



**In re Estate of WW ailas JWW (Deceased) (Probate & Administration 86 of 2010) [2024] KEHC 7578 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 7578 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
PROBATE & ADMINISTRATION 86 OF 2010**

**REA OUGO, J**

**JANUARY 31, 2024**

**IN THE MATTER OF THE ESTATE OF WW AILAS JWW ( DECEASED)**

**BETWEEN**

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**FNM ..... PETITIONER**

**AND**

**LWM THRO SSW ..... OBJECTOR**

**RULING**

1. The deceased died on the 10<sup>th</sup> of January 2006. On the 10<sup>th</sup> March 2010 FNM (Petitioner), AA and JM petitioned for letters of administration intestate. The only asset left by the deceased was Land Parcel number Kimilili/Kamukywa/1XX4 measuring 8.6 acres.
2. SSW filed an objection on behalf of LWMW (a minor) on the 20<sup>th</sup> of April 2010.
3. On the 1<sup>st</sup> of April 2011 the Objector applied to revoke the grant issued to the petitioner on the 7<sup>th</sup> of June 2010. This objection was heard and Judge Muchelule (as he then was) delivered a ruling on the 20<sup>th</sup> of September 2012. In the said ruling the grant that had been issued to FM , AAA and JM was revoked and any transfer and/or title issued to AAA following the grant or the death of the deceased was cancelled and the parcel were to revert into the name of the deceased.
4. After this ruling the Objector filed a petition by way of cross application for grant on the 6<sup>th</sup> February 2013. In the said notice of petition, he states as follows; that LWM (minor) through SSW contemporaneously with the filing of an answer to the Petition hereby petitions the court for grant of letters of administration intestate of the estate of JWW alias WW (deceased). He presents the petition as a son of the deceased. He avers that he will faithfully administer according to the law all the estate by law and render a just and true account of the estate whenever required by law. The cross-petition is



supported by the affidavit of SSW. He deposed as follows that LWW (minor) is the biological son of the deceased and that FNM is the Objectors' stepmother. The objector was the only surviving son of the deceased and was confirmed during the "Lufu" ceremony which was held on 15.1. 2006 where F was present. That the deceased left 2 dependents FNM and LWMW. That F did not consult the minor nor his next friend before she filed the petition

5. On 4/3/2014 the Court ordered that the cross-petition be heard by way of viva voce evidence.
6. The parties filed affidavits and written statements which they adopted as their evidence at the viva voce hearing.
7. SSW testified before Justice Ali-Aroni. On 30/3/2022 LWW appeared before Judge Reichi and informed the court that he was now 27 years old, that he knew SSW who is his uncle's son, and that he knew that the said S had filed an objection on his behalf. MNB too appeared before the court on the said date and informed the court that she knew L and that he was the son of the deceased. The court ordered that the 2 file written statements in preparation for the viva voce hearing. Thereafter I took over and heard the remaining witnesses.

### **Evidence**

8. SSW testified that he knows LW who is his cousin. The deceased is a stepbrother to his father. The deceased owned Land Parcel Kimilili/Kamukuywa/ 1XX4 measuring approximately 8.5 acres. The petitioner is his aunt. He knows that the deceased had 4 wives and sired a child with the 4<sup>th</sup> wife MN. The said child was recognized when he was appointed by the clan to look after his welfare. The boy went through the shaving ritual when the mother took him to the home of the deceased. The child was not yet known during the "lufu" ceremony as he was not brought for the said ceremony. A is a buyer and J is a clan member.
9. AWS adopted her statement dated 5<sup>th</sup> August 2022. she testified that she knows MNB who is her granddaughter. M married the deceased as the 2<sup>nd</sup> wife and they sired a son LWW in the year 1995. M separated from her late husband and went to live with her mother and L was saved by his father.
10. After S and A testified, the objector closed his case.
11. The petitioner testified and called two witnesses. FN adopted her statement filed on the 20<sup>th</sup> May 2015. She avers as follows; she got married to the deceased in 1996 and she is the only surviving widow of the deceased. At the time of his death, the deceased had not sired any child or the objector. When she got married to the deceased he had married five (5) women and their marriages failed because the deceased had not been blessed with any child with them. The said women remarried and sired children where they got married. MNB is a wife of one PBW both are alive. M does not have a minor child called LWMW. The deceased did not sire any child with M and at no time before or after the death of the deceased was the objector brought for shaving or naming. She lodged a petition in this matter and after 5 years no one brought to her attention the existence of the objector. S is fabricating the story of the child and that after the death of the deceased S wanted the deceased's land and he used all means to chase her away so that she would leave the land to him. On cross-examination, she told the court that the deceased was sick for 4 years and he died in the 5<sup>th</sup> year and that the deceased told her that no one should claim that he has a child outside of marriage. That the deceased cautioned her not to bring any one home from anyone claiming to be his child. The evidence adduced by the objector is all lies. That the "lufu" chairman did not testify nor did she see any document on the said "lufu". After the "lufu" meeting people left. The deceased left her a shamba of 10 acres. She cannot give the objector the said land as the child is with her in-law the child belongs to her husband's brother David. She was not aware if M had a relationship with her husband and her brother.



12. IWM testified that he knew the deceased well and they were born together and they stayed together. He adopted his written statement dated 10<sup>th</sup> July 2014 as his evidence in which he depones as follows; the deceased had five marriages at different times but all the said marriages failed due to barrenness. The deceased married the petitioner in 1996, she is the only surviving widow of the deceased. He worked with the deceased they used to split timer together up to the time of his death. He was a friend to the deceased's children and he fully participated in his funeral more than his relatives. During the "lufu" sitting after the burial the objector was not brought and neither was he at the funeral. During the lifetime of the deceased he never told him that he had sired a child. That the 6<sup>th</sup> marriage of the deceased was never blessed with any child. It is not in dispute that the deceased died when not capable of siring a child. On cross-examination, he testified that the deceased was his neighbour. He did not of his other wives and that he attended the deceased's burial. He did not see Longanus nor did he witness the child being shaved at the said home.
13. WWD adopted his statement filed on the 20/5/2015. He averred as follows; he participated in the deceased's funeral programme and burial and was fully involved. He was in a fellowship with the deceased in " dini ya Misawmbwa" . that there was no child during the burial as the deceased's widow was the only one who sat in front. The deceased did not sire any child. On cross-examination, he told the court that the deceased was a member of his church and he had known him 2000. The deceased had one wife and he did not know of other wives.
14. At the close of the petitioner's case, counsels representing the parties were given time to file written submissions. The petitioner filed submissions, but the objector did not. I have read and considered the said submissions. The issue for determination is whether the objector should be made an administrator of the deceased's estate.
15. Section 107 (1) provides as follows, " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person". Section 109 provides as follows, "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law 109. Proof of particular fact that the proof of that fact shall lie on any particular person".
16. *Halsbury's Laws of England, 4th Edition*, Volume 17, at paras 13 and 14: states :
 

“ The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”
- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”



17. The objector claims that LWMW is a son of the deceased S testified that L is the son of the deceased and that the mother is M. The petitioner testified that the deceased did not sire any children in his lifetime with any woman. S is a nephew to the deceased. It is no dispute that the petitioner is the deceased's wife. S's claim that the L is the son of the deceased was neither supported by L or M. L appeared before the court and informed the court that he is the deceased's son. L and M were advised by the court to file written statements for the viva voce. After this appearance, the two did not appear to adduce evidence for their claim. If indeed they were genuine they should presented themselves in court to testify on their claim. I am persuaded by the petitioner's evidence that the deceased had no child. The evidence adduced by S did not in any way prove that L is the deceased's son.
18. I find that the objector has not proved his case. His objection has no merit. I therefore appoint FNM as the administrator of the deceased's estate. A grant shall be issued in her name forthwith. The petitioner shall apply to confirm the grant within 45 days from the date of the grant. This being a family matter, each party will bear their costs.

**DATES, SIGNED AND DELIVERED VIA MICROSOFT TEAM THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**R. OUGO**

**JUDGE**

**In the presence of;**

Petitioner- Absent

Objector – Absent

Wilkister C/A

