



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1729 OF 2009**

**IN THE MATTER OF THE ESTATE OF NATHANIEL M'RUTEERE M'MUKETHA**  
**(DECEASED)**

ISAAC MARETE MUGAMBI.....1<sup>ST</sup> PETITIONER  
DENIS MBICHI MBOROKI.....2<sup>ND</sup> PETITIONER  
DR. JULIUS KITHINJI KAJUME.....3<sup>RD</sup> PETITIONER

VERSUS

FAUD MOHAMMED ABDULLA.....OBJECTOR

**R U L I N G**

The deceased herein one NATHANIEL M'RUTEERE M'MUKETHA died testate on 22<sup>nd</sup> March 2009. In his Will which was filed in this court, he appointed 3 persons as the Executors of the said Will. The 3 moved this court on 3<sup>rd</sup> August 2009 for the Grant of Probate. Before the Grant was issued one Faud Mohammed Abdulla filed an objection thereto. He also filed a petition by way of cross-application for a Grant dated 22<sup>nd</sup> December 2010. He filed the objection in his capacity as a creditor. He has annexed an agreement showing that he had lent 1.4 million shillings to the deceased as a loan. The loan had nonetheless not matured as at the time the deceased passed on. He rightly says that the deceased had not included the said loan in his Will. I nonetheless note that the Will was made long before the said loan was advanced to the deceased and it could not therefore have been included. He is asking the court to appoint him as a Co-administrator to the said Estate.

The matter proceeded by way of filing written submissions and counsel for the Objector has submitted that the Objector is relying on **Section 68 of the Law of Succession Act** as well as **Rule 17 of the P & A Rules** . In my view however these 2 provisions are not enabling provisions but only prescribe the procedure to be used when filing the objection. **Section 68 of the Law of Succession Act** provides:-

**68(1) "Notice of any objection to an application for a Grant of Representation shall be lodged with the court in such form as may be prescribed, within the period specified by the notice, or such longer period as the court may allow."**

Rule 17 is on presumption against intestacy and has nothing to do with giving the Objector the capacity to file for a Grant of Administration. He further states that the Petitioners willfully and deliberately omitted to list the Objector as a beneficiary

of the Estate of the deceased.

According to counsel for the Petitioners, the Objector is not a beneficiary or dependant of the deceased's Estate. He says that the Objector's claim is that of a creditor and it is premature for the Petitioners to acknowledge the debt before they are even given the Grant of Probate by the court. I have considered all the documents before me including the contents of the said submissions. I have also considered the Law applicable in this matter.

Firstly, I wish to state that these are not proceedings under intestacy. The deceased died testate. He had named 3 people as the Executors and it is only these 3 persons who can move this court for a Grant of Probate or Letters of Administration.

**Under Section 59 of the L.S.A.**

***“A person who has been appointed by a Will as an Executor thereof may, either by oral declaration before the court or by writing under his hand, renounce executorship, and shall thereafter be finally precluded from applying for Grant of Probate of that Will.”***

In this case none of the named executors have renounced their appointment as executors.

**Section 62 L. O. S. Act** continues to expound the point and provides thus:

***“When a person who has been appointed by a Will as an Executor thereof has not renounced the Executorship, Letters of Administration shall not be granted to any other person until a citation has been issued, calling upon the Executor to renounce his Executorship or apply for a Grant of Probate of the Will.”***

There is no renunciation in this case and there is no citation to the executors. The court cannot actually entertain a cross application for a Grant of Letters of Administration in this matter because these are not proceedings under intestacy and nor have the executors renounced their executorship. That cross petition is totally misplaced and devoid of merit. It has no support of the law.

On whether the executors can be forced to acknowledge the debt or not, I agree that it is premature for them to be asked to do so at this stage. The Grant of Probate has not been issued to them yet and they have not therefore had the opportunity or time to comply with the provision of **Section 83 (d) of the Law of Succession Act**.

The executors are enjoined by law to ascertain all the debts accruing against the Estate of the deceased and pay them before the Estate is distributed. That cannot nonetheless be done at this stage. The Objector must wait for the Grant of Probate to be issued to the Executors who will then verify his claim and if satisfied that the same was due and owing, settle it from the deceased's Estate. If the Executors fail to do so, then the Objector could be at liberty to file a suit against the executors herein for recovery of the said debt.

The pith and substance of this is that the Objectors objection and cross-petition has no basis in Law and the same is therefore dismissed with costs in the cause.

**Delivered, Signed and Dated at Nairobi this 7<sup>th</sup> day of November, 2011.**

**W. KARANJA**  
**JUDGE**