



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO.1380 OF 2013**

**IN THE MATTER OF THE ESTATE OF JECKONIA OLIVER ACHOLA NDINYA**  
**(DECEASED)**

P W N .....APPLICANT/OBJECTOR

**VERSUS**

E A O.....1<sup>ST</sup> PETITIONER/RESPONDENT

J J O A .....2<sup>ND</sup> PETITIONER/RESPONDENT

**RULING**

**PLEADINGS**

Jeckonia Oliver Achola Ndinya died intestate on 1st December 2010. He was survived by four adult children namely;

- a. E O O
- b. J J O A
- c. A O O
- d. J N A (deceased) Father to D A (minor)

The Petitioners are the daughters of the deceased. They petitioned this Court for grant of letters of administration intestate, which was issued to them on 23<sup>rd</sup> August 2013. They subsequently filed summons for confirmation dated 7<sup>th</sup> April 2014 together with a proposed mode of distribution. The summons was later withdrawn and replaced with summons dated 30<sup>th</sup> April 2015 with a fresh proposed mode of distribution. The summons is yet to be heard and determined.

The Applicant, P W N , daughter-in-law to the deceased by an affidavit of protest filed on 24<sup>th</sup> June 2015, stated she was married to the late J J C N, a son of the deceased, objected to the confirmation of the grant. She averred that her marriage to the J C N was blessed with one issue namely D A A aged 11 years. The Objector stated that she did not consent to the grant herein being issued to the Petitioners neither did she sign the affidavit in support of the summons for confirmation, and thus the alleged signatures appended to the said documents were a forgery.

She further stated that several properties forming the estate of the deceased were not included in the petition for grant. They are namely; motor vehicles Reg. [particulars withheld] J V W, [particulars withheld] Mercedes Benz and [particulars withheld] Toyota Prado. Their daughter D A N A was not mentioned as a beneficiary of the said estate.

She protested to the proposed mode of distribution and the new proposed mode of distribution that seeks to put the Petitioners herein as trustees of her daughter's share in the estate instead of her. She proposed that she be appointed as trustee for the share of estate due to her daughter D to hold in trust for her until she attains the age of majority. Further, that all the fixed assets and cash in the various bank accounts be distributed equally amongst the four beneficiaries.

The 2nd petitioner, J J O A in response to the Applicant's objection, by the Further Affidavit filed on 15<sup>th</sup> July 2015, stated that the cars belonging to the deceased had been distributed amongst his three children as follows; [particulars withheld] Toyota Prado to the late J A and the vehicle was stolen in 2012, [particulars withheld] Mercedes B E A and [particulars withheld] to herself, all using them ever since, except for one child A A who resides abroad.

She further stated that the deceased's pension benefits do not form part of succession proceedings as the same are subject to nomination. It was her case that in the absence of grant of letters of administration in respect of the estate of their deceased brother James, the petitioners are by law required to hold any share accruing to the said J in trust for his only child D.

The parties canvassed their cases by way of written submissions. The administrators reiterated their position that all the properties forming the estate of the deceased, except for the motor vehicles, should be shared equally amongst the four beneficiaries (being his three children and one surviving grandchild representing the estate of their late brother J N, a son of the deceased). It was submitted that the vehicles have been in use by three of the four children of the deceased, except one who resides abroad and thus only fair that the same should be shared according to the use. The petitioners submitted that legally it is them the administrators of the estate who should hold the share due to the minor D in trust till she attains the age of majority; and not the petitioner herein.

The objector on the other hand submitted that she was in agreement with the proposed mode of distribution and that the only issue for determination of this court was who is the proper trustee as between the protestor and the petitioners. She submitted that as the only surviving parent of the minor beneficiary, she was legally suitable to be the trustee. Lastly, she submitted that although **Section 38** of the **Law of Succession Act** envisages equality in distribution of the estate, the court should factor in the needs of the minor beneficiary herein.

## **ISSUES**

1. The issue for this court's determination is the mode of distribution of the estate of the deceased
2. Who should be appointed trustee of the share of the estate due to the minor beneficiary herein.

## **DETERMINATION**

The deceased died intestate having been survived by his four children his spouse having predeceased him. Distribution of his estate is thus governed by **Section 38** of the **Law of Succession Act** which provides that;

***" 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 be equally divided among the surviving children."***

The above section envisages equal distribution of the estate of the deceased amongst his surviving children **SEE [IN THE MATTER OF THE ESTATE OF GEORGE KAREGWA GITAU (DECEASED) NRB. HIGH COURT SUCCESSION CAUSE NO.959 OF 2001]**. Thus the four children

of the deceased should share in the estate equally.

One of the children of the deceased J N A has since died, and it is proposed that his share in the estate devolve to his only daughter D A, a minor. This is in order as per **Section 41 of the Law of Succession Act** which provides that a child deserves a share of the property in the estate of his or her grandparent which would have gone to his or her deceased parent.

The bone of contention seems to be who between the Objector and the Petitioners herein is suitable to be a trustee for the minor. The Petitioners relied on **Section 83 (f) of Law of Succession Act** which does not stipulate any provision of the administrators holding a trust for minors but it is to hold in trust as the case may require. In the instant case the child has a surviving parent; her mother the Objector.

**Rule 32(1) of the Probate and Administration Rules** provides that:-

*“Where in the case of intestacy the person to whom a grant could otherwise be made is an infant, administration for his use and benefit until he attains the age of eighteen years may, subject to sub-rule (2), be granted to both parents of the infant jointly or to the surviving parent or to the statutory or testamentary guardian of the infant or to any guardian appointed by a court of competent jurisdiction.”*

The marriage between the deceased’s son and the objector is not contested nor paternity of the child. The above rule is clear that the Objector herein as the only surviving parent of the child should be one of the trustees. No allegation as to her incapacity to be a trustee has been alleged by the Petitioners. Where there is a continuing trust there shall be with regard to holding a minor’s share be 2 trustees.

**COURT ORDERS**

1. **In the instant case this Court appoints the mother of the child Pamela Wanjira Achola and her sister, Patricia Wambui Njuguna to hold D A A, the minor’s share of the deceased’s estate except for the motor vehicles which the parties herein already agreed on the mode of distribution until she attains 18 years.**
2. **The objection succeeds to the extent of inclusion of the deceased’s daughter and appointment of trustees of D AA’s share.**
3. **The grant of letters of administration issued to the Petitioners on 23<sup>rd</sup> August 2013 and Summons for confirmation of grant filed on 30<sup>th</sup>**

**April 2015 is confirmed in terms of the mode of distribution.**

4. **This being a family matter I make no orders as to costs.**

**READ, DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 17<sup>th</sup> DAY OF MARCH 2016**

**M.W. MUIGAI**

**JUDGE**

***In the presence of:***

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