



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

**SUCCESSION CAUSE NO. 2557 OF 2012**

**IN THE MATTER OF THE ESTATE OF JMW (DECEASED)**

**RULING**

1. The deceased herein JMW died intestate on the 27<sup>th</sup> March, 2012 at the age of 89 years. According to the Chief's letter Kanzala Location, the deceased was survived by six children namely PMW (son), MWW (daughter), RKK(daughter), JKW (daughter), MNW (son) and HKW (daughter).The six children herein are born of two different mothers. MNW and HKW are biological siblings born of one matter known as MN who divorced with the late JM (deceased) sometime in the seventies. The other five are also siblings born of one mother together with one PM who died before his father but had no family.
2. On 20/11/2012, H K and M W W petitioned for letters of administration pendente lite in which they prayed for authority to collect and preserve the estate of the deceased. From the court record this prayer was not pursued nor were any orders granted.
3. Subsequently, on 25/10/2012, PM, MW and HK filed a petition for a full grant of letters of administration intestate. Accompanying the petition were two consents executed by RKK and JKW to the exclusion of the other survivor one MN. After noting the omission of M's signature in the consent form, the Deputy Registrar requested for explanation as to why he had not signed the same to which the petitioners answered that forms had been availed and served on MN but refused to sign.
4. To prove to the court that N was not ready to sign consent forms and that he had refused, they filed citation dated 19/7/2013 which was issued on 25<sup>th</sup> September, 2013 and served on the said Michael. In response to the said citation, M filed an affidavit sworn on 31/10/2013 but filed in court on 1/11/2013. He denied receiving any consent forms. Nevertheless he expressed his desire to be a co-administrator to the estate herein so as to make a total of four. His justification was, each house ought to be represented by two administrators. In this case, he wanted to join his biological sister H K from the one house and the other two from the other house.
5. The said citation was heard by Justice Musyoka who dismissed it through his ruling dated 31/7/2014 on grounds that it was filed after an application or petition for grant of letters of administration had been made contrary to the provisions of Part VI of the Probate and Administration rules.
6. The estate was gazetted on 3/10/2014 giving 30 days notice to anybody willing to object to the grant of letters of administration intestate. After gazettelement, M swiftly moved to court and filed an objection dated 29/10/2014 challenging the issuance of a grant to the three petitioners on the following grounds:
  - (a) That he had not been consulted and as a son of the deceased he has equal rights.

- (b) That he did not receive any consent forms for his signature.
- (c) That his mother MN was not listed as a beneficiary and that she had not consented.
- (d) That he was not issued with proper communication on the petition.
- (e) That PM was staying out of the country in the USA and that he cannot make a good administrator due to distance.
- (f) That the petitioners were guilty of non disclosure of material facts and information thereby giving false statements.
- (g) That the sureties proposed by the petitioners one JM and KM were not worth 2.6 billion shilling.

7. The objector filed answer to petition on 10/3/2015 simultaneously with his cross petition. Equally the petitioners filed reply to petition on 7/7/2015 with R swearing her affidavit on 2/7/2015 and H K on the 30<sup>th</sup> June, 2015. In their reply, R and H avers that the objector is a difficult and un co-operative person who had failed to account for the property he was managing for the estate since the time he was appointed as a guardian ad litem under the Mental Health Act when their father fell sick due to medical disorder. They further contend that, the objector is a difficult person who will make administration and management of the estate impossible. They accused M (objector) of collecting rent from Mombasa and Machakos properties and that he never accounts for the same.

8. During the hearing, the objector told the court that, he wanted to be the 4<sup>th</sup> administrator and that there will be no prejudice for him being appointed. He alleged that, during their family meetings, a resolution was made for any of the survivors of the deceased willing to petition for letters of administration to volunteer. That despite volunteering himself, he was left out as the three petitioners colluded to petition for the grant without his knowledge. He also dismissed the allegation that he was a difficult person citing several minutes in their family gatherings where he was participating and that he has been giving full account as and when demanded for him to account for the properties he was managing. He produced several minutes to prove that he was always attending family meetings and therefore co-operative. Lastly, he pleaded with the court to recognize him as an additional administrator to HK from one house and the other house to remain with two.

9. The petitioners on the other hand reiterates the averments in their affidavit citing non-cooperation of the objector and lack of accountability and transparency. Their evidence was corroborated by RK (3<sup>rd</sup> Objector's witness). The petitioners argued that MN objector's mother had divorced their father sometimes 1976 and therefore has no beneficial interest in the estate of the deceased. They further contend that, the objector was duly served with a petition application together with consent forms for his signature but deliberately refused.

10. In his submission, Mr. Muniyithya submitted that his client was not served with any notice to give his consent as required in law. He quoted the case of **John Kibunja Njoka and another vs Joseph Njuguna and 3 others (2014) eKLR** in which the court held that

**“.....the duty was on the petitioners to demonstrate that the petition is filed with consent of all the beneficiaries”.**

Mr. Muniyithya urged the court to exercise its discretion under Section 66 of the Succession Act and in the best interest of the estate to appoint the objector as an additional administrator as he qualifies as such in accordance with Sections 56 of Cap 160.

11. Lastly Mr. Muniyithya urged the court to appoint the eldest sons from both mothers, that is the 1<sup>st</sup> petitioner representing the first mother together with the objector representing the second mother. In

support of the petitioners' case, Mrs. Madahana submitted that consent was duly served with notice to the objector who refused to accept service thus prompting service vide a letter dated 3/8/2012 through registered post. Counsel quoted the case of **Pius Mbengei Musyoki vs Wambua Musyoki (2016)eKLR (succession cause No. 558/309)** in which the court observed that an objector who is served with a notice of consent but opts not to sign cannot claim non disclosure of material facts.

12. Mrs. Madalana urged the court to ignore the claim that MN former wife to the deceased with whom he had divorced had not been consulted as she was not a dependant. On non-disclosure of material information, counsel opined that all material particulars were supplied to the objector and that his interest is to be an administrator. She therefore submitted that the burden is on the objector to prove his allegation. She relied on a case in the matter of estate of **Henry Wande Indika (deceased) Kakamega High Court Succession cause No. 51/1989** in which Judge G.B.M. Kariuki dismissed a petition because he found that there was material disclosure to all beneficiaries by the petitioners.

13. Having gone through the pleadings with regard to the objection herein and having carefully evaluated and assessed the evidence of both parties in open court and their counsels submissions, I will endeavour to deal with each ground separately.

14. The first and second grounds in support of the objection is that the objector was never consulted and served with any notice by the petitioners disclosing of their intention to petition. The petitioners contend that, notice was duly served upon the objector who refused to acknowledge hence forcing them to serve by way of registered post vide letter dated 3<sup>rd</sup> August, 2012. There is however no proof on record that such notice was served directly upon the objector. The objector equally does not deny being served by registered post. Be it as it may, notice was eventually served upon the objector through a citation which he vehemently opposed and instead demanded to be one of the administrators. This therefore implies service of notice to consent was not the issue but rather the issue was to be enjoined as co-administrator.

15. As regards consultation, the minutes produced by the objector himself clearly indicate that the issue of petitioning for grant of letters of administration was frequently deliberated in their family meetings in which the objector attended hence sufficient consultation.

16. The third ground was non-inclusion and lack of consent from the objector's mother one N. It is clear from the testimony of both parties that MN divorced with the deceased sometime in the 1970s and that she was not a dependant of the estate. The objector and his sister Happy Koki admitted as such during the hearing. That being the position, that issue is already settled by the parties themselves hence I do hold that MN is not a dependant for purposes of this succession cause.

17. The fourth ground was that the objector was not issued with any proper communication. As stated above, there was proper communication with regard to the intention to file a succession cause during their family meetings. Even after he had been served with the citation, he still insisted on being added as additional administrator. I do hold that there was sufficient communication.

18. Concerning the allegation that one of the petitioners one PM was staying out of the country and that he could not properly execute his mandate and role as an administrator, the said M told the court that he has since been transferred from U.S.A. to Kenyan office hence readily available to discharge his duties a fact that was not disputed by the objector

hence that ground of objection is overtaken by events.

19. The sixth ground of objection was non-disclosure of material facts by petitioners and giving false statement. It was not clearly spelt out by the objector on the specific facts and falsehood being propagated by the petitioners. He who alleges must prove. This is a basic principle in evidence law Section 107 of the evidence Act which burden the objector has not fully discharged.

20. Lastly, the objector contends that the monetary worthness of the sureties is not correct as the figure quoted of 2.6 Billion is not realistic. The requirement for surety in succession causes is basically to serve

as guarantors for purposes of indemnifying the estate in the event of false information and therefore loss or wastage occasioned to the estate by the persons guaranteed as petitioners. There is no provision for precision or accuracy on the figures quoted nor does the court require a valuation report to ascertain the approximate value quoted. The objector did not tell the court how much the sureties were worthy in his opinion and how prejudicial the figure quoted is to the eventual determination of this cause. I find that ground frivolous and do dismiss it.

21. I will now turn to the elephant in the room which is inclusion of the objector as one of the administrators. This is the core of all the grounds of objection.

According to the objector, he has a right to be one of the administrators and that there will be no prejudice if he were to be included.

22. On the other hand, the petitioners contend that the objector is a difficult person who is not co-operative to the rest of the family members hence will make the administration and management of the estate impossible. The power of appointment of administrators reserved by the court is purely a discretionary issue. Section 66 of the Law of Succession provides a court with such power by providing as follows:

**“when a deceased person 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 the other beneficiaries.**

**(b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V....”.**

23. In this particular case, there is no spouse surviving the deceased and therefore the children listed herein as dependants are beneficiaries and have beneficial interest in the estate. Section 56 of the Succession Act qualifies as to who cannot be an administrator even if one is a dependant or a beneficiary. In this category, a minor or person of unsound mind cannot be appointed and not more than four persons can be appointed as administrators.

24. In the instant case, both petitioners and objectors are qualified as they meet conditions set out in Section 56 and 66 of the Section Act.

What is the bone of contention here?

What will be the effect on the preservation, management and administration of the vast estate of the deceased herein if the objector was included?

According to the petitioners and all family members, they are in concurrence that the objector is a difficult man who is not co-operative and should not be appointed as the interest of the estate will be jeopardized.

25. It is clear from the pleadings and materials placed before the honourable court that the objector is a lone ranger. He is the only person being regarded as a black sheep in the family. His biological sister whom he wants to join as co-administrator equally expressed her regrets over the proposed inclusion of the objector as an administrator.

26. During the hearing, there was evident displeasure and bitterness displayed all over the face of both parties against each other. This is a case of family rivalry in which one member is not liked by the entire family. Since the deceased died, the estate is being managed jointly as each child including the objector has been given a portion of property to manage. It is the contention of all family members that the

objector has never rendered a full account of what he was mandated to manage hence the fear that nothing will move as they are not likely to agree.

27. As clearly stated in Section 66 of the Succession Act, the ultimate final decision in the appointment of an administrator squarely lies with the court. The court must be extra careful and cautious in appointment of administrators of an estate who will not waste, damage and or destroy and generally loot and intermeddle with the entire estate. The court must ensure that the best interest of the estate is taken care of. This is a paramount consideration. There is no exclusive gains conferred upon an administrator over and above the other beneficiaries by virtue of being appointed as such.

28. The fight over appointment as administrator or administratrix is totally uncalled for and unwarranted. Both parties are in agreement that they have no objection in sharing the estate equally at the confirmation state. Why fight ? According to the objector, there should be a representative from his mother's side i.e. himself and Happy Koki and two from the other house. This therefore means that the other house must drop one petitioner. It would appear that the objector has some fear that some resolutions or decisions if made by a majority of administrators, his house will be disadvantaged.

29. In my own assessment of the general demeanor of one PM (petitioner) and the objector, they hate each other and are great enemies. They definitely cannot work together. That being the case, and in the best interest of the estate and without any prejudice to any party and considering that an administrator is mere manager of an estate without exclusive benefit over above the others, I hereby appoint HKW as a representative of the objector's house and MWW as a representative of the other house as joint administratrix with mandate to preserve and manage the estate pending confirmation. Secondly, the two administrators shall take full account of the estate and preserve the same until confirmation of grant after six months from today. Grant of letters of administration intestate to issue to the two as ordered above. This being a family matter, I will not make any order as to costs.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2017.

**J. N. ONYIEGO (JUDGE)**