



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 101 OF 2009

IN THE MATTER OF THE ESTATE OF JAMELICK KOOME UKIIRU....DECEASED

HELLEN KAREA.....1ST PETITIONER

DOMISIANO MUTWIRI M'IRARI.....2ND PETITIONER

VERSUS

PAULINA KAUNGU MUKANGU1ST APPLICANT

JUSTUS MAWIRA OKILLO.....2ND APPLICANT

J U D G M E N T

1. The petitioners petitioned for grant of letters of administration intestate to the estate of Jamlick Koome Ukiiru through a petition filed on 18th February, 2009. The 1st petitioner described herself as wife to the deceased while the 2nd petitioner was described as father in-law to the deceased. The petitioners indicated the survivors to the deceased to be Hellen Karea, first petitioner and Sarafina Gacheri, daughter to the deceased.
2. The objector filed objection to making of a grant dated 28th May, 2009 together with answer to the petition for the grant and petition by way of cross-application for grant in their capacity as mother and brother to the deceased respectively and as persons having an equal or prior right to the grant of representation.
3. The objectors in their objection averred the 1st petitioner was a girlfriend and not wife to the deceased and that the 2nd petitioner father to the 1st petitioner were not related to the deceased and were complete strangers to the deceased estate; however the objectors acknowledged out of the loose and brief cohabitation between the 1st petitioner and the deceased they begot one child, SARAFINA GACHERI.
4. The objectors contended therefore that the petitioners were not rightful petitioners as they were strangers and acted without consent and knowledge of the objectors in petitioning for the grant of letters of administration in respect of the deceased estate.
5. The petitioners filed two separate Replying Affidavits dated 11th March, 2011 averring that they rightly petitioned for the grant as wife and father-in-law to the deceased respectively. The 1st petitioner averred that she was married to the deceased under Kimeru customary law and they had cohabited together as

man and wife for 8 years from 2000 to 2008 and had one issue Sarafina Gacheri. The 1st petitioner averred all assets in issue save Abothuguchi Gaitu/2232 were acquired by the deceased alone. She denied the objectors claim in toto and averred that the objectors were conspiring to disinherit her.

6. The objectors filed summons dated 20th September, 2011 for prohibition and return of chattels premised under Section 128 of the Registered Land Act (Repealed), section 47 of the Law of Succession Act, Rule 59 and 73 of the Probate and Administration Rules. The petitioners filed grounds of objection dated 1st November, 2011 and Replying Affidavit claiming ownership of the deceased assets.

7. On 12th November, 2012 court gave directions that the objector's objection dated 27th May, 2009 together with prayer NO. 4 of the application dated 20th September, 2011 be heard together by way of viva voce evidence. The matter was set down for hearing on 17th December, 2012 however the same could not proceed as both the petitioners and their advocate were absent.

8. On 19th December, 2013 the matter was set down for hearing on 15/5/2014 by consent however when the matter came up for hearing on 15/5/2014 the petitioners and their advocate did not attend. The objectors and their counsel attended and insisted on proceedings as there was no application for adjournment consequently as the hearing date had been taken by consent court allowed the matter to proceed.

9. The objectors gave evidence in support of their objection and called no witness. OW1 Paulina Kaungu testified that the deceased was her first born and 2nd objector is brother to the deceased. She contended that Hellen Kareia was a friend to the deceased but she was cohabiting with the deceased as man and wife. She said the 2nd petitioner is unknown to her but she heard he was father to the 1st petitioner.

10. The 1st objector testified that the deceased and Hellen Kareia had a child called "Gacheri" who is about 8 years old and that the child stays with the 1st petitioner.

11. The 1st objector petitioner testified that when the petitioners filed this petition she was not aware of it nor was she informed of it. The objectors objected to petitioners claim to plot No's 2232, 2102 and motor vehicle KAB 001A Mazda.

12. The 1st objector testified Plot NO. 2233 belonged to her late husband and produced green card exhibit O.1 plot 2012. She averred she brought it with the deceased but had it registered in the deceased name. OW1 produced green card as exhibit O.2. On the vehicle she averred it was brought by herself and the deceased but registered the name of the deceased. She averred the motor vehicle logbook and titles to the land are with the petitioner alleging the petitioner took them when the deceased was admitted at the hospital.

13. OW1 testified that the vehicle is at Hellen Kareia's home after she had taken it in company of her father from the deceased home together with several other items. The 1st objector testified that she reported the matter to police and administration but the 1st petitioner refused to return the vehicle. As regards lands the objector testified that the same are used by the objectors.

14. The 1st objector prayed that she be appointed 1st administratrix of the deceased estate with the 2nd objector because the deceased was her son. The 2nd petitioner in his evidence concurred with OW1's evidence.

15. The issue for consideration at this stage is whether the objectors objection has met necessary conditions for it to be granted and whether motor vehicle registration No. KAB 001A should be returned to the objectors. I have carefully considered the objection, all affidavits in support by both the petitioners and the objectors and evidence adduced by the objectors.

16. The objectors in their affidavits and evidence claim that the 1st petitioner and 2nd petitioner are strangers to the deceased. The 1st objector in her sworn evidence claimed that the 1st petitioner was a girlfriend of her deceased son and she used to visit them and that they were cohabiting together as man and wife and had a child out of their association aged 8 years. The 1st petitioner in her affidavit dated 11th March, 2011 deponed that she was married to the deceased in accordance with Kimeru customary law from 2002 to 2008 and she cohabited with the deceased for 8 years from 2000 to 2008. She referred to Chief's letter as supporting her position as wife to the deceased.

17. The 1st petitioner in her replying affidavit dated 1st November, 2011 under paragraph 6 deponed that she was legally married to the deceased in accordance with Kimeru customary marriage and the 1st objector together with the deceased paid dowry for her marriage. The 1st petitioner averred that following the death of her husband the objectors chased her from the matrimonial home and 2nd objector moved into her house and started living there with his wife. She stated the objector did not contribute even a single cent to buying motor vehicle Reg. No.KAB 001A a Mazda as it was bought by the deceased. She averred that she has secured title deed over L.R. Abothuguchi/Gaitu/2232 to DO Abothuguchi East Division for safe keeping. She also averred she petitioned for the grant as wife of the deceased. The petitioner also deponed that the objectors are wasting the estate as they have sold all trees on plot No. 2232 and leased the land to strangers.

18. The objectors did not controvert the contents of the 1st petitioners affidavit dated 11th March, 2011 and 1st November, 2011 and more specifically over the marriage of the 1st objector, payment of dowry by the 1st objector and the deceased; the eviction of the 1st petitioner and occupation of her house by the 2nd objector. The objectors did not even in their oral evidence deny the allegations levelled against them in the affidavit dated 1st November, 2011. I am therefore convinced that the petitioner was wife to the deceased herein.

19. On the issue of properties, the 1st petitioner in her affidavit dated 11th March, 2011 has deponed that Abothuguchi/Gaitu/2232 is a family land registered in joint names of the deceased and 2nd objector and that the title is kept with administration for security reasons. That M/V registration KAB OO1A belonged to her late husband alone whereas L.R. Abothuguchi/Gaitu/2102 she alleged was bought by her husband whereas the objector stated otherwise. The issue of the ownership of the three properties can be further canvassed in this cause when parties shall be at liberty to avail all necessary supportive evidence as the issue as before is limited to objection as making of the grant.

20. According to Rule 26(1) of the Probate and Administration Rules grants of letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. In cases of continuing trust no grant of letters of administration can be granted to one person alone. Under Section 58(1),(a),(b),(2) of the Law of Succession Act it is provided:-

“1) Where a continuing trust arises (a) no grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation. (b) no grant of letters of administration with the will annexed shall be made to one person alone except where (i) that person is the Public Trustee or a Trust Corporation; or (ii) in the will the testator has appointed one or more trustees for the continuing trust who are willing and able to act. (2) Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises the court shall, subject to section 66, appoint as administrators the applicant and not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion.”

21. The 1st petitioner petitioned for the grant of letters of administration without the consent of the mother and brother to the deceased as regards to second petitioner as envisaged under Section 58 of the Law of Succession Act. The 1st objector claim interest over the deceased estate and especially over

family land which is jointly registered in the name of the deceased and the 2nd objector. The objectors interest would not be well protected if the 1st petitioner is allowed to be an administratrix jointly with her father. This may further strain the parties relationship. Having considered the contents of parties affidavits and doing the best I can to ensure that the parties are able to expeditiously administer the estate and in the best interest of the welfare of the deceased child Sarafina Gacheri I will delete the name of the 2nd petitioner as an administrator and substitute the same with that of PAULINA KAUNGU MUKANGI.

22. The upshot is that the 1st petitioner HELLEN KAREA and 1st objector PAULINA KAUNGU MUKANGI are appointed joint administratrixes to the estate of JAMLICK KOOME UKIIRU(deceased). That grant of letters of administration intestate do issue upon gazettelement of the petition upon the two. Each party to bear its own costs as the parties are daughter in-law and mother in-law in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 8th DAY OF OCTOBER,2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Majau for the petitioner
2. Mr. C. Mbaabu for the objectors

J. A. MAKAU

JUDGE