



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 156 of 2004

IN THE MATTER OF THE ESTATE OF LATE BENEDICT MBUTU NGUTA (DECEASED)

SERAH MUTHIO MBUTU.....APPLICANT

VERSUS

CONSTANCIA NZISA NGUTA

WILFRED MUTISYA NGUTA.....RESPONDENTS

RULING

1. The deceased herein Benedict Mbutu Ngutu died on 8.11.03. A grant of letters of administration (the Grant) was issued to the Respondents Constancia Nzisa Nguta and Wilfred Mutisya Nguta, on 2.12.04. In their application for the Grant, the Respondents indicated that the deceased was survived by themselves as widow and son respectively, 2 daughters and a granddaughter.

2. By a summons dated 18.1.05, Serah Muthio Mbutu the Applicant sought the revocation of the Grant. The Applicant also sought interim orders that the Respondents be restrained from dealing with the estate of the deceased. Her grounds are that the Grant was obtained fraudulently by the making of false statements and concealment of material facts. The Applicant claimed that the 1st Respondent had been divorced by the deceased and therefore ought not to have been appointed administrator of his estate. The Applicant further claims that she was married to the deceased in 1994 under African customary law and both swore an affidavit to that effect. They had 2 sons, Pius Mbutu born in 1995 and Joseph Maingi Mbutu born in 1997. The deceased also took care of her 2 other children from a previous marriage Esther Mwikali born in 1982 and Pris-Benta Mutethya born in 1990. She lived with the deceased and nursed him until his demise. It was she and not the Respondents who arranged for his burial. The Respondents did not disclose these facts to the Court when they applied for the Grant. She further claims that the 2nd Respondent is not a son of the deceased. The Applicant had herself applied for a grant of representation in respect of the estate of the deceased in Succession Cause No. 368 of 2004.

3. On 19.1.05 interim orders were granted restraining the Respondents from dealing with the following properties of the estate of the deceased:

- i) Funds in Account No. 12062030000 in National Bank of Kenya, Kitui branch.
- ii) Plot No. Kyangwithya/Tunguta/320.
- iii) Plot No. Kyangwithya/Tunguta/1614.
- iv) Plot No. 1083/II/MN, Mtopanga, CR. 16741.
- v) Commercial Plot in Kitui Township.
- vi) Nissan Pickup KAN 918A.
- vii) KPA Pension and terminal benefits.

4. The Respondents filed grounds of opposition dated 21.2.05. They contend that the Application is bad in law and out of time. In her replying affidavit sworn on 21.2.05, the 1st Respondent on behalf of the Respondents denied the allegations by the Applicant. She was married to the deceased under Kamba Customary law on 1970 and their marriage was blessed with 3 children, Wilfred Mutisya Nguta born in 1971, Rose Kamene Nguta born in 1973 and Celestine Mwia Nguta born in 1978. The Applicant was not the deceased's wife as she had been married first to Malelu Kiva and later to Musau Wa Festo and none of the marriages were ever dissolved. She accused the Applicant of

interfering with the deceased's property known as Plot Changwithya/Thugutu/320 and has motor vehicle KAN 918A.

5. In her testimony, the Applicant gave vent to her allegations in the Application. Upon marriage to the deceased in 1994, she lived with him until his demise in 2003. He died in Kitui and the Applicant buried him at her home. The decree of divorce between the deceased and the 1st Respondent is dated 27.10.95. The deceased owned property in Mombasa and Kitui. The plots in Kitui are Kyangwithya/Tunguta/320 and 1614. The deceased sold Plot 320 to raise money for his treatment but she does not know to whom it was sold. As for the motor vehicle, the same was registered in her name and is in her home. She lives in a commercial plot in Kitui Township which she bought in 1997 and is in her name. The deceased gave her the original title to his plot in Mtopanga. The 1st Respondent withdrew all the money in the deceased's account with National Bank in Kitui and took part of the deceased's pension with Kenya Ports Authority. She asked the Court to revoke the Grant as the Respondents did not include her and her children and a fresh grant be issued to her. She pledged to carry out fair distribution of the estate.

6. Titus Kimanthi testified that he is a neighbour, an age mate and brother in law to the deceased having married his younger sister. The deceased married the Applicant under Kamba Customary law. He was present in 1994 when 5 goats were paid as *ntheo* to the Applicant's mother. 1 was slaughtered for a feast. The deceased and the Applicant had 4 children 2 of whom were from the Applicant's previous relationship. The whole village recognised the Applicant and not the 1st Respondent as the wife of the deceased. The deceased told him that he and the 1st Respondent were divorced. The 1st Respondent lives in Mombasa and not in Kitui. He has daughters and a son but the son is not the deceased's child. Titus was the master of ceremonies at the burial of the deceased. The deceased was buried at the home he lived with the Applicant.

7. In her testimony, the 1st Respondent stated that she and the deceased got married on 5.3.70 under Kamba customary law and had 3 children. She was not aware that deceased had another wife. She also denied that the deceased had any other children. At the time of his demise, the deceased was staying with the Applicant who was his mistress. She contended that she was married to the deceased and was never divorced or separated. She and the deceased bought the Mtopanga house in which she lives, in February 1984. The deceased took a loan from Housing Finance for the purchase of the house while she contributed Kshs. 48,000/= as deposit. At the time she worked with the Family Planning Association of Kenya. The deceased had the title documents for the house as well as for Plot No. 320 and the log book for the vehicle. Plot No. 1614 was yet to be transferred to him. She alleged that the Applicant sold Plot No. 320 and the vehicle.

8. The 1st Respondent further stated that following the retirement of the deceased from Kenya Ports Authority where he worked, they went to their rural home in Kitui. The 1st Respondent together with the children then returned to Mombasa in January 2002. The deceased used to do light transport business with the vehicle in Kitui and they used to visit each other in alternate months. In 1994 she filed a suit against the deceased seeking maintenance because the deceased had failed to provide for her. She denied that Plot No. 320 and vehicle were sold to cater for the deceased's hospital bill. According to her, the deceased was not sick and his was a sudden death. She was in Mombasa when the deceased died and went to Kitui the following day. She stated that the deceased died at Jordan Hospital and that the Welfare paid the hospital and mortuary bills. The 1st Respondent further testified that when in Kitui, she stays in a house she built on her own piece of land which she bought. She cannot live in the deceased's house as the Applicant took over the same. She stated that she transferred the Mtopanga house to Dr. Chamia and his son Obed as trustees for her. They did not pay her any money. The Applicant was married to one Maleli Kimba and her 4 children are his.

9. Celestine Muiya Nguta a daughter of the deceased and the 1st Respondent testified in place of the 2nd Respondent who resides out of the country. According to her, the deceased's properties included the house in Mtopanga, pickup KAN 918A and 2 farms in Kitui. She was not aware that deceased and her mother were separated or that he had another wife or children. After the demise of the deceased, the Applicant came and claimed to be a wife of the deceased. The pickup and 2 farms were taken by the Applicant. Her mother resides in the Mtopanga house. She is aware that the same was transferred to Dr. Chamia as trustee.

10. Dr. John Mutua Chamia testified that the 1st Respondent is his cousin. He did not buy the house in Mtopanga. The family approached him to be custodian of the house and he agreed. The house was then transferred to him. There was an agreement dated 17.6.16 that named him as a purchaser. When pressed, Dr. Chamia conceded that he paid Kshs. 3.5 million as purchase price and confirmed that the property is now his.

11. I have considered the Application and the evidence adduced in Court. Only 2 issues fall for determination are:

- i) Whether the Applicant is a wife of the deceased
- ii) Whether the Grant should be revoked

Whether the Applicant is a wife of the deceased

12. The Applicant's case is that she is a wife of the deceased having married him in 1994 under customary law. They lived together until his demise in 2003. She exhibited an affidavit sworn by both of them on 6.5.03. Titus Kimanthi a neighbour and age mate of the deceased corroborated the Applicant's evidence. He told the Court that the deceased married the Applicant under Kamba custom. He attended the ceremony in 1994 when 5 goats were paid as *ntheo* to the Applicant's mother and 1 goat was slaughtered for the feast. He further stated that the whole village recognised the Applicant and not the 1st Respondent as the wife of the deceased. The deceased was buried at the home he lived with the Applicant. The deceased and the Applicant had 2 children together and took in 2 of the Applicant's children from a previous relationship.

13. The 1st Respondent however denied that the Applicant and the deceased were married or that they had children together. She stated that the Applicant had been married to one Malelu Kiiva and later to one Musau wa Festo. No evidence was however made available to support these claims.

14. In order for this Court to draw the conclusion that a Kamba customary marriage did exist between the Applicant and the deceased, the evidence called by the Applicant must be sufficient to persuade the Court on a balance of probabilities. In Re Estate of Stephen Kimuyu Ngeki [1998] eKLR, Mwera, J. (as he then was) stated:

Akamba customary marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of 3 traditional goats called Mbui Sya Ntheo.

15. The Court notes from the evidence of Titus Kimanthi that the traditional goats called *mbui sya ntheo* were taken to the Applicant's mother. Further, 1 goat was slaughtered at the ceremony. In Anna Munini & another v Margaret Nzambi [1984] eKLR, Kneller, J. described the essentials of a Kamba Customary marriage as well as its elaborate course as follows:

At the end Mr Mututo brought in Dr Cotran's summary of the essentials of a valid marriage in kamba customary in Kenya: I Marriage and Divorce, 1st edn, (1968) 28 which is :-

(a) Capacity

(b) Consent

(c) Slaughter of a billy goat

(d) Marriage consideration

(e) Cohabitation

Dr Cotran deals with each, save for cohabitation, in greater detail beforehand (see pp 23 and 24) and I set out some of these details...

Dr Cotran includes one that was not touched upon in the evidence. One of the billy goats (which he calls a ram) belonging to the man's father or guardian must be slaughtered by the woman's father and its blood allowed to seep into the ground.

16. The taking of the *mbui sya ntheo* by the deceased to the Applicant's mother and the slaughtering of 1 goat for the feast is in line with Dr. Cotran's summary of essentials of a valid Kamba customary marriage. The customary rights of taking of goats to the Applicant's home and in particular the mandatory slaughter of one goat were performed. This evidence was not controverted by the Respondents. Further, Titus Kimanthi is a brother in law to the deceased. His wife is the deceased's younger sister. As such he is in my view an independent witness. He was also a neighbour and friend of the deceased was even the master of ceremonies at the burial. It would seem therefore that Titus Kimanthi was close to the deceased and had first-hand information regarding the family. I do therefore find his evidence credible.

17. The Court has considered several factors. That *mbui sya ntheo* were taken to the Applicant's home in a ceremony; the slaughter of 1 goat at the ceremony; the Applicant and the deceased lived together in the village in Kitui until the time of his demise; the general repute in the village that the Applicant, and not the 1st Respondent, was the deceased's wife; the joint affidavit of marriage sworn by the deceased and the Applicant; the Applicant and the deceased had children together; the deceased was buried at the home where he lived with the Applicant. All these factors taken together, and in the absence of any evidence to the contrary, have led me to the conclusion that the Applicant was indeed the wife of the deceased.

Whether the Grant should be revoked

18. The Applicant's case is that the 1st Respondent is not a wife of the deceased as her marriage to him was dissolved. The 1st Respondent denied this and stated that she had moved to Court to seek only maintenance from the deceased and not divorce. The Applicant however exhibited an extract of the Register of this Court in relation to Divorce Cause No. 45 of 1994, Constance N. Nguta v Benedict Nguta Mutua. It indicates that the prayers sought by the 1st Respondent therein were dissolution of marriage, alimony, apportionment of property, injunction and costs. Of these, the Court granted dissolution of marriage and maintenance of Kshs. 800/=. This documentary evidence was not controverted by the 1st Respondent. I am therefore satisfied that at the time of the demise of the deceased, the marriage of the 1st Respondent to him had been dissolved.

19. Having found that the 1st Respondent was not married to the deceased at the time of his demise, did she have the legal capacity to take out a grant of representation in respect of his estate? Section 66 of the Law of Succession Act (the Act) provides:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

20. It is clear from the foregoing provision that a former spouse does not feature amongst the people to whom the Court shall make a grant of letters of administration. The 1st Respondent therefore had no business of applying for a grant in respect of the estate of a man she had long divorced. Even assuming the 1st Respondent was still a wife of the deceased, she had an obligation under Rule 26 of the Probate and Administration Rules to inform and obtain the consent of all other persons entitled in the same degree, in this case the Applicant. Rule 26 provides:

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same 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.

21. Where a grant is issued to an applicant without disclosure to the Court that there are persons who ought to have been notified of the application, such grant is liable to revocation. Section 76 of the Act provides:

“ 76 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) 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 the 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.

22. In the present case, the 1st Respondent in her application for grant described herself as a widow of the deceased yet she knew very well that at the time of his demise, their marriage was long dissolved. This was a false statement. I am therefore satisfied that the 1st Respondent obtained the Grant fraudulently by the making of a false statement.

23. Further, the 1st Respondent obtained the Grant without the involvement of the Applicant who is a wife of the deceased. The 1st Respondent was obligated to notify the Applicant of her application for the Grant and further obtain her consent as required by Rule 26. For want of consent of the Applicant, the proceedings to obtain the Grant were defective in substance. The Grant which was obtained pursuant to defective proceedings cannot stand.

24. Before I conclude, I must state that I have found the 1st Respondent to be untruthful. Beyond making the false statement in her application for the Grant that she was the widow of the deceased, she maintained throughout her testimony that this was so. She stated that she was neither separated nor divorced from the deceased. She further stated that the case she had filed in Court in 1994 was for maintenance only. The evidence however shows that the case was for more than maintenance. The main prayer was dissolution of the marriage which was granted. She further told the Court that she did not sell the house in Mtopanga to Dr. Chamia but only transferred the same to him as trustee, whatever that means. Dr. Chamia stated that he paid Kshs. 3,500,000/= as purchase price and that the house now belonged to him. This renders her an unreliable witness. Further it is not lost on the Court that the purported transfer was made before the confirmation of the Grant which renders the transfer illegal as it contravenes the provisions of Section 82(b)(ii) of the Act.

25. The upshot of the matter is that the Applicant has proved her case as against the Respondents on a balance of probabilities. The statutory grounds for revocation of the Grant have been established. Accordingly the Court finds that the Application dated 18.1.05 has merit and the Court makes the following orders:

i) Grant of letters of administration issued to Constancia Nzisa Nguta and Wilfred Mutisya Nguta on 2.12.04 is hereby revoked.

ii) All transactions made pursuant to the revoked grant are hereby nullified.

iii) There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 12th day of July 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondents**

..... **Court Assistant**