



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 286 OF 1995

IN THE MATTER OF THE ESTATE OF PATRICK MAKAU MUSEMBI (DECEASED)

MUNINI MAKAU.....OBJECTOR/APPLICANT

-VERSUS-

MUTUA MUSEMBI.....PETITIONER/RESPONDENT

RULING

1. The application by way of notice of motion under Section 76 (b) of the Law of Succession Act CAP 160 and dated 6th May, 1996 is brought by the applicant who avers that she is the wife of the deceased. She wants the certificate of confirmed grant issued on 8th March, 1996 be revoked and or rectified and the name of the respondent be deleted and the name of the applicant be substituted as the Administratrix of the deceased's estate. She also wants the record of the application and the grant be amended and altered to show the names of the objector's children as the descendants of the deceased and their entitlement to inherit the estate of the deceased. Further she wants the court to order that she and the heirs of the estate of the deceased be allowed to take in the assets and take possession of all the assets of the deceased.

2. The applicant explains in her affidavit that she was married to the deceased customarily in that the deceased delivered 'Mbui Sya Ntheo' (Dowry) to her parents in 1969 and the goat called 'Mbui ya kwitia mbui thi' was slaughtered and the shoulder part of the carcass was taken back to her husband's home according to Kamba custom. She also established that before the father of her husband died, he subdivided his land Kangundo/ Kikambuani/899/906/966 and after adjudication was done, the land was recorded in his name at the time when she was already cohabiting with the deceased and continued working and occupying the same until his death. According to the applicant, at the burial ceremony of the deceased, she and her children were recognized as his wife and children and that she continued living on the land until the respondent evicted her whereby she sought employment at Muli's farm. She averred that the respondent failed to include her six children as dependents of the deceased and that she did not know that the respondent had applied for letters of administration. It is in this respect that she would like the certificate of confirmed grant rectified and or revoked to reflect her children as heirs of the deceased. She attached a copy of a statement from the elders to demonstrate that she was the wife of the deceased.

3. In reply to the application, the respondent vide his counsel Mr. Makundi filed grounds of objection dated 30.5.96 wherein he stated that the application is bad in law and has no merit and the supporting affidavit is tainted with falsehoods.

4. On record are witness statements by **Kioko Mutua**, **Patrick Maingi**, and **Mutua Musembi** that were filed on 21.2.2017. **Kioko Mutua** stated that he is the son of the petitioner and that the applicant had never been married to the deceased. He stated that the applicant was a bartender at his uncle's club and that the deceased died without being married or having any children. **Patrick Maingi** in his statement stated that he worked with the applicant who was a bartender at a club owned by the petitioner and that he has never known the applicant as a wife to the deceased since the deceased died as a bachelor and had no children. **Mutua Musembi** in his statement stated that the applicant was never married to the deceased and that the deceased inherited Kangundo/ Kikambuani/899/903/906 from the estate of their deceased father. Further that the customary rituals that the applicant averred had happened were not witnessed by anyone from his family. Further that the applicant has never cultivated any land belonging to the deceased as she was a bartender who resided at her parent's house and not with the deceased as the deceased had no house of his own and lived in his father's house. He disputed the applicant's exhibit 1 as the same was authored twenty one years after the death of the deceased. Finally he asserted that the application for revocation be dismissed with costs.

5. The court directed that the application be canvassed vide written submissions. The Respondent filed his submissions on 3rd April, 2019. The respondent submitted that the applicant has not demonstrated that the customary marriage rites were performed and as such she was not a wife of the deceased and did not fulfil the requirements under Section 76(b) of the Law of Succession Act. Counsel relied on the case of **Re The Matter of the Estate of Samuel Kiarie Kiriire (Deceased) (1999) eKLR** where Justice Githinji held that the fact that the applicant was included as a wife of the deceased in the eulogy is not proof of marriage. Learned counsel cited the provisions of Section 39(1) (c) of the Law of Succession Act and submitted that the petitioner is the next in order or priority as administrator of the estate of the deceased. Learned counsel concluded that the applicant failed to demonstrate that she met the requirements under Section 76(b) of the Law of Succession Act and hence the application should be dismissed with costs.

6. The applicant has not filed any submissions. The issues for determination are whether the applicant has satisfied the conditions for revocation of the grant and what orders the court may make.

7. The application primarily seeks for an order of rectification of grant whose remedy is covered under **Section 74** of the Law of Succession Act. **Section 74** provides for the errors on grants of representation that may be rectified by the court. It provides:

“Errors in names and descriptions or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court; and the grant of representation whether before or after confirmation, may be altered and amended accordingly”.

8. The procedure for seeking the relief is set out in Rule 43 (1), which echoes **Section 74** of the Law of Succession Act. Rule 34(1) says:-

“Where the holder of a grant seeks pursuant to the provisions of Section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made.....”

9. The import of the section is that rectification of grants is limited to three instances, to wit; **errors in names and descriptions of persons or things; errors as to time or place of death of the deceased; and in cases of a limited grant, the purpose for which such limited grant is made.**

10. The matter in issue in this case is the omission of **the applicant and her children** from the grant. The explanation given by the applicant in this application is that she was married customarily to the deceased. In this case it cannot be said that such omission was by error or mistake. Therefore the court has no power to rectify the grant, but to consider whether or not the same may be revoked.

11. The circumstances in which a grant may be revoked or annulled is found under section 76 of the Law of Succession Act as follows:

Revocation or annulment of grant a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

a.;

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.;

12. Applying the test of law in section 76 of the Law of Succession Act, the applicant alleges that she is a wife to the deceased and that the children listed in the application are the heirs of the deceased. The respondent has not controverted the facts that are alluded to by the applicant in her affidavit. Instead the respondent opted to file grounds of objection and the consequences of such failure were addressed in the case of **Mohammed & Another v. Haidara [1972] E.A 166** at page 167 paragraph F-H, where **Spry V.P** considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:

“The respondent made no attempt to reply to these allegations and they therefore remain unrebutted... Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolific but it should have made clear which of the facts alleged by the appellants were denied...”

13. The applicant seeks that in the absence of uncontroverted evidence, the court finds that she was a wife to the deceased. In the case of **Hortensiah Wanjiku Yawe v The Public Trustee, Civil Appeal No. 13 of 1976**, the court held:-

(i) The onus of proving customary law marriage is generally on the party who claims it.

(ii) The standard of proof is the one usually for a civil action namely “on the balance of probabilities.”

(iii) Evidence as to the formalities required for a customary law marriage must be proved to that standard.

(iv) Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it.

(v) Only cogent evidence to the contrary can rebut the presumption.

(vi) If specific ceremonies and rituals are not fully accomplished, this does not invalidate such a marriage.

14. In the case of **In Re Estate of Stephen Kimuyu Ngeki (1998) eKLR J.W Mwera, J.** (as he then was) stated that Akamba customary marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of three traditional goats called ‘Mbui Sya Ntheo’.

15. In his book; **Marriage and Divorce, 1st edn, (1968) 28 Dr. Cotran** summarizes the essentials of a valid Kamba customary marriage as follows:-

(a) Capacity.

(b) Consent.

(c) Slaughter of a billy goat.

(d) Marriage consideration.

(e) Cohabitation.

16. From the uncontroverted evidence on record, the applicant is of age, the element of consent and the slaughter of a billy goat as well as cohabitation is established by the applicant vide her affidavit. The applicant opted not to testify and her evidence is not corroborated despite not being challenged. Her children have not filed witness statements nor did they attend court to substantiate this claim and I am not satisfied that the applicant has demonstrated to this court that she is a wife to the deceased or her children are dependants to the deceased. Therefore I find that neither she nor her children are entitled to any share in the estate of the deceased. The applicant's witnesses ought to have sworn affidavits so as to back her claim that she had been married to the deceased. The applicant also failed to prosecute her application as she failed to attend court .It was incumbent upon her to avail evidence that indeed there was a marriage with the deceased. Again none of her alleged children swore affidavits to indicate that the deceased was their father and supported them.

17. In the result it is my finding that the applicant's application dated 6th May 1996 lacks merit. The same is dismissed with costs to the Petitioner/Respondent.

It is so ordered.

Dated, Signed and Delivered at Machakos this 6th day of June, 2019.

D.K. KEMEI

JUDGE