



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO 984 OF 2007**

**IN THE MATTER OF THE ESTATE OF J K N (DECEASED)**

N N K.....APPLICANT

**VERSUS**

W M K.....RESPONDENT

**R U L I N G**

There is a dispute pending before this court in respect of the determination of the question as to who are the beneficiaries of the estate of the deceased. Directions were issued to the effect that the dispute was to be resolved by this court hearing *viva voce* evidence adduced by the parties to the dispute. Hearing commenced before Onyancha, J. The case is therefore part-heard. By an application dated 5<sup>th</sup> December 2013, the Applicant sought an order from this court pursuant to the provisions of **Section 26** of the **Law of Succession Act** for an order of dependency in respect of one L W K. According to the Applicant, she was moved to make the application during the pendency of the hearing of the case because of the dire situation of the said dependant. She deponed in the affidavit in support of the application that the said L W K was a daughter of the deceased. She was currently a student at the University of Nairobi's School of Business. It was her case that the court should issue appropriate orders to enable the said L W K access funds which are in the account of the deceased to enable her pay her University fees.

The application is opposed. The Respondent, W M K filed a replying affidavit in opposition to the application. He deponed that the court has yet reached a determination in regard to the issue of who are the beneficiaries of the estate of the deceased. He insisted that the said L W K was not the biological daughter of the deceased and is therefore not a dependant of the deceased. It was his case that before this issue is determined by the court, it would be premature for this court to issue an order on dependency pursuant to the provisions of **Section 26** of the **Law of Succession Act**. He swore that it was up to the Applicant to establish by evidence her assertion that the deceased had adopted the said L W K as his daughter prior to his death.

At the hearing of the application, this court heard rival oral submission made by Mrs. Mwaura for the Applicant and by Mr. Namada for the Respondent. Mrs. Mwaura submitted that the deceased had adopted L W K as his daughter when he got married to the Applicant. She conceded that L W K was not the biological daughter of the deceased. However, during his lifetime, the deceased assumed parental responsibility over the said L W K by paying her school fees. It was in this regard, that the Applicant was pleading with the court to make an appropriate order of dependency to enable her pay the University fees of the said L W K. Learned counsel for the Applicant admitted that the Applicant was currently in possession of a property belonging to the estate of the deceased which earns rental income to the tune of Kshs.15,000/- per month. It was the Applicant's case that this amount was not sufficient to enable her pay the said University fees. She stated that it was this amount that she uses for her own subsistence. Her plea was that the court should allow her to access a bank account which was maintained by the deceased which has the sum of Kshs.131,000/- to enable her pay the said University fees. She urged the court to allow the application.

The application was opposed by Mr. Namada. He submitted that the Applicant was attempting to access part of the property that comprises the estate of the deceased before the court has determined who are the

actual beneficiaries of the estate of the deceased. He accused the Applicant of attempting to short circuit the judicial process by obtaining a determination in regard to the question of dependency before the hearing and determination of the dispute. He submitted that it is the Applicant who has been indolent in the prosecution of the case. She should not therefore benefit from her lack of diligence. It was the Respondent's case that it would be premature for this court to make such determination because the court has not yet determined whether L W K is a dependant of the deceased. Mr. Namada submitted that other than the property that was currently in possession of the Applicant, the other property that is available for distribution is the amount in the bank accounts of the deceased. He urged the court to disallow the application.

This court has carefully considered the rival submission made by counsel of the parties to this application. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the Applicant established a case for this court to grant the order that she craves for in her application. The Applicant application is predicated on the provisions of **Section 26** of the **Law of Succession Act** which grants this court jurisdiction to make such reasonable provisions for a dependant as the court may deem fit out of the net estate of the deceased. The court can only make such an order after it has established that indeed the person who seeks such provision is in fact a dependant. Such dependant is as defined under **Section 29** of the **Law of Succession Act**. In the present application, it was clear that there is dispute regarding whether L W K who seeks provision from the estate of the deceased as a dependant is in actual fact such a dependant. It was conceded by the Applicant that the said L W K was not the biological daughter of the deceased. However, it is her case that she was adopted and maintained by the deceased as his own daughter when he married the Applicant. The Respondent disputes this assertion. The court has yet determined whether in fact the said L W K is a dependant of the deceased. The case is part-heard. This court agrees with the Respondent that it would be premature for this court to issue an order providing for a dependant under **Section 26** of the **Law of Succession Act** when there is still pending before this court the determination of whether the person seeking such provision is in fact a dependant. This court cannot therefore issue an order under **Section 26** of the **Law of Succession Act** where there is dispute in regard to whether the person seeking to benefit from such order is a dependant.

In the premises therefore, this court finds no merit with the Applicant's application. There is dispute, which is yet to be determined by this court, in regard to whether L W K is a dependant of the deceased. The application is dismissed but with no orders as to costs. The Applicant is hereby directed to list the case for hearing so that the dispute can be determined by the court without any further delay. It is so ordered.

**DATED AT NAIROBI THIS 22<sup>ND</sup> APRIL, 2014**

**L. KIMARU**

**JUDGE**