



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 634 OF 2013

IN THE MATTER OF THE ESTATE OF ALBERT MUSYOKA MUETI (DECEASED)

CHRISTINE NZILANI MUSYIMI.....APPLICANT/ADMINISTRATIX

AND

MUETI KALA MUMBE

DORCAS KANINI MUETI.....RESPONDENTS

RULING

1. This matter relates to the estate of **Albert Musyoka Mueti** the deceased who died intestate on 7th March, 2013. The Petitioner Christine Nzilani Musyimi applied for Letters of Administration intestate in the estate of the deceased and a grant was issued on 30th July, 2014 and she applied for confirmation vide application dated 25th February, 2015.

2. Before the grant was confirmed, a protest was filed, by the respondents who are the parents of the deceased who averred that the employer of the deceased told them that they would be paid Kshs 1,000,000/- to condole them for the loss and an amount of KShs 480,960/- as death gratuity was released but they have not been given anything and further that a sum of KShs 3,114,240/- being the deceased's compensation is awaiting collection and they being dependents of the deceased are entitled to the same hence proposed that the said amount be distributed as follows

a. Kshs 2,000,000/- in a trust account on behalf of the minor

b. Kshs 500,000/- to be released to the mother of the deceased

c. Kshs 6,114,240/- to be released to the father of the deceased.

3. The 3rd Administrator/Applicant countered this and in response averred that the 1st and 2nd Administrators/Respondents are excluded from benefitting from the estate of the deceased and would only be entitled if the deceased died a bachelor and further that they have not proved their dependency. In her application for confirmation of grant she proposed the mode of distribution as follows:

PROPERTIES	BENEFICIARY	SHARES
Death Gratuity	Christine Nzilani	all
Compensation for death,	Christine Nzilani Musyimi	Kshs 2,000,000
Kshs 3,114,240	NMM	Kshs 1,114,240

4. The respondents opposed the confirmation of grant contending that the mode of distribution was not acceptable. Their proposal is as enumerated above in paragraph 2.

5. The parties adduced evidence in Court. **PW.1** was **MUETI KALA MUMBE**. He testified that the deceased Albert Musyoka Mueti was his son and was a policeman and he had married Christine Nzilani Mueti and had one child MM. He testified that when the deceased died in 2013 in an accident in Nairobi the child was aged 9 months. He testified that after he died all parents of those who died in the accident were called to the Police Nairobi Headquarters and told each family would be given a present of Kshs.1 million “to wipe out tears”. They were asked for an account number and that the deceased’s wife gave her account number and they were told to check the account from the next day. However he had not seen the money since then. He asked the deceased’s wife if the money had come and who sent him Kshs.60,000/ but she did not tell him if the money was sent to her account. On cross – examination, he testified that the parents of the deceased were told by mouth about the Kshs.1 million. He further testified that in Nduturi there had been no rain for five years and that he did not have cows or goats for he used everything to educate the deceased and the family depended on the deceased hence emphasized that he wanted his rightful share as well as the deceased’s mother. He also testified that he wanted everyone including the 3rd Administrator and the minor to get their share. Further that he wanted his share as he had educated the deceased and he was now old and about to die because of difficulties. On re-examination, he testified that in his papers that were filed in court he mentioned how the deceased’s property should be divided and shared. He testified that when Albert died he became sick and at his age of 77 years he cannot dig or farm. It was his evidence that when Albert started working he rested and when he died he became poor.

6. **PW.2** was **DORCAS KANINI MUETI** who testified that PW.1 is her husband and the deceased was her son who used to work before he died as a policeman. She testified that the deceased had a family, his wife was Christine Nzilani and his child was MM. She testified that she works as a farmer. She lives in Nduturi in Makueni. She testified that she and her husband stopped farming as it does not rain except during *el nino*. She used to rely on the deceased and she and her husband educated him so that he could help them and when he was employed he used to help them and started educating his younger siblings. She testified that the deceased had been given a portion of land by his father where he started building and had finished upto the lintel level and had not roofed the house when he died; he was buried there when he died. It was her testimony that her relationship with the deceased’s wife was very good and the deceased did not have his own land; the only property the deceased had was money. She lamented that she had not received any of the deceased’s money personally. She further testified that the deceased left behind her, her husband, the deceased’s wife, his child and two children called Mwendwa Mueti and Milka Vaati Mueti – who were the siblings of the deceased. That Milka Vaati was in Shanzu Teachers College and Mwendwa was in a course in Kitui when the deceased died. Due to lack of school fees the two dropped out of school. She testified that when the deceased died she heard that there would be money paid and with regard to the payment of the Kshs 1 million the deceased’s wife told her that the money was paid into the child’s account and she received no money. She stated that the deceased’s wife told her that the other money had not been paid and that she would tell her when it is paid but has received no feedback. She urged the court to distribute the deceased’s money to Christine, the deceased’s child, her and her husband. On cross-examination, she testified that the law does not refuse a child to help his parents and that the deceased’s property is for his wife, child, mother and father as these people are the ones who assisted him. She admitted that Christine came to know that she and her husband had filed the succession case when she went to the office in Nairobi to ask about the money and she discovered that she had been left out. She also testified that she used to have cows but has none as she sold them to help herself and the rest died because of the drought. She averred that before she gave birth to the deceased, she used to have strength and could vend for herself. She however was unaware of the mode of distribution of the deceased’s property but she was to be given kshs.500,000/ and her husband kshs 6 million while the child was to get kshs 2 million. On re-examination, she testified that the persons who depended on the deceased and who were being helped by him were his wife, Christine, child M, his father Mueti, herself, Milka & Mwendwa and in addition she and Pw1 were told by the police that Christine would get the deceased’s salary for five years. She further testified that she and her husband came to court without Christine because she was getting money and she was not telling them and they now wanted the court to stop the money so that they could first understand what was going on.

7. **DW.3** was **SAMUEL ODUOR OOKO**. He testified that he works at the Kenya police service – Vigilance House as a senior Human Resource Officer in charge of retirement benefits and that the deceased had been an employee of the Kenya Police service. It was his testimony that the following sums were paid to his next of kin.

- a) *Kshs 480,960/= as death gratuity paid by the public Trustee Machakos by the Director of Pension letter of 27th August, 2016.*
- b) *In respect of work injury Act – Kshs.3, 114,240/ that was paid through the Public Trustee.*
- c) *Kshs. 8,602/ being his salary for 7 days through the DC Nzaui on A/c of Albert Mueti.*
- d) *Kshs.20,000/ being funeral expenses as per the code of regulation was paid to Christine Nzilani.*
- e) *A cheque of kshs.1 million was issued on 16th April 2013 to Christine Nzilani Musyimi being a token payment to the family by the then commissioner of police.*
- f) *Kshs. 300,000/= being Group Life Insurance was paid by NHIF to the account of Christine Nzilani Musyimi.*
- g) *Kshs.40,000/ being last expenses from NHIF paid to the account of Christine Nzilani Musyimi.*
- h) *As per Pensions Act the widow is paid the widowers person directly to the account on a monthly basis for 5 years.*
- i) *The widow’s children Pension Scheme is also paid monthly to the widow until she dies or remarries.*

He testified that these were the only payment he was aware of. He had certified copies of documents to support these documents that were produced as the Objectors Exhibits 1 – Exhibit 11.

8. On cross-examination, he testified that the certificate of dependency was a requirement for procuring the death gratuity but however he did not come across any for the deceased. He was shown a certificate of dependency in court that was issued in respect of the deceased and there are two dependants of the deceased indicated as NM – his son and Christine Nzilani the wife. He testified that the dependency degree was

100% and there were no other dependants named. On exhibit 1 – the death gratuity – the letter therein was copied to Christine Nzilani Musyimi as the next of kin and there was no copy to the parents of the deceased. Exhibit 2 on the Work Injury Act, he testified that the payment had not been collected (amount of Kshs.3,114,240/) it was sent to the Public Trustee Nairobi – it was processed by Treasury Nairobi. The same was compensation for the death of the deceased. On exhibit 3 he testified that the same is a letter from the Public Trustee indicating the next of kin as Christine Nzilani. He testified that Exhibit No. 5 was the letter of the chief which stated the deceased left behind the wife Christine Nzilani and one son NM and the parents of the deceased were not included as dependants. He testified that the sum of kshs.1 Million has no nature in law – it is paid as a token to immediate family for accidental death and the cheque was issued to Christine Nzilani Musyimi. Exhibit 10 was a marriage certificate showing the deceased was lawfully married to Christine Nzilani. Exhibit 11 was the next of kin of particulars of the deceased shown to be Christine Nzilani. He testified that he did not have any documents to show the parents depended on him. On reexamination, he testified that the payments to the Public Trustees were in respect of the estate of the deceased. He was shown a certificate of dependency under the Workmen Compensation Act and he stated that it was not dealt with by the police but it is a requirement and it is a token before workman compensation is processed. The objectors closed their case and the applicant gave her testimony.

9. **CHRISTINE NZILANI MUSYIMI** testified that the deceased herein Albert Musyoka Mueti was her husband with whom they we got married in a church wedding on 24/4/2010. She produced the marriage certificate that was marked as **exhibit 1**. She testified that she lived for two and a half years with the deceased and were blessed with one child NMM who is now aged 6 years. She testified that she was not informed by the parents of the deceased when they lodged this succession cause but was only alerted by a call from police headquarters that deceased’s parents had secretly taken a grant there in a bid to access benefits. She wanted the benefits given to her and part of it be kept for the child. She testified that the deceased had four sisters and five brothers who are all adults and employed. Further that the parents have land and cows and they should not deny her and the child the benefits of the deceased. She produced the rectified grant that was marked as **Exhibit 2**. She also produced the certificate of dependency under the workmen compensation Act showing that she and her child are the only beneficiaries, the same was marked **Exhibit 3**. She produced a letter sent to the Public Trustee indicating that she was the wife of the deceased, the same was marked **Exhibit 4**. It was her testimony that the deceased died after he fell off from a horse while in the course of his duties. She presented what was marked as **Exhibit 5 – letter of gratuity**. It was also her testimony that there were no other persons apart from her and her child who depended on the deceased. She therefore urged the court that the claim by the respondents be dismissed and the benefits be given to her. On cross-examination, she testified that the parents of deceased are all alive and are the 1st and 2nd respondents herein, they are her parents in law, they are in court and are elderly. Further that the 1st and 2nd petitioners have a farm and animals and they also have children who are all employed. She testified that the two petitioners gave her two acres of land during her wedding but they took it back after the death of her husband. It was her testimony that her mother in law used to rear goats and she cannot tell whether they are still there but she has not laid claim onto the animals. It was her testimony that the deceased’s siblings are employed and should help their parents. She testified that the deceased was buried at the parent’s home and she obtained certificate of death and also received certificate of dependency but however did not inform the DC about the deceased’s parents. She admitted that the death gratuity is with the Public Trustee Machakos while the other benefits is with the Public Trustee Nairobi. She testified that she had not received the deceased’s salary for five years after his death, but she was given Kshs.1 million after the deceased died because she was the beneficiary. She testified that she paid 60,000/= into the account of the 1st Petitioner towards clearing college fees in regard to his last born daughter Milka Mueti. She told the court that she runs a salon and does not get any support from any one and emphasized that she and her child are the only beneficiaries of the deceased. She admitted that she gets some help from her parents. However she does not expect to get any assistance from her son when he grows up. When re-examined, she testified that her relationship with the other Petitioners is strained as they filed this cause behind her back. Further that she had not been allocated land by her co-petitioners. She testified that growing old is a natural process and she had not contributed to the old age of the other petitioners. She disagreed with the proposal by her co-petitioners distribution, as she was the only one recognized by the deceased’s employer and her co-petitioners have no right to claim the benefits because they snatched the land they had earlier given her.

10. The protestors vide submissions filed on 7th May, 2019 cited the provisions of Section 26, 27, 28 and 29 of the Law of Succession Act and urged court that under Section 29 of the Act, the parents of the deceased are considered dependants. Learned counsel submitted that the net estate of the deceased is not known to the court and urged the court to order a lumpsum payment to the parents of the deceased for they depended on the deceased during his lifetime. The applicant has not filed any submissions.

11. I have considered all the evidence adduced. There are three issues which arise for determination:

- *Who are the beneficiaries entitled to the estate of the deceased"*
- *Are the parents of the deceased entitled to inherit the deceased’s estate"*
- *How should the estate be distributed"*

12. **Who are the beneficiaries"?** The deceased was survived by one child, his wife and his two parents. **Section 29** of the **Law of Succession Act** provides:

“For the purposes of this Part, “dependant” 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, grandparents, 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;

Thus, the parents of the deceased are dependants if they were maintained by the deceased prior to his death. The above named who are children of the deceased are therefore dependants who are entitled to the estate of the deceased subject to proof of maintenance.

13. **The second consideration is whether the parents are entitled to inherit the deceased's estate** From the definition given under **Section 29 (supra)** the parents of the deceased can inherit if they were being maintained by the deceased prior to his death. In this present cause, the parents are claiming interests as dependants. In persuasive decision by Musyoka J. in the case of **In Re Estate of John Musambayi Katumanga – (Deceased) [2014]eKLR** it was stated:

“.....she is not a dependant of the estate. She did not apply, as she should have, for provision under Section 26 of the Act, and there is no court order making her a dependant of the deceased. Under Section 29 of the Act, a grandchild can be a dependent of her grandparent, but for her to qualify as such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was dependent on the grandparent immediately before his death..”

14. Section 26 governs Provisions for dependants not adequately provided for by will or on intestacy. It states that

“ Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”

15. The cited case refers to grandchildren. However the principle applies equally to the parents of the deceased and this would mean that there being no demonstration to court of an application under Section 26, the parents would not be entitled to benefit from the estate of the deceased. However a Succession court being a court of justice is enjoined to make such orders as necessitate justice as per Section 47 of the Law of Succession Act. Having considered the sentiments of the parents of the deceased that came out during their oral evidence, I would give them an opportunity to demonstrate the same under the said Section 26 of the Law of Succession Act.

16. This brings me to the last consideration which is: the **Distribution of the Estate**. I am of the view that issue shall be stayed as the parents of the deceased are given an opportunity to make an application under section 26 failing which I shall make orders in respect of the estate.

17. In the result I make the following orders:

- a) The 1st and 2nd Petitioners shall within two weeks file an application to demonstrate their dependence on the deceased, failing which the court shall proceed to make a final determination in respect of the objection.*
- b) The final orders in respect of the objection are stayed in view of (a) above.*
- c) The matter shall be mentioned in two weeks for compliance and any further orders*
- d) This being a dispute involving family members, each party will bear their own costs.*

It is so ordered.

Dated and delivered at Machakos this 30th day of July, 2019.

D. K. KEMEI

JUDGE