



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PROBATE AND ADMINISTRATION DIVISION**

**SUCCESSION CAUSE NO. 118 OF 2012**

**IN THE MATTER OF THE ESTATE OF HARRISON KIMITI KIMANI (DECEASED)**

**BENJAMIN MBUGUA KAMAU.....APPLICANT/INTERESTED PARTY**

**- Versus -**

**PETER KIMANI KIMITI.....1<sup>ST</sup> RESPONDENT**

**JOSEPH KAMAU GATHERU.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. In his Summons dated 3<sup>rd</sup> October, 2014 Benjamin Mbugua Kamau (hereinafter the Applicant), asked the court to enjoin him in this cause as an Interested Party, and for the court to find that he is entitled to a share of the deceased's estate.
2. The grounds of the application as contained in the supporting affidavit are that the deceased was known to the Applicant since 1994. That the deceased who lived with him all his life and treated him as his own child had no wife or children of his own. That when the deceased was involved in a road traffic accident in 2009, the Applicant took care of him and assisted him with medications, while no one from his family came to his aid.
3. The Applicant deposed that the deceased died on 3<sup>rd</sup> July 2011 through a road traffic accident. That Peter Kimani Kimiti (hereinafter the 1<sup>st</sup> Respondent) petitioned for grant of Letters of Administration in Succession Cause No. 280 of 2011 in the Kiambu Chief Magistrate's Court which was issued on 14<sup>th</sup> December, 2011.
4. In reply to the Applicant's application Peter Kimani Kimiti, the 1<sup>st</sup> Respondent deposes that he is the stepbrother of the deceased, and that he is also the Administrator of the estate of the deceased by virtue of the Grant of Letters of Administration, issued to him in Kiambu Succession Cause No. 280 of 2011. The Respondent states that the Summons by the Applicant is frivolous, vexatious and an abuse of the court process.
5. The Respondent further deposes that the rule governing priorities stipulates that he is the right and proper person to administer the deceased's estate. That since the deceased was not married, and had no children; the Respondent is entitled to inherit his estate.
6. Mr. Mbiyu Learned Counsel for the Applicant in his submissions, invited the court to determine who a

dependant is and whether the Applicant should be enjoined as an interested party who is entitled to a share of the estate.

7. Counsel argued that the Applicant in his supporting affidavit had averred that he had lived with the deceased since 1994 and that the deceased treated him as his own child. He cited the case of the Estate of **Cecilia Wanjiku Ndung'u (deceased) [2013]eKLR**, in which Musyoka J stated that **Section 29(c)** talks of a child that had been taken as a dependant of a male person. The court found that by virtue of **Section 39(b)** of the law of Succession the right of a child supersedes the rights of other beneficiaries.

8. Counsel also referred the court to the decision of Visram J as he then was, in the matter of the **Estate of Humphrey Edward Gichuru Kamugu (deceased) Nairobi HCSC No. 2332 of 1995**, where the Judge stated that only the free estate of the deceased is available for purposes of **Section 26** of the Act. Counsel urged that in this case, the deceased's estate has not been allocated to anyone although there is a claim by a purchaser which is yet to be determined by court. That the property should be deemed to be free and the dependant given a share thereof.

9. Counsel submitted that under **Section 28(d)** any gift made by the deceased to the dependant during the deceased's lifetime should be considered. He pointed out the Applicant's contention that on 3<sup>rd</sup> December, 2009 the deceased had allocated him a portion of land measuring 50ft out of parcel number Kiambaa/Ruaka/956, and put it in writing in Kikuyu language. He urged that although the deceased died on 3<sup>rd</sup> July 2011 without having transferred the piece of land to the Applicant, the court should consider the application and enjoin the Applicant as an interested party.

10. Mr. Irungu Learned Counsel for the Respondent submitted that a stranger cannot be entertained in succession proceedings. That under **Section 39(1)(d)** of **Law of Succession Act**, the Respondent being a stepbrother and the only surviving family member of the deceased, is entitled to the grant of Letters of Administration.

11. Counsel argued that the two authorities to which counsel for the Applicant relied on being the Estate of Rachel Wangari Babu and in the Estate of Mong'are Mongare. The first case talks about revocation on the ground that the Grant was obtained fraudulently while the second talks about the provision for the deceased's children. That in the instant cause the Applicant is not a child of the deceased and he has not held himself as such.

12. The Applicant has come to court seeking a share of the estate in his capacity as a dependant. The Applicant can only come under, **Section 29(b)** of the **Law of Succession Act** which provides that for purposes of **Part III** of the Act, a dependant is 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.

13. There is no dispute that the deceased had no child of his own and no wife during his lifetime. Indeed he appears to have had no family around him while he was alive. The Applicant stated that he did not know any of the deceased's siblings since they took no interest in the deceased during his life time. He attached the eulogy of the deceased as evidence that the Respondent was not mentioned in it as a sibling.

14. The Applicant argued that he had been taken in as a child of the deceased and that his rights herein, superseded the rights of the Respondent who was a step-brother to the deceased and who was never there for the deceased when he was alive. That he should therefore be enjoined as an interested party and considered as a beneficiary.

15. The Applicant further averred that due to the good relationship he and the deceased had, on 2<sup>nd</sup> July 2011, the deceased informed him that he had allocated him a portion of land measuring 50ft within his land parcel number Kiambaa/Ruaka/956. That the deceased had always expressed his intention and willingness to his family, to allocate a portion of his land to the Applicant as a sign of good gesture and gratitude for having taken care of him.

16. The Respondent on the other hand denies that the Applicant ever lived with the deceased or took care of him. The Respondent argues that the piece of paper the Applicant annexed to his application is suspect since it was written in kikuyu language and no translation was proffered. That it was not signed, it had no reference number Kiambaa/Ruaka/956 and that it indicated that the Applicant was granted “wako” a licence to build, but does not signify a proprietary interest. He urges that the Applicant has never lived in the subject property.

17. I agree with Nambuye J (as she then was) in **Ngetich, In Re: estate of [2003]KLR pg 84** in which she stated that the law cannot move to perfect an incomplete gift. This was in reference to the transfer of land to the petitioner which had not been completed before the deceased died.

18. If indeed the deceased had taken in the Applicant and treated him as his child for 15 years and accommodated him allowing him to build his house on the deceased’s land there is evidence of the intention of giving a portion of his land to the Applicant.

19. If on the other hand the Applicant is a mere busy body who observed that the deceased had no family of his own around him and decided to invent himself as such family, it would be an injustice to distribute to him any part of the estate. Under section 7 of Cap 168 Public Trustee Act where the particular circumstances of any case appear to the court so to require, the court may, if it thinks fit for reasons recorded in its proceedings, of its own motion under the Law of Succession Act letters of administration to the Public Trustee notwithstanding that there are persons who, under that Act or any other written law, would in the ordinary course be legally entitled to administer the estate of the deceased person concerned in preference to the Public Trustee.

20. The Applicant is asking the court to consider him as a dependant and therefore make provision for him. It is his averment that the deceased had intention of giving him a piece of land. Under **Section 27 Law of Succession Act** in making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

21. After a careful consideration of the application before me, I find that it is meet to enjoin the Applicant as an interested party. He will however, have to prove his entitlement to share in the estate of the deceased by adduction of evidence.

It is so ordered.

**SIGNED DATED and DELIVERED** in open court this **28<sup>th</sup> day of February, 2017.**

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**L. A. ACHODE**

**JUDGE**

In the presence of: