



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE 320 OF 2003

1. MONICA PETER MUTUKU.....1ST APPLICANT

2. NGEI MUTUKU.....2ND APPLICANT

VERSUS

WILSON MUENDO MUTUKU.....RESPONDENT

RULING

Peter Mutuku Muli (hereinafter “the deceased”) died on 14th September 2002 intestate. On 14th November 2003, Wilson Muendo Mutuku (hereinafter “the surviving administrator”) and Joyce Mukei Mutuku (hereinafter “the deceased co-administrator”) petitioned for a Grant of representation in their capacity as son and widow of the deceased. In the affidavit in support of the petition, the following were listed as having survived the deceased:- the two administrators; Sammy Mutuku, David Mutuku, Justus Wambua Mutuku and Musyoki Mutuku. On 18th May 2004, a grant of representation was issued to the said administrators which grant was confirmed on 2nd December 2004.

On 2nd September 2005, Monica Peter Mutuku and Ngei Mutuku (hereinafter “the 1st and 2nd applicants”) lodged summons for revocation of grant on the grounds that the same was obtained fraudulently by the making of a false statement or concealment from the court of something material to the case; that the proceedings to obtain the grant were defective in substance, and that the administrators had willfully misrepresented facts. The application is supported by affidavits sworn by both applicants. The 1st applicant also swore further and supplementary affidavits. It is contended in the said affidavits that the deceased married the 1st applicant as his 2nd wife under Kamba customary Law and Lilian Mwikali was born of their union. It is also contended that the deceased accepted as his, three other children of the 1st applicant of a previous marriage and took care of them.

The application is opposed and there are two affidavits in opposition to the application sworn by the surviving administrator. The substance of the opposition is that the 1st applicant was not married to the deceased and that all the children of the 1st applicant including the 2nd applicant are issues of the former’s previous marriage.

When the application came up for hearing before Njagi J. on 13th May 2009, counsel agreed to file written submissions which were in place by 23rd July 2009. It is submitted on behalf of the applicants

that the administrators knew of the marriage of the 1st applicant to the deceased and yet they failed to disclose the fact in their application for grant of representation. In the view of the applicants' counsel, the 1st applicant and her children qualify as dependants under the Law of Succession Act and should have been disclosed by the administrators.

In response, counsel for the administrators submitted that the application for revocation of the grant of representation had not been lodged in good faith and that the 1st applicant had not been candid with the court with regard to her relationship with the deceased and her children. Counsel further contended, on behalf of the administrators, that the application had been lodged as an afterthought after the death of the co-administrator which event occurred in December 2004.

I have considered the record, the application, the affidavits and the submissions of counsel. Having done so, I take the following view of the matter. There is no dispute that the deceased cohabited with the 1st applicant for a considerable period before his demise. The dispute is whether the said cohabitation amounted to a marriage. The 1st applicant has exhibited copies of letters from the local Chief, the village Chairman and the District Officer all of which state that the 1st applicant was married to the deceased as a 2nd wife under Kamba customary Law. She has further exhibited her Identity Card which shows that she is registered as Monica Peter Mutuku. The Identity Card was issued on 9th February 1996 before the demise of the deceased. It is significant that the Identity Card has two names of the deceased. Besides the documents exhibited by the 1st applicant, the surviving administrator acknowledged that the deceased indeed cohabited with the deceased but denies the marriage.

For my part, I have on the basis of the documents and averments of the applicant, come to the conclusion that the 1st applicant's cohabitation with the deceased was that of wife and husband. The Local Administration recognized the 1st applicant as the wife of the deceased. The surviving administrator may not have recognized the 1st applicant as such but he knew that she was cohabiting with the deceased and had been in such cohabitation for a long time.

In the premises, the 1st applicant is entitled, as one of the deceased's widows, to benefit from the deceased's estate as an heir.

With regard to the deceased's step children namely the 2nd applicant, Ngei Mutuku, Munyiva Thomas and Florence Wambua and the deceased's grandson Willy Muli, the provisions of section 2a (b) of the Law of Succession apply.

Section 29 (b) of the Law of Succession Act (Cap 160 Laws of Kenya) reads as follows:-

“For the purposes of that part “*dependant*” means such of the deceased’s parents, step parents, grand parents, grand children, step-children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters as were being maintained by the deceased immediately prior to his death.”

It is plain that a dependant must have been maintained by the deceased immediately prior to the demise of the deceased. In her affidavit in support of the petition for Letters of Administration intestate, sworn on 17th March 2003, the 1st applicant averred *inter alia*, that Ngei Mutuku was an adult and that Munyiva Thomas and Florence P. Wambua were married. Mwikali Mutuku was said to be unmarried. Ngei Mutuku himself has sworn an affidavit in support of this application. It is significant that he does not depose that he was dependent upon the deceased immediately prior to his death. In the premise, I am not satisfied that the 2nd applicant being the deceased's step son qualified as a dependant.

With regard to Mwikali Mutuku, I am persuaded on the basis of the material availed that she was the deceased's daughter and is entitled to benefit from his estate as an heir. Willy Muli is however a minor and being the deceased's grandson qualifies as a dependant.

The applicant, her daughter, Mwikali Mutuku and the deceased's grandson Willy Muli should have been listed as beneficiaries and/or heirs of the estate of the deceased. The administrators did not do so in their petition for a grant of representation. They therefore concealed from the court matters material to the cause which concealment amounted to a misrepresentation of facts that misled the court in issuing the grant of representation. For those reasons, I allow the 1st applicant's application and hereby revoke the grant of representation made to the administrators on 18th May 2004 and confirmed on 2nd December 2004.

To expedite the administration of the estate of the deceased, I order that a grant of representation be issued in the joint names of the surviving administrator and the 1st applicant and both should apply for confirmation of grant after jointly ascertaining the assets of the estate and all persons beneficially entitled to the estate.

Costs shall be in the cause.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kipsang holding brief for Mwatu for the Applicant and Abed holding brief for Mokaya for the Respondent.

F. AZANGALALA

JUDGE

7TH OCTOBER 2009