



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 87 OF 1986**

**IN THE MATTER OF THE ESTATE OF BOAZ LIGARI OREMBE (DECEASED)**

**RULING**

1. What I am called upon to determine is the summons for substitution and confirmation of grant, dated 9<sup>th</sup> October 2019.
2. The original administrators are said to be dead, hence the application for substitution. Firstly, the Law of Succession Act, Cap 160, Laws of Kenya, does not provide for substitution. What is available is revocation of grant, for where the sole holder dies, it becomes useless and inoperative. It cannot be passed from one person to another. The issue of substitution should, therefore, not arise. So the applicants ought to have sought revocation of the grant herein rather than substitution.
3. Although I am told that the original administrators are dead, and ought to be replaced, no evidence has been provided of their deaths. Under Kenyan law, deaths are registered, under the Registration of Births and Death Act, Chapter 149, Laws of Kenya, and certificates of death issued. Proof of death is through such certificates. The applicants ought to have obtained and displayed such certificates as proof that the said administrators died. As it is, there is no evidence, and the court cannot just blindly replace administrators without concrete evidence of their deaths.
4. Before I make final orders on the status of the original grants, if indeed the grant holders are dead, the applicants will have to attach copies of certificates of death.
5. On the confirmation limb of the application, I am told that the original grant had been confirmed, and then the confirmation orders set aside, and the certificate cancelled. That is the correct position. The orders setting aside the confirmation orders were made on 26<sup>th</sup> August 1994. So, a fresh grant would be available for confirmation.
6. However, I am uncomfortable with revoking a grant, making a fresh one on the spot and in the same orders confirming the fresh grant. It denies the administrators a chance to do the duty required of them under the proviso to section 71(2) of the Law of Succession Act Cap 160, Laws of Kenya and Rule 40(4) of the Probate and Administration Rules, of ascertaining the persons beneficially entitled to a share in the estate and their shares. The administrators would have no time to do so. Secondly, it denies those who might have an intent to challenge any proposed distribution such a chance. Making a grant and confirming it in one sitting ought to be discouraged for that reasons, unless it is very clear who the beneficiaries are or where there is clarity on the proposed distribution. The applicants are not administrators in the first place, and they ought not mount an application for confirmation of grant before they are appointed administrators and before the grant is made.
7. I have perused closely through the supporting affidavit, and it is clear that it does not comply with the proviso to section 71(2) and Rule 40(4). The applicants have not made an effort to identify the survivors of the deceased. They have listed names of individuals, without disclosing how those individuals related to the deceased, so as to provide justification for their being allocated shares in the estate. The deceased died intestate, after the Law of Succession Act, had come into force, and, therefore, distribution of the estate has to be in terms of Part V of the Act. Under this Part, the estate is distributed to the survivors of the deceased, his kin, principally surviving spouses, followed by children, followed by parents and then other relatives follow. Priority is given to the surviving spouse and children, other relatives, such as parents, siblings and grandchildren do not have priority, unless the deceased did not have a spouse or children surviving them, and, therefore, they can only take where there is no surviving spouse or child.
8. The court can only tell whether there was a surviving spouse or surviving child where the applicant indicates how the persons listed as survivors were related to the deceased. The right or entitlement to inheritance in intestacy is dependent on the kinship relationship between the deceased and the survivors. The survivors take in degrees, with the surviving spouse having priority, followed by the children and so on.
9. In the application before me, I am unable to distribute the estate since I do not know how the persons listed were related to the deceased. I cannot tell who would be entitled under section 35, or Section 36, or Section 38, or Section 39 of the Law of Succession Act. The proviso to section 71(2) and Rule 40(4) of the Probate and Administration Rules require the court to be satisfied that the persons who are beneficially entitled to a share in the estate have been ascertained. That requires applicants to give details of the persons who survived the deceased, by giving their names and disclosing their relationship with the deceased. They should tell the court if the deceased had sons and daughters, giving their names. If any son or daughter was dead, indicate when he or she died, with supporting documentation, and state whether the dead son or daughter had children, and if they had any, give names of such children. If there was no surviving spouse or child, then they should disclose whether the parents of the deceased were still alive, and name them if alive. If the parents are dead, they ought to indicate whether the deceased had brothers and sisters, and, if so, list them. If any of the brothers or sisters are dead, then indicate whether they had children of their own, and, if so, list them. Without such information, the court cannot possibly be satisfied that the administrator had properly ascertained the persons beneficially entitled to a share in the estate.
10. In the application before me, I am not satisfied that the applicant has ascertained the persons entitled to a share in the estate. I am not told whether the deceased was survived by a spouse, and, if he was, who she was. If he was survived by children, who were they. If any of the children had died, I am not told who had died, and I am not told whether the dead ones were survived by any children of their own. I cannot,

therefore, distribute the estate before that is done.

11. In view of everything that I have said, it ought to be clear that there is no merit in the application dated 9<sup>th</sup> October 2019. The applicants ought to do one thing at a time. They must first of all apply for revocation of the grant, for having become useless and inoperative, on account of changed circumstances, occasioned by the death of the original administrators. They ought to provide proof of the death of the original applicants. Secondly, they should apply for confirmation of grant only after their appointment as administrators, where they shall have to scrupulously comply with the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules.

12. The application, dated 9<sup>th</sup> October 2019, is hereby dismissed, for the reasons given above.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29<sup>th</sup> DAY OF October 2021**

**W. MUSYOKA**

**JUDGE**