



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 690 OF 2010

IN THE MATTER OF THE ESTATE OF HENRY MAGU KAHIGU (DECEASED)

JUDGMENT

1. The deceased Henry Magu Kahigudied testate on 3rd December 2009 at Madras India. The deceased died testate leaving behind a will dated 6th July 2007and codicil dated 19th March 2008. On 13th April 2010 Marie Linda Njeri Kahigu and John Kahigu Magu the executors of the deceased's will and codicil petitioned for a grant of probate with will annexed. Via summons dated 29th November 2010 the said executors petitioned for confirmation of the said grant of probate as per the annexed will. The deceased was survived byhis wife Cecilia Christine Makandi and five children Sophie Njeri Moturi, John Kahigu Magu, Tom Muchuri Kahigu, Marie Linda Njeri Kahigu and Anne Marie Muthoni Kahigu. The said grant was not contested and was subsequently confirmed on 1st February 2011.
2. The application for consideration is the Notice of Motion dated 10/10/2016. The application is brought under section 26,27,28,29 and 30 of the Law of succession and Rule 25 of the probate and administration Rules. The applicant seeks orders that;
3. The honorable court be pleased to make provision for dependents not provided for under the deceased's will namely Annrita Karimi Njeru, Anthony Mugambi Kahigu and Edel Teresa Nkirote Kahigu. The application is based on grounds that the deceased upon his demise did not make any provision for the named dependents despite them being his wife and children. That they were not consulted or involved in the administration of the deceased's estate. That the said dependents are entitled to a share of the deceased's estate.
4. In her affidavit in support of the application she avers that she and the deceased were husband and wife and had engaged in a romantic relationship in 1972 while she working a as a teacher at St. Mary Igonji in Meru. That the said union was blessed with 2 issues namely Anthony Mugambi Kahigu born on 14th January 1976 and Edel Teresa Nkirote Kahigu born on 2nd January 1978. Though based in Embu he would spend the weekend with her and the Children in Meru. That the deceased secured a job with the officer of registrar of motor vehicle and moved to Nairobi while she joined politics and was elected as Member of Parliament for Meru Central Constituency in 1975. That she and the deceased together with their children were staying at Makadara Estate in Nairobi House no. MF 29 and the deceased owned another house in the same estate MF 44. That at all material time the deceased recognized the said children as his dependents and took care of them and paid their school fees. The couple however parted ways in 1981 and lived separately until his demise. That despite the said separation the deceased continued providing for the children and spend time with them as he would call them to his place of work at Gillhouse and Nyayo house and later at Princess Hotel after he retired from public service. That despite being a father to the said children the deceased omitted to make provisions for her and her children and it is only fair that provisions be made for them from the deceased's estate.
5. The application is opposed and Sophie Moturia daughter to the deceased in her affidavit dated 12th June 2017 in reply avers that she lived with her late father in various places namely Eldoret, Olkalao, Muranga, Uhuru estate Nyandarua, Embu and lastly Madaraka Nairobi until 1985 she got married. Adding that at the time he deceased lived as husband and wife with her mother and did not live with the applicant as alleged. She avers that the deceased had two wives being her mother Alice and Christine Kahigu but did not have any other wives. She denied allegations that Anthony and Edel were children of the deceased and denied any document record recognizing that the said children were the deceased's.
6. Cecilia Christine Makandi Kahigu in her replying affidavit aver that she met her late husband the deceased in 1977 and she was working at the registrar of motor vehicles as his secretary and knew his children Sophie, John and Tom and their mother Alice. She and the deceased started dating in 1981 and got married in 1982 under customary marriage. They later solemnized their marriage at the attorney General's Chambers in January 1984 and later in church in 1987. That she lived with her husband from then on until his demise. That neither the applicant nor her children ever visited the deceased. She denied the allegations by the applicant that she is a wife and that her children are the deceased's. That she was working at Princess Hotel after she resigned from public service in 1991and shared an office with the deceased and could have known if at all the applicant or her children visited the deceased there.
7. Marie Linda Njeri Kahigu a daughter of the deceased deposed that the applicant and her children are not dependents of the deceased. That none of the alleged took out any proceedings in regards to the deceased's estate in respect of his estate which she avers is inconsistent with the allegation of being a wife and children of the deceased. That following the demise of the deceased there was an obituary in the nation daily and the applicant and her children did not attend any of the meetings or the funeral. That the grant of probate was confirmed and the estate was fully distributed and each of the beneficiary had received their share in line with the will left by the deceased and as it stands the estate stand wound up and there is nothing to be given to the applicant and her children. She argues that the application lacks merit and should be dismissed.

8. In her supplementary affidavit dated 20th November 2017. She expressed her shock that Christine had denied she was a wife adding that Christine having been the deceased's secretary knew her and even knew her sister Mwarania and Kathure as they had schooled together at St. Mary's Igoji. That when Christine learnt that she and the children used to collect school fees from the deceased raised a huge quarrel and the deceased had to get other avenue to give money for upkeep and school fees. Adding that Christine concealed the truth for her own benefit.

9. In her affidavit dated 5th December 2017 she avers that their failure to take part in the proceedings of the succession cause of the deceased was because they were not aware of the same. Further that no documentary evidence has been adduced to show that all the property bequeathed to the beneficiaries had changed hands or disposed of. Adding that Nyandarua/Upper Gilgil/488 and Nyandarua/Upper Gilgil 649, Nyandarua/Upper Gilgil/398 and Olkalou Township 3/253 and plot No.8 are within the reach of the beneficiaries and hence available for redistribution. She refutes allegations that the estate of the deceased had been wound up.

10. Parties filed written submissions. The applicant in her submissions gave a background of event culminating to the current application. The respondent in her submissions raised 3 issues for determination namely;

i. Whether this Court has Jurisdiction to entertain the application as filed?

ii. Whether the applicants are beneficiaries within the meaning of Section 26 of the Law of succession Act?

iii. Are the applicants entitled to provision from the Estate of the deceased?

10. It was submitted that the deceased died on 3rd December 2009 and the executors applied for a grant of probate in the year 2010 which was granted and subsequently confirmed and a certificate of confirmation of grant was issued on 1st February 2011. It was submitted that section 30 sets limitation of time on when one can bring an application under dependency. It provides, "*No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71.*"

That having filed the same after confirmation the court has no jurisdiction to entertain the said application. She relied on the case of **Succession Cause No. 2508 of 1999**, where the Court Held that, "*an application for provision for dependents must be filed before the confirmation of grant.*"

Succession Cause No. 1058 of 2005 In the Matter of the Estate of Cecilia Wanjiru Kibiche (Deceased). The applicants have indicated that they did not file the application earlier claiming that they were not aware of the proceedings should this have been true they ought to have filed for leave prior to filing the application.

On whether the applicants are beneficiaries within the meaning of Section 26 of the Law of succession Act? It was submitted that for the applicants to be eligible to file for provision as dependents they must first prove that they are dependents as provided for within the meaning of section 26. Which provides²⁹. For the purposes of this Part, "dependent" means-

"(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to this death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death"

11. It was submitted that though the applicant has alleged to have been married to the applicant she did not state the date the said marriage took place or any traditional rights that took place. As such it is submitted that the applicant has failed to prove that she is a wife and therefore is not a dependent as provided for under Section 29 of the Act. Further, it was submitted that the children alleged to belong to the deceased were born in the year 1976 and 1978 no birth certificates were adduced by the applicant. That Edel and Anthony have not been named in accordance to the deceased's tradition.

12. That the applicant having failed to prove that she and her children are dependents of the deceased in accordance to section 26 of the Law of succession. That though the court has discretion in determining an application for maintenance it is important to note that the estate has already been distributed and as such it is not available for the applicant. Further that the will of the deceased had provided that upon proof of paternity any other beneficiary would be entitled to Kshs. 250,000/- each.

DETERMINATION

13. The applicant has sought to be considered as a dependent of the deceased. The deceased died testate leaving a will that declared his wishes in regards to his estate. The applicant and her children were not provided for. This is what prompted the applicant to make this application seeking provisions for her and her children. Her application is brought under section 26 of the law of succession Act which provides. "*Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependent, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependent order that such reasonable provision as the court thinks fit shall be made for that dependent out of the deceased's net estate.*"

