



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT ELDORET**

**SUCCESSION CAUSE NO 67 OF 2021 (Ad Colligenda Bona)**

**IN THE MATTER OF THE ESTATE OF DANIEL A. KORIR KIPKURUI (DECEASED)**

**MARGARET JEPKOECH.....APPLICANT**

**VERSUS**

**PETER KEMEI KIRUI..... 1<sup>ST</sup> RESPONDENT**

**IRENE CHEBET..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant herein approached this court by way of a petition for special letters of administration dated the 28<sup>th</sup> of June 2021 seeking to access the deceased money from Kenya Commercial Bank account number [particulars withheld] for the sole purpose of paying school fees, education requirements, medical and maintenance costs for the WAK aged 12 years, SCK aged 9 years and HK aged 25 years.

2. The application is supported by the affidavit of the applicant herein sworn on even date wherein she deponed that she is the widow to the late Daniel Korir Kipkurui and the mother to the minors herein. She further deponed that WAK is a grade 6 student at Potters house academy while SCK is a grade 3 student at the same school, and both need school fees and maintenance. She also stated that the house requires to be maintained. Moreover, the applicant averred that she is a house wife with no means of getting income to pay the school fees for her 3 children and maintaining the house.

3. The applicant itemized the children needs and further stated that she needs Kshs 6000 for clothing, Kshs 5000 for the house maid and Kshs 5000 for the Shamba boy per month. Finally, the applicant pleaded that she be allowed to access money in the deceased account above, thus allowing her application.

4. The application is opposed by the 1<sup>st</sup> respondent herein via his replying affidavit sworn on the 9<sup>th</sup> of July 2021 at Eldoret. In the said affidavit, the 1<sup>st</sup> respondent avers that he is the son to the deceased and opposes the application on grounds that the petition has not been made in good faith as he is aware that the petitioner/applicant is not in dire need of the money she seeks to withdraw. In particular, the 1<sup>st</sup> respondent deponed that the petitioner is in control and custody of rental income from 3 developed plots within Kapsoya Estate namely Eldoret Municipality/Block 9/1771, Eldoret Municipality/Block 9/1526 and Eldoret Municipality/Block 9/2400 totaling to about of 80,000/= per month. Further, the 1<sup>st</sup> respondent averred that the petitioner/applicant stays in a secluded area in plot Eldoret Municipality/Block 9/1771 wherein she keeps 4 grade cows and sells milk thus she is able to cater for herself and the children. The 1<sup>st</sup> respondent also deponed that on the 24<sup>th</sup> of May 2021, he together with the deceased and the petitioner/applicant withdrew Kshs 70,000 from the account under reference for the personal use of the petitioner and her children.

5. Finally, the 1<sup>st</sup> respondent deponed that no evidence has been brought before court to confirm that there are fees arrears for the two school going children and, in the foregoing, there is no compelling reasons to warrant court to grant the applicant the prayers sought.

6. The 2<sup>nd</sup> respondent also filed her replying affidavit sworn on the 9<sup>th</sup> of July 2021 wherein she averred that she opposes the application and that she favors issuance of full grant as opposed to limited grant so as to ensure that justice is done. The 2<sup>nd</sup> respondent also averred that her late father was solely responsible for payment of fees of her two children both of whom are minors and that the applicant has several other sources of income that can sustain her until full grant is issued and distribution done.

7. In response, the applicant filed a further affidavit sworn on the 16<sup>th</sup> of July 2021 wherein she deponed that the 2<sup>nd</sup> respondent is married but has left her husband and taken over management and income from the deceased tea estate farm in Kericho together with grade cows at the farm in Kericho. According to the applicant, the cows alleged by the 1<sup>st</sup> respondent belong to her brother and not the deceased. The

applicant further averred that the respondents have deliberately failed to state the properties owned by the deceased in his rural home some of which are being managed by the 2<sup>nd</sup> respondent. Further, the applicant rejected the allegation that the 2<sup>nd</sup> respondent's children were being paid for school fees by the deceased and that in any event, the income from tea and cows is enough to pay for the 2<sup>nd</sup> respondent's children school fees.

8. The applicant also averred that the 1<sup>st</sup> respondent does not care for her welfare and that of her children and has in fact lodged a caveat at the Moi University pension department thus the applicant is unable to access the pension funds. The applicant further deponed that she is the only surviving widow of the deceased and the funds are thus due to her and that she could have used part of the pension to maintain herself and her children.

9. The applicant also contended that the tenants in the houses pay Kshs 10,000 and not Kshs 60,000 as stated by the 1<sup>st</sup> respondent and that the houses in L.R No 9/1526 attract rent of Kshs 8,000 each bringing the total to Kshs 16000 with total rental income being Kshs 36,000 and not Kshs 80,000 as alleged.

10. The applicant therefore submitted that the amount collected from rent is not enough to meet the needs of her children and pay school fees considering that the total annual school fees plus transport for the two children is Kshs 211,000 without other needs such as foods, uniforms, books and stationery, clothing, medical fees and utility bills against Kshs 432,000 being annual rental income.

11. Finally, the applicant deponed that her children were brought up in certain lifestyle which ought to be sustained and considering that schools are set to open on the 27<sup>th</sup> July 2021, it is prudent that the court allows her to access the money in the bank so as to pay fees with an undertaking to render a true account of the same during the probate and administration proceedings.

12. On the 12<sup>th</sup> of July 2021, court directed that the application be canvassed by way of written submissions and directed parties to file the same within 7 days of filing of the further affidavit.

13. On the 19<sup>th</sup> of July 2021 when the matter came up for mention, the applicant confirmed that she had filed and served her submissions while the respondent requested court's permission to file a supplementary affidavit and submissions.

14. The court directed the respondent to file a supplementary affidavit and submissions within 3 days that is by the 23<sup>rd</sup> of July 2021 but the same were not filed within the timelines given.

#### **Applicant's Submission**

15. The applicant via submissions dated the 16<sup>th</sup> of July 2021 submitted that *Section 54 of the Law of Succession Act* as read with *Rule 36(1)* of the probate and administration rules provide for limited grants and that the exigencies of the situation required her to do so. The applicant submitted further that it is not contested that none of the parties to the petition has applied for grant of letters of administration. In fact, the applicant contended that she has not refused to petition for grant of letters intestate as alleged by the 1<sup>st</sup> respondent as she has been mourning her late husband. Further, the applicant submitted that since schools are set to open on the 26<sup>th</sup> of July 2021, it will not be possible to obtain grant within that period. She thus submitted that the application is merited and in the best interest of the children.

16. The applicant further submitted that she is a widow with no source of income and thus she shouldn't be denied access to her deceased husband's account as she was solely dependent on the deceased. She also submitted that as per Section 29 of the Law of Succession Act as read with Section 26(1), the 2<sup>nd</sup> respondent has not proved that the deceased maintained and educated her children during his lifetime. In this regard, she submitted that the 2<sup>nd</sup> respondent is not being honest considering that the 2<sup>nd</sup> respondent is opposed to the limited grant but at the same time seeks school fees to be paid pending distribution. How then will the school fees be paid pending distribution?

17. Finally, the applicant submitted that she has not sought orders to administer the deceased estate and as such the objections raised by the respondents are misplaced and urged court to invoke Rule 73 of the probate and administration rules and the authority in *Peter Kaniaru Wanja vs Mathew Angira Ondego Kajiado High Court Succession Cause No.17 of 2017* and find in her favour.

#### **Analysis and Determination**

18. I have considered the application herein, affidavit in support, replying affidavits and submissions by the parties and take cognizance of the fact that as a general principle of the law of succession, grants may only be made with notice under section 67 of the Law of Succession Act which provides as follows:

##### **“67. Notice of application for grant**

**(1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.”**

19. This position has been reiterated in a litany of cases including *IN RE ESTATE OF MARY SYOKWIA KYALILI [2015] ECLR AND MARY WAITHERA V ANN NDEGWA & ANOTHER [2014] ECLR*. However, where special circumstances exist, the Law of Succession Act allows application for a limited grant of letters of administration ad colligenda bona for purposes of collecting and preservation of the estate. The same is entrenched under rule 36 of the Probate and Administration rules which provides that:

**“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 representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defunct of the estate of the deceased.”**

20. I note from the application and the affidavit in support that the applicant primarily seeks grant of letters ad colligenda bona in order to access funds from the deceased’s account held at KCB for purposes of paying school fees for her children together with upkeep/maintenance.

21. There is no doubt that issues pertaining to the education of children especially minors is an issue that requires the attention and urgency of court, considering that it pertains to the rights of children especially the right to education. This is a right entrenched under our Constitution and in particular *Article 53(1)* underlines the fact that children are entitled to compulsory basic education and thus, this Court appreciates that the payment of school fees and related expenses is an urgent matter which may necessitate the filing of an application as presently before the court in terms of *Rule 36 (1)* of the *Probate and Administration*. This position was shared by court in **IN RE ESTATE OF MARY SYOKWIA KYALILI [2015] EKLR.**

22. In the instant application, there is no contention that the minors are children of the applicant and the deceased and birth certificates have been attached to demonstrate the same. In any event, the respondents have not questioned and or challenged the same. Secondly, there is no contention that the minors are school going children enrolled at [ParticW]. Thirdly, there is no contention that the deceased used to pay the fees for the children prior to his death. What is in dispute is whether the applicant has sufficient funds drawn from the rental income as to pay the fees and related expenses. The applicant says it is not sufficient while the respondents say it is.

23. Taking into account all the circumstances of the case and the best interest of the children, I am of the view that the issues raised can be fully dealt with at hearing of the succession cause. However, as part of preservation of the estate of the deceased and in the best interest of the children, the court do find that the prompt payment of urgent needs of the deceased’s children such as school fees, upkeep and related expenses is necessary. This however should be limited only to the minors WAK and SCK. As regards HK, there has been no evidence submitted to show the fees required nor where she goes to school and thus court cannot make a conclusive finding on the support she needs.

24. Consequently, a Grant of Letter of Administration *ad colligenda bona* is therefore granted to the petitioner for the purpose of solely making the withdrawal and payments of school fees for the whole year as follows:

a. Kshs 211,000 (Kshs Two Hundred and Eleven Thousand) in respect of/being school fees and transport for WAK and SCK for one year. The stated amount shall be paid from Account Number [particulars withheld] KCB Eldoret Branch in the name of Daniel Kipkurui Korir (deceased) and shall be deposited/paid directly into one of Potters House Academy Eldoret Accounts namely Barclays Bank Account Number [particulars withheld], Equity Bank Account Number [particulars withheld] or KCB Account Number [particulars withheld] and the receipt deposited in court.

25. The petitioner is also authorized to withdraw the sum of Kshs.70,000/- only for the general upkeep of the children till a full grant is obtained or further orders issued to the contrary.

26. Accordingly, a Grant of Letters of Administration Ad Colligenda Bona is issued to the petitioner for purposes of making withdrawal and payment of school fees and related expenses as set out in paragraph 24 and 25 above.

27. For avoidance of doubt, this Grant of Letter of Administration authorizes the withdrawal from the deceased’s accounts of a total sum of Ksh.281,000/- (Two Hundred and Eighty One Thousand) and no further or other sums of money may be withdrawn from the said account till a full grant of representation or further orders of the Court.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 2<sup>ND</sup> DAY OF AUGUST, 2021**

In the presence of:-

Mr. Murgor for the Applicant (absent)

Mr. Mateka holding for Mr. Nyolei for the Respondent

Ms Gladys - Court assistant