decree was issued. That all copies of the birth certificates indicate that the children were born during the subsistence of the marriage of the said NIK. That in 1984 the Applicant was still married to NIK. The Applicant's witness could not indicate the date he conducted the marriage ceremony between the Applicant and the deceased. That the evidence of the other witnesses could not create a marriage between the Applicant and the deceased.

iii. Whether the Orders sought by the Applicant can be granted?

It was submitted that the Applicant had failed to prove any of the conditions provided in Section 76 of the Act to revoke the Grant of Probate and Written Will. On Nullification of Will it was submitted that the Applicant had failed to prove any grounds of nullification of the Will. That the deceased was of sound mind at the time he made the Will. It was further submitted that the Applicant cannot be appointed as administrator as she has failed to prove dependency and consanguinity. That the Applicant's application to have the estate declared as an intestate has been overtaken by events as the estate has been distributed over 15 years and the assets transmitted into the name of the Respondent and some of the properties have been disposed off to third parties, thus the application has been overtaken by events. That L.R.

209/[xxxx] was transmitted to the Respondent in upon execution of the Will and has been transferred to a third party.

iv. Who should bear the costs of the suit?

It was submitted that the suit should be dismissed with costs.

DETERMINATION

17. I have considered the evidence, the rival submissions and the law in my view the issues for determination are;

i. Whether the Grant of Probate with Written will should be revoked.

ii. Whether the Will should be nullified.

iii. Whether the Estate should be declared as intestate.

iv. Whether the Applicant should be appointed as the joint Administrator of the Estate.

v. Whether the proceeds from the sale of L.R. No. 209/[xxxx] Nairobi being held by Shah and Shah Advocates not be released to K P.

i. Whether the Grant of Probate with Written will should be revoked?

Section 76 of the Act provides the grounds to revoke a grant. The grounds are as follows;

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from then date thereof, or such longer period as the court order or allow;
 - or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.

The applicant claims that she was a wife of the deceased, they had three children and that the Respondent did not disclose to the court all the surviving beneficiaries of the deceased. This was challenged by the Respondent. According to the Respondent she is the only widow of the deceased, the deceased had no other wife or children with the Applicant. It is not in dispute that the Applicant was married to one NIK and they got divorced in 1995. Section 107 of the Evidence Act Cap. 80 provides;

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

To prove that she was a wife of the deceased and beneficiary of the estate, the Applicant has to prove that she was married to the deceased. Her evidence is that she married the deceased in 1984. Going by her documentary evidence it clear that in 1984 she was still married to NIK, in my view she had no capacity to marry the deceased as she was still married to NIK and was his wife. The evidence adduced by her witnesses have not helped her to establish she was a wife. Khalija Salim Maro a Sheikh testified that he married the Applicant and the deceased in 1986, even if he did she had no capacity to enter into another marriage as she had not been divorced. I therefore find that she has not proved that she was a wife of the deceased. There is also the issue that she sired three children with the deceased. The Applicant's evidence is that she sired the three children. The birth certificates indicate that the children were born in 1988, 1991 and 1993. It is evident that these children were born when she was still married to NIK. On the face of the copies of birth certificates admitted in evidence the three children belong to N I K. In my view again she has failed to demonstrate that the three children were children of the deceased and therefore

beneficiaries of the estate. The evidence adduced by the Respondent through B is that the deceased took care of his staff the Applicant being one of them and that the Company paid fees and utilities for the Applicant. Paying fees, doing shopping, buying a house, paying for medical insurance does not make one a wife, evidence must be adduced to show that there was a valid marriage with the deceased. The applicant has failed to prove that she was a wife and a dependant of the deceased and her children too. Her claim that the Respondent obtained the Grant of Probate without disclosing the other surviving beneficiaries therefore fails.

18. Whether the Will should be nullified?

It is not in dispute that the deceased left a Will. The said Will was written on the **20th July 1983**. Part 11 the Law of Succession Act Cap 160 provides for Wills, Section 26 of the Act provides for provisions for dependants not adequately provided for by will or on intestacy. The Respondent petitioned for the Grant of Probate using the Will dated 20th July 1983, the Will is valid. The Applicant does not challenge its validity. Her issue is that she was not provided for. It is the evidence of the Respondent that when the deceased wrote the Will he was of sound mind. He chose not to write another so the only Will that was used by the Respondent was the existing Will. As per the said Will the Respondent KP was appointed as the Executrix of the Will. The Applicant seeks to be provided for together with her children. Having found that she is not a wife nor dependant of the deceased and noting also that the Applicant has failed to prove any ground for nullity of the Will I find that her plea to have the Will nullified fails.

19. Whether the Estate should be declared as intestate

Having found that the deceased left a valid Will the Applicant's plea to have the Estate declared as intestate fails.

20. Whether the Applicant should be appointed as the joint Administrator of the Estate?

The Applicant has failed to prove that she was the deceased's wife, or dependant or that she has a beneficial interest in the estate. She has failed to show that her children were also dependants of the deceased. The Respondent's evidence is that the Company paid fees for her children because she was a long standing employee. It was not the deceased paying the fees from his pocket but the Company. I therefore decline to appoint her as joint administrator to the deceased's estate.

1. Whether the proceeds from the sale of L.R. No. 209/[xxxx] Nairobi being held by Shah and Shah Advocates not be released to K P.

The Will dated 20th July 1983 states as follows;

2. "I devise and bequeath all my real and personal estate and effects whatsoever and whosoever unto my said wife KP to sell, call in and convert the same into money (with power I give her absolute discretion to post-pone such sale, call in and conversion) and after payment thereof of my debts and burial and testamentary expenses to be invested the residue of such money in her name in any of the investments authorised by law stand possessed of such investment and of all parts of my estate for the time being unsold (hereinafter called " My Residue Estate")

3. I do hereby devise and bequeath absolutely all my Residue Estate to my said wife K P.

The deceased's Will is clear the Respondent being the Executrix was bequeathed all the deceased's real and personal estate and was authorised to sell, call in and convert the same into money. The Respondent has indicated that the property in issue has been sold and the funds dispensed. As the Executrix what she did was within her mandate. The Applicant has failed to demonstrate her interest in the said property nor the accounts in I & M Bank and ABC Bank, she is therefore not entitled to the orders sought.

Lastly before I conclude I note that this application was brought about 15 years after the deceased's demise. Though Section 76 of the Act does not have a limitation period within which one can file an application to file an application to revoke a grant, and noting each case is considered on its on facts and merit, I find that the Applicant has failed to explain the inordinate delay. All in all I find no merit in her application dated the 29th June 2016 it's dismissed with costs.

Dated signed and delivered at Nairobi on the 16th day May 2019

R.E.OUGO

JUDGE

In the presence of;

Miss Khafafa For the Applicant

Miss Mburu h/b Mrs. Mbanya For the Respondent

Ms Mercy Court clerk