



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

P & A MISC APPLICATION NO. 82 OF 2018

CONSOLIDATED TOGETHER WITH SUCCESSION CAUSE NO 4 OF 2019

ESTATE OF WILLIAM KIPSANG BUSIENEI (DECEASED)

FELIX SANG.....APPLICANT/1ST PETITIONER

VERSUS

ANNAH CHEROTICH BUSIENEI.....RESPONDENT/2ND PETITIONER

AND

JOSEPH KIPISIO SABANGAN.....1ST INTERESTED PARTY

SIMON KIPLANGAT CHANGTOEK.....2ND INTERESTED PARTY

JOSEPH KIPKEMOI KEBENEI.....3RD INTERESTED PARTY

RULING

1. This is the 5th application before this Court in respect of the Estate of William Kipsang Busienei. The same has come to me through a Notice of Motion under Certificate of Urgency and dated 6 May 2021 together with a supporting affidavit sworn by Felix Sang dated on the same date. The prayers are:-

- (i) That the Court issues an Order replacing Joyce Chebet Busienei with Felix Sang as the joint account holder for the joint KCB Account No. xxxxxx with Annah Busienei;
- (ii) That a total of 621,420 be withdrawn from KCB Account No. xxxxxx for purposes of paying school fees for Mercy at [Particulars Withheld] University;
- (iii) That Kshs.168,000 be withdrawn from KCB Account No. xxxxxx for her accommodation at [Particulars Withheld] University;
- (iv) That in the absence of cooperation from the Respondent, the Deputy Registrar be directed to sign all relevant documents in respect of the first three prayers;
- (v) That the Orders of 18 December 2018 be varied or set aside.
- (vi) That the Court be pleased to grant any further orders it deems fit and as pertains the ends of justice; and
- (vii) The costs of the Application be provided for.

2. The Application is premised on the grounds that the Applicant, Mrs. Joyce Busienei died on 24 December 2019 and that her son Felix (the Applicant) was now taking care of his school going siblings and could not afford their upkeep and fees. Secondly, that the present circumstances required a review or setting aside of the previous orders since the Respondent had remained as the only account holder of the joint KCB Account and by consent, the parties had agreed on 5 March 2020 to have the Applicant be a co-administrator with the Respondent.

3. Through an oral application by counsel for the interested parties, the present Application was amended to include the interested parties. Mr. Joseph Kebenei, the 1st Interested party filed a Replying Affidavit dated 28 June 2021, objecting the Application. He contended that the numerous applications to withdraw money for school fees were detrimental to them as business partners of the deceased's Estate, and delayed the conclusion of the Succession matter. He averred that the consent which was referred to by the Applicant was never adopted in Court because the Applicant himself disagreed with the terms and hence he could not be added as co-administrator or a joint account holder with the Respondent; that the Applicant sought the same orders that the family meeting minutes had indicated he had already been granted and that the Application ought to be dismissed to allow the Succession Cause to proceed.

4. The Respondent filed a Replying Affidavit dated 5 July 2021 in which she challenged the consent to have the Applicant substitute his deceased mother as a co-administrator of the Estate claiming that the Applicant was not a biological son of the deceased. Secondly, that his prayer to withdraw Kshs.621,420/= for fees and upkeep for his school-going siblings was not well founded since he did not clearly demonstrate the urgency and did not attach a list of creditors as he claims to have borrowed loans to offset the school fees. Thirdly, that the fees schedules attached indicated fees for the previous years which had already been paid based on the court Order of 18 December 2018 and fees for future years which his sister was yet to undertake. Lastly, she contended that the request for Kshs.504,620/= was unfounded since there were no supporting documents and that the receipts attached for payment of accommodation were not genuine. She asked that the Court dismisses the Application and allows the Succession cause to proceed.

5. The Application was urged through written submissions.

Petitioner/Applicant's Submissions

6. In his submissions, the Applicant raised five issues for consideration. Firstly, he argued that he should be allowed to replace his deceased mother as a joint account holder for the KCB joint account since without the said substitution, the administration of the matter would be impeded. He relied on the case of **Nakuru High Court Succession Cause No. 606 of 2006, In the Matter of the Estate of Elizabeth Wanjiru Waweru**.

7. Secondly, he submitted that he should be allowed to withdraw money from the joint account to pay for the school fees of his younger sibling who was a dependent of the deceased. He relied on the **Nairobi High Court Succession Cause No. 2243 of 2021 in Re Estate of AMK (deceased)** and **Machakos High Court Succession Cause No. 207 of 2015, in the Matter of the Estate of Mary Syokwaa Kyalili**.

8. He also urged the court as the third issue, to direct that the Deputy Registrar be allowed to execute the relevant documents to give effect to the court Order(s) and relied on **Kerugoya High Court Succession Cause No. 372 of 2021, Tabitha Wangithi Muriuki vs. Wathiba Kimoo (2020) eKLR**.

9. Lastly, he urged the court to vary the consent dated 18 December 2018 on the premise that there was concealment of proceeds from some assets which the Respondent and her accomplice failed to remit to the joint account and the lack of cooperation from the Respondent in running the joint account. To this end, he relied on **Order 45 of the Civil Procedure Rules, Nairobi High Court Misc Civil Suit No. 693 of 2002, James Kingaru & 17 Others vs. J.M. Kangari & Muhu Holdings Ltd & 2 Others (2005) eKLR** and **Nairobi Court of Appeal, Civil Appeal No. 275 of 2010 Pancras T. Swai vs. Kenya Breweries Limited, C.A. No. 80 of 1985**. The Applicant also submitted that each party should bear the costs of the Application.

The 2nd Petitioner/Respondent's Submissions

10. The Respondent submitted on six issues. Firstly that there was no evidence adduced before court proving that the deceased paid school fees for the Applicant's younger siblings and that so far, the Applicant and his two brothers had been able to pay the said fees. They relied on **Beatrice Ciamutua Rugamba vs. Fredrick Nkari Mutegi & Others, Chuka Succ Cause No. 12 of 2016, eKLR** and **Estate of Gerishon Kamau Kirima** in relation to the request by the Applicant for partial distribution.

11. Secondly, on the prayer that the Deputy Registrar be authorized to sign the relevant documents on behalf of the Respondents, they submitted that the Respondent never refused to sign any documents in that respect and relied on **Rose Wanjiku Kuria vs. Ng'ang'a Mugwe (2003) eKLR** in which the court stated that a Deputy Registrar cannot be so authorized as such under the Law of Succession Act.

12. Thirdly, they submitted that the Application was improperly before the Court since the Applicant never applied for a Special Limited Grant to enable him access monies for school fees. They relied on the **High Court of Kenya at Nairobi Succession Cause No. 567 of 2017, In the Matter of the Estate of Stephen Keroso Makori (deceased) 2018 eKLR**.

13. Fourthly, on whether the consent order dated 18 December 2018 ought to be varied, reviewed or set aside, the Respondent submitted that there was no demonstration on how the said Orders occasioned a miscarriage of justice.

14. On whether the Court should allow the Applicant to replace the deceased mother as the joint account holder, counsel for the Respondent submitted that the Applicant was not a legitimate son of the deceased and that his mother was also not a legal wife of the deceased. To this end, he argued that the Applicant could not be regarded as a beneficiary of the Estate of the late William Busienei. He also submitted that the paternity of the two school going children was an issue. He relied on **High Court at Nairobi Succession Cause No. 1008 of 2018, in the Matter of the Estate of M.A.O. (deceased)**.

15. Lastly they prayed for the Respondent to be awarded the costs of the Application.

Issues for determination

- (i) Whether the two school-going children are children of the deceased and whether they are entitled to school fees from the Estate of the deceased as his dependents.
- (ii) Whether the Court has authority to issue orders to withdraw from the estate of a deceased person before the conclusion of a succession cause and the limitations of such an Order.
- (iii) Whether the Applicant ought to be allowed to substitute the deceased mother as a joint account holder with the Respondent.
- (iv) Whether the previous Court Order dated 18 December 2018 can be varied, reviewed or set aside to accommodate the present circumstances and whether this Application is merited.

(i) Whether the school-going children are children of the deceased and whether they are entitled to school fees from the estate of the deceased as his dependents.

16. It is apparent from the pleadings in this case that there are two households claiming the Estate of the deceased. It has been argued that there are two school going children from the second household. It has been also stated from the facts that the second wife Mrs. Joyce Busienei was a househelp in the house of the first wife Mrs. Annah Busienei before she got into a relationship with the deceased. I must hasten to state that this aspect of the submissions cannot be considered within this Application as the issue whether or not the Applicant's mother was married to the deceased cannot be entertained in this Application.

17. Similarly, the paternity of the children however weighty, cannot be determined in this Application. Such a matter can only be determined in the main Succession Cause.

18. Whereas matters relating to paternity will be heard and eventually determined in the main Succession Cause, the live issue before the Court presently is whether the two younger children of the second wife were supported by the deceased and thus could be deemed to be dependents for purposes of this Application.

19. The Law of Succession Act is very clear on who constitutes a child of a deceased person. **Section 3 (2) of Law of Succession Act Cap 160 of the Laws of Kenya** provides:-

“References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born of her out of wedlock and in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

20. From the above, it is clear that the circumstances of a parent are not considered a prerequisite for determining parental responsibility. Such would amount to discrimination. This notion was aptly discussed in **Petition No. 17 of 2014, NSA & Another vs. Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another [2019] eKLR** where sections 3(2) and 3(3) of the Law of Succession Act were declared unconstitutional. The Constitution of Kenya cushions such children under the following Articles:-

“Article 27.

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.....

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Article 53.

(1) Every child has the right—

(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;”

21. It has been claimed in this Application that the deceased at some point left the first house to live with the Applicant's mother with whom he had 5 children. While the Respondent has vehemently disputed the existence of a marriage between the deceased and the Applicant's mother, she has not disputed that he did live with her (Applicant's mother) with the high probability that he assumed parental responsibility over all or some of the children.

22. I therefore find for the limited purposes of this Application the said children - Mercy and Abigael - qualify to be dependents of the deceased under section 29 of the Law of Succession Act which provides as follows:

“Meaning of dependent

For the purposes of this Part, "dependent" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

23. On the same breath, I find it disingenuous for the Respondent to now claim that she believes that all the children of the second household were never sired by the deceased and thus underserving of their urgent school fees needs, yet from the first Application for Special Limited Grant, the members of the two households entered into a consent which consent was adopted as the Court's Order of 18 December 2018 to open a joint account and withdraw from the proceeds of the Estate to cater for the fees of these two children. Her change of mind in this application is unexplained.

24. The last consideration under this issue is to consider the best interests of the child. The Constitution of Kenya and Section 4 (2) of the Children Act requires that all decisions which relate to children should be made with utmost regard to the best interest of the child. They provide as follows:

Article 53 (2) of the Constitution,

"(2)A child's best interests are of paramount importance in every matter concerning the child."

Section 4 of the Children Act

"(2). In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

25. Ultimately, the best interests of the child will and must be considered. If it is in their best interest for court to make a provision and order a withdrawal of funds from the accounts as in the present Application, then the same will be followed. However, if their interests are best served with the conclusion of a succession cause, then the court may dismiss such an Application and urge the parties to pursue and conclude the succession cause. (See **M.W. vs. P.N.M. & H.T.K. [2017] eKLR**)

26. Based on the material before me, I have come to the conclusion that the interests of the child in university will be best served where the Estate caters for her school fees and accommodation needs.

(ii) Whether the court has authority to issue orders to withdraw from the estate of a deceased person before the conclusion of a Succession Cause and the limitations of such an order.

27. Courts are replete with decisions relating to withdrawal from a deceased person's estate and the principles governing the same. In **Succession Cause 1667 of 2007, Re the matter of the Estate of E.M.O (deceased)**, an Application for withdrawal of funds for the school fees of the deceased's child was made where Nambuye J. stated as follows:-

"It is apparent that a dependent wishing to be provided for out of a deceased person's estate before final distribution of the estate has to approach the seat of justice through two avenues. The first avenue is where a petition has been presented and the second avenue is where no petition has been presented:

(1) Where a petition has been presented and a grant made even, ad collegenda bona, or full grant, but no confirmation made, the dependent addresses the application for provision of a dependent to the court asking the court, to direct the orders to the petitioner grant holder.

(2) Where no petition has been presented and no grant issued, the plea for provision is directed to the court."

Evidently, the present Application falls under the second category.

28. The decision on whether to withdraw from the Estate of a deceased person should also be founded on a 'need be basis'. Musinga J in **Nakuru High Court Succession Cause 539 of 2001, In Re the Estate of Simon Ndungu Njoroje (Deceased) [2005] eKLR** stated as follows in respect of an interim Application for the withdrawal of funds from the Estate of a deceased person,

"...the applicant should not expect the court to order any payment to her so as to meet her personal financial obligations like repayment of the loan which she obtained from Equity Bank Ltd. Where the court has to intervene to order some interim disbursement of an estate's funds pending distribution of the estate amongst the beneficiaries, it will only do so to meet some basic necessities of a beneficiary or to alleviate excessive suffering of such a person but not otherwise."

29. It follows then that the Court should take into consideration the immediate and existing needs of the dependents pending the determination of the Succession Cause.

30. The Applicant has made claims tucked in prayer (ii) and (iii) and explained in his submissions that he has had to take loans to pay fees for which he seeks reimbursement. No records were produced in respect of these claims. This notwithstanding, such claims constitute debts to be settled by the Estate. This can only be done at the determination of the Succession cause because the same entails a withdrawal from the proceeds of the Estate. It goes without stating that the resulting effect of allowing partial withdrawal from the Estate would be to open a Pandora box where other creditors would emerge seeking an expeditious settlement of their debts. This would also mean that the actual beneficiaries are eventually unduly prejudiced as such a decision would amount to partial distribution.

31. It is trite that the principle for partial distribution of an Estate before the conclusion of Succession proceedings requires a consent from all the parties. This was aptly discussed in the case of **Re Estate of Gerishon Kamau Kirima (deceased) (2015) eKLR** where it was noted that;

“I am therefore of the view that Mr. Wanjau is only entitled to the payments that were consented upon by all the beneficiaries and the interests of justice cannot be served by partial distribution of the estate to one beneficiary whatever his circumstances, unless the beneficiaries consent, as they have previously done, to such partial distribution.”

32. In the present case, it appears to the Court that the Applicant shot himself in the foot when he declined to sign the family agreement in which the beneficiaries had consented to the withdrawal of funds from the Estate.

33. The Applicant must therefore await the Succession proceedings to enable the Estate reimburse him his claim upon proof.

(iii) Whether the Applicant ought to be allowed to substitute the deceased mother as a joint account holder with the Respondent

34. The Law of Succession affords the beneficiaries in a Succession Cause opportunities to agree on various issues. Where an agreement exists amongst the beneficiaries of an Estate, the court has discretion to adopt the same. The case of **Re. Estate of M'mummu Metaya (2009) eKLR** emphasizes this principle of consent from all the beneficiaries in respect of certain prayers.

35. The Respondent in her Replying Affidavit challenged the prayer to have the Applicant substitute his deceased mother as the joint account holder for the KCB Account No. xxxxxx on the basis that he was not even a son of the deceased and had no right to be appointed as such.

36. I note that there exists a Consent dated 10 March 2021 in the file in which the parties had agreed to have the Applicant appointed as a joint account holder together with the Respondent. The said Consent was however not adopted by the Court because the representative of the second household, the Applicant herein, did not agree with the terms and refused to execute it.

37. Clearly therefore, there is no agreement amongst the beneficiaries for the substitution of the deceased second wife by the Applicant. To the extent that this issue remains unresolved with no agreement in place, this Court cannot allow the substitution in respect of the joint account as prayed.

(iv) Whether the previous court orders dated 18 December 2018 can be varied, reviewed or set aside to accommodate the present circumstances.

38. Generally, the principles governing variation of Consent Orders require that, a review or variation of court orders, declarations, decrees or directions validly issued by a competent Court cannot be made unless there has been a discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the knowledge or could not be produced by the applicant at the time of the initial order or decree complained of was made, or an accident of some mistake, or error of fact apparent on the face of the record.

39. In the present Application this threshold is met. Whereas there are no compelling reasons demonstrated by the Applicant on why the Court Order of 18 December 2018 should be set aside, it is clear that the circumstances of the parties have since changed. The Applicant's mother who was the original Applicant has now passed on. Being that she was a joint account holder with the Respondent Mrs. Annah Busienei, the latter now remains as the sole surviving account holder.

40. In light of this, the Court recognizes the need to revise the said Order. The Respondent shall remain as the sole surviving joint account holder until the deceased Applicant has been properly replaced or substituted by a legal representative of the deceased wife Joyce Busienei. In the interest of preserving the Estate, the only authorized withdrawal therefrom will be for purposes of paying school fees for the children and particularly, Mercy Chepng'eno in [Particulars Withheld] University.

41. In conclusion the Application succeeds only to the extent that the prayer for school fees for Mercy Chepng'eno is allowed subject to the production in Court of a current fee structure authenticated by the university.

42. This Court has previously noted with concern the numerous applications and counter applications that have impeded the commencement and progress of the Succession Cause. While the court appreciates the need to make provision for the existing and urgent needs of the dependents, it is paramount that the parties pursue the gazettelement of the Estate and appointment of Administrator(s).

43. Orders

(i) Pending the hearing and determination of the Succession Cause, Mrs. Annah Cherotich Busienei do operate the KCB Joint Account Number xxxxxx for purposes of collecting rent and paying out of the account, school fees expenses in favour of Mercy Chepng'eno at [Particulars Withheld] University, upon production of a current fees structure and accommodation expenses.

(ii) The claim for reimbursement of monies already paid by the Applicant is declined pending succession proceedings.

(iii) The proposed administrator(s) are directed to have the Estate gazetted within a period of thirty (30) days and to expeditiously proceed with the Succession Cause.

44. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER, 2021.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Mugumya for the Applicant, Mr. Kadet holding brief for Mr. Kipngetich for the Respondent, Mr. Merebu for the Interested Parties and Kiprotich (Court Assistant).