



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
SUCCESSION CAUSE NO. 573 OF 1998

IN THE MATTER OF THE ESTATE OF MACHARIA NDIRANGU – (DECEASED)

RULING

The application dated 4th February 2013 seeks rectification of the certificate of confirmation of grant to substitute names of beneficiaries who have died. The persons to be substituted are Damaris Wangui Macharia and Mwangi Macharia alias Junius Mwangi Macharia. They died on 16th June 2005 and 24th September 2008 respectively. There are certificates of death on record to support these assertions.

Damaris Wangui Macharia was administrator of the estate. It is proposed that she be substituted as administrator by her daughter Esther Wanjiku Macharia. The grant was made to on her 25th May 1998. Junius Mwangi Macharia was a son of the deceased. After his death it is proposed that his name in the certificate of confirmation be replaced with that of his widow, Mercy Wanjiku Mwangi.

I note that the deceased died testate. He left a will made on 1st March 1994. The grant made on 25th May 1998 was one of probate. The will appoints John Njoroge Maina as executor, but curiously the grant of probate of 25th May 1998 was made to Damaris Wangui Macharia who is not named as executor in the will. A grant of probate ought not have been made to her as she was not named in the will as executor. The grant of probate ought to have been made to John Njoroge Maina.

The law on this is **Section 53** of the Law of Succession Act which provides that:-

“A court may -

(a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all the property to which the will applies, either grant -

(i) probate of the will to one or more of the executors named therein,
or

(ii) if there is no proving executor, letters of administration with the will annexed; and

(b) if and so far as there may be intestacy, letters of administration in respect of the intestate estate.”

As Damaris Wangui Macharia was not a proving executor, grant of probate ought not have been made to her; instead a grant of letters of administration with the will annexed should have been made to her. Even then, such grant of letters of administration with the will annexed should not have been issued before the

position of the executor appointed by the will, that is to say John Njoroge Maina, was explained. It ought to have been explained what became of John Njoroge Maina – was he died as at the date of the filing of the petition or had he renounced probate? The grant of probate made on 25th May 1998 was made in error.

Whatever the case, the person appointed as personal representative is now dead. The court should appoint her substitute. The proposed substitute is Esther Wanjiku Macharia. She is was not named executor in the will made on 1st March 1994. A grant of probate cannot therefore be made to her. A grant of letters of administration with the will annexed should be made to her instead, as this is a case of existence of a valid will with no proving executor. Under **Sections 63, 64 and 65** of the Law of Succession Act, where the deceased had made a will but there is no proving executor, then a universal legatee or any beneficiary under the will qualifies for appointment as personal representative under a grant of letters of administration with the will annexed. Esther Wanjiku Macharia is not a universal legatee or residuary beneficiary, but she is a beneficiary named under the will of the deceased. She therefore qualifies for appointment as personal representative of the deceased under a grant of letters of administration with the will annexed.

On the issue of substitution of Junius Mwangi Macharia with his widow Mercy Wanjiku Mwangi; the legal position is that substitution under the proposed circumstances is not tenable. The will of the deceased does not provide for such substitution in the event Junius Mwangi Macharia dies before the estate is distributed. He is the person named in the will as beneficiary and the gifts made to him under the will cannot devolve upon anybody else. The said gifts should devolve upon his estate and not to his widow. The widow must therefore apply for representation to his estate.

The orders that are finally made in this case are:-

1. That Esther Wanjiku Macharia is hereby appointed personal representative in respect of the estate of Macharia Ndungu, deceased.
2. That a grant of letters of administration with the will annexed shall be made to her.
- (3) That Mercy Wanjiku Mwangi cannot replace Junius Mwangi Macharia as beneficiary. She shall apply for representation to the estate of the said Junius Mwangi Macharia instead.
- (4) That the gifts made in the will in favour of Junius Mwangi Macharia shall devolve upon his estate.
- (5) That the certificate of confirmation of grant dated 12th May 1999 shall be amended to reflect Esther Wanjiku Macharia as administrator and the estate of Junius Mwangi Macharia as entitled to the gifts in favour of Junius Mwangi Macharia.
- (6) Costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 30th DAY OF August, 2013.

W. M. MUSYOKA

JUDGE