



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 708 OF 2005

AND

IN THE MATTER OF THE ESTATE OF GUANDAI KARUGU KIBUE (DECEASED)

WINFRED NYAMBURA KARUGU.....1ST APPLICANT

ELIZABETH WAMBUI KABUI 2ND APPLICANT

VERSUS

MAGDALENE NYOKABI GUANDAI RESPONDENT

JUDGMENT

PLEADINGS

1. The matter before this Court concerns the contested administration of the estate of the Guandai Karugu Kibue, hereafter “the deceased”, who died intestate on 18th May 2004. A certified copy of the deceased’s Certificate of Death is in the Court’s record. On 24th March 2005, after obtaining the requisite consents from all the ten (10) sons and daughters of the deceased, Mumbi Guandai, the widow of the deceased, petitioned the Court for a grant of letters ad litem of the estate of the deceased limited only for the purpose of substitution/defending in **High Court Civil Case No. 629 of 1999** in which the deceased was the plaintiff. A limited grant of letters of administration ad litem was subsequently made to Mumbi Guandai on 1st April 2005.
2. On 30th May 2005, Mumbi Guandai, in her capacity as a wife of the deceased, petitioned the Court to be issued with letters of administration intestate in respect of the estate of the deceased. The said petition was founded on the basis that every other person having an equal or prior right to petition for a grant of representation in respect of the deceased’s estate had either given their consent to Mumbi Guandai’s to apply for that grant or had renounced such right. Letters of administration intestate were subsequently made by this Court on 4th August 2005 to Mumbi Guandai who subsequently became the sole Administratrix of the estate of the deceased. No objection was raised to this petition.
3. In her petition, Mumbi Guandai set out the following list of beneficiaries of the deceased’s estate, and this list has not been subject to any contestation:
 - a. Mumbi Guandai – wife (deceased)
 - b. Magdalene Nyokabi Guandai – daughter
 - c. Peter Karugu Guandai – son (deceased)
 - d. Paul Miruru Guandai – son
 - e. Teresia Wanjiku Guandai – daughter

- f. Dr. Francis Kibue Guandai – son (deceased)
- g. Patrick Waweru Guandai – son
- h. Salome Nebbo Guandai – daughter
- i. Anthony Max Kiarie – son
- j. Philomena Wambui Guandai – daughter
- k. Nicholas Njau Guandai – son

4. The schedule of assets constituting the estate of the deceased as per the petition of Mumbi Guandai of 30th May 2005 and their approximate value as at that date are as follows:

a. National Bank of Kenya –	Kshs. 18,000
b. Gathatha Company Ltd –	Kshs. 159,000
c. Kenya Airways shares –	Kshs. 25,225
d. Title Dagoretti/Ruthimitu/251 –	Kshs. 3,000,000
e. Naivasha/Mwachiringiri Block 4/2698 –	Kshs. 300,000
f. Naivasha/Mwachiringiri Block 4/2677 –	Kshs. 400,000
g. Naivasha/Mwachiringiri Block 4/2696 –	Kshs. 300,000
h. Nairobi/Block 72/907 –	Kshs. 2,000,000
i. Nairobi/Block 72/925 –	Kshs. 2,000,000
j. Nairobi/Block 72/924 –	Kshs. 2,000,000
k. Kajiado/Olekasasi/12 –	Kshs. 3,000,000
l. Kajiado/Olekasasi/22 –	Kshs. 10,000,000
m. Nairobi/Dagoretti/Karandini/31 –	Kshs. 4,500,000
n. Nairobi/Dagoretti/Karandini/16 –	Kshs. 1,000,000
o. Title Dagoretti/Kangemi/S.116 –	Kshs. 1,000,000
p. Allotment for Ndumbuini/19 –	Kshs. 500,000
q. Changamwe/1744 –	Kshs. 1,000,000
r. Mombasa/Block/XX/26 –	Kshs. 10,000,000
s. Ngong/Ngong/8200 –	Kshs. 1,000,000
t. Mwana Mukia House Co-operative (8 shares) –	Kshs. 500,000
u. L.R. No. 209/11482 –	Kshs. 5,000,000
v. Dagoretti/Karai Farmers (8 shares) –	Kshs. 800,000
w. Barclays Bank (K) Ltd Account No. [xxxxxxx] –	Kshs. 92,000
x. Kenya Commercial Bank Account No. [xxxxxxx] –	Kshs. 22,920

According to the above estimations, the deceased's property was worth a total sum of approximately Kshs. 40,000,000. The petition of Mumbi Guandai of 30th May 2005 did not list any liabilities of the deceased's estate.

5. Mumbi Guandai died intestate on 18th April 2014 thus leaving the estate of the deceased without an administrator. Two of the sons of the deceased who were recognized as beneficiaries of the estate of the deceased, namely Peter Karugu Guandai and Dr. Francis Kibue Guandai subsequently died on 26th August 2009 and 18th May 2009 respectively. Both sons of the deceased are survived by their wives and children who now seek to claim the share due to them from the estate of the deceased.
6. On 19th June 2014, a joint application was made by the 1st Applicant, Winfred Nyambura Karugu, the widow of Peter Karugu Guandai and the 2nd Applicant, Elizabeth Wambui Kabui, the widow of Dr. Francis Kibue Guandai seeking to have themselves substituted for Mumbi Guandai as co-administrators to the estate of the deceased.
7. The Applicants filed summons made under **Section 45** of the **Law of Succession Act Cap 160** seeking, inter alia, orders that:

- i) all beneficiaries to the estate of the deceased be restrained from interfering with the status quo pending distribution of the deceased's estate;
- ii) all proceeds from rents accruing from the estate be paid to Court pending the hearing and final determination of the matter.

8. The Supporting Affidavit filed by the 1st Applicant alongside the Applicants' summons of 19th June 2014 disclosed that after the demise of Peter Karugu Guandai, the 1st Applicant petitioned for and was issued on 29th April 2010 with a limited grant of letters *colligenda ad bona* in **High Court Succession Cause No. 1931 of 2009**. A copy of that grant is on the Court's record. The said grant was limited to the purposes only of collection and preservation of the estate of Peter Karugu Guandai, and defending/instituting any suit on behalf of the estate until further representation was granted by the Court. On the basis that Peter Karugu Guandai was a son of the deceased and thus an heir to the deceased's estate, the 1st Applicant averred that, by virtue of being his wife, she was also an heir to the deceased's estate.
9. The 2nd Applicant's Supporting Affidavit that was filed together with the Applicants' summons dated 19th June 2014 reveals that after the demise of her husband Dr. Francis Kibue Guandai, the 2nd Respondent jointly with the 1st Respondent applied for and was issued on 6th August 2013 with letters of administration in **High Court Succession Cause No. 1353 of 2012**. A copy of that grant is on the Court's record.
10. On 29th September 2014, the eldest daughter of the deceased, Magdalene Nyokabi Guandai, hereafter "the Respondent", filed an Affidavit of Protest in which she challenged the summons filed by the Applicants on 19th June 2014. The Respondent's application was filed on her own behalf and on behalf of her seven (7) surviving siblings, namely Paul Muiruri, Teresia Wanjiku, Patrick Waweru, Salome Nebbo, Anthony Kiarie, Philomena Wambui, and Nicholas Njau. The Respondent challenged the suitability of the Applicants in seeking to be Administrators of the deceased's estate on the grounds that they are both dishonest, of questionable character and had taken to threatening and intimidating the beneficiaries of the deceased's estate. The following points raised in the Respondent's Affidavit of Protest are important because they have a bearing on certain key issues for determination:
 - a. The 1st Applicant is the estranged widow of the late Peter Karugu Guandai and has been separated from her husband since 2007 pending a divorce in **Divorce Cause No. 137 of 2007**. Moreover, by means of dishonesty, the 1st Applicant caused herself to be issued with a limited grant of letters of administration *colligenda ad bona* of the estate of her late husband in **Succession Cause No. 1931 of 2009**, but the use of that grant was stayed by an order of this Court on 18th May 2010 per Kimaru J. Additionally, the 1st Applicant is the beneficiary of the estate of her later father and enjoys the benefits of that estate without the interference of the Respondents or other beneficiaries of the deceased's estate.
 - b. The 2nd Applicant is the widow of the late Dr. Francis Kibue Guandai and a grant of letters of administration to the estate of her late husband was made to both Applicants. Despite being financially stable and receiving rental income from her inheritance in Karen L.R. No. 3589/126, the 2nd Applicant has harassed family members for upkeep, including reporting the deceased Administratrix to government authorities for allegedly failing to ensure the welfare of the 2nd Applicant's children. In addition, the 2nd Applicant has confronted the Respondent at her workplace demanding money for school fees and upkeep of her children even though the estate of the deceased currently has no administrator. Furthermore, the benefit due to the 2nd Respondent from the estate of her late father per the ruling of Rawal J (as she then was) of 20th March 2006 in **Succession Cause No. 659 of 1991** have not been interfered with by the Respondents and other beneficiaries of the deceased's estate.
 - c. The conduct of the 2nd Applicant makes her unsuitable for the role of an administrator of the estate of the deceased as illustrated by the fact that she transferred her late husband's motor vehicle registration number KAY 500N to herself and sold it before first obtaining letters of administration. The 1st Respondent, with the acquiescence of the 2nd Respondent and with a view to disposing it, later transferred her late husband's motor vehicle registration number KBD 403F to herself.
11. The Respondent's Affidavit of Protest filed on 29th September 2014 further underlined that after the death of the Administratrix, it is the children of the deceased that rank prior in the order of

preference as set forth in **Section 66** of the **Law of Succession Act**. The Respondent also dismissed as premature the Applicants' application on the basis that the greater estate of the deceased is yet to be confirmed and distributed to the beneficiaries. Moreover, the Respondent stated that the injunctive relief being sought by the Applicants is beyond the jurisdiction of the Court. The respondent further averred that apart from the limitation inherent in the grant of letters of administration *ad colligenda bona* made to the 1st Applicant, the use of that grant was stayed by this Court and hence it cannot be utilized to support any subsequent application. Thus, the 1st Applicant lacked capacity to purport to represent the estate of the deceased.

12. The Applicants' written submissions of 3rd November 2014 defended their contested capacity to represent and inherit from the deceased's estate. They argued that they are widows of deceaseds' and therefore they are beneficiaries. They have taken out the requisite grants of representation to their deceased husband's respective estates, and hence they have the right to inherit from the deceased's estate. On that basis, the Applicants argued that they ranked in *pari pasu* with other heirs of the deceased. The Applicants further argued that they had a right to represent the estate of the deceased since part of the said estate is the interest of their respective husbands. It was the Applicants' submission that their application is based on the fact that nobody has sought to represent the deceased's estate since the demise of the Administratrix in 18th April 2014. A further argument in support of the Applicants' application was raised that the Respondents were wasting and intermeddling with the deceased's estate contrary to **Section 45** of the **Law of Succession Act**, and this warranted the issuance by the Court of orders to preserve the estate and to make both Applicants administrators of the estate.
13. In her written submissions of 18th November 2014, the Respondent stated that the Applicants had not filed a response to the objections raised by the Respondent against the proposed substitution of the Applicants for Mumbi Guandai as co-administrators of the deceased's estate. The Respondent also reiterated that the 1st Applicant was ill-suited for the role of administrator of the deceased's estate as the limited grant on which her claim is founded had been stayed by a Court order. The validity of that limited grant was the subject of ongoing litigation between the 1st Respondent and her co-wife and thus uncertain, and the fact that the 1st Applicant had been separated from her late husband pending divorce. Similarly, the Respondent restated that the 2nd Respondent was unsuited to the role of administrator for reasons set forth in paragraph 15 of the Respondent's affidavit of protest. As regards the order of priority, the Respondent was categorical that the Applicants as in-laws of the deceased could not rank above the children of the deceased, and further that it is contrary to Kikuyu customary law for daughters-in-law to administer the estate of a late father in law. Furthermore, the Respondent raised some objections to the Applicants application based on points of law, and these include:
 - a. No evidence has been adduced by the Applicants to support allegations of wastage and intermeddling by the Respondents of the deceased's estate contrary to **Section 45** of the **Law of Succession Act**. The failure to either substantiate or specify the above allegations is a ground for denial of the injunctive remedy sought and dismissal of the suit because the burden of proof rests with the party seeking a remedy from the Court.
 - b. In any event, under **Rule 63(1)** of the **Probate and Administration Rules**, this Court lacks the jurisdiction to grant the relief of injunction sought by the Applicants.
 - c. Under **Rule 7(7) PART III** of the **Probate and Administration Rules**, it is mandatory that applicants for grants of representation who are not in order of preference under **Section 66 of the Law of Succession Act** should furnish the Court with consents in writing to the making of the grant to the applicant from every person having a prior preference to a grant by virtue of **Section 66 of Law of Succession Act**. Hence, the failure to seek an avail such consents is fatal to the Applicants obtaining the grant of letters of administration to the deceased's estate.
 - d. A Certificate of Death must be produced as evidence of the demise of a person to whose estate a grant of representation is sought under the **Law of Succession Act**, but the Applicants have not produced the deceased's Mumbi Quandai's Certificate of Death.
 - e. The Applicants' cause is incompetent since it seeks to substitute Mumbi Guandai generally instead of petitioning the Court to be issued with a grant *de bonis non administratis* for the part of the estate that has not been administered following the death of the administrator.

ISSUES

14. The key issues that this Court is called upon to determine in this case are the following:

- a. Whether the Applicants as daughters-in-law of the deceased have a valid claim to the estate, first, as heirs and, secondly, as possible administrators of the estate in light of the fact that:
 - i. The 1st Applicant had been separated pending divorce from her late husband who is the root of her claim to the estate;
 - ii. The 1st Applicant had dishonestly obtained a limited grant of letters of administration *ad colligenda bona* in respect of the estate of her late husband but the use of that grant was subsequently stayed by this Court.
 - iii. The 2nd Applicant had already remarried.
- b. Whether the Applicant's conduct in relation to the deceased Administratrix and the beneficiaries of the estate has any bearing on their claim for the substitution of their names for that of the deceased Administratrix.
- c. Whether the Respondent and her siblings rank first in the order of priority to make a grant of representation in respect of the deceased's estate or whether they rank in *pari pasu* with the Applicants.
- d. Whether the Applicants' cause is fatally defective for lack of the requisite consents from the beneficiaries of the estate of the deceased and the lack of a certificate of death to evidence the death of the Administratrix of the estate.
- e. Whether the application for substitution is of the Applicants' names for that of the Administratrix is pertinent and suitable or whether the proper application should have been a grant *de bonis non administratis*.

EVALUATION

15. The applicable law that is relevant to determine this matter is to be found in **Sections 29, 45, 66 and 82** of the **Law of Succession Act** read together with **Rules 7(1), 7(7), 7(8), and 63(1)** of the **Probate and Administration Rules**.

Section 29 of the **Law of Succession Act** defines persons who can lawfully be considered as a dependent for the purposes of succession as follows:

For the purposes of this Part, "dependent" 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;*
- b. *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, half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death*

In the instant matter, the applicants and respondents are beneficiaries of the

deceased's estate. The applicants by virtue of their husbands; sons of the deceased and therefore they are entitled to their husbands shares of the deceased's estate.

Section 45 of the **Law of Succession Act**, which prohibits intermeddling with a deceased person's property, provides:

1. ***Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.***

2. *Any person who contravenes the provisions of this section shall?*

- a. *be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*
- b. *be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.*

He deceased's estate is to be protected preserved and maintained until distribution of the estate. The administrator Mumbi Quantai was the administrator until her death in April 2014. She has not been replaced and hence no one is legally accountable for the estate until another administrator is appointed to carry out the duties outlined under **Section 83 of Law of Succession Act** and be held accountable by the Court and beneficiaries. As at this time, no evidence of intermeddling or wasting the deceased's estate has been adduced or provided to the court.

Section 66 of the **Law of Succession Act**, which outlines the preference to be given to certain persons to administer where the deceased died intestate, 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 order of preference?

- a. *surviving spouse or spouses, with or without association 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*

Provided that, where there is partial intestacy, letters of administration in respect of the estate shall be granted to any executor or executors who prove the will.

16. The above analysis makes clear that the Applicants are beneficiaries by virtue of being the spouses of the deceased's sons who are also deceased. The sons' share of the estate from their father's estate is what is available to the applicants. The letters of administration are to be taken by spouse (s), widow or widower to the deceased, children of the deceased, brothers and sisters of the deceased, parents of the deceased and so on.
17. If the applicants are to replace the administrator, the late Mumbi Quandai the widow of the deceased herein; they must provide written consents from the children of the deceased who are ranked in priority in obtaining the grant. The consents were not availed to the Court.
18. 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 comingling the properties of the 3 deceaseds' 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.

FINAL ORDERS

19. Upon a careful evaluation of the facts brought out in the rival submissions of both parties, hereby orders as follows:
 - a. That the Respondent, Magdalene Nyokabi Guandai, is hereby appointed as the Administrator of the estate of the deceased who died intestate in accordance with **Section 66 of the Law of Succession Act**;
 - b. That the Respondent/Administrator must henceforth comply with the statutory duties of an administrator in accordance with **Section 83 of the Law of Succession Act**.

- c. That the Respondent/Administrator shall file in Court an application for confirmation of the grant after obtaining the consents of all beneficiaries and after having agreed amongst themselves on the mode of distribution of the estate.
- d. If the deceased's beneficiaries are unable to agree on the distribution of the deceased's estate, they shall file in Court various proposed modes of distribution for the Court to determine.
- e. Each party is at liberty to apply.
- f. No orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2015

M. MUIGAI

JUDGE