



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 786 OF 2002
IN THE MATTER OF THE ESTATE OF
JOSEPH AKUKO NYAMIRI (DECEASED)
AND IN THE MATTER OF APPLICATION BY
BETWEEN
JUMA NYAMIRI.....APPLICANT
AND
JACKLINE ATIENO NYAMIRI.....1ST RESPONDENT
HARRISON NYAMIRI AKUKO.....2ND RESPONDENT
RULING NO. 2

1. This matter before me today concerns the estate of Joseph Akuko Nyamiri (“the deceased”) who died on 9th October 2002. His children, Jackline Atieno (“Jackline”) and Harrison Nyamiri Akuko (“Harrison”), applied for grant of letters of administration to administer his estate which comprised several properties located in Kisumu. The grant of letters of administration intestate was issued to them on 23rd January 2003 and confirmed by the certificate of confirmation issued on 25th May 2004.

2. On 10th January 2006, the deceased's brother Juma Nyamiri (“Juma”) filed summons to revoke the grant under **section 76** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)**. He contended that the grant was obtained by fraud as the petitioners were not children of the deceased. Although the application was initially dismissed for non-attendance, I reinstated it and heard it based on the depositions filed and *viva voce* testimony of Juma, Jackline and Harrison.

3. Juma’s case was that the deceased never married Alice Mary Osuri Akuko (“Alice”), that he never sired any children and that the petitioners are imposters. Juma told the court that Alice was married to a man from Rarieda who bore the same name as the deceased. He further told the court that the Jackline and Harrison were the children of one lady, RMAA, who hailed from Asembo and was buried there in August 2000. He asserted that Alice was buried at Kajulu by mistake. Juma pointed out that when both Jackline and Harrison applied for identity cards they stated that came from Siaya and not Kabar, North East Kano where the deceased and his family hails.

4. Both Jackline and Harrison swore affidavits and testified. They confirmed that the deceased was their father and that when their mother, Alice, died she was buried at Kajulu. They both explained that when

they applied for their identify cards, they were allowed to refer to their the details in their parent identity cards which showed that they hailed from Siaya rather than Kisumu. They produced evidence to show that Alice was their biological mother and that when she died she was buried at Kajulu.

5. It is the burden of the applicant to prove that the petitioners are not children of the deceased. This proof is on the balance of probabilities. I heard the testimony of Juma and frankly I was into impressed by his demeanor. He was evasive and his testimony and answers were lacking the details necessary to support his case. It appeared he was hiding the truth.

6. Juma denied knowledge of Alice yet in the letter he was given by the office of the District Commissioner, Nyando dated 8th June 2005 to take to Kenya Breweries to process the deceased's benefits, it named Alice O. Akuko. Although Juma admitted that when Alice died she was buried at Kajulu, he told the court that she was buried by mistake. When asked about what he did when the he realized the mistake, he merely stated that he reported to the police. I am convinced that Juma knew that the deceased had a wife and children and that is why when she died she was buried on the deceased's property at Kajulu without any objection on his part.

7. The petitioners annexed a family photo of the deceased, Alice and the children to the affidavit of Harrison. When the photo was put to Juma in cross- examination, he admitted that the deceased was in the photo but he was evasive on the other members of the family. The petitioners also produced other documents including an affidavit sworn by the deceased on 10th March 2001 in which he confirmed that he married Alice in 1973 under Luo Customary Law and that they had three children. They also produced newspaper announcements published following the death of Alice which recognised her as the deceased's wife and Jackline and Harrison as their children.

8. The funeral service programme and eulogy leaves no doubt that Alice was the deceased's wife and that they had three children one of whom predeceased the parents. The program shows that she was laid to rest in Kajulu. It is worth noting that Alice died prior to the deceased and he would have likely raised issues if Alice was not his wife. He never complained when it was publicly announced that she was his wife and when she buried at his homestead at Kajulu in 2001. Juma cannot turn around and deny that his brother did not have a wife and children.

9. There is overwhelming evidence that Jackline and Harrison are the only surviving children of the deceased by his marriage to Alice Mary Osuri Akuko. The applicant failed to discharge his burden to show that the application for grant of letters of administration was obtained by fraud.

10. The summons for revocation of grant dated 7th January 2006 is dismissed with costs which I assess at Kshs 30,000 only.

DATED and DELIVERED at KISUMU this 3rd day of March 2017

D. S. MAJANJA

JUDGE

Mr Adiso instructed by Adiso and Company Advocates for the applicant.

Mr Nyanga instructed by Nyanga and Company Advocates for the respondents/petitioners.