



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NUMBER 241 OF 2004

IN THE MATTER OF THE ESATE OF E N N ALIAS E N N (DECEASED)

E W M.....1ST APPLICANT

M K K.....2ND APPLICANT

VERSUS

E N N.....PETITIONER/RESPONDENT

RULING

1. The application before court is dated 15th July, 2016. Vide this application E W M and M K K (hereinafter the 1st and 2nd applicants respectively) seek orders that the Grant of Letters of Administration made to E N N on 22nd September, 2004 and confirmed on 27th May, 2005 be revoked.
2. The application is premised on grounds:
 1. THAT the Grant was made without disclosure of material facts to the court.
 2. THAT the Grant was obtained by misrepresentation and fraudulently by the Petitioner/Respondent with the sole intention of ensuring that the children of E M N (deceased) were deprived from benefiting from the deceased's estate.
 3. THAT contrary to the mandatory provisions of Section 51 (2) of the Law of Succession Act Cap 160, Laws of Kenya and Rule 7 of the Probate and Administration Rules E N N, the administrator in this cause, failed to disclose or omitted some of the beneficiaries or survivors from the petition herein being E W M and M K K daughters and beneficiaries of the estate of the above named E N N ALIAS E N N who died on the 10th December, 2003.
 4. THAT the Petitioner/Respondent, E N N did not obtain certain mandatory consents.
3. It is further supported by the affidavit of the applicants sworn on 15th July, 2016.
4. In a nutshell, the applicants' case is that E N N alias E N N who died on 10th December 2003 was father to the two (2) applicants having married E M N (deceased) who was the mother to the applicants.
5. As proof of this, the applicants have annexed baptismal cards, a marriage certificate showing the deceased as the father of E W and a letter from the chief, Bibirioni Location, Limuru Sub-County showing the two (2) applicants as daughters of the deceased.
6. The applicants aver that the petitioner/respondent in this matter is their step mother and by misrepresentation and fraud. She omitted the names of the children of E M N when she petitioned for a grant of letters of administration thus depriving the said children their share of the estate of the deceased.
7. The applicant neither sought nor obtained the consents of the applicants as required by law.
8. The applicants only learnt that the petitioner had applied for and obtained a grant of letters of administration in respect of the estate of the deceased when it became known to them that land known as Nyandarua/Matindiri/[particulars withheld] belonging to the deceased had been sub-divided among the children of the petitioner.

9. The only beneficiary from the house of E M N who has received a share of parcel of land Nyandarua/Matindiri/[particulars withheld] is one T N N.
10. It is urged that the grant herein should be revoked in view of the foregoing.
11. The application is opposed and on record is a replying affidavit by E N N (hereinafter the respondent).
12. The respondent avers that she married the deceased in 1949 under Kikuyu Customary Law and in 1971 she solemnized the union in a Christian wedding. She annexes an extract of an entry on the marriage certificate book.
13. It is her case that the initial deposit for the land in Nyandarua was paid using her savings and the deceased paid the balance around 1968.
14. The respondent acknowledges that the deceased had an affair with one M N (now deceased). M had two (2) children before the affair. These were E W and T N.
15. The said M had other children from different fathers namely; M K G alias M K K, D N, K and one W.
16. It is averred that in the late 60's M took two (2) young sons to the respondent's home stating that the deceased herein should take care of them. These are N and N. The respondent was prevailed upon by the deceased to take care of these children N and N and she has done so to date.
17. The respondent included the two (2) sons in the distribution of Nyandarua/Matindini/[particulars withheld] and ten (10) titles arising from the sub-divisions have already been issued to the beneficiaries and some have used the said titles as security for loans.
18. It is the respondent's case that M had land in Mai Mahiu where her children are free to inherit from and also land in Ngararinga Limuru.
19. It is denied that the deceased ever married M n and none of the children can claim to be the deceased's children. They never visited him at Matindiri for the many years the deceased lived there and the deceased never recognized them as his children.
20. An affidavit sworn by B N N on 14th October, 2016 was filed in court on 18th October, 2016. B avers that the deceased was his elder brother. To the best of his (B) knowledge, the deceased had never married any other wife apart from E N N. Before his death the deceased directed that two (2) children abandoned by M N in his (deceased's) place should get three (3) acres of land each.
21. E W M swore a supplementary affidavit on the 11th November 2016 in which she avers that to her knowledge, the deceased had only four (4) children with M N. These were:
 - (a) E W M
 - (b) T N N
 - (c) D N N
 - (d) M K K
22. E avers that K and W were born after their mother M had left the deceased's farm and she doesn't know if the deceased was their father. She however points out that her three (3) siblings and herself stayed with their father and mother at Matindiri Farm with the respondent living there too.
23. Family differences led to the separation of her mother and the deceased in 1966. She and her siblings were left in the custody of their father at Matindiri Farm. It is only later that she took Martha her sister and who was a toddler to their mother.
24. It is E position that her brother D N was not given any portion of the estate.
25. She further avers that the deceased received bride price from her husband on 13th July, 1980 and an acknowledgement is annexed in evidence.
26. On the 10th October 1985, the deceased received bride price from her husband in the presence of the respondent. An acknowledgment is annexed.
27. An obituary advertisement in the Saturday Nation of 13th December, 2003 is relied on to show that the applicant and her siblings to the exclusion of M were identified as his children.
28. E adds that the letters from the chief dated 12th October, 2004 erroneously omitted her and M from the list of beneficiaries.
29. It is denied that the late M owned any other land and it is stated that she was buried at a cemetery in Limuru when the respondent objected to her burial at Matindiri Farm.

30. The supplementary affidavit of E W M elicited a supplementary affidavit in rejoinder from E N N the applicant sworn on the 26th May, 2017.

31. The respondent annexes a confirmation from the National Registration Bureau that M K K of identity card number xxxx was born in 1966 at Kiambu District. The name of her father is K G and the mother is E M. It is also confirmed that E W M was born in 1953 at Kiambu District. The name of the father is E N and the mother is E M.

32. It is averred that T N and D N duly gave their consent to the confirmation of grant and the division of the deceased's property and this is impliedly put the applicants on notice of the application for Grant of Letters of administration of the deceased's estate. It is questionable why the applicants did not object to the said grant then despite being aware of the proceedings and they have waited for eleven (11) years to challenge the same.

33. Annexure "ENN4" is exhibited to show that in E M N's eulogy during her burial, the deceased herein was not recognized as M's husband. Of note is that the eulogy states that M was married in 1951 and got her first child E W in 1952.

34. The marriage certificate and the baptism cards produced are challenged as having incorrect information. The marriage certificate gives a name of the father of the bride which is different from the deceased's. The baptism card for the first applicant does not indicate the church of baptism, does not indicate name of deceased and it indicates date of matrimony with one J M.

35. The baptism card produced by the second applicant is said not to contain the second applicant's name. It indicates year of birth as 1965 yet the second applicant's identity card and the record from the registration bureau show her year of birth as 1966 and the father's name indicated there is not a true reflection the deceased's name.

36. Yet another affidavit is sworn by D N N. He avers that the deceased was his father T N and the two (2) applicants herein are his siblings. He denies having been given any share out of parcel of land Nyandarua Matindiri/[particulars withheld]. A certificate of official search annexed shows that the sub-division purportedly given to him is registered in the names of E N N. I confirm the search certificate annexed shows as much.

37. E W M has sworn a further supplementary affidavit in which she responds to the supplementary affidavit by E N N. She avers that M adopted the name of K G, a brother to M (their mother) for purposes of attending the same school with K's children and accessing harambee funds for fees.

38. It is asserted that the deceased was known as E N N and E N and E W M verily believes that the E N captured in the government records refers to his father.

39. A further supplementary affidavit is filed by the respondent. She avers that K G being the second applicant's father took up parental responsibility for the second applicant.

40. Both parties filed written submissions.

41. I have had occasion to consider the application, the multiple affidavits filed in support and in opposition to the application. I have had due regard to counsel's submissions.

42. The broad issue for determination is whether the applicants have achieved the necessary threshold in law for the revocation of the grant of letters of administration issued to E N N on the 22nd September, 2004 and confirmed on the 27th May, 2005. Specific answers will be required of the following questions:

- (i) Was the grant made without disclosure of material facts to the court?
- (ii) Was the grant obtained by misrepresentation and fraud with an intention to disinherit the children of E M N?
- (iii) Were E W M and M K K children of the deceased and were they omitted as survivors of the deceased and beneficiaries?

43. **Section 76 of the Law of Succession Act** sets out in clear terms the conditions that would vitiate a grant of letters of administration whether or not confirmed leading to its revocation. The section provides:

"S.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 has ordered or allowed; 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.**

44. As noted earlier, there is an avalanche of rival affidavit evidence on record in these proceedings. In view of the hotly contested issues of fact, one wonders whether, after all, it was prudent for the parties to choose to prosecute this matter through affidavit evidence and submissions. There are serious issues contested as regards whether E M N was a wife of the deceased and the paternity of the applicants herein, issues which, with benefit of hindsight, the parties ought to have ventilated through a formal *viva voce* hearing.

45. That said, the court is properly seized of the matter and its duty now is to analyze the evidence all along alive to the law on the burden of proof.

46. The law on where the burden of proof lies is clear in our law. This is well captured under **Section 107, 108 and 109 of the Evidence Act (Cap 80 Laws of Kenya)**.

“ S.107. Burden of proof

(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.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

47. In civil cases a plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was clearly stated in the case off **KIRUGI & ANOTHER VS KABIYA & 3 OTHERS [1987] KLR 347** wherein the Court of Appeal stated that the burden was always on the plaintiff to prove his case on a balance of probabilities and that such burden was not lessened even if the case was heard by way of formal proof.

48. **Section 51 of the Law of Succession Act** provides for the information an applicant ought to include in a petition for grant of representation. The section provides:

“S. 51. (1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) An application shall include information as to -

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers

and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.”

49. In our instant suit the applicant is faulted for failing to comply with the provisions of **Section 51(g)** above by failing to list the applicants, the children of E M N, as survivors of the deceased herein being daughters.

50. It thus becomes incumbent on this court to first and foremost determine whether E M N was a wife to the deceased and whether the two (2) applicants herein were daughters of the deceased with E M N. Even if the question as to whether E was a wife answered in the negative that would in no way affect the claim by the applicants as children of the deceased. That aspect of the question will need to be addressed.

51. From the entire affidavit evidence from the applicants the attempt to show that E M N was a wife to the deceased has been a feeble one. No iota of evidence is provided to show proof of any form of marriage between the deceased and E whether customary or otherwise. There is not even evidence of a long cohabitation between the deceased and E. In her eulogy, she is not referred to as the wife of the deceased. On the material before me I find no evidence to support a finding of any form of marriage between the deceased and E M N.

52. This leads to the other aspect of the question; whether the two (2) applicants herein have tendered evidence to show that they are children of the deceased.

53. The applicants have relied on the following documents to show that they are daughters of the deceased. For M K G;

i) A baptism card issued by Jesus Evangelism Ministry. The parent is indicated as E N.

ii) Chief's letter dated 23rd May, 2016.

54. Whereas a baptism card be a persuasive piece of evidence in ascertaining the identity of an individual, it certainly isn't an official record that can conclusively determine the identity, leave alone the paternity of an individual.

55. The letter by the chief dated 23rd May, 2016 lists the deceased as having been survived by two (2) wives and the two (2) applicants herein are named as children in the second house. This is an official record from the chief of Limuru. Suffice to note that the deceased was obviously resident at Matindiri in Nyandarua. From the record there is yet another official letter from the chief Dundori Location dated 12th May, 2004 who states that the deceased had one (1) wife and eleven (11) children who are listed thereon and this list excludes the applicants herein.

56. No party found it necessary to resolve this issue by summoning either or both chiefs to shed light on this matter.

57. A fact is not proved if it is neither proved nor disproved (see **Section 3(4)** of the **Evidence Act**).

58. In respect W M documents relied on are;

(i) A baptism card (The source of church advertising the baptism is not named. The father is named only as N. Date of birth reads "14 years 1967")

(ii) A certificate of marriage which indicates her father as E N.

(iii) Letter from the chief Limuru Location.

59. The baptism card exhibited gives scanty information as regards the connection of the first applicant and the deceased, its source of authenticity is not provided and it is completely unhelpful to the first applicant's cause. The certificate of marriage has indication of the father of the bride as E N. This is completely different name from the names of the deceased E alias E. It was incumbent on the part of the first applicant to prove that this name E referred to the same person known as E alias E. As regards the letter from the chief, the argument made at paragraph 55 above applies.

60. The documents presented by the applicants are countered by the affidavit evidence of the respondent who avers that they are not children of the deceased. Her evidence is corroborated by that of B N N who states that the deceased called him to his (deceased's) house and acknowledged two (2) children left by M N and directed that the two (2) should get three (3) acres from his estate each.

61. A record from the National Registration Bureau has been produced by the respondent showing that M K K's (2nd applicant) father is K G. This is from the official records held by the government of the Republic of Kenya. Any attempt to explain this away by stating that M took the name of an uncle for purposes of going to the same school with the children of the uncle and for accessing harambee money for fees must come a cropper.

62. It is not lost on this court that she identified herself as such in her national identity card. If it was necessary to identify herself as M K K at school for purposes of education, was it still necessary to identify herself as such during registration with the National Registration Bureau?

63. M called no independent evidence to confirm her assertion. The record from the National Registration Bureau in the absence of concrete evidence to controvert it dilutes her claim of being a daughter of the deceased.

64. The respondent has tendered a record from the National Registration Bureau showing that the father of E W M is E N. The name E bears some remote similarity, with the names of the deceased herein E alias E. No evidence was laid before court to show that this was another alias name of the deceased. Whose duty was it to show this? Once the respondent produced the record showing that the father of the first applicant is E the burden of proof lay on the first applicant to prove that the person referred to as E N is the deceased herein.

65. I have agonized over this issue and alive to the obvious difficulties that some of these foreign names pose to our local people in terms of pronunciation and spellings, my finding has been reached after very careful consideration.

66. This court can only make inferences that clearly come out from the material presented before it. This court cannot possibly stretch the making of inferences to a complete substitution of someone's name. E and E alias E completely different names the remote similarity notwithstanding and it was upon the first applicant to show that the names referred to the same person. I need to emphasize that the name E is from official government records and that is the true identity of that person as per records held by the government.

67. The applicants seem not to have found it necessary to call evidence from close relatives who could have bolstered their case, this to their great detriment.

68. It is also instructive that there is evidence that the deceased accepted two (2) children T N N as his own and the two (2) were brought up to the deceased's home at Matindiri. The begging question is why the deceased would take up only the two (2) children and exclude others if they were his children. It is safe to infer that the deceased knew that his only two (2) children with M were the two (2) boys. The applicants have fallen short of a plausible explanation for this.

69. In the end, I must reach the conclusion that the applicants have not satisfied this court by way of evidence that they were survivors of the deceased as daughters. The respondent cannot in the circumstances be faulted for any material non-disclosure, misrepresentation or fraud. The respondent was under no obligation to include persons who were not survivors of the deceased in the petition for letters of administration.

70. The timing of this application also militates against any favourable finding for the applicants.

71. Assuming they were children of the deceased, they certainly got to know of his death. Being children, and their mother being alive then, they know that they ranked high as wife or children in priority in so far as petitioning for letters of administration was concerned. No explanation is given whatsoever why they never moved to apply for grant. The cause was gazetted and it was expected that any interested party would lodge their objection in the period prescribed by law. The applicants are guilty of inexplicable inaction. Equity aids the diligent and not the indolent.

72. The obtaining legal position is that **Section 76 of the Law of Succession Act** does not impose any timelines for filing of an application to revoke or annul a grant. In the case in **RE ESTATE OF JOSEPHINE MAGDALENA (DECEASED) [2016] eKLR *Musyoka J*** stated;

“As indicated above, Section 76 of the Law of Succession Act does not provide time limits for filing the applications envisaged by that provision. The office of personal representative is for life. The personal representative can therefore be called to account at any time during his lifetime. This account is not just about rendering a statement about how he has or had gone about managing or administering the estate, it can also about how he or she obtained the grant of representation in the first place, or how he got it confirmed.”

73. While that is the correct legal position, every case must be considered within its circumstances and any unexplained inordinate delay must face sanctions. I am fortified in this finding by the holding by the Court of Appeal in **ELIZABETH KAMEME NDOLO VS GEORGE MATATA NDOLO [1996] eKLR** where the court stated;

“it is hardly reasonable to think that the respondent was unaware of the dispute over the will between his mother Rose and the appellant. We are cognizant of the fact that Section 76 of the Act does not set any time limit within which a summons for revocation or annulment of a grant can be taken out. But the delay by the respondent in the circumstances of this appeal gives to this court the clear impression that the respondent was merely fishing for some plausible excuse upon which he could have the grant to the appellant revoked or nullified.”

74. As stated earlier, on it is hardly reasonable that the applicants herein who claim to be children of the deceased were unaware of the succession cause involving their father. They ranked high in priority (as per their claim of the degree of consanguinity) and why they did not take the initiative to seek for the letters of administration themselves or to closely monitor the going ons in the estate of their father is unexplained and thus their claim of such a close relationship with the deceased begs belief.

75. In the end, on the material before court, the inevitable conclusion is that the applicants who allege the deceased was their father shouldered the burden of proof to prove that they were children of the deceased and they have failed miserably to discharge this burden. On a balance of probabilities, the applicants have failed to prove their case. The applicants rose from their slumber eleven (11) years after the confirmation of the grant herein. In the intervening period the estate has been distributed and beneficiaries already hold independent titles. The delay by the applicants is not explained. Yet their claim is one of a very close relationship with the deceased and in which it would be expected they would take a very keen attention to the affairs of their father's estate, if at all, something they did not do.

76. I need to say one more thing relating to the claim running through the affidavit of the applicants and affidavit sworn by D N N. There is

no dispute that D N N is a beneficiary of the deceased's estate. He is entitled to an equal share of the estate like all other children of the deceased. The estate must meet all incidental costs of its administration. The administrator should not demand any monies from D N N to ensure that his share is transferred to him. There exists no known law requiring a beneficiary to make any payments to get their inheritance. Let the share of D N N be transferred to him without further ado.

77. The upshot is that the summons dated 15/7/2016 is found to be without merit. The same is dismissed. In the circumstances of this case, and although the law is that costs follow the event, I order that each party bears its own costs.

Dated and Signed at Nakuru this 9th day of July, 2019.

A. K. NDUNG'U

JUDGE