



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

PROBATE AND ADMINISTRATION NO. 94 OF 2012.

MARK KIMANI KAGO ::::::::::::::::::::::::::::::::::::::: DECEASED.

AND

JANET WANJA KAGO :::::::::::::::::::::::::::::::::::::::APPLICANTS.

RULING.

This Succession Cause No. 94 of 2012 was consolidated with Succession Cause No. 110 of 2012 so that they could be heard together as they involve the estate of the deceased Mariko Kimani Kago.

The application dated 24th October, 2012 is made by Mary Wamboi Kimani who may be referred to as the applicant/objector and is for the revocation of grant issued to the respondent/petitioner, Janet Wanja kago, respecting the estate of the deceased on the 16th July, 2012.

The grant was issued to the respondent/petitioner in her capacity as the widow of the deceased son of the late Mariko Kimani Kago. The applicant/objector claims that she was the second wife of the deceased and contends that the grant was obtained by concealment of material facts.

The application dated 12th October, 2012, in Succession Cause No. 110/12 is an objection to the making of a grant in favour of the proposed petitioners.

The applicant is Janet Wanja Kago while the respondents/proposed petitioners are Francis Wango Kimani and Patrick Kaminja Kimani.

The objection was raised on ground that grant of letters of administration had already been issued to the applicant and that the second petition was filed in bad faith and without consent of the family members of the deceased Mariko Kimani Kago.

The facts foregoing, clearly indicate that Succession Cause No. 110 of 2012 being a petition for letters of Administration Intestate by Francis Wango Kimani and Patrick Kaminja Kimani (the proposed petitioner) ought not have been instituted as there was already in existence a valid grant of letters of administration made in favour of the applicant Janet Wanja Kago.

What the proposed petitioners should have done is to simply apply for revocation of the grant already in

existence instead of making a fresh application for the grant respecting the same deceased person.

The second application for the grant by the said Francis Wango Kimani and Patrick Kaminja Kimani was therefore misconceived and for that reason alone, the application dated 12th October, 2012 by Janet Wanja Kago is allowed.

As it were, the application/petition for grant of letters of administration made vide Succession Cause No. 110/12 on 5th June, 2012 is null and void having been overtaken by events in that the grant was issued to Janet Wanja Kago on 16th July, 2012 vide her application filed on 30th April, 2012 in Succession Cause No. 94 of 2012.

With regard to the application dated 24th October, 2012, made in Succession Cause No. 94 of 2012, the applicant objector claims that she was the second wife of the deceased and resides on plot No. 278 Suwerwa Settlement Scheme which is part of the deceased's estate but was not aware of the respondent/petitioner's application for grant as it was filed secretly in collusion with a chief of a location where the deceased never resided. That, she allowed her sons to file Succession Cause No. 110 of 2012 on account of her age and the inconvenience of making frequent trips to the court. That her children and herself were excluded as beneficiaries of the estate of the deceased.

It is for those reasons that the applicant/objector prays for the revocation of the grant issued to the respondent/petitioner on the 16th July, 2012.

The application was opposed by the respondent/petitioner vide her replying affidavit dated 21st August, 2013 and further affidavit dated 23rd January, 2014 in which she avers that the deceased Mariko Kimani Kago was survived by a total of five children including James Kago Kimani (deceased), Joseph Kabue Kimani (deceased), Scolastica Wangui Kimani, Njeri Kimani and Francis Wango Kimani.

That, the aforementioned were children of the deceased with Grace Mukuhi Kimani who is now deceased. That, she (petitioner) is the widow of the late James Kago Kimani and the administrator of the estate of the deceased Mariko Kimani Kago while the objector/applicant is a stranger to the estate.

That, the objector left her legally married husband in 1978 together with her adult children and temporarily stayed with the deceased or attempted to stay with the deceased as a wife but later left him. That, she (objector) knows her lawful husband and her children know their biological father and cannot therefore claim anything from the estate of the deceased. That, the objector's intention is to disinherit the rightful beneficiaries of the estate of the deceased.

The respondent/petitioner further averred that the objector was never married to the deceased in 1951 as alleged. She (petitioner) exhibited a letter dated 4th September, 2001, from the deceased's first wife to the Lands Department with regard to the estate property Plot No. 278 Suwerwa Settlement Scheme and the objector's entry into the land in 1985 together with her eight children with another person (see, annexure marked "JWK 2).

Also exhibited by the petitioner is a letter dated 12th March, 2002. Annexure marked (JWK 3) allegedly written by the deceased stating his position with regard to the said estate property vis-a-vis his wife Grace Mukuhi and her children while annexure marked ("JWK 4") is a document or letter allegedly written by the deceased.

A son to the deceased with the late Grace Mukuhi Kimani averred in his affidavit dated 23rd January, 2014, that the objector temporarily stayed with the deceased in 1978 as a wife after abandoning her own husband. That, in a meeting held between the deceased, elders and the area chief a resolution was reached that the objector and her children do vacate the estate property and they did so, only to lay a claim over the property after the burial of the deceased.

That, he (Francis Wango Kimani) had no knowledge of the Succession Cause No. 110 of 2012 and that his name was used without his consent. That, the objector and her children who temporarily joined the

deceased are strangers to the estate of the deceased and that the objector came into the estate property in 1985 when the deceased's first wife and her children were residing thereon. That, the objector was never given seven (7) acres of the land as alleged and that she temporarily stayed on the estate land until her fate was sealed when the village elders and the area chief resolved that she goes back to her lawful husband together with her children who were already adults. That, the allegation that the objector moved to Kitale in 1952 is untrue and so is the allegation that she was given a tea plantation by the deceased.

That, it is also not true that the objector was given two (2) acres of land at Githirioni, the deceased's ancestral home. That, the objector is not a beneficiary of the estate of the deceased as she was not officially married to the deceased and came into the deceased's homestead with her adult children.

Basically, from the foregoing averments by the respondent/petitioner and her brother-in-law Francis Wango Kimani, the issue arising is whether the objector/applicant was a wife to the deceased and if so, whether she is entitled to benefit from the estate of the deceased together with her children or without her children if they have no blood linkage with the deceased.

The objector contended that she was a second wife to the deceased meaning that the fact was not disclosed when the respondent/petitioner applied and obtained grant of letters of administration respecting the estate of the deceased.

Under section 76 of the Law of Succession (Act Cap 160 LOK), a grant whether or not confirmed, may be revoked or annulled if it was obtained fraudulently or by concealment of material facts.

The grant obtained herein by the respondent is yet to be confirmed. Those listed as heirs/beneficiaries in the application for the grant include the respondent as a daughter in law of the deceased. Mary Wangui Kabue, Scholastica Wamboi Kimani, Nancy Njeri Njuguna and Francis Wango Kimani are included as the children of the deceased.

The objector/applicant was not included as an heir/beneficiary and hence, the present application for revocation of the grant.

If, indeed, the objector was a wife to the deceased in addition to the first wife, she would be entitled in the order of priority to apply for the grant of letters of administration respecting the estate of the deceased. For that matter, she would have been more deserving than the petitioner/respondent for grant of letters of administration given that the respondent was a daughter-in-law being wife to as son of the deceased.

On the other hand, if the objector was not a wife to the deceased but depended on him for a period of time, she would not be entitled to apply for the grant as a widow but would be entitled to apply for a share in the estate of the deceased as a dependant in terms of section 26 of the Law of Succession Act.

In this present case, it is evident that the deceased and his first wife had children who were adults as of the time of his death, it would therefore have been appropriate for any of the children to apply for the grant of letters of administration instead of the petitioner/respondent who was only a daughter in law.

Be that as it may, the contention by the objector that she was a second wife of the deceased is somehow confirmed by the fact that the deceased moved her into the estate property Plot No. 278 Suwerwa Settlement Scheme in 1985 much to the chagrin of the first wife. She (objector) admitted that at the time she moved into the said property, the deceased's late first wife Grace Mukuhi, had already settled there. She (objector) said that she was given seven (7) acres of the property while the late first wife was given nine (9) acres. She also said that the deceased's ancestral property was divided between herself and the first wife.

The area chief, Moses Kosgei, averred in his affidavit dated 3rd December, 2013, that the deceased was married to two wives i.e. the late Grace Mukuhi and the objector and that both wives resided on the material estate property.

The letter from the late Grace Mukuhi to the Department of lands annexed to the petitioner's affidavit and marked "JWK 2" confirmed that the objector settled on the estate property in 1985 and implied that she did so as a second wife. The letter indicates that the objector was ordered by the elders to quit her relationship in the year 1999.

Annexure "JWK 3" in the petitioner's affidavit is a letter allegedly written by the deceased. It implied that the deceased and the objector may have been staying together with the objector being his second wife and that the deceased was expressing remorse for his action which brought suffering to this first wife.

It is apparent from the foregoing, that the deceased and the objector held themselves out to all and sundry as man and wife even though they were not formally married. Their relationship amounted to more or less a common law marriage which was broken after a period of about fourteen (14) years in 1999 by the elders. Consequently, the objectors status vis-a-vis the deceased became one of a former wife who may therefore apply to the court under section 26 of the Law of Succession Act for reasonable provision from the estate of the deceased for herself. Her children if they depended on the deceased, may likewise apply to the court for reasonable provision or otherwise derive any provision from their mother's provisions if they are not blood children of the deceased.

For all the foregoing reasons, it would not be appropriate to revoke the grant as applied by the objector but the same shall be amended to include one or two children of the deceased with his late wife Grace Mukuhi.

The application is therefore dismissed with each party sharing own costs.

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

[In the presence of Mr. Karani H/B for M/s. Arunga for objector and Mr. Kaosa for petitioner/respondent.]

J.R KARANJA.

JUDGE.