



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei - J

**SUCCESSION CAUSE NO. E004 OF 2020**

**IN THE MATTER OF THE ESTATE OF JOHNSON MAWEU KIETI ALIAS JOHNSON MAWEU KIETTI (DECEASED)**

ANGELISTA NANGINYI ENE OLOBORA.....1<sup>ST</sup> PETITIONER/APPLICANT

JANE MWENDE MAWEU.....2<sup>ND</sup> PETITIONER/APPLICANT

VERSUS

JOYCE MWENDE WAMBUA.....RESPONDENT

**RULING**

1. The ruling relates to an application by the petitioners vide chamber summons dated 16.10.2020 that were stated to be brought under section 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules 1980. The following orders are sought;

*a) Spent*

*b) That pending the hearing and determination of this application, the Petitioners be allowed to file the petition for grant of letters of administration intestate using the copies of the title deeds for the properties and the certificate of official searches for the land to follow afterwards.*

*c) That an order do issue compelling Equity Bank Kenya limited to supply the petitioners herein with a bank statement for the deceased's account number [...].*

*d) That an order to issue allowing the petitioner herein to withdraw a sum of Kshs 450,000/- from the deceased's Equity Bank Account number [...] limited for purposes of meeting the deceased person's burial expenses and the legal fees for this application.*

*e) That the costs of this application be in the cause.*

2. The application is supported by an affidavit deponed on 16.10.2020 by Angelista Nanginyi Ene Olobora who is stated to be the wife of the deceased. It was averred that a suit had been filed in **Machakos Chief Magistrates Court (CMCS 108 of 2020)** where an injunction was granted barring the removal of the body of the deceased from the mortuary (AN1). It was averred that a consent was later recorded in the magistrate's court (AN2) where the parties agreed to bury the deceased. According to the deponent there were mortuary charges amounting to Kshs 97,050/- as evidenced by a quotation from the Machakos Funeral home (AN3) and that the deponent is elderly and dependent on the deceased hence unable to raise the sum. The deponent averred that she sought Kshs 450,000/- from the estate of the deceased to clear the legal fees of Kshs 150,000/- and the expenses related to the interment of the deceased's remains. It was averred that the orders sought are necessary to preserve the estate.

3. The application was strenuously opposed by an affidavit deponed on 4.11.2020 by Joyce Mwendu Wambua who is stated to be the daughter of the deceased. It was averred that the body of the deceased needed to be preserved in order to determine the paternity of Eunice Soila Maweu who is not recognized as a daughter of the deceased. It was averred that there were DNA tests conducted pursuant to an order in **Machakos CMCC 108 of 2020 (JWM 1)** in which it was discovered that the deceased was not the biological father of Patrick Sirere Maweu. It was averred that the deceased was never married to the 1<sup>st</sup> petitioner/applicant but that he had had an affair with her. It was averred that the 1<sup>st</sup> petitioner is not a beneficiary of the estate of the deceased and as such cannot be allowed to petition for letters of administration. It was averred that the orders sought are not merited and if the court is inclined to grant the orders sought then the funds mentioned in the order be accessed by actual beneficiaries of the estate of the deceased.

4. In rejoinder, the 1<sup>st</sup> applicant averred in her further affidavit that she lived with the deceased who sired Patrick Sirere Maweu and Eunice Soila Maweu with the deponent; that the deceased recognized them as his children. It was admitted that there was a DNA test conducted on the 2 mentioned children and that the results turned negative whereupon the deponent revealed that though Eunice Soila Maweu was not a biological daughter to the deceased, the deceased accepted her as his daughter and even gave her his surname. It was also admitted that though the DNA results indicated that Patrick was not a biological child of the deceased, he was accepted by the deceased. The deponent averred that for the sake of love for her husband, her application be allowed.

5. The application was canvassed vide written submissions. The applicant's submissions are dated 16.11.2020 while those of the Respondent is dated 21.12.2020. Learned counsel for the applicant in placing reliance on section 47 of the Law of Succession Act urged the court to grant the orders sought in the application. Learned counsel for the Respondent urged the court to dismiss the application. Counsel submitted that in the alternative a compromise be reached between the parties in the interim in the following terms :

**a) That a special grant be hereby granted to Jane Mwendu Maweu and Joyce Mwendu Wambua for purposes of meeting the deceased's mortuary charges, cremation and legal fees for the application herein.**

**b) That an order be issued compelling Equity Bank Kenya Limited to supply the 2<sup>nd</sup> Petitioner and the Respondent herein with a bank statement for the deceased's account number [...] and [...].**

**c) That an order be issued allowing the 2<sup>nd</sup> Petitioner and the Respondent herein to withdraw a sum of Kshs 400,000/ from the deceased's Equity bank account number [...] and [...] limited for purposes of meeting the deceased person's mortuary charges, cremation charges and other burial related expenses.**

**d) That an order be issued allowing the 2<sup>nd</sup> Petitioner and the Respondent herein to withdraw a total sum of Kshs 150,000/ from the deceased's Equity bank account number [...] and [...] limited for the purposes of meeting the 2<sup>nd</sup> Petitioner's legal fees for this application.**

**e) That an order be issued allowing the 2<sup>nd</sup> Petitioner and the Respondent herein to withdraw a total sum of Kshs 150,000/ from the deceased's Equity bank account number [...] and [...] limited for the purposes of meeting for the Respondent's legal fees for this application.**

**f) That the costs of the application be in the cause.**

6. The issue for determination is whether the application has merit.

7. It is quite clear from the affidavits that the deceased died intestate leaving property and persons claiming a share of the same and more specifically the applicant would like to access the estate of the deceased. It is also quite clear that no one has been appointed administrator of the estate of the deceased.

8. The position of the law in an instance such as this was rendered in **Tristram and Coote's Probate Practice, 24 ed.** At page 394 it is stated:

***“When the estate of a deceased person may be endangered by delay in administering it, the Court is not bound to wait for an application by the person entitled to a grant under the rules, but may grant letters of administration ad colligenda bona for the purpose of preserving the property.”***

9. Section 67 of the Law of Succession Act CAP 160, Laws of Kenya provides for the administration of the estate limited for purposes only of collecting and preserving the assets. Under Rule 36 (1) of the Probate and Administration Rules such letters can only issue "where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of the representation to the person who by law be entitled thereto in sufficient time to meet the necessities of the case ..."

10. In the case of **HC W/U Cause No. 23 of 2002 IN THE ESTATE OF KAHAWA SUKARI LTD** Justice Ringera stated that a grant of letters of administration ad colligenda bona cannot confer the grantee the status of the personal representative of the deceased person hence he cannot administer the estate of the deceased.

11. **Ghafoor and others v Cliff and others ChD 11 Apr 2006 [2006] EWHC 825 (Ch), [2006] 2 All ER 1079, [2006] 1 WLR 3020** the court held that

***“A grant ad colligenda bona is a limited grant of administration, enabling the grantee to safeguard the assets of the deceased within the jurisdiction of the court. It is a useful, sometimes vital, power enabling urgent steps to be taken at a time when it is not yet practicable to obtain a full grant of probate or administration. However the affidavit which was the basis of the application was seriously flawed, and made allegations which were now accepted to be unfounded. The application for the grant should have been made on notice. It was clearly a contentious application, where allegations of dishonesty were being made, and which was not so urgent as to preclude notice. The practice books said that it should be made without notice, but there was no such requirement in the rules. In these circumstances also, the solicitors who made the application were not sufficiently independent. Though the defendants had agreed to the withdrawing of the grant, that was inevitable. It was right that the defendants should pay the costs, and not out of the estate, but that should not be on an indemnity basis. Despite the decision in D’Costa, probate registrars in their duties exercise judicial functions: ‘It is inimical to a judicial process that a party should engage in private communications with the person exercising the judicial function whether during the proceedings or at a later stage.’”***

12. A grant *ad colligenda bona* is meant to preserve a deceased's estate and may be granted before a full grant is made. See **Morjaria v Abdalla (1984) KLR 490**.

13. Where any life or minority interest arises in the estate of the deceased, whether under his will or on intestacy, administration *ad colligenda bona* cannot be granted to a sole individual and application should be made for the appointment of two or more individuals or a trust corporation with or without an individual.' See **Tristram and Coote's Probate Practice, 24 ed**. At page 369 of the same book it is said:

***“A grant ad colligenda bona may be made not only to a person whom the Court considers suitable, but also to the persons who are entitled to a full grant but in the interests of the estate cannot wait or to entire strangers who have been brought into connection with the matter.”***

14. It is quite clear from the above provisions of the law that a grant *ad colligenda bona* is meant to preserve a deceased's estate and may be granted before a full grant is made and that either a person entitled to full grant or a total stranger who is concerned with the estate may apply to Court for a grant *ad colligenda bona*. It is also quite clear that a grant *ad colligenda bona* cannot be issued to an individual where any life or minority interest arises in an estate.

15. It would therefore be up to the applicants to convince the court that they meet the threshold for grant of the orders sought as well as bring an application under the appropriate provision of the law. Further, in this case without going to the merits of the application for grant of letters of administration, as can be gleaned from the affidavits in support of the application for grant, there is an indication of both life and minority interests. The life interest being the surviving spouse and the minor children represent the minority interest. As such there should have been a joint application by all the persons claiming life interest.

16. I find that the instant application is inappropriate for several reasons: firstly; the applicant has not approached the court for an application for a limited grant as envisaged in the law but in disregard of the law has sought direct access to the estate of the deceased. Secondly, even if I were to turn a blind eye to the procedural infraction in presenting the instant application, a grant *ad colligenda bona* cannot be issued to an individual where any life or minority interest arises in an estate. In those situations, an application should be made for the appointment of two or more individuals or a trust corporation with or without an individual; there is no such joint application before this court. Even though the applicants appear anxious to carry out the interment of the remains of the deceased, the parties herein had already reached a consent vide **Machakos Cmcc No.108 of 2020** in that regard and hence they can proceed from there as they arrange to approach this court appropriately. I note that the counsel for the Respondent vide their submissions have proposed a consent in terms of paragraph 22 of the Respondent's replying affidavit. The Petitioners counsel's submissions at the tail end has urged the court to allow the application as prayed or direct the money be released to the 2<sup>nd</sup> petitioner and respondent strictly for the purposes stated in the application. Indeed, the remains of the deceased are yet to be interred and hence the need by this court to assist the parties herein do the needful and thereafter the parties can approach the court over the other pending issues regarding the estate. The court will proceed to accept the compromise broached by the parties herein.

17. The upshot of the foregoing observations is that the application dated 16.10.2020 lacks merit. The same is dismissed. The court proceeds to issue the following orders:

***a) That a special grant be and is hereby granted to JANE MWENDE MAWEU and JOYCE MWENDE WAMBUA limited for the purposes of meeting the deceased's mortuary charges, cremation charges and legal fees for the application herein.***

***b) That an order is hereby issued compelling Equity Bank Kenya Limited to supply the 2<sup>nd</sup> Petitioner and the Respondent with a bank statement for the deceased's bank account numbers [...] and [...].***

***c) That an order is hereby issued allowing the 2<sup>nd</sup> Petitioner and the Respondent to withdraw a sum of Kshs 400,000/ from the deceased's Equity bank account numbers [...] and [...] limited for the purposes of meeting the deceased person's mortuary charges, cremation charges and other burial related expenses.***

***d) That an order is issued allowing the 2<sup>nd</sup> Petitioner and the Respondent to withdraw a total sum of Kshs 150,000/ from the deceased's Equity bank account numbers [...] and [...] limited for the purposes of meeting the 2<sup>nd</sup> Petitioner's legal fees for this application.***

***e) That an order is issued allowing the 2<sup>nd</sup> Petitioner and the Respondent to withdraw a total sum of Kshs 150,000/ from the deceased's Equity bank account numbers [...] and [...] limited for the purposes of meeting the Respondent's legal fees for this application.***

***f) Each party to bear their own costs.***

It is so ordered.

Dated and delivered at Machakos this 28<sup>th</sup> day of January, 2021.

D. K. Kemei

Judge