



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION- MILIMANI LAW COURTS
SUCCESSION CAUSE NO 370 OF 2009
IN THE MATTER OF MARTHA NJERI MUTONGA (DECEASED)

SAMSON MUTONGA MURIITHI.....ADMINISTRATOR/RESPONDENT

AND

KENNETH MATEKWAOBJECTOR/APPLICANT

RULING

INTRODUCTION

The deceased died on 9th July 2008.

The Grant of Letters of Administration of her Estate was made to Samson Mutonga Muriithi (hereafter 'the Respondent), by this Court on 7th October 2009. Subsequently, in an Application dated 8th April 2010, Kenneth Inganji Matekwa (hereafter 'the Applicant') filed a Summons for Revocation or Annulment of the said Grant and he seeks the following orders:

(a) That the grant of letters of Administration to Samson Mutonga Muriithi on 7th October 2009 be annulled on the grounds that the grant was obtained fraudulently by the said Petitioner by making of false statements and concealment from the Court of facts and/or information material to the case.

(b) Costs be borne by the Petitioner.

THE APPLICANT'S CASE

In his Affidavit in support of the Application sworn on 8th April, 2010, it was the Applicant's deposition that the Grant was obtained fraudulently by the making of false statements and concealment from the Court of facts material to the case and that one of the Petitioner's guarantors, Julia Wanjiku Mutonga, who is also the deceased's mother, stated that the deceased was single, and yet, she was married to him and was his wife until her death. He contended further that he and the deceased got married on the 28th February 2004 at the Pentecostal Christian Fellowship Church in Pangani.

It was the Applicant's contention that the deceased's mother, with the knowledge of the Petitioner, produced in Court, a Chief's letter stating that the deceased was single in actual fact they knew that it was not true. Further, that they averred that the aforesaid was done in an aim for them to administer the Estate

to their advantage.

Further, that one of the properties listed as the deceased's assets in the Petitioner's Affidavit, in support of the Letter of Administration Intestate, is Plot No. 219 'B' of the Makongeni Settlement Scheme, which property he alleged belongs to him and whose letter of allotment is in his name. Accordingly, that the Petitioner, either jointly with others and/or individually, unlawfully made and presented to this Court fake letters of allotment both for the said plot and for another parcel namely, Plot No. 105 of the Makongeni Settlement Scheme. In that regard he argued that the said letters of allotment indicates that he is a joint owner with the deceased and that is not the case.

In the Applicant's further view, the discrepancies on the letter heads in the letters of allotment draws attention to their validity and that the word 'assurance' as used therein differs greatly with the word 'issuance' as indicated in the allotment letters in his possession and as such, that is conclusive evidence of the falsification in the Petitioner's letters of allotment.

It was the Applicant's other argument that the deceased's death certificate as produced by the Petitioner was as well fraudulently generated for the purpose of unlawfully obtaining the Grant for Letters of Administration as it indicates the same entry number as the one in his possession. That the serial number therein also differs with the one that is in his possession; the place of residence of the deceased in the certificate produced by the Petitioner indicates that the deceased was resident in Kakamega but the one in his possession indicates that she was resident in Shitoli, Kakamega.

Based on the foregoing, the Applicant is apprehensive that the Petitioner has no prudent intentions in the administration of the deceased's properties as he is seeking not only to unlawfully acquire his property, but is also directed at ensuring that he has no administrative role in his wife's properties. He asserted further that he has relinquished and makes no claim to any other of the other properties belonging to the deceased, including her employment benefits, which the Petitioner can and has already taken.

In his Written Submissions dated 2nd December, 2015, the Applicant reiterated his earlier assertions and submitted that the deceased was lawfully married to him and as the husband, he is the first in line in the Application for Letters of Administration. Accordingly, that all the other issues being raised by the Petitioners are irrelevant to the law in as far as the determination of who is entitled to take out Letters of Administration is concerned and that in as far as the distribution of the Estate is concerned, and in the spirit of bringing the whole dispute to a close, it is fair that the assets be shared out between the two beneficiaries, inclusive of the employment benefits.

In that regard, the Applicant maintained that he stands to suffer irreparable harm if this Application is not allowed and that in any event, the Petitioner, being the son of the deceased from a different father, they both have a right as beneficiaries of the deceased's Estate.

THE RESPONDENTS' CASE

In opposition, the Respondent filed an Affidavit in reply sworn on 9th June 2010. He stated that he is the only surviving child of the deceased and that he was granted Letters of Administration pursuant to his Petition filed on 17th February 2009 which was gazetted on 26th June 2009 and there being no objection to the same, he was issued with the said Letters.

According to the Respondent, the Grant was not obtained fraudulently and the material facts disclosed to this Court were true and bona fide within his knowledge concerning his late mother's Estate after protracted communication and correspondences with the Applicant.

That his mother was a single parent and he lived with his grandmother, Julia Wanjiku Mutonga, at Mlango Kubwa in Nairobi, who became a staunch Christian and member of the Pentecostal Fellowship Church in Pangani. Additionally, that the Applicant started a relationship with his mother and they subsequently got married despite the Applicant not solemnizing the marriage under Kikuyu Customary Law. In that regard, the Respondent argument that the Applicant quietly and secretly arranged for the

marriage in order to enable him benefit from his mother's Estate.

It was the Respondent's position that he is the joint owner of the properties listed in his Petition for Letters of Administration and the same was acquired long before the marriage between the Applicant and the deceased. Accordingly, he rebutted the assertions that he presented fake letters of allotment and contended that the same were genuine.

The Respondent deposed in regard to the events that occurred after his mother's death and the Applicant's conduct during that period until her burial and states further that immediately after the death, the Applicant vanished thereby leaving him and his grandmother with the burial responsibilities. Finally, it was his argument that the Applicant only resurfaced to claim the deceased's body alleging that they were married despite not paying any dowry.

In his Written Submissions dated 25th November 2015, the Respondent asserted that although the Applicant claimed to have paid dowry, he led no evidence in support of those allegations and that although the Applicant is not indicated as a joint owner of Plot No. 219 'B', he purportedly got the plot transferred to him after the deceased's death without letters of administration being issued in regard to her Estate.

The Respondent submitted that the pleadings and evidence submitted in Court did not in any way reveal the reason as to why he was wrong in disclosing to the Court that the Applicant was the deceased's husband for purposes of applying for a Grant of Representation. Accordingly, that the evidence confirms that the Applicant never at any time paid dowry and hence the conditions as to a Kikuyu marriage were never fulfilled.

According to the Respondent, he was not wrong in not disclosing that the Applicant was a beneficiary of the Estate, since at the time of the application for the Letters of Grant of Administration, he had remarried and hence, by dint of **Section 35 (1)** of the **Law of Succession Act** and the holding of the Courts in *In the Matter of the Estate of the Late Rose Wanjiku Njoroge (Deceased) [2014] eKLR and Douglas Njuguna Muigai vs John Bosco Maina Kariuki and Another [2014] eKLR*, he is not a beneficiary anymore.

In the Respondent's further view, the conduct of the Applicant in relation to the deceased, her parents, siblings and him clearly shows that he did not and does not consider their feelings in so far as the deceased's Estate is concerned and yet he wants to administer the Estate. As such, his further contention was that the Applicant is not a suitable administrator and on the basis of his relationship with the deceased's family at the moment, he cannot be issued with Letters of Administration jointly with him either, since they cannot work well for the purposes of administering the Estate.

According to the Petitioner, **Section 66** of the **Law of Succession Act** gives this Court the final discretion as to the person(s) who can be issued with Letters of Administration and the order of preference in the said **Section** is a general guide and does not grant a spouse an automatic right to be an administrator and hence, this Court ought to exercise its discretion in his favour and as such, the present Application ought to be dismissed with costs.

In her Affidavit sworn on 9th June 2010, Julia Wanjiku Mutonga, the deceased's mother, in support of the Respondent's case, deposed that she lived with the deceased her entire life as a single parent, being the Petitioner's mother. That the deceased was working at the City Council of Nairobi in 2002 and she started assisting her to acquire property in Kayole Plot No. 105, Makongeni Settlement Scheme which the deceased registered in her name and that of her son and upon full payment of the purchase price, she was issued with a certificate of allocation on 27th August 2002 awaiting issuance of the Title Deed.

That she immediately embarked on acquiring another Plot on the same scheme being Plot No. 219 'B' which she again fully paid for and was issued with another certificate on 17th October 2003 and she commenced development of houses thereon and moved from her house to Kayole, leaving her son under her custody. That, she alleges, was in February 2004, after she got married to one Pastor Kenneth

Matekwa. The deceased's mother asserted further that she insisted that the son remains with her in Mlango Kubwa as he was still going to school and hence the relocation with her mother would have affected his studies since the said plots were still under construction.

Accordingly, it was her contention that at the beginning of 2004, she insisted on the deceased to undergo a proper Kikuyu marriage but the same was never done before the wedding. But since she had known Bishop Mwenesi for over 17 years, who assured her that Kenneth Matekwa was his brother, she allowed the wedding to proceed while awaiting formalization of the marriage under Kikuyu Customary laws. In addition, that she informed the deceased about the requirements of performing marriage rights such as the payment of dowry and the husband-to-be recognizing his son.

The deceased's mother further asserted that based on the marriage certificate exhibited herein, the Applicant arranged the marriage without following the usual customary rights but later promised to do so which he never did until the death of the deceased and even after her burial.

The deceased's mother deposed largely to the events prior to the deceased's death and her encounter with the Applicant at a hospital in Eastleigh and alleged that she never again saw or heard from the Applicant and in that regard, she solely soured for funds that were used for the deceased's burial. That she later on saw the Applicant on the morning when the deceased's body was being removed from City Mortuary after which there was a confrontation as regards where the deceased was to be buried. However the same was resolved and it was agreed that the deceased would be buried and the Applicant's family undertook to complete the marriage rights as required under Kikuyu customary laws. However, after the burial, that never happened and the Applicant continued to stay in her daughters plot and further collected rent and thereby denied her and her grandson any access to the deceased's properties. That as a result of the foregoing, she took it that the Applicant's family declined to return and solemnize the marriage as by tradition and as such, she concluded that her daughter died single and unmarried and in that regard, his son applied for Letters for Administration declaring that the mother had died single despite the marriage certificate being held by the Applicant.

The deceased's mother finally took the position that the Applicant has no title or claim to any of the deceased's properties and that she lodged a complaint with the Medical Practitioners and Dentist Board against the hospital where the deceased died, and that the Applicant has at no time raised any complaint and yet he was the one that took the deceased to hospital and cut a deal with the Hospital Administrators. Further, that the letters of allocation adduced by the Applicant are falsified and were fraudulently obtained after the deceased's death.

DETERMINATION

The key issue for determination is whether the Applicant has made out a case to warrant the revocation of the Grant of Letters of Administration. In that regard, **Section 76** of the **Law of Succession Act** provides for the alteration and revocation of Grants. It states that:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) That the proceedings to obtain the grant were defective in substance;

(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) To proceed diligently with the administration of the estate; or

(iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(iv) That the grant has become useless and inoperative through subsequent circumstances.

It therefore follows that in an application such as this, an Applicant must base his/her application for revocation on any of the grounds stipulated under the aforesaid provision. In the circumstances of this case, the key contention by the Applicant is that the Grant herein was obtained fraudulently as a result of the non-disclosure of certain information and the giving of false statement as regards the relationship between the Applicant and the deceased. Is the Application merited?

The foregoing therefore leads me to the question of whether the Grant herein was obtained fraudulently as alleged. In that regard, the key contention is that the Grant was obtained fraudulently by the failure of the Respondent to inform the Court that the Applicant herein was married to the deceased. In that context, I have seen the Marriage Certificate, annexed in the Affidavit sworn by the Applicant in the present Application. The Marriage Certificate indicates that the two got married on 28th February 2004 and as such, it is evident that the Applicant and the deceased were married. Furthermore, in his Written Submissions, the Respondent admits that the Applicant and the deceased were married. The Respondent however admits that he failed to disclose that fact owing to the fact that the Applicant failed to pay dowry and hence he ought not to be allowed to be an administrator. The admission of failing to disclose to the Court that the Applicant was married to the deceased in itself is sufficient ground to warrant the revocation of the Grant of Letters of Administration and I hereby find that the Applicant has made out a case to warrant the revocation.

Being a spouse to the deceased, the Applicant is entitled to be enjoined as an administrator of her Estate. **Section 66** of the **Law of Succession Act** makes provisions in regard to the persons who are entitled to Grant of Letters of Administration. The section provides thus:

When a deceased has died intestate, the court shall, save as otherwise provided, have a final discretion as to the person or persons to whom a grant of letter 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.

This Section gives the Court discretion as to whom to issue with the Grant of Letters of Administration and in terms of the preference, a spouse is to be given such priority. Furthermore, the entitlement to the Grant of Letters of Administration may be issued to such a spouse solely or jointly with the beneficiaries. In my view, the contentions in regard to failure to pay dowry cannot be in any way be a ground for nullifying the Applicant's marriage to the deceased's Estate.

As a result, I am satisfied that the Applicant has made out a case under **Section 76** of the **Law of Succession Act**.

The second issue is whether the Applicant is entitled to share in the estate of the deceased. The facts as gleaned from evidence adduced during the *interpartes* hearing of the matter are that the following issues remain contested;

- a) Whether the deceased acquired the properties Plots 105 and 219 B before her marriage to the deceased?
- b) Whether the deceased and Objector acquired the Plots and developed them together partially or not?
- c) Whether the Objector is entitled to part of, any share of the deceased's estate?

The deceased and Objector were married and there is a marriage certificate to confirm the same. However, the Respondent; the deceased's son and mother testified at length that the Objector abandoned the deceased, he did not participate in clearing the medical bills after he took her to hospital, he stopped pursuing the claim for medical negligence filed with the Medical and Dentists Board against the hospital, he did not contact or visit the family after burial of his late wife.

On acquisition of the plots, the Objector by his own admission in his testimony he admitted he found the deceased had purchased Plot 105 Makongeni Settlement Scheme at the time they got married. He stated they bought Plot 219 B together built 3 rooms and moved in after they relocated from Kangemi. They later built more rooms up to 7 rooms during their 4 year marriage. On the one hand the Objector claimed as pastor he had independent means and helped purchase and develop Plot 219B and at the time he lived with the deceased in his house in Kangemi. On the other hand, the Respondent stated that his mother lived with him and his grandmother at Mlango Kubwa. In 2000, the deceased purchased the Plot 219 B and developed it as is evidenced by Peter Nyaga Njagi. He testified how the deceased told him she bought the Plot for her son. She paid him Ksh 20,000/- and got a card which asked him to keep. She also paid Ksh 15,000/- as further instalment for the Plot. Later, in 2002, he built the house and the deceased paid him for the materials. He did not see the Objector at the site. He confirmed the 1st Plot, the deceased bought when she was single but the 2nd Plot was when she was married to the Objector.

From the evidence above-coupled with the fact that the Plot 219B was registered in the deceased's son name and ID card, without evidence of income by the Objector, this Court is inclined to believe, the deceased who was in formal employment purchased the property and developed it with the sole intention to secure property for her only child the Respondent as she was now married to the Objector.

For now the revocation of grant and distribution of the deceased's estate to include the Objector as beneficiary is moot. The Objector has contrary to Section 35 of the Law of Succession Act Cap 160; remarried and his wife is Phanice Atabwa and 1 son as deposed in paragraph 9 of the Respondent's submission. The Objector did not disclose this fact during the proceedings neither was it controverted by any evidence during the proceedings.

Although **Section 35 of Law of Succession Act Cap 160** provides;

Subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to

a) personal and household effects of the deceased absolutely; and

b) a life interest in whole residue of the net intestate estate:

Provided that if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person.

The position is that once a widow remarries the life interest in the intestate estate expires. This is inherently discriminatory on the basis of gender. However, under **Article 27 (1) - (5) Constitution 2010** the provision spells out equality of all persons and freedom from discrimination. Therefore the said proviso to **Section 35** should be read in the spirit of the Constitution, not to apply to widows who remarry but also widowers who marry also lose their beneficial life interest to the deceased's estate.

This was observed in the case of ***IN THE MATTER OF THE ESTATE OF LATE ROSE WANJIKU NJOROGE (DECEASED) SUCCESSION CAUSE 794 OF 2007***

NAKURU HIGH COURT;

That provision is in my view inherently discriminatory in the situation where the surviving spouse is a widower and he remarries. There is no plausible reason why a widow's interest should determine upon her remarriage, while that of widower (would apparently survive) upon his remarriage. Article 27(1) of Constitution 2010 provides inter alia that every person is equal before the law and has the right to equal protection and benefit of the law.

CONCLUSION

I am satisfied that the Applicant has made out a case to warrant the revocation of the Grant of Letters of Administration that had been issued to Samson Mutonga Muriithi on 7th October 2009. However, the claim to substantial beneficial interest to the deceased's estate is vitiated by the fact that the Objector remarried and has a new family. It would be grossly unfair and inhuman to withdraw and deny the Respondent, an only child of the deceased, beneficial interest of his late mother's estate to give to the Objector who although was spouse to the deceased, their marriage terminated upon her death and he has since remarried.

DISPOSITION

In the circumstances therefore, the said Grant of Letters of Administration and the following are the orders that commend themselves for the disposition of this Application:

- a) The Grant of Letters of Administration issued to Samson Mutonga Muriithi on 7th October 2009 remains valid for distribution of the deceased's estate.**
- b) Plot 105 shall remain the Respondents share as it was purchased by the deceased before her marriage to the Objector**
- c) Plot 219 B although purchased by the deceased and registered in the son's name, since the Objector remarried after the deceased's death and has another family; by virtue of Section 35 of Law of Succession Act as read with Article 27 of Constitution 2010, he is not eligible for life interest in the deceased's estate.**
- d) The Respondent is entitled to retirement benefits.**
- e) Let each Party bear their own costs to this Application.**

DELIVERED SIGNED & DATED ON 16TH SEPTEMBER 2016

M. W. MUIGAI

JUDGE