



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
SUCCESSION CAUSE NO. 430 OF 2010
IN THE MATTER OF THE ESTATE OF
A M A (DECEASED)

B K M

J O A.....PETITIONERS

VERSUS

F N N OBJECTOR

RULING

1. **A M A** (herein, the deceased), died on the 12th March 2010, at the age of forty four (44) years and a police officer by occupation. According to the letter dated 20th April 2010, from the chief of his location he left behind his one wife, **B K**, and five minor children i.e four daughters namely C M, W B, C K and V K and a son, S N.

The widow together with a brother of the deceased, **J O A**, filed a petition for letters of administration intestate on the 28th September 2010. They deposed in their supporting affidavit that the deceased was survived by the widow Beatrice and the five children aforementioned.

The affidavit indicated that the assets of the deceased comprised of pension benefit from the Kenya Police and savings from his bank account with Barclays Bank of Kenya.

2. A grant of letters of Administration Intestate was eventually issued to the petitioners on the 19th January 2011, even though they had also made an attempt to obtain a limited grant for purposes of accessing the deceased's pension and savings.

A few months thereafter, by a letter to the Deputy Registrar of this court dated 12th April 2011, F N (herein, the objector) claimed that she was also a wife of the deceased with whom they had children but no consent was obtained from her by the petitioners prior to obtaining the grant. She only learnt of their petition from the police headquarters. She was therefore raising an objection to confirmation of the grant pursuant to the summons for confirmation of grant filed on 19th August 2011, by the petitioners.

3. The objector filed a formal objection to confirmation of the grant on 2nd February 2012, in which she lists six (6) grounds for the objection viz:-

(i) That, the petitioners falsely swore that the deceased died having five (5) daughters surviving him.

(ii) That, the area chief, John Bosire Oire, misled the court by giving false information that the deceased was married to only one wife and blessed with five (5) children.

(iii) That, the objector was not aware as to when the succession cause was filed as this was done in secrecy.

(iv) That, the objector is also the wife of the deceased who married her in 1997 and are blessed with three minor children namely M N, S M and F A.

(v) That, the objector has evidence to prove the existence of her marriage with the deceased being the chief's letter dated 13th January 2011, a letter from police headquarters dated 8th November 2010, and a letter from the DC Nyamira , dated 14th January 2012.

(vi) That, the objector will suffer irreparable loss if the grant is confirmed in favour of the petitioners with her and her children being left out.

4. Apparently, the summons for confirmation of grant was never prosecuted thereby rendering the objection thereto obsolete.

Nonetheless, the objector took out summons for revocation and/or annulment of grant dated 28th February 2012, on grounds that the grant was issued pursuant to false representations and concealment of material facts by the petitioners and that the objector and her children were excluded as beneficiaries of the estate of the deceased. Further that, if the grant is not revoked then the objector and her children will stand to be unfairly disinherited.

These grounds are based on the averments contained in the objector's supporting affidavit dated 28th February 2012, together with the annexures thereon.

The grounds were re-iterated and affirmed at the oral hearing of the application whereby the objector testified and called a witness, **Felix Kamba Kitema (PW 2)**, who relied on the averments in his affidavit dated 12th January 2016.

5. The application is opposed by the petitioners on the basis of the averments contained in their replying affidavit, dated 10th May 2012. Both testified at the oral hearing of the application and reiterated the contents of their affidavit. They called a witness, **Juvenalis Kibwana Mochache (DW 3)**, who supported their firm position that the deceased was married to the first petitioner as his only wife and was never at all married to the objector as his second wife.

6. On conclusion of the hearing, both parties filed their respective written submissions which when considered alongside the grounds in support of the application and those in opposition thereto raise one crucial issue for determination and that is, whether the objector was also a wife to the deceased and if so, whether the marital relationship brought forth three issues as alleged by the objector.

If the answer is in the affirmative, then it would follow that the grant issued to the petitioners was obtained by false representations and/or concealment of the fact that the deceased was also married to the objector and that they had three children together.

But, if the answer is in the negative, then it would mean that the grant was properly and validly issued to the petitioners and therefore, the objector and her children would be regarded as strangers to the estate of the deceased unless otherwise.

7. **The Law of Succession Act (Cap 160 LOK)**, is the applicable statute in relation to intestate and testamentary succession and the administration of estates of deceased persons and for purposes connected therewith and incidental thereto.

Under S.3(5) of the Act, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of the Act and in particular S.29 and S.40 thereof, and her children are accordingly children within the meaning of this Act.

8. Part V (i.e Ss. 32 to 42) of the Act relates to intestacy succession such as the present matter and the general rule is that intestacy essentially benefit persons who have a direct blood link with the deceased apart from spouses. The purpose of the rules of intestacy is to hand over the deceased's estate to the person who is most likely to use it in the best interest of the deceased's heir and dependants and that person is usually the mother of the deceased's children.

A wife or spouse of the deceased person is therefore a very important and prominent feature in intestacy succession. In such succession, a benefit would not be conferred to unmarried partners. A person claiming to be a relative or a person beneficially entitled to the estate of the deceased is allowed to make a claim under S.26 of the Act and in that event, the court may make reasonable provision for that person.

9. Herein, the big question is whether the applicant/objector was a second wife to the deceased and if not whether they had any issues together.

Basically, the objector relies on two documents to show that she was married to the deceased and that they had children together. These are not marriage certificates or related documents but official letters from public offices. The first is a letter from the D.C's offices Nyamira dated 14th January 2011 (Annexure marked EXB "FNN 4" in the supporting affidavit) and the second is a letter from the office of the Attorney General (Public Trustee) dated 17th November 2010.

10. The letter from the Public Trustee (Exh "FNN 5") was addressed to the D.C Nyamira referring to a letter dated 23rd November 2010, which indicated that the first petitioner was the only wife to the deceased and that they had five (5) children together.

The letter ("FNN 5") required a clarification on the deceased's marital status as it appeared to the public trustee that he had a second wife in the person of the objector with whom they had three (3) children. The letter from the D.C (Exh "FNN 4") was the reply. It clarified that the deceased had two wives being the first petitioner as the first wife and the objector as the second wife. Both had children with the deceased.

11. Apart from the aforementioned letters, the objector also referred to a letter dated 13th January 2011 from a chief in Keera Location addressed to the District Officer Nyamaiya Division, indicating that the deceased had two wives and had children with each of them.

There is also a letter dated 8th November 2010, from the police headquarters addressed to the public trustee indicating that the first petitioner and the objector were wives to the deceased. These two letters were contained in the objector's notice of objection to the confirmation of grant dated 2nd February 2012.

12. Suffice to state that within the official echelons the information was that the deceased was married to both the first petitioner and the objector and that each of them had issues with him. However, within the deceased's family set up the deceased was married to only one wife who was the first petitioner and together they had five (5) children. According to the petitioners, the objector surfaced after the death of the deceased and claimed to have also been his wife and her children were his children.

13. The objector herein testified that her marriage with the deceased was contracted in Nairobi in 1997 under Kikuyu Customary Law even though the deceased was a Kisii by tribe.

A person called **D.O.**, is said to have known about the marriage since dowry in the sum of Ksh. 10,000/= was paid by the deceased to the objector's father in his presence and that of two elders from the side of the objector. There was no elder from the side of the deceased.

Neither the said O nor the objector's father nor the two elders were called as witnesses to confirm the alleged marriage between the deceased and the objector.

Apart from what the objector stated there is no evidence to prove that a marriage whether customary or otherwise was contracted between the deceased and the objector in the year 1997 or any other year.

14. If there was no marriage between the two, the objector could not be heard to claim that she was a second wife to the deceased. Indeed, a part from Felix (PW 2) no other person knew her as such. In his testimony he merely indicated that the deceased was his workmate and that he had introduced the objector to him (Felix) as his wife.

There was nobody from the office of the public trustee or the police headquarters or the D.C's office at Nyamira who was called to testify and/or depose an affidavit to confirm the validity of the documents and in particular those marked "FNN 4" and "FNN 5" which the objector sought to rely on to prove that she was married to the deceased. The petitioners disowned those documents. It would therefore have been prudent for officers in the aforementioned public offices to have appeared in court or deposed affidavits to confirm the authenticity of the material documents and perhaps disclose the actual source of the information contained therein.

15. It is intriguing and ironic that the objector claims that she was married to the deceased yet she admitted herein that she had never met his parents prior to his death and her parents and his parents had never met. This was clear indication that she was not a wife to the deceased let alone being a member of his family. Most likely than not, she was his girlfriend or ladyfriend or secret lover or an unmarried partner with whom he may have or have not sired children out of wedlock.

In normal circumstances, the children of a male deceased person would include his children born out of wedlock to women who were not married to him. The fact that the objector was not married to the deceased does not prevent his children inheriting him in intestacy. Marriage is not a factor in determining a child's right to inherit his father.

16. Where the issue of paternity cannot be proved but there is evidence that the deceased took in a child and accepted him as his own, such child would be treated as a child of the deceased for the purposes of succession (S. 3(2) Law of Succession Act) and shall have relationship to other persons through him as though the child had been born to him in wedlock.

However, the most effective proof of paternity remains the DNA test.

If therefore the deceased sired children with the objector whatever their relationship was, those children would be treated as beneficiaries of his estate. The same position would apply if the deceased took in the children of the objector with any other person and accepted them as his own.

17. The objector contended that her three children were sired by the deceased. She produced copies of birth certificates for each of the children. All these (see, annexures marked "FNN 3" in the supporting affidavit) indicate that the father of the children was the deceased. However, the certificates were obtained or issued after the death of the deceased thereby creating the possibility that they may not be genuine and could have been obtained for purposes of lending credence to the objector's case against the petitioners.

The most that the objector could have done was to request for a DNA test to establish her children's paternity. She also did not avail in evidence any credible document to show that these children and probably herself depended entirely on the deceased for their general welfare and for the payment of school fees and medical bills for the children.

18. In the upshot, the finding of this court is that there was no marriage relationship between the objector and the deceased. If anything, the two were friends and secret lovers. Whether the objector's children are as a result of that relationship is a factor which was not herein established by cogent evidence.

Otherwise, the present application for the revocation and/or annulment of the grant issued to the petitioners is lacking in merit and is hereby dismissed with each party bearing their own costs.

However, for the sake of the children mentioned herein by the objector, it would be prudent for the objector and the petitioners to arrange for a DNA test at their own costs to determine with certainty the paternity of the children at least prior to the confirmation of the grant so that they may benefit from the estate if indeed they are children of the deceased. In that event, the objector may apply for provision as a dependant.

Short of that, the children should be availed in court on a date to be agreed upon by the parties so that they may be seen by the petitioners and any of the parents of the deceased to determine whether they bear any physical resemblance with the deceased.

J.R. Karanjah

Judge

[Read and signed this 12th day of May 2016]

COURT: By consent of the parties, the children of the objector allegedly sired by the deceased be availed in court on 16/6/2016 for them to be seen by the family and parents of the deceased.

J.R. Karanjah , Judge

12/5/2016