



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

SUCCESSION CAUSE NO. 370 OF 2014

IN THE MATTER OF THE ESTATE OF MARY NAMUKURU WABWILE - DECEASED

BETWEEN

BATHOLOMEW JUMA WAFULA.....PETITIONER/RESPONDENT

VERSUS

FRANCIS WABWILE NYONGESA.....OBJECTOR/APPLICANT

RULING.

The deceased MARY NAMUKURU WABWILE died on 8.2.2014 aged 58 years old. She has been a teacher in various schools. Upon her death, the Petitioner filed this Succession Cause as a Widower and was issued with grant of Letters of Administration Intestate of all the estate of the deceased on 3rd November, 2014. The objector applicant Francis Wabwile Nyongesa filed this application dated 7th June, 2018 seeking orders;

1. **THAT** the Grant of Letter of administration issued to BATHOLOMEW JUMA WAFULA on 3rd November 2014 be revoked and/or annulled.
2. **THAT** costs be provided for.

WHICH APPLICATION was based on the following Grounds;

- (a) **THAT** the grant was obtained fraudulently.
- (b) **THAT** there was material concealment from the court of things material to the case.
- (c) **THAT** the grant was obtained secretly.

The application/objection supported the application by supporting affidavit sworn on even date where he depones; inter alia

1. **THAT** at the date of her death, the deceased was not married neither was she survived by any child but she was survived by the following siblings;

- (a) **Francis Wabwile Nyongesa** - **Brother**
- (b) **Oscar Sikwany** - **Brother**
- (c) **Jennifer Wabwile** - **Sister**

2. **THAT** the Petitioner herein without any capacity to petition for Letters of administration in relation to the above estate, fraudulently petitioned this Honourable Court and obtained Letters of administration for the estate of the deceased on 3rd November, 2014 without my knowledge.

3. **THAT** without my knowledge of fraud on the part of the petitioner, I petitioned the Honourable Court for a grant of Letters of administration for the estate of the deceased on 12th September, 2014 vide **BUNGOMA SUCCESSION CAUSE NO. 418 OF 2014**.

4. **THAT** the grant of letters of administration for the estate of the deceased obtained by the Petitioner has not been confirmed.

5. **THAT** Upon discovering the fraudulent acts of Petition, I filed an objection on 17th March, 2015 to making of grant of letters of administration to the petitioner.

6. **THAT** the petitioner intends to disinherit the rightful heirs of the estate of the deceased by failing to disclose material facts to the Honourable Court.

The petitioner Bartholomew Juma Wafula filed a Replying Affidavit where he depones that he married the deceased in year 2000 under customary law, paid 4 herds of cattle as dowry; that they lived happily together even when she battled with breast cancer for 4 years. They had no issues of the marriage and when she finally died, she was buried in his home. He concludes that he knows the objector as his In-law who never cared for his deceased sister but attended the funeral at the Petitioner's home where deceased was buried.

From the application and Replying Affidavit, the Court determined that the main issue in contention is whether the deceased was married to the petitioner and whether the grant issued to the petitioner was obtained fraudulently for this court to revoke or annul the same. This court on 9.10.2018 issued directions that the application dated 7.6.2018 be canvassed by way taking viva voce evidence and the parties directed to file witness statement. On 18.2.2019 the parties gave evidence.

Francis Nyongesa Wabwile testified that the deceased was his sister at time of death. He testified that at time death she was not married and had no children. He stated that in 2002, his father Wilbas Wabwile Wabomba was alive but sick but he knows he never directed Oscar Sikwani his brother to receive dowry from the Petitioner.

He testified that the deceased was staying in Misikhu where she had built a house and that all he knows is that the Petitioner was a friend of the deceased but not a husband. He however admitted that upon her death she was buried in Petitioner's home.

Oscar Sikwani the objector's brother and brother of deceased testified that there agreement which was signed by him in which he acknowledged receipt of 4 herds of cattle as dowry from the petitioner in respect of the deceased. He confirmed that at the time deceased was staying with the petitioner and that upon her death petitioner buried her in his home and the witness Oscar attended the burial. Jennifer Nasimiyu the sister of the deceased knew the petitioner as a friend of the deceased and when deceased died she was buried in his home.

The Petitioner Batholomew Wafula Juma testified that he married the deceased Mary Namukuru Wabwile on 10.4.2000 under Bukusu Customary law. He paid dowry to the family. They had no issues of the marriage. He produced agreement on acknowledgment of dowry, and letter from the late father In-law. All these documents he testified show that the deceased's family acknowledged him as husband of the deceased. When she died he buried her in his home. He applied for the grant of letters of administration intestate as the widower and therefore there was no fraud or concealment of material facts.

Pius Wamachekha Mutoro a neighbor testified that he participated in dowry payment in 2002 and on 26.4.2002 he took 2 herds of cattle and Kshs.1,000/= being the value of one goat to home of deceased which was received by Oscar who signed an acknowledgment.

M/s Arunga Counsel for the objection in her submission filed in court submits that no Bukusu Customary marriage has been shown to have been conducted. Counsel submits that the photographs and burial program produced is not sufficient to prove a marriage. Finally Counsel submits that if dowry was paid, it was paid to Oscar the brother of the deceased who had no capacity to enter into dowry negotiation with Petitioner or receive dowry for deceased as the father was then alive.

Khakula learned Counsel for the Petitioner submitted that the Petitioner has shown that he married the deceased; in year 2000, paid dowry which was received, and that when she died the Petitioner buried her in his home. Counsel submits that the witnesses confirmed this and therefore the deceased was not a mere friend as alleged by the objector but a legally married wife. He submits that the deceased being Petitioner's wife, the petitioner as a widower had a right to apply for grant of letters of administration in respect of the estate of the deceased.

Was the deceased married to the petitioner?

The petitioner in his evidence testified that both petitioner and deceased were from the Bukusu Sub-tribe and married under Bukusu Customary Law. The essential ingredients of a customary marriage is capacity to contract a marriage, consent of the spouses to marry, lack of bars to customary marriage which will involve prohibited degrees of relationship including clan relationship, or blood relationship. There is also the requirement of consent of the parent, dowry negotiation and payments followed by cohabitation or staying together as man and wife. While birth of children is evidence it is not mandatory in most customary marriages. In this case the deceased was born in 1955, studied and graduated as a teacher, and taught in many schools and lastly served as the Principal of Maeni Girls School when she died on 8.2.2014. In 2002 when she married the Petitioner she was an Adult; with capacity to enter into marriage. By letter dated 30.9.2001 Alphaus Wabwile the father acknowledged receipt of letter from Petitioner of Intention to marry the deceased. By agreement dated 26.4.2002, the Petitioner delivered 2 herds of cattle and Kshs.1,000/= to home of deceased which was received and acknowledged by Oscar Sikwanyi the brother. Oscar again received 2 herds of cattle on 4.11.2010 in respect of the dowry. The objection both in his evidence admits that the brother received dowry but assents that he had no capacity to do so. He also readily admits that indeed the deceased was staying with the petitioner, and that when she died, she was buried in petitioner's home, a ceremony even the objector attended. Considering all the evidence and submissions, I am satisfied and do find that Mary Namukuru Wabwile was a wife of the Petitioner Batholomew Juma Wafula.

The petitioner being the husband of the deceased and therefore a widower or surviving spouse Section 66 of the law of Succession Act, provides;

66. 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

Section 66 having given the surviving spouse priority, he was properly the appropriate person to file for grant and he committed no fraud in doing so. The grant issued by the court on 3.11.2014 was properly issued to the petitioner. The application dated 7.6.2018 is without merit and same is dismissed with costs.

Dated and Delivered at Bungoma this 9th day of October, 2019

S. N. RIECHI

JUDGE.