



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO.919 OF 2018

IN THE MATTER OF THE ESTATE OF DWM (DECEASED)

MAO (Suing as next friend and mother of ABA (Minor) and

GHM (Minor).....OBJECTOR/APPLICANT

VERSUS

B C M.....1ST PETITIONER/RESPONDENT

FOAL.....2ND PETITIONER/RESPONDENT

JUDGMENT

1. The Deceased herein DWM (Deceased) died intestate on 20.4.2018 domiciled in Kenya.

2. The 1st and 2nd Respondents BCM and FOA petitioned for Letters of Administration on 7.7.2018 and on 4/9/2018 the Objector herein MAO filed an objection to the said application on the following grounds;

i. THAT Petitioner's dishonesty and non-disclosure in the listing of names of other beneficiaries, namely (a) MAO (widow) (b) ABA-(Daughter) and (c) GHM (Daughter)

ii. THAT Petitioners have not sought nor obtained the Consent of MAO – Widow and mother of the two children of the Deceased namely ABA and GHM as she has equal priority in accordance with Rule 7 (7) of the Probate and Administration Rules and Section 66 (a) of the Law of Succession Act

iii. THAT Interest of the house of MAO as widow and mother of the two Children of the deceased, namely ABA daughter and GHM Daughter is not protected having been unlawfully excluded in the list of the beneficiaries by failing to include her as co-administrator of the estate of the late DWM.

iv. THAT Petitioner's insincerity, unfaithfulness, dishonesty and uncandid in the petition by lying that every person having equal or prior right to a grant of representation has consented thereto and hence they cannot be trusted with administration of the estate.

v. A grant of representation has consented thereto and hence they cannot be trusted with administration of the estate.

3. The Case proceeded by viva voce evidence. The objector MAO told the Court that the deceased was her husband and the father of her two minor children ABA and GHM (hereinafter referred to as the minors)

4. She said the deceased was taking care of her and the minors immediately prior to his death.

5. The objector called ANNE AKINYI ONGONDO, ALLOYS JUMA AOGAH GORDON ODHIAMBO AMISO and PHILIP O. ONYINA who is the Chief at Kondele Location and these witnesses said they knew the objector as the wife of the deceased.

6. The objector also called HENRY RABALA who was working at Safaricom as a Liaison Officer in Security Department who produced Mpesa statements issued to the objector.

7. The 1st Respondent who is a lecturer at [Particulars Withheld] University of Kenya said in her evidence in court that she got married to the deceased on 1.11.1995. she said the deceased had three children and they got three more children.

8. The 1st Respondent said the three children of the deceased were mothered by one A who was not married to the deceased but with whom he had an affair. She said she accepted A's children and raised them.

9. The 1st Respondent said she first saw the Objector in Court on 5.2.2019 and she said if a DNA is done and the two minors are found to belong to the deceased she would accept them.

10. The 2nd Respondent, FAO who is the sole surviving brother of the deceased and co-administrator of the Estate of the deceased also testified. He also denied that the objector was married to the deceased or that her children were sired by the deceased and he stated that proof of paternity is a DNA test.

11. The Respondent also called a neighbor, JUSTUS BERNARD KITOTU and the chief in Kileleshwa Location ELVIS MACHARIA ETHAN who said they knew the deceased had one wife, the 1st Respondent and six children.

12. The Parties filed written submissions which I have duly considered together with the oral evidence and affidavits filed in this case.

13. I find that it is not in dispute that the deceased died intestate on 20.4.2018 domiciled in Kenya. The issues for determination in this objection are as follows:

- i. Whether the Petitioner/Respondents were dishonest in failing to disclose the names of other lawful beneficiaries of the Estate of the deceased – namely the objector and her two minor children.**
- ii. Whether the Petitioner/Respondent were under a duty to obtain the Consent of the Objector before filing the Petition.**
- iii. Whether the objector and the two minor children are beneficiaries of the estate of the deceased.**
- iv. Whether the Petitioners can be trusted as administrators of the estate.**

14. On the issue as to whether the Petitioner/Respondents failed to disclose the names of other lawful beneficiaries of the estate of the deceased, I find that there is no evidence that the Petitioner/Respondents knew the existence of the objector and her minor children at the time they filed the Petition on 7.7.2018.

15. The 1st Respondent said she learnt about the objector after the burial of her husband. The burial documents produced in Court do not feature the Objector and her children although she said she attended the burial.

16. I do not believe the Objector and her witnesses that the Objector was married to the deceased. None of the witnesses attended any marriage ceremony or customary rites and their evidence is mere hearsay.

17. The 1st Respondent was legally married to the deceased and at the time the objector says she contracted a customary marriage with the deceased, he had no capacity to enter into another marriage as his marriage with the 1st Respondent was subsisting. There is also no evidence that the Objector married the deceased under customary law and therefore the Objector does not qualify to be regarded as a wife for inheritance purposes under Section 3(5) of the Law of Succession Act.

18. The objector is therefore not a beneficiary of the Estate of the deceased.

19. **Section 3(5) of Law of succession Act** states as follows; "**Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act**".

20. I find that in this case, there is no evidence that the Objector was married to the deceased under a system of law that permits polygamy. There is no evidence that any dowry was taken to her parents or that any customary rites were performed by the parties. The family of the deceased did not know about the Objector and her children and she did not even feature during the burial of the deceased.

21. On the issue of the minors whose birth certificates bear the names of the deceased as their father, I find that paternity is in dispute in this case. The Law is very clear that in a situation where the deceased had taken up children and was maintaining them prior to his death, the said children are entitled to inherit whether or not the deceased was their biological father.

22. However in current case, the Petitioners had never heard about the objector and they had never seen her when the deceased was alive. I find that the objector's allegation that the deceased used to support her and her children was hotly contested.

23. Section 29 of the Law of Succession Act states as follows:

Meaning of dependant

For the purposes of this Part, "dependant" means—

(a) The wife or wives, or former wife or wives, **and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her prior to her death.

24. I find that there is no evidence that the objector was married to the deceased and further, there is no evidence that the deceased had taken up the Objector's children as his own. If indeed he had done so, his family would have been aware of it. The deceased had other children with A whom he had accepted as his own and there is no dispute about A's children.

25. I find that the objector has not proved that the minors were the biological children of the deceased or that he had taken them up as his children.

26. The production of the mpesa statements is not sufficient to show that the deceased had taken up the objectors' children when the family members did not even know the existence of the said children.

27. The Law of Succession Act is very clear that the children of the deceased are entitled to inherit whether or not the deceased was supporting them immediately prior to his death. Since paternity is in contest in this case and there is no evidence that the deceased had taken up the children as his own, a DNA test would resolve this issue.

28. I accordingly direct that DNA tests be conducted to determine the paternity of the two minors.

29. I accordingly find that the objector's application dated 4.9.2018 objecting to the Petition for grant of letters of administration must fail for the following reasons;

- i. THAT there is no evidence that the Petitioner/Respondents were aware of the objector at the time of filing the Petition.**
- ii. THAT the Petitioner/Respondents were not under a duty to obtain the Consent of the Objector whom they did not even know.**
- iii. THAT Objector has not proved that she was a beneficiary of the Estate of the deceased since there is no evidence that the Objector was married to the deceased herein under any system of law.**
- iv. The paternity of the minors is also contested and since there is no evidence that the deceased had taken up the minors as his own children or that he was maintaining them immediately prior to his death. I direct that a DNA be conducted to determine the issue of paternity.**
- v. Finally I find that the 1st and 2nd Respondents have properly petitioned for grant of letters of administration.**
- vi. I accordingly dismiss the objection dated 4.9.2018 with no orders as to costs and direct that DNA be conducted within 45 days of this date to settle the issue of Paternity of the two minors.**
- vii. The two minors will be included as beneficiaries of Estate of the deceased subject to the paternity test.**
- viii. This matter will be mentioned after 60 days on 7.10.2019 for compliance and further directions.**
- ix. Finally the estate to pay the costs of the DNA tests and the Deputy Registrar of the Court to make arrangements for the tests to be conducted by an independent service provider and the report to be filed in Court before the mention date.**

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 5TH DAY OF JULY, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.