



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 982 OF 2011

(IN THE MATTER OF THE ESTATE OF W W (DECEASED))

K W.....APPLICANT

VERSUS

S W W.....ADMINISTRATRIX/RESPONDENT

JUDGMENT

The deceased WW died on 17th November, 2010 at Shalom Hospital in Machakos County. He was domiciled in Kenya and his place of residence as indicated in the death certificate was Ithithe, in Nyeri county.

On 27th September, 2011 the respondent together with one I M petitioned for letters of administration intestate of the deceased's estate in their capacities as the widow and a step brother to the deceased respectively.

According to the affidavit in support of the petition, the deceased was also survived by 5 other children who are listed as follows:

1. JMW son aged 26
2. NMW aged 24
3. PNW aged 12
4. EMW son aged 10
5. EWW "son" aged 7

The last child must have been erroneously described as "son" because the name suggests that she is of the female gender; she must have been the deceased's daughter and not his son.

The deceased's estate comprised several landed properties in the counties of Makueni and Nyeri; he also held a bank account with Kenya Commercial Bank, though it is not clear from the petitioner's affidavit how much money was held in that account. The deceased had shares with the same bank. The total net worth of the estate was estimated at Kshs 2 million.

The grant of letters of administration intestate was made to the respondent and her co-administrator on 7th

May, 2012; it was subsequently confirmed on 23rd day of November ,2012. According to the schedule to the certificate of the confirmation, the respondent transferred almost the entire estate to herself; she gave her co-administrator half an acre of one of the parcels of land comprising the estate in Nyeri county.

By a summons for revocation or annulment of grant dated 18th April, 2013, the applicant sought to have the grant revoked on the grounds, that it was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; that there was a misrepresentation of facts during the hearing of the application for confirmation of the grant; that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently; and, the proceedings to obtain the grant were defective in substance.

The applicant swore, in the affidavit in support of the summons, that he was the son of the deceased and that his mother, NM was his first wife. The respondent on the other hand, was the deceased's second wife.

He also swore that the respondent petitioned for grant of letters of administration of the deceased's estate without the knowledge or consent of all the persons who were beneficially entitled to the estate, and in particular the deceased's first wife and her children.

In response to the application, the respondent filed a replying affidavit in which she reiterated that she was the only wife of the deceased and her children were the only children surviving the deceased. She stated further that the applicant was the son of one MI (deceased); she knew the applicant because he was her immediate neighbour at Kaungani within Kalimani Settlement Scheme. She also swore that the applicant was the deceased's tenant in one of the deceased's properties known as Plot No. [particulars withheld] within Kalimani settlement scheme. This particular property had subsequently been registered in the respondent's name.

Parties in this contest took directions to the effect that the applicants summons be disposed of by way of viva voce evidence; however, when it came up for hearing on 1st February, 2016 the respondent did not appear and neither was her counsel in court. Since there was an affidavit of service on record showing that the respondent's counsel had been duly served the hearing proceeded *ex parte*.

The applicant testified as he had sworn in his affidavit that the deceased was his father and that he died on 17th October, 2010. At the time of his death he lived in Makueni County and that he was survived by two wives the first of whom was his mother, NM, while the respondent was the second wife. The deceased lived with his mother in Makueni while the respondent lived in Nyeri. Apart from his mother there were five other children including himself; these were **WW, WW, WW and KW**.

He also testified that he only became aware of the succession cause when the respondent wrote to his mother threatening to sue her for trespass on her land. He produced a letter by the chief of Nguumo location listing the children the deceased had with his mother.

The applicant also admitted that his mother was married before but that her previous husband died; the latter, whom the applicant identified as MI, had several children with his mother but that he could not recall their names. He could also not remember when his mother's first husband died but he was aware that his mother married the deceased in 1975.

It was also his evidence that his mother is now living with her children apparently from the first marriage. He himself was living on one of the deceased's properties in Makueni county with one of his siblings. One of the other children was deceased while the other one was living in Nairobi; it was not clear from his evidence where the rest of the surviving children were.

As much as the applicant's case proceeded *ex parte* it is subject to the test of whether it measures to the threshold of proof on a balance of probabilities and his evidence has to be interrogated from this

perspective.

One thing that perturbed me from the applicant's evidence is that he could not tell who his alleged step brothers and sisters were; these are the children that he claimed were from his mother's first marriage. To compound this question even further, none of the other children alleged to have been born out the deceased's marriage with the applicant's mother testified to establish, at the very least, if there was any relationship between them and the deceased. Could it be that these children including the applicant were the children of Muteti Itee, the applicant's mother's first husband?

Furthermore, the applicant's mother, whom the applicant himself testified that she is still alive today never featured anywhere in the applicant's application apart from being mentioned as having been married to the deceased. She neither filed any affidavit nor testified on the claims by her son; the lingering question is, if she is the deceased widow and she had children with him as the applicant suggests, wouldn't she be interested in the deceased's estate? Couldn't she also step forward and express her interest in the estate based on her relationship with the deceased?

All that the applicant told the court about her mother was that she went back to live with her children; it was not clear from his evidence where these children are; it is quite possible that she might as well have gone back to live where she was previously married.

In the absence of the evidence of the applicant's mother, or that of her children, irrespective of whether they were born out of her first marriage or the second one, there is no conclusive proof that the persons whom the applicant has named as the deceased's children with his mother are the deceased heirs and therefore are entitled to his estate. The applicant's mother's two marriages create uncertainty as to where to place these children. They may as well have been the deceased's children, but in order to support this possibility I think the applicant needed to go further than produce a letter from the chief of Nguumo location purporting to show who the deceased's children were.

In any event, that letter expressly stated that the deceased was married to only one wife who happens to be the respondent herein. The chief also stated that the deceased stayed with the applicant's mother but whom he went further to explain that she was the wife to the late Muteti Itee. Although he said that it was during the deceased's stay with the applicant's mother that the applicant and his siblings were born, it is not clear from that letter whether the two stayed together in the lifetime of the applicant's mother's first husband. Suffice it to say, the chief's letter did not provide a satisfactory answer to the glaring uncertainties in the applicant's case.

For the foregoing reasons, I am not convinced that the grant of letters of administration intestate in respect of the deceased's estate was obtained fraudulently by making of a false statement or by concealment from the court of something material to the cause; neither am I persuaded that there was any misrepresentation of facts during the hearing of the application for confirmation of grant. There is also nothing, in my humble view, to suggest that the grant was obtained by means of untrue allegation of fact essential in point of law that would justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. I also find no merit in the allegation that the proceedings to obtain the grant were defective in substance.

Accordingly, I dismiss the summons dated 18th of April, 2013. Parties will bear their own costs

Signed and delivered in open court this 2nd December, 2016

Ngaah Jairus

JUDGE