



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**MISC. SUCCESSION CAUSE NO. E010 OF 2020**

**IN THE MATTER OF THE ESTATE OF THE LATE ASHFORD MIRITI (DECEASED)**

**ERIC KARIUKI MIRITI.....PETITIONER**

**R U L I N G**

1. Ashford Miriti (the deceased) to whom this succession cause relates died on 05/11/2020. Eric Kariuki Miriti, the Petitioner herein, has petitioned for letters of administration ad litem where he states that the deceased died intestate and was survived by the following children:

- a. Justice Mugambi Miriti (Deceased son)
- b. Rosemary Mukwanyara Miriti – Daughter
- c. Peter Mwiti Miriti – Son
- d. Erick Kariuki Miriti – Son (and the Petitioner herein)

2. According to the Petitioner, the estate of the deceased comprised of his share as a beneficiary of the estate of the late Daniel Muindi (the original deceased).

3. The Petitioner has now moved this court seeking for a grant of letters of administration ad litem. The gist of his petition is that he wishes to substitute the deceased as a beneficiary in the estate of the original deceased.

**Analysis**

4. From the above facts, the main issue for determination by this court is whether the Petitioner's petition for grant of letters of administration ad litem dated 25<sup>th</sup> November 2020 and filed on 30<sup>th</sup> November 2020 is merited.

5. **In re the estate of Helena Wangechi Njoroge (Deceased) (2015) eKLR** the court stated as follows concerning letters of administration '*ad litem*':

**“The suit envisaged to be filed on the strength of a grant *ad litem* is not a probate or succession case, or an interlocutory application within a probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or defence the estate against third parties.”**

6. In this case, the Petitioner does not intend to file a civil suit to protect or defend the deceased's estate. Instead, he wishes to substitute the deceased as a beneficiary in the estate of the original deceased. The grant sought is intended to be used in a succession cause and not in a civil suit. For that reason alone, it is my view that it would be improper for this court to allow the said petition. Nevertheless, I will proceed to analyze the issue of what happens to the share of a deceased beneficiary.

7. This has been the subject to consideration in several persuasive cases. **In re Estate of Tuaruchiu Marete (Deceased) [2019] eKLR** the court expressed itself as follows:

**“Whereas a child of the deceased may take the share of his deceased parent directly, but this should be done in clear cases and with much circumspection. Trouble may come when one of the children of the deceased beneficiary takes the whole of the estate of the deceased beneficiary. This is fraught with many dangers. Consider these dilemmas; (1) you may disinherit**

other dependants of the deceased; (2) the court may not be in a position to identify the rightful beneficiaries of the estate of the deceased beneficiary; (3) the cause does not relate to the deceased beneficiary, thus, the safeguards in law say gazettment of the cause to invite objections may not be available in that kind of transmissions; (4) in case of disputes amongst the beneficiaries of the deceased beneficiary, those may not be resolved in the original cause.”

8. In this case, the Petitioner wishes to substitute the deceased as a beneficiary in the estate of the original deceased. I have carefully perused the court record and I note from the onset that there is no evidence of when the original deceased died and whether he had property to bequeath. If at all the original deceased left behind any property, it is only through a grant in respect of his estate that the identity and value of the property he left behind can be ascertained. In addition, there is also no proof in this case whether a grant has been applied and/or obtained in respect of the estate of the original deceased.

9. I also note that there is no evidence to show who were the survivors of the original deceased and more importantly, whether the deceased herein was a beneficiary of the estate of the original deceased. The Petitioner annexed to his affidavit in support of the petition a letter dated 24<sup>th</sup> November 2020 from the office of the assistant chief of Kariakomo sub location. The letter only confirms that the late Ashford Miriti was the Petitioner’s biological father and was a resident of the said sub-location until the time of his demise. There is no any other indication of who were the other survivors of the deceased apart from the averments of the Petitioner. The applicant has not annexed any evidence to support his claim that there was a succession cause and his deceased father was bequeathed a share. It is a cardinal principle in the admiration of justice that courts of law don’t act in vain.

10. The applicant had the burden to prove to this court that such proceedings exist. This burden on the applicant has not been discharged.

**Section 107 and 108 of the Evidence Act** provides as follows:

107. **Burden of proof**  
“ (1) *Whoever desires any court to give judgment 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.*  
108. **Incidence of burden**  
*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”*

11. In an application of this nature, it is not sufficient to allege that his father had a beneficial interest, material evidence must be laid before this court. The applicant’s father is deceased.

12. The **Law of Succession Act (Cap 160 Laws of Kenya)** has an elaborate procedure for obtaining a grant of letters of administration in the estate of a deceased- see **Sections 67-73**. This is meant to ensure that all those who are beneficiary entitled to the estate are notified and are given an opportunity to raise objections if they so wish and are given an opportunity to be heard. The procedure which the applicant has followed is a short cut which is flawed. Under **Section 82 a & b of the Law of Succession Act**, the powers of a personal representative are spelt out. It provides:

” *Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-*

(a) *to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;*

(b) *to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best.”*

13. It is my view that the applicant should have applied for a grant of letters of administration in the estate of his deceased father because if his deceased father was entitled to a share of the estate of his deceased father, such share is property which forms part of his estate and the law requires that it be distributed to those who qualify as his dependents. In this application, the Chief’s letter has not identified the beneficiaries and the consent presented in court is signed by a person said to be deceased and the indentity card numbers of the rest have not been given. A limited grant issued without such particulars and details, might end up to being used to disinherit other beneficiaries.

14. **In re Estate of Tuaruchiu Marete (supra)**, the court stated as follows with regards to the proper procedure of dealing with the share of a deceased beneficiary:

“**I have seen in my practice as a judge, many causes being unduly delayed by wrangles amongst the beneficiaries of the estate of deceased beneficiary. Of significance to note is that the share of the deceased beneficiary belongs to his estate and therefore, to all the beneficiaries of the deceased beneficiary. A more creative way which is supported by law is to indicate that the share shall go to the estate of the deceased to be shared equally by all his children. Such share is held in trust by the administrators of the original cause for transmission to the estate of the deceased beneficiary.”**

15. From the foregoing, it is deducible that the proper procedure that the Petitioner ought to have followed in order to replace his deceased father as a beneficiary in the estate of the original deceased was to petition for grant of probate or letters of administration in the estate of the deceased herein. After confirmation of that grant, it is the executor or administrator of the estate of the deceased herein who should move the court to have the grant revoked for the reason that it has become useless and inoperative through subsequent circumstances. **Section 76 of the Act** provides that an application to revoke or annul the grant of representation whether or not confirmed may be filed by an interested party or the court on its own motion can order that the grant be revoked. One of the grounds for revocation of grant is where the grant has

become useless and inoperative through subsequent circumstances. **Section 76 (e)** provides:-

***“ A grant whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-***

***e) that the grant has become useless and inoperative through subsequent circumstances.”***

16. A fresh grant would then be issued showing that the share of the deceased would go to his estate represented by his personal representatives.

**Conclusion**

17. In view of the limited facts provided in this instant cause, I opine that there are certainly many potential legal hurdles that will be created if this present petition is allowed. The object of this court is to uphold substantive justice and substitution of a deceased beneficiary where a confirmed grant exists cannot be made in the absence of a grant of letters of administration intestate appointing the applicant as the administrator/tix of the Estate. In the circumstances, it is my view that the Petition dated 25<sup>th</sup> November 2020 has no merits and is not properly before this court. I dismiss the application.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 30TH DAY OF SEPTEMBER 2021.**

**L. W. GITARI**

**JUDGE**