



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 693 OF 2001

IN THE MATTER OF THE ESTATE OF NAFTALI ONGUO MOTURI (DECEASED)

BETWEEN

FLORENCE ONDICHO NAFTALI.....OBJECTOR

AND

MATILDA MWARINGA.....1ST PETITIONER

BILIA NYABOKE.....2ND PETITIONER

JUDGMENT

BACKGROUND

The deceased Naftal Onguso Muturi died on 4th December 1997.

The deceased's mother and widow filed Petition for grant of letters of administration of deceased's estate on 27th March 2001.

The beneficiaries listed were;

1. Matilda Mwarunga Moturi- widow
2. Judith Moraa- daughter
3. Claudine Rehema Mwaka- daughter
4. Cathrine Moraa- daughter
5. Elma Mishi- daughter
6. Rose Mukami- daughter
7. Bilia Nyaboke- Mother
8. Mecha Onger- Father

Assets that comprised of the deceased's estate were;

1. Nairobi/Block/3673
2. Nairobi/Block 82/4044
3. Ngong/Ngong/17457

The grant of letters of administration were granted on 19th July 2001 and confirmed on 3rd November 2008.

1. Frank Onguso Moturi - Ancestral home in Kisii I acre & LR Nairobi /Block 82/3673
 2. Caroline Mokeira Moturi- ‘’
 3. Judy Moraa Moturi-‘’
 4. Walter Ondicho Moturi-‘’
1. Claudina Rehema Moturi- I acre Kamulu & Ngong/Ngong1745 & LR 82/4044 in equal shares
 2. Catherine Ann Moturi-‘’
 3. Elma Mishi Muturi-‘’
 4. Rose Mukami Moturi-‘’
 5. Bilia Nyaboke - ½ acre Kamulu
 6. Matilda Mwaringa Moturi - Thome Home- Absolute.

APPLICANT’S CASE

The Objector/Applicant Florence Ondicho Naftal filed application dated 20th May, 2013 brought by way of Chamber Summons and seeking revocation of grant made to the Respondents herein in their capacity as widow and mother of the deceased respectively. The application is supported by an affidavit sworn by the Objector on 20th May, 2013.

It is noteworthy that in the application dated 20th May, 2013, the Objector sought that the grant be declared null and void, an issue that was deliberated upon by Justice William Musyoka in his ruling of 30th January, 2015. The learned Judge stated that the application had not been properly filed because **Section 76** of the **Law of Succession Act** upon which it is founded provides for revocation of a grant and not its declaration as null and void. Further that the application had been brought by way of Chamber Summons whereas **section 76** provides for filling of a Summons for Revocation of Grant. I will nonetheless proceed to determine the application as filed, guided by **Article 159(2)(d)** of the **Constitution** and in the wider principles of justice.

The basis of the application is that the Objector, though the 1st wife of the deceased, was left out of the distribution. The Objector contends that she is the 1st wife of the deceased having solemnized their marriage in 1977 under Kisii customary law. Their union was blessed with five (5) issues: Caroline Mokeira Onguso, Frank Onguso Moturi, Judy Moraa Moturi, Walter Ondicho Moturi and Haron Goti Onguso.

The grant of letters of administration intestate of the estate of the late Naftali Onguo Moturi was issued to the Respondents herein on 19th July, 2001 and confirmed on 23rd June, 2008.

On 13th August, 2012 the Objector filed a Further Affidavit sworn by herself on 12th August, 2012 in which she deposed that the deceased had two (2) wives and not one as argued by the 1st Petitioner. She stated that contrary to the 1st Petitioner’s claims, the deceased’s estate has not been distributed equitably. That the distribution is beneficial to the 1st Petitioner’s children and detrimental to the Objector’s children as demonstrated by the amended Summons for rectification of grant dated 4th February, 2013. A copy thereof is annexed to the affidavit.

The Objector accused the Petitioners of distributing the deceased’s estate maliciously since some of the dependants, herself and her son Haron, were omitted from inheriting the estate. That in any case, Haron Goti Onguso is the deceased’s son. A copy of Haron’s birth certificate of number issued on 23rd February, 1998 which names the deceased as his father is on record. She asserted that both widows contributed towards the acquisition of the deceased’s estate both directly and indirectly and neither of them should therefore claim a larger share to the detriment of the other. She urged the court to compel the 1st Petitioner to render accounts showing the incomes and expenditure supported by receipts.

In a Supplementary Affidavit sworn on 3rd April, 2014 the Objector alluded to a meeting held on 26th March, 2011 by the deceased’s family in which it was agreed that the deceased’s estate be distributed equally between the two families. Her statement found support in the statement of the 2nd Petitioner as shown in the 2nd Petitioner’s affidavit of 6th November, 2014.

The Objector drew attention to an affidavit sworn by Bilia Nyaboke the 2nd Petitioner on 8th May, 2013 seeking to be discharged from the responsibilities of managing the estate as a co-administrator. Bilia is the mother of the deceased herein.

In the affidavit Bilia deposes that the deceased was survived by two wives: Matilda Mwaringa and Florence Ondicho Naftali being the 1st Petitioner and the Objector respectively. Bilia stated that due to her advanced age, and chronic illness due to anaemia, she is unable to properly discharge her duties as a co-administrator. Further that she and the 1st Petitioner have irreconcilable differences which though not disclosed to the court, make it impossible to diligently administer the estate.

Bilia contended that after confirmation of grant, she realized that the 1st Petitioner and her children received a larger share of the deceased's estate with more economical value. This prompted both families to call a meeting which was held on 26th March, 2011 where the parties agreed that the confirmed grant be rectified so that each family benefits equally. A copy of the minutes of the said meeting are on record and annexed to the affidavit. The minutes are duly signed by the attendees who include the 1st Petitioner, the deceased's brother Peter Mecha, one Sam Mang'era and the Objector's three sons: Frank, Walter and Haron. She accused the 1st Petitioner of undertaking construction works on the Thome plot which was allocated to the first family as shown in the minutes of the meeting.

There is also on record an affidavit sworn by one James Omwansa Mobe, on 27th February, 2015. Mr. Mobe is a retired Pastor of the Church of God at Rionano, Nyamira County and first cousin to the deceased's father. Mr. Mobe confirmed that the Objector was a wife of the deceased duly married under Kisii Customary Law. He narrated that the Objector and the deceased met in 1977 and moved in together in 1978. That dowry negotiations began in 1980 and once concluded, the marriage was solemnized by the Objector's family accepting the dowry which was paid in the form of two cows and one bull. He stated that at the time of the deceased's death, he and the Objector had been blessed with five (5) issues. While he was aware of the existence of the 1st Petitioner as the deceased's second wife, he stated that he had never met her since she was never formally introduced and had never visited the deceased's ancestral home.

To buttress the Objector's case, the deceased's brother Peter Mecha swore an affidavit on 27th February, 2015 in which he deposed that the Objector is a wife of the deceased since dowry was duly paid in 1980 as per Kisii Customary law. That the marriage between the deceased and the Objector started as a "come we stay" in 1977 and in 1978 they sired their first child Caroline. He contended that the Objector lived with the deceased in Ntana Village from 1977 until 1984 when she relocated to Kapkangani in Nandi district where the deceased had purchased a parcel of land. He urged that the 1st Petitioner was brought in as a second wife only because the relationship between the Objector and the deceased became sour.

On record also is an affidavit sworn by one **Nemwel Arani Keganda** on 26th February, 2015 in his capacity as **Chief of Bomwagamo Location** having served as such since 2007. Before his appointment as Chief, Mr. Keganda had served as the Assistant Chief of the location since 1993. He deposed that the Objector was married to the deceased herein and that they were blessed with five (5) issues. He urged that he only learnt that the deceased had a second wife at the time of the deceased's demise in 1997, when he was informed that the second wife had buried the deceased in Ngong'.

RESPONDENT'S CASE

In opposition to the application, Matilda Mwaringa the 1st Petitioner swore a Replying Affidavit on 17th July, 2013 in which she asked the court to dismiss the application for want of merit. She also relied on a further affidavit dated 23rd October, 2013, a Supplementary Affidavit dated 7th May, 2014, a Replying Affidavit dated 9th April, 2015. She stated that the distribution of the deceased's estate was just and equitable. Further that the grant herein was confirmed in 2008 and that the Objector has therefore occasioned inordinate delay. She urged that the Objector had an opportunity to file objection proceedings when the matter was gazetted before confirmation but chose to remain silent.

According to Matilda, the Objector was never recognized as a wife of the deceased during the deceased's lifetime since no dowry was ever paid and neither did the deceased's extended family recognize her as such. To her knowledge, the deceased and the Objector had an affair which bore four children all of whom were included in the distribution of the deceased's estate. She however stated that she was a stranger to one Haron Onguso Moturi who the Objector states is the 5th child of the deceased. She asked the court to order that a DNA test be conducted to establish paternity.

Matilda contended that she is the legal wife of the deceased whom she married in 1992 at St. Joseph Ruaraka Church. She referred to the Eulogy of the deceased, a form filled for a funeral announcement broadcast on KBC radio station and a letter from the deceased's father which recognized her as the deceased's widow but none of which mentioned the Objector in any way. She asserted that the Objector did not in fact attend the deceased's funeral.

It is the 1st Petitioner's contention that during the deceased's lifetime, she and the deceased lived together with the Objector's four (4) children together with her four (4) biological children. That she stayed with the children for an uninterrupted period of 6 years and it was only after the deceased's death that the Objector forcefully took away her children with the exception of Judy Moraa Moturi. She annexed letters dated 13th January, 1998 and 14th January, 1998 by the Provincial Children's Office to this effect. She stated that it is curious that the Objector's children have signed consents objecting to the grant which was issued with their knowledge and consents.

The 1st Petitioner denied the allegations that she was mismanaging the deceased's estate stating that she has managed the estate to the best of her ability. She reiterated that the Objector's children consented to the confirmation of grant herein on their own volition and cannot therefore be heard to state otherwise. That by signing the consents, all beneficiaries were in agreement with the list of beneficiaries and the mode of distribution. That the deceased's father had granted her prior consent to file the petition for a grant of the deceased's estate.

According to the 1st Petitioner, the deceased's estate was distributed fairly and all beneficiaries were in agreement with the distribution as evidenced by their consents to the confirmation of grant and expressed her readiness to render accounts if so ordered. She denied the Objector's claims of contributing towards the purchase of the properties comprising the deceased's estate and asserted that the properties were acquired by herself and the deceased, both of whom were working for gain at the time and earning a considerable income.

SUBMISSIONS

Learned Counsel Ms. Matunda of M/s Mandi & Co. Advocates filed written submissions dated 26th November, 2018 on behalf of the Objector in which she relied on the Objector's pleadings and submitted that the Objector had proved that she was the 1st wife of the deceased. That the Objector is therefore a dependant entitled to benefit as such under **section 29** of the **Law of Succession Act**. Counsel

asserted that the Objector had demonstrated that she was married to the deceased under Gusii customary law and that dowry was duly paid. That the Objector has never remarried and still resides at the deceased's ancestral home, an indication that she was a wife of the deceased. Counsel urged the court to declare that the Objector is a widow of the deceased entitled to benefit as such from the estate of the deceased.

In opposition, learned counsel Ms. Machio of M/s Lilian Amere Machio & Co. Advocates filed written submissions dated 27th November, 2018 on behalf of the 1st Petitioner. Counsel submitted that the Objector had failed to prove that she was a wife of the deceased and as such was not entitled to benefit from the deceased's estate.

Ms. Machio submitted that the testimonies of the Objector's witnesses were marred by contradictions. That the Objector and the deceased's mother Bilia stated that the deceased and the Objector contracted a Kisii Customary marriage in 1977 contrary to the testimony of James Omwansa that the deceased and the Objector started living together as husband and wife in 1978. Counsel urged that none of the witnesses were however able to demonstrate that indeed the due process was followed. She referred to Chapter Six of Eugene Cotran's *Restatement of African Law Kenya* and 'An abstract on Traditional Marriage Customs among the Gusii of Kenya' by Nyaruri Paul Okinyi and Maangi Eric Nyakanga both of which explain the process of marriage under Kisii customary law.

DNA REPORT

On 20th December 2018, this Court was informed that the DNA Report would be ready in 30 days. As the Court proceeded on transfer to Commercial Division, of the High Court the DNA Report was filed with Written Submissions for the Court's Ruling.

There is on record a DNA report dated 28th February, 2019 and filed on 8th March, 2019 prepared by the Government Analyst Dr. J. K. Kimani. The court had on 15th October, 2018 directed that the parties conduct DNA sibling testing of all the children of the deceased.

According to the report, buccal swab samples were obtained from five (5) individuals: the Objector Florence Ondicho, Peter Mariita Mecha, Frank Onguso Moturi, Walter Ondicho Moturi and Haron Goti Onguso. The autosomal DNA profiles generated from the buccal swabs were analyzed and tabulated. After analyzing the DNA profiles, the government analyst concluded that:

- I. Peter Mariite Mecha, Frank Onguso Moturi, Walter Ondicho Moturi and Haron Goti Onguso share a common patrilineal lineage.
- II. Frank Onguso, Walter Ondicho Moturi and Haron Goti Onguso are biological siblings who share a close genetic relationship with Peter Mariita Mecha.
- III. Frank Onguso, Walter Ondicho and Haron Goti are biological sons of Florence Ondicho Naftali.

DETERMINATION

The issues for determination are as follows;

- a) Is the Objector/Applicant Florence Ondicho Naftal 1st wife and widow of the deceased?
- b) Is Haron Goti Onguso son of the deceased?
- c) Was the confirmed grant of regular and valid under Section 76 of law of Succession and/or should it be revoked?

EVIDENCE

On 15th October 2018, the Respondent testified she moved in with the deceased in 1985 in Kisumu. He was transferred to Nairobi in 1990 and they were married on 18th December 1992 and she produced the certificate of marriage. The Deceased and children of the Objector lived with her. The Objector lived in Nandi on land the deceased bought and was resettled. The Respondent stated that the deceased and Applicant had problems and he refused to marry her. They had 4 children, the deceased disputed the paternity of 5th child. The Respondent lived with the Applicant's children upto the deceased's death when she came with Children officers and took them away.

During the Administration of deceased's estate, she included the deceased's children. They consented to her as administrator and to the distribution of the estate of the deceased.

On 18th October 2018, the Objector/Applicant testified in Court and relied on her affidavit in support of the instant application. She deponed that she was married by and to the deceased under Kisii customary law in 1977. They had 5 children; Caroline Onguso, Frank Onguso, Walter Ondicho Moturi, Judith Onguso and Haron Goti Onguso. He married the 2nd wife/widow administrator of the deceased's estate in 1984.

The Applicant lived in Nandi/Chepsului/Kipkeng where their in laws sold them land and the deceased worked in Kisumu. That is when the Petitioner joined them. The deceased was moved from Kisumu to Homabay and he went with the children. She went back to deceased's home and lived with her mother in law.

The Objector stated that she was excluded with their son Haron Onguso as beneficiaries of deceased's estate. The Petitioner engaged her children to her detriment. The Petitioner did not fully disclose all the assets that comprised of the deceased's estate, she mismanaged the estate and misled the Court in granting the confirmation of grant. The Petitioner claimed she was not married to deceased and her son was not a child of the deceased. The Objector was excluded in the deceased burial arrangements and he was buried at the home in Ngong.

PW1 Bilia Nyaboke mother of the deceased testified on 16th November 2018, that the Objector was married by the deceased in 1977. They visited Flora's home and took 3 cows as dowry. She admitted that they excluded PW 2 when filing petition for letters of administration because she could not see eye to eye with the Petitioner.

PW 3 Pastor James Omwansa Mobe a cousin to deceased's father, testified and relied on his affidavit filed on 27th February 2015 that the Applicant was married to the deceased in 1977 and they took a bull and 2 cows as dowry to the Applicant's home. The deceased and Applicant had /have children. The deceased married the Petitioner as 2nd wife in 1984. The witness confirmed that the Applicant resides at the Deceased's home to date since then.

ANALYSIS

Section 3(5) of the Law of Succession Act which was aimed at defining who a wife is as follows;

“Notwithstanding the provisions of any 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 section 29 and 40 thereof and her children are accordingly children within the meaning of this Act”

Is the Objector/Applicant Florence Ondicho Naftali 1st wife/widow of the deceased?

This court is satisfied from the evidence on record that the Applicant/Objector was /is wife /widow of the deceased. The mother of the deceased and Uncle of the deceased witnessed and were involved in dowry paid for the Applicant/Objector. The chief of Bomwagamo location confirmed by affidavit the objector was wife to the deceased. The evidence confirms a marriage under customary law. The Deceased cohabited with the Applicant they had 5 children. They lived together from 1977- 1985 when the deceased took on/up the 2nd wife/Petitioner they were later married and lived together. They had 4 children. The Objector/applicant resides at the deceased's rural home with her mother in law in Kisii to date.

The Respondent/Petitioner cannot testify on the facts of what happened before 1990 as this is when she came and joined the deceased and was married and they had children. She was not in the deceased's life and she had not met and lived with the deceased before then. PW 2 & 3 have testified as to payment of dowry in 1977/78 of 1st wife/objector by the deceased to her parents. This was not contested.

From the totality of the evidence adduced; it discloses the Applicant/ Objector as wife/widow of the deceased. She is entitled to benefit from the estate of the deceased under **Section 3(5) Law of Succession Act**.

Is Haron Gori Onguso son of the deceased?

With regard to whether, Haron Goti Onguso is son of the deceased, the DNA report dated 28th February, 2019 and filed on 8th March, 2019 was prepared by the Government Analyst Dr. J. K. Kimani. The Sibling DNA testing was conducted on Florence Ondicho, Peter Mariita Mecha, Frank Onguso Moturi, Walter Ondicho Moturi and Haron Goti Onguso. After analyzing the DNA profiles, the Government Analyst concluded

Peter Mariite Mecha, Frank Onguso Moturi, Walter Ondicho Moturi and Haron Goti Onguso share a common patrilineal lineage. He is son of the deceased by virtue of DNA profiles similar to those of the deceased's brother Peter Mariite Mecha. The Government Analyst Report of 28th February 2019 produced was not challenged by any other medical report and hence is conclusive on the subject child's paternity. From the DNA report, it is therefore not in doubt that Haron Goti and the Objector's children share a father, being the deceased herein.

Was the confirmed grant regular and valid under Section 76 of Law of Succession?

Section 76 of the Law of succession Act which provides that;

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court 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 persons 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.”

In G. A. M & Another –vs- M.O.A.O [2016]eKLR it was held that;

“any of the circumstances enumerated in section 76, if proven may lead to revocation or annulment of a grant of representation whether that grant has been confirmed or not.”

From the evidence on record the confirmed grant is vitiated by illegality as the Applicant/Objector and her youngest child were excluded from the list of beneficiaries of the deceased’s estate.

Although the beneficiaries, the other children of the Applicant/Objector signed written consents to the Petitioner /Respondent and their grandmother to be joint administrators, it was not legally right to exclude by non disclosure the Applicant and son Haroun. The contested issues of marriage and paternity with regard to the excluded parties; has now been established in these proceedings from evidence adduced and Sibling DNA testing results. The confirmed grant was obtained by the concealment from the court of something material to the case, as the Applicant/Objector was excluded and her last child with the deceased Haroun was omitted. In fact the deceased’s mother, one of the administrators of deceased’s estate admitted that the Applicant /Objector was left out in the process of obtaining grant and distribution of deceased’s estate because she was not in good terms with her co wife, Petitioner. So she knew all along the Applicant was married to her late son.

DISPOSITION

- 1. The Chamber Summons filed on 30th May 2013 by Applicant/ Objector is granted.**
- 2. The Confirmed grant of 3rd November 2008 is revoked/annulled.**
- 3. The administrators shall in consultation and consents from ALL beneficiaries of the estate include Florence Ondicho Naftal as wife/widow of the deceased and Haron Goti Onguso as son of the deceased; agree on portion of the estate of the deceased that shall be distributed/allocated to the Applicant/Objector and her son from the estate of the deceased.**
- 4. If the administrators and/or beneficiaries are unable to agree they shall file summons for confirmation, proposals and/or protests for the Family Division of High Court to determine.**
- 5. Each party to bear own costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 6TH DECEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MS MALINDA FOR THE APPLICANT/OBJECTOR

MR. WARUI FOR MS MACHIO FOR 1ST PETITIONER

MS JASMINE – COURT ASSISTANT