



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 18 OF 2019

IN THE MATTER OF THE ESTATE OF JAMES WANJOHI GITAHU (DECEASED)

BETWEEN

ANTONY GITAHU MUTHOGA

ESTHER WAMBAIRE MUTHOGA

THOMAS NJAGI MUTHOGA

GEORGE MATHENGE WANJOHI

FAITH WAMBUI MUTHOGA

CAROLINE WANGUI MUTHOGA.....PETITIONERS

AND

JULIA WANJIRU WANJOHI

JANE NYAGUTHII MUTHOGA.....OBJECTORS

RULING

1. A brief outline of the cause is that it relates to the estate of **JAMES WANJOHI GITAHU** (deceased) who died on the 20/08/2019; on the 4/10/2019 a Citation was filed by Mary Wambui Nderitu which prompted the petitioners to petition for a Grant of Letters of Administration and this was done on the 9/07/2020 by Antony Gitahi Muthoga and Esther Wambaire Muthoga who are a son and daughter to the deceased; before the issuance of the Grant various parties filed their respective objections; the first objection was filed on the 9/11/2020 by the 1st and 2nd objectors with a claim that the 1st objector being the widow of the deceased ranks first in priority to other persons to applying for a Grant of Letters of Administration; the 3rd, 4th and 5th Objectors also filed their objections which is dated 6/11/2020 and claim to be beneficiaries who had not been included;

2. Directions were given on the 14/12/2020 that the parties canvass the objections by way of filing and exchanging written submissions; hereunder is a summary of their respective submissions;

THE OBJECTORS CASE

3. The 1st objector submitted that she was the only lawful sole surviving spouse of the deceased; their marriage having been solemnized in church on the 23/07/1977 and she annexed a copy of her certificate of marriage; that she ranked in priority to other persons and urged the court to exercise its discretion under Rule 7(1)(e)(iii) of the Probate and Administration Rules and that she be appointed as the sole administrator of the estate or jointly with Jane Nyaguthii Muthoga;

4. The 3rd and 4th objectors filed their objection to the Petition on the 11/11/2020 and also filed an Answer to Petition and Petition by way of Cross application both are dated 4/12/2020; they submitted that the petitioners were not legally fit and proper persons to administer the estate as they had intermeddled with the estate; that the petitioners had only listed their step-mother Julia Wanjiru and her children on the list of beneficiaries but their names had been omitted yet they were rightful heirs and beneficiaries; copies of their Birth Certificates were annexed to the affidavit as proof that they were rightful beneficiaries to the estate; that in the affidavit made by the petitioners they have taken cognizance of the fact the deceased supported them during his lifetime;

5. They urged the court to exercise its discretion as provided under Section 66 of the Law of Succession.

THE PETITIONERS RESPONSE

6. The petitioners state that they appreciated the fact that the 1st objector was their mother but she had delayed in moving the court appropriately and no action was taken until the petitioners filed the Petition within the 30 days time lines directed by the court; they contend that the 1st and 2nd objector were intermeddling with the estate and could not be entrusted with the serious responsibility of administering the estate;

7. They were aware that that there can be more than one administrator and propose that in the spirit of fast tracking the matter that the 1st objector and the two petitioners be issued with the Grant; they contend that the 3rd, 4th and 5th objectors are not suitable administrators and are not recognized as beneficiaries to the estate and will have to prove their relationship with the deceased; that even if they were to be considered as beneficiaries their interest cannot rank higher than that of the petitioners;

8. They urged the court to exercise its discretion under the provisions of Section 66 of the Law of Succession Act.

ISSUES FOR DETERMINATION

9. After reading the written submissions there are two (2) attendant issues framed for determination which are;

(i) Whether the 4th and 5th objectors are beneficiaries to the estate

(ii) Which person(s) should be appointed as administrator(s) so that the estate may be administered and distributed;

ANALYSIS

Whether the 4th and 5th objectors are beneficiaries to the estate;

10. The first concern that this court needs to address before considering who is suitable to administer the estate is the issue as to whether or not the 4th and 5th objectors are immediate family members and whether they should be locked out of the administration of the estate on the grounds of unsuitability; because it would augur well to appoint persons as administrators who are found to be unsuitable; therefore, the starting point is the determination of whether or not these two objectors are children of the deceased;

11. There appears to be a second house claiming to be beneficiaries to the estate; the petitioner named Antony Gitahi Muthoga contends that the 3rd, 4th and 5th objectors are not suitable administrators as they are not recognizable as beneficiaries to the estate; that they would have to first prove their relationship with the deceased; this hard line stand by the petitioner appears to soften in his next line of submission in which he submits that he is not opposed to their inclusion provided they are not ranked in priority to them; and it reads as follows;

‘Your ladyship, even if the 3rd, 4th and 5th objectors were to be taken as dependants to the estate, their beneficial interest does not rank higher than that of the Petitioners.’

12. The same petitioner even made an averment under oath at paragraph 23 of his affidavit dated 30/09/2020 wherein he acknowledges there are other children of the deceased by alluding to ***‘one other dependant’*** but he falls short of naming this dependant and his averment reads as follows;

‘THAT in his lifetime the deceased used to meet the educational needs of the following grandchildren and one other dependant who is not a member of the family.....’

13. The 4th and 5th objectors annexed copies of their Birth Certificates to support their claims as beneficiaries to the deceased’s estate and this court notes that the authenticity of this documentary evidence was not challenged and or controverted by either the petitioners and or the 1st and 2nd objectors;

14. In the case of **Re; Estate of Nicholas Kaaka Kapore (Deceased) [2018] eKLR** it was held that

‘...the law also appreciates the position that the deceased surviving children include even those born outside the marriage....’

15. For those reasons this court is satisfied that the 4th and 5th objectors have proved on a balance of probabilities that they are beneficiaries and suitable persons to be considered as administrators of the estate of the deceased

16. Accordingly, the list of surviving persons the deceased left shall read as follows; namely;

(i) Julia Wanjiru James - widow

(ii) Ester Wambaire Muthoga - daughter

- (iii) Jane Nyaguthii Muthoga - daughter
- (iv) Antony Gitahi Muthoga – son
- (v) Thomas Njagi Muthoga – son
- (vi) George Mathenge Wanjohi – son
- (vii) Faith Wambui Muthoga – daughter
- (viii) Carol Wangui Muthoga – daughter
- (ix) Edwin Gitahi Wanjohi – son
- (x) David Njagi Wanjohi - son

Which persons should be appointed as administrators to the estate of the deceased:

17. There appears to be three groups in this matter; the first group consists of Mary Wambui Nderitu the 3rd Objector and is the mother of the 4th and 5th Objectors, upon getting frustrated by the non-action of the widow and the children of the deceased fired the first warning shot by filing a citation; this gave rise to three groupings, one being the Petitioners who comprise of children of the deceased and one other group that consists of the 1st objector and the 2nd objector who are a surviving spouse of the deceased and a daughter who is also a child of the deceased; the third grouping being the 3rd objector and her two sons whom she claims were sired by the deceased; all these groupings seek to be appointed as administrators of the estate;

18. The applicable law that sets down the order of preference is found under Section 66 of the Law of Succession Act which reads 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 in part V;

(c) The Public Trustee; and

(d) Creditors.’

19. The group consisting of mother and daughter argue that the 1st objector ranks in priority and therefore seek to be appointed as administrators either singularly or jointly; whereas the group comprising of the petitioners while having acknowledged the fact that the 1st objector is their mother and is also a surviving spouse of the deceased contend that the 1st and 2nd objector cannot be entrusted with the serious responsibility of administering the estate as they were and continue to intermeddle with the estate; and proposed that the 1st objector be appointed together with the two petitioners as administrators; as for the group consisting of the 3rd, 4th and 5th objectors their main bone of contention appears to be recognition as beneficiaries to the estate;

20. The order of preference is set out in the foregoing Section 66 of the Law of Succession but this order is not binding and the court may exercise its discretion and appoint administrators without following this order of preference;

21. The 1st objector definitely ranks in priority to be appointed as an administrator but the facts brought out during the hearing of this matter is that the 1st objector is aged 80 years; the question that arises is that being an octogenarian would she be capable of collecting, preserving, administering and distributing such a vast estate on her own; in answer to this question it is this court’s considered view that singularly she may not be up to the task due to her advanced years, and may be prone to dependency and manipulation;

22. The law permits the appointment of a maximum number of four administrators; therefore the surviving spouse that is the 1st objector shall be appointed as an administrator and will be assisted by her son Antony Gitahi Muthoga who has the consent of his siblings from the first house and David Njagi Wanjohi who has his brothers consent.

FINDINGS AND DETERMINATION

23. From the afore-going reasons this court makes the following findings and determinations that;

- (i) This court finds that the 1st and 5th objections have merit and are hereby allowed;

(ii) The court hereby appoints **JULIA WANJIRU WANJOHI AND ANTONY GITAHU MUTHOGA AND DAVID NJAGI WANJOHI** as joint administrators of the estate;

(iii) A Grant of Letters of Administration shall accordingly issue to them; after the expiry of three (3) months the administrators are at liberty to file the application for Confirmation of the Grant;

(iv) Each party shall bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 24TH DAY OF JUNE, 2021.

HON.A.MSHILA

JUDGE