



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 397 OF 2015

(FORMERLY MERU HIGH COURT SUCC. CAUSE NO. 655 OF 2013)

IN THE MATTER OF THE ESTATE OF F N M (DECEASED)

AND

A NPETITIONER

VERSUS

J K ROBJECTOR

R U L I N G

1. J K R , the applicant herein has through Summons for Revocation of Grant dated 20th August, 2015 brought under **Section 76** of **Law of Succession Act** and **Rule 44 (1)** of the Probate and Administration Rules applied for the following orders namely:-

- (i) Certification of the application as urgent (spent).
- (ii) Inhibition Orders on land parcel No. South Tharaka/Tunyai/A/[Particulars Withheld] pending the hearing and determination of this application inter partes (spent) .
- (iii) Inhibition Orders to stop dealings on parcel No. South Tharaka/Tunyai 'A'/ [Particulars Withheld].
- (iv) That the grant issued herein on 19th February 2014 and confirmed on the 16th September 2014 be annulled and/or revoked.
- (v) Restraining Orders against the petitioner, purchaser, their agents, servants or assigns on parcel No. South Tharaka/Tunyai 'A'/[Particulars Withheld] pending the hearing of this application inter partes (spent).
- (vi) Restraining Order in terms of prayer (v) above pending the hearing and determination of this application.
- (vii) That the applicant be granted leave to file her objections and cross petition.
- (viii) That this honourable court be pleased to issue such further or better orders as will meet the ends of justice.
- (ix) That costs be provided.

2. The grounds upon the above prayers are being sought are listed as follows:-

- a) ***That the applicant and her children reside on parcel No. South Tharaka/Tunyai A/[Particulars Withheld].***
- b) ***That the Respondent did not consult her before filing the petition for letters of administration through this cause.***
- c) ***That the filing of this succession cause was fraudulent and aimed at disinheriting the applicant.***

3. In her Supporting Affidavit sworn on 20th August, 2015, the applicant has deposed that she was married to the deceased under Kitharaka Customary Marriage in 1999 and that dowry was paid to her father by the deceased.

4. The applicant has further deposed that the Petitioner/Respondent is her co- wife and that she brought up her children namely W G N , E M N , J W N and L K N on the estate where she has also claimed to have extensively developed.
5. The applicant has also deposed that the Petitioner/Respondent did not seek her consent when filing this cause that the aim was appropriate the entire estate to herself in exclusion of the applicant and her children.
6. The applicant's assertions and claims are supported by F M N , who swore an affidavit on 25th January, 2016 claiming that he was an immediate neighbour of both the deceased and the applicant whom he knew as a wife. The same sentiments further supported by J M K through affidavit sworn on the same day on 25th January, 2016.
7. In her oral evidence before this court, the applicant testifying as PW1 told this court that the deceased was her husband and that they were blessed with four children and tendered birth certificates of the said children as P.Exhibit 1a, b, c and e. She further testified that she got married to the deceased customarily on 2nd January, 1999. She admitted under cross- examination that she only started processing the birth certificates of her children after the demise of the deceased and had no reasons for the delay in processing the birth certificate apart from saying that there was delay in processing the birth certificates by the Registrar of births and deaths.
8. The applicant summoned witnesses to testify in support of her claim about the deceased herein and his estate. F M N (PW2) came and testified that he was an immediate neighbour of the deceased at Tunyai Location, Kibuka village where he had reportedly lived for over 10 years after buying a plot there. He testified that the applicant was married to the deceased and had four children whom he knew by their names.
9. T K (PW3) a mother to the deceased also testified and acknowledged that both the applicant and the Petitioner were her daughters in law. She testified that her deceased son introduced the applicant to her as a wife and that when she was brought in she had no children. She further testified that all the four children whom she knew by name were born in Kibuka where she resided with both the deceased and the applicant. She confirmed the applicant's claim that dowry was paid in respect to which ten goats and two cows were given to the applicant's parents although she could not recall when the same was paid
10. The above testimony was supported by K M K (PW4) who testified that the applicant was a daughter of his late brother R K. He further testified that he knew the deceased herein as his son in law as he was married to the applicant. He further confirmed that he was present when dowry was negotiated in December, 1999 in his late brother's homestead and that at the time the late brother R K was alive. He further testified that during dowry negotiations, it was agreed that the dowry was comprise 48 goats and five cows. He confirmed that 10 goats and two cows have since been received by the bride's parents and the balance was to be paid later. According to him, the deceased herein having paid part dowry was allowed to take the applicant as his wife. He further testified that both the side of bride groom and the bride were well represented recalling that T K (PW3) and a lady named E were present on the side of bridegroom and on their side were himself, his late brother (deceased herein) and wife K R and a relative named N M.
11. S K N (PW5) testified too and supported the applicant's claim. She testified that the deceased was her uncle who took care of her from her young age and educated her. She further testified that her deceased uncle brought the applicant home in Kibuka and introduced her and instructed her to respect her as her mother. She also confirmed that the four children named were born at Kibuka where she lived with both the applicant and the deceased herein. She knew the petitioner as another wife of her late uncle and that she lived in Isiolo.
12. The other witness called by the applicant was the Area Chief Tunyai Location. (J M M (PW6)) who told this court that the deceased herein was personally known to him. He added that the applicant was the 2nd wife of the deceased herein and that when the deceased passed on, it is her who personally called him to inform him of the sad news and that she instructed her to go to the Assistant Chief for a burial permit in view of the fact that the deceased had died at home. He also testified that after the demise of the deceased herein, both the petitioner and the applicant approached him in his office requesting for help in the form of a letter meant to assist them on account of a loan which the deceased had taken from Kenya Industrial Estate. It was his evidence that he wrote a letter dated 8th August 2013 for the purpose of the loan advanced by Kenya Industrial Estates and that when he realized that the Petitioner had misused the letter for purposes of a succession cause he wrote another letter dated 17th August 2015 clarifying that the applicant and her four children were also dependants of the deceased as wife and children respectively. He explained that he had to swear an affidavit dated 20th August 2015 to clarify the same and give in order the correct position. He maintained that he wrote the letter dated 8th August, 2013 indicating that the Petitioner was the only wife only for purposes of Kenya Industrial Estate who had advanced a loan facility and charged the estate for security. He further told this court that he was informed that the petitioner was the guarantor and needed a letter showing that she was the legal wife of the deceased as per the marriage certificate which he said was shown to him. He tendered a letter (P. Exhibit 4) dated 22nd July, 2013 which he said was authored by the Petitioner explaining that she was to sell a portion of the estate to pay outstanding loan arrears and leave two acres for the other children of the deceased and told this court that he understood the term "**other children**" to mean the applicant's children.
13. The Respondent has opposed this application through a Replying Affidavit sworn on 24th September, 2015 and the oral evidence tendered. The Respondent denies that the applicant was ever married to the deceased herein and has averred that she is the only widow to the deceased having met him at New Nyanza General Hospital in 1979 before moving to Marsabit where they worked together. She has deposed that they later left to Mombasa where they formalized their marriage on 16th April 1983 before moving to Isiolo in the year 1986 where they settled down.
14. The Respondent has deposed that sometime in 1984 she pooled resources together with the deceased, who operated a private clinic at Isiolo, and bought parcel No.South Tharaka/Tunyai 'A'/[Particulars Withheld] measuring approximately 22 acres. She has further affirmed that they carried out subsistence farming until 2011 when they ventured into commercial farming where according to her they engaged the applicant as a caretaker to look after the farm.
15. The Respondent has deposed that the applicant had children when she was engaged to work in the farm and that she was allowed to reside on the farm together with her children. The Respondent has added that they took a loan from Kenya Industrial Estate in 1994 to

expand their clinic at Isiolo and used parcel No. South Tharaka/Tunyai 'A'/[Particulars Withheld] as security/collateral for the loan and that she together with deceased had difficulties servicing the loan and that the deceased died when the loan repayment was in arrears. According to the Respondent she made arrangements with the chargor to be allowed to dispose part of the security to redeem the property which she did upon filing this Succession Cause.

16. The Respondent has accused the applicant for trying to collude with the Area Chief to falsely lay claim on the estate by pretending to have been the wife of the deceased. She has termed the birth certificates of applicant's children tendered by the applicant as "*forgeries*" insisting that the applicant lived on the estate as a caretaker and not a widow as claimed.

17. In her oral testimony before this court the Respondent told this court that she was the only window to the deceased and were blessed with five children. She maintained that the applicant was an employee and that she even used to pay her salary like the other employees in the farm. It was her evidence that the applicant was allowed to reside in the farm with her children and her husband.

18. The Respondent disputed the applicant's claim that she was given a burial permit because she was recognized as a widow. According to the Respondent, she sent the applicant to pick the burial permit on her behalf as an employee because she was busy with other funeral arrangements. She also disputed that the applicant was allowed to carry the cross during the funeral service of the deceased on account of being a widow.

19. She further testified that the applicant processed birth certificate of her children inserting the deceased name as the father after the demise of the deceased. She also accused her mother in law T K (PW3) for lying in court about the applicant's relationship with the deceased.

20. The Respondent also testified that she sold 18 acres to one Patrick Mbaya Muthaura at Kshs.2,652,000/- and that the amount was paid directly to the chargor and tendered receipts to prove the same. The receipts were tendered as D. Exhibit 5a, b, c, d, f and g. She denied that she went to the Area Chief in the company of the applicant where an agreement was reached on 22nd July 2013. She denied authoring a letter dated 22nd July, 2013 (tendered as P. Exhibits 1 by the applicant).

21. The Respondent admitted that she had sued the deceased in a Children's Case because he had allegedly neglected his parental responsibilities but denied that she was referring to the applicant when she swore an affidavit in the children case deposing that the deceased had married another wife. Accordingly to her the deceased had a concubine in Isiolo and not a wife.

22. The Respondent's claims about where her mother in law used to reside was supported by C M (DW2) who testified that he was a brother to the deceased. He testified that his mother resided in Thagichu and not Kibuka as claimed. He also testified that S K N (PW5) was his own daughter and that she used to stay with the deceased in Isiolo but denied that the said daughter resided at the estate in Kibuka. He further denied knowledge of the applicant or the fact that she was a 2nd wife to his late brother the deceased herein.

23. Peter Mauki Machebe (DW3) and Jeremy Ngoci Ruchiani (DW4) both testified and told this court that were both engaged by the deceased as casual labourers in the farm in 1984. They both testified that the applicant was an employee who lived at the farm at Kibuka. D K K (DW5) also testified and told this court that that the deceased was his uncle and that he knew only the Respondent as the wife of the deceased. He further added that he knew the applicant as a worker who lived in the farm at Kibuka where he on one occasion worked as a guard. During cross-examination however, he conceded at times that he only went to work at the farm during the day but never stayed at the farm and could not tell if the deceased used to reside at the farm as he only went there three times a week and during the day.

24. The other witness who testified in support of the Respondent was Patrick Muthaura Mbae (DW6). He confirmed that he was approached by the Respondent to buy a parcel of land measuring 18 acres and that they agreed at Kshs.200,000 per acre. He further confirmed that the subject matter of the agreement was parcel No. South Tharaka/Tunyai 'A'/[Particulars Withheld] and that out of the total consideration of Kshs.3.6 million, he paid a deposit of Kshs.2,652,000 directly to Kenya Industrial Estate for purpose of clearing the outstanding loan arrears to redeem the title. He further testified that the transaction was blocked at Land Control Board by the applicant who claimed interest on the parcel as a widow a claim which according to him surprised him as he did not know about it.

25. I have considered this application and the evidence tendered. This cause relates to the estate of **F N M** (deceased herein) who died intestate domiciled inTunyai Sub-location on 4th May 2013 as per the Death Certificate No.197803 filed in this cause when the petition for letters of administration was filed in this court. The Respondent was appointed the administratrix of the estate of deceased herein on 19th February 2014. The assets listed as comprising the estate were listed in the petition (P & A5) as follows:

(i) South Tharaka/Tunyai 'A'/[Particulars Withheld]

(ii) Thagichu home 50 acres &

(iii) Tunyai Farm.

The listed dependants were given as follows:-

a) A N - widow

b) G M N - son

c) G K N - daughter

d) R M N - daughter

e) H M - son

f) M M - son

26. The applicant felt that the Respondent/Petitioner sidelined her in the Succession Cause during the distribution of the estate and that she took the entire estate without considering her and her children who she alleges are also dependants.

27. The main issue in this application therefore is whether or not the applicant was a "**wife**" to the deceased within the meaning of **Section 3** of the **Law of Succession Act** and whether her named children are dependants within the meaning provided under **Section 29** of the **Law of Succession Act** and if so if there was material concealment by the Petitioner/Respondent when applying for letters of administration to the estate of the deceased herein.

28. It is the Respondent's submissions that the applicant was not a wife to the deceased herein and that dowry was not negotiated and paid for by men from the deceased's side. She has submitted that K M K (PW4) conceded that dowry is negotiated by men only among Tharaka people during cross-examination. However a look at the proceedings reveals that PW4 a retired Assistant Chief Rukenya Sub-Location reveals the contrary as he clearly stated he was like a father to the applicant as he was a brother to the late R K , the deceased father to the applicant and that;

"Under Tharaka Customary practices, women negotiates dowry. In this case it is T (PW3) and E who negotiated dowry on behalf of N ."

It is true as submitted by Respondent's counsel that among most African communities dowry plays an important role in recognition or signifying that a union between man and wife is marriage. Dowry usually takes forms of money, livestock and other gifts. In most parts of Central Kenya and some parts of Meru it is known as "**Ruracio**." The Respondent has referred this court to "**Restatement of African Customary Law**" by **Eugene Contran** which refers to dowry as marriage consideration. According to the said author, the responsibility for payment of dowry in the first instance is upon the bridegroom's father and that in the absence of the father, a successor is given the responsibility. If however the son decides to marry subsequent wives the responsibility for dowry payment is down to him though the father or other relatives may contribute. The author has however added a rider that,

"Non payment of marriage consideration prior to the commencement of co-habitation does not invalidate a marriage provided there is an agreement to pay it."

29. The applicant has insisted that dowry was paid to her parents as confirmed by PW4. On the other hand the Respondent has contended that there is no way that dowry could be paid by deceased's mother and one Elizabeth. I have looked at the authority relied on by the Respondent's learned counsel but I am unable to find anywhere where a mother in law is precluded from paying dowry on behalf of her son. I am also inclined on a balance of probability going by the evidence of K M K (PW4) and T K (PW3) that some form of dowry was paid to applicant's parents with an agreement that the remaining part was to be paid at a later stage. But even if dowry was not paid, I am persuaded by **Eugene Contran** as cited above on "**Restatement of African Customary Law**" that absence of dowry **per se** does not invalidate a customary marriage provided there is an undertaking or agreement to pay for it at a later stage.

30. There are other important facts which came out during the hearing that appear to lend some credence to the applicant's claims.

Firstly the Respondent admitted that she sued the deceased herein sometime in 2004. The proceedings of the children case vide **Meru Cm's Court Children's Case No.111 of 2004** were tendered as P Exhibit 2 and what got this court's eye is paragraph 4 of the affidavit sworn on 15th December, 2004 by the Respondent where she complained that;

"The Respondent (referring to the deceased herein) has married another wife."

The claim was of course made by the Respondent herein with a view to making her case in the children's court on the accusations about neglect the deceased had reportedly subjected them because of the fact that the deceased apparently had gotten himself another wife or family. Although she denied during the trial herein that she was referring to the applicant as "**another wife**" in her affidavit, I found her explanation wanting because if she wanted to state that her husband had a concubine, she could have stated so in the affidavit because there is a difference between a concubine and a wife. This court found the Respondent is literate enough to know the difference and if she really meant that her late husband had a concubine and not a wife she could have simply said so.

31. Secondly I have looked at a letter dated 22nd July 2013 signed by the Respondent which seems to acknowledge the fact that her late husband had "**other children**". The Respondent has denied authoring or signing the letter tendered as P.Exhibit 4 by J M M (PW6) but the signature appearing on the letter, though handwriting expert was not called to give expert opinion, in my view appears on the face of it similar with other signatures appearing in this cause in the various affidavits signed by the Respondent. I also do not find any basis on the Respondent's claim that the applicant was colluding with the Area Chief (PW6) in order to grab part of the estate herein. Of course I note from the proceedings that the said chief was put to task to explain how a letter addressed to him could be copied to him at the same. The chief was a bit hesitant in answering questions regarding that anomaly but in my view that does not lessen the weight of the evidence tendered. The witness (PW6) gave a good account of why he wrote the letter dated 8th August, 2013 ("**JM1**") indicating that the Respondent was the only wife to the deceased. He stated that he was writing that for the purpose of the loan and the chargor (Kenya Industrial Estate) and that when he realized that the letter had been misused he wrote another dated 11th August 2015 ("**JM3**" in his further affidavit sworn on 4th April, 2016).

32. Thirdly the fact that the applicant was allowed by the Respondent herself to go and pick the burial permit shows that she acknowledged the fact that the applicant was much more than "**an employee**" as she put it. The Area Chief (PW6) confirmed that when the applicant informed him about the demise of the deceased at home in Kibuka, she instructed her to go and get a burial permit from the Assistant Chief Tunyai Sub-location. The fact that the applicant was issued with the burial permit by the Assistant Chief in itself shows that the applicant was considered to be a widow or the next of kin of the deceased by the local administration because a burial permit cannot be issued to anyone in ordinary circumstances. A person must be a close family member of the deceased to be given the burial permit. I have perused through the copy of burial permit marked as "**JMM4**" in the further affidavit of J M D.Exhibit 3 and it is clearly indicated that it was issued to the applicant herein.

33. The applicant also tendered birth certificate of her children (P. Exhibit 1 a to e) which show that the deceased herein was their father and though the Respondent termed the same as forgeries no evidence was tendered to show that the birth certificates were not legitimate or genuine.

34. This court also found evidence of T K (PW3) significant to the applicant's claim because as the mother of the deceased I find no reason to support the Respondent's contention that the evidence tendered by her were lies. No reasons were advanced to show the motive, if any, for her to lie that she knew the applicant as a wife to her late son and recognized the children as her grand children. Her evidence was corroborated by S K N (PW5) who also supported the applicant in her claims. There is nothing to show that she would directly benefit if this court found merit on applicant's claim.

35. On the other hand, I found the evidence of C M (DW2) a brother to the deceased to be aloof. This is because on one hand he stated that he was so close to the deceased but on the other hand he stated that he did not know where and when his late brother died. The witness (DW2) struck me to be a brother to the deceased but distant in his relations to him because when asked if he knew of a child maintenance case between the Respondent and her late brother he answered that he did not know. He further said that he last visited Kibuka farm where the applicant last in 1984. So when he says that he does not know if the applicant was another wife to his late brother, he can be, on account of his testimony in court, he cannot be taken seriously by this court.

36. This court further finds that the court Respondent's claim that the applicant was just an employee at Kibukia farm is not supported by any evidence. There was no master roll produced indicating that the applicant was engaged as an employee and there was no documentary proof that she was on salary. This court found no tangible evidence to support the oral testimonies of David Kirema Kilongo (DW5) and Jeremy Ngoci Ruchiani (DW4).

37. On account of the above evidence this court finds that the applicant on a balance of probability has established that she was a 2nd wife to the deceased. The Petitioner tendered a marriage certificate (D.Exhibit 2) indicating that she was the legal wife courtesy of a statutory marriage that took place in Mombasa on 16th April 1983 but the provisions of **Section 3(5)** of the **Law of Succession Act** (Cap 160 Laws of Kenya) supercedes the Marriage Act when it comes to recognizing a union such as the one that existed between the applicant and the deceased. I also find that the applicant actively took part in the burial ceremony of the deceased as exemplified by the photographs tendered in evidence. (P.Exhibit 2 a to h). This coupled with other evidence tendered show that the applicant was a "**wife**" as per the provisions of **Section 3 (1)** of the **Law of Succession Act**.

38. The above finding clearly shows that the Respondent failed to disclose all the material facts and this court issued a grant on account of an inadvertence or due to some concealment which clearly forms a ground envisaged under **Section 76** of the **Law of Succession Act** for annulment of a grant.

In the premises this court finds merit in the application dated 20th August, 2015. The same for the reasons aforesaid is allowed under the following terms:-

- 1) The grant issued to the Respondent on 19th February, 2014 and confirmed on 16th September, 2014 is hereby annulled or revoked.
- 2) All consequential orders including the transmission of the estate as described under the confirmed grant are reversed. The properties mentioned therein shall revert back to the name of the deceased pending determination of this cause.
- 3) A fresh grant in respect to the estate of the late **F N M** is hereby issued to both the applicant J K R and the Respondent A N . The two shall jointly administer the estate herein and are at liberty to move this court for confirmation of grant before expiry of 6 months statutory period because of the age of the matter.
- 4) The claim of the purchaser if any shall be entertained during the distribution process.
- 5) There shall be no order as to costs at this stage as this is a family matter.

Dated, signed and delivered and Chuka this 20th day of September, 2018.

R.K. LIMO

JUDGE

20/9/2018

Ruling signed, dated and delivered in the open court in the presence of Kariuki for Petitioner and Murithi holding brief for Mutegi for the

objector.

R. K. LIMO

JUDGE

20/9/2018