



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 2432 OF 2008
IN THE ESTATE OF LUCY NJERI WAMUKONYA – DECEASED

RULING

1. The application dated 10th July 2013 invites me to confirm the grant made on 23rd November 2011 to Jacinta Njoki John and David Irungu Wamukonya with respect to the estate of Lucy Njeri Wamukonya.
2. Lucy Njeri Wamukonya died on 6th July 2008. According to the letter on record from the Chief of Muguru Location, the deceased died a single woman without children. The chief indicates that her mother, Jacinta Njoki John, was her sole heir.
3. The affidavit sworn on 20th August 2008 in support of the petition for grant shows that the deceased was survived by her mother, Jacinta Njoki John, and her two brothers – Stephen Maina Wamukonya and Simon Muiga Wamukonya. Other brothers, not mentioned in the petition, raised objections. The said objections were eventually withdrawn on 15th April 2013 to pave way for the confirmation of the grant.
4. The confirmation application dated 10th July 2013 is at the instance of the two administrators of the estate, Jacinta Njoki John and David Irungu Wamukonya. In their joint affidavit sworn on 10th July 2013 they propose that the estate be shared equally between the mother of the deceased and the siblings of the deceased. They have attached a schedule of the assets making up the estate, proposing how the same is to be shared out between the mother and the said siblings of the deceased.
5. The application was canvassed by way of written submissions. The mother of the deceased represented, by Messrs. Okundi & Company Advocates, filed her submissions on 10th December 2013, while her co-administrator filed his through M/s. J.W. Kimiti & Co. Advocates on 4th December 2013. The mother asserts that under Section 39 of the Law of Succession Act she is the only person entitled to the estate. The other administrator argues that the purported distribution is by consent, that his mother never objected right from the start to the co-administrator being appointed, that she has not renounced the consent, and that she has also not filed an affidavit of protest.
6. The deceased died on 6th July 2008, and therefore the Law of Succession Act applies to her estate. She died intestate meaning that her estate is available for distribution in terms of the intestacy provisions in Part V of the Law of Succession Act. She was not survived by spouse nor child, consequently distribution of her estate is to be governed by Section 39(1) of the Act. It will be noted that she was survived by her mother and siblings.
7. Section 39(1) (a) (b) (c) of the Act, which is relevant to these proceedings, provides 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 estate 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...**

8. The provision in Section 39(1) of the Act is in mandatory terms. Its effect is that where a deceased person whose estate is up for distribution is not survived by a spouse or a child or a father, the next in line of inheritance would be the mother. Under the scheme in **Section 39(1)** the mother should not share her inheritance with anybody else even where the deceased had surviving siblings. Such surviving siblings should access the estate through Section 26 of the Law of Succession Act, if they were dependent on the deceased or through the estate of their mother followed her eventual death.

9. The matter that confronts me in this case is whether the very clear and mandatory provisions of Section 39(1) of the Act can be overridden by a consent between the mother and the siblings of the deceased to have the estate shared out equally between the mother, who is entitled to the estate by dint of Section 39(1) of the Act, and the siblings of the deceased, whose right to the estate has not yet crystallised under Section 39(1) of the Act.

10. This matter has caused me some anxiety given that it is the mother of the deceased who is clearly entitled to the estate by dint of Section 39(1) of the Act. I note however that the application for the grant to be confirmed, dated 10th July 2013, is at her instance and that of her co-administrator. She has signed the affidavit in support of the application as well as the consent to the mode of distribution. After the application was lodged in court, she did not disown it, although there was opportunity for her to do so. She could have cited, coercion or undue influence. She could have even filed an affidavit of protest, renouncing her affidavit in support of the application and proposing a different mode of distribution. The assertion that she should be the sole heir by dint of Section 39(1) of the Act only appears in her submissions.

11. My view of this is that the mother of the deceased cannot denounce the application dated 10th July 2013 in the manner that she done in her submissions. An effective denunciation, showed of the application should have been in the manner alluded to in paragraph 10 hereinabove. I take the view that by swearing the affidavit in support of the confirmation application proposing distribution in the manner set out in paragraph 4 of the said affidavit and executing the consent to the mode of distribution of the estate of the deceased, the mother of the deceased ceded her right to be the sole beneficiary or heir of the estate of her deceased daughter, and chose to have the estate distributed equally between her and her sons contrary to or against the provisions in Section 39(1) of the Act.

12. The application dated 10th July 2013 is hereby allowed as prayed. Costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 28th DAY OF August, 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Khamati for Mr. Wesonga for the applicant.

No appearance for the petitioner.