



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
SUCCESSION CAUSE NO. 19 OF 2016

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

TABITHA WAITHERA MARARO aka

TABITHA WAITHERA MARARO KAAKA.....APPLICANT

VERSUS

EVA NAINA KAAKA1ST RESPONDENT

STELLA EIYAN KAAKA.....2ND RESPONDENT

RULING

Introduction

1. The deceased herein one Nicholas Kaaka Kapore died on 22nd November 2014. Before his death the deceased was the registered owner of Ngong/Ngong/45796; Mugunda/Wairrutia Block 1/1205;Nyandarua/ Ndaragwa/Kiriogo/Block 1(Kamiruri)142; Nyandarua/Ndaragwa/Kiriogo/Block 1(Kamiruri)141; Nyandarua/ Ndaragwa/Kiriogo/Blocks 1(Kamiruri)201.

2. Grant of letters of administration of the estate of the deceased was made to Eva Naima Kaaka(wife to the deceased) and Stella Seiyen Kaaka (daughter to deceased) on the 19th September 2016.

The application

3. On 17th October 2016, the Applicant made an application for summons for revocation or annulment of grant.

4. The grant for letters of administration intestate was issued in respect of the estate of Nicholas Kaaka Kapore on 19th September 2016.

5. That Application was based on the grounds that;

1. The proceedings to obtain the grant were defective in substance.

2. The grant was obtained fraudulently by making false statements and concealing from the Honourable court material facts to the case.

3. The aforesaid grant was obtained by means of untrue allegation of the facts essential in point of law to justify the grant.

6. The Applicant, in her Affidavit in support of the summons for revocation of grant averred that she was the second wife of the deceased and had one child TNK, a minor with the deceased.

7. The Applicant in a further Affidavit averred that the deceased had conducted a DNA test which confirmed he was the father of the Applicant's daughter. She further averred that three people had witnessed her traditional marriage to the deceased. These three persons swore respective affidavits to confirm this and also gave oral evidence in open court to this effect. A government chemist also confirmed the results of the test.

8. The Applicant proceeded to aver that the Respondents had not sought her consent while petitioning for the letters of grant of administration. Moreover, the Respondents had fraudulently caused a minor to swear into giving consent to the making of a grant of administration intestate. The Respondents had further left out the names of the Applicant and her minor daughter from an amended petition.

9. The Applicant also averred that she had started cohabiting with the deceased in the year 2008 in the residence Ngong/ Ngong/45796 situated at Kamuru, Matasia Kajiado County.

10. In response to the Respondent's claim that the deceased's estate had gone to waste since the applicant had chased away all the tenants, the applicant averred that the Respondents continue to collect rent from the rental units on Ngong/Ngong/45796 and the respondent has welded permanently the doors of some units thereon.

The Respondent's case

11. The Respondent avers that she is the only widow of the deceased. Further the deceased had only one daughter and further that at the time of his demise he had assumed parental responsibility of JNK, a minor.

12. The Respondent denies knowing the applicant as a wife of the deceased.

13. The Respondent avers that the applicant is facing a criminal case where she is charged with forging the death certificate of the deceased and the birth certificate of the child.

14. The Respondent avers that the Applicant was a tenant at the premises owned by the deceased and took advantage of that state to claim the property.

15. The Respondent further avers that neither the deceased nor the applicant sought her consent to marry a second wife and that she was not aware of any marriage.

SUBMISSIONS

Applicant's Submissions

16. Counsel for the Applicant submitted that there are three main legal issues for determination. These are whether the Applicant and her should be a wife and child of the deceased for purposes of the law of Succession, hence entitled to benefit from the estate of the deceased; Whether the Respondent committed an offence by omitting the Applicant's child in the cause of applying for a grant of letters of Administration and lastly whether this Honourable court should exercise its jurisdiction in favour of the Applicant as against the Respondents and revoke the grant of letters of Administration issued in this matter.

17. Counsel submitted that the evidence of the Applicant in respect of payment of dowry was not controverted at all by the Respondents. Counsel also submitted that it was the Applicant's evidence that

she cohabited with the deceased husband at Ongata Rongai town from year 2008 and later and at the time of the demise of her husband at Stevani house being one of the assets of the deceased known as LR. No Ngong/Ngong/45796 situates at Matasia in Kajiado County and upon which a unit thereon served as matrimonial home of the Applicant herein. Counsel cited **In the matter of the estate of Geoffrey Githu Kahoro(deceased)2013Eklr P.3 where Musyoka J held;**

Could marriage be presumed from prolonged co-habitation between the deceased and the 1st Applicant? The Kenyan law on this was authoritatively stated in Hotensia Wanjiru Yawe Vs The Public trustee Court of Appeal number 13 of 1976 where it was held that the fact of a long cohabitation between a man and a woman can give rise to a presumption of a marriage in favour of the woman, which presumption can only be rebutted or displaced by a cogent evidence to the contrary.

18. In addition to the above counsel submitted that although the certificate o birth of the minor was issued on 16.12.2015, after the demise of the person to whose this cause pertains, it is not disputed that the names of the deceased had been entered thereto properly and the same must have arisen from the birth notification which is not contested and or tendered has evidence before this court. Counsel directed this court to the authority cited above where the court held that;

“... there is a supporting certificate of birth, which shows the deceased as the father of the child. No evidence has been presented to challenge the authenticity of the certificate. The child was also accepted by the deceased and raised as his own child.”

19. Counsel also submitted that the minor in this cause was confirmed to be a child of the deceased vide DNA carried out during the lifetime of the said deceased therefor the question of paternity does not arise.

20. On the second issue, counsel submitted that the Respondents filed two petition for Grant of letters of Administration intestate for the estate of the deceased. In the first petition presented to court on 7th April 2016, counsel submitted that facts had been misrepresented as follows;

- i. Caused a minor, Joan Nyokabi Kaaka to swear an affidavit while knowing that the minor was not aware of the consequences of taking oath.
- ii. Fraudulently procuring a letter from the area local chief of Lower Matasia sub-location on 16.03.2016 indicating that Joan Nyokabi Kaaka was a daughter of the deceased.
- iii. Fraudulently omitting the name of the Applicant in the petition without citing her first.

21. Counsel proceeded to submit that on the second alleged amended petition filed in court on 25th July 2016, acts had been misrepresented as follows;

- i. Obtaining a letter of the local area assistant chief fraudulently from upper Nkoroi sub-location, well Respondents were aware that they had obtained another earlier letter albeit from an assistant chief from a different sub location.
- ii. Concealing the names of the minor TNK and the Applicant from being included in the aforesaid letter.

22. Counsel submitted that the Respondents have committed a cognizable offence as per Sec 52 of the Law of Succession Act (CAP 160) by willfully or recklessly making a statement which is false and that this Honourable court has jurisdiction to punish the Respondents as per the provisions of Sec 52.

23. In conclusion, counsel submitted that the matter reveled by the Applicant’s pleadings points out that the provisions of sec 76 of the law of Succession Act were breached by the Respondents and as such, calls for revocation of the grant so issued.

Respondent's Submissions

24. The Respondent in her submissions avers that in order for the applicant to prove the grounds upon which her application was premised, she must show that she had an interest in the estate of the deceased either as a wife or bore a child while married to the deceased and that the amendment to remove the child's name from the petition was unlawful.

25. Respondent's counsel submitted that the Applicant could not prove that she was married to the deceased as she was unable to remember the date the alleged marriage ceremony took place and how many people were present. The only evidence adduced by pw4, the mother of the Applicant was that the only ceremony done was a Kikuyu traditional marriage whereas the deceased was a Maasai. Counsel submitted that as per sec 51 as read with sec 53 of the Evidence Act CAP 80, the burden was upon the applicant to call an expert in Maasai customary law to prove whether the alleged marriage took place.

26. Counsel also submitted that the Applicant failed to adhere to the norms of naming the child and that it is the change of name that caused the petitioner to amend the petition. Counsel submitted that if the court makes a finding that the child is o the deceased, then she can be considered using division of the property but that cannot be a ground to revoke the grant.

27. Finally, counsel submitted that although DNA report was produced, no evidence was tabled to show the deceased ever took care of the child as requested and it is not clear why no action was taken on the DNA report from 2013 to date. Counsel also submitted that the Certificate of the child was issued after the demise of the deceased which was highly suspicious.

28. In conclusion, counsel submitted that the Applicant ought to have made an application under section 26 as read with 27,28 and 29 of the Succession Act CAP 160 Laws of Kenya to be considered as a dependent and that the Applicant should have filed objection proceedings instead of revocation of grant.

Determination and analysis

29. The first issue for determination is whether the Applicant and her child are a wife for purposes of the law of succession Act.

30. Bromley Family Law, 5th Edition 64 reads as follows: -

“If a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married and when it is challenged, the burden lies on those challenging it to prove that there was in fact no marriage, and not upon those who rely on it to prove that it was solemnized.”

Bromley says that the two essentials of marriage are the ones really presumed that they went through a valid marriage and that they had capacity.

31. In **CHRISTOPHER NDERI GATHAMBO & SAMUEL MUTHUI MUNENE.. vs SAMUEL MUTHUI MUNENE[2003] eKLR Hayanga J** stated that

“..... Here, the Plaintiff says they cohabited for 17 years and there is a child born in the union so he urges a presumption. In the case of HORTENSIAH WANJIKU YAWE V PUBLIC TRUSTEES EACA C.A. NO. 13 OF 1976 (UR) Mustafa J.A. said: -“The position seems to me to be this. The appellant had testified that she was married to the deceased, and the deceased in an application in 1966 had stated that the appellant was his wife. By general repute and in fact the parties had cohabited as man and wife in a matrimonial home for over 9 years before the deceased died.. and during that time the appellant bore him four children.. long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant only cogent evidence to the contrary can rebut such a presumption.. such a presumption carries considerable weight in the assessment of evidence. Once that factor is

put into the balance into the appellant's favour the scale must tilt in the direction.. Even if the proper ceremonial rituals were not carried out that would not invalidate the marriage."

32. In the present case, the Applicant testified that she cohabited with the deceased husband at Ongata Rongai town from the year 2008 and later and at the time of the husband's demise at one of the deceased's asset LR No. Ngong/Ngong/45796. The Applicant also testified and produced evidence that out of their union an issue was born. This court was presented with results for a DNA test confirming the paternity of the deceased. The Respondents have not brought in evidence to rebut the presumption of this marriage as per the principle in *Hottensia Yahwe*.

33. Additionally, from the evidence adduced before this court and the Affidavits sworn by Stephen Mbutu Mbutia (PW3), Elizabeth Wanjiru Mararo (PW4) and Joseph Maikai Ole Koitee on 4th November 2016 it is evident that the Applicant was married to the deceased under the Kikuyu-Maasai customary law.

34. According to PW3 and PW4 evidence each of them participated in witnessing the deceased agree my formalizing the marriage with PW1 – Tabitha Mararo the applicant by providing a traditional Maasai/Kikuyu sword 'njora' (traditional sword) a suit for the father to the applicant (instead of the blanket), a skirt suit for PW4 (instead of kanga and cash Ksh.50,000/=).

35. It is also clear from the evidence by PW1, PW3 and PW4 that the Ksh.50,000 was appropriated to solemnize the customary marriage thus: Ksh.10,000 for purpose of a she-goat and ewe (in Kikuyu known as mwati and harika). Ksh.10,000 for a tin of honey, Ksh.10,000 for two bundles of firewood and Sh.20,000 to be later spent on heads of animals known as mirigo.

36. According to PW1, PW3 and PW4 the parents gave a nod to the marriage between PW1 and the deceased following the substantial fulfillment of the requirements of Maasai/Kikuyu Customary Law.

37. As supported by the evidence in these proceedings the marriage between the applicant and the deceased was never annulled during the lifetime of the deceased. The Respondents have not brought any cogent evidence in rebuttal of this fact.

38. Are the Applicants therefore dependants off the deceased?

39. S. 29 For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

40. Having established that the Applicant is a wife to the deceased, then it automatically follows that the Applicant and the Applicant's child are dependents as described in section 29 of the Law of Succession above.

41. The other issue for consideration is whether this Grant ought to be revoked by the fact that there was misrepresentation of facts and that material facts were withheld from this court as alleged by the Applicant.

42. The family courts have widely discussed this subject in various authorities: in the case of the **Estate of Mutambu Ndiku P&A in Succession Cause No. 2688 of 2002 at Nairobi** the court deal with a

similar circumstances where the widow of the deceased son had been excluded in participating during the application and petitioning of the grant of letters of administration. The widow applied for revocation of the grant on grounds that she had not been notified nor consented to the petition being lodged by the grant holder. The court held that the grant had been obtained through a defective process and it was therefore ordered revoked.

43. In deciding a similar application in the matter of the **Estate of Muriranja Njiri Succession Cause No. 890 of 2003 at Nairobi UR** the Court stated that where a consent of the widow of the deceased was not obtained or never participated in the proceedings to execute any of the mandatory forms to support the application the grant was revoked for failure that it was not made in accordance with the laid down statutory requirements.

44. I have considered the evidence, the witness statements, the verifying affidavit, the documents exhibited, the submissions and authorities cited in this matter.

45. The Applicants procured two letters from two different area chiefs. Both letters are dated 16th March 2016. The letter obtained from Upper Nkoroi sub location Assistant chief excludes both the Applicant and her child from the list of beneficiaries while the letter from the Assistant Chief Lower Matasia sub-location includes the Applicant's Minor as a beneficiary but excludes the applicant. The fact that the Respondents obtained two letters from the chiefs with an intention to gain different results shows that they were being fraudulent in their dealings. The fact of existence of the Applicants minor was in their knowledge but they choose to subvert this fact by obtaining a second letter from a sub-chief in a different location. This ground on itself warrants for revocation of the grant issued.

46. Additionally, from the Affidavits filed in this court, it is not in dispute that the Applicant was known to the first Respondent, in fact the 1st Respondent avers that sometime in 2013, the Applicant dumped the minor in their premises but she later came back and collected her. She also admits to the fact that the Respondent was occupying one of the rental houses owned by the deceased.

47. The existence of the Applicant and the Applicant's minor was a material fact that was in the knowledge of the Respondents as at the time of making the application for the grant. These facts ought to have been disclosed but they were intentionally withheld from the court. The grant issued on 19th September 2016 is hereby revoked.

48. Section 66 of the Law of Succession Act provides as follows;

“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 interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide 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 interests as provided by Part V;**
- (c) The Public Trustee; and**
- (d) Creditors;**

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

Orders

49. The Application dated 17th October 2016 is allowed.

50. The Grant of letters of Administration issued on 19th September is hereby revoked.

51. The Respondents are directed to apply for fresh letters of administration and enjoin the Applicant herein as a co-administrator.

52. The Applicant's minor be included as a beneficiary in the fresh letters of Administration.

53. This being a family matter there shall be no orders as to cost.

54. It is so ordered.

Dated, signed and delivered in open court at Kajiado this 13th day of March 2017

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R NYAKUNDI

JUDGE

In the presence of:

Mr. Nzau for the applicant present

Mr. Itaya for the respondent

Mr. Mateli Court Assistant