



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CASUE NO 1152 OF 2017

IN THE MATTER OF THE ESTATE OF DKB (DECEASED)

AKB.....APPLICANT

VERSUS

SH.....1ST RESPONDENT

SB.....2ND RESPONDENT

AB.....3RD RESPONDENT

RULING

1. The deceased herein died intestate on 2nd May 2016. In her petition for a grant of representation filed on 19th September, 2017, SH described herself as the divorced wife of the deceased. In form P and A 5, she listed survivors to the deceased as; SB (daughter) and AB (son).
2. Listed under the asset's section is 50% share in Maisonette No [xxxx] as the only property left by the deceased. Consequently, the estate was gazzetted on 8th December 2017 and a grant of letters of administration intestate issued to SH the former wife to the deceased as the sole administratrix.
3. Vide a Chamber Summons dated 27th August, 2018, the administratrix sought confirmation of the grant. With consent from her two children, the estate comprising of 50% share in Misonette [xxxx] was to devolve fully to the administratrix as the sole beneficiary. Consequently, the grant was confirmed on 19th December 2018 and the estate distributed as proposed in the affidavit in support of the application for confirmation.
4. However, vide a summons dated 29th April 2019, one AKB a brother to the deceased sought revocation of the grant and confirmed certificate of grant on grounds that, it was obtained fraudulently by the making of a false statement or concealment from court of material facts pertinent to the case. He further sought orders prohibiting further dealings in respect of [xxxx] Maisonette No 3. Lastly, he prayed for the court to issue a fresh grant of letters of administration in his name.
5. The application is supported by an affidavit sworn on 29th April, 2019 by the applicant in which he gave a chronology of events justifying his prayer to be issued with the grant of letters of administration. He averred that the 1st respondent who is a resident of California U.S.A is a former wife to the deceased with whom they had children but divorced the year 2003 and therefore has no right in law to petition for grant of representation in respect of the estate of the deceased. That the 2nd respondent is a daughter to the deceased residing in Canada while the 3rd respondent is a son in a medical rehabilitation center in India owing to exposure to drug abuse.
6. It was his contention that his brother had suffered from mental disorder (dementia) before his death which prompted him to file Misc. Application No 119 /2013 Nairobi High Court where he was appointed the manager and guardian to the deceased and his estate. That when the deceased fell sick, he single handedly took care of him as the respondents never bothered. He attached a court order appointing him as the manager and guardian to the estate. He further attached medical notes in relation to the health status of the deceased.
7. It was his further contention that during the lifetime of the deceased and while undergoing treatment, he was the manager of the estate hence representing the deceased in various Civil cases against him interlia; Milimani H.C Civil case No 865/2001 Delphis Bank Limited Vs Sunil Mehar & Deepak Bhasin and Nairobi Environment and Land court Case No 603/2020 Sunil Mehra Vs Deepak Bhasin.

8. In his view, having represented the deceased in those cases with the knowledge of the 2nd respondent and further considering that the two cases are still pending, the estate will suffer immensely if there is no legal representation by a person who is conversant with the cases. He claimed that, before petitioning for a grant of representation, the administrator should have sought his consent as a person who had taken care and has been taking care of the deceased and his estate respectively. He further stated that he has spent so much money in paying lawyers to represent the estate in the aforesaid cases and that if appointed as the administrator, he will ensure that the property is sold to offset 3rd party liabilities owed by the estate to himself and the advocates representing the estate.

9. In response, the 1st respondent/administratrix filed a replying affidavit sworn on 27th September, 2019. She admitted having been married to the deceased in December, 1979 and divorced in November, 2003.

10. She averred that, after their separation, she single handedly took care of their children who are now adults. She further claimed that the deceased was taken care of by the mother who met all medical expenses and not the applicant.

11. Concerning her sick son, she admitted that he is in India undergoing medical treatment as a result of Schizophrenia. She contended that in view of the fact that she had divorced, her children rank first in priority to herself and the applicant. That she petitioned in the children's best interest and that she disclosed to the court as such in her pleadings.

12. She further claimed that the deceased and the applicant had a strained relationship to the extent that they could not see each other eye to eye. She denied the assertion that she and the 2nd respondent were aware of the deceased's mental health proceedings. Regarding the alleged 3rd party claims against the estate, she opined that they are free to lodge their claims as creditors. On 15th June, 2020, parties agreed to dispose the application by way of written submissions

Applicant's submissions.

13. Through the firm of Stanley Henry Advocates, the applicant filed his submissions dated 20th March, 2020. Basically, counsel reiterated the averments contained in the affidavit in support of the application. Counsel submitted that the applicant having been appointed as the manager and guardian of the deceased's estate while suffering from mental disorder is an important consideration to appoint him as an administrator. Counsel contended that a court has the discretion to depart from the order of consanguinity under section 66 of the Law of succession. In his view, any interested person in the welfare of the estate can be appointed as an administrator. In support of this argument, counsel placed reliance in the holding in the case of **Ansazi, Gambo Tinga and Another vs Nicholas Patrice Tabuche (2019) e KLR** where the court citing with approval the case of **Musa Nyaribari Gekone and 2 others Vs peter Miyianda and another (2015) e LKR** stated that:

“The expression “any interested party” as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr. Oguttu urged, that that expression is limited by or should be construed against the provisions of section 66 and 39 of the law of Succession Act. Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate.”

1st Respondent's /Administratrix's submissions.

14. The firm of Wandabwa appearing for the respondent/administratrix filed their submissions dated 27th July, 2020. Equally, they adopted the averments contained in the affidavit in a reply.

15. Principally, counsel submitted that the appellant has not proved acts of fraud or concealment of material facts or information to the required degree.

16. It was counsel's submission that under Section 66 of the Law of Succession, the applicant is not entitled to take letters of administration in respect of a brother's estate where those who rank first in priority are alive.

To support this proposition, counsel made reference to the case in the estate of **In re estate of George Ragui Karanja (deceased) (2016) e KLR** where the court stated that, although Section 66 of the Law of Succession provides guidelines on appointment of an administrator, priority should be given to surviving spouses, followed by other beneficiaries entitled in intestate as set out in part V of the Act and then the public trustee.

17. It was submitted that a person appointed as a manager or guardian of a person suffering from mental disorder is not automatically entitled to be appointed as an administrator of the estate of the patient should the patient die.

Determination

18. The applicant herein is seeking revocation of the grant and the subsequent certificate of the confirmed grant. In essence, the applicant is seeking to have the grant revoked and get appointed as the administrator of the estate so as to clear and defend outstanding liabilities and suits filed for and against the estate.

19. His main concern is that a divorced wife cannot be appointed an administrator of her former husband's estate. From the pleadings, he is not demanding a share of the estate.

20. Authority to revoke a grant is conferred upon the court by dint of Section 76 of the law of succession Act which provides that;

“A grant of representation, 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-

(a) That the proceedings to obtain the grant were defective in substance;

(b) That the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d).....

(i).....

(ii).....

(iii).....

(e).....”

21. From the wording of the above provision, it is apparent that authority to revoke a grant is a matter of discretion by the trial court. In recognizing these wide powers conferred upon the court under Section 76 of the law of succession Act, the Court of Appeal in the case of Nyaga Cottolengo Francis Vrs Pius Mwaniki Karani (2017) e KLR had this to say;

“The combined effect of the provisions of the law cited above is to clothe the court with considerably wide powers to do justice in any particular estate of a deceased person on case by case basis.

The discretion excisable is in terms unfettered but, of course, it must be guided by the law and reason but not whims or caprice”

22. However, revocation of a grant is not a mechanical act but a product of clearly defined legal parameters. It is incumbent upon the applicant to prove one or more of the conditions set out under section 76 of the law of succession Act.

23. In the case of Matheka and another V Matheka (2005)1E.A 251 the court succinctly laid out guidelines that have to be satisfied before revoking a grant as follows;

“(1) A grant may be revoked either by application by an interested party or on the court’s own motion.

(2) Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of a false statement or by concealment of something material to the case or that the grant was obtained by making of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the distribution of the estate.

(3) The grant may also be revoked if it can be shown to the court that the person to whom the grant has been issued has failed to produce to the court such inventory or account of administration as may be required.

(4) 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 concern 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 interest as provided by part V of the Law of Succession Act.

(c) The public trustee and;

(d) Creditors

24. The bone of contention which is the issue for determination here is, who was or is entitled in priority to take out letters of administration. Section 66 of the law of succession does recognize the discretionary powers of the court in appointing an administrator by following the order of priority with a surviving spouse or spouses with or without association of other beneficiaries in the order provided under part V of

the Law of Succession taking priority. Part five lists those beneficiaries under Section 39 of the law of Succession by stating that;

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority;

- (a) father or if dead
- (b) mother; or if dead
- (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none;
- (d)
- (e)

25. According to section 39, brothers to the deceased are ranked below spouses and children. It therefore follows that, where there is a spouse and children, the other relatives are not recognized as direct beneficiaries so as to be consulted for their consent. It is a nuclear family affair unless the spouse (s) or children are not there. The rest of the claimants seeking a share in the estate can only apply either as dependants under Section 26 or 29 of the law of succession Act or creditors.

26. The applicant is not claiming dependency nor a share as a direct beneficiary. He is claiming an interest in the brother's estate so that he can sell and recover expenses incurred in paying for the deceased's medical expenses and legal fees. With the existence of the children to the deceased in particular the second respondent, the applicant ranks far below. See **Nairobi Succession cause No 2015/2012 In the matter of the estate of Joshua Orwa Ojode (deceased) (2014) e KLR** where the court stated that;

“Going by the above provisions, where a deceased person is survived by a spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and children are entitled to the estate to the exclusion of all the other relatives. The excluded relatives include parents of the deceased. Parents are only entitled where there is no surviving spouse or child.”

27. Since the applicant is not entitled to a share in the estate, there was no need to seek his consent. See also **Ali-Amin Abdulrehman Halimany V Abdulrehman Mohamed and another (2013) e KRL** where the court held that by virtue of rule 26 any petition for issue of a grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate .

28. The fact that the applicant took care of his brother when he was sick, paid some medical bills and even got appointed as manager of his estate does not in any way elevate the petitioner to a higher position in the order of ranking or priority under section 39 and 66 of the Law of Succession Act. Those were acts of benevolent or good will to a brother and does not transcend to any superior rights in succession to supersede those of the direct beneficiaries.

29. Accordingly, lack of consent as a ground for revocation is not applicable hence failure to list the applicant in the petition application does not amount to concealment of any material information or facts. Further, the administrator did not hide the fact that he had married and divorced. There was therefore material disclosure.

30. Having answered the above issue regarding consent, the other issue is whether the administrator as a former wife to the deceased was entitled to take a grant of representation. Under Section 39 and 66 of the law of succession Act, only a surviving spouse is recognized and not former wives. However, a former wife can claim a share out of the estate pursuant to section 7 of the matrimonial property Act especially where the property in question was acquired during the subsistence of the marriage.

31. For purposes of taking out letters of administration, the administratrix is not recognized as having a direct right to petition for a grant. However, her children who are entitled in priority authorized her as their mother to petition. This was in an effort to safeguard their interest through a trusted person. Although the administratrix was not entitled to take out letters of administration, the general circumstances where one of the children is not in his sound mind require a person in a position of trust in the management of the estate. Further, as a former wife, she has a direct interest in the estate as well as an indirect interest in the best interest of her children who have mandated her to represent them.

32. In the circumstances, I have been constrained not to interfere with the grant and certificate of confirmation in the best interests of the estate, justice and the children who are the direct beneficiaries. The appellant will not suffer any prejudice if the status quo is maintained. After all, the children who are the only beneficiaries are comfortable with their mother administering the estate on their behalf.

33. Concerning pending cases in court, that is the work of the administrator to follow. As to liabilities, creditors can follow the administratrix if they wish. For the above reasons stated, I do not find any merit in the application and the same is thus dismissed with no orders as to costs.

Dated, signed and delivered virtually this 23rd day of December 2020

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HON. JUSTICE J. N. ONYIEGO

JUDGE