



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 56 OF 2011

IN THE MATTER OF THE ESTATE OF VERONICA WAMBI.....DECEASED

AND

MILDRED ACHIENG AWARO.....PETITIONER

VERSUS

SAMUEL ONINDO WAMBIA (Guardian) Ad Litem of

DENIS WAMBIA ONINDO.....1ST OBJECTOR

MOSES JUMA OYOLA.....2ND OBJECTOR

CHARLES ONYANGO ODUKE.....3RD OBJECTOR

JUDGMENT

The late Veronica Juliana Aoko died in a road traffic accident on 10/9/2009 along Katitio - Sondu road. After her death Charles Onyango Oduke and Moses Juma Oyola Vs Samwel Onindo Wambi the 1st objector herein contested her place of burial vide Kisumu HCC No 143/2009. The court however ruled in favour of the Plaintiffs and the deceased remains were interred at Butso/5889 in Kakamega.

Subsequently the petitioner herein Mildred Achieng Awora filed the cause on her own behalf . The objectors herein proceeded to file their objection before the grant was issued. The substantive question therefore is who should be granted letters of administration on behalf of the deceased estate.

The court did order that the above question be determined via viva voce evidence. Their evidence can be summarised as below;-

PW1, the 1st objector Samwel Onindo Wambi, the deceased father in law testified that his son Dennis Wambi Onindo married the deceased on 31st March 1990 at St Pauls Catholic church Nairobi. They were blessed with two children namely Fredrick and Samwel who died at their early age due to cerebral palsy and autism disease.

In the year 1997, Dennis Wambi the husband to the deceased was involved in a road traffic accident which rendered him

incapacitated and forced to depend on the 1st objector. He is sill confined in a wheelchair according to the 1st objector. The 1st objector vide Kisii HCC No 158 /2010 (O.S) obtained orders appointing him the

Guardian Ad Litem of his son Dennis Wambi Onindo, an order which is still subsisting.

In effect therefore the deceaseds marriage with Dennis at the time of her death was still subsisting and according to the 1st objector, he is entitled to be appointed the administrator of her estate.

The 3rd objector Charles Oduke, equally filed his objection seeking to administer the deceased estate. She claimed that the deceased was his step sister but from different mothers. The petitioner too is her step sister. He said that he was a Catholic priest (Jesuits order) and that all that he wanted to do was manage the deceased estate in trust for her beneficiaries. He said that he was involved in the burial dispute earlier stated and was permitted to bury the deceased at Butso in Kakamega.

According to him the deceased had other dependants namely;

a) Moses Juma

b) George Ochango

c) Caroline Kanila

d) Chemtai dependant to Caroline. All were adults except Caroline who was still in school. He testified that Moses mother was presumed dead as she had gone missing for over 7 years as well as Georges mother too. According to him Kanila was the deceased baby sister and her daughter Chemutai was taken up by the deceased as her grandchild. He did not however produce legal documents to backup the above assertions.

The Petitioner Mildred testified that she was the sister to the deceased. That they were born 4 girls namely Benita, Atieno, Mary Apondi, the deceased and herself. She acknowledged that the deceased was married to Dennis Wambi but their marriage was never good and by the time the deceased died they were staying separately.

She said that the 1st objector took away Dennis from Kakamega home his place at Kamagambo where he is today. That she confided a lot with the deceased and as far as she was concerned she had the legitimate right of administering her sisters estate. She acknowledged that both the deceased and Dennis had 2 children who passed on while their marriage was substituting due to some illness. She confirmed that there was a burial dispute in respect to the place of the deceased interment between the 1st objector and the rest of the objectors. She denied that the rest of the objectors had the legal right to administer the estate.

The parties then proceeded to file their written submissions which I have had the benefit of perusing them together with the attendant cited authorities.

Analysis and Determination

At this juncture the issues which the parties seemed not to contest are that

a) The deceased was married to Dennis Wambi although no certificate of marriage was produced.

b) the deceased and Dennis had 2 children Fredrick and Samwel who have since died.

c) there was a burial dispute between the objectors herein and finally the court ruled that the deceased body be buried at Kakamega according to her wishes.

d) that Dennis as a result of the road traffic accident in 1997 is so incapacitated that he cannot vent for himself save through the assistance of his father the 1st objector vide a court order

appointing him as Guardian At Litem.

The fact of course that the deceased was buried at Kakamega does not entitle the objectors to be administrators of the estate. It must be known that mounting a successful burial dispute does not necessarily mean that one will automatically be appointed as administrator of a deceased estate.

Equally, it does not of its own permit one to inherit the estate of a deceased person.

The law governing administrators of an intestate estate is found under section 66 of the Law of Succession Act Cap 160 laws of Kenya which states that;

“When a deceased has died intestate, the court shall Save as otherwise expressly provided have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall, without prejudice to that discretion accept as a general rule the following order of preference-

a) Surviving spouse, or spouses with or without association of other beneficiaries.

b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interest or provided by part V;

c) The public trustee and

d) creditors.”

Part V thereof under Section 39(i) where an intestate has left no surviving spouse or children, the net intestate shall devolve upon the kindred of the intestate in the following order of priority -

a) father; or if dead

b) mother; or if dead

c) brother and sisters and any child or children of the deceased's brothers and sisters in equal shares; or if none

d) half brother or half sisters and any child or children of the deceased half-brothers and half sisters, in equal shares; or if none

e) the relatives who are in the nearest degree of consanguinity upto and including the sixth degree, in equal shares.....”

Its clear that the spouse takes the first priority in the order of succession. This was envisaged by the drafters of the Act for the simple reason that whatever they did together the remaining spouse ought to benefit before all and a sundry including the children.

In the instant case, there is no evidence that the deceased divorced her husband. Although there were suggestion that 12 years prior to her death they were separated , there was no sufficient material placed before the court. The petitioner herein have and the other objectors except the 1st objector were relatives to the deceased. They could therefore rank 2nd after Dennis.

The only special consideration here in this cause is that Dennis due to the accident has remained incapacitated and has to rely on his father the 1st objector for his upkeep and maintenance.

This seemed to have occurred even before the deceased died. If, peradventure, she desired not to have him as her husband, there

was nothing difficult in divorcing him. Part of the reason why Dennis is at his fathers place is because that was his home. Kakamega land seemed to have been acquired later. In any case there was no evidence that the 1st objector snatched Dennis from the deceased. The reason was so as to relieve the burden of taking care of the children who were equally in need and care.

The order giving the 1st objector to act as a guardian to Dennis has never been challenged. Although the 3rd objector argued that the said authority was not envisaged by the Succession Act, I do not think that that argument holds water. The order by Musinga J (as he then was) stated as follows;-

a) “ The respondent herein be and is hereby declared as a person of unsound mind and hence incapable of taking care of his personal interest, including safe guarding properties and this requires the applicant of a guardian Ad Litem.

b) The Applicant herein be and is hereby appointed as the guardian Ad Litem for and on behalf of the Respondent, who is of unsound mind.

c) The Applicant be and is hereby granted the liberty to protect and or vindicate the respondent's personal and proprietary interests, in general, including but not limited to filing and or taking such proceedings, as may be necessary to protect the interest of the respondent.”

Clearly the order is wide and inclusive. In my view the 1st objector has every right and authority to act on behalf of Dennis thus giving him priority over the petitioner as well as other beneficiaries or objectors. In my view they have not demonstrated way and how they think they should rank in priority ahead of Dennis even though he is incapacitated.

In any case none of them has objected to the guardian Ad Litem orders granted to the 1st objector.

Conclusion

I think I have stated as much to show that in sync with the Succession Act, the order of priority in terms of the administration of intestate recognises the spouse as of first amongst the rest who follow thereafter. In this case the 1st Objector, Smwel Onido Wambi is hereby appointed the administrator of the estate of the late Veronica Julia Aoko Auma Wambi for and on behalf of Dennis Onindo Wambi the husband.

Since the question of distribution of the estate is still pending, all is not lost for the other objectors as well as the petitioner and the persons mentioned during the evidence whom it was alleged were being maintained by the deceased.

As this is a family dispute each party shall meet their respective costs.

H.K. CHEMITEI

JUDGE

Delivered this 15 th day of March 2017 by

D.A.S. MAJANJA

JUDGE