



REPUBLIC OF KENYA AT KITALE.

IN THE HIGH COURT OF KENYA AT KITALE.

P & A CAUSE NO. 19 OF 2007

GEORGE NAMASAKA NASURUTIA :::::::::::::::::::: DECEASED.

VERSUS

HELLEN NAMASAKA NASIPWONDI ::::::::::::::::::::PETITIONER.

R U L I N G.

1. The application dated 21st November, 2008 was heard by way of “*viva-voce*” evidence whereupon the applicant, Sisilia Naliaka Namasaka, testified and called three witnesses.

Testimony was also received from the respondent, Hellen Nasipwondi Namasaka, who did not call any witnesses. Thereafter, both parties filed their written submissions.

Basically, the application is brought under section 47 and 76 of the Succession Act Cap (160 LOK) and Rule 73 of the Probate & Administration rules, seeking orders for the revocation and/or annulment of the grant of letters of Administration issued on 29th May, 2005 and confirmed on the 22nd August, 2008.

2. The said grant was issued to the respondent as the sole surviving widow of the late George Namasaka Nasurutia (deceased), who was also survived by a total of eleven children including four sons and seven daughters all of whom were adults at the time of the petition for the grant. The applicant filed the present application after the confirmation of the grant on grounds that it was obtained fraudulently and with concealment of material facts such that the applicant who also claims to be a widow of the deceased was left out as a beneficiary together with her son.

The applicant claimed that false allegations were made by the respondent for her to obtain the grant and that genuine beneficiaries were omitted from the estate.

3. In support of her claim, the applicant filed a supporting affidavit dated 21st November, 2008, but the averments therein were opposed by the respondent in her replying affidavit dated 6th August, 2010.

At the hearing of the application, the applicant stated that she was married to the deceased under customary law in 1974 after he paid dowry in the form of money to her parents. Thereafter, she lived with the deceased at this Kipsoy farm measuring approximately thirty seven (37) acres. He later in 1976, purchased additional land measuring eighteen (18) acres at Kwanza and in 1977, their son Martin Simiyu was born.

4. The applicant went on to state that after the death of the deceased the community elders held a meeting under the chairmanship of Peter Wanjala (PW3), and recognized her as a wife to the deceased but to her surprise, the respondent applied for grant of letters of administration

respecting the estate of the deceased without her knowledge.

Peter (PW3), indicated that the deceased was his uncle and that he had three (3) wives including the applicant, the respondent and one Everlyne who left the matrimonial home after his (deceased) death. He (PW3) stated that the respondent was the first wife while the applicant was the second wife and both were married to the deceased in 1956 and 1974 respectively. He (PW3) confirmed that the deceased and the applicant had one son called Martin (PW2) born in 1977 and that the applicant lived at their Kipsoin or Kipsoy farm measuring approximately 32 acres before being moved to their Lunyu farm measuring approximately 18 acres which she currently occupies.

5. Peter further stated that the deceased who died in 1977 hailed from the Bukusu community and that after his death his clan met and decided that the applicant would occupy the Lunyu farm and the respondent, the Kipsoini farm. In the year 2000, the clan met again as the children of the deceased had become grown ups. It was then decided that the three sons of the respondent were entitled to portions of the Kipsoini farm together with the respondent and that, one son of the respondent and the applicant's son were entitled to portions of the Lunyu farm together with the applicant.
6. Martin Simiyu Namasaka (PW2), confirmed that he is son to the deceased and the applicant and that he was born at the Lunyu farm with his own family while the respondent who is his step-mother lives at the Kipsoy farm and has always lived there.

Patrick Kuloba Kituyu (PW4), also indicated that the deceased was his uncle and that both the applicant and the respondent were his wives. He (PW4) said that he was the chairman of the clan which met and divided the property of the deceased among his two families. He more or less confirmed what was said by Peter (PW3), with regard to the division of the deceased's property.

7. In her testimony, the respondent denied that the applicant was ever married to the deceased and stated that she (applicant) was married to her (respondent's) neighbour and that she (respondent) first met her (applicant) in their farm when she was taken there by a brother-in-law called Christopher Wekesa.

The respondent indicated that both farms of the deceased were jointly purchased by him and her. She refused the applicant's allegation that she (applicant) was married to the deceased in 1974. She (respondent) went on to state that she knew nothing about the child said to belong to the deceased and the applicant and contended that she never agreed before a chief that the applicant should be given the deceased's land at Kwanza. She alleged that the chief was a friend to the applicant and denied that she obtained the grant fraudulently. She contended that the deceased was survived by herself and their children.

8. From the evidence foregoing, it is apparent that the recognition of the applicant as a second wife of the deceased is at the centre of the current dispute. If indeed, the applicant was the deceased's second wife then it would follow that her name was deliberately excluded by the respondent in her petition for grant of letters of administration. In that event, the grant would have been obtained by concealment of material fact meaning that it has to be adjusted to accommodate any beneficiary who may have been left out.

The basic issue for determination is therefore whether the applicant was a second wife to the deceased with whom they had a child who is now an adult (i.e. PW2).

9. The burden of establishing that a valid marital relationship existed between the deceased and the applicant before the demise of the deceased lay on the applicant especially that such a relationship has vehemently been denied by the respondent who suggests that the applicant and a brother of the deceased have conspired to have the applicant enjoined as a beneficiary of the estate of the deceased to serve their own selfish purposes.

In her evidence, the applicant alleges that she married the deceased in 1974 under the Luhya customary law and that dowry was paid to her family. In 1977, the marriage was blessed with a child i.e. a son called Martin Simiyu but before that in 1976, the deceased purchased and settled the applicant on the parcel of land measuring eighteen (18) acres situated in Kwanza.

10. Peter (PW3), claimed that the deceased who was his uncle had three wives who included the applicant and the respondent. The third wife called Everlyne allegedly left the matrimonial home after the death of the deceased. The respondent was allegedly the first wife while the applicant was the second wife.

Despite the foregoing evidence, Peter (PW3), did not offer tangible evidence of the alleged marriage between the deceased and the applicant and for that matter between the deceased and his alleged third wife. The dispute herein pertains to the alleged marriage between the applicant and the deceased.

Most of Peter's evidence is confined to the deceased's property at Kipsoin and at Lunyu farm and distribution thereof by clan, elders in accordance with Bukusu Customary practises on assumption that the applicant was also a wife of the deceased.

11. Peter pointed out that in accordance with Bukusu customs, the applicant was **“inherited”** by a younger brother of the deceased.

Patrick (PW4), was the clan chairman at the material time. He confirmed more or less what Peter said but did not also provide tangible evidence of the applicant's alleged marriage to the deceased who was also his uncle.

The applicant herself did not also provide any tangible evidence of her alleged marriage to the deceased other than simply stating that they were married in accordance with customary law and that dowry was paid to her family.

12. The fact that a man and a woman lived together for a few years and had a child within the period would not by itself amount to a marriage between the two. Even in a customary marriage there are ceremonies to be conducted for a relationship to be converted into a valid marriage.

Herein, there was no evidence of such ceremonies and whether, indeed the same were performed in relation to the applicant and the deceased. There was also no tangible evidence to prove that the alleged son of the deceased and the applicant (i.e. Martin Simiyu Namasaka (PW2) was indeed sired by the deceased. In the circumstances, the alleged marriage between the applicant and the deceased was not proved and so was her son's alleged paternity.

13. It would therefore follow that the omission of the applicant and/or her son Martin (PW2) from the administration and/or benefits of the estate of the deceased was not an act of false misrepresentation or concealment of material facts or fraud on the part of the respondent in her petition for grant of letters of administration.

This application is without merit and is hereby dismissed. If anything, the applicant and her son should have considered invoking section 26 of the Law of Succession Act prior to the confirmation of the material grant on 22nd August, 2008. So, what allegedly happened under Bukusu Customary law, in terms of distribution of the estate property under the chairmanship of Patrick (PW4) was null and void. May each party meet own costs of this application.

[Read and signed this 4th day of March, 2015.]

J.R. KARANJA.

JUDGE.