



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.175 OF 2014**

**IN THE MATTER OF THE ESTATE OF AMOO ..... (DECEASED)**

**PAO.....PETITIONER/APPLICANT**

**VERSUS**

**KOO.....RESPONDENT**

**RULING**

1. Following the demise of the late AMO on the 5<sup>th</sup> day July 2013, in Atlanta-Georgia U.S.A, at the age of seventy-seven (77) years, her daughter PAO (**PETITIONER**) petitioned for grant of letters of administration intestate respecting her estate.

The grant was accordingly issued by the Court on the 3<sup>rd</sup> October 2014, but was subsequently revoked on 2<sup>nd</sup> February 2016, following an objection raised by the deceased's son, KOO. (**OBJECTOR**). Consequently, a fresh grant was issued in the joint names of the petitioner and the objector on the 22<sup>nd</sup> February 2016.

Thereafter on issuance of the fresh grant, the petitioners or any one of the them was required to take out fresh summons for confirmation of the fresh grant. Apparently, this was not done instead the first petitioner (**P**) applied for confirmation of the grant which was solely issued to her and which was subsequently revoked on the 2<sup>nd</sup> February 2016, for a fresh grant in favour of herself and the objector (**K**). The application was made vide the summons for confirmation of grant dated 24<sup>th</sup> March 2017 and filed herein on 14<sup>th</sup> June 2017.

2. Ironically, on the 30<sup>th</sup> October 2014, the second petitioner purportedly filed an affidavit of protest against a previous summons for confirmation of grant dated 16<sup>th</sup> March 2015 and filed herein by the first petitioner on 12<sup>th</sup> May 2015.

Clearly, the first petitioner's summons for confirmation of grant dated 24<sup>th</sup> March 2017 and the second petitioner's affidavit of protest against the first petitioner's summons for confirmation of grant dated 15<sup>th</sup> March 2015, are both misconceived as they were rendered obsolete by the revocation of the previous grant issued on 3<sup>rd</sup> October 2014 and issuance of the fresh grant dated 22<sup>nd</sup> February 2016.

As the position stands, there is no fresh summons for confirmation of the fresh grant, yet the parties have been appearing in Court purportedly for confirmation of grant.

3. As the parties waited for the elusive confirmation of the grant, a totally different application dated 22<sup>nd</sup> October 2020, was filed by the first petitioner, seeking the basic Order that she be appointed as the next friend or "guardian *ad litem*" of one GMO, who happens to be son of the deceased and beneficiary of her estate. The application was made via a Notice of motion under S.32 and **ORDER 51 RULE (1)** of the **CIVIL PROCEDURE RULES** and **RULE 73** of the **PROBATE & ADMINISTRATION RULES**, on grounds that the subject beneficiary is a mentally challenged person whose interest needs to be protected.

The annexures in the supporting affidavit marked "PAO – 1" and "PAO – 2" were exhibited to confirm or prove the alleged disability affecting the subject beneficiary.

However, none of these documents show that the subject beneficiary is a person of unsound mind. Annexure "PAO – 2" alludes to the beneficiary suffering from intellectual disability and not mental disability while annexure "PAO – 1" merely shows that the subject is registered as a disabled person. The nature of disability indicated on the document varies with the nature of the disability indicated by a medical expert, one Dr. David Bukusi, Consultant Psychiatrist, in his report dated 3<sup>rd</sup> September 2014.

4. Be that as it may, the application was opposed by EAO (**PROTESTOR**) who is said to be the subject beneficiary's legally married wife.

The parties apparently decided to argue the application by way of affidavit evidence and written submissions.

In that regard the first petitioner's/applicant submissions dated 13<sup>th</sup> January 2021 were filed by **GABRIEL FWAYA & CO. ADVOCATES**, while those of the protestor dated 25<sup>th</sup> January 2021 were filed by **MALOPA & CO. ADVOCATES**.

From the affidavit evidence availed herein and the rival submissions of the applicant and the protestor, the basic issue for determination is whether the application is competent and proper before this Court and if so, whether the applicant/first petitioner ought to be appointed next friend or "*guardian ad litem*" for the beneficiary GMO. It is instructive to note that the second petitioner/objector did not file any affidavit or submissions in support or opposition to the application.

5. With regard to whether the application is proper and competent before this Court, it is this Court's opinion that it is not inasmuch as it is brought under the provisions of the Civil Procedure Act which do not apply to a Succession cause. Secondly, it introduces a separate cause of action under a different regime of the law other than the Law of Succession Act. Thirdly, the invocation of Rule 73 of the Probate & Administration Rules in the application was not made in good faith in the present circumstance, considering that the person for whom guardianship is sought is an adult with a wife or former wife and adult children.

6. On whether the applicant should be appointed next friend of the subject beneficiary for purpose of this case, it is clear that a next friend per **BLACK'S LAW DICTIONARY 10<sup>TH</sup> EDITION** is a person who appears in a lawsuit to act for the benefit of an incompetent or minor but who is not a party to the lawsuit and is not appointed as a guardian. This definition clearly overrules the applicant/first petitioner as a potential next friend of the subject beneficiary.

On the other hand, a "*guardian and ad litem*" is a person appointed by the Court to appear in a lawsuit or behalf of an incompetent or minor party. The subject beneficiary is obviously not a minor and as to whether he is incompetent for the purposes of this suit, no demonstration of the fact has been shown herein and the documentary evidence exhibited by the applicant is not cogent and credible evidence of his alleged mental disability. After all, it is often stated that "**disability is not inability.**"

7. For all the foregoing reasons, the first petitioner/applicant cannot at this juncture be appointed the "*guardian ad litem*" of the subject beneficiary in this matter. It would thereafter follow that this application fails and is hereby dismissed with each party bearing their own costs. The protestor opined herein that being the wife of the legal beneficiary she ought to be appointed his "*guardian ad litem*" in this matter. However, the reasons for non-appointment of the applicant/first petitioner as such "*guardian ad litem*" would also apply to her (**PROTESTOR**). She may nonetheless pursue a different cause in having the subject beneficiary declared mentally unsound and/or disable for her to be appointed his guardian for purposes of any legal proceedings.

8. Otherwise, this application stands dismissed and the parties to this Succession cause directed to take out the necessary summons for confirmation of the fresh grant after agreeing on the distribution of the estate property and in any event, within the next four (4) months from this date hereof. In default, the court shall be at liberty to invoke Rule 73 of the Probate & Administration Rules to revoke the fresh grant and make appropriate orders to meet the ends of justice and/or prevent abuse of the Court process.

Ordered accordingly,

**J.R KARANJAH**

**J U D G E**

**[Read and signed this 22<sup>nd</sup> day of April, 2021]**