



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**P&A CASE NO. 24 OF 2018**

**IN THE MATTER OF THE ESTATE OF THE LATE SOLOMON JIRONGO (DECEASED)**

**MARGARET NABWORA WANYONYI .....APPLICANT**

**VERSUS**

**ROSE MMBOGA LIDOVOLO.....RESPONDENT**

**RULING**

The respondent was issued with a certificate of confirmation of grant on 22<sup>nd</sup> august 2017 as the sole administrator to the estate of the late *Solomon Jirongo*. The same was confirmed on 28<sup>th</sup> February 2018. The applicant moved this court on 9<sup>th</sup> august 2018 for the revocation of the confirmed grant on the following grounds;

- a) That the proceedings to obtain the grant were defective in substance.
- b) The grant was obtained fraudulently by making of false statements and concealment of facts.
- c) The respondent misled the court to believe that her children and herself were the only beneficiaries.
- d) The respondent has already claimed for the deceased gratuity from the Teacher's Service Commission and the same will be paid out to her to the detriment of other beneficiaries.

**APPLICANT'S CASE**

The applicant submitted that the respondent was the wife to the deceased but he had divorced her 30 years up to the time of his death. The applicant is the legal wife of the deceased and they were married in 1997 under Tiriki customary law. The deceased paid dowry on 10/5/2002 to the applicants' father and she annexed as MNW1 an agreement in fulfilment of the same.

The deceased put up their matrimonial home in Milimani, Uasin Gishu county where they lived together until his death. They had 4 children namely; Godfrey Wanjala Jirongo, Laurenzi Wafula Jirongo, Esther Nasimiyu Jirongo and Wallman Steel Jirongo.

The applicant relied on section 3 of the Law of Succession Act on the definition of children. She further submitted that the deceased indicated his wishes on 18<sup>th</sup> August 2012 through a letter dated the same date and annexed the letter as MNW6a. The letter stated that he be buried by the applicant and further stated the reasons why he left the respondent and *Everlyn Rukia Mutumanu*.

The applicant submitted that the children are beneficiaries to the estate of the deceased and are therefore entitled to part of the estate.

The applicant submitted that the respondent had failed to disclose that she had separated/divorced the deceased for over 30 years and that he had remarried. Further, that he had married the applicant and was staying with her at their matrimonial home and that they were blessed with 4 children.

The respondent failed to disclose that it was the applicant who buried the deceased at their matrimonial home and that he had cohabited with *Everlyne Rukia Mutumanu* and fathered 3 other children. She failed to give all the details of the beneficiaries and misled the court to believe she was the only surviving widow. She also failed to disclose that she had already petitioned the court for letters of administration vide Eldoret CMCC Succession cause no. 259 of 2016 wherein the respondent filed an objection and is still pending up to date. The application before the Kapsabet court is tainted with falsehoods and concealment of material facts. The applicant prays that the grant be revoked.

**RESPONDENTS' CASE**

The respondent submitted that she was the only widow of the deceased having contracted a statutory marriage on 10<sup>th</sup> May 1985. She tendered a marriage certificate in evidence. She did not conceal any facts.

The respondent contended that there was no evidence adduced other than the dowry agreement to show that the applicant was married to the deceased. Further, that there was no evidence of her marriage having been dissolved and therefore the marriage between the applicant and the deceased was void ab initio. On the voidability of the marriage she relied on *Section 37* of the Marriage Act. She also cited the case of *Jessica Atieno Onyony v Cecilia Angel Marwah and Another, High Court Succession cause no. 207 of 2006.* On the effect of *Section 37* of the *Marriage Act* on the purported customary marriage.

She maintained that there was no failure to disclose material facts and the letter marked as MNW6a has no legal standing as it does not qualify as a Will. She referred to *Section 11* of the Law of Succession Act on Wills. She further submitted that the gratuity paid to the respondent no longer forms part of the free property of the deceased as it had already been distributed in accordance to the act.

#### **ISSUES FOR DETERMINATION**

- a) Whether the Applicant was married to the deceased.
- b) Whether the Respondent was married to the deceased.
- c) Whether the Respondent concealed material facts.
- d) Whether the grant should be revoked.

#### **WHETHER THE APPLICANT WAS MARRIED TO THE DECEASED**

The applicant claimed she was married to the deceased via customary law. In *M W K v A M W [2017] eKLR* the court cited *Hortensia Wanjiku Yawe v The Public Trustees, Civil Appeal 13 of August 6, 1976* where Justice Kneller laid down three important and salutary principles regarding proof of customary marriages in Court. These are:

- i. The onus of proving customary law marriage is generally on the party who claims it;**
- ii. The standard of proof is the usual one for a civil action, namely, one the balance of probabilities;**
- iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.**

The applicant has provided a dowry payment agreement as proof of the marriage. There is no corroborating evidence on the formalities of the customary law agreement or any proof in form of witness statements that

prove that the customary marriage process took place. In my opinion the dowry agreement does not prove that there was a marriage to the deceased on a balance of probabilities. However for the purpose of inheritance there are basis upon which marriage can be presumed of which this court needs not ignore at this juncture.

#### **WHETHER THE RESPONDENT WAS MARRIED TO THE DECEASED**

The respondent produced a marriage certificate as proof of marriage. The applicant provided a letter dated 30<sup>th</sup> march 2016 as proof that the marriage had been dissolved. The letter references an application for separation in the year 1995 but there is no other documentary proof of such an application. Further, there is a discrepancy of 3 years between the date the letter was written and when it was stamped by the AGs office. The applicant did not provide any proof that the said marriage had actually been dissolved. There being no proof of dissolution, it stands that the marriage was never dissolved and the respondent was therefore a wife to the deceased until his death.

#### **WHETHER THE RESPONDENT CONCEALED MATERIAL FACTS, MAINLY OF EXISTENCE OF THE APPLICANT AS A WIFE OF THE DECEASED AND OF HER CHILDREN AND THOSE OF MS EVERLYNE RUKIA MUTUMANU AS BENEFICIARIES TO THE DECEASED'S ESTATE.**

The applicant contended that the respondent had concealed a number of material facts; that she had separated from the deceased; that the applicant and her children, and those of *Everlyne Rukia Mutumanu* were beneficiaries; and that there was another cause by the applicant, No. 259 of 2016 in which the Respondent had filed an objection.

The applicant produced copies of supporting affidavit in Eldoret CMCC 29 of 2016 sworn by the respondent as proof that there were other beneficiaries, including *Ms Everlyne Rukia Mutumanu's* children. There is also a chief's letter marked as annexure MNW-2 listing the deceased's children. The applicant also relied on identity cards of her children as documentary proof that the deceased was their father. The applicant alleged she is the one who buried the deceased as his wife. *Section 76* of the *Law of Succession Act* provides grounds for revocation of a grant as follows:-

- (a) If the proceedings to obtain the grant were defective in substance.
- (b) Where the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something

material to the case.

(c) If 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.

The applicant herein has established that there is another Petition, CMCC Succession Cause No. 259 of 2016, filed by the applicant and in which the Respondent filed an objection. The respondent was therefore aware of it and did not disclose about it of which amounts to concealment from the court of something material to the case. She must also equally must have been aware of the applicant's herein claim, and also about the claim of *Ms. Everlyne Rukia Mutumanu's* children as beneficiaries, a fact of which she failed to disclose. The applicant has adduced evidence which establishes a prima facie case that she and her children are beneficiaries to the deceased's estate. Unless the court intervenes at this point and revokes the grant, there is a possibility that genuine beneficiaries will be disinherited, of which will amount to an injustice to them. On the aforesaid grounds, I do find the application merited and is allowed. The grant therefore stands revoked. Costs be in the cause.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 7<sup>th</sup> day of May, 2019.**

In the absence of:-

Ms Mututu for applicant

Mr. Ngigi for Respondent

Sarah - Court clerk