REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO 97 OF 2017

IN THE MATTER OF THE ESTATE OF MARY KARUGI MWANGI (DECEASED)

R U L I N G

1. The Petitioners, James Mugi Mwangi, George Gathumbi Mwangi, and Njeri Mwangi are children of the deceased Mary Karugi Mwangi who died intestate on 15th May 2016. On 5th July, 2017 the Petitioners filed for letters of administration. Stating, that they were the surviving children of the deceased and also beneficiaries of her estate, alongside a fourth sibling, Carol Nduta Mwangi.

2. However, in a subsequent petition for Limited Grant that was filed on 19th July, 2017 , the Petitioners included two other beneficiaries, namely, Catherine Njeri Mwangi and Renny Maina Mwangi (deceased). On the basis of the petition for limited grant and several affidavits, the Petitioners obtained a limited grant *ad colligenda bona* which allowed them access to the bank accounts of the deceased, from whence they withdrew a total sum of KShs.2,480,887.87 for the stated purposes of servicing a car loan facililty, financing certain construction projects and payment employee dues.

3. On 27th October 2017, the Petition for letters was published in the Kenya Gazette. There is on record two signed copies of a Grant of Letters of Administration in favour of the Petitioners and dated 16th January 2018. It seems that the grant was not issued to the Petitioners due to lodgement of the Objection to Making of Grant (the Objection) filed in the registry on 25th January 2018. The Objectors are **Andrew Mwangi Maina** and **Debbie Karugi Maina** and are children of the deceased **Renny Maina Mwangi** who predeceased his mother **Mary Karugi Maina**, having died on 22nd July 2015.

4. The Objectors state that their said father was also survived by a wife, one **Jane Wairimu Munge**. Asserting their right as beneficiaries of the deceased herein, the two Objectors claim that the Petitioners filed for the grant of letters secretly and concealed their existence as beneficiaries.

5. The Objectors also filed an Answer to Petition for a Grant on 14th February 2018. They reiterate the reasons stated in the Objection, and the alleged intermeddling in the estate by the Petitioners through sale or purported sale of some of the assets of the estate, while concealing some of the estate assets such as shares in **Safaricom a**nd **Kengen** companies and the deceased's matrimonial home in Lavington, Nairobi. The Objectors also cross- petitioned for a grant.

6. In response, the Petitioners filed a preliminary objection to the effect that the Objection was filed outside the period provided under the Law of Succession Act. In addition, on the 18th June 2018, the Petitioners filed what is erroneously entituled as an Affidavit of in Support Preliminary objection. It was sworn by **James Mugi Mwangi** in his own behalf and on behalf of his co-Petitioners.

7. Therein he opposes the cross—Petition for grant stating that the Objectors do not qualify for appointment as administrators. For reasons that they rank lower in priority to the Petitioners, and to their own mother and have no locus or legal capacity to represent their deceased father. Moreover, the Objectors have already benefited from the estate, and have failed to disclose the existence of other children of their deceased father. The Petitioners dismiss the objection and cross petition as an afterthought.

8. The Answer and cross application filed by the Objectors was argued orally before me on 21/6/18. Miss Mutuku submitted that the Objectors have approached the court as grandchildren of the deceased, and therefore beneficiaries pursuant to **Section 41** of the Law of Succession Act. And that, the preliminary objection taken to their objection ought not to be allowed to bar them from asserting their claim. For their part, the Petitioners through Ms Gichuru argued that the Objection was made out of time and without leave being sought to extend time for late filing. Further, that the Objectors as grandchildren do not rank equally in priority with the Petitioners who are children of the deceased.

9. The court was referred to the provisions of **Sections 38,** and **66** of the Law of Succession Act. It was argued that to acquire a proper standing, the Objectors ought to come as dependents under Section 26 Law of Succession Act, as their deceased father had already received gifts *inter vivos.* It was the position of the Petitioners that the Objectors have no tangible beneficial interest in the estate.

10. Ms Mutuku in her answer stated that there was no evidence of the alleged gifts to the deceased . Further that, by dint of **Section 41** of the

Law of Succession Act the Objectors can inherit directly from the estate of their deceased grandparent. The parties cited various authorities to support their respective positions.

11. The court has considered the material canvassed in respect of the Answer and Cross- application. There is no dispute that the Objection upon which the Answer and Cross Application are premised, was filed outside the period of 30 days provided under **Section 67(1) of the** Law of Succession Act and Rule 7(4) of the Probate and Administration Rules. While notice of the petition herein was published in the Kenya Gazette of 27th October 2017, it was not until 25th January 2018 that the Objection was filed. The period for making an objection lapsed on 27th November 2018.

12. The Objectors did not seek extension of time under Rule 17(2) of the Probate and Administration Rules before filing the objection. Section 68(1) Law of Succession Act provides.

> **"68. Objections to application (1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow."**

13. There is no dispute that the Objectors herein are grandchildren of the deceased and not mere busybodies. They are aggrieved by their alleged exclusion from the proceedings. It is true as pointed out by the Petitioners that the Objectors ought to have first sought an extension of time prior to filing their Objection. That said, I think It would be a travesty of justice for this court to drive the Objectors from the seat of judgment in a peremptory manner for non -compliance with a formal rule of procedure. Substantive justice, is what the court must consider, rather than an unwarranted attention to procedural technicality. That is the injunction to courts under Article 159(2)d of the Constitution: to administer justice without undue regard to procedural technicalities.

14. Rule 17(2) of the Probate and Administration Rules must be read together with the general rule on enlargement of time contained in Rule 67 which provides that:

> **"Where any period is fixed or granted by these Rules or by an order of the court for the doing of any act or thing, the court upon request or of its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired."**

15. Similarly Order 50 of the Civil Procedure Rules which is applied to succession causes through Rule 63 of the Probate & Administration Rules provides at Rule 6 that:

> **"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of time appointed or allowed."**

16. In my considered view, notwithstanding the Objectors' failure to explain the late filing of the Objection without leave, they stand to suffer prejudice if the Objection is struck out *in limine*. Justice in proceedings of this nature cannot be done by barring patently genuine parties from agitating their case. Thus, on its own motion, the court, in exercise of its discretion in the rules deems the Objection as properly filed.

17. There is a second limb of objection made by the Petitioners against the Objectors to the effect that, the Objectors lack *locus standi* or legal capacity to bring the Objection and by extension the Answer and cross-Petition. A further Objection was also made in relation to the question whether the Objectors have a tangible claim in the deceased's estate. The circumstances in the case of **In The Estate of John Musambayi Katumanga – [Deceased] (2014) eKLR** cited by the Petitioners differ from those herein. In that case, the parent or parents of granddaughter to the deceased were confirmed to be living and had survived the deceased grandparent. Secondly, the granddaughter did not demonstrate that she was a dependent of the deceased grandparent within the terms of **Section 26** of the Law of Succession Act.

18. In this case, the parent of the Objectors who was a child of the deceased predeceased his mother **Mary Karugi Mwangi** (the deceased herein). It does appear however that a widow survived the deceased son of the above deceased and it is not clear why she is not involved in these proceedings.

19. There is no provision in the Law of Succession Act or the Probate and Administration Rules that can be construed to require that an Objector/ grand child should have been appointed as a personal representative of his or her deceased father in order to raise an objection in a cause relating to the estate of his grandfather or as in this case, grandmother. It must be borne in mind that the object behind the publication of the notice of presentation of a petition for a grant is to ensure the widest reach possible, and secondly to afford an opportunity to those who may have an objection or even information as to why the grant ought not to issue, to come forward (see Rule 16 of the Probate & Administration Rules).

21. The rationale being the protection of estates of deceased persons and their beneficiaries from unscrupulous applicants who may not have any *bonafides* or genuine claims to the estate. This noble object will be defeated if family courts were to summarily reject objections or informations merely because the Objectors or informants have not been appointed as representatives of deceased persons in whose name they apply, or demonstrated a tangible interest in the estate.

22. Of course it is prudent, time allowing, for an Objector representing a deceased person to first obtain a grant in his favour before filing an objection. In a situation such as present whether or not he had done so, the burden will be upon him in any event to establish his grounds in support of the Objection, Answer and Cross petition. In the circumstances, I find and hold that the objection relating to the legal capacity or

locus standi of the Objectors has no merit. It is enough that the Objectors are the undisputed children of the deceased brother to the Petitioners.

23. Regarding the Answer to the petition and cross- application, it is beyond disputing that the Petitioners being the surviving children of the deceased rank higher in priority than the Objectors. That is clear from a reading of the Act . The order of priority and preference to be given to persons to administer an intestate estate is stated in Section 64 of the Law of Succession Act as follows:

a) Surviving spouse or spouses with or without association with others.

b) Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided in Part V.

24. For purposes of this case, the relevant provision in Part V is Section 38 which states that:

> **"38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children".**

25. And further Section 41 states that:

> **"41. Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate".**

26. All the Petitioners herein rank equally in priority and therefore any four of them could have applied jointly for letters of administration. The Objectors' complaint that the Petitioners did not give them notice of the petition is based on the assumption that such an obligation existed on the part of the Petitioners. Rule 26(1) of the Probate and Administration Rules places no such obligations on the Petitioner ranking higher in priority as against a person ranking lower in priority.

25. Rule 26(3) provides:

> **"Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree".**

So that even if the Objectors were appointed personal representatives of their deceased father, preference would be given to the surviving brothers of their deceased father in this case. The application of the principle of representation to their case in no way raises their ranking in priority to the level of or above that of the Petitioners.

26. The Petitioners and Objectors are all beneficiaries to the estate of the deceased by dint of the principle of representation, but the petitioners enjoy statutory preference for purposes of issuance of a grant of letters of administration. I do not accept the argument by the Petitioners that the Objectors are not competent for appointment as administrators. Rather, the correct position is that a grant could only issue in their favor in this case as an exception to the rules of priority as provided in rules 26 and 27 of the Probate and Administration Rules. Besides, there is no evidence that the widow, if alive, to their father has consented to the Objectors taking priority over her as a spouse, been served with a citation or renounced her right to apply (see Rule 7(7) of the Probate and Administration Rules).

27. Indeed in this case, there is no evidence that the widow named by the Objectors as **Jane Wairimu Munge** , if still living, has made an election to renounce her right or consented to the Objectors' cross-petition or been served with a citation to accept or refuse any grant to be sought in respect of the deceased herein for the benefit of the estate of her deceased husband. . There is an uncontroverted deposition in the Replying Affidavit to the Cross-Petition that apart from the Objectiors before the court, there are other surviving children **of Renny Maina Mwangi** the deceased son of the deceased herein.

28. The cross-Petition stands on shaky ground. So where does this leave the Objectors in the event that their mother is deceased or is alive and has exercised the options envisaged in Rule 7 (7) of the Probate and Administration Rules? The answer is found in Section 41 of the Law of Succession as discussed in the decision of the Court of Appeal in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** regarding the fate of surviving children of deceased children of the intestate.

29. The court delivered itself as follows:

> **"Although Section 35 and 38 of the Law of Succession Act is silent on the fate of surviving grand children whose parents predeceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The Law on is section 41. <u>If a child of the intestate has pre-deceased the intestate then that child's issue alive or *en ventre sa mere* on that date of the intestate's death will take in equal shares *per stirpes* contingent on attaining the age of majority. *Per stirpes* means that that the issue of a deceased child of the intestate take between them the share their parents would have taken had the parent been alive at the intestate's death".</u>**

30. For the foregoing reasons the Objection, Answer and Cross-petition cannot succeed. The court must however point out that the Petitioners erred by failing, in the initial pleadings to comply with **Section 51(2)(g)** of the Law of Succession Act which states that:

> **"51. (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.**
>
> **(2) Every application shall include information as to—**
>
> **(a) The full names of the deceased;**
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> **(b) The date and place of his death;**
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> **(c) His last known place of residence;**
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> **(d) The relationship (if any) of the applicant to the deceased;**
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> **(e) Whether or not the deceased left a valid will;**
>
> **(f) The present addresses of any executors appointed by any such valid will;**
>
> **(g) In cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased."**

31. The Petitioners' brother **Renny Maina Mwangi** predeceased their intestate mother but this pertinent and material fact was not disclosed in the Petition. It seems from the arguments raised by the Petitioners, that they believe their deceased brother does not count in these proceedings, allegedly because, he had benefitted from his mother's estate while alive. Whether true or not, the matter is neither here nor there; deceased or not, the law requires disclosure of children of the deceased. Besides, the question whether any assets are due to his estate under these proceedings is a matter to be determined during the distribution of the estate, and cannot be used to disqualify *bonafide m*embers of the family of **Renny Maina Mwangi** from claiming as persons entitled as beneficiaries, or be used as justification for non-compliance with **Section 51(2)g** of the Law of Succession Act.

32. Finally, even though there is no proof of the existence of any estate assets which have not been included in the Petition, the Petitioners are under obligation to present a full inventory of all assets and liabilities of the deceased at the time of applying or as soon as any omission in that regard is discovered by them. Equally, both the Petitioners and Objectors are duty bound to declare all known surviving or deceased children or spouses of **Renny Maina Mwangi** to enable their participation in this cause.

33. The Objection, Answer and Cross Petition brought by the Objectors having failed, the court has no reason to decline to issue the grant sought by the Petitioners. In the circumstances the un-issued grant dated 24th January 2018 is cancelled. A fresh grant of Letters of Administration is to issue forthwith in favour of the four petitioners.

34. I have further noted that under the terms of the Limited Grant issued to the Petitioners, they are under an obligation to render a just and true account thereof whenever required to do so. I therefore direct that the Petitioners herein do within 21 (TWENTY ONE) days of this ruling render an accurate account supported by relevant documentation , in respect of the sum of Shs.2,480,887.87 drawn from the bank accounts of the deceased.

Parties will bear their own costs in light of the nature of these proceedings.

DELIVERED, DATED AND SIGNED AT KIAMBU THIS 24TH DAY OF SEPTEMBER, 2018.

In the Presence of:

Miss Ndirangu holding brief for Agimba for Petitioners

Mr. Mutuku holding brief for Mr. Miyare for Objectors

C. MEOLI

JUDGE