



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 362 OF 2012

In the matter of the Estate of K N M (Deceased)

M R M.....PETITIONER

V E R S U S

J K E.....OBJECTOR

R U L I N G

1. This is a ruling on an objection to making a grant dated 31/10/2012 by J K E the mother of the deceased. The grounds in support of the objection are that the deceased was not married to the petitioner as she alleges in this cause.
2. He had only one child namely C M who was born out of wedlock and whom he used to take care of. The objector names other beneficiaries as herself, D M a nephew to the deceased and N a niece.
3. The objector avers that this cause was filed secretly without the objector and her family being involved. The petitioner is accused of taking advantage of the deceased's family who claim she never supported the deceased morally, psychologically or physically during his lifetime.
4. The objector further states that the deceased paid school fees for two of his late brothers children namely D M and G N. The petitioner failed to include the two children who need support in this cause. The objector further states that she does not know how the petitioner obtained the death certificate while the object was in possession of the burial permit and the identity card of the deceased.
5. The objection was filed together with a cross-petition for letters of administration intestate based on the same grounds with the objection.
6. The petitioner in her evidence told the court that she married the deceased in 2004 under Kimeru customary law. An affidavit of marriage was prepared by and advocate and sworn by the parties. The petitioner says she had one child namely K N who was born before she got married. After marriage the couple was blessed with a child namely K M N.
7. The deceased paid dowry to the parents of the petitioner. The parties stayed together from 2004 to 2012 when the deceased died. The couple met at Tigania in Meru County where they both worked. The petitioner was a police officer stationed at Tigania police station while the deceased was a court clerk at Tigania law courts.
8. The petitioner further testified that she attended the burial of the deceased at his rural home in Chuka but was not recognized as a wife due to the hostility of the objector. The deceased is eligible for payment of gratuities and other benefits from his place of work.
9. The petitioner argues that being the wife of the deceased, she was entitled to the payments as opposed to the objector who is the mother.
10. Before determining who between the objector and the petitioner is entitled to the grant of probate, it is imperative that the court determines whether there was a marriage between the deceased and the petitioner was valid.
11. The petitioner claims to have been married to the deceased under Kimeru customary law. It was said that dowry was paid to her parents and that the couple started staying together. They were blessed with one child for the other one was born before the parties got married.
12. The petitioner testified that she was a Kamba by tribe while the deceased was a Meru. In most African societies, the law of marriage applicable is that of the man. In this case, Kimeru customary law was applicable in conducting marriage between the deceased and the petitioner. Marriages under African customary law are potentially polygamous.

13. Bride price or dowry is a requirement under customary law and is the most important in the legal recognition of customary marriages. The petitioner called her father as a witness. He said he was paid Kshs.6,000/= as dowry by the deceased at his Kitui home. PW2 then gave his blessings to the couple the couple build a home in Meru which became their matrimonial home. PW2 never heard any complaints from the deceased and his wife for the years they lived together.

14. It is not in dispute that the parties who were adults consented to the marriage. The woman under customary law is the one who has to declare her consent for the marriage ceremonies to proceed. The petitioner has testified that she gave her consent which PW2 confirmed. The two visited the parents of the petitioner at their home where dowry was discussed and paid.

15. The parties admitted that the parents of the deceased were opposed to their son marrying a Kamba girl from the beginning of the relationship. They refused to accompany the deceased to the home of the petitioner in Kitui Central. This did not move the parties for they started staying together and were blessed with an issue of marriage. The deceased put up a home in Chuka for the petitioner in his family's rural home. The objector did not oppose this move although she lives on the same parcel of land.

16. The two were under the employment of the Government of Kenya and were illegible to transfers. At the time the deceased died, he was working in Embu Law courts as a clerk while the petitioner stayed in Nairobi where she works. Unfortunately, the deceased fell sick for sometime. He was admitted in hospital but finally died in his house alone. The objector swore an affidavit that no foul play was suspected.

17. It is my considered view that the absence of parents from one side in the payment of dowry should not invalidate a customary marriage. PW2 confirmed the receipt of the dowry this being the most important aspect of traditional marriage ceremonies. All the requisite formalities in a customary marriage were carried out between the parties. There was no divorce or return of wife to her parents before the death of the deceased to signal separation or divorce.

18. I reach a conclusion that the petitioner and the deceased were married under Kimeru customary law and the marriage subsisted to the death of the deceased.

19. The deceased and the petitioner had two children during the subsistence of their marriage. Their first one is K M the biological son of the deceased and I K who was adopted by the deceased upon marriage. An adopted child is entitled to inherit on the same status as a biological child the two children are beneficiaries of the estate fo the deceased whose interests must be protected under the law.

20. The objector said the deceased had a child with one K M whom he wanted to marry but the plans aborted. The child is C M is now aged 17 years and in high school. It is the objector's case that the child was being supported by the deceased and that he was his biological child. I find that it has been established that this child has a beneficial interest in the estate of the deceased. It is imperative that his interests be taken care of by the objector upon being joined in the grant of representation.

21. The objector is an aged lady who was dependent on the deceased and ought to be provided for in the estate fo the deceased.

22. As for the other two children D M and G N said to be nephew and niece to the deceased, it was not established how the deceased became responsible to maintain or educate them. They were not his children and the nature of the responsibility were not explained even by the objector who wanted to bring them on board as beneficiaries. I find that their interest in the estate has not been established.

23. The court was made to understand that the deceased did not own any immovable assets. The petitioner and the objector were clear in their minds that they were following the work-related benefits of the deceased. I am of the considered opinion that there is no need to prolong this case anymore and that the decision on grant of representation should be determined together with the shares of the beneficiaries.

24. I reach a conclusion that the objector has established her beneficial interest in the estate of the deceased together with that of C M. For this reason, it is in order that the objector be a co-administrator with the petitioner to protect her interest and that of the son of the deceased C M.

25. I hereby allow the cross-petition and the objection partly in the following terms:-

(a) That the petitioner M R M and the objector J K E be and are hereby appointed co-administrators in the estate of the deceased.

(b) That any benefits payable in favour of the estate shall be shared as follows:-

i. M R M - 30%

ii. J K - 10%

iii. I K N (minor) - 20%

iv. K M N (minor) - 20%

v. CM (minor) - 20%

26. It is further ordered that the petitioner invests the shares of I K N and K M N in an interest earning account in a reputable bank or financial institution until the minors attain the age of majority.

27. The objector will similarly invest the shares of C M in a reputable bank or financial institution.

28. I hereby direct that in case of any disagreement between the co-administrators, the Deputy Registrar is hereby authorized to execute all the necessary documents on behalf of any one of the administrator who may not co-operate in the execution of this court's order.

29. Each party to meet their own costs of this objection and petition.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Petitioner

Objector