



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

SUCCESSION CAUSE NO. 19 OF 2016

IN THE MATTER OF THE ESTATE OF NICHOLAS KAAKA KAPORE (DECEASED)

RULING

On the 24th August 2018 the administrators Eva Naima Kaaka and Tabitha Waithera Mararo to the Estate of Nicholas Kaaka Kapore who died on 22nd November, 2014 applied to this court to have grant of letters obtained on 27th July, 2018 be confirmed.

Background

This succession cause has had a chequered history as the following facts can attest. On 19th September, 2016 Eva Naima Kaaka and Stella Seiyen Kaaka by petitioning this court were issued with grant of letters of administration intestate to undertake and administer the estate of the deceased Nicholas Kaaka Kapore. In the light of this on 17th October, 2016 Tabitha Waithera Mararo filed objection proceedings against the grant of letters of administration issued to Eva Kaaka and Stella Seiyen Kaaka on grounds that it was issued and obtained fraudulently by making statements. Thirdly, that the administrators concealed material facts to the succession cause rendering the grant of administration defective and invalid in the circumstances.

As far as the dispute in the objection proceedings was concerned it was pleaded by Tabitha Waithera Mararo that she was legally married to the deceased under the Kikuyu customary law. That during the subsistence of the marriage they were blessed with one child namely TNK. Further Tabitha Waithera Mararo advanced the argument that she was therefore entitled to the share of the estate of the deceased as a wife together with her minor child – TNK.

However from the proceedings filed by the administrators Eva Kaaka and her daughter SK they falsely misreported the facts that the deceased had no other spouse or children. After careful consideration of the matter this court agreed with the issues in the objection proceedings brought pursuant to Section 76 of the law of Succession by revoking the grant of letters intestate issued to Eva Kaaka and SK.

Being aggrieved with the decision on revocation of the grant that Tabitha Waithera was a wife to the deceased the administrator filed an appeal to the court of appeal.

In a well-reasoned judgement of the court they partially parted ways with my position and findings that Tabitha Waithera was a wife to the deceased under Kikuyu customary law. The effect of the decision was therefore to affirm that there was no evidence placed before the court that the two ever went through any ceremony of marriage, and if they did so the form it took did not qualify Tabitha Waithera to the status of a wife.

It was however agreed that the deceased and Tabitha Waithera Mararo had a daughter TNK who was undoubtedly an issue born out of the union. She was therefore entitled to inherit the share of the estate of the deceased.

That decision of the court of appeal set in Motion applications one after another more specifically filed by Tabitha Waithera Mararo on grounds that she was still a spouse to the deceased and therefore should be recognized such by this court. I see the position taken by Tabitha Waithera as that of a litigant who has lost his or her claim before the court but refusing to accept the verdict and move on or in the alternative seek a review of the judgement. The position in law as of now Tabitha Waithera Mararo is not entitled to receive any share from the deceased estate.

Dealing particularly with distribution of the estate her direct involvement is that of trustee intended to safeguard the interest of her minor child SNK until she attains the age of maturity.

As the parties failed to agree on the mode of distribution my task is therefore to ascertain the shares and what each beneficiary to the estate is entitled under the law of succession. It is not disputed that from the moment the deceased dies his or her property belongs to the heirs. In accordance with provisions of the Act Tabitha Waithera Mararo is not a heir to the estate of the deceased.

On this issue Section 3 of the Act stipulates that free property “*means the property which the person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.*”

There are two proposals one by Eva Naima Kaaka and Tabitha Waithera Mararo. When I review the two proposals and the inventory of properties together with the suggestive mode of distribution there is no reference made to the principle of equal share expressed in section 35 and 38 of the law of Succession Act.

I must now consider the question of how the estate of the deceased ought to have been shared out between Eva Naima Kaaka, the daughter SSK and TNK (Minor) had they filed a consent. During their marriage the deceased and his wife Eva Naima Kaaka acquired Land properties namely:

Ngong/Ngong/[xxxx] KJD/Keekonyokie/Iliksumet/[XXXX] ,

KJD/Keekonyokie/Iliksumet/[XXXX] ,

Mugunda/NairuthaBlock 1/[XXXX] ,

Nyandarua/Ndaragwa/Kiriogo/Block 1 (Kamiruri) [XXXX]

Nyandarua/Ndaragwa/Kiriogo/Block1 (Kamiruri)[XXXX]

Nyandarua/Ndaragwa/Kiriogo/Block1(Kamiruri)[XXXX]

Nyandarua/Ndaragwa/Kiriogor/Block1Kamiruri[XXXX]Nyandarua/Ndaragwa/Kiriogor/Block 1 (Kamiruri) [XXXX] .

In resolving the dispute raised in this confirmation of grant as provided by section 3 there is evidence that the deceased left behind the above properties and bank accounts receivables for the benefit of the heirs to the estate.

It can therefore be said that the ownership of the property was jointly owned with the deceased. In this estate Eva Kaaka is the only widow of the deceased and was entitled to inherit from the estate and part of the shares distributed to the children or dependants of the deceased.

There is cogent evidence that the deceased owned agricultural land, urban properties and accounts in two financial institutions – Equity and Barclays Banks of Kenya. I have weighed the two affidavits filed in court with annexed inventory on proposed mode of distribution from the perspective of Eva Naima Kaaka and Tabitha Waithera Mararo.

For my part Tabitha Waithera Mararo has not come to terms with the judgment of the court of appeal she still lives in the past on the findings made by this court recognizing her as a wife of the deceased. From the time of the court of appeal decision she has developed animosity with Eva Naima Kaaka to the extent that she refused to respond to any court summons including ignoring orders of the court issued through her advocates to participate in this proceedings. In refusing to abide with the court orders she held the entire estate hostage due to her unavailability which occasioned delay in confirming the grant.

The purpose of grant of letters of administration is to collect the deceased assets, pay any liabilities due and then distributing the assets to the beneficiaries. I have to come to the conclusion that in the circumstances surrounding these estate of the deceased the purpose of the confirmed grant would be defeated if Tabitha Waithera Mararo is permitted to co-sign any instrument as a co-administrator. It is desirable and in the interest of justice that this estate remains being administered principally by Eva Naima Kaaka to avoid unnecessary protracted litigation between her and Tabitha Waithera Mararo.

I have looked at the two schemes by both parties to this confirmation hearings on the estate of the deceased and the mode of distribution. I hold the view that this estate should be distributed and governed by the provisions of Section 35 as read with section 38 of the law of Succession Act.

The rights the spouse and surviving children is well captured in Section 35 (2), (3) (5) and Section 38 of the Law of Succession Act which provides as follows:

“A surviving spouse shall, during the continuation of life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date. Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made. Subject to the provisions of Section 41 and 42 and subject to any appointment or award made under this Section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children. 38 where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”

My understanding of Section 35 of the Act is that it was expressly stated to cater for the surviving spouse and the children of the deceased.

Eva Kaaka was a wife of the deceased for purposes of Section 29 and 40 of the Act. The law also appreciates the position that the deceased surviving children include even those born outside the marriage therein. In arriving at an appropriate formulae on the mode of distribution the letter and spirit of Part (v), of the law of succession and more specifically Section 35, 38 and 40 should be adhered to unless there are exceptional circumstances for the court to exercise discretion to the contrary. I now turn to address and determine the distribution of the estate of the deceased to his beneficiaries.

I have read the provisions of Section 35(5) and 38 of the Act they emphasize the doctrine of equal share and not equity. In the circumstances of this case upon reading and weighing the two proposals on distribution I take the following view:

Ngong/Ngong/[XXXX] to Eva Naima Kaaka the personal and household effects of the deceased absolutely, life interest as a whole and all household. KJD/Keekonyokie/Iliksumet/611 to SSK in equal share with TNK (her share to be held in trust by Tabitha Waithera Mararo). Mugunda/Nairutia/Block1/[XXXX] in equal shares to SSK and TNK (the share of TNK. a minor be held in trust by Tabitha Waithera Mararo) Nyandarua/Ndaragwa/Kiriogo/Block1(Kamiruri)141 the equal shares to Stella S.K. with T.N.K. a minor whose share is to be held in trust by Tabitha Waithera Mararo, Nyandarua/Ndaragwa/Kiriogo/Block/2 (Kamiruri) [XXXX] in equal shares to Stella Kaaka and TNK. (Minor) to held in trust by Tabitha Waithera Mararo Nyandarua/Ndaragwa/Kiriogo/Block 1Kamiruri [XXXX] to Eva Naima Kaaka life interest and thereafter in equal shares to SSK and TNK(Minor) her share to be held in trust by Tabitha Waithera Mararo), Nyandarua/Ndaragwa/Kiriogo/Block [XXXX] in equal shares to Stella Kaaka and TNK (TNK share to be held in trust by Tabitha Waithera Mararo, Nyandarua/Ndaragwa/Kamiruri 208 in equal shares to SSK and TNK Minor whose share shall be held in trust by Tabitha Waithera Mararo). The bank accounts absolutely to Eva Naima Kaaka. That the minor TNK shares be held in trust by Tabitha Waithera Mararo until she attains the age of maturity thereafter her share to devolve accordingly. The trustee in the interim is at liberty to establish a home to TNK on any of the properties allocated to her under the principle of the best interest of the child/welfare as provided for in Article 53(2) of the constitution. The administrator Eva Naima Kaaka to file a probate account with the Registrar of the High Court Kajiado within 6 months from today's date of the confirmed grant of letters of administration. This confirmation of grant be allowed in terms of the above court mandated distribution. For avoidance of doubt the main administrator in this estate is Eva Naima Kaaka with Tabitha Waithera Mararo's role limited to being a trustee to the estate in so far as the shares of the Minor TNK are concerned.

The costs be in the cause.

Dated, signed and delivered in open court at Kajiado this 10th day of December, 2018.

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Ombasa for the petitioner

Eva Maina Kaaka

Stalla