



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**Succession Cause No.2520 Of 1994**

**In The Matter Of The Estate Of B E P – Deceased**

**L C A.....APPLICANT**

**Versus**

**R K.....RESPONDENT**

**JUDGMENT**

B E P, the deceased to whose estate these proceedings relate died on 7<sup>th</sup> August 1994. On 9<sup>th</sup> December 1994, Rose Kikuyu (the Respondent) petitioned the court to be issued with a grant of letters of administration intestate in respect of the estate of the deceased. The Respondent petitioned the court in her capacity as the mother of the deceased. In the petition, she specifically indicated the deceased was not married at the time of his death. The grant was issued to the Respondent on 23<sup>rd</sup> February 1995. On 1<sup>st</sup> March 1995, L C A (the Applicant) filed an application under **Section 76** of the **Law of the Succession Act** and **Rule 44** of the **Probate and Administration Rules** seeking to have the grant issued to the Respondent revoked on the grounds that the same had been obtained after the Respondent had made a false statement and concealed from the court the fact that she was a wife of the deceased. In the affidavit in support of the application, the Respondent swore that she lived with the deceased for a period of four (4) years before his death. She claimed that she was the common law wife of the deceased. The marriage was blessed with one child, F K who was aged four (4) years at the time of the deceased's death. She therefore urged the court to revoke the grant and instead issue the same to her.

In the petition and in the application seeking to revoke the grant, it was common ground that the deceased's assets were essentially in form of cash. The applicant stated that the deceased's estate comprised of life benefit under the deceased's life policy with Jubilee Insurance Company Limited, cash held at Co-operative Bank, terminal dues from the Ministry of Health, and finally, shares worth Kshs.15,300/- held at Afya Co-operative Society Limited. Interlocutory applications were filed to preserve these sums pending the hearing and determination of the dispute. The parties agreed by consent to have all the above sums deposited in court pending the determination of the dispute. The consent was recorded on 10<sup>th</sup> May 1995. On perusal of the court file, the court noted that Afya Co-operative Society deposited in court the sum of Kshs.30,450/- in a cheque dated 1<sup>st</sup> September 1997. Jubilee Insurance deposited in court the sum of Kshs.56,580/- in a cheque dated 14<sup>th</sup> September 1995. There was no evidence to suggest that the deceased's terminal dues with the Ministry of Health were deposited in court as directed by the court.

During the hearing of the case, the issue that was placed for determination by the court was one: whether the Applicant was a wife of the deceased. Directions were earlier issued by the court whereby it was determined that the issues in dispute would be disposed of by the court hearing *viva voce* evidence. During the hearing of the case, it was only the Applicant who testified before court. The Respondent, although represented by counsel, opted not to give any evidence. At the close of the case, the court directed both parties to file written submission in support of their respective opposing positions. Both counsels duly filed the said submission. This court has carefully considered the evidence adduced by the Applicant. It has also read the submission filed by counsel to the parties to this suit. The issue for determination is whether the Applicant established that she was indeed married to the deceased at the

time of his death. According to the Applicant, she was at the material time employed as a subordinate staff at **[particulars withheld]**. The deceased worked in the same hospital as a **[particulars withheld]**. They started living together in 1990. Their cohabitation was blessed with a child, a son born on 6<sup>th</sup> July 1991. At the time the Applicant adduced evidence in court, the child was 23 years. The Applicant conceded that she was not married to the deceased under Luhya Customary Law. This was because no ceremony was performed to celebrate the marriage under the said customary law.

However, she testified that the Respondent, the mother of the deceased was aware that she was cohabiting with the deceased and that she had a child with the deceased. It was her testimony that immediately she gave birth to the child, the Respondent took custody of the child for a period of two months before the child was returned to her. She was therefore surprised that the Respondent failed to acknowledge her when she petitioned the court to be issued with a grant of letters of administration. She reiterated that she was compelled to come to court because she wanted their child to benefit from the estate of the deceased. The Applicant produced several documents, including a letter from the Chief, which confirmed that she lived with the deceased as his wife at the time of his death. As stated earlier in this judgment, the Respondent chose not to adduce any evidence to controvert the testimony of the Applicant.

Having evaluated the evidence adduced in this case, it was clear to this court that the Applicant indeed established, to the required standard of proof on a balance of probabilities, that she was the wife of the deceased at the time of his death. Why this conclusion? The evidence adduced by the Applicant was uncontroverted. She testified that she had lived with the deceased for a period of four (4) years before the deceased died. During this period, the couple was blessed with a child, who was even recognized by the Respondent. Although it was established that the Applicant had not married the deceased under the Luhya Customary Law, it is this court's considered view that she proved that she was the common law wife of the deceased having established a reputation in society as husband and wife due to their long period of cohabitation. In **Margaret Doreen Atieno Adongo -vs- Benjamin Adongo Adeya & Others [2006] eKLR**, Koome J (as she then was) held that presumption of marriage by virtue of a long period of cohabitation between a man and a wife is now part of Kenyan jurisprudence. Such presumption of marriage can only be displaced by evidence which will rebut the presumption. In the present case, no evidence was adduced by the Respondent to rebut the presumption that indeed the Applicant was the wife of the deceased by virtue of the long period of cohabitation.

In the premises therefore, this court holds that the Applicant and her son are dependants of the deceased by virtue of **Section 29(a)** of the **Law of Succession Act**. Under **Section 66(a)** of the **Law of Succession Act**, it is the Applicant who had priority to petition the court for a grant of letters of administration intestate. The Respondent, as the mother of the deceased, can only make representations to this court in regard to, firstly, whether she should be considered as a dependant of the deceased, and secondly, whether she should benefit as a heir to the estate of the deceased.

From the foregoing, it is evident that the grant issued to the Respondent on 23<sup>rd</sup> February 1995 must be revoked. It is hereby revoked. A new grant is issued to the Applicant, L C A. She is now at liberty to apply to the court for confirmation of grant. There shall be no orders as to costs. It is so ordered.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF OCTOBER, 2014.**

**L. KIMARU**

**JUDGE**