



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**SUCCESSION CAUSE NO.85 OF 2016**  
**IN THE MATTER OF THE ESTATE MBITA MWAMBIRE**  
**KIGOMBE alias MBITA MWAMBERE (DECEASED)**

KAVUMBI MANGI CHAI & OTHERS.....PETITIONERS

VERSUS

GENGESHA MBITHA MWAMBIRE alias KARISA MBITHA MWAMBIRE.....OBJECTOR

Coram: Hon. Justice R Nyakundi

Nyang'au T. O & Co. Advocates for the Petitioner

Mouko & Co. Advocates for the Objector

**RULING**

This matter was filed before the court on 3rd June 2019 by way of an objection to the making of a grant from **Gengesha Mwambire alias Karisa Mbitha Mwambire** for a declaration;

**a. That the objector is one of the beneficiaries of the estate being a son to the deceased and when the petition was lodged, he was not notified nor made aware of the process.**

**b. That there was no consent attached to the summons for confirmation of grant by heirs of the estate as required by law.**

The respondent filed a rejoinder dated 1st November 2019 based on the following grounds;

**a. That the objector is not being truthful by stating that he is not aware of the existence of the petition and their appointment as legal representatives to the estate of the deceased.**

**b. That the process has been all inclusive as indicated by the letter issued by the Assistant Chief of the sublocation in support of the petition. Therefore, the allegation on the heirs not being involved is a fallacy.**

**c. That it is an open secret that the beneficiaries including the objector have been aware of the entire process and this objection is merely vexatious and abuse of the court process.**

**d. That the petitioner Kavumbi Mangi acknowledges that she is the only surviving spouse and her children to the deceased who died intestate. Incidentally, one of those surviving children happens to be the objector.**

**e. That there is no member of the family who has been discriminated against as alleged by the objector and it is clear from the petition that the only asset being a parcel of land ought to be subdivided to the children in equal share as provided in the law.**

It was upon this full disclosure, I now proceed to determine the objection.

**Determination**

Does the objector demonstrate a prima facie case to obtain the relief agitated for in the objection proceedings?

The law being invoked by the objector is as expressly stated under Section 76 of the Succession Act on revocation and annulment of grant of letters of administration intasted. Section 76 of the Law of Succession provides:

- a. That the proceedings to obtain the grant were defective in substance;**
- b. That the grant was abstained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**
- c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**
- d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either-**
  - (i) to apply for confirmation of the grant within one year from the date thereof or such period as the court has ordered or allowed;or**
  - (ii) to proceed diligently with the administration of the estate;or**
  - (iii) to produce to the court,within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular;or**
- e. That the grant has become useless and inoperative through subsequent circumstances.**

In the present objection, the record contains the following features;

a. That the grant of letters of administration intasted was made to Kavumbi Mangi Chai and William Mbirtha Mwambire of P.O **BOX 1 MALINDI** on **8th August 2016**. In the same proceedings, it is asserted that the deceased Mbitha Mwambire alias Mbitha MWambire Kigombe (now deceased) died on 6th July 2005. He was survived by the following dependents’;

- i. Kavumbi Mangi Chai -Wife**
- ii. Kazungu Mangi Mbitha-Son**
- iii.Ezekiel Thethe Mbitha-Son**
- iv.Simon Mbitha Mwambire-Son**
- v.Karisa Mbitha Mwambire-Son (Objector)**
- vi. William Mbitha Mwambire-Son**
- vii.Sidi Mbitha Mwambire-Daughter**
- viii. Shahida Nyevu Mwambire-Daughter**

It is also clear from the supporting affidavits and the letter from the chief attest to the fact that no person, dependent or heir has been discriminated against or left out pursuant to the petition for the making of the grant of letters of administration. The only asset referenced as **Kibabamushe/98** valued at Ksh.1,000,000 remains to be the only subject matter for distribution to the beneficiaries. It is not in dispute that the petitioner and her son have been duly granted leave by the court to be legal representatives to the estate of the deceased.

What was contested by the objector by way of his protest in the making of the grant revolves around the question of not being notified or consent obtained in terms of the law leading to the confirmation of the grant of letters of administration. My reading of the record finds no iota of evidence that the petitioners have in any way discriminated against the objector. The law recognizes all heirs or children to the deceased to enjoy equal share of the residual estate which survived the deceased in terms of Section 3 of the Succession Act. In the Court of Appeal Case, Rono Vs Rono CA No. 66 of 2000, the Law of Succession Act outlaws discrimination on distribution of the estate on the basis of sex or gender. In this regard, the estate of the deceased should be shared amongst his children as correctly identified in the chief’s letter dated 16th May 2016. From the affidavit’s file in support of the making of the grant, the petitioners have neither denied or discriminated any heir or dependent as alleged by the objector. As the law of succession act grants full rights to both the surviving spouse and the children of the deceased, it is pertinent that Section 35 (1) , 37 and 38 of the Act be the starting provisions applicable to the facts of this case. They provide that in the making of the grant and the distribution of the estate, there shall be no distinction between male and female children. Consequently, there is no discrimination or bias in the provisions against any children of the deceased as both are entitled to share the estate of the intasted equally. Section 35 (1), 36 (1) an 37 of the Act emphasizes as follows: “Subject to the provisions of Section 40, where an intestate has left a surviving spouse and a child or children, the surviving spouse shall be entitled to :

**a. The personal and household effects of the deceased, absolutely; and**

**b. A life interest in the whole residue of the net intestate estate:**

Provided that, if the surviving spouse is a widow, that interest shall determine upon remarriage”.

Section 36 (1) provides:

Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate to:

**a. The personal and household effects of the deceased absolutely; and**

**b. The first ten thousand shillings out of the residue of the net intestate estate or twenty per centum thereof, whichever is the greater; and**

**c. A life interest in the whole of the remainder:**

Provided that if the surviving spouse is a widow , the life interest shall be determined upon her remarriage to any person.

Section 37 provides:

**“A surviving spouse entitled to a life interest under the provisions of section 35 or 36 with the consent of all co-trustees and all children of full age, or with the consent of the court, may during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance: Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court”.**

This claim concerns a dispute surrounding the alleged intestate property. There is no dispute as to the ownership of the land on which the alleged heirs are claiming entitlement. As regards the objection on non-disclosure or lack of obtaining the necessary consent , the evidence so far given by the objector fails the threshold test. It is well stated under Section 107 , subsection 1 and 2 of the Evidence Act ;

**1. Whoever desires any court to give judgement 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.**

It is in these circumstances, that this Court is of the view that the objector is not entitled to any of the reliefs sought in the objection proceedings. The best the objector has done is to delay the confirmation proceedings in the making of the grant of letters of administration to the prejudice of other beneficiaries to the estate. Strikingly, **in the judgement of Koome J, as she then was in the matter of the estate of Patrick Mungai, the deceased, Case No. 1374 of 2000**, she held inter alia as follows:

**“The protest to confirmation of grant was by a son who claimed that the estate of the deceased should not be divided equally between all the children. He contended that one of the assets was acquired with money that he had given to his father and further, that the deceased had bequeathed some property to him. The Court took the view that there wasn't enough evidence to support this contention and proceeded to hold that Section 38 of the law of succession Act was explicit that the estate of the deceased who is survived by children should be shared between the children in equal shares”.**

At least from the perspective of the objector, it is observed that he is claiming to be paid Kshs. 180, 300 as an extra benefit from the estate of the deceased. However, on consideration of the protest, that claim remained a mere allegation with no shred of evidence to prove it on a balance of probabilities for this Court to grant the relief. It follows that the grant of letters of administration issues to the petitioners and said to be confirmed should not be revoked or annulled as the objector has failed to satisfy the criteria outlined under Section 76 of the Succession Act. As the petitioners have already demonstrated due diligence in the making of the grant, the pending summons for confirmation of grant dated 26th September 2019 should hereby proceed to the next stage as premised in the Act as read together with the probate and administration rules.

I consider the application for confirmation of grant, pursuant Section 71 (1) of the Law of Succession properly grounded but the reasons on the face of it and an affidavit sworn by Kavumbi Mangi Chai and William Mbithya Mwambile. The deceased having been survived by a spouse and children should have the mode of distribution to be governed by the provisions of Section 35, 36, 37 and 38 of the Act. Upon these specific provisions, the summons for confirmation of grant dated 26th September 2017 be and is hereby allowed on the basis that the proceedings to obtain the certificate of confirmation is not tainted or defective in any way to impeach the whole process.

For the forgoing reasons, I find that there is no justification or valid objection for this Court to interfere with the proposed scheme of distribution as deponed under paragraph 4 of the supporting affidavit attached to the confirmation of the grant of letters of administration. The affidavit is in consonant with the principle on the distribution of the estate in equal share to the beneficiaries.

The upshot of all this is that the objection fails and the summons for confirmation dated 26th September 2017 carries the day with no orders to costs applicable in these proceedings.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT GARSEN THIS 29<sup>TH</sup> DAY OF APRIL, 2021.**

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**R. NYAKUNDI**

**JUDGE**

**NB:**

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules. ([nyanguadvocates@gmail.com](mailto:nyanguadvocates@gmail.com))