



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION NO. 691 OF 2018

IN THE MATTER OF THE ESTATE OF JOHN GICHIA MACHARIA

RULING

1. The proceedings herein relate to the estate of John Gichia Macharia, who died intestate on 26.4.18. The record shows that on 11.3.19 a grant of letters of administration was issued to Samuel Kamau Macharia (SK Macharia), the deceased's father. Thereafter another grant of letters of administration was issued to SK Macharia and the deceased's mother Serah Njeri Macharia (Serah), on 5.4.19 and rectified on 23.5.19. By a ruling of 28.7.21, the former grant was revoked pursuant to an application dated 10.12.2020 by SK Macharia himself while the latter grant was revoked pursuant to 2 applications dated 11.6.19. One application was filed by David Karanja Macharia and Stella Nyanjiru Macharia, the deceased's siblings. The other application was filed by Lisa Anyango Amenia (Lisa) the mother Adam Kamau Macharia (Adam), the only child of the deceased.

2. Following the revocation of the grants, Adam, filed an application dated 12.8.21, seeking:

**1. Spent.**

**2. THAT pursuant to the cross-petition for grant dated 10.2.20 Adam Kamau Macharia and Lisa Anyango Amenia be appointed as Administrators of this estate.**

**3. THAT this Honourable Court do grant such further or other orders as it may deem fit under the circumstances of this Cause.**

**4. That the costs of this application be in the Cause.**

3. In his supporting affidavit sworn on even date, Adam averred that following the revocation of the 2 grants, the estate has no administrators to take charge of pending litigation involving the estate and to give instructions to advocates with a view to protecting his late father's estate. One such case is HCCC No. E256 of 2020 Directline Assurance Company Limited v AKM Investments Limited and 6 Others. AKM Investments Limited (AKM) in which the deceased was the sole shareholder owns several properties, including Land Reference Numbers 209/7799; 209/7868; 7752/258, 2781/3 as well as motor vehicles and motorbikes. Adam stated that the deceased also had interests in Directline Assurance Company Limited (Directline). Additionally, the deceased was a shareholder of Serenity Media Productions, Big Five Conservancy Limited, Bushfire Media Distributors, Toi Redevelopment Limited and Harbour Capital Limited. Adam stated that in view of the foregoing, it is in the best interest of the estate that he and his mother be appointed administrators as they are the fit and proper persons to be so appointed. Further that the cross petition filed by himself and his mother Lisa seeking to be appointed administrators, is not opposed.

4. The Application is opposed by SK Macharia *vide* his replying affidavit sworn on 28.1.22. He averred that he is one of the 2 administrators of the estate of the deceased pursuant to a grant issued on 5.4.19; that Adam and Lisa filed the present application with full knowledge that he was lodging appeals against the ruling of 28.7.21 by Mutuku, J and the ruling in by Mativo, J. in HCCC E256 of 2020; that the Application is incompetent on account of the intended appeal in the Court of Appeal, the decision of which will be binding on this Court; that this Court is *functus officio* as far as matters determined by the 2 Honourable Judges; that the cross petition having been filed after the Grant was issued is incompetent, as is the present summons which premised upon the same.

5. Lisa supported the Application by her affidavit sworn on 16.2.22, in which she stated that following the revocation of the grants, the estate has no administrator. She listed the multiple suits that are pending which involved the estate and stated that it was necessary for her and Adam to be appointed administrators, to defend the estate of the deceased and to prevent wastage of the estate. It was her opinion that she and Adam were the most suitable parties to be appointed administrators, under the law.

6. I have given due consideration to the Application, the rival affidavits, as well as the parties' submissions and the issues that all for

determination are:

- i. Whether the Application is incompetent.
- ii. What orders should be granted

Whether the Application is incompetent

7. In this application, Adam seeks that he and Lisa be appointed administrators of the estate of the deceased pursuant to the cross petition dated 10.2.2020 which they filed. Section 67 of the Law of Succession Act provides:

**1. No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.**

8. Section 68 of the Act provides as follows:

- 1. Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.**
- 2. Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.**

9. It is clear that from the above provisions that an objection is to be filed within the period stipulated in the published notice and in any event before issuance of a grant. The petition for the grant was published on 8.3.19. The latest date by which any objection was to be filed was 8.4.19. Lisa and Adam filed their objection and cross petition (the correct term is petition by way of cross application) on 14.2.2020, long after the stipulated period had expired. This was done without seeking and obtaining extension of time thereby rendering both incompetent. Further, the objection and cross petition were both filed many months after the 2 grants dated 11.3.19 and 5.4.19 respectively, were issued. An objection and cross application filed after issuance of grant is incompetent having been overtaken by events. Indeed, this Court did on 7.12.21 find that the objection and cross petition filed by Lisa and Adam after issuance of the grant, were incompetent.

10. In view of the finding that the said objection and cross petition are incompetent, can the Application stand? In the case of Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, at page 1172 (1) Lord Denning rendered the opinion of the Privy Council thus:

**If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.**

11. Duly guided, the inevitable conclusion I draw is that the Application which is anchored on an incompetent cross petition which in turn is anchored on an incompetent objection is itself incompetent.

What orders should be granted

12. Having found as I have that the Application is incompetent, what orders should be granted in the circumstances? It is noted that since the orders of 28.7.21, the estate has remained without an administrator. This state of affairs is untenable especially given the fact that there are pending suits in which the estate, through various companies in which the deceased was a shareholder or had interests. In the premises, it is necessary to appoint an administrator without further delay. SK Macharia and both Lisa and Adam seek to be appointed administrators.

13. Section 66 of the Law of Succession Act enumerates the persons to whom preference is to be given to apply for a grant of representation in respect of the estate of a deceased intestate 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:**

14. Part V of the Act stipulates how the estate of a deceased intestate is to devolve. In circumstances such as prevailing herein, where an intestate has left a surviving child but no spouse, Section 39 of the Act provides:

**Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.**

15. Under Section 39, a father and then a mother are only considered where the deceased left no surviving spouse or children. In the present case, the deceased left a child, Adam, but no surviving spouse. In the premises, between SK Macharia, father of the deceased and Adam, son of the deceased, the latter has priority to apply for a grant over the former. SK Macharia submitted that Adam who he described as a rebellious grandson is a front for his mother Lisa, who seeks to control the estate of the deceased.

16. SK Macharia further contended that he has a legal and moral duty to protect and ensure dignified succession of his son who he toiled to bring up and who through his mentorship entered the business world and acquired the assets that form his estate. Additionally, SK Macharia submitted that due to his vast business and commercial experience, he is best suited to be administrator of the estate of his deceased son.

17. In the case of In re Estate George Ragui Karanja (Deceased) [2016] eKLR, relied on by Lisa in her submissions, Musyoka, J had this to say about the order of preference set out in Section 66 of the Act:

**The order of preference set out in section 66 of the Law of Succession Act is not binding to the court. It is discretionary. Section 66 refers to it as 'a general guide.' The court can appoint administrators without following the order of preference. Priority is given to surviving spouses, followed by the other beneficiaries entitled in intestacy as set out in Part V of the Act, then the Public Trustee and creditors. The persons entitled in intestacy according to Part V, in their order of preference, include children (and grandchildren where their own parents are dead), parents, siblings, half-siblings and other relatives who are in the nearest degree of consanguinity up to and including the sixth degree.**

18. The learned Judge went to say:

**Going by the principle stated by Waki J., in In the Matter of the Estate of Aggrey Makanga Wamira Mombasa HCSC No. 89 of 1996, to the effect that surviving spouses and children have priority in administration, and other relatives as set out in section 39 of the Act should only come in where no spouse or children survived the deceased, or the surviving spouse or children are unsuitable; it would appear on the face of it that Koigi wa Wamwere should be locked out of the administration on the ground of unsuitability. That is to say, on the basis that it would be undesirable to appoint as administrator a person of lesser priority over the children where the children have not been found to be unsuitable.**

19. At the time of the demise of the deceased and issuance of the revoked grants, Adam, the sole beneficiary of the estate was a minor. Although Adam is now an adult, the Court acknowledges that he is still a youth, having just attained the age of 19 years. In the premises, I agree with SK Macharia that Adam has no experience or technical knowhow to administer the estate of the deceased. He requires someone to hold his hand as he navigates through the complexities of managing his deceased father's vast estate.

20. The powers and duties of personal representatives of the estate of a deceased person are set out in Sections 82 and 83 of the Act. The role of a personal representative as bestowed by the law and the Court, is fiduciary in nature. A personal representative is appointed by the Court, to collect in and manage the assets of the estate of a deceased person as trustee, for the benefit of its beneficiaries in accordance with the law and ultimate distribution to the beneficiaries. A personal representative thus owes a fiduciary duty to the beneficiaries. The person to be appointed as administrator of the estate herein must therefore be a person who will act in the best interests of the estate and beneficiaries of the deceased.

21. Section 66 of the Act provides that the Court shall 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.

22. Adam's best interests as the sole beneficiary of the estate must be of paramount consideration when considering appointment of administrators. Lisa is the mother to Adam and has been taking care of him. The evidence on record is that they live together in a house in Loresho that is owned by AKM. Other than SK Macharia stating that Lisa wants to control the estate, no evidence of her unsuitability to be appointed as administrator has been placed before the Court. Notably, Lisa is one of the directors of AKM, a company in which the deceased was the sole shareholder. To my mind therefore, Lisa is the person who would best take care of her son's interest as the sole beneficiary of the estate.

23. Having said that, I am mindful of the fact that Lisa does not fall within the list of preference of persons to be appointed administrators, as set out in section 66 of the Act. She is not a beneficiary of the estate and does not have priority over SK Macharia. I am also cognisant of the fact that SK Macharia has vast business and commercial experience, which fact is in the public domain. However, the record shows that Adam has made very serious allegations against his grandfather SK Macharia in his pleadings. Indeed, one can feel the pain of SK Macharia as a grandfather. On his part, SK Macharia has referred to Adam as a rebellious grandson. He has further accused Lisa, Adam's mother who he refers to as the deceased's former girlfriend of seeking to control the estate of the deceased and further of supporting the fraudulent obtaining from Directline, the sum of Kshs 314,992,768/= belonging to Adam. It is evident that Adam is now an adult and has chosen his path. What has come out very clearly from the foregoing is that Adam cannot work with his grandfather. Appointing them as joint administrators is untenable and not in the best interest of the estate, or indeed of Adam as the sole beneficiary. It is further noted that the order of preference in Section 66 is just but a general guide.

24. The powers of administrators set out in Section 82 of the Act include *inter alia to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.*

25. The record shows that SK Macharia and the deceased have interests in companies that are in litigation against each other. For instance, in

HCCC 256 of 2020, Directline whose Chairman is SK Macharia, is the Plaintiff while the Defendants include AKM, SK Macharia and Serah as administrators of the estate of the deceased, among others. Similarly, in HCCC 278 of 2019, the Plaintiffs include Directline, SK Macharia himself and others while the Defendants include AKM among others. Noting his position as chairman of Directline, if SK Macharia were to be appointed administrator of the estate of the deceased, he would have split loyalty between Directline and the estate of the deceased. As chairman of Directline, SK Macharia is accountable to the shareholders of the company. As administrator of the estate of the deceased, he would be accountable to the beneficiaries and to the Court. When a critical decision were to be made relating to the litigation aforesaid, where would SK Macharia's loyalty lie? With directline or with the estate? In light of the foregoing, I am of the view that it is necessary to appoint administrators other than SK Macharia to forestall a potential conflict of interest. Indeed, one would have expected SK Macharia himself to opt out of administration of the estate of the deceased due to the apparent conflict of interest.

26. Confronted by similar circumstances, in In re estate of Gurdial Kaur Sihra (Deceased [2018] eKLR, Onyiegio, J. was of a similar view and stated:

**17. Who then among the four remaining children does not qualify to be appointed as an Administrator or Administratrix? According to the Original Petitioners, the 1<sup>st</sup> Cross Petitioner, Kulwant Singh has cases filed against him as a defendant in relation to the estate's property or as a plaintiff against the deceased hence conflict of interest in case he is appointed as an Administrator. Counsel for Kulwant Singh admitted that in some cases Kulwant was a litigant against the deceased. Learned counsel was however quick to add that incase Kulwant is appointed as the Administrator, he will withdraw from the pending cases.**

**18. It is trite that among the duties an Administrator is supposed to perform is to protect, collect and preserve the Estate and incase of a suit defend or institute one for and on behalf of the estate. In the instant case, the 1<sup>st</sup> Cross Petitioner (Objector) is a litigant in ELC case No. 216/2013 where he sued his late mother (deceased) and Jagjeet Singh. The suit is still pending. What will happen if he were appointed as an Administrator? How will he balance the two interests where one is a plaintiff and at the same time the defendant by virtue of being an Administrator? It is my finding that there will be a conflict of interest if Kulwant Singh (1<sup>st</sup> Objector) is appointed an Administrator.**

27. I now turn to the legal capacity of SK Macharia to be appointed administrator of the estate of the deceased. Adam submitted that by dint of Section 56(1)(a) of the Act, SK Macharia had no capacity to be appointed administrator, having been adjudged bankrupt. For SK Macharia, it was submitted that the issue of his alleged bankruptcy is the subject of litigation in both the Court of Appeal and the Supreme Court. In this regard, I adopt the position taken by Mutuku, J. in her ruling of 28.7.21, who declined the invitation to delve into issues that are outside the jurisdiction of the Succession Court.

28. In the end, and in view of the foregoing, I make the following orders which are necessary for the ends of justice:

- i. The Summons dated 12.8.21 being incompetent is hereby struck out.
- ii. Grant of letters of administration in respect of the estate of the deceased John Gichia Macharia is hereby issued to Lisa Anyango Ameyo and Adam Kamau Macharia.
- iii. The circumstances of this case does not call for an award of costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 25<sup>TH</sup> MARCH, 2022**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicants**

..... **for the Respondent**

..... **Court Assistant**