



**REPUBLIC OF KENYA**

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

**SUCCESSION NO. 505 of 2011**

**IN THE MATTER OF THE ESTATE OF A G K (DECEASED)**

**I N K.....APPLICANT**

**VERSUS**

**G G K.....1<sup>ST</sup> RESPONDENT**

**I N K.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The deceased to whose estate the proceedings herein relate is A G K, who died on 20.5.11 at the Aga Khan Hospital, Mombasa. The deceased was survived by 5 children, namely the Applicant, the Respondents and two other brothers. From the record, the deceased died testate having made a Will dated 29.10.10 wherein he named the Respondents as executors. In the said Will, the deceased provided for all his children except the Applicant. A Grant of Probate of written will was issued to the Respondents on 5.11.12.

2. In the Application herein dated 17.2.14 the Applicant seeks provision of a monthly stipend of Kshs. 100,000/= to cater for her medical needs and upkeep. The Applicant claims that she has been under medication since 2003 and had depended fully on her deceased father for support for her medical bills till his demise in 2011. The Applicant further claims that being HIV positive, her health is deteriorating and that she requires urgent medical care from a good medical facility as well as a balanced diet which she cannot afford.

3. The Respondents in a Replying Affidavit sworn by the 1<sup>st</sup> Respondent on 21.2.14 claim that the Application being premised on Civil Procedure Rules is incompetent and fatally defective. The Respondents claim that the Application is unnecessary as the Applicant has by her Summons for Revocation of Grant dated 13.3.13 stalled the administration of their father's estate. That the estate comprises of land and does not have liquid finances which can cater for the needs of the Applicant.

4. In her Supplementary Affidavit, the Applicant claims that the deceased's estate comprises of income generating assets and annexed photographs of buildings. That unless the Respondents are compelled to provide for her, she is likely to die due to her medical condition, which she claims is the wish of the Respondents.

5. From the submissions of counsel for the parties several issues arise for determination. It was submitted on behalf of the Respondent that Application is incompetent and fatally defective having been filed under Civil Procedure Rules which do not apply to succession matters. Counsel argued that all applications

under the Law of Succession Act are to be made in the prescribed form and those not provided for should under Rule 49 be by summons in Form 104. For the Applicant, it was submitted that the Application is brought under Section 27, 28 and 29 of the Law of Succession Act. It was further argued that Article 159 enjoins the Court to do justice in total disregard to technicalities and that the era of technicalities is long gone.

6. This Court notes that the Application is by Notice Motion expressed to be brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure and Order 40 Rule 1 of the Civil Procedure Rules. I agree with Counsel for the Respondent that the said provisions in the Civil Procedure Act are not among those listed in Rule 63 of the Probate and Administration Rules that apply to succession matters. Does this render the Application incompetent and fatally defective? It is clear from the body of the Application that the Applicant seeks provision from the estate of the deceased for her upkeep and medical care given her medical condition. It is my finding that filing the Application by a notice of motion instead of summons in the prescribed form and quoting the wrong provisions of law is not fatal. This Court must dispense substantive justice without undue regard to procedural technicalities. In this regard, I am guided by Article 159(2)(d) of the Constitution which provides

***159(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

***(d) justice shall be administered without undue regard to procedural technicalities;***

7. Before moving on to the next issue however, I must add state that I disagree with the Applicant's contention the Court should do justice in total disregard to technicalities. This is certainly not the intention of Article 159 of the Constitution. The Article does not do away with procedural technicalities. It reprobates paying *undue* regard to procedural technicalities.

8. On whether a monthly provision of Kshs. 100,000/= should be made for the Applicant for her upkeep and medical needs, Counsel for the Respondents submitted that this would amount to distribution of the estate. Counsel argued that making provision would offend the provisions of Section 55 of the Law of Succession Act which prohibits the distribution ***"of any capital assets, or to make any division of property, unless and until the grant has been confirmed..."*** To this, it was submitted on behalf of the Applicant that the Application was not for distribution but for provision of a monthly stipend for the Applicant's upkeep and for managing her medical condition. Counsel cited Sections 27, 28 and 29 of the Law of Succession Act.

9. It is not disputed that the Applicant is a child of the deceased and therefore a dependant. Under Section 29 of the Act, the Applicant as a child of the deceased need not prove dependency. Section 29 of the Act defines dependant as follows:

***"29. 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;"***

Section 26 of the Act provides:

***"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".***

10. It is clear from the Will of the deceased made on 29.10.10, and which has been challenged by the

Applicant vide her Summons for Revocation of Grant dated 13.3.13, that no provision, reasonable or otherwise has been made for the Applicant. Section 27 of the Act, gives the court a wide discretion to provide for dependants not otherwise provided for as follows:

***“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”.***

11. Section 28 enjoins the Court in making an order under Section 27 of the Act to have regard *inter alia* to the nature and amount of the deceased’s property and the existing and future means and needs of the dependant. It is not disputed that the estate herein is vast. From the Applicant’s Supplementary Affidavit, the estate comprises stocks/shares and commercial buildings in the centre of Mombasa town that generate hundreds of thousands of shillings monthly. This claim was not controverted by the Respondents. As to the existing and future needs of the Applicant, she is HIV positive. The Court takes judicial notice of the fact that a person of her status requires specialised medical care and a good balance diet.

12. I disagree with the submission for the Respondent that making provision for the Applicant would offend the provisions of Section 55 of the Law of Succession Act. Section 30 of the Act is clear that no application for reasonable provision shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed.

13. In the premises therefore and in exercise of the Court’s inherent power under Section 47 of the Act and Rule 73 of the Probate & Administration Rules to make such orders as may be necessary for the ends of justice powers, I allow the Application dated 17.2.14. The Respondents shall provide to the Applicant a monthly stipend of Kshs. 100,000/= from the income of the estate. There shall be no order as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 17<sup>th</sup> May, 2016.**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondents**

..... **Court Assistant**