



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
SUCCESSION CAUSE NO. 26 OF 2015

(Original Succession Cause No. 46 of 2014 of the Chief Magistrate's Court at Naivasha)

IN THE MATTER OF ESTATE OF THE LATE T W.....DECEASED

-VERSUS-

E W C.....PETITIONER

R U L I N G

1. The impugned Petition for a Grant of Letters of Administration Intestate in respect of the Estate of T W (deceased), was filed by her mother E W C on 17th March, 2014 in the Chief Magistrate's Court Naivasha. The deceased left behind three children, namely E W C (adult), J C W (adult) and a minor, S W W.
2. The Petition was published on 9th May 2014. On 6/6/2014 a protest was filed by the two adult children of the deceased denouncing the petition and disputing that they consented to the Petition by their grandmother. They dismissed the consent and Death Certificate accompanying the Petition as forgeries. They assert that the Petition was filed secretly and that the value of the estate of the deceased exceeds the jurisdiction of the subordinate court.
3. In her Replying affidavit the Petitioner/Respondent denied to have moved the court secretly and also defended the impugned documents filed in support of her petition.

Detailing alleged intermeddling in the estate of the deceased by various family members, the Petitioner asserted that she only came to court to ensure that the estate, which is substantial by any account, is not wasted but equitably distributed for the benefit of the children of the deceased. She emphasized that the minor S W W is ailing and in her care. She listed the properties which comprise the estate and proposed the manner of distribution.

4. The parties have filed written submissions which I have carefully considered in light of the affidavits before me. The objection before me is erroneously entitled as "Affidavit of Protest" as contemplated under Rule 40 (6) of the Probate and Administration Rules (The Rules). Such protest is contemplated by the Rules to be filed in objection to proposed Confirmation of Grant. In our case, no grant has issued. The proper procedure applicable is prescribed under Rule 17, namely the filing of an objection, Answer and Cross-Application. From the submissions made by the counsel, it would seem that the objectors treated their objection as one brought under that Rule 17. Ditto the Petitioner/Respondent, as evidenced by her detailed proposal towards what she termed as "equitable distribution" of the estate.

5. The court, alive to the exhortation in Article 159 2(d) of the Constitution would not wish to dwell unduly on the procedure adopted above substance and is capable of doing justice, as anticipated under Section 68 of the Law of Succession, notwithstanding.
6. It is not disputed that the deceased was survived by three children, two of whom are adults, capable of being appointed as administrators of her estate.

It may or may not be that the consent of the adults was sought by the present Petitioner. In the setting of family squabbles reflected in the material before me, anything is possible as the relatives jostle for the control of the estate of the deceased. Section 38 of the Law of Succession however requires that priority be given to the adult children of the deceased. Section 38 states:-

“Where an intestate has left a surviving child or children but no spouse, the net intestate 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.”

7. Possibly, the present Petitioner who appears to be the undisputed care-giver or guardian to the minor child may qualify as a dependant of the deceased. The deceased having died intestate, the Petitioner is not entitled to a share of the estate as her proposed distribution mode in her affidavit suggests but only to a reasonable provision under Section 26 of the Act. (**See in Re estate of Joshua Orwa Ojodeh – (Deceased) [2014] eKLR**).
8. The question concerning what share will go to the minor child of the deceased is also covered under the Act and need not at this stage be unnecessarily emphasised for purposes of enhancing the Petitioner’s position. It may require that the guardianship of the minor child be determined to preclude the likelihood that he might be subjected to suffering while his relatives do battle over the estate.
9. As noted, the authenticity of some of the supporting documents filed with the Petition has been put to doubt. Notably there are two different Death Certificates bearing different serial numbers and particulars, in respect of the deceased.

Equally, it is evident that the Petition was commenced before a court without jurisdiction in view of the value of the estate. As a consequence to the erroneous procedure adopted by the Objectors, no answer and/or cross-application in terms of Section 68 (2) has been filed by the Objectors. That notwithstanding, the Petition on record is untenable and is therefore disallowed.

10. There being no dispute whatsoever as to the priority of the two Objectors, and in order that this matter may be properly adjudicated expeditiously to forestall further wastage of the estate, I direct that the Objectors do file a fresh Petition before this court within 21 days of today’s date. It will be necessary that the Death Certificate be authenticated by a responsible officer in the Registry concerned in light of the discrepancies in the two sets tendered by the rival parties. Each party will bear its own costs.

Delivered and signed at Naivasha this **30th** day of **April, 2015**.

In the presence of:-

Mr. Gitau for Objector/Applicant

Mr. Gichuki for Petitioner/Respondent

Court Clerk : Stephen

C. W. MEOLI

JUDGE