



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2015 OF 2012

IN THE MATTER OF THE ESTATE OF JOSHUA ORWA OJODEHH – (DECEASED)

RULING

1. The application for determination is the Summons for Confirmation dated 8th April 2013. It seeks confirmation of the grant made on 14th January 2012. It is supported by the affidavit of the administrator, Mary Awuor Ojodeh.
2. The deceased was survived by his widow, Mary Awuor Ojodeh, and son, Andy Okeyo Ojodeh. It is proposed that his net intestate estate be shared equally between the two of them.
3. There are also on record two supporting affidavits sworn by Ulda Aloo Ojodeh on 24th May 2013 and 23rd August 2013. The deponent is the mother of the deceased. She is not an administrator of the estate of the deceased as according to the grant of letters of administration made on 14th January 2013 the sole administrator of the estate is the widow of the deceased, Mary Awuor Ojodeh. I therefore do not understand the basis upon which Ulda Aloo Ojodeh swears these two supporting affidavits. I am cognisant of the provisions of *Section 7(1)* of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules, which state that the application for confirmation of grant ought to be by the holder of the grant.
4. The said affidavits sworn by Ulda Aloo Ojodeh do not in reality support the application for confirmation of the grant. They are in opposition to it. Indeed, the deponent is complaining that she has been left out in the distribution of the estate having been a dependant of the deceased by virtue of having been his mother. An affidavit to that effect cannot be in support of an application for confirmation of the grant. Such affidavit is envisaged in Rule 40(5) of the Probate and Administration Rules, and it should be an affidavit of protest. Indeed, I note that Kimaru J had ordered the objector to file an affidavit of protest.
5. The issue is whether the mother of the deceased is entitled to be allotted a share in the intestate estate of her deceased son. The answer to this lies in the provisions in Parts III and V of the Law of Succession Act. The deceased died intestate and therefore the intestacy provisions stated in Part V of the Act apply. He was survived by a spouse and a child and therefore the particular provisions applicable to his estate are *Section 35(1) (5)* of Part V which provides as follows:-

“35(1).Subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –

(a)The personal and household effects of the deceased absolutely; and

(b) A life interest in the whole residue of the net intestate estate.

Provided that, if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person.

(2)...

(3)...

(4)...

(5) Subject to the provisions of Sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children,”

6. Going by the above provision, where a deceased person is survived by spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of all the other relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child. This is clear from the language of *Section 39(1)* of the Act, which states as follows:-

“39(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate, in the following order of priority –

(a) father, or if dead

(b) mother...”

7. It is quite clear from the above therefore that Ulda Aloo Ojodeh as mother of the deceased intestate is not entitled to a share in the estate of the said deceased as he was survived by a spouse and child. She would have had a prior right to inherit if there was no such surviving spouse or child.
8. Ulda Aloo Ojodeh claims to have been dependent on the deceased during his lifetime, meaning therefore that she was a dependent of the deceased. Even if she was dependent on the deceased that did not entitle her to a share in his estate in the event of intestacy so long as the deceased was survived by a spouse and child. In these circumstances, she can access the estate only through Part III of the Law of Succession Act.
9. Part III of the Law of Succession Act provides for reasonable provision. *Section 26* of the Act provides a relief to dependants, who are not provided for at all or adequately either by the will of the deceased or in intestacy. *Section 26* of the Act provides as follows:-

“26. 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. The definition of “dependant” is to be found in *Section 29* of the Act and means, among others, parents of the deceased person who were being maintained by the deceased immediately prior to his death. Ulda Aloo Ojodeh was a parent of the deceased and she can be classified as a dependent so long as she is able to demonstrate that she was dependant on her deceased son immediately prior to his death. Ideally, before the court can exercise discretion under *Section 26* of the Act, it must be established that the applicant was dependent on the deceased immediately prior to the deceased’s demise.
11. It is important to put this into perspective. When a man marries, he acquires new responsibilities – to his wife and children. These become his immediate family and his primary responsibility. The other relatives become secondary – including his parents. The law has given force to this arrangement, so that the responsibility over wife and children becomes a legal obligation. Such a married man does not have a comparable legal responsibility over his parents. His responsibility over his parents is not legal, but moral – it’s not a responsibility that parents can legally enforce against their children.
12. The legal responsibility over wives and children is stated in statute. Husbands have a legal duty to maintain their wives, and parents have a legal obligation to care for provide for their children. Statute does not impose similar obligations on children towards their parents. The Matrimonial Causes Act and the Subordinate Courts (Separation and Maintenance) Act have very elaborate provisions on these duties towards wives and children. The Children Act is also strong on the maintenance of children. These statutes carry elaborate enforcement mechanisms for giving effect to the maintenance provisions. These provisions are geared to protecting wives and children from exposure to neglect by their husbands and fathers. Unfortunately, there are no comparable provisions to protect parents, the explanation for this being that children are under no legal obligation to maintain their parents.
13. This duty to maintain a wife and children extends to protection of widows and orphans following the death of the person who is legally bound to maintain them. The law ensures that widows and orphans are given first priority in terms of access to the property of a dead husband and father. The other relatives, including parents, are relegated to a secondary position, and only access the property in the event that there is no widow or child, or if they convince the court in a proper application that they were dependent on their dead child or sibling or other relative and that the court should then make provision for them out of the estate of the dead child. These provisions are designed to obviate the possibility of widows and orphaned children being rendered destitute, as they would be if they are forced to share their inheritance with the parents and siblings of the deceased. Quite clearly therefore under succession law, parents are not in the same footing with widows and children.
14. In view of the provisions that I have discussed above, Ulda Aloo Ojodeh was not entitled in intestacy to a share in the estate of the deceased. I have gone through the record and I have noted that Kimaru J had declared her a dependant of the deceased, and therefore entitled to provision from the estate. On 20th March 2013 Kimaru J ordered the administrator to make a maintenance provision of Kshs 720, 000.00. It is not clear whether this was supposed to be a one off lump sum payment or whether it was the first of several payments. The parties are not agreed on the matter. The administrator asserts that the same was a full and final payment hence her exclusion from the proposed distribution.
15. I am unable to determine the confirmation application before it is determined whether the payment of Kshs. 720, 000.00 was meant to be a final payment or not. For if it was a final payment then the application ought to be allowed, but if it was not then the administrator will have to revise the proposed distribution so as to provide for Ulda Aloo Ojodeh.
16. I will therefore postpone the confirmation application. The parties shall cause the application to be mentioned before Kimaru J for further directions.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE