



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 795 OF 2014**

**IN THE MATTER OF THE ESTATE OF: CLAUDIA K. OUMA.....DECEASED**

**AND**

**IN THE MATTER OF APPLICATION BY: JAMES OUMA OLOO.....APPLICANT**

**RULING**

Having carefully read the petition herein and the submissions by Mr. Okero counsel for the applicant, the main beef is in respect to the requirement that a consent ought to be obtained from other would be beneficiaries in line with rule 26 of the Probate and Administration Rules. According to him the said section is discriminative and flies in the face of Article 27 (1) of the Constitution as well as Article 47 (1) of the said Constitution.

In this matter one James Ouma Oloo is the petitioner in respect to the estate of his late wife Claudia K. Ouma who passed away on 10-9-2011 leaving behind the petitioner and the following children:

- 1) Simon Odhiambo Ouma aged 35 years.**
- 2) Moses Okech Ouma aged 34 years.**
- 3) Isabel Akinyi Ouma aged 30 years.**
- 4) Emily Achieng Ouma aged 28 years.**

In terms of section 66 of the Succession Act Chapter 160 Laws of Kenya it is the surviving spouse who has priority in respect to succeeding the deceased estate. In this case, the petitioner has priority over the children.

What does Rule 26 (1) (2) of the Probate Rules demand? The same state as follows:

**“26 (1) Letters of Administration shall not be granted to any applicant without notice to every other person entitled in the same degree or in priority to the applicant.**

**(2) 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 equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require”.**

The plain reading of this portion implies that Rule 26 (1), for one to comply, a notice ought to be issued to “every other person entitled” to be granted the letters. The same is captured in the requisite forms and for this case Form 38.

What I understand the petitioner to say is that since he is the legitimate husband to the deceased, it is unfair then to seek consents from the children prior to him being granted the letters. I respectfully do not think there is any unfairness. The intention of the drafters of the rules I believe was to bring on board anybody who has an interest in the estate. Further, should there be any objection then the same ought to be raised at an early stage.

In any case, the requirement does not violate section 66 of the Act in terms of the rankings or priority in the granting the letters. The impugned section is couched in mandatory terms and it is therefore not optional. In any case I do not see any difficulty in the petitioner having the consent forms to be signed by the children.

Does the provisions of Rule 26 run contrary to Article 27 (1) and 47 (1) of the Constitution? Articles 27 (1) reads:

**“Every person is equal before the law and has the right to equal protection and equal benefit of the law”.**

Article 47 (1) states:

**“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.**

The estate in question does not belong to the petitioner but his wife. The wife left behind children who are equally entitled to the estate. Consequently as much as he ranks first, I do not think that the views of the children ought to be disregarded. This is the spirit of the rules which is equally espoused by Article 27 (1) of the Constitution. Both the father and the children in this case have equal constitutional rights.

In terms of Article 47 (1) I conclude that by failing to comply with the rules as required, it is the petitioner who is deliberately breaching the said Article. Had he produced the necessary consent, perhaps he would have been granted the letters by now.

Finally, the petitioner has not demonstrated any difficulty in complying with the provisions. If he was unable to secure the consent of the beneficiaries for any worthy reason, the court would have intervened in behalf of his interest and the estate.

In the premises and based on the foregoing reasons I do not think there is any valid reasons for the petitioner not to comply with Rule 26 of the Probate and Administration Rule.

**Dated, signed and delivered at Kisumu this 18th day of February, 2015.**

**H.K. CHEMITEI**

**JUDGE**