



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA ATR MOMBASA
SUCCESSION NO. 77 of 2014
IN THE MATTER OF THE ESTATE OF E K I (DECEASED)

RULING

1. The deceased to whose estate the proceedings herein relate is E K I, who died intestate on 7.8.10 at the Outspan, Nanyuki. From the record, the deceased was a corporal with the Kenya Defence Forces and was based at the Nanyuki Air Base. The Public Trustee on 28.2.14 filed a Petition for a grant of Letters of Administration in respect of the estate of the deceased. In the Affidavit in support of the Petition, the Public Trustee avers that the deceased was survived by a son A H K, two brothers and two sisters.
2. By an Application dated 19.6.14, R K, the Applicant sought to be included together with A H K as beneficiaries of the estate as widow and son respectively, of the deceased herein. The Applicant claimed that she and the deceased were married under Taita customary rites in January 1995. She annexed a copy of an affidavit of marriage. That she and the deceased were blessed with one child A H K who was 17 years old at the time of filing the Application. She annexed a copy of the birth certificate of the child. That she and the son were erroneously excluded from the list of the deceased heirs forwarded to the Public Trustee. That she needs to access the deceased's death gratuity held by the Public Trustee to pay school fees of Kshs. 27,550/= for the deceased's son who had been sent away from school for non-payment of fees. She also claimed a further Kshs. 150,000/- as maintenance as she was jobless and unable to meet the needs of the son of the deceased.
3. A H K also swore an affidavit in support of the Applicant's Application. He claimed to be the biological son of the deceased. That he was born on 23.7.96. He claimed that he knew his father from birth till the time of his death and that his father supported him and his mother socially and financially. That he is a form 1 student at [particulars withheld] Secondary school and he annexed what a school fees structure. He prayed for payment of fees by the Public Trustee from the death gratuity and also sought his share of inheritance as one of the beneficiaries of the estate of the deceased.
4. In a Replying Affidavit sworn on 27.10.14, B N I, (B) a brother of the deceased opposed the Application. He denied the Applicant's claim that she was a legal wife to the deceased. He avers that the deceased never married and no Taita customary marriage rites involving both families had been performed. He claims that the deceased joined the military on 18.7.94 and was in the training camp for 9 months and there was no way he could have married to the Applicant in January 1995. He annexed a copy of letter dated 17.1.11 from the Ministry of State for Defence addressed to the Director of Pension, showing when the deceased was enlisted. That the deceased was survived by their late mother and two brothers and three sisters listed in the letter from the County Commissioner dated 29.10.13.
5. B further claims that the Applicant went to the Public Trustee and unlawfully inserted the name of A H K as one of the beneficiaries. B further claims that the deceased had named only their late mother as next of kin a fact confirmed in the said letter dated 17.1.11 from the Ministry of State for Defence addressed to the Director of Pension. According to him, the Applicant is a busybody who does not

deserve the orders sought.

6. On 2.7.15, Muriithi, J. ordered that DNA testing be done on A H K, his mother, the Applicant and B to establish the paternity of the child. Dr. K. N. Mandalia, a pathologist from Pathcare Laboratories who performed the DNA testing testified in Court. He confirmed that the test was done on A H K and B, the brother of the deceased for the obvious reason that the deceased is dead. According to him the result of the test done was inconclusive necessitating statistical analysis of the Y chromosome. The outcome of this analysis is that A H K and Benson differ greatly and in many respects. From the result, the chances that the deceased is the biological father of A H K is about 11%. The result also indicated that the chances that the deceased is not the biological father of A H K is eight times greater than the chances that he is the biological father. The witness stated however that the report is only valid if the deceased and B are full siblings of the same father.

7. Zablon Siri Mabita, the Registrar of Births and Deaths, Taita also testified. He confirmed that birth certificate number [particulars withheld] of 20.8.10 was issued by his office. That the birth certificate is for H A K whose mother is given as R K K and father is given as E K I. That the informant is R K K. The witness confirmed that this was a late registration and that all supporting documents were submitted to their office. The said supporting documents required include a form signed by the Assistant Chief, Chief and area District Officer. Other documents required for late registration include the national identity card of the parents or death certificate where parent is dead, clinic card, baptism card or letter from the headmaster of the school attended by a child whose birth is registered late. The witness confirmed that his office was provided with sufficient supporting documents and that the birth certificate is genuine.

8. On cross examination, the witness said that birth certificates can be issued as many times as applied for. The serial number will change but the date of registration and entry number remain the same.

9. I have carefully considered the application, the affidavits and the documents produced in Court as well as the testimony of the witnesses. On the claim of that the Applicant was married to the deceased under Taita customary rites, B denied that such rites were ever performed. No evidence was tendered by the Applicant to support her claim. The Applicant relied on an "affidavit of marriage". Unfortunately, this affidavit was sworn, not by the deceased but by the Applicant herself. Secondly, the said affidavit was sworn on 16.6.14 almost four years after the death of the deceased. This affidavit cannot be relied upon. Further, the letter from the Ministry of State for Defence dated 17.1.11 addressed to the Director of Pension clearly stated that the deceased's next of kin was his mother, P M D. There was no mention of a wife or child as next of kin. The letter to the Public Trustee dated 29.10.13 from the Deputy County Commissioner, Voi Sub-County indicated that the rightful heirs of the deceased were his two brothers and three sisters. There was again no mention of a wife or child. In the absence of any other evidence, this Court finds that there was no marriage between the deceased and the Applicant.

10. On the claim that the deceased and the Applicant were blessed with one child A H K, the Applicant relied on several documents key among them being the birth certificate, the legality of which B contested. The Registrar of Births confirmed that the birth certificate was issued by his office and that the informant was the Applicant. I have no reason to doubt that the birth certificate is genuine or legal. The question however, is whether the particulars contained therein are correct. I note that this birth certificate was issued on 20.8.10 which is also the date of registration. What is interesting though is that this birth certificate was issued thirteen days after the death of the deceased. No explanation was given for the delay in the registration of the birth of A H K until after the death of the deceased and the child was about fourteen years old.

11. Further, one of the supporting documents submitted to the Registrar for issuance of the birth certificate is the baptism certificate of A H K. The name of the deceased appears in the box provided for full name of father. However, a close look at the name indicates that it was written by a hand clearly different from the hand that wrote the other particulars in the certificate. That the name of the deceased was written by a different hand suggests that it may have been inserted after the certificate was issued.

12. The Court did order a DNA test to be done as a sure way of confirming paternity. Unfortunately in

this case the putative father is deceased. The test was therefore done on A H K and on Benson, a brother to the deceased. The result yielded by the DNA test was that A H K and Benson differ greatly and in many respects. That the chances that the deceased is the biological father of A H K is only about 11% while the chances that the deceased is not the biological father of A H K is eight times greater than the chances that he is the biological father. The outcome, the Court was told by the pathologist however, is only valid if the deceased and B are full siblings of the same father. The DNA result is therefore inconclusive and not helpful in proving the Applicant's case.

13. I now turn to the survivors of the deceased. There are three letters showing the survivors of the deceased. The first one is a letter from the Deputy County Commissioner, Voi Sub-County, dated 29.10.13. It states that the deceased was not married, that both parents had passed away and that he was survived by two brothers and a three sisters. There is another letter from the Chief of Mbololo location dated 10.11.15 which states that the deceased left behind the son, the brothers and sisters. The letter also indicates that the deceased left behind a guardian, R K. However the name is written in a manner that suggests that the same was inserted as an afterthought after the letter had been written and signed. There is a third letter from the Deputy County Commissioner, Voi Sub-County dated 16.11.15 which states that the deceased left behind R K, "guardian to the son", H A K, son, two brothers and two sisters.

14. The affidavit in support of the Petition for letters of administration was sworn by the Public Trustee on 7.2.14 and filed in Court on 28.2.14. This affidavit states that the deceased was survived by a son, two brothers and three sisters. It is not clear from where the Public Trustee got this information, given that the letters from the local authorities which gave the name of the son were written almost 2 years after the filing of the said affidavit. The only letter that was available before the filing of the affidavit is that of the Deputy County Commissioner, Voi Sub County, dated 29.10.13 which did not list the A H K as the son of the deceased. This Court is therefore inclined to believe Benson when he states that the Applicant went to the Public Trustee and inserted the name of the said A H K as the son of the deceased.

15. In view of the foregoing, I find that the Applicant has neither satisfied this Court that the deceased was married to her nor that he had a son named A H K. The Applicant has therefore not demonstrated to this Court sufficient grounds to warrant the granting of the orders sought. Consequently I find that the Application lacks merit and the same is dismissed. There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 14th day of July 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**