REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

SUCCESSION CAUSE NO. 1239 OF 2005

IN THE MATTER OF THE ESTATE OF T K G (DECEASED)

RULING

1. The summons dated 21st January 2009 is what is up for determination. It seeks review of an order on distribution of the deceased's estate made on 16th July 2008. The orders made on 16th July 2008 shared the bulk of the estate equally between the two widows of the deceased. It is this distribution that the applicants are unhappy about.

2. The applicants are the sons of the deceased belonging to one house. Their complaint is that the equal distribution of the bulk of the estate as between the two surviving widow has disadvantaged their house. They state that their side of the family comprises of a widow and four children while the other side of the family comprises of one widow and one child.

3. The deceased herein died on 26th January 2002. Representation to his estate was sought on 17th May 2005 by B N K, who described herself as widow of the deceased. There is a letter on record dated 16th August 2004 from the chief of Gatanga Location which lists the petitioner and her four sons, including the applicants herein, as the persons who had survived the deceased. These five (5) are listed in the petition as such. A grant of letters of administration intestate was made on 18th July 2005 to the said B N K.

4. On 24th October 2005, a summons for revocation of the grant was lodged in court by J W K. She alleged that the grant had been obtained fraudulently in that the petitioner, B N K was a former wife of the deceased having divorced the deceased, whereas the applicant in the revocation application, J W K, was the lawful wife of the deceased as at the time of his death. She argued that that fact was concealed from the court and that the petition was founded on false statements.

5. The revocation application dated 24th October 2005 was resolved by consent on 28th November 2005. It was agreed that the two women – B N K and J W K-be appointed joint administrators and that the earlier grant be cancelled. A grant in the joint names of B N K and J W K was duly issued dated 28th November 2005. It is this latter grant that was confirmed on 16th July 2008.

6. B N K and her children were apparently not happy with the said distribution. They therefore lodged an application dated 25th September 2008 seeking revocation of the orders made on 16th July 2008. They argued that they were not consulted and that estate was divided equally between the two houses instead of being divided into seven units proportionate to the number of persons who survived the deceased. The widow, J W K, opposed the application and filed a detailed replying affidavit sworn on 30th August 2006.

7. While the application dated 25th September 2008 was still pending, the sons of the deceased by his

former first wife filed the summons dated 21st January 2009. Directions were given on 18th November 2009 that the application dated 25th September 2008 be disposed of by way of written submissions to be highlighted on a date to be given at the registry. On 2nd March 2010 the said application was fixed for hearing on 6th December 2010. It was not heard on 6th December 2010 and it pends todate.

8. In the meantime the application dated 21st July 2009 was fixed for hearing on 3rd October 2011. The hearing did not take off then, and the matter was not heard until 9th May 2012 when counsel for both sides orally addressed Njagi J. The applicants argued that the deceased was a polygamist and the estate ought to have been distributed in accord with *Section 40(1)* of the Law of Succession Act. It was also submitted that the consents of the children of the deceased had not been obtained. In reply it was argued that the application was filed after a substantial delay of six (6) months, the grant having been confirmed on 16th July 2008. It was also submitted that the applicants had failed to sign the relevant consent papers.

9. What emerges from the record is that the deceased married twice. He first married B N K on 7th December 1986 at a ceremony conducted at the PCEA Church at Githumu in Kiambu. That marriage produced four children and ended in divorce pronounced sometime in the 1990s. The second marriage was allegedly contracted sometime in 1988 under a system of law that is not disclosed. It produced one child, born in 1988.

10. The emerging scenario presents are tricky situation. It cannot be said that the deceased was a polygamist for polygamy is practiced under African Customary Law and Islamic Law. The deceased was no doubt an African, but there is no evidence that he was a Muslim. Indeed it is instructive that his first marriage was conducted at a church ceremony in 1986. When he allegedly took a second wife in 1988 he did not have capacity then to marry her by virtue of *Section 37* of the Marriage Act, Cap 150, which applied to his first marriage. Even then it is not disclosed the family law system under which he contracted the second marriage and no basis has been laid to suppose that it was a customary law marriage. By the time the deceased died in 2002 he had been divorced from his first wife and therefore he was strictly survived by only one spouse.

9. It has been argued that his estate is for distribution in terms of Section 40(1) of the Law of Succession Act. The said provision states as follows:-

> *"40 (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal estate shall in the first instance, be divided among the houses and the household effects and the residue of the net intestate according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.*
>
> *(2) The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in Sections 35 to 38.*

10. The deceased did not marry more than once under a system of law permitting polygamy. As I mentioned earlier, he married the first wife under statute, meaning that he was statutorily barred from taking another wife under any other system of law during the pendency of his statutory marriage. Any such wife would not be a wife at all during the currency of the said marriage.

11. *Section 3(5)* of the Law of Succession Act provides a remedy for the woman married as a second or third wife to a man who is married under statute. The said provision states as following:

> *"Notwithstanding the provisions of any other written law, a woman married under a system of law which allows polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of the Act, and in particular sections 39 and 40 thereof and her children are, accordingly, children within the meaning of the Act."*

12. Under *Section 3(5*) of the Law of Succession Act, a woman who marries a man under a system of law allowing polygamy at a time when such a man is married statute would be treated as a wife for succession purposes once the man dies. The man would then be treated as having died a polygamist. ***Section 3(5)*** of the Act is clear that that second wife be married *"under a system of law which allows polygamy."*

13. The material before me establishes that the deceased took J W as a second wife in 1988 after having contracted a statutory marriage in 1986 with B N. The record is insufficient in terms of establishing whether the purported second marriage was contracted under African Customary Law which permits polygamy or whether it was a case of mere cohabitation. I am therefore not convinced that the said second wife can seek the comfort of *Section 3(5)* of Act for the purpose of being treated as a wife of the deceased within the meaning of *Section 3(5*) of the Act.

14. The statutory marriage was dissolved in the 1990s. It would appear that the deceased thereafter continued to cohabit with J W as his wife. It would appear to me that the consent order entered into to recognize the said J W was in recognition of that fact. It would appear that the parties and their children consider her to be a widow of the deceased. I shall consequently treat her as such.

15. Am I to treat B N in equal measure? The material before me establishes that she divorced the deceased in court sometime in the 1990s. So as at the date of his death in 2002, she was not his wife and did not therefore survive him as a spouse. The definition of *"wife", "spouse" and "widow"* is at Section 3 of the Law of Succession Act. It states as follows:-

> *"wife" includes a wife who is separated from her husband and the terms "husband" and "spouse," widow" and "widower" shall have a corresponding meaning."*

This definition does not include a divorced wife. The effect is that a separated wife is a surviving spouse, but a divorced wife is not. B N, therefore, being a divorced wife, did not survive the deceased and she is therefore not one of the persons who are entitled to a share in the estate.

16. The record should reflect the deceased as having been survived by his widow – J W, and his five children. The five children being the four sons he had with B N and the one child he had with J W. Consequently, his estate should be for distribution in accordance with *Section 35* of the Law of Succession Act. The said provision states at *Section 35(1) and (5) –*

> *"35(1). Subject to the provisions of Sections 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-*
>
> *(a) the personal and household effects of the deceased, absolutely;*
>
> *(b) a life interest in the whole residue of the net intestate estate:*
>
> *provided that, if the surviving spouse is a widow that interest shall determine upon her remarriage to any person.*
>
> *(5) Subject to the provisions of Sections 41 and 42 and subject to any appointment or award made under this sections, the whole residue of the net intestate estate shall on death, or in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally decided among the surviving children."*

17. The applicants complain about the process of the confirmation of the grant. Their case is that they were not consulted when the grant was proposed for confirmation neither were their consents obtained. The procedure for confirmation of a grant is stated in Rule 40 of the Probate and Administration Rules. The procedure does not require involvement of survivors in the confirmation process, nor does it not require that they give consent to the proposed distribution. The courts have however in exercise of their wide discretion in these matters insisted on administrators involving the heirs and beneficiaries in the process to avoid fraud and to engender good faith.

18. I have carefully gone through the record. I have noted that the confirmation application was moved at the instance of only one of the administrators, J W K. There is no evidence that the other administrator was ever consulted in the process and whether she consented to the proposed distribution.There is also no evidence that the children consented to the proposals. The grant was confirmed on 16th July 2008 in the absence of representation for B N, in her capacity administrator, and in the absence of the children.

19. The applicants ask me to review the confirmation orders made on 16th July 2008. Review of orders of a probate court is done under the provisions of the Civil Procedure Rules, which have been adopted into the probate process through Rule 63 of the Probate and Administration Rules. I note, however, that the applicants did not seek to convince me that there were errors on the face of the record nor that there was discovery of new important evidence which was not available on 16th July 2008.

20. I have discussed the law governing distribution in the context of this matter. I have also discussed the confirmation process. I am convinced that there was an error on the face of the record. The divorced wife of the deceased was treated as one of the persons who survived the deceased yet she was not a surviving spouse of the deceased. I have also noted that the estate was distributed equally between the households, instead of being distributed equally between the children.

21. Consequently, I hereby allow the summons dated 21st January 2009 and review the orders made on 16th July 2008 in the following terms:-

a. That the intestate estate of deceased shall devolve upon J W K, the surviving spouse of the deceased during life interest to hold in trust for the five children of the deceased;
b. That thereafter the estate shall devolve equally among all the five children of the deceased.

22. There shall be no order or costs.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd DAY OF October 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Ombwayo advocate for the applicant.