



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS NAIROBI

Succession Cause No. 2377 Of 2008

In The Matter Of The Estate Of Benard Njonjo Rubi-(Deceased)

RULING

1. The deceased, Bernard Njonjo Rubia, died on 27th July 2008. Representation to his estate was sought on 15th October 2008 by Elizabeth Wanjiru Njonjo Rubia in her capacity as widow of the deceased. She listed herself as the sole survivor of the deceased as the couple did not have children.
2. On 22nd January 2009 objection was raised to the grant being made to her. The objection was at the instance of Michael Rubia and Maurice Kamau Rubia, both brothers of the deceased. They complained that it had not been disclosed in the petition by the widow that the deceased had also been survived by a father and four brothers. The two objectors also filed an answer to the petition by the widow and a petition by way of cross application. Their prayer is that grant of representation be made jointly to them with the widow.
3. While the objection was still pending, Brian Mwituria filed a Summons on 3rd February 2010 under Section 26 of the Law of Succession Act. He sought reasonable provision out of the estate of the deceased on the basis that he was a son of the deceased.
4. The parties were directed on 12th July 2011 by Karanja J to file written submissions on the issue of appointment of administrators to dispose of the objection. The objectors filed their submissions on 13th September 2011 dated 12th September 2011. The widow filed hers on 26th July 2011, while the son filed his on 2nd August 2011. The said submissions were highlighted before Mugo J. on 6th June 2012 and judgment was reserved for 20th September 2012.
5. It transpired that Mugo J. was affected by the vetting process, and did therefore manage to deliver judgment in the matter. When the matter was placed before Kimaru J on 29th April 2013, His Lordship appointed Elizabeth Rubia, Charles Wanyoike Rubia and Brian Mwituria administrators of the estate of the deceased, and directed them to file affidavits on their preferred mode of distribution of the estate. Distribution was to be done on 23rd July 2013.
6. Before the date appointed for distribution, Mr. Charles Rubia moved the court by an application dated 10th July 2013 for his substitution as administrator with his son, Maurice Kamau Rubia. He also sought other orders – to access the deceased’s records and assets and to report back to court after assets have been verified. From his affidavit in support of the application, it is quite clear that the applicant is not keen on taking up the role of administrator. He cites the fact of the

relationship between him and the widow.

7. The application has been opposed by the widow and the son of the deceased. Both filed notices of preliminary objection, dated 17th September 2013 and 26th July 2013, respectively. The widow's case is that the remaining administrators are sufficient as the proposed substitute did not have a right to the estate. The son's position is that the proposed substitute had petitioned for the grant but had been by-passed in the appointments of 29th April 2013. He further states that the said proposed substitute was not a dependant of the deceased.
8. On 24th September, 2013, it was directed that the application dated 10th July 2013 be disposed by way of written submissions. The applicant filed his on 23rd October 2009 and 11th December 2013. The widow's submissions were filed on 22nd October 2008 while those by the son were filed on 9th October 2013.
9. I have perused through the said submissions together with the attached documents and indeed the entire record. The only issue for determination is whether Mr. Charles Rubia should be replaced by his son Maurice Kamau Rubia as one of the administrators of the estate of the deceased.
10. From the affidavit in support of the application, the applicant argues that the widow is not suitable as sole administrator for she has a problem with alcoholism and in any event widows are not allowed in law to be sole administrators. It is further argued that since the deceased did not have children the widow is not entitled absolutely to the estate and therefore there is need to safeguard the interests of the other beneficiaries.

11. The deceased in this case died intestate. In the circumstances *Section 66* of the Law of Succession Act applies. The said provision sets out as a general guide an order of preference which the court should follow in determining who should administer the estate of the intestate. For the avoidance of doubt I will cite the said provision *verbatim* herebelow:-

“66 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...*”

12. The deceased in this case was survived by a widow – Elizabeth Wanjiru Njonjo Rubia, a son- Brian Mwituria, a father – Charles Rubia and brothers – Maurice Rubia and Michael Rubia. Going by the provisions of *Section 66* of the Law of Succession Act, the persons with priority with respect to the administration of the estate of the deceased are the widow and son, followed by the father and finally the brothers of the deceased. Kimaru J was no doubt guided by **Section 66** of the Act when he made the appointments on 29th April 2013.

13. The applicant does not wish to take up the office of administrator. He cannot be compelled to take up the office. He would like his place taken up by one of his sons, who is also a brother of the deceased. Should the court allow that? From the scheme of distribution of the estate of an intestate set out in Part V of the Law of Succession Act, surviving spouses and children have a prior right over every other relative. By dint of **Section 39(1)** of the Law of Succession Act, parents and siblings of the deceased are entitled to a share of the estate only where the deceased has left no surviving spouse or children. Such relatives can only access the estate through *Section 26* of the Act, but only if they were dependent on the deceased immediately prior to his death. *Section 39(1)* says 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, or if dead*
- c. *Brothers and sisters and any child or children of deceased brothers and sisters, in equal shares, or...*”

14. The father and brothers of the deceased are remote relatives as the deceased was survived by a widow and a child. By virtue of **Section 39(1)** of the Act, the father and brothers of the deceased are not entitled to a share in the estate of the deceased. Similarly, by virtue of **Section 66** of the Act, the father and brothers of the deceased do not have a prior or equal right to administration over or with the widow and child of the deceased. In other words the widow and son have a superior right to the administration of the estate of the deceased over the father and siblings of the deceased. So long as there is a surviving widow and child, the other relatives have no interest in the estate, and there is therefore no need for them to be represented in the administration of the estate. If the applicant is not willing to participate in administration he can be excused, but there is no need in the circumstances for his son, a brother of the deceased, to be enjoined in the administration of the estate.

15. Having studied all the papers placed before me and examined the relevant provisions of the Law of Succession Act, I am disposed to make the following orders-

- a. That the application dated 10th July 2013 is without merit and I hereby dismiss it with costs;
- b. That I hereby confirm Elizabeth Wanjiru Njonjo Rubia and Brian Mwituria to be the administrators of the estate of Benard Njonjo Rubia deceased;
- c. That a grant of letters of administration intestate shall issue to them accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 11th DAY OF April, 2014.

W MUSYOKA

JUDGE

No appearance for the Applicants.

In the presence of Miss. Kavage for Mr. Lutha, advocate for the widow, Elizabeth Wanjiru Rubia. No appearance for the son, Brian Mwituria.