



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 442 OF 2015

IN THE MATTER OF THE ESTATE OF JAMES MEME ANAMPIU (DECEASED)

LEAH MUTHONI MEME.....APPLICANT

VERSUS

EDITH MUTHONI MEMERESPONDENT

JUDGMENT

PLEADINGS

The deceased James Meme Anampiu died on 4th January 2015.

He was survived by the following;

- a) Cathrine Karegi Kamanja
- b) Jane Gacheri Meme
- c) Frida Kagwiria Meme
- d) Edith Muthoni Meme
- e) Samson Kathurima Meme
- f) Wilson Muriuki Meme

Edith Muthoni Meme applied for grant for letters of administration through Petition of 25th February 2015. The grant was issued on 11th June 2015. The grant was confirmed on 10th November 2015.

On 18th December 2015, Leah Muthoni Ndiangui filed summons for revocation of grant on the basis of the grant being obtained fraudulently by material disclosure and without requisite consents from the Applicant as wife of deceased and BK as son of the deceased.

Application No.61/15 and Succession Cause No. 442 of 2015 were consolidated with **Succession Cause No. 442 of 2015** as the main file. The Application dated 17/2/2016 **Misc. Application No. 61 of 2015** by the Applicant filed the application to set aside the orders of 11/5/2015.

The application for consideration is the summons dated 16/12/2015. The applicant seeks that the grant of letters of administration intestate issued to the respondent by this honorable court on 11th June 2015 and confirmed on 10/11/2015 be revoked.

The application is premised on the grounds that the grant was obtained by making false statements and material non-disclosure on the part of the respondent and specifically that the applicant Leah Muthoni Ndiangui was a wife to the deceased and even cohabited with the deceased as up to the time of his demise. That the applicant also had a child with the deceased one BK who is a beneficiary to the estate of the deceased. That the grant was therefore obtained fraudulently by material non-disclosure and without requisite consent from the said two beneficiaries. that it is only fair and just and in the interest of justice that the orders sought be granted.

The application was premised on the grounds to protect the estate from misuse and to secure the estate and all other dependants. That it is proper that to open an account in the name of the estate to deposit all the rental income in the said account so that the same can be distributed to all beneficiaries. That the delay in petitioning for the letters of administration was that the Applicant did not know of the grant and confirmed grant issued by the court until the Petitioner showed the documents to the Chief and Police in a case of harassment by the deceased's family. That it is on the interest of justice and fair play that the orders sought are granted.

In her affidavit in support of the said application, Leah avers that her union with the deceased was blessed with one issue named BK Meme born on 6/2/2006. She avers that her marriage and cohabitation with the deceased was known to the petitioner as he had built for her on the same parcel of land as the petitioners mother where they resided as co-wives peacefully until November 2015 when his brothers raided her home. That before then the petitioner had taken over collection of rent from the deceased's houses even the ones that had been allocated to her by the deceased during her lifetime to her exclusion. This prompted her to file **Misc. No. 61 of 2015** to obtain restricting orders against the petitioner. However she was unable to extract the orders as the file was misplaced at the Court registry. Despite being a neighbor, the petitioner had filed succession proceedings without any notice to her and had the petition gazetted and the grant of letters of administration issued. That she only learnt of the same on 28/11/2016 when shown as shown documents by the area chief who was investigating her harassment by the applicant and her brothers. That on the perusal of the court file she learnt that a grant had been issued albeit at the concealment of other beneficiaries. She urged the court to revoke the grant issued on 11th June 2015.

Edith Muthoni Meme, a daughter to the deceased opposed the application and filed replying affidavit dated 22nd June 2015. She averred that the deceased was legally married to her mother on 22nd February 1997. She alleged that the applicant is dishonest as she misled the Chief to believe that she had separated with her former husband and had married the deceased and upon that realization, the Chief wrote a letter cancelling the letter he had issued to her. That the death certificate she obtained was without the consent of her mother and other siblings. That she went ahead to forge a birth certificate indicating that the deceased was the biological father to her son while the true biological father of the child has been noted in the child's baptismal card as JK. That the applicant obtained orders by misrepresenting to the Court marriage certificate of her marriage to the deceased, birth certificate of her son BK Meme, Baptism card of the child Chief's letter confirming her and son as family of the deceased and copy of death certificate of the deceased. Based on these documents, the Applicant sought that the court set aside the said Court orders so issued. The Respondent stated that the Applicant should not be allowed to take part in the estate of her late father and she is not entitled to a share of the deceased's estate. That the applicant's claim that she was married to the deceased would be an act of bigamy as she was still married to another man and was not divorced at the time.

In her further affidavit dated 4th October 2016, Edith avers that the Applicant filed divorce proceedings in **Divorce Cause No. 24 of 2013 at Chief Magistrates Court at Meru** and the same were served upon the husband JK who still recognizes her as his wife to-date and her son LM and B K as his biological sons. That upon inquiry at the Registrar's office it came out that the alleged Birth certificate was a forgery so that she could fraudulently claim from the deceased's estate.

HEARING

The matter proceeded by *viva voce* evidence. Leah Muthoni Ndiangui in her witness statement filed in this court on 27th January 2017. She stated that she was married to one JK until 2003 when they separated and the marriage was terminated by the elders. Later she filed for a divorce in **Meru Court via Divorce Cause no. 24 of 2013** that the same was served upon the respondent and it was her understanding that the same would be allowed. That she met the deceased in 2005 they dated and lived separately until 2011 when they started cohabiting together at South C in Nairobi. That he built for her a house in the same compound as his first wife one Catherine Karegi and the same was separated by a temporary fence with each of them having their own gate. That during the said time she cohabited with the deceased and lived with their son one BK and the deceased used to provide for them. That between 2014 and 2016 the deceased became sick on various occasions and she took him to Mater Hospital for treatment. He however died on 3/1/2016. That after the demise of the deceased, the administrator Edith Muthoni, daughter of the deceased started harassing and threatening her. This prompted her to report to the Chief's office in Langata Division at Nyayo Police post who advised her to move to court. She then filed **Misc. application 61 of 2015** which was not challenged by the administrator and other beneficiaries. That unknown to her the first family had filed **Succession Cause No. 442 of 2015**. That on 10/11/2015 the administrator in the company of her brothers went and evicted her and took everything. That prior to the deceased demise she used to help collect rent from premises owned by the deceased but the administrators locked her and her son out of the estate as a result she and her son have suffered and urged the court to revoke the grant issued to the applicants.

Robert Wanjogu Ngunjiri and Stephen Irungu Macharia a brother and cousin to the applicant respectively. They stated that they knew the deceased and he had a relationship with the applicant which began in 2005 and later on they started cohabiting in 2011. They stated that the deceased in the company of his brother Julius Gitonga Anampiu took dowry to their home in Giankere. They stated that though the applicant was earlier on married to one JK the two had separated in 2003 and a divorce cause had been filed.

Leah Muthoni Ndiangui (PW1) in her testimony stated that she was married to James Anampiu for over 10 years between 2005-2015 and were living in the same compound when he died in South C. She stated that in 2012 the deceased went with his brothers to her home and paid dowry. She stated that the deceased is the father of her son BK. That after the demise of the deceased the men from Meru went and removed her from the home and reported the matter to the chief. She stated that she was married to one JK but they divorced.

In cross examination she stated that she had 4 children

- IG
- JG
- LM and
- BK

That there are divorce proceedings in Meru Law Court but stated that she did not know whether the case was over and did not produce any documents to support the same. She also did not produce any documents to show that the deceased paid for the child's upkeep; clothes, food, school fees and expenses. She stated that the deceased was the father of her son and stated that the deceased and his brother Julius Gitonga paid dowry according to Meru customary Law. The birth certificate of BK was processed by the deceased.

Agnes Mwihaki Nganga,(PW2) a friend to the deceased testified that the deceased had indicated that he wanted to marry the applicant and she had met her and the child who had moved in with the deceased. But she was surprised that when the deceased died and the applicant was evicted from the home. It was only during the deceased's funeral that she learnt that he had another family. On cross examination she stated that she knew the deceased in 2006 and Leah came in 2011 but admits she did not know how or when the marriage was conducted between the deceased and Applicant. She knew of deceased other family after his death.

Milka Diana Odalo,(DW1) an officer from the Civil Registrar in her testimony stated that the birth certificate No. [particulars withheld] of BK was not genuine because its year of entry number [particulars withheld] is supposed to have 12 digits and not 10 digits. She stated that a birth has to be registered within 6 months and if not they have to give an authority from their department. She referred to **Section 8 of the Births and Death Registration Act**. It was stated that the serial Number [particulars withheld] there is no such number in their records in Nairobi. A birth is registered within 6 months after that there must be authority to register the same; in this case there is no such authority. Secondly, the Birth records in Meru confirm BK was born in Meru Hospital and father is indicated as JK. Further, it was stated that the child BK was born in Meru Hospital and not in Nairobi as claimed by the applicant. Further, it was stated that the documents showed that the father of the child was JK. She added that one cannot have 2 birth certificates from 2 different areas. Further that the entry number from Meru has 9 digits instead of 10 digits and noted that birth certificate serial number [particulars withheld] belong to someone else. She produced the Report to this effect.

Edith Muthoni Meme (DW3) a daughter to the deceased she added that the applicant went to her father's compound as a worker and took care of her father's animals. That at the time she came she came with a small child and lived in the home working. The applicant's husband complained to the deceased that they were taking away his children. That after the demise of the deceased they tried to evict the applicant but they could not get her out and had to involve the chief.

Catherine Karegi (DW4) in her testimony stated that she was married to the deceased in January 1978 as per marriage certificate annexed to her affidavit and had 5 children with him. That Leah Muthoni was her employee from 2012 as she stayed in Meru managing the farm while the deceased stayed in Nairobi. Later, Leah and another employee called Jane took care of her husband in Nairobi as he had high blood pressure and diabetes and he ran a Bar. She lived in Meru and looked after the farm. After the deceased died, they were in Nairobi for 2 weeks and thereafter, Leah stayed on and later obtained letter from the Chief and claimed to be widow of the deceased. She refuted the applicant's claims that she was a wife to the deceased.

SUBMISSIONS

The objector in her written submissions raised only one issue for determination as to whether she and the minor are beneficiaries of the deceased. It was submitted that the deceased paid her dowry and her son depended on him and the birth certificate which is the subject matter of the defence was procured when the deceased was still alive. It was submitted that the applicant's evidence was uncontroverted. That though the officer from the registry stated that the certificate did not have the 9 digit serial number no evidence was adduced to show that the birth certificate was fake and whether it belonged to another. That the documents were printed from a computer database and do not have any probative value and fly in the face of **Section 106B of Evidence Act Cap 80**. That it is clear that the applicant cohabited with the deceased for several years before his demise and that she took care of the deceased through his sickness as a faithful wife would. That the respondent have choreographed a scheme to kick her out of the home in blatant contents of the court orders in Misc. 61 of 2015. It was submitted that the child is a child of the deceased under **Section 3(2) of the Law of Succession Act** She also submitted that it was the deceased who processed the birth certificate and the administrators have conceded that the deceased took care of the child. It was submitted that there is no doubt that the child falls within **Section 29 of the Act** as a dependant of the deceased. She urged the court to exercise the court's discretion under **Section 27 of the Act** to ensure that the minor is not exposed to suffering as a result of being left out of the estate when he is clearly the son of the deceased. It was submitted that the applicant had aptly demonstrated her case to the requisite standards.

DETERMINATION

I have considered the parties pleadings, their testimony, and submissions. From the evidence; I find that these are the issues for determination;

- i) Has the applicant has proved she is a wife to the deceased?
- ii) Is the applicant's son a son to the deceased
- iii) Is the applicant and her son are beneficiaries of the deceased?
- iv) Has the applicant proved sufficient grounds to enable the grant to be revoked?

The applicant alleges to be a wife to the deceased married under Meru customary Law. In her testimony she stated that the deceased in the company of his brother had visited her home and paid dowry. However, I note she does not go into details on the process and rites of the said dowry payment as per the Meru customary Law.

Section 51 of Evidence Act Cap 80 and Rule 64 of Probate & Administration Rules on evidence to be provided on the existence of any general custom or application or effect of African Customary law. Legal provisions and case-law are cited to require evidence on customary marriage rites to be provided for the valid customary marriage to be confirmed by the court.

Cotran on *Restatement of African Law: The Law of Marriage and Divorce Sweet & Maxwell 1968 Pg 11& 15*; provides processes of a valid Kikuyu/Meru Customary Marriage; njohi ya njurio, ruracio, ngurario ceremonies and mwati harika and ngoima are produced by the deceased's family to the Objector's family.

Cotran on *Essentials of a Valid Kikuyu marriage* further states;

No marriage is valid under Kikuyu customary law unless the *ngurario ram is slaughtered and unless a part of the ruracio has been paid*.

In the estate of **FRANCIS MBURU (DECEASED) SUCCESSION CAUSE NO. 145 OF 2012** where it was held,

“The applicant did not allude to any of the ceremonies mentioned above. Her witnesses did not allude to them either. It is noteworthy too that the family was split in the middle as to the legitimacy of her alleged marriage, lending credence to the allegation that she was brought in specifically to vex the first administrator. From what is on record, it is as clear as day that the applicant has not placed before the court any material upon which it can conclude that there was a customary law marriage between her and the deceased, or put differently, that she was the deceased's customary law wife.”

See also; **ELIUD MAINA MWANGI VS MARGARET WANJIRU GACHANGI [2013] ECLR CIVIL APPEAL 281(A) OF 2003** on the question whether the Respondent was married to the deceased or not.

In RE ESTATE OF DICKSON KIHKA KIMANI (DECEASED) 2009 ECLR

SUCCESSION CAUSE 158 OF 2005. The Respondent filed objection to making of grant as she and her child were excluded as beneficiaries of deceased's estate.

Her brother, Robert Wanjogu Ngunjiri and cousin Stephen Irungu Macharia in their written statements support her claim. However, none of them give a detailed account of the various processes and rites involved in a Meru customary marriage. They did not testify in Court to test veracity of their evidence and credibility of the witness.

These processes were not proved in evidence by the Objector during the proceedings. What was proved was that the Objector was an employee at some point and developed into a relationship with the deceased. They lived together. This proves cohabitation but not marriage because no details of the alleged dowry payment were disclosed to the Court. When did the deceased, family and friends visit the Objector's home? Where was it? Whom did they find and how was the ceremony conducted? The information of payment of dowry was scanty to amount to a customary marriage as envisaged in a valid Kikuyu/Meru customary marriage. The Objector's reliance on **Section 3 of Law of Succession Act** where as a woman married under a system of law which permits polygamy [is] nevertheless a wife for purposes of Law of Succession Act. In the instant case, the Objector did not prove customary marriage and therefore she cannot successfully rely on the above provision. From the foregoing I find that the applicant has not proved on a balance of probability that she was a wife to the deceased as such she is not a beneficiary to the deceased.

The Objector annexed to her application for grant a copy of marriage certificate between her and the deceased in 1997. In her testimony she abandoned reliance on the church ceremony of their marriage. Even if it happened it was illegal because she was married to JK who she filed for divorce in **Divorce Cause 24 of 2013** whose proceedings were attached to Further Affidavit of the administrator Edith Muthoni Meme of 5th October 2016. There was/is no decree nisi or absolute produced. On the other hand the deceased also was married to Administrator's mother in 1978. Both of the parties; the deceased and the Objector could not legally marry in a monogamous marriage as they were already married. The Objector was not married to the deceased.

The Objector stated that the child BK belonged to the deceased and produced birth certificate which was found not genuine but fraudulently obtained. DW1 from the Registration of Persons; Nairobi stated that BK is registered in Meru as born in Meru Hospital and his father is JK. The officer from the Civil Registry pointed out various inconsistencies in the said birth certificate. It was her testimony that the said birth certificate did not have a valid serial number. It was her conclusion that the alleged birth certificate was a fake was not issued by the Civil Registry.

Therefore the Objector's children were not the deceased's biological children but the Objector alleged that he adopted them yet no evidence of this fact was adduced. The process of legal adoption was not undertaken nor proof that they are dependents under **Section 29 of Law of Succession Act shown or produced in Court.**

DISPOSITION

This Court finds as follows;

- 1. The applicant Leah Muthoni Ndiangui did not prove on a balance of probability that she was a wife to the deceased.**
- 2. The Applicant did not prove on balance of probability that BK was a biological son to the deceased. The Applicant also failed to prove if at all that she and the son were dependants of the deceased.**
- 3. Therefore the summons for revocation application filed by the Applicant Leah Muthoni Ndiangui on 18th December 2015 is dismissed.**
- 4. The Grant of 11th June 2015 and confirmed grant of 10th November 2015 remain in force and the estate of the deceased**

shall be distributed as per the confirmed grant to the beneficiaries of the deceased.

5. Each party to bear own costs.

6. Any aggrieved party to lodge an appeal

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF DECEMBER OF 2018.

M.W.MUIGAI

JUDGE –FAMILY DIVISION –HIGH COURT

IN THE PRESENCE OF;

ODHIAMBO ORONGA ADVOCATES FOR APPLICANT

WAMBO MUNYALA ADVOCATES FOR RESPONDENTS

COURT CLERK - PATRICK