



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISCC SUCC NO. 764 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE MZEE BIN

ISMAIL KIBIBI MZEE ISMAEL.....ADMINISTRATOR

VERSUS

HALMA ISMAIL.....APPLICANT

RULING

1. By a Chamber Summons dated 4th February, 2021, **Halma Ismail**, the applicant herein, seeks an order that she be appointed as joint administrator as a substitute for the late **Swaleh Ismail** and that the letters of administration be issued jointly to her and **Kibibi Mzee Ismai**, the Respondent herein.
2. According to the applicant, the deceased in this cause, **Mzee Bin Ismail** was her grandfather and was survived by **Fatuma Binti Ali**, his wife, **Kibibi Mzee Ismail**, his daughter and **Ismail Mzee Ismail**, his deceased son, who is the father to the applicant herein. According to the applicant, she is the only surviving child of the said **Ismail Mzee Ismail** after her brother **Swaleh Ismail** died on 7th March, 2018 through a road traffic accident. The applicant deposed that on 11th May, 2015, the family recorded a consent in court appointing the said **Swaleh Ismail** and **Kibibi Mzee Ismail** as joint administrators and allocated part of Machakos Block ii/275 and in particular the big shop previously occupied by **Johnson Kieti T/A J. K Stores** to **Swaleh Ismail** to take possession, management and collect rent for and on behalf of the family of the late **Ismail Mzee Ismail**. However, following the death of **Swaleh**, the Respondent herein has completely side-lined the said family in the affairs of the Estate and started wasting the same by carrying out demolition of the inner walls of the portion of the said property and in particular the said shop. According to the applicant, the Respondent has also taken over the portion allocated to them, chased away the tenant and has been collecting rent from the persons she has allocated the same.
3. According to her, the Respondent is aware that **Swaleh** is survived by two sons of tender age who depended wholly on the said rent but as a result of her actions, the two children have been deprived of their livelihood and are living in deplorable conditions and are at the mercy of the meagre earnings by their mother from menial jobs.
4. The applicant was therefore of the view that for proper administration of the estate and with a view to safeguarding the interest of her late father and brother's interest, the application ought to be allowed.
5. In opposing the application, the Respondent swore a replying affidavit in which she deposed that she and her co-administrator instructed their advocates to call the applicant in the application for a meeting to discuss finalization of this matter wherein their advocate by several phone calls spoke with advocates of the applicant to schedule for a meeting. That for some unwarranted reason the applicant who is her niece and granddaughter respectively declined to be part of the meeting until she was made an administrator to this cause.
6. According to the Respondent, the law is clear on hierarchy of administrator to estate of the deceased. The applicant, she stated, is a granddaughter to deceased and that the deceased's widow is alive with two children of the deceased.
7. The Respondent averred that the consent dated 11th May, 2015 has always been complied with on the part of the applicant by herself, her advocate and the late **Swaleh** in that they were being paid rent for the specified big shop as per the consent while the small shop specified in the consent was to remain to the Respondent's and co-administrator but the tenant refused/declined to totally pay them and eventually passed on and his beneficiaries vacated both shops. It was averred that the big shop has/is always available for the applicant to rent, use at all times and they have never occupied or put nor intend to put anyone in the shop.
8. The Respondent denied that they have deprived, denied or intend to deny the applicant use, benefit of the big shop and since they consented hence no need for any further consent to use it. It was therefore her position that this application is just a waste of court's time and

that the applicant ought not to be an administrator unless she has other known intentions. However, the applicant remains a daughter to the Respondent's deceased brother and a beneficiary of the big shop as per the said consent but should pay all rates rents for the shop to county government for the share which she has never paid since 2015. She therefore urged the court to dismiss the application.

Determination

9. I have considered the application, the affidavits both in support of and in opposition to the application.

10. The only issue for consideration by this Court is the substitution of one of the Administrators of the Estate of **Mzee Bin Ismail**, one **Swaleh Ismail** who died on 7th March, 2018. The said **Swaleh** was the brother to the applicant and both of them are/were grandchildren of the deceased in this cause. The objection by the Respondent that the applicant ought not to be appointed simply because she is a granddaughter of the deceased, in these circumstances, does not hold since the person she intends to substitute was similarly a grandson of the deceased.

11. It is not in doubt that in terms of priority, the Applicants ranks below the Respondent and other beneficiaries of the estate since Section 66 of the **Law of Succession Act**, Cap 160, Laws of Kenya provides that:

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;

12. It is however clear from the said provision that the ultimate power as to whom the grant of representation ought to be made rests with the Court. In arriving at that determination the Court is to be guided by the provisions of section 66 of the said Act. In other words, in the absence of any impediment, the grant ought to be issued in accordance with the said provision. In this case however, the Applicant intends to replace her deceased brother in order to protect the interests of their house. That must have been the reason why her deceased brother **Swaleh**, himself a grandson, was appointed as an administrator in respect of the estate of their grandfather. While the Applicant is in the ordinary course of things not entitled to be appointed as an administrator of the estate of the deceased in this cause, her late brother was the administrator and it is her late brother that is sought to be substituted.

13. Therefore, in the circumstances of this case, I allow the application and substitute the late **Swaleh Ismail** with the applicant herein, **Halma Ismail**. The grant is to be rectified accordingly.

14. I caution the administrators that they are trustees of the said estate and must always act in the best interest of the estate and the beneficiaries. Should they fail to do so, this Court will remove all of them from the administration and appoint neutral persons to administer the said estate.

15. There will be no order as to the costs of the Summons.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 27TH DAY OF JANUARY, 2022.

G V ODUNGA

JUDGE

In the absence of the parties.

CA Susan