



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO.
SUCCESSION CAUSE NO. 110 OF 2010
IN THE MATTER OF THE ESTATE OF THE LATE
D K-----DECEASED
AND
P C K-----ADMINISTRATOR
J A A-----OBJECTOR

R U L I N G.

1. The Objector/Applicant filed the summons dated 13th November, 2012 seeking the following orders:-

- (1) *THAT this Honourable Court do order that, grant of representation to the estate of the above-named D K N who died on the 25th May 2010 having being obtained and not confirmed, such reasonable provision be made for the Objector/Applicant as a dependant of the deceased out of his net estate as the Court thinks fit.*
- (2) *THAT this Honourable Court do order that such share as the Court thinks fit of the capital of the net estate of the above-named D K N who died on the 25th May 2010 be appointed by way of gift to the Applicant with variation in the appointment already made as set out hereunder.*
- (3) *THAT this Honourable Court do order that the grant issued to the Petitioner P C K be revoked and the Court be pleased to appoint interim joint administrators.*
- (4) *THAT pending hearing and confirmation of the grant the Administrator and the sureties be ordered to present an inventory of assets, monies received, expenses, accounts and costs incurred in the manage of the Estate of the deceased.*
- (5) *THAT pending hearing and determination of this application and cause an order directed at the sureties of the estate to make a deposit equivalent to the value of the monies misappropriated and which formed part of the deceased estate.*
- (6) *THAT pending the hearing and determination of this application and cause order do issue preventing and Administrator from transferring, selling and/or in any way dealing with the assets and transacting bank accounts No.[particulars withheld] held at Standard Chartered Bank, Moi Avenue and the accounts operated by the deceased with Equity Bank Account No.[particulars withheld], Barclays Bank Account [particulars withheld]and Co-Operative Bank Account No[particulars withheld] and*

others not listed in the Petition for letters of Administration.

(7) *THAT this Honourable Court do order the sureties to the appointment of the Administrator to deliver to the Courts grant and show cause why the Administrator should not pay or indemnify the Estate for the loss suffered.*

(8) *THAT this Honourable Court do give directions on the protest filed by the Objector pending Confirmation of the grant.*

1. The Applicant is supported by the grounds on its face plus an affidavit in support.

In the said affidavit she states that she was a wife to the deceased. She too demands to be provided for from the deceased's estate, as a dependant.

2. She alleges that there has been misuse of the deceased's estate and that the grant issued to the Petitioner/Respondent should be revoked.

This application has been filed **under Section 26 of the Law of Succession Act.**

3. The Petitioner/Respondent filed a Replying Affidavit refuting the Applicant's claims.

She acknowledges that S G A N is a product of a love affair between the deceased and the Applicant. She however denies that the deceased & Applicant were married.

4. She denies misusing the deceased's estate.

5. Mr. orina for the Petitioner/Respondent has in his written submissions stated that for purposes of the Law of Succession Act the Applicant is neither a divorced or a Judicially separated wife.

6. Secondly he submits that the minor S G A N is recognized by the Petitioner and her family as a child of the deceased. The Petitioner has been making provision for her, and will make provision for her from the estate. (Her share should be held in trust for her).

7. That the Applicant made the request for revocation under the wrong provision of the Law. She should have made her application under Rule 44 Probate & Administration Rules. He submitted that the application was therefore incompetent.

8. Mr. Mengich for the Applicant has listed six (6) issues as falling for determination. They are:

1. *Who are the rightful beneficiaries of the Estate of the Deceased?*

2. *Whether the grant applied for in the name of the Petitioner is defective and ought to be revoked and/or annulled?*

3. *Whether the objector should be made a joint administrator or as interim joint administrator of the estate of D K N.*

4. *Whether the Applicant has misappropriated the assets of estate and whether the sureties should be called to account?*

5. *Whether the Interested Party has a valid claim?*

6. *Who should meet the costs of the Summons and Affidavit in protest?*

1. His submission is that the child of the deceased is the rightful beneficiary of the estate of the deceased.

- Further he states that the petitioner having concealed the fact of the existence of the minor child obtained the grant fraudulently and the same should be revoked. He cited the case of **SAMUEL WAFULA WASIKE -Vs- HUDSON SIMIYU WAFULA Court of Appeal No. 161 of 1993.**

2. It was his submission that the Applicant be appointed the trustee of the minor in accordance with Section 84 of the Law of Succession Act. And that the Petitioner be ordered to render an account of the expenditure in the management of the estate.

3. I have considered the application, affidavits, annexures and submissions by both counsel. The issues I find falling for determination are:

i. *Whether the Applicant was a wife of the deceased.*

ii. *Whether the minor S G A N is a dependant of the estate of the deceased.*

iii. *Whether the grant issued to the Petitioner/Respondent should be revoked.*

iv. *Whether the Petitioner has misappropriated the assets of the estate and if so, what is the remedy.*

1. ISSUE NO (I): WHETHER THE APPLICANT WAS A WIFE OF THE DECEASED.

It has been alleged here and there by the Applicant that she was the wife of the deceased. In other places she says they were cohabiting and there was an intention to marry.

She annexed to her affidavit a Tenancy Agreement between her and one Mary W. Muthui in Nairobi. The agreement was entered into on 1st August 2007. It could be renewed after a year.

2. She also annexed receipts for rent paid by the deceased from October 2007 to August 2008 (11 months).

- The deceased died on 25th May 2010. There is no proof of payment of rent by the deceased after August 2008. The Applicant has in her affidavit at Paragraph 7 indicated that they cohabited for more than five (5) years.

3. It's not clear when the cohabitation started and ended. Did it end when he died? Were they really living together as husband and wife upto his time of death? The Petitioner/Respondent has denied this.

4. The Applicant relied on the tenancy agreement and rent receipts to demonstrate this. It does not add up. The period covered is so brief (i.e. 11 months only).

5. The tenancy was in respect of a house rented by her and not by the deceased. The payment of rent and the birth of the minor S G A N do not by themselves confirm cohabitation and/ or marriage.

6. According to the Petitioner they buried the deceased as a bachelor. Later they learnt that he had been involved in a love affair with the Applicant out of which the minor S G A N was born.

7. The Applicant had the burden to prove a marriage between her and the deceased and/or their cohabitation. She did not. I therefore find that she was not a wife of the deceased for purposes of the Law of Succession.

8. ISSUE (ii): WHETHER THE MINOR S G A N IS A DEPENDANT OF THE ESTATE OF THE DECEASED.

A birth certificate was annexed to the Applicant's affidavit. It shows that the child was born on 19th June, 2007 and the deceased is the father. Infact the Petitioner acknowledges that the minor S G A N is the grand daughter.

9. My finding is that the minor is a child of the deceased and therefore a dependant under **Section 29 of the law of Succession Act which provides:**

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

She is therefore a dependant of the estate of the deceased.

1. ISSUE (iii): WHETHER THE GRANT ISSUED TO THE PETITIONER/RESPONDENT SHOULD BE REVOKED.

When the Petitioner/Respondent applied for grant of letters of administration she listed the deceased's dependants leaving out the minor S G A N. It is not that she was not aware of her existence. She has even sent the Applicant some money for the child's upkeep.

2. The question that is bothering me is why she did not include her in that list.

Again when she applied for summons for Confirmation of Grant she did not include her. I find this to have been concealment with an intention to deceive the Court. This forms a ground upon which a grant may be revoked.

3. Secondly with the addition of the minor S G A N as a dependant it follows that the administrator can no longer be one. It has to be at least two administrators.

4. **Under Section 41 Law of Succession Act**, property devolving upon a child has to be held in trust. It has been submitted that the Applicant has long since married and has children in the new relationship. This was a Submission by Mr. Orina. It would require evidence to be adduced on this before the Court makes a finding.

5. Having found that the estate requires two administrators it now behoves this Court to appoint the additional administrator to specifically take care of the interest of the minor.

6. While appointing one, the Court is alive to the fact that it has a duty to ensure that the best interests of this minor are catered for.

7. This minor child lives with her mother who is the Applicant herein. Had the Applicant not brought her plight to the attention of the Court, the Petitioner and her family who knew of her plight were quiet about it. I therefore find that none of them would be an adequate protector of the interests of the said minor.

8. The biological mother would be best placed to take up that role. She will be so appointed. And it should be clear from the onset that her appointment is for the interest of the minor's share in the estate and not to antagonize the family of the deceased.

9. ISSUE NO (IV): WHETHER THE PETITIONER HAS MISAPPROPRIATED THE ASSETS OF THE ESTATE AND IF SO, WHAT IS THE REMEDY.

The Applicant has accused the Petitioner of delay in distributing the estate and of misappropriating the assets of the estate. A perusal of the record shows that the Grant herein was issued on 10th June 2011.

10. The summons for confirmation of grant was first fixed for hearing on 7th February 2012. It was stood over to 6th March 2012 by the court to enable the petitioner file a further affidavit.

It next came for hearing on 8th May 2012 & 29th May 2012 but the court was not sitting. The same came up on 28th June 2012, & 28th November 2012 but could not proceed for no fault of the petitioner.

11. On 28th November, 2012 it was noted that a protest had been filed by the Applicant herein.

Directions for the protest were not taken on given dates and on 24th September 2013 the Court was informed that the parties were trying an out of Court settlement.

12. On 11th March 2014 the Court was informed that the parties were still pursuing settlement. It was on 6th May 2014 that the Court was informed of the failure of the intended settlement.

13. The matter was then listed for hearing. I have set out the above record to clearly show that the Petitioner has not delayed the confirmation of the grant at all. There are applications by the Applicant, which applications must be disposed of first.

14. He who alleges a fact must prove it. Misappropriation of assets of a deceased person is a criminal offence. The Applicant has a duty to avail to this Court evidence of misappropriation. Mere allegations & suspicions will not assist the Court or herself.

15. The sureties cannot be asked to make deposits for unknown sums of money, when no misappropriation has been proved at this stage. In as much as the Applicant is the mother of the minor herein, its also clear that the Petitioner is the mother of the deceased.

It is important to give room for patience & tolerance and not allow parties to do things that would wound the Petitioner instead of assisting her heal. She lost a son!.

16. I also wish to state that I have not dealt with the protest file herein because its not clear what indeed are the deceased's assets & the value of the estate. It also follows that the Court would not with certaintzity at this stage state the exact provision for the minor herein.

17. With the above findings I make the following orders:-

- i. *The Applicant is not a beneficiary of the deceased's estate;*
- ii. *The minor S G A N is a beneficiary of the deceased and ranks first in the order of priority.*
- iii. *The grant issued to the Petitioner on 10th June 2011 is hereby revoked. A fresh grant to issue in the joint names of the Petitioner (P C K) and the Applicant (J A A). The role of the 2nd administrator is limited to the minor's interest only.*
- iv. *Since there is an additional dependant fresh summons for Confirmation of Grant should be filed & served clearly showing the following:-*

? Full inventory of assets in the deceased's estate.

? Expenditure with proof.

? Liabilities with proof.

? Mode of distribution.

i. *The issue of costs will await the outcome of the final process of confirmation.*

Orders accordingly.

Dated, Signed and delivered in Open Court this 3rd day of July 2015.

H.I ONG'UDI

JUDGE.

In the presence of:

Mr. Koech for Mr. Orina for Petitioner.

Petitioners – Present.

N/A by or for Applicant.

Robert – Court Assistant.