



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION CAUSE NO. 158 OF 2005**

**IN THE MATTER OF THE ESTATE OF DICKSON KIHKA KIMANI (DECEASED)**

**PERIS NJOKI KIHKA.....APPLICANT**

**RULING**

Peris Njoki Kihika is a daughter to the deceased, Dickson Kihika Kimani and she is named as one of the beneficiaries in these proceedings. She has filed the summons dated 23/11/2010 seeking an order that Kshs.70,000/- held in account number 0130191180095 Equity Bank Gate House Branch in the name of the deceased be released to the applicant to cater for mortuary fees, post mortem fees and funeral expenses for Felix Kariuki Njoki (now deceased). The application is brought pursuant to **Section 47** of the **Law of Succession Act** and **Rule 73** of the **Probate and Administration Rules**, grounds found on the face of the application and the supporting affidavit of the applicant dated 23/11/2010.

The applicant deponed that the deceased was her father and she is therefore a beneficiary of his estate and so is her son, Felix Kariuki, now deceased. She further deponed that her son Felix was found dead at Engashura on 1/10/2010 and his body was taken to the Municipal Mortuary. She requires Kshs.70,000/- to cater for post mortem, mortuary fees and funeral expenses. She has no means of her own and she urges the court to release to her some money from the above mentioned account which holds about Kshs.400,000/-. Mrs Gatei, counsel for the applicant urged that even if the deceased is not a beneficiary to the deceased's estate, the applicant is a beneficiary and she is the one who needs the money to assist in defraying funeral costs. Mr. Waiganjo, counsel for the 1<sup>st</sup> administrator and for the 3<sup>rd</sup> and 4<sup>th</sup> widows of the deceased opposed the application. He filed grounds of opposition on 9/12/2010 to the effect that the application is brought in bad faith in that the child died on 1/10/2010 and the application was not filed until 24/11/2010 about two months later, and the delay is not explained. He urged the court to find mischief in the delay. Secondly, counsel urged that the subject account is not the subject of these succession proceedings and the signatories have not been disclosed. Thirdly, counsel submitted that the deceased child is not a beneficiary of the deceased's estate and the applicant being an adult should be able to run her own affairs.

Mr. Mbiyu, counsel for the 2<sup>nd</sup> administrator, Alice Mukuhi also opposed the application and adopted Mr. Waiganjo's submissions. He added that the appellant should wait for distribution before such a claim can be made.

Mr. Githui, counsel for the 3<sup>rd</sup> and 4<sup>th</sup> administrators filed grounds of opposition dated 29/11/2010 and associated himself within the other counsel's submissions. Counsel urged that this court has the duty to provide for liabilities of the deceased's estate and distribute the assets as guided by the affidavit filed on 23/3/05 which outlines who the beneficiaries are.

Although the appellant depones that the deceased is a beneficiary to the estate of her late father, Dickson Kihika Kimani, that is not correct. The deceased is not a child of the deceased and is not listed as one of the beneficiaries. He is not a beneficiary envisaged under **Section 40 of the Law of Succession Act**. Counsel for the applicant seemed to accept that indeed the child, Felix, is not a beneficiary of the subject estate. The affidavit filed on 23/3/05 in support of the succession cause lists the beneficiaries of the deceased estate and at paragraph 6 thereof, the assets and liabilities were set out. Unless a further affidavit has been filed setting out more assets/liabilities, none was drawn to this court's attention. The named bank account number 013019118095 Equity Bank is not one of the assets. The applicant did not disclose who are the signatories to the said account nor is there evidence from the Bank disclosing the exact sums held therein. The court needs to be sure of the sums available before it can make an order. Courts do not make orders in vain.

The applicant is a grown up person. She claims to be unable to meet the funeral costs of her deceased child. It is curious that even her own mother, one of the administrators does not support this application. As pointed out by counsel, the delay in bringing this application for about 2 months is unexplained. Mrs Gatei tried to explain from the bar but that explanation is not acceptable. If the child died on 1/10/2010 and the body was taken to the mortuary, costs started accumulating then. If indeed the applicant did not have the necessary funds to keep a body in the mortuary for so long then it is not understandable why it took her so long to file this application, about 2 months later. There has been an unexplained delay in bringing this application and courts will not assist the indolent. Matters of burial are urgent and have to be treated with the urgency they deserve. Counsel pointed out that it is not normal for members of the Kikuyu community to which the applicant belongs, to keep a dead body for that long without good reason. Besides, matters of burial are communal and since the applicant belongs to such a large family it is inconceivable why they cannot afford to remove the body of the deceased for burial.

Lastly, this court finds that the claim for Kshs.70,000/- is without basis. The applicant did not demonstrate how she came up with that figure. Some evidence from the mortuary on the daily charges and an invoice from the doctor who is due to conduct the post mortem would have been of help. The claim for Kshs.70,000/- is unfounded.

The applicant contends that since she is a beneficiary to the estate of the father, the sum sought can be discounted from her share at the time of distribution. The estate is yet to be distributed. In any event, if Kshs.400,000/- is the only money available for distribution would the applicant be entitled to Kshs.70,000/- considering the number of beneficiaries to the subject estate? I doubt it. It is premature for the applicant to claim from her late father's estate before distribution.

From the foregoing I find the application without merit. It is dismissed with the applicant bearing the costs.

**DATED and DELIVERED this 11<sup>th</sup> day of February, 2011.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Mrs Gatei for the applicant.

Mr. Githui for the 2<sup>nd</sup> & 4<sup>th</sup> administrators.

Kennedy – Court Clerk.