



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 1213 OF 2010
IN THE MATTER OF THE ESTATE OF MOHAMED ISMAIL IBRAHIM (DECEASED)
BETWEEN
SHARATH HALEY NEAVE (also known as
SHARATH ISMAIL IBRAHIM).....1ST OBJECTOR
SHAREEN STEFANI NEAVE (also known as
SHAREEN ISMAIL IBRAHIM).....2ND OBJECTOR
AND
HAFIZA KHANAM ISMAIL.....PETITIONER

RULING

1. The deceased Mohamed Ismail Ibrahim died on 7th March 2010 at the Nairobi Hospital. He was domiciled in Nairobi. He left a will dated 11th May 1984 whose executors were his brother Mohamed Ayub and his wife Hafiza Khanam Ismail (the petitioner). Mohamed Ayub died on 6th April 1995. On 16th June 2010 the petitioner filed this petition for the grant of probate. In the petition the beneficiaries were herself and her son Janmohamed Elias Mohamed Ismail and daughter Janmohamed Somayya Mohamed Ismail. The deceased had acknowledged the two as his only children.

2. On 7th December 2010 the objectors filed a notice of objection to the making of the grant to the petition on the grounds that the petitioner had failed to disclose them as persons surviving the deceased in respect of whom provision had to be made, and, secondly, that the assets forming the estate had been undervalued. On 3rd October 2011 they filed answer to the petition and a petition by way of cross-application for grant. Their case was that they were daughters of the deceased who had not been acknowledged by the petitioner and provided for. They also claimed that the petitioner had failed to disclose the true assets of the deceased, and had also grossly undervalued them.

3. The petitioner filed a replying affidavit sworn on 11th October 2011 to deny that the objectors were the daughters of the deceased, and annexed their birth certificates ('HKI – 1') showing their parents to be

Robert Insted Neave and Zeline Emilien. She stated that the estate of the deceased was governed by Islamic Law of Inheritance and therefore that they had no valid claim to it.

4. The 1st objector swore a response on 14th October 2014 to state that the deceased had told them that he had secretly married their late mother Zeline Yolande Neave under muslim customary law. The marriage had been conducted by a muslim priest. Their late mother was a christian and the deceased was a muslim. The marriage was secret because of the difference in the religion of parents. She stated that:-

“4. The marriage was kept a secret since during that time the family would have never permitted it and it would give a bad name to the family amongst the muslim community.”

Her mother had a close friend called Faiza who knew about the marriage, she said. In 1978 the two of them were born as twins to the two parents, but because of the secrecy they were each issued with a birth certificate in which their father was indicated as Robert Insted Neave. He was the husband of their mother

“with whom she had no relationship.”

Their mother died in 1984. The objectors were taken up by Faiza, but that the deceased paid for their upkeep. Later on Faiza migrated to Rome. At that point the deceased took them to join his family. He introduced them as his daughters to the family, and that is where they remained until her sister got married in 2001 and she got married in 2006. On each occasion, it was the deceased who married them off as the father. She recalled in the deceased's house she stayed with the petitioner and her children and the deceased's parents. In 1997 the deceased sought to change their names and executed a deed poll ('S112'). She stated that her name was changed to Sharath Ismail Ibrahim and her sister to Shareen Ismail Ibrahim. Lastly, she stated that the deceased had introduced them to all and sundry as his daughters. Some people he had introduced them to as such were Mohamed A. Bhatti and his brother Anwar Bhatti.

5. The petitioner filed a further affidavit to respond to the averments of the 1st objector. She denied that there was any marriage between the objector's mother and the deceased. She wondered why, if the marriage existed, there was no marriage certificate, now that all muslim marriages have marriage certificates. She stated that a muslim man is allowed to marry a christian woman and therefore there would have been no need for any secrecy. She claimed that if it was true that the deceased had married the objectors' mother then indicating on their birth certificates that their father was Robert Insted Neave was criminal under **section 22 of the Births and Deaths Registration Act (Cap 140)** and **section 320 of the Penal Code (Cap 63)**. She admitted that when the objectors become 18 the deceased brought them into his household and said he was their guardian. Since the deceased did a lot of charity work and would house people he was helping, she did not find anything strange about this. He never introduced them as his daughters. It is under these circumstances that they attended the objectors' weddings. Regarding the deed poll, she stated that it was the objectors changing their names but that did not mean they were becoming the daughters of the deceased. Lastly, the petitioner stated that when the deceased made his will on 11th May 1984 it was clear to him that he was married to her and had only two children, Janmohamed Elias Mohamed Ismail and Janmohamed Somayya Mohamed Ismail. It was clear from the bequeathals, she said, that the deceased intended that his estate be devolved according to Islamic Law. In which case, if the objectors were indeed the deceased's biological daughters they would be illegitimate as the deceased never married their mother under Islamic law.

6. The questions to be determined are:-

- a. whether the deceased and the objectors' mother were married under muslim law;
- b. whether the objectors were the daughters of the deceased;
- c. whether the objectors are entitled to benefit from the estate; and

d. who is entitled to the grant of probate?

In dealing with these issues, I will consider not only the sworn evidence of the parties but also the written submissions by counsel for both sides. Secondly, the issues for determination will largely be taken together.

7. There is no dispute that the deceased was a muslim and left a muslim family. It is also not in dispute that when the objectors state that their late mother got married to the deceased, they indicate that the marriage was celebrated under Islamic law. Their mother was, however, christian. The objectors were not born when the marriage was allegedly celebrated. The petitioner stated that muslim marriages are registered. That was not disputed. The marriage was allegedly conducted by a muslim priest. It was not indicated where that was done. It was not indicated whether the priest is still alive. If he is still alive, it was going to be easy to obtain an affidavit from him. Secondly, the objectors swore that one Faiza was privy to the marriage and its happening. She is still alive in Rome. She was not made to swear an affidavit to confirm that indeed the marriage happened. It is also clear that at the time of the said marriage their late mother was legally married to Robert Insted Neave. In short, there is no evidence to show that the objectors' mother was married to the deceased.

8. The next issue is whether the objectors were the daughters of the deceased. I have found that there was no proof that their mother was married to the deceased. When they were born, each got a birth certificate saying that her father was Robert Insted Neave. Their case was that their mother was hiding the fact of their paternity because she was a christian who was secretly married to the deceased, a muslim, and that this was embarrassing to his family. The petitioner stated that a marriage of a christian woman to a muslim man was a common phenomenon. It is material that the objectors came to the deceased's household when they were big. The objectors stated that while living with Faiza the deceased was providing for them. There was no evidence to confirm this as Faiza swore no affidavit. The evidence of the petitioner was that the deceased did charity work and brought many people to live in his house, and that it was in this regard that he brought in the objectors whom he provided guardianship to. The objectors stated that the fact that it was the deceased who gave them away in marriage was further evidence that he was their father. Further, that he introduced them to all the sundry as his children. In this regard, the objectors pointed to two specific people to whom the deceased said that the two were his children. They were Mohamed A. Bhatti and his brother Anwar Bhatti. None of them, however, swore any affidavit. Lastly, the objectors changed their name to take the name of the deceased. This was done in 1997. The gazette notice shows it was each objector who was changing her name. There is no evidence that this was occasioned by the deceased. It should be pointed out that when the deceased made his will on 11th May 1984 the objectors had been born. He did not include them in his will. In the will he indicated his family to comprise the petitioner and their two children. That was not a conduct of a man who had another family. In short, I do not find that any sufficient basis has been laid to show that the objectors were the daughters of the deceased. What is apparently clear is that the deceased provided guardianship to the objectors up to the time when he gave each of them out for marriage. That was when his obligation to them ceased.

9. It follows from the foregoing that the objectors were not beneficiaries of the estate of the deceased, and neither were they his dependants to be able to derive any benefit or claim to the estate.

10. The consequence of this is that, the objectors lack the basis to object to the petition by the petitioner for grant of probate. They themselves have no legal association with the deceased, or his estate, and cannot in any way be called upon to administer the estate. The deceased left a will and the petitioner is the surviving executor.

11. The submissions by counsel went to great length to discuss the issue as to which law will govern the estate of the deceased. The objectors counsel contended that the estate was governed by the **Law of Succession Act (Cap 160)**, and the counsel for the petitioner took the position that the estate was governed by Islamic Law. The objectors' counsel proceeded on the basis that his clients were the children of the deceased; that it did not matter whether or not they were illegitimate. They were entitled to the estate. Counsel for the petitioner was of the view that the objectors were not the children of the deceased,

but that if the court found them to be the illegitimate children of the deceased then they could not benefit under Islamic law and the decision in **Chelanga v. Juma [2002]I KLR 339** was referred to. In view of my findings above, the issue as to which law was applicable is not a relevant matter for determination. This is because the objectors were not the children, legitimate or illegitimate, of the deceased.

12. In conclusion, I grant the petition by the petitioner. She will be issued with grant of probate in the estate of the deceased. I consider that, owing to the fact that the matter has been pending for long, it is appropriate, and it is directed that, she files an application within 60 days for the confirmation of the grant. The petitioner shall have costs of the petition and the cross-petition.

DATED and SIGNED at NAIROBI this 4TH day of JULY 2016.

A.O. MUCHELULE

JUDGE

DELIVERED AND SIGNED this 11TH day of JULY 2016.

W. MUSYOKA

JUDGE