



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

SUCCESSION CAUSE NO 304 OF 2014

IN THE ESTATE OF THE LATE AAM (DECEASED)

KFO.....APPLICANT

VERSUS

JNM

AFM

JOM.....RESPONDENTS

RULING

1. The deceased herein AAM died testate on 15th January 2014 while domiciled in Kenya. She left behind a will dated 19th January 2005 in which she appointed LFB as the sole executor and trustee in respect of her estate. She bequeathed all her personal, movable and immovable assets to LFB who at the material time was her husband.
2. Clause 2 of the will stipulated that in the event her husband predeceased her or died simultaneously with her or in such circumstances as shall render its execution impossible, the same shall be null and void and that subsequent clauses were to take effect to the complete exclusion of the provisions of clause 2 hereof.
3. Therefore, according to the subsequent clause which is clause 3, she appointed JNM and AFM as executors or trustees of her estate. At clause 5, she bequeathed her net testate estate to JNM, JOM, AFM, and MM. That should more than one of them survive her, they could share the estate as tenants in common including any child/children of any of those beneficiaries who may have predeceased her.
4. However, on 22nd July, 2011, the deceased and her husband LFB divorced. Subsequently, the two engaged in a suit for division of matrimonial property via HCC. 419/2014. On 29th June, 2012, the court decided that the properties acquired during the subsistence of their marriage was matrimonial property and the same were to be sold and proceeds thereof shared out equally. Consequently, Plot Nos /MN/[...] and [...] were sold and proceeds are still held by advocates handling the conveyancing.
5. The deceased having died on 15th January,2014, LFB petitioned for a grant of probate of written will on 21st July 2014 in his capacity as the sole executor. The said grant was issued on 5th November, 2014.
6. Before the grant could be confirmed, Mr LF died on 15th January, 2015. Apparently, LF had also executed a will dated 20th August, 2004 and another one dated 8th August, 2014 appointing KO his niece as the sole executrix and one of the beneficiaries of his estate.
7. Following the death of LF, JNM and AFM filed a Chamber Summons dated 24th March, 2015 seeking to be substituted as executors in place of the deceased executor and that a fresh grant to issue. Earlier on, they had filed succession cause No 223/2014 on 30th May, 2014 but the same was abandoned.
8. However, pursuant to the application dated 24th March, 2015, a grant of letters of administration de bonis non was issued to JNM and AFM on 16th April, 2018 to administer the an un administered estate. Subsequently, vide summons for confirmation dated 9th May, 2019 JNM and AFM applied for confirmation of the grant. Meanwhile, JNM, MM , AFM, and JOM siblings to the deceased who were fighting over the estate assets as well recorded a consent dated 24th May, 2019 and filed on 27th May, 2019 purporting to share part of the sale proceeds (Kshs 7,284,944) pursuant to HCC NO 419/14 (originating summons).
9. However, on 11th June, 2019, the court declined to record and adopt the consent. The court stated as follows;

“I am not able to record the consent as according to the terms of the will of the deceased dated 19th January, 2005 LFB was the beneficiary under the will and not the 4 persons listed in the will. Consequently, counsel are directed to relook at the will and move the court appropriately”

10. Pursuant to the above quoted court observation, KO a niece to LF who is also the executrix in respect to LF's estate filed a notice of motion dated 1st July, 2014 and amended on 18th September, 2019 seeking orders;

(1) That leave be granted to KO to replace and/or substitute JNM and AFM as the executors of the estate of AAM;

(2) That leave be granted to the said KO to apply for letters of administration with written will annexed of assets unadministered.

11. The application is anchored on grounds set on the face of it and the content of an affidavit sworn by the applicant on 1st July, 2019 and a further affidavit sworn on 26th October, 2020. Basically, the applicant claimed that, her uncle having been appointed the sole executor of the estate of the deceased herein, and considering that LF died before completing the administration of the estate, she was entitled to take over as the executrix to L's estate to continue with the administration of the estate. She went further to explain as to who is entitled as a beneficiary of the estate.

12. In response, JNM and AFM filed grounds of opposition dated 19th November, 2020 and a replying affidavit sworn on 17th February 2021, stating that, in the absence of LF now deceased, they were the next in line to take over as executors pursuant to the deceased's will of 19th January, 2015 and that K is not appearing anywhere. They argued that K the applicant can only seek to be an executrix only in respect of the estate of LF and not the estate of AA.

13. They further averred that, upon the death of LF, they automatically assumed the role of executorship which role they have not renounced. They urged the court to confirm the grant as per their application.

14. On the other hand, JOM described as the 3rd respondent in the application herein swore an affidavit on 12th February 2021 stating that, A's will was voided by the dissolution of her marriage with LF before she died and that KO has no right to come on board in this succession case as the estate herein is not LF's estate.

15. When the matter came up for hearing, parties agreed to file submissions. The applicants through the firm of Kakai Mugalo filed their submissions on 15th March, 2021 reiterating the averments contained in their affidavit in support of the application. Counsel submitted that the application is in compliance with the court orders made on 11th June, 2019 that the executor of the estate ought to be LF and not JN and AF. Counsel urged the court to find that K is the right person to take over executorship position to complete administration of the estate. Mr Mugalo submitted that the will of A is still valid and that a mere divorce does not make a will invalid.

16. On their part, the 1st and 2nd respondents filed their submissions in person on 5th March, 2021 literally adopting the averments contained in their affidavits in support. They emphasized the fact that KO has no role to play as an executor in this estate.

17. Equally, the 3rd respondent filed his submissions on 15th March, 2012 adopting his averments in the replying affidavit.

Determination.

18. Having given a factual background in respect to this matter, I am left with only one issue to determine as follows; whether KO the applicant herein is entitled to be appointed as executrix of the estate herein in place of the deceased executor LF.

19. I must caution from the word go that, this application is not concern with distribution of the estate but appointment of an executor in place of the current administrators one JNM and AFM.

20. There is no dispute that the deceased left a will dated 15th June, 2005. At clause 2 the deceased appointed her husband then LFB as the sole executor to whom she bequeathed all her property. At clause 3, the deceased said that if L did not survive her or died at the same time with her and that if it was not possible for him to survive her, then clause 2 was null and void and the subsequent clauses were to apply.

21. One such subsequent clauses is clause 4 in which she appointed her siblings JNM, AFM as the executors in place of LF and the net intestate estate shared amongst them, JOM and MM.

22. When the deceased died, LF was issued with a grant of probate of written will on 5th November, 2014. Unfortunately, he died before the grant could be confirmed. After his demise, JNM and AFM were issued with a grant of letters of administration de bonis on 16th April, 2018. It is this grant that the applicant in the instant application seeks to be substituted with her name.

23. Under section 62 of the Law of Succession, when a person who has been appointed by a will is an executor thereof has not renounced the executorship, letters of administration shall not be granted to any other person without a citation being issued calling upon the executor to renounce his executorship or apply for a grant of probate of the will. See also rule 7(6) of the probate and administration rules.

24. In this case, LF died before administering the estate to completion. In accordance to clause 4 of the deceased's will, JN and AF took over and the court appointed them as such. As per the will the two were next after LF.

25. One K is not recognized in the will of the deceased. she is only interested in the estate because her uncle had a stake in the estate which he never realized. She cannot use nor extend her appointment as an executor in respect of the estate of LF to become an executrix in A's estate. She can only endeavor to claim beneficial interest in the estate through the estate of her uncle. This can only be done in my honest opinion during confirmation stage.

26. The applicant herein has no legal right to be appointed as an executrix in this estate. The claim that the court gave contradictory directions on 11th June, 2019 is not true. What the court rejected is the consent order purporting to confirm the grant with the respondents sharing out the property of the deceased yet LF was indicated as the sole beneficiary. These directions did not in any way in my view vacate the appointment of JN and AF as administrators as per the orders of 16th April 2018.

27. The implication of those directions was that the grant could not be confirmed based on that consent hence the advice that lawyers ought to relook into that issue on distribution of the estate. Therefore, by seeking to remove JN and AF from being administrators of the estate is not the way to go. The two shall remain as the administrators and the application for confirmation dated 9th May,2019 be served if not served upon K as an interested party who shall then file her response by way of a protest which the court will then determine on merit.

28. As regards the issue of the validity of the will, submission of accounts and whether the deceased's divorce invalidated the will is not the subject of this application. Anybody challenging the validity of the will or its enforcement should raise it through an appropriate forum. As regards distribution of the estate, that is not the subject of this application for confirmation is yet to be determined and that is where distribution will be considered alongside any protest or objection.

29. For the above reasons stated, I do not find any merit in the application herein and the same is dismissed with no order as to costs. Parties to take a hearing date for the confirmation of the grant herein. Anybody willing to object to the application is at liberty to do so within 30 days from today.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JUNE 2021

.....

J. N. ONYIEGO

JUDGE