



REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA AT KITALE.

Succession Cause No. 82 Of 2012.

J L M ::::::::::::::::::::::::::::::::::::::: DECEASED.

AND

M C M)

J J) ::::::::::::::::::::::::::::::::::::::: RESPONDENT.

D L L)

R U L I N G.

The application dated 7th November, 2012, is made by **J C** (Objector) who claims to be a lawful wife of the deceased J L M. The respondents in the application are said to be the second widow, daughter and brother of the deceased respectively who are the current administrators of the estate of the deceased by virtue of the grant of letters of Administration issued to them on the 4th October, 2012.

this application seeks to have the said grant revoked and to have the respondents restrained from collecting the pension of the deceased amounting to Ksh. 1,670,175/70 c ts or any lesser or greater sum from the Public Trustee Eldoret.

The grounds for the application are that the grant was obtained secretly, fraudulently and by means of untrue allegations of facts.

The grounds are based on the facts contained in the supporting affidavits of the applicant/objector dated 7th November, 2012, 12th March, 2013 and 28th January, 2014.

The respondents oppose the application on the basis of the facts contained in replying affidavits dated 21st January, 2013, 14th May, 2013, and 14th November, 2013.

On 19th March, 2013, directions were given to the effect that the application be heard by way of affidavit evidence.

Learned Counsel, **Mr. Chebii**, argued the application on behalf of the applicant while Learned Counsel, **Mr. Barongo**, did likewise on behalf of the respondents.

The arguments by both counsels were mostly based or derived from the averments contained in the aforementioned supporting and replying affidavits.

In essence, the applicant argued through their learned counsel that she is the first widow of the deceased and that the application for grant of letters of administration was made secretly and without her

knowledge yet she enjoys equal rights with the other widow and was entitled to be enjoined in the administration of the estate of the deceased or be treated as a beneficiary. The applicant contends that she is a legal wife to the deceased with whom they had three children. That, the respondents misled the court when they stated in the application for the grant that the first respondent was the only wife to the deceased and that they had nine (9) children. That, there was no disclosure that the nine children included the children of the applicant.

The applicant further argued that the respondents colluded with the area chief to disinherit her and that their allegation that she was divorced by the deceased is not truthful. She (applicant) contended that the petitioners maliciously instigated criminal proceedings against her at the Kapenguria court but she was however acquitted by the court. That, the letter from the chief submitted by the respondents in that application for grant was a forgery.

For all the foregoing reasons, the applicant prayed for the grant of the orders sought in this application.

In response to the arguments by the applicant the respondents, through their learned counsel submitted that there was no dispute that the applicant was once married to the deceased but on the 9th April, 2001, vide a Divorce Cause No. 1 of 1999 at the Magistrate's court in Kitale, the applicant and the deceased were divorced as confirmed by the court's decree. That, in the process, the applicant was awarded a share of land parcel No. [particulars withheld] measuring 1 ½ acres. That, the decree of the court was effected by a gazette notice transferring part of the land to the applicant.

That, the divorce enabled the applicant to secure a share of the matrimonial property. That, the deceased and the first respondent were married under the African Christian marriage and Divorce Act which does not allow a marriage if a first marriage was subsisting. The respondents further submitted that the records from the Teachers Service Commission could not be relied upon as they were not altered after the divorce and after the deceased married the first respondent. That, it was an over-sight for the non-inclusion of the first respondent as a next of kin. That, the second respondent is a biological daughter of the deceased with the applicant while the third respondent is a brother to the deceased.

The respondents contended that the applicant is not entitled to a share of the estate of the deceased as she was given her share in the divorce cause. That, the court's decree and the gazette notice were never challenged. The respondents therefore prayed for the dismissal of this application.

In reply to the foregoing, the applicant, contended that the gazette notice referred to a succession and not a divorce cause. That, the documents exhibited by the respondents are contradictory and therefore forgeries. That, there can be no divorce by consent as alluded to in the court's decree. That, the divorce cause alluded to was in fact a land case rather than a divorce case. That, the decree is defective as it was not dated and signed by a deputy registrar and that she (applicant) has shown that she is a widow to the deceased.

From the submissions foregoing and the averments contained in both the supporting and replying affidavits by the applicant and the respondents, it is apparent that the bone of contention is the alleged divorce of the applicant by the deceased prior to his death.

There is no dispute that the deceased had previously married the applicant prior to taking the first respondent as a "Second wife, the question is whether the applicant was divorced by the deceased thereby removing from her any marriage or inheritance rights that she may otherwise enjoy as a first wife to the deceased.

In an attempt to establish that she is a legal wife to the deceased, the applicant presented the annexures marked "**JCM 1**" a-d. The letter from the Ministry of Finance (JCN 1 (a) dated 27th April, 2012, was addressed to the applicant asking her to complete specified, documents for purposes of processing the death gratuity respecting the deceased. Another document from the Teacher Service Commission dated 10th April, 2012 and addressed to the applicant (JCN 1 (b)) indicate that the death gratuity claim had been forwarded to the Pensions Department for necessary payment.

Apart from the foregoing documents, the applicant also presented a copy of the register of African Marriage (JCN 1 (c)) showing that she underwent a statutory & Marriage with the deceased on 15th December, 1979. A letter from the [particulars withheld] Parish of the A.C.K. Kitale Diocese (JCN 1 (d)) is a confirmation that the marriage ceremony took place at their St. John's Church.

The aforementioned documents were not disputed by the respondents but they implied that the same are no longer of any value since the applicant was divorced by the deceased vide a Divorce Cause No. 1 of 1999 at the Kitale Court after which the deceased contracted another marriage with the first respondent. The first respondent produced a marriage certificate dated 20th August, 2006 and an affidavit of marriage showing that she was initially married to the deceased under customary law on the 15th August, 1985 (see, Annexures marked "MM1 1a-b").

the decree issued in the aforementioned divorce cause was also produced by the first respondent. (Annexure marked "MML 2").

The relevance of the decree is that it confirms that the marriage between the applicant and the deceased was dissolved meaning that the applicant was no longer wife to the deceased and that her place was taken over by the first respondent.

The decree shows that the custody of the children of the deceased and the applicant/objector including the second respondent herein was granted to the deceased and that the existing matrimonial property i.e Land Parcel No. [particulars withheld] was shared between the applicant the deceased.

The marriage certificate (MM1 1(a)) indicated that the deceased underwent a statutory marriage with the first respondent on 20th August, 2006 but the affidavit of marriage (MM1 L(b) shows that they had been married under customary law in 1985. this meant that the deceased was involved in an extra marital affair with the first respondent while legally married to the applicant from the year 1975. Nevertheless, he formalized his marriage with the first respondent in the year 2006 after divorcing the applicant in the year 2001.

It was the applicant's contention that the first respondent's marriage certificate, the affidavit of marriage and the decree issued by the court are all forged documents. However, no tangible documentary evidence was provided to prove that indeed the said documents are false documents and therefore forgeries.

Additional documents were produced by the first respondent showing that there has been a tussle between the first respondent and the applicant over the deceased's death gratuity brought about by the applicant's allegation that she was still legally married to the deceased prior to his death (see Annexures marked "MCM 1 to 6").

A gazette Notice dated 3rd April, 2009 (Annexure "MCM 7") and a green-card (Annexure "MCM 8") were exhibited to establish that the applicant was given a part of the matrimonial property upon dissolution of marriage between her and the deceased.

Basically, nothing has been presented before this court by the applicant/objector to disprove all the documentary evidence produced by the respondents showing that whereas the applicant was previously married to the deceased she was effectively divorced by him prior to his death. Therefore, all the claims she made to the relevant government authority to secure the deceased's death gratuity and related claims were not made in good faith and were made without full disclosure of material facts.

In the circumstances, this court must find and does hereby find that the applicant is a divorced wife of the deceased and would have no right to the estate of the deceased although her children with the deceased would benefit from the estate.

However, a divorced wife may make a claim under section 26 of the Law of Succession Act considering that section 29 of the Act defines a dependant to include former wife.

Otherwise, the present application is lacking in merit and is hereby dismissed with costs to the respondents.

Ordered accordingly.

[Read and signed this 12th day of March, 2014.]

[In the presence of Mr. Kaosa for Mr. Barongo for petitioner and Mr. Karani H/B for Mr. Chebii for objector].

J.R. KARANJA.

JUDGE.