



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**SUCCESSION CAUSE NO.8 OF 2017**

**IN THE MATTER OF THE ESTATE OF P NJM (DECEASED)**

**A N D –**

**PWM.....1<sup>ST</sup> PETITIONER**

**SGM.....2<sup>ND</sup> PETITIONER**

**V E R S U S**

**MMN.....PROTESTOR**

**JUDGMENT**

This matter relates to the estate of **PNM** who died intestate on 29/2/2000. **PW** a widow to the deceased and **SGM**, a son to the deceased, were issued with letters of grant of representation dated 24/3/2009.

By a summons dated 2/10/2013, the petitioners sought to have the grant of representation made to them confirmed. In the application, the following sixteen people are named as the deceased's beneficiaries:

1. **MMN - Widow**
2. **BWN - Daughter**
3. **SW - Daughter**
4. **DWN - Daughter**
5. **DMN - Son**
6. **GNN - Daughter**
7. **SGM – Son (2<sup>nd</sup> Petitioner)**
8. **JM N - Son**
9. **EGN - Son**
10. **PWN – Widow (1<sup>st</sup> Petitioner)**
11. **S KN - Son**
12. **LWN - Daughter**
13. **DMN - Son**
14. **TWN - Daughter**

**15. DWN - Daughter**

**16. MWN - Daughter**

By affidavit dated 14/5/2015, the protestor MM, filed an affidavit of protest against the confirmation of grant in which she averred that the deceased was a polygamous man; that she was the first wife of the deceased whereas the 1<sup>st</sup> petitioner was the 2<sup>nd</sup> wife. The protestor was objecting to the mode of distribution of the deceased's estate because she had been left out of the distribution together with her two children, **DW** and **EWN** and she proposed that the estate be shared equally amongst all the deceased's children and the 2 wives as units and that the beneficiaries being all mature people, the issue of one holding for the other in trust should not arise.

The petitioners/respondents filed a joint replying affidavit contending that all the beneficiaries of the deceased's estate have all been catered for in the summons for confirmation of grant and that the protestor signed the consent to distribution; that the deceased and protestor divorced at Nyahururu Law Courts in 1978 and that by then the two children DW and EWN had not been born; that the protestor has never returned to the deceased's home; that the protestor remarried and therefore the protestor and the two children born after the dissolution of the marriage to the deceased are not entitled to inherit from the deceased; that the protestor and deceased never got a child by name JM, who is listed in the affidavit of protest; that the protestor has property in Limuru where she remarried and therefore wants to benefit twice.

The 1<sup>st</sup> petitioner also filed a statement on 5/11/2018 in which she reiterates the contents of the replying affidavit.

Directions were taken that the matter proceeds by way of viva voce evidence.

In her evidence, the protestor (PW1) stated that she was the deceased's wife but that they had separated by the time of the deceased's death; that they were blessed with 10 children and there was another wife – the 1st petitioner. The protestor stated that she objects to the distribution proposed by the administrators because the whole estate devolves to the 1<sup>st</sup> and 2<sup>nd</sup> petitioners and other children have not been given anything. Her proposal to distribution is that all the deceased's children and the two widows share the estate equally. She denied that the deceased had distributed the estate before his death.

Both the petitioners testified, DW1 PW stated that she got married to the deceased in 1978 and they got 6 children together; that the deceased never told her that he had another wife; that the time deceased died, each beneficiary had constructed on their portion of land and she too was given her own portion; that she saw the protestor for the first time in Nakuru High Court. DW1 however admitted that the deceased had 8 other children who were not hers, but that she did not know DW and EW.

**DW2, SG** testified that he did not know the protestor because he was told their mother left when he was only 7 years old; that his father called a surveyor and distributed his land to his 8 children who were left; that they were told their mother had gotten married elsewhere and got children there and should not step on the deceased's land; that the chief called them and informed them that the protestor was their mother.

I have considered the affidavits filed by both the protestor and the petitioners and the testimonies of all parties. I think that the issues that this court needs to solve are:

- (1) *Whether the protestor is the deceased's wife;*
- (2) *Whether the protestor is a beneficiary to the deceased's estate;*
- (3) *Whether DW and EW are the deceased's children and therefore beneficiaries;*
- (4) *How should the estate be distributed?*

Whether the protestor is the deceased's wife; the letter of introduction written by the chief on 1/12/2008 listed the deceased's beneficiaries and the first on the list is MMN the protestor who was described as a wife belonging to the first family to which the 2<sup>nd</sup> petitioner belongs. In the list of beneficiaries is also the 1<sup>st</sup> petitioner who is named as a widow. In the affidavit in support of the petition for letters of administration intestate filed in court on 1/12/2008, MM, the protestor was also named as a widow of the deceased. The 1<sup>st</sup> petitioner alleged that it is the chief who included the protestor in the introduction letter but she could not explain how the protestor's name came to be in the affidavit sworn and signed by her on 2/10/2013, in support of the petition for letters of administration and a consent which was filed by the petitioners allegedly signed by all beneficiaries including the protestor. Again, the protestor was named as one of the beneficiaries. The petitioners must have prepared the consent and filed it including the protestor's name as a signatory. The petitioners are not truthful when they allege that they did not know the protestor at all. They included her in the petition because they recognized her as a beneficiary but for some reason, they seem to have changed their minds when it came to the distribution. In fact DW2 contradicted himself. He had deponed in his affidavit that he knew that his father divorced with his mother in a Nyahururu court in 1978. However, DW2 did not avail any evidence to that effect. DW2's testimony that he did not know his mother PW1 does not make sense. Similarly, DW1's testimony that she did not know of any other wife is also contradictory because in the same vein, she admitted to having found the deceased with 8 children and so there must have been a mother to those children. DW1 and DW2 were untruthful witnesses and their testimonies cannot be wholly believed. The court will find as a fact that MM, the protestor, was the deceased's wife and they had separated. Separation is not a divorce and there is no evidence to the contrary.

Being a wife, the protestor ranks in equal priority as the 1<sup>st</sup> petitioner both being wives of the deceased and she should have been considered as one of the petitioners.

According to DW1 & DW2, the deceased had distributed his property during his life and that there is nothing left to be distributed. Although DW1 & DW2 said that a chief, elders and a surveyor were present when the said distribution was made 2 – 3 years before the deceased's death, they did not mention any of the persons who were present by name. They did not call any of those persons as witnesses. They did not produce any document that the deceased may have written as evidence of how the deceased distributed his estate. I have seen that when the petitioners filed this cause, they also attached a letter from the chief dated 3/9/2008 listing six persons as having purchased some land from sons, daughters and widow of the deceased. The seller's names were not indicated but the buyer were listed as:

1. SNG
2. DNC
3. PN
4. J MW
5. JNM
6. FNM

The petitioners seem to have sold part of the deceased's estate to 3<sup>rd</sup> parties irregularly and that is why they want to lock out the protestor. The petitioners had no capacity any party of the estate until they had letters of administration.

The protestor told the court that they got 10 children with the deceased as listed in the affidavit of the protestor. However, DW1 said that she only found her husband with 8 children namely:

1. DM
2. SW
3. BW
4. DW
5. GN
6. SG – 1<sup>st</sup> petitioner
7. JM
8. EG

DW2 denied that JMW, who is named by the protestor at paragraph 4 of her affidavit, is the deceased's child. However, I note that DW1 named a JMN as being amongst the 8 children belonging to the protestor. I have found earlier that both, DW1 & 2 are not truthful. Unfortunately, the petitioners did not call any independent evidence to support their assertions, for example the chief of the area. It is also interesting that though DW2 is the son of the protestor, he is keen to ensure that his mother does not benefit from the deceased's estate. DW2's other siblings have kept quiet and have not come up to corroborate his evidence. Even if DW2 is an administrator, the voice of the other siblings may have made a difference.

In my considered view, the protestor is the wife of the deceased and claims that two of the children were not catered from him the letter of introduction and even the affidavit in support of the petition. There is no doubt that the protestor had been separated from the deceased for long. It was upon the protestor to demonstrate that these children were born during the marriage with the deceased and that she left the marriage with them. The protestor should have produced some evidence as proof that the two, DW and E are children of the deceased. In her testimony, the protestor never attempted to prove that E and D are children of the deceased. The court has no idea when the protestor left the deceased's home, the age of D and E or whether she ever reconciled with the deceased. I will find that the protestor has not proved on a balance of probability, that DW and E are children of the deceased. The two will therefore not be entitled to inherit from the deceased.

How should the distribution be done? Section 40 of the Law of the Succession of Act provides on how an intestate will be distributed where the deceased was polygamous and was survived by the wives and children. The Section states:

***“Section 40***

- 1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children;***
- 2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”***

I recognize the fact that the petitioners may have sold some of the land and it is only them who know what is remaining and available for distribution. It is, therefore, my decision that the parties do have some time to try to agree on distribution of the estate failing which the distribution will proceed in terms of Section 40 of the Law of Succession Act, that is, to be shared equally between the 16 named beneficiaries who include the protestor. Mention on 4/3/2019.

**Dated, Signed and Delivered** at NYAHURURU this **13<sup>th</sup>** day of **December**, 2018.

.....

**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Mr. Chege for protestor

1<sup>st</sup> and 2<sup>nd</sup> petitioner – in person

Soi – Court Assistant