



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE 881 OF 1993

IN THE MATTER OF THE ESTATE OF DANIEL EDWIN OCHIENG (DECEASED)

MARGARET JUMA OCHIENG.....APPLICANT

VERSUS

1. MANASE OTIENO

2. PHILIP ODUOR.....RESPONDENTS

RULING

The marriage certificate No 29947 shows that Daniel Edwin Ochieng, then 30 years old, married Margaret Juma Odhiambo, then 29 years. On 30th January, 1993 Daniel died. The two respondents petitioned for grant of letters of administration without including the applicant as a beneficiary to the estate. The persons shown as having an interest in the estate and who did not object to the grant being made to the respondents were:

1. Dora Amelea Awino
2. John Samuel Okoth
3. Janet Auma
4. Joseph David Ouma

The applicant further alleges there were two issues of the marriage namely Jacqueline Awuor and Dora Atieno. Only Dora was mentioned as a beneficiary. She now seeks a nullification of the grant on the grounds that it was obtained fraudulently by making a false statement or by the concealment of something material to the case – s 76 Succession Act.

Mrs Adul for the respondents has argued that the applicant did not by her own conduct qualify as a beneficiary to the estate. She removed herself and her children from the matrimonial home in January, 1991 and was away till the death of her husband. She had filed an application in Court for separation but the same had not been disposed by the date of death. She further left home barely a week after the burial. She further submitted that Jacqueline was a child born out of wedlock, and that the deceased had not adopted her as his child. The deceased subsequently married Janet Auma.

The onus of proving fraud or concealment of material fact lies in the applicant. There is no dispute she was married to the deceased. The marriage was registered under the Marriage Act. Any person married under that Act has no capacity to contract a valid marriage under any native law or custom – s 37 Marriage Act. The deceased did file for divorce in his life time but the same had not been determined when he expired. The

position at law is that the applicant remained his legal wife. By staying away from the matrimonial home as is submitted she did not invalidate her marriage to the deceased. Consequently the deceased had no capacity to contract any other marriage during the subsistence of his marriage to the applicant.

The deceased went through a ceremony of marriage with the applicant when Jacqueline had been born. He had accepted her as his child. I do not agree with Mrs Adul that Jacqueline be excluded from the deceased's estate.

As the lawful widow of the deceased, the applicant had the sole right to apply for letters of probate. The respondents had no legal duty to act as they did without consulting her and without including her as a beneficiary. She did not have to wait to see the gazette notice in order to raise objection. She was the main player in the whole game without whose consent the exercise became a nullity.

Whatever prejudices the respondents had against the applicant they acted fraudulently to the Deputy Registrar of this Court by not disclosing a material fact of great importance, ie that the deceased was survived by a legal wife. I find the fact of fraud and non-disclosure proved by the applicant. I order that the letters of administration (intestate) issued to the respondents be nullified by the Deputy Registrar of this Court.

Costs to the applicant.

Dated and Delivered at Nairobi this 4th day of August 1994.

H.I.ONG'UDI

JUDGE