



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 480 OF 2007

IN THE MATTER OF HARRISON MAKAU JULIUS MANTHI (DECEASED)

JOSEPHINE KAMENE MAKAU.....APPLICANT

VERSUS

1. PHYLLIS RACHEAL NGUNDO

2. JOSEPH MWANIKI NGUNDO

3. GIDEON MWAKA NGUNDO.....OBJECTORS

R U L I N G

1. The deceased herein Harrison Makau Julius Manthi died on 12/3/2007 and a grant of letters of administration intestate was made to Phyllis Rachael Ngundo, Joseph Mwaniki Ngundo and Gideon Mwaka Ngundo on the 7/1/2008. The Objector herein Josephine Kamene Makau filed a summons for revocation or annulment of grant dated 25/6/2008 on the grounds inter alia that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegations was made in ignorance and or inadvertently and finally that the petition offends the legal requirements for grant of representation. The application was also supported by the affidavit of the objector sworn on even date.

2. The application was opposed by the Respondents. The first petitioner swore a replying affidavit dated 9/8/20108 in which she deposed that the Objector was a stranger and was not married by the deceased and that she was not a dependant or beneficiary of the deceased and therefore the grant of letters of administration had been properly obtained.

3. Parties herein agreed to canvass the objector's application by way of viva voce evidence. Matter proceeded before other judges upto the stage of filing written submissions. I have now been called upon to determine the matter.

The Objector Josephine Kamene Makau stated that the deceased herein had been her husband of thirty years with whom they were blessed with three children namely **Richard Kavemba, Cyrus Nzuki** and **Elizabeth Kavithe**. She went on to state that the marriage was not formalized. She confirmed that the deceased while based at Mombasa married a white woman named Anka who has since died. She further maintained that the deceased herein fell sick while working at Kitale and she had to go nurse him until he died in March 2007. She went on to state that she was involved during the burial of the deceased but that thereafter the Petitioners shunted her aside on allegations that she had not been a wife to the deceased. On cross-examination, the Objector admitted that no ceremony was conducted regarding her marriage to the deceased and further admitted that all her three children do not have names bearing the deceased and she further admitted that she was aware that the deceased had married a white woman and further admitted that her names and those of her children do not bear those of the deceased herein. On being re-examined by her learned Counsel, she confirmed that she was not the deceased's girl friend.

The Objector called one Nehemiah Kibe Nganga who stated that the deceased had been a friend of his while he worked at Kitale and that he knew the Objector to be a wife of the deceased. Julius Manthi Mwololo was the Objector's third witness. He stated that the deceased was his uncle and that the Objector was his wife. He further stated that the Petitioners later disowned the Objector just like they did to his mother when his father passed on and he was not happy about the injustice being perpetrated by the Petitioners against the family members including himself and the objector.

The petitioners also presented their evidence through Joseph Mwaniki Ngundo and Phyllis Rachael Ngundo. It was the evidence of Joseph Mwaniki Ngundo that the deceased who was his brother had not married the Objector since he had married white woman by the name of Anka van Gen Hassend Mohammed as per the certificate of marriage which he produced as an exhibit. The witness also produced a document which had been signed by the deceased stating his next of kin and in which the Objector is not mentioned. As far as the said witness was concerned, the Objector is a stranger since the deceased did not marry her as alleged and further that the objector's three children were not sired by the deceased as they do not bear his names and that the Objector might have been a girlfriend to the deceased and might have accessed some of the secrets of the deceased and further the funeral arrangements relied upon by the Objector did not amount to a

marriage ceremony under the Kamba customs.

Phyllis Rachael Ngundo stated that the deceased was her son and that the Objector is a stranger to her as she was not a wife to the deceased since the deceased had married a white woman but they had no children. The witness stated that she was elderly and could not recall most of the things involving the deceased.

4. Learned counsels for the parties herein filed written submissions. I have considered the said submissions and the authorities cited. I have also considered the pleadings and documents filed herein as well as the evidence of the Objector and Petitioners and their witnesses. The issue for determination by this court is whether the objector has proved that she indeed was married to the deceased and therefore established that she and her children are dependants of the deceased's estate.

The objector herein has claimed that the Petitioners left her out while petitioning for grant of letters of administration yet they knew that she was a wife to the deceased herein and thus a dependant plus her children of the deceased's estate. She has therefore sought for and or annulment of the said grant under Section 76 of the Law of Succession Act. The said Section provides as follows:-

“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 on 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”

The objector in her testimony claimed that she had been married to the deceased way back in 1978 and thereby implied that the marriage had been subsisting for close to about 30 years as at 12/3/2007 when the deceased herein died. She also admitted in her said evidence that her marriage with the deceased was not formalized. She also admitted that the deceased got married to a white woman named Anka Van Gen Hassend Mohammed. The deceased's marriage with the said white woman was proved by the production of a certificate of marriage by the Petitioners. The Objector claimed that she did not object to the deceased marrying the white woman who was then based in Mombasa yet according to her the deceased had been her husband all along. In order for the Objector to prove the existence of the marriage with the deceased, she had to show that deceased's parents visited hers and negotiated dowry payments. This did not take place at all as the Objector admitted on cross examination that no such ceremony was performed and neither dowry was ever paid to her parents. Again, the Objector claimed that she has three children with the deceased yet none of them carried names associated with the deceased. The objector was cross – examined as to why the name “**Mutinda**” was attributed to her first two children Richard Kavemba Mutinda and Cyrus Nzuki Mutinda and her response was that the name “**Mutinda**” belonged to her friend. The objector's third child Elizabeth Kavithe Mulwa was not named after the deceased and when pressed to offer an explanation, the Objector stated that she used the name of someone whom she paid so as to sign the birth certificate. Indeed the Objector admitted that by doing that she had committed fraud. The question to ask is “**why would she go to that length yet she could approach the deceased for the name?**” The only irresistible reason could only be that the deceased had not been the biological father to the Objectors three children. The Objector attempted to explain that the deceased supported the children but she failed to avail any documentary proof. I am sure if the deceased had indeed sired these children, he would have been happily assisting them noting that the white woman did not bear any children.

The objector did not call any member from her family to come and give evidence and establish whether the marriage between her and the deceased had been solemnized even under customary law. The two witnesses called by the objector namely Nehemiah Kibe Nganga and Julius Manthi Mwololo did not establish the existence of marriage between objector and deceased save only to lay the claim of cohabitation. As the objector denied being a girl friend to the deceased, I find she was obliged to avail concrete evidence of the marriage. The objector attempted to present a death announcement and eulogy as evidence of the marriage and further availed a document from the deceased's Employers Staff Superannuation Scheme which indicated her as a beneficiary. This claim was further watered down by the petitioners who produced an NSIS Staff Superannuation Scheme in which the deceased had clearly nominated his wife Anka Van Gen Hassend Makau with no children and also nominated the three petitioners as his dependants. The said document was produced as exhibit 3. If indeed the objector had been the deceased's wife, nothing could have been difficult for her name to be indicated on that document as well as her children. As noted, none of her family members came forward to give evidence and establish if the objector had indeed been married to the deceased. The Objector also did not even call her three children who were then adults to give evidence and to show beyond any doubt that the deceased was not only their father but that he had maintained them prior to his demise. The death announcement document as well as the eulogy presented by the objector are not concrete evidence of marriage since anybody can acquire such documents with ease. The evidence of the petitioners was quite clear that the deceased had married one Anka Van Gen Hassend Mohammed as evidenced by the certificate of marriage produced herein. Again the NSIS Staff Superannuation Scheme listed the petitioners as the next of kin. There is nowhere that the name of the Objector is shown as a next of kin. Hence I am satisfied that the objector was not a wife to the deceased and therefore not a beneficiary to the estate of the deceased. The objectors children were also not dependants of the deceased as no evidence was tendered to prove that the deceased maintained them during his lifetime. Indeed the objector admitted that her children had been sired by her friends and gave the names as Mutinda and Mulwa. To that extent therefore I find the objector has not satisfied the requirements of Section 76 of the Law of Succession Act to warrant the grant issued to the Petitioner to be revoked and or annulled as sought by the Objector.

Finally, as regards the two authorities cited by learned counsel for the Objector namely the **Estate of Ezekiel Amoyo Odili Nakuru – HC Succession Cause No 282 of 2001** and **Estate of Joakim Makokha Ochieng – Busia HC Succession Cause No. 55 of 2002**, I find the said authorities to be distinguishable to the present circumstances of this case in that whereas in the said authorities a marriage had been established between the objectors and the respective deceased persons in that customary rites were performed unlike in the case of the

objector herein where no such rites were performed and no dowry was paid to her parents to solemnize the alleged union with the deceased.

5. In view of the foregoing observations, it is the finding of this court that the Objectors summons for revocation of grant dated 25/6/2008 lacks merit. The same is ordered dismissed. Each party to bear their own costs.

Orders accordingly.

Dated and delivered at Machakos this 20th day of July, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Mukula for Kavita for the Petitioners

No appearance for Nzilani Muteti - for the Objectors

Josephine - Court Assistant