



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO.3 OF 2017

IN THE MATTER OF THE ESTATE OF ELIJAH MBONDO NTHEKETHA (DECEASED)

SERAH MUTHIO MBONDO.....1ST ADMINISTRATOR

RICHARD MUEMA MBONDO.....2ND ADMINISTRATOR

BERNARD NTHEKETHA.....3RD ADMINISTRATOR

VERSUS

ALICE MWELU MBODNO & OTHERS.....4TH ADMINISTRATOR

AND

ROSE MUENI MUTUA.....1ST INTERESTED PARTY

EVERGREEN CROP (K) LTD.....2ND INTERESTED PARTY

COUNTY GOVERNMENT OF MACHAKOS..3RD INTERESTED PARTY

RULING

1. The subject matter of this ruling is a sort but an important one in so far as the administration of intestate estates are concerned. It is whether one of the Administrators herein, **Alice Mwelu**, is competent to continue as an administrator of the Estate of the Deceased herein. It is alleged that by reasons of advancement in age, the said administrator is not competent to continue as an administrator of the said Estate in light of the complexity of the administration of the said Estate.

2. Section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides as follows:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

3. Section 39(1) of the Act which falls under Part V deals with situations where the intestate has left no surviving spouse or children and provides that:

Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

4. It is therefore clear the rule regarding priority is a general rule but the court has discretion to determine who ought to administer the estate of the deceased. Rule 73 of the ***Probate and Administration Rules*** provides that:

Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

5. What runs through the said provisions is that though the Court has discretion as to who ought to administer the Estate of a deceased person who dies intestate, that discretion must be exercised taking into account the provisions. It is clear that the priority and thus the competency of an administrator does not depend on the administrator's skills, professional or academic qualifications but on his or her relationship to the deceased. Therefore, unless the age of an otherwise competent administrator makes it difficult or impossible for him or her to properly administer the Estate, such as where the person who ought to apply for grant is not of full age, meaning below 18 years or is senile, there ought to be no impediment to the said administrator exercising the powers of that office.

6. While it is appreciated that administration may, on occasion, call for expertise in the form of accounts or legal knowledge, or even estate management and survey, the mere fact that a person does not possess any of these attributes does not necessarily render the person unfit for the office of an administrator. These are services which may be outsourced by retaining services of the experts in the relevant fields on a need basis and are therefore not prerequisite for appointments as administrator.

7. In this case it is contended that **Alice Mwelu** does not understand the intricacies of administration of this particular estate and therefore her continued role as such is a hindrance to the efficient administration of the Estate. Where an administrator is appointed by virtue of her position in the estate such as where he or she represents a certain constituency in the Estate, such as a particular house, the Court would not readily accede to his or her removal where his or her removal is being orchestrated by parties other than those whose interests he or she was appointed to represent.

8. In this case, I had occasion to listen to **Alice Mwelu's** answers to questions posed to her and while I appreciate her advanced age, she struck me as a person who is still in command of her senses. In fact, I daresay that her appreciation of her role in these proceedings surpasses that of some of those who may be in the age bracket of her grandchildren. She is aware of the history of this cause and why the matter is still in court as well as the events that have taken place since the time the cause was commenced. She might not know the minute details but she has the general overview of those events.

9. In my view she is comparatively a better person to be retained as an administrator of the Estate than some of the younger beneficiaries of the Estate. While other parties may find her a little slow in appreciating certain aspects due to her age, which is expected, age is not sickness and it does not necessarily follow that younger people would appreciate the issues better than her if they were to be appointed in her place. With her knowledge of where she is coming from and where she is going her repository of knowledge may well be an asset in the administration of the Estate.

10. Accordingly, I decline any attempt to have her removed as an administrator of the Estate of the Deceased, at least not at this stage.

11. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 28TH DAY OF JANUARY, 2022.

G. V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Muruiki for the 4th Administrator and 1st House

Mr Nzei for the 1st, 2nd and 3rd Administrators and all the beneficiaries from the 4th House and part of the 2nd House

Mr Muli for the beneficiaries from the 2nd House

Mr Nyarango for the 1st Interested Party

Ms Mutuku for Mr Mutisya

Ms Muhalia for 2nd Interested Party

Ms Ndolo for the 7th Interested Party

Ms Mbugua for Mr Kithinji for Jane Wavinya

CA Susan