



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 1008 OF 2014
IN THE MATTER OF THE ESTATE OF M A O (DECEASED)

M OPETITIONER/APPLICANT

VERSUS

C A O.....1ST RESPONDENT /PETITIONER

P O O.....1ST RESPONDENT /PETITIONER

R U L I N G

1. This matter relates to the estate of M A O who died on 1st May, 2013 intestate. A Grant of Letters of Administration Intestate was issued to C A O and P O O (hereinafter the Respondents) in their respective capacities as daughter and brother of the deceased. She was not married but during her lifetime, the deceased took care of the following beneficiaries;

- a. M O - Sister
- b. M O - Sister
- c. J W O O - Brother
- d. P O O - Brother
- e. S O - Sister
- f. R B M - Brother
- g. S K H - Brother
- h. C A O - Niece

2. On 30th January, 2015 a Summons for Revocation or Annulment of Grant, dated 8th September, 2014 was lodged in this cause by M O (hereinafter the Applicant), one of the beneficiaries for orders that:

- a. Directions be given as to what persons may be served with the summons and affidavits herein and Probate of Administration of the Estate be hereby administered by herself;
- b. A grant of probate of letters of administration intestate issued on the 8th September, 2014 to the

Respondents be revoked or annulled.

c. A temporary injunction do issue against the Respondents, their servants, agents and or representatives from using, managing, selling, disposing off, transferring, leasing or interfering with the estate of the deceased in any way with the said letters of administration they have already obtained.

d. The petition for grant of letters of administration in this cause be consolidated with Succession Cause No. 281 of 2014 earlier filed by the Applicant.

e. Any subsequent sub-division, transfer and or transaction of the deceased estate and properties using the fraudulent letters of administration obtained herein be revoked, suspended and or annulled.

f. The Respondents do give a full account of any portion of the estate of the deceased they have since assembled.

g. The court do penalize the Respondents for forgery and perjury, and the Applicant be enjoined in the administration of the estate of the deceased and a new letters of administration be issued.

h. The court do issue a caveat to be served upon the deceased properties and subsequent titles hived thereof using the said Letters of Administration obtained by the Respondents.

3. From the averments in her affidavit sworn on even date, she grounds her application on reasons that the application for grant of letters of administration intestate was fraudulent as there were untrue allegations of fact essential in point of law to justify the grant. That the beneficiaries had not been notified by the Respondents that they had filed petition in court while the Applicant on the other hand, had filed a similar application in Succession Cause No. 281 of 2014 which the Respondents objected to and failed to disclose to this court.

4. The Applicant argues that the Nairobi area chief's letter dated 15th April, 2014 is questionable since the chief did not know the deceased's background which can only be clarified by the area chief where the deceased's remains were interred. That the Respondents' intention is to divide and dispose of the deceased estate and more particularly the land titles without the other beneficiaries' knowledge. That in case the Respondents sell the deceased's property, the Applicant and other beneficiaries are likely to suffer irreparable loss.

5. The application was opposed by C A O in an affidavit sworn on 18th March, 2015, who is named in the application as first Respondent. She avers that the information disclosed while applying for the grant was truthful, honest and made in good faith and that the grant was not obtained fraudulently, or out of non-disclosure of information on the Respondents' part.

6. The Respondent further avers that she is aware that the element of non-disclosure, fraud and acting mala fides was eminent on the part of the Applicant in Succession Cause No. 281 of 2014 since in her list of beneficiaries, she failed to disclose that the 1st Respondent was a dependant or beneficiary of the deceased which material fact she knew to be true.

7. The Respondent asserts that the deceased adopted her as her child and took responsibility over her while she was still a child, paid her school fees and took up general care over her childhood. That the Applicant knew this fact since the Respondent's biological mother was a sister to both the Applicant and the deceased. That on 14th April 2014 the family of the deceased, the Applicant included were summoned by the Chief, Parklands Location where the chief informed them that, the 1st Respondent was the only surviving child of the deceased and she should be granted the mandate to pursue Administration of the deceased's property. That the chief wrote the letter naming the 1st Respondent as the sole beneficiary to the estate of the deceased.

8. The Respondent denies that she intends to sell the property of the deceased, or that she hid any material facts when making the petition, or that she harassed or threatened any other party. The Respondent states that there is no prejudice caused if the grant of letters of administration is made to her since the grant was issued on 8th September, 2014 and is yet to be confirmed and as a result the estate is yet to be distributed.

9. The Respondent denies having derived any income from the deceased's estate and therefore she has nothing to account for. She alleges that the Applicant has continued to illegally earn rental income from L.R. No. 209/[particulars withheld] for which she should be held responsible. That the

Applicant has taken away all the documents of ownership including but not limited to land title deeds in respect to the Buruburu and Westlands houses and has refused to avail the said documents for purposes of applying for letters of Administration.

10. The Applicant swore a supplementary affidavit on 12th February, 2016 in which she deposes that according to the Guardian Ad-litem affidavit dated 16th April, 1992, at paragraph 7, in Adoption Misc. cause No. 3 of 1992, the 1st Respondent was disinherited by the deceased as concerns all the deceased's properties. That she should therefore be removed from the list of beneficiaries in respect of the deceased's properties.

11. The Applicant avers that the 1st Respondent was adopted by the deceased for purposes of benefiting from an education policy that the deceased's employer [particulars withheld], was providing for children of their employees. That since the deceased had no child of her own to benefit, she opted to have the benefit go to the 1st Respondent who was her niece, a fact that is in the knowledge of all the deceased's siblings and relatives. That at the time of adoption the Respondent was 13 years old and was aware of the terms and conditions of her adoption by the deceased. That she cannot now claim the deceased's whole estate which will go against the deceased will.

12. The Applicant argues that the deceased worked outside the country and did not live with the Respondent at any one time in her life, even after the Applicant's biological mother passed on in the year 1997. That after her O level, the Respondent totally cut ties with the deceased, and only visited the deceased when she was terminally ill. The Applicant has attached a next of kin form in which the deceased indicated the Applicant as the next of kin in all her documents and in the management of all her properties and that all the family members are aware of this fact. That deceased left a will.

13. The Applicant asserts that since the deceased had no child of her own and was not married, the interest in her estate devolves to the O family which includes the 1st Respondent's mother. That therefore the 1st Respondent will share in the interest due to her late mother.

14. M/s. Nyang learned counsel appearing for the Applicant submitted that the adoption proceedings have not been challenged by the Respondent, since the only contention by the 1st Respondent is that she is a child of the deceased by virtue of the adoption order and is therefore entitled to be the sole heir of the deceased's estate. That no other reason has been advanced to this court as to why the deceased's will should not be respected now that the 1st Respondent confirmed in her own evidence that she had very bad blood with the deceased before her death and that apart from visiting the deceased in Namibia, they never stayed together as a family.

15. The issues that arise for determination from these proceedings are firstly, whether the deceased died intestate or testate and secondly, what the rights of the Applicant/Petitioner are as an adopted child, vis-a-vis those of the siblings of the deceased to inherit the estate of the deceased.

16. As regards the will it is trite law that parties are bound by their pleadings. From the record it is observed first, that the Objector, M O filed Form P&A 80 on 11th February 2014 to commence her **"petition for letters of Administration Intestate"** in Succession Cause 281 of 2014. She avers in that Form P&A 80 that **"The deceased died intestate domiciled in Kenya"**. Second, other beneficiaries

being M O, J W O O, P O O, S O, R B M and S K H signed “**consent to the making of a grant of administration intestate to a person of equal or lesser priority**”. Thirdly, J O a sibling to the deceased and the Objector testified that the deceased’s will has never been found and it is for that reason that in 2013 they filed for a Grant of Letters of Administration intestate.

17. The court observes that there is a copy of a purported will annexed to the Objector’s supplementary affidavit which the Objector explained was prepared in Nambia and the witnesses thereto affixed their signatures without stating their names. She appears to have abandoned it and that is why it was not annexed to the petition and the petition itself is for grant of letters of Administration intestate and not for probate of will. The copy of the will is therefore of no probative value in this cause.

18. The ground on which the revocation of grant is sought is that the Respondent is not the child of the deceased and that it is the Petitioner who managed the deceased’s property while she was alive. The four witnesses who testified in support of the objection did not dispute that the deceased who was not married had no children of her own and her parents predeceased her. The other important and undisputed fact is that the deceased adopted the Applicant by order of court issued in Adoption Misc. Cause No. 3 of 1992.

19. The common argument running through the testimonies of the four witnesses for the objection is that [particulars withheld] for whom the deceased worked had a good educational package for the children of their employees. That since the deceased had no children of her own she adopted the 1st Petitioner but the adoption was limited to availing her [particulars withheld] educational package to the 1st Respondent and did not extend to inheritance. The court was told that in fact the relationship ended when the Respondent performed dismally in her Form Four examinations and refused to repeat the exams. Only the 2nd Respondent is of the view that the property should devolve to the 1st Respondent.

20. Section 174 Children Act which gives the guiding principles on intestacies, wills and settlements states inter alia as follows:

“(1) Where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any movable or immovable property (other than property subject to an entailed interest under a disposition made before the date of the adoption order), that property shall devolve in all respects as if the adopted person were the child of the adopter born inside marriage and were not the child of any other person.

2. In any disposition of movable or immovable property made, whether by instrument *inter vivos* or will (including codicil), at the date of an adoption order—

(a) any reference (whether express or implied) to the child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person;

(b) any reference (whether express or implied) to the child or children of the adopted person’s natural parents or either of them shall, unless the contrary intention appears, be construed as not being or as not including, a reference to the adopted person.”

21. In this regard I am in complete agreement with Musyoka J in his exposition in the matter of the **Estate of Simon Njehia Mundia HC Succession Cause No. 2079 of 2015**, where he rendered himself thus:

“The administrators herein, the administrator and their counsel, ought to understand that once an adoption order is made in respect of any child, such child acquires all the rights to inheritance and succession to the estate of their adoptive parents as would be the case if they were their natural or biological parents. That is the effect of Section 174 of the Children Act, Cap 141, Laws of Kenya. Such children should get their due, and it is the duty of the court to ensure that they do.”

22. Section 174 Children Act does not provide for degrees of adoption. It must be understood that an adoptive parent can no more change their mind about being the parents of a child once the said child is adopted through a valid process of an adoption, than natural parents can change their mind about being the biological parents of their child once the child is born. An adoptive parent by the very process of adoption assumes parental responsibility over the subject child irrespective of where the child physically resides. A falling out between parent and child does no more sever their relationship than it does for the natural parent and child.

23. Adoption is different from guardianship or fostering which do not automatically confer the rights of inheritance and succession from the guardian to the ward. All witnesses herein paid glowing tribute to the deceased whose generosity saw many of her nieces and nephews through school and also bought properties for her siblings. Without a will, however, in which she expressly distributed her property to them, her estate must devolved to her only child the 1st Respondent.

24. Under section 16(1) and section 19 of the Adoption Act under which the deceased adopted the 1st Respondent and which was the precursor to Section 174 of the current Children Act, the law provided that:

“16 (1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights of appoint a guardian and to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.”

“19. where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any movable or immovable property (other than property subject to an entailed interest under a disposition made before the date of the adoption order), that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person.”

25. In view of the Adoption order vesting parental rights and responsibilities in the adopter the minor, the adopted child enjoys rights as if born in wedlock. The 1st Petitioner is no exception to this rule. In the eyes of the law the deceased herein had a surviving child to her estate and as a consequence, Section 38 of the Law of Succession Act is to the effect that where the deceased is survived by a child the whole estate devolves to the child in this case the 1st Respondent/Petitioner.

26. The 1st Respondent/Petitioner in this case has on more than one occasion demonstrated willingness and intent to share the distribution of the Estate of the deceased but was frustrated by the Objector. Under section 38 where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

27. Learned Counsel Mr. Jumba for the Respondents also filed written submissions as did Miss Nyang for the Objector. The authorities of **Elizabeth Kamene Ndolo vs George Matata Ndolo, Estate of Ishmael Juma Chelanga** and **Ruth Wamaitha Njuguna vs Stanley Ndungu Njuguna** to which M/s. Nyang referred the court however were not of much help in this case and are distinguishable as they pertained to widows who were ascertaining their claims and illegitimate children who wished to be recognized as heirs to the estate. None of those situations apply to the circumstances in the cause before me.

28. In sum the objection raised by M/s. M O is found to lack merit and is dismissed.

DATED, SIGNED and DELIVERED at NAIROBI this 14th DAY OF June 2017.

L. ACHODE

JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the Respondents