



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 297 OF 2014

IN THE MATTER OF THE ESTATE OF WON (DECEASED)

MMO.....APPLICANT/OBJECTOR

VERSUS

JPO.....1ST RESPONDENT/PETITIONER

JMO.....2ND RESPONDENT/PETITIONER

RULING

1. The deceased **WON** died on 2nd February 2011. A grant of letters of administration was issued to his wife POJ ("**J**") and son JMO ("**J**") and J listed the persons who survived the deceased in their affidavit in support of the petition of administration intestate. A grant was issued to J and J on the **12th October 2015**. On the 9th June 2016 the said grant was confirmed and the only assets listed was shared amongst the deceased's beneficiaries and a purchaser. The assets listed was Land Parcel No. [xxxx].
2. On 26th July 2016, MMO ("**M**") filed summons for revocation of the grant on the grounds that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making of false statement; and that the grant was obtained by means of untrue allegation of essential facts.
3. The application was supported by the affidavit of M filed on 27th July 2016 where she deposes that the deceased had three wives, that the first wife is deceased, that she was the second wife and J the third wife. She averred that some of the beneficiaries were not included in the petition, the said beneficiaries were the children from the 1st house and 2nd house, herself and someone by the name SMA. She also stated that the petitioner did not include all of the deceased properties including Parcel No. [xxxx].
4. The application was opposed by J who filed her response on 18th August 2016. She deposed that the deceased only had two wives, herself and the deceased first wife PKO (also deceased) while M only had a brief frolic liaison with deceased and as a result had a son, SMA, with the deceased who was included as a beneficiary. She deposed that M had been married before and her son BDN was not one of the deceased's children. She averred that the first house was not entitled to Plot No. 78 as the deceased had settled them on Parcel No. [Particulars Withheld]. She averred that she was the only wife legally married to the deceased having been married at the District Commissioner's Office and issued with a marriage certificate. She deposed that the deceased had divorced M when he filed **Divorce Cause Number 7 of 2013** at Keroka Resident Magistrate's Court. She alleged that the letter by the objector obtained from the chief was forged.
5. When the matter came up for hearing before Okwany J., the parties by consent agreed to maintain status quo in respect to distribution of the estate pending hearing and determination of the objection, and that the objection be heard by way of oral evidence. Before the matter could be heard the parties intimated to the court that they were engaged in negotiations with a possibility of settlement. In due course the negotiations collapsed, and this court directed that the parties file their proposed mode of distribution and their written submissions in regard to distribution.
6. In its submissions, the applicant contends that the Borabu Land Dispute Tribunal Board Nyamira District in Tribunal Case No. 001/2007 held that M should get 7 acres from Plot No. [xxxx], while the deceased should get 8 acres. That upon filing the **Miscellaneous Civil Case No. 1 of 2008** in the Resident Magistrate's Court at Keroka, the court upheld the verdict by the tribunal. It was submitted that the documents on record reflect that indeed M was the deceased wife. It was submitted that M and her children are entitled to the deceased estate and in any case have at all times been in occupation of the 7 acres in plot no. [xxxx].
7. The Respondents in their submissions maintained that M was not a wife and BDN was not the deceased son. They recognized that the deceased son with M was SMA and urged the court to adopt their proposed mode of distribution as proposed by the petitioner in her mode of distribution dated the 2nd October 2018 and filled in Court on the 3rd October 2018.

8. Before I turn to the issue of distribution, I will determine whether the applicant's summons for revocation is merited. No oral evidence was adduced. I have considered all the rival arguments by the parties in their submission, the affidavits filed as well as the law and I find that M has made out her case for revocation of grant under **Section 76** of the **Law of Succession Act**. Though the respondent claims that the deceased filed a divorce petition in the Resident Magistrate Court at Keroka in **Divorce Cause No. 7 of 2003** intended to severed ties with M, the petition filed by the deceased was struck out, thus M remained the deceased's wife as their divorce never finalized. The proceedings from the Borabu Land Dispute Tribunal Board Nyamira District in Tribunal Case No. 001/2007 show that the deceased in his testimony recognized that BDN was his son and the assertions by J that BDN was not the deceased son is untrue. **Section 76** of the **Law of Succession Act** provides that the court may on application by any interested party or on its own motion revoke a grant on the ground that the proceedings to obtain the grant were defective in substance; or that the grant was obtained fraudulently by making of a false statement; or by concealment of something material to the case; or that the grant was obtained by means of untrue allegations of facts essential in point of law. It was material for the respondents to disclose to the court that the deceased had three wives and other children. The respondents failed to include M and her son BDN amongst the deceased beneficiaries. I therefore revoke the grant issued to J and JMO on the 12th October 2015 and confirmed on the 9th June 2016.

9. I now turn to the issue on distribution. The respondents filed their proposed mode of distribution on 3rd October 2018 seeking the Plot No. 78 be distributed as follows;

1. POJ – 1.9 Ha
2. JMO – 0.4 Ha
3. TMO – 0.4 Ha
4. JMO – 0.4 Ha
5. JNO – 0.4 Ha
6. INO – 04 Ha
7. JBO – 0.4 Ha
8. AMO – 0.4 Ha
9. COO – 0.4 Ha
10. HOO – 0.4 Ha
11. SMA- 0.4 Ha
12. GMA – 0.4 Ha

The hectares by the petitioner indicated above total to about **15.6 acres of Plot. No.[xxxx]**.

10. M on the other hand proposed that the Plot No. [particulars withheld] be divided into two parts, measuring 7 and 8 acres respectively. She argued that the second house to get the 7 acres and third house 8 acres.

11. According to **section 3** of the **Law of Succession Act** “estate” means “the free property of a deceased person” while “free property”, in relation to a deceased person, means “the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”In **Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR**, the Learned Judge observed that :

“This Court's view before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution.”

12. The 7 acres forming part of Plot No. 78 form part of the deceased's estate as M do not indicate if she has a title for the said 7 acres. The Resident Magistrate's Court in **Miscellaneous Civil Case No. 1 of 2008** subdivided the property into two parts and ordered that M is entitled to 7 acres of the property. The deceased did not appeal the decision and. The said 7 acres belong to M.The only property thus available for J and the beneficiaries named by her are 8 acres which also form part of Plot No. [xxxx] .

13. It was not in dispute that the deceased had three wives therefore his estate should be distributed in accordance with section **40(1)** of the **Law of Succession Act** which deals with the estate of a polygamous intestate and provides that:

“40(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

14. The 8 acres forming part of Plot No. [Particulars Withheld] being the only property owned by the deceased should be divided among the houses. I however recognize that **Section 42 (a) and (b)** of the **Law of Succession Act** provides that previous benefits should be brought into account where;

“(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

15. In this case it is not in dispute the deceased during his lifetime already bequeathed **Parcel No. [xxxx]** to the first house. Similarly I find that the second house was awarded 7 acres out of Plot No. [xxxx] belonging to the deceased and thus find that the two houses are not entitled to a share in the 8 acres forming part of Plot No. [xxxx]. The 8 acres forming part of Plot No. [xxxx] are available to the third house and shall be divided among them. I note that in the proposed mode of distribution by the petitioner dated the 2nd October 2018, she has a bigger portion and the other beneficiaries have an equal share. The 3rd house needs to have a discussion on the distribution of the 8 acres before confirmation of the grant.

16. Having revoked the grant of **12th October 2015** and the one confirmed grant dated **9th June 2016**, I hereby appoint **JPO, JMO, and BDN** as the administrators to whom a grant of letters of administration shall now issue forthwith. The administrators shall list the 2 properties of the deceased namely Kisii- [xxxx] and [xxxx] as properties to be shared amongst the beneficiaries. Parcel No. [xxxx] belongs to the 1st house, 7 acres of plot No.78 belong to the 2nd house and 8 acres of Plot no. [xxxx] shall be shared by the 3rd house. **JPO, JMO, BDN** shall apply for confirmation of the grant within 30 days from the date hereof. Each party to bear its own costs.

Dated, signed and delivered at Kisii this 4th day of July 2019.

R.E. OUGO

JUDGE

In the presence of;

Mr. Magara h/b Mr. Ochoki for the Petitioner

Mr. Momanyi for the Objector

Rael Court clerk