



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 1552 OF 2015
IN THE MATTER OF THE ESTATE OF GABRIEL MWANGI
NJUGUNA alias GABRIEL MWANGI N. (DECEASED)
TABITHA WANJIKU MWANGI.....PETITIONER
VERSUS
ANNE MUTHONI NJUGUNA.....1ST OBJECTOR
GABRIEL MWANGI NJUGUNA.....2ND OBJECTOR
AGATHA TABITHA WANJIKU NJUGUNA.....3RD OBJECTOR
MATHEW KIBUGI NJUGUNA.....4TH OBJECTOR
TERESIAH NDUTA KIMANI.....5TH OBJECTOR

RULING

The deceased Gabriel Mwangi Njuguna died on 5th May, 2014 as evidenced by the death certificate attached to the Petition filed on 7th October, 2015.

The matter before this Court involves contested administration of the deceased's estate. The following chronology of events is outlined to inform the issues of determination.

PLEADINGS

The Petitioner filed a Petition for grant of letters of administration on 6th June, 2015 and citations to the 1st Objector and the Petitioner's step daughter were also filed and served on the respective parties.

On 6th July, 2015 the citees filed a Notice of Objection to the issuance of letters of administration to Tabitha Wanjiku Mwangi on the basis that the administrator did not consult all beneficiaries of the estate and obtain consents from them. The Objectors alleged the Petitioner sidelined some of the beneficiaries and there were other confidential reasons.

The Petition contained written consents of some of the beneficiaries. The letter from the Chief dated 7th

July, 2015 asking that all beneficiaries go to the Chief's office to sign consents indicated that only the Objectors went to sign the consents.

An amended and revised petition was filed by the Petitioner on 7th October, 2015. This time it contained all beneficiaries' names and most of them consented apart from the 1st Objector and the step daughter of the Petitioner who on 9th December, 2015 filed through their advocate the Objection to making of grant application.

The gist of the objection is that;

- a. The Objectors were omitted from the list of beneficiaries
- b. That the Objectors did not consent to grant of letters of administration
- c. That the whereabouts of one of the beneficiaries Magdalene Nduta Karanja are unknown yet she has signed the consent
- d. That the Petitioner threatened to evict the 1st Objector and her children 2nd, 3rd and 4th Objectors from their matrimonial home left to her by her husband, late son of the deceased.

On 10th December, 2015 the Objectors filed under certificate of urgency an application and sought the following orders;

- a. The Court to decline the grant of letters of administration to Tabitha Wanjiku Mwangi
- b. That the 1st Objector Anne Muthoni Njuguna be made Co-administrator of the estate of Gabriel Mwangi Njuguna *alias* Mwangi Njuguna Gabriel who died on 5th May, 2014
- c. The Court to order inclusion of assets of the deceased that comprise of the deceased's estate that have been left out.

The Objectors relied on the grounds set out that they are dependants to the deceased's estate as provided under **Section 29 of the Law of Succession Act Cap 160** by virtue of being widow and children of the deceased's son who predeceased him.

The Petitioner filed Replying Affidavit on 9th February, 2016 and objected to the application on the following grounds;

- a. The application is bad in law, misconceived and frivolous as the Objectors are not dependants or beneficiaries of the deceased's estate and they lack the *locus standi*.
- b. The Petitioner is the rightful person to be appointed administrator of the deceased's estate by virtue of being widow to the deceased.
- c. The Objectors have been included in the list of beneficiaries in the Petition filed on 7th October, 2015.
- d. The petition has disclosed all assets of the deceased and if any are left out the Objectors may disclose them to be added to the list of assets.

The matter was scheduled for hearing on 6th April, 2016; the Petitioner through Counsel opted to file written submissions. The Petitioner filed written submissions on 29th April, 2016 and the Objectors filed on 21st April, 2016 and 25th May, 2016 respectively.

ISSUES

1. Are the Objectors beneficiaries and/or dependants to the estate of the deceased?
2. Should the Petition for grant for letters of administration be granted annulled or denied?

DETERMINATION

This Court has perused and considered the evidence contained in the pleadings furnished to the Court and the content of written submissions.

It is clear that the beneficiaries of the estate of the deceased are not unanimous on the distribution of the deceased estate

The applicable law relevant to determine the issue is to be found in **Section 29, 35, 51, 45, 66, 82 and 83 of Law of Succession Act Cap 160**

The Objectors are daughter in-law, grand children of the deceased and daughter to the deceased and step daughter to the Petitioner respectively.

By virtue of **Section 29 (a) and (b) of the Law of Succession Act Cap 160** the Objectors are dependants to the deceased's estate.

According to the 1st Objector's pleadings, the deceased's son family resides on property that the deceased bequeathed his only son during their lifetime. The family resides there to date and they collect rent from the rental rooms. The 1st Objector widow of the deceased's son and their children 2nd, 3rd and 4th Objectors are clearly dependants of the deceased's estate

The petition for letters of grant of administration filed on 7th October, 2015 in paragraph 4, outlines the names of the beneficiaries of the deceased's estate; the surviving spouse and the children of the deceased and daughter in-law.

Section 51 (2) (g) of Law of Succession Act Cap 160 provides that;

“ in an application for grant every application shall include information as to; (among other details) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and the children of any child of his or hers then deceased.“

The grand children of the deceased have not been included in the Petition. The late Joseph Njuguna Mwangi son of the deceased died on 25th August, 2003 as shown by the attached death certificate. The Objectors, wife and children of the deceased's son attached marriage certificate and birth certificates to confirm their relationship as his family and should be recognized as beneficiaries as required under **Section 51 (2) (g) Law of Succession Act Cap 160.**

Therefore as beneficiaries their Consents to the appointment of administrators was required.

In the case of **GRACE KANYI NGANGA Versus NICHOLAS NJONJO NGANGA IN THE MATTER OF THE ESTATE OF JOSEPH NGANGA GAKUMO (DECEASED) SUCCESSION CAUSE 1045 OF 1990 G. B. M. KARIUKI J** (as herein was) held as follows;

“In the absence of written consents by each of the beneficiaries to the estate, one widow could not alone legitimately be entitled to have the grant confirmed and the estate distributed in the manner that it was done”

Although the written consents are premised on a confirmation of grant the written consents similarly applies to the grant of representation. The grant of letters of administration is regulated by **Rule 26 (1) and (2) of Probate and Administration Rules**; which provide;

“letters of administration shall not be granted to any Applicant without notice to any other person entitled in the same degree as or in priority to the Applicant”

“An application for a grant where the Applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equity or priority, be supported by an affidavit.....”

In the instant case the Objectors consents were not obtained, the instant application is predicated upon the notice of the Petition for grant of letters of administration appearing in the Special Issue of Kenya Gazette of 4th December, 2015. (a copy is attached to the application) the Objectors were not aware or informed until they saw the matter in the Kenya Gazette, hence the application to decline the grant of letters of administration.

Therefore on the circumstances outlined above, the Objectors are beneficiaries of the deceased’s estate and the grant of letters of administration process has been irregular and contrary to the mandatory provisions of law regarding identification of beneficiaries and being listed in the Petition and their written consents obtained before the Petition was gazetted.

In the event some beneficiaries refuse and /or withhold consents, the Petition for of letters of administration ought to be placed before Court after the parties are cited. The Court would then consider the matter on its merits and determine the issue of administration and gazettelement of the Petition.

The Court notes that the Objectors filed Notice of Objection on 6th July, 2015 to the Petition of grant of letters of administration and the Petition was regularized with regard to consents of beneficiaries but some of the beneficiaries were omitted. This has to be resolved first before the grant is issued.

After examination and perusal of the documents filed in the matter, the Court is satisfied the Objectors are beneficiaries of the estate and ought to be disclosed in the Petition of grant of letters of administration.

The 2nd issue is whether the process of grant of letters of administration should be halted and the issuance of the grant denied and declined. The amended Petition was filed and it contains the children of the deceased but not the grand children. This can be amended in accordance with the legal requirement.

The consents of the Objectors are required in the absence of which the matter is lodged in Court for determination. The matter in Court is acrimonious and the bone of contention is who should be the administrator of the estate of the deceased.

The Petitioner submitted that under **Section 66 of Law of Succession Act Cap 160** being the sole surviving spouse she is the administrator of the deceased’s estate. Through Counsel she cited an earlier similar cause determined by this Court on the same issue **Succession Cause 708 of 2005; IN THE MATTER OF THE ESTATE OF GUANDAI KARUGU KIBUE (DECEASED) WINFRED NYAMBURA KARUGU AND ELIZABETH WAMBUI KABURI VERSUS MAGDALENE NYOKABI GUANDAI** this Court held; that the daughter of the deceased was appointed administrator of the estate and was to comply with **Section 83 of the Law of Succession Act** in administration of the deceased’s estate.

The Court stated as follows;

“the Court has taken into account the fact that the Applicants are administrators of their respective husbands’ estates. They would not effectively discharge their duties under section 83 of the Law of Succession Act Cap 160 as administrators without commingling the properties of the 3 deceased’s’ members of the 3 separate but related families. It is best that Applicants remain

administrators of their respective husband's estate and the other children of the deceased have one of their own as administrator."

The Objectors submitted they are beneficiaries of the deceased estate and the Petitioner who is the administrator has excluded the step daughter, daughter in-law and grand children in discussions which prejudice their beneficial interest to the estate. The 1st – 4th Objectors' beneficial interest is in the following properties; **Ndarugu/Gathaitha 51, Plot Nairobi/Block 116/1173, Plot Nairobi/Block 166/1166** in that these properties were gifts *intervivos* from the deceased to the 1st Objector's late husband during their lifetime. They reside on the said premises and they collect rents from the said properties. The Petitioner threatened to evict them. Therefore the 1st Objector wishes to be appointed co-administrator to safeguard the deceased's son interest in the deceased's estate for his family.

The Objectors further submitted that under Kikuyu Customary Law, married daughters have no right to inheritance of their father's estate and unmarried daughters inherit from their father's property allocated to their mother after her demise. Therefore they can only wait to inherit after the Petitioner's demise.

The Objectors through Counsel cited **HCC 9 of 2009 Nyeri High Court** to fortify this position. The Objectors position is that they are beneficiaries and/or dependants and the family of the only deceased's son and they ought to have a larger interest in the estate of the deceased. To safeguard their interest the 1st Objector applies to be Co-administrator of the estate.

Section 66 of Law of Succession Act Cap 160 provides;

'when a deceased 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 orders of preference;

- a. A surviving spouse or spouses, with or without allocation of other beneficiaries;*
- b. Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided by Part V;*
- c. The Public Trustee; and*
- d. Creditors.*

In the instant case, the Court has final discretion to appoint administrator(s) but it should be in the best interests of all concerned. The Court must exercise judicial discretion based on law and pertinent facts. Unfortunately, since this matter proceeded on the basis of written submissions, this Court is not able to discern the pertinent facts in the absence of oral sworn evidence tested through cross examination. What is contained in the documents furnished to this Court is not subjected to cross examination and its veracity is lacking. This Court is unable to discern pertinent facts in the absence of oral sworn evidence by affidavits. Also, the pleadings depict a more entrenched dispute and what is presented is just but a tip of the iceberg. What this Court has discerned is that, the Objectors and Petitioner's family are not on talking terms as deposed in the Objectors' further submissions of 25th May, 2015.

To appoint the 1st Objector as a Co-administrator with the Petitioner of the deceased's estate in the present circumstances is a recipe for disaster. This is further supported by the provision of **Section 66 of the Act** preference that is to the surviving spouse(s) of the deceased, children of the deceased, brothers and sisters of the deceased, parents of the deceased and so on. The in-law is not expressly provided for or considered.

The appointment of the 1st Objector in this prevailing circumstance would not expedite the process of administration especially now that it is clear that they do not talk to each other with the Petitioner, this

would indeed delay/halt the distribution of the estate process and energies would be expended in protracted dispute(s); rather than administration of the estate. There is also the concern that the 1st Objector is the administrator of her late husband's estate. Although the distribution of the said estate is complete; the assets of that estate may be commingled with the deceased's estate. It would be prudent not to appoint her Co-administrator.

However, there are glaring and genuine concerns as to the Petitioner's administration of the estate as have been highlighted by the Objectors these are;

- a. The Petitioner does not involve the 1st Objector Anne Muthoni Njuguna and 5th Objector Teresiah Nduta Kimani her step daughter in matters related to the estate.
- b. The Objectors have suit properties that were bequeathed by the deceased to his only son now deceased and that is where his family, the Objectors reside and draw rent for their subsistence. There is imminent danger of their eviction from the said premises by the Petitioner.
- c. There is the issue of some of the assets that comprise the estate of the deceased that have been excluded from the petition filed on 7th October, 2015. The fact is confirmed by the content of this Petition and the Petition attached to the 1st Objector's affidavit filed on 4th September, 2015. There is a disparity of the assets outlined.
- d. This is the question of whereabouts of one of the beneficiaries Magdalene Nduta Karanja which has not been established and confirmed.

These concerns can only be resolved by building in safeguards to ensure that the beneficial rights of all beneficiaries are safeguarded in the process of administering the estate of the deceased. The legal provisions that safeguard the beneficial interests of all beneficiaries are as follows;

Article 27(1) and (4) Constitution provides;

“every person is equal before the law and has the right to equal protection and equal benefit of the law.

The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”

Therefore Kikuyu Customary would apply if the deceased died before 1991 before the legislative enactment of **Law of Succession Cap 160**. After 1981, this is the law that is applicable to Succession matters and distribution of deceased's estate. More recently the **Constitution 2010** has amplified the application of the **Law of Succession Act** by the provision of **Article 2(4) and 27 of the Constitution 2010**.

Further in a Ruling delivered by Court of Appeal after the advent of Constitution of Kenya 2010 **CIVIL APPEAL 235 OF 2014 PETER KAIRUMBI KEINGATI & 4 OTHERS Vs. DR ANN NYOKABI NGUTHI & 4 OTHERS P. M. MWILU, P. O. KIAGE & K. M'INOTI JJA HELD;**

“Those decisions predated the promulgation of the Constitution of Kenya, 2010 which has been described as a very progressive and transformative charter; a potent instrument for the reconstruction of our society. Although, prima facie, the Constitution recognizes culture and systems of personal law, it also has very strong pro-equality and non-discrimination provisions such as Article 27.”

All the children of the deceased are entitled to inherit from the deceased's estate. The deceased's son portion was bequeathed his son and now to the 1st Objector, 2nd, 3rd and 4th Objectors respectively. They

should hold onto the property by virtue of **Section 42 of Law of Succession Act**. The 5th Objector Teresiah Nduta Kimani biological daughter of the deceased is legally entitled to benefit from the estate of the deceased. Magdalene Nduta Karanja daughter of the deceased whose whereabouts is unknown or confirmed is also entitled to benefit from her late father's estate.

Therefore the Administrator/Petitioner is under mandatory statutory obligation under **Section 83 of the Law of Succession Act Cap 160** to use the grant to gather and collect the deceased's assets, settle the deceased's liabilities and thereafter in consultation with and with written consents of beneficiaries and dependants file summons for confirmation of grant. Where the beneficiaries are not in agreement, they shall file affidavits of protests with alternative mode of distribution for the Court to determine.

The Objectors beneficial rights shall be safeguarded by participating in consultation on the proposed distribution of the estate. In the event they are excluded or evicted they are at liberty to file application as dependants of the deceased for reasonable provision under **Section 26 of the Law of Succession Act Cap 160**.

The Objectors may opt to also file an application under **Section 35 (3) of the Law of Succession Act Cap 160** for their beneficial share to be hived off from the estate during the pendency of the Petitioner's life interest.

COURT ORDERS

After carefully examining the pleadings and written submissions filed in Court by the parties, this Court orders as follows;

1. The application filed on 10th December, 2015 is comprised as follows;

The appointment of the surviving widow of the deceased TABITHA WANJIKU MWANGI as administrator of the estate of the deceased under Section 66 of the Law of Succession Act Cap 160 is upheld but on the following conditions;

2. The administrator shall include the grand children of the deceased in the Petition as required under Section 51 2 (g) of the Law of Succession Act Cap 160

3. The administrator shall exercise the statutory mandate under Section 83 of the Law of Succession Act Cap 160.

4. The administrator shall not use the grant to harass, intimidate or interfere with the 1st, 2nd, 3rd and 4th Objectors and/or evict them from the suit premises/properties; NDARUGU/GATHAITE/51 and PLOT NAIROBI/BLOCK 116/1173 and PLOT NO. NAIROBI/BLOCK 166/1166 until the confirmation of grant or if not unanimously agreed on until hearing and determination of the administration of the deceased's estate.

5. The administrator shall ensure the deceased's daughter 5th Objector Teresia Nduta Kimani obtain her beneficial interest from the estate of the deceased.

6. The administrator shall ensure that whereabouts of Magdalene Nduta Karanja or disappearance confirmed by official documents either from Area Chief or Police O.B extract report. Her beneficial interest shall be identified and held by the administrator in trust for her.

7. Any aggrieved party is at liberty to apply to Court.

8. Each party to bear own costs.

DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI ON THIS 16TH DAY OF AUGUST, 2016

M.W.MUIGAI

JUDGE

In the presence of:

Dr. Kanyariri for the Applicant/Objector

Ms. Marai holding brief Ms. Wambugu for the Petitioner