REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 232 OF 2000

IN THE MATTER OF THE ESTATE OF K M alias S K M (DECEASED)

C W K.....APPLICANT

-VERSUS-

P N K.....RESPONDENT

RULING

There are 2 applications before me. The summons general dated 8th May 2017 by C W K seeking orders: -

1. *THAT pending the proper distribution of the deceased property, this honourable court be pleased to appoint the applicant C W K as a joint administratrix to the deceased's estate.*

2. *THAT the costs of this application be in the cause*.

It is brought under Rules 49 and 73 of the P&A Rules, and supported by her affidavit sworn on the same date.

The 2nd application is the summons dated 10th April 2019 brought under rules 49 and 73 of the same P&A Rules of Cap 160 of laws of Succession Act. It seeks orders: -

1. That pending the proper distribution of the deceased property, this honourable court be pleased to appoint M W K as administrator to the deceased estate.

a) THAT this court do order the children of C W K,

i) LMK

ii) AMK

iii) JMK

To undergo DNA test with me the Government Chemist, Nairobi to remove all doubts whether they are the children of the deceased and the costs thereof be shared between the applicants and respondents.

2. That the costs of this application be costs in the cause.

It is supported by the affidavit of M W K sworn on the same date. She depones that she is the only child of the deceased and is entitled to inherit his entire estate.

The 2 applications were argued together by Ng'ang'a Munene for the applicant in the 1st application, and Mr. Wandaka for the applicant in the 2nd application.

Background

On 26th July 2016 this court (Mativo J) found for C W K and revoked grant of letters of administration issued to P N K, the mother to M W K.

He however found that the issue as to whether the said C W K was a wife of the deceased was a matter to be proved by evidence

> ***"by this court while ascertaining the lawful beneficiaries of the deceased. For now, it will suffice for me to find that the applicant having raised a claim to the deceased's estate has a right to be informed at the time these proceedings were instituted…." (emphasis mine)***

During the hearing of the 2 applications Mr. Ng'ang'a proposed a joint administration of his client and Mr. Wandaka's client- to which Mr. Wandaka added that he would be agreeable subject to Mr. Ng'anga's client's children undergoing DNA test to determine their paternity.

That broke the proposal and led us to the arguments.

The arguments

Mr. Ng'ang'a argued that following this court's ruling of 26th July 2016 it was in order that before determining who the proper beneficiaries were, to appoint the applicant C and the applicant M as joint administrators in order to preserve the estate.

With regard to Mr. Wandaka's application he did not oppose M becoming a joint administrator but was opposed to the DNA tests for C's children pointing out that these children were coming in under s.29(b) of the Laws of Succession Act. That it was not necessary to prove paternity because the three children were seeking to inherit the deceased's estate as dependants as provided for under section 29 of Laws of Succession Act.

He referred to page 3 and 4 of the Ruling submitting, that the court had already found that the identity cards of these children bore the names of the deceased as their father.

In response Mr. Wandaka argued that it was not disputed that M was the daughter of the deceased, and that she was the only child of the deceased, and the only one entitled to the entire estate.

That for C, she still had to establish her relationship with the deceased. That that she had other children other than the ones claiming from the deceased and if truly they were children of the deceased, there was nothing to fear. All she needed to do was to submit them to DNA testing.

Analysis and determination

I have carefully considered the submissions by each of the counsel.

The issues for determination are: -

i) Whether C should be made a joint administration with M.

ii) Whether the children of C should undergo DNA testing for purposes of this cause?

On the issue I am guided by Section 66 of the Laws of Succession Act provides inter alia: - ***Preference to be given to certain persons to administer where deceased died intestate***

> ***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 concerned, 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 interests as provided by Part V;***
>
> ***(c) the Public Trustee; and***
>
> ***(d) creditors:***

The first priority is given to the spouse. In this case it is the deceased's spouse Priscila Komu.

The Ruling of 26th July 2016 found that it was necessary to give Catherine the opportunity to establish whether she was a wife of the deceased. The Ruling did not find she was a wife but that she had expressed interest in the estate and she ought to have been informed. That is the gist of the ruling. Hence she does not in any way fall within that category of priority to come on board as an administrator yet she still had to establish that she was indeed the wife of the deceased.

The Ruling states at page 3-4

> ***"In the present case the <u>applicant's case</u> is that she was married to the deceased, that she had children with the deceased who are named after their father and she produced copies of National Identity cards in support of the said position. The respondent disputed this fact and insisted she did not know the applicant, but in her affidavit stated that the applicant was an employee".***

Evidently an identity card cannot by itself be proof of paternity hence if C claims that the three children are children of the deceased she still has to establish the same. C was known to the petitioner but not as a co-wife. The petitioner was faulted for not disclosing that the applicant had made a claim to the estate.

Hence as it is now only the petitioner fits under section 66 to be the administrator of the deceased's estate. She has appointed her daughter to take her place due to illness. Her illness is not a matter in dispute as the record speaks her itself.

With regard to the application for DNA, it is evidently clear that C's children are not claiming as biological children of the deceased. C's reliance on section 29(b) of the Laws of Succession Act speaks for itself. It states:

> *For the purposes of this Part, "dependant" means—*
>
> ***a. ……. ;***
>
> ***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***

<u>Disposition</u>

With regard to C, she is yet to establish her position with regard to the deceased hence I decline her request to be made joint administrator.

The grant of letters of administration intestate to issue to M W K.

Due to C's reliance on s. 29(b) of the LOSA the prayer for DNA for her children is denied.

M W K to file and serve Summons for confirmation of grant within 30 days hereof.

Each party to bear its own costs.

Dated, signed and delivered in open court at Nyeri this 26th June 2019.

Mumbua T. Matheka

<u>Judge</u>

In the presence of: -

Court Assistant: Juliet

Ms. Mugo holding brief for Mr. Wandaka for the applicant in the application of 10th April 2019.

Mr. Theuri holding brief for Mr. Ng'ang'a for the applicant in the application of 8th May 2018.

Judge