

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

SUCCESSION CAUSE NO.29 OF 2010

IN THE MATTER OF THE ESTATE OF:

TRKDECEASED

JUDGMENT

The FRK died on 17/12/2009. His bother Winston Majengo Katana petitioned the court for letters of administration intestate and was issued with a grant on 29/4/2015. The objector, MSL filed her objection in relation to the petition. The matter proceeded to full hearing.

MS testified that she is the deceased's wife. They had a customary marriage and were blessed with three children: A (17 years), D (16 years) and S (13 years). The deceased was working at the Kenya Ports Authority. The petitioner did not involve her when he filed this cause. She would like to be the administrator. The deceased was entitled to part of the family land at Mwatundo area in Kanamai. The land is 4.7 Hectares. She denied that she had separated with the deceased or that she declared that the deceased did not sire her children.

PW2, ARK is the deceased's son. He testified that his father died on 17/12/2009 out of motor bike accident. He was in form one at [Particulars Withheld] School, Likoni but dropped out of school. He only knew the petitioner after his father's death. He was with his father when he died. His further evidence is that his late father started a business for his mother at Bamburi. He denied that his mother alleged that they are not the deceased's children.

PW3, Albert karisa Mwangandi is the village elder of Mwatundo village. He stated that he had been sent by the area chief to testify. It is his evidence that the deceased was his neighbour. The objector is the deceased's wife and they had three children. The deceased used to stay in Mombasa and Mwatundo. The deceased had three brothers and used to work at KPA. He was not aware if the deceased had another wife.

The petitioner, **Winston Majengo katana** is the deceased's brother. He testified that the family appointed him to be the administrator of his late brother's estate. The deceased lived in a rental house in Bamburi and also used to live in Mwatundo. On 7/1/2010 the Kikambala District Officer called him and he met the objector at the D. O's office. She claimed that she had no school fees for her children.

It is his evidence that immediately after the burial of his brother, the objector left and declared that the deceased did not sire the children. He went to the KPA to process the deceased's benefits. The petitioner left the deceased while the last born was still suckling. The first born, Ali, came with his mother and was not the deceased's child. According to him, the objector left for her Kwale home and has never had another child after his brother's death. He was only given ksh.21,960/- at KPA and used it to process the sub-division of the family land. Mishi gave him the children's documents and he was processing their birth certificates. He opened two accounts for D and S with the Post bank. It is his further evidence that the deceased was not living with the objector. It was their mother who was taking care of the deceased. He denied that he has misused the deceased's estate.

DW2 Mbiko Mwalundi Mwatela is the deceased's uncle. His evidence is that they burried the deceased on 23/12/2009 and on 24/12/2009 the objector took her clothes and children and left after declaring that the deceased did not sire the children. According to him the objector was the deceased's wife. He knew her as the deceased's wife and was surprised to hear that the deceased did not sire the children.

The main issue for determination is who should be appointed the administrator of the deceased's estate. The evidence on record shows that the objector, MS was the deceased's wife. PW3 and DW2 did confirm that they knew her as the deceased's wife. The fact that there was no official marriage ceremony cannot be an issue. The last born child is 13 years old and this shows that they have been living together for quite a long time. According to the objector, they married under Customary law. Although the custom was not stated, I am satisfied that the two lived together and had three children.

It is the Petitioner's evidence that the first born child came with his mother which does not change the situation under Succession Law. The petitioner produced documents indicating that he was processing the children's documents. One of the document is application for birth certificate as well as application for late registration for ASF. The documents indicate that the deceased was the father of A. Under the succession Act, Chapter 160 Laws of Kenya, a beneficiary child need not be the deceased's biological son. The objector informed the court that she was willing to undergo DNA test to prove that the children were sired by the deceased.

It is clear that, the petitioner is a brother to the deceased. The objector, being the wife is the best person to administer her husband's estate. I do find that the allegations that the objector declared that the children were not sired by the deceased to be an afterthought. The deceased lived comfortably with his family as per the evidence of PW3 and DW2 who are independent witnesses.

In the end, I do find that the petitioner should not administer the deceased's estate. The grant issued on 29th April, 2015 is hereby revoked. A fresh grant to be issue to the objector, MSL. The objector to file application for confirmation of the grant upon being issued with the first grant of letters of administration.

Dated, signed and delivered at Malindi this 2nd day of October, 2015.

SAID J. CHITEMBWE

JUDGE