



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Succession Cause 1667 of 2007**  
**N THE MATTER OF THE ESTATE OF E.M.O (DECEASED)**  
**RULING**

The background information to this ruling is that the ball herein was set rolling by a letter from the chief Kamser Nyakango who introduced one Mrs A.W.N as the only legal wife of the late Colonel E.O.M, the deceased subject of these proceedings.

On the strength of the said letter among others, the Petitioners A.W.N.O and (2) R.A.O presented the petition in their capacity as widow and sister of the deceased. The cause was gazetted vide gazette notice of 17<sup>th</sup> August 2007. The beneficiaries named are A.W.N.O as widow aged 48 years, and R.J.O a son aged 12 years.

The gazettelement of the cause ushered in the petition by way of cross application for a grant of representation by one E. R.A.O in her capacity as first widow.

A perusal of the court record reveals that on 31<sup>st</sup> day of July 2008, the original petitioner presented an application for school fees to the tune of Kshs 122,000.00 from the death benefits of the deceased and Ksh 100,000.00 from KCB, from an account held by the deceased. Apparently the matter was argued before Gacheche J and this gave rise to the ruling by the said judge dated 28<sup>th</sup> day of January 2009. It is annexed to the replying affidavit as annexure ERA 0-1. This court has perused the same and in its opinion the following are the salient features of the same:-

1. At page 2 – 3 the learned judge quoted with approval sections 67 of the law of succession Act and rule 36 of the Probate and Administration rules.
2. At page 3 there of that counsels of both sides had recorded the following consent “----By consent, the Department of Defence do pay the school fees for A.R.J.O. That the said amount shall not be paid from the pension or any other dues payable to the deceased herein. That parties be at liberty to apply.”
3. That by virtue of the existence of the said consent regarding fees for the minor, what was left for the learned judge to rule on was whether the applicant deserves an order for the maintenance of the said minor in line with her second prayer. In granting the prayer the learned judge had this to say at page 4, line 4 from the top:- “ The applicant has unfortunately not provided evidence to support that particular deposition, an omission which in my humble opinion is fatal and it is my view that the applicant has failed to convince this court, that she deserves an order for maintenance at this stage and should accordingly

4. At line 10 from the top, the learned judge went on: “---- the application was never the less bound to fail as it is brought under the wrong provision of the law which provision only caters for an applicant who wishes to obtain orders to collect and preserve the estate without powers to distribute, disburse or utilize any portion thereof which is not the case in the particular instances.”

This court, has once more been presented with an application dated 9<sup>th</sup> day of December 2009 filed on the 10<sup>th</sup> day of December 2009. It is by way of chamber summons. The provisions of law to access the seat of justice had initially been quoted as section 67 of the succession Act and Rule 36 of the probate and Administration Rules. At the trial the applicants counsel sought an oral amendment to amend the provisions under which the application has been presented to read sections 26, 27 and 28 of the law of succession Act and Probate and Administration rules and it was allowed.

The prayers sought are as follows:-

- (1) That the application be certified urgent and service thereof be dispensed within the first instance.
- (2) That the court do order for payment of Kshs 122,000/= per term to St. Christopher school as fees for the deceased's only surviving child A.R.O from the deceased's employee death benefits/gratuity being held by the Department of Defence.
- (3) That the said sums paid as fees to be taken into account upon the determination of the cause herein.
- (4) That the court grants any other orders and relief necessary in the cause herein.
- (5) That costs of the cause.

The grounds are set out in the body of the application, supporting affidavit, and oral submissions in court and case law. The major ones are as follows.

5. The subject boy is the only surviving child of the deceased.
6. He attends St C School in year eight.
7. He used to attend the same school during the life time of the deceased.
8. Since the demise of the deceased, it is the applicant who has been meeting the school fees of the child. But the resources have now become stretched resulting in the boy being send away from school.
9. It is the applicants stand that they had moved to this court earlier seeking the same relief vide an application annexed as annexure Awn 01.
10. The said application resulted in an order issued by this court directed at the Department of defence directing the department of defence to pay fees for the subject child but the said payments were not to be made from the pension and death benefits of the deceased annexure Awn (2).
11. That the Department of defence responded to the said order by saying that they do not hold any other funds for the deceased other than death benefits for the deceased and for this reason they were unable to pay fees for the subject child.
12. That by reason of this, the applicant has been left with no option but to rely on well wishers to support herself and the said subject child as shown by annexures (ANW) (3) which are remittances of funds emanating from the united Arab emirate/Dubai. Maintains that the school fees is timely owed as shown by the contend of annexure ANW 04.
13. That the subject child has been sent away from school on account of lack of payment of school fees and it is only proper that this court, do consider the interests of the subject child and order the release of the said funds to the said child so that he resumes school.

14. Concedes that letters of administration have not been issued herein and as such the shares of the beneficiaries have not yet been determined.
15. Apparently the petition is being contested and it is not known when the proceedings will be determined. It is their stand that the interests and welfare of the child cannot await the final determination of the petition.
16. The court, is invited to take note of the assurance that applicant has made to the effect that the amount of money advanced will be taken into account when the final shares of the rightful beneficiaries are determined.
17. The court, is urged to uphold justice to the child more so when the entitlement of the said child is not in dispute.
18. That the case law relied upon by the respondents to oppose their application is distinguishable from the facts of the current application.

The Respondents opposed the application by way of a replying affidavit deponed by one E.R.A.O deponed on the 10<sup>th</sup> day of February 2010, and filed on 11<sup>th</sup> day of February 2010 provisions of law, case law and oral representations. The salient features of the same are:-

19. That the status of the child is not in issue herein, but that of the grantees of the grant of letters of administration.
20. That no grant of representation has been granted herein.
21. That the issue of the lawful or rightful grantee of the letters of administration should be determined first.
22. That the Respondent is in favour of having the issues of representation and entitlement determined first before distribution of any part of the estate is distributed.
23. That the provision of law cited do not assist the applicant because section 26 of the L.S.A applies only where a dependant has not been adequately provided for either by the will or the estate. Herein no provision has been made where by it can be stated that the child has not been adequately provided for so as to need more provision.
24. They are opposed to provision of school fees in the manner sought as it amounts to partial distribution of the estate and yet there is not grant of letters of administration which has been issued and confirmed.
25. If this court, were to act in the manner sought, it, the court will be acting contrary to the provisions of section 45 of the L.S.A and it can safely be stated to be intermeddling in the affairs of he estate. It is preferable that parties do proceed to establish their status before any distribution can be made.
26. The Respondent has no objection to the child going to school but are of the opinion that no disbursements should be made out of the estate property before the beneficiaries and shares of the beneficiaries are determined and distribution done through confirmation of the grant.
27. Rule 73 of the Probate and Administration rules though it enable the court, to do justice and prevent abuse of the court process, it does not empower the court, to do anything outside the laws. The court, has to consider the value and or amount of the estate which was given as 500,000.00 and if any disbursements are allowed in the manner sought then the estate will be depleted and the other beneficiary will be disadvantaged as they will have nothing to inherit as there will be nothing to be distributed. For this reason the courts function at this juncture should be to determine the case first and then distribute the estate.

In response to the Respondents submissions the applicant's counsel submitted that to take action as invited, it would not be said to be intermeddling in the estates affairs as section 45 of the L.S.A applies to outsiders as all that the court has been called upon to do is to do

justice in a situation where the child is unable to be provided for because of issues raised by the petitioner and cross-petitioner.

There is also on record a supplementary affidavit deponed by A.W.O on the 20<sup>th</sup> day of January 2010 and filed the same date. A perusal of the same reveals that all that the deponent is telling the court, is that she is the only lawful widow of the deceased recognized by the authorities during the funeral of the deceased as she had also been documented as the deceased's dependant in annexure AWN 04.

28. she also disputed the purported records of employment of the deceased exhibited by the cross-petitioner which were prepared long after the death of the deceased which purport to exclude the petitioner as wife of the deceased.

29. She also relied on the cross-petitioners' renunciation of the deceased's name in 1995 meaning that she considered herself (cross-petitioner) no longer a wife of the deceased.

30. Further that the medical scheme documentation exhibited herein does not reveal the cross petitioner as a wife or dependant of the deceased.

31. That by reason of the cross-petitioner renouncing the name of the deceased, and abandoning him in 1994, her purported come back is fraudulent and the same should be interrogated by this court.

Due consideration has been made by this court, of the Rival arguments herein and the same considered in the light of the provisions of law, and principles of case law relied upon by both sides and the court, makes a finding that the following issues do not seem to be in contest namely:-

- (1) The petitioner contests the entitlement of the cross-petitioner as a beneficiary to the estate of the deceased herein.
- (2) The cross-petitioner on the other hand does not contest the entitlement of the petitioner to the estate of the deceased herein.
- (3) Both the petitioner and cross petitioner do not dispute the entitlement of the child for whose benefits the application has been brought.
- (4) There is no dispute that no grant even a grant Ad colligenda bona has been issued to any party herein.
- (5) Proceedings to determine the rightful administrator and beneficiary to the estate of the deceased has not yet been determined.

By reason of the above, common grounds, the question that the court, has been confronted with for determination is whether on the basis of the facts demonstrated herein, the court, is properly vested with jurisdiction to grant the relief sought. To resolve the problem, the court, would like to follow the reasoning in an own ruling delivered by this court, on the 29<sup>th</sup> day of September 2007 in Nairobi HCC NO 483 of 2007 in the case of HELLEN MUENI KALINGA AND FELISTA KAMENE KALINGA VERSUS DELMONTE KENYA LTD.

At page 7 of the said ruling line 2 from the top the court made the following observations:- “ Secondly that further a wrong procedure has been invoked to seek the reliefs being sought. In summary, the plaintiff has opposed the preliminary objection on the basis that technicalities should not stand in the path of:-

- (a) Ends of justice to be met.
- (b) Interests of children which should be considered to be paramount in any litigation.
- (c) Unlimited jurisdiction of this court, is an effective tool against any incompetence or defects in the pleadings presented.
- (d) That where triable issues are raised, technicalities have no space or place to trial and
- (e) Lastly that issues of human rights overrides technicalities.

At page 12 line 8 from the bottom, it is observed thus:-

“ It is common ground that the:-

- (1) Plaintiffs claim to be widows of one deceased person by the name Christopher Kalinga Ngutuu.

- (2) *The action is brought on behalf of themselves and their children seeking provision for subsistence for themselves.*
- (3) *The defence does not seriously contest holding funds due to the estate of the deceased, but maintain that access to the same should be processed through the probate and administration procedures under section 5-4 of the law of succession Act Cap 160 laws of Kenya.”*

At page 13 line 4 from the top this court, quoted with approval the provisions of section 54 of the laws of succession Act thus:- “*A court may according to the circumstances of each case limit grant of representation which it has jurisdiction to make in any of the forms described in the Fifth schedule.*”

On the same page 13, line 7 from the top there is observation that:- “*Rule 12 of the probate and administration rules found at page 73 of the Act lays down the procedure to be followed when one applies for a limited grant. The circumstances under which such a grant can be issued are set out in the 5<sup>th</sup> schedule. Since the plaintiffs have moved to court, in their capacity as, dependants, they are covered by the provisions of section 26-29 of the said Act.*

*Application for provision of dependants under those sections are set out in part IX of the probate and administration rules. Rule 45 is very elaborate. It is at page 92 of the Act and it provides:- “ Every application to the court under section 26 of the Act shall where a grant has been applied for or made but not confirmed be brought by summons inform 106 in that cause or where no grant has been applied for is brought by petition inform No. 96 and the summons or petitions and supporting affidavit shall be filed in the Registry and copies there of served upon the personal representatives of the deceased provided that if representation has not yet been granted to any person a copy of the petition and supporting affidavit shall be served upon the persons who appears to be entitled to apply for a grant under the Act.*

*(2) The application shall be supported by evidence on affidavit informs 15 or 16 stating that no grant of representation to the estate of the deceased has been confirmed and contains so far as may be within the knowledge of the applicant.”*

The particulars that an applicant is supposed to provide are set out at page 14-15.

At page 15 line 4 from the bottom, the court, made observation on sections 26-29 of the L.S.A as follows:-

32. *Section 26 empowers the court, to make provision for a dependant having due consideration to the will or the law out of the deceased net estate.*
33. *Section 27 on the other hand, gives the court, a discretion to order a specific share of the estate to be given to the dependant or to make such other provisions for him by way of periodical payments or lump sum and to impose such conditions it thinks fit.*
34. *Section 28 enjoins the court, to take cognizance of the following factors, namely the nature and extent, of the deceased property, any past, present or future capital or income from any source of the existing and future means and needs of the dependant, if the deceased had made any advancement or other gift to the dependant during his life time, the conduct of the dependant in relation to the deceased, the situation and circumstances of the deceased other dependants, and the beneficiary under any will, the general circumstance of the case including so far as can be ascertained the testatory, reason for not making provision for the dependant.*
35. *Section 29, on the other hand guides the court by providing a definition of who a dependant is.*

At page 18 line 3 from the top, this court, went on to observe thus:- “*There is no provision in section 60 (1) of the said constitution, which empowers the high court, to ignore specific provisions of law that it is required to follow. This means that when it*

*exercises jurisdiction under the probate and administration law it has to be guided by the procedural boundaries laid down by parliament in the exercise of that jurisdiction. The net effect of this is that this court, cannot afford to ignore the existence of a special procedure governing the dispute herein.*

Applying the above reasoning in the own cited ruling, it is apparent that dependant wishing to be provided for out of a deceased's persons estate before final distribution of the estate has to approach the seat of justice through two avenues. The first avenue is where a petition has been presented and the second avenue is where no petition has been presented.

- (1) Where a petition has been presented and a grant made even, ad collegenda bona, or full grant, but no confirmation made, the dependant addresses the application for provision of a dependant to the court asking the court, to direct the orders to the petitioner grant holder.
- (2) Where no petition has been presented and no grant issued, the plea for provision is directed to the court.

Of the two, the prevailing circumstances herein fall under the first category because a petition has been presented. It is however clear that no grant has been made not even ad collegenda bona and therefore issue will arise as to who the orders will be directed for purposes of execution. It is trite law that the only persons authorized to protect the interests of a deceased person's estate is a person who is a holder of a grant even a temporary grant. Herein there is no holder of a temporary grant. This being the case, issue will arise as to which party will be directed to execute the orders if granted.

Another issue that the court, has to address its mind on, is the fact that before any order of provision for a dependant is made, the court, has to have before it facts demonstrating the value of the estate, the vest of dependants, the needs of each dependant, their economic or financial status. Herein what the court has before it is the estimate of the value of the deceased's estate. This court, has no tangible information before it confirming the real value of the estate in order to determine the entitlement of each beneficiary. The amount forming the content of the bank account, dependants pension and value of the motor vehicle have not been given. It is therefore difficult for this court, to rule with certainty that the deceased's estate is worth more than what is being sought in terms of school fees and that after meeting the same, there will be a balance left for the other beneficiaries of the estate.

Another consideration that the court, is called upon to take into consideration is the number of beneficiaries and their entitlement. Herein the subject child is a contender and there is no dispute about the Child's entitlement. There is however issues to be settled by the court, as regards one claimant who is the cross-petitioner. Should the estate be depleted through payment of school fees, from the estate and she ultimately succeeds at the end of the conclusion of the matter, this claimant will stand prejudiced.

Indeed the court, has been informed on oath and through submissions, that there is an undertaking on the part of the petitioner who is the mother of the subject child to refund the same. Indeed this is an alternative. But this notwithstanding, the court, has to decide whether there is no other better alternative which the court, can resort to so that at the end of the conclusion of the matter, there will be no further litigation undertaken in order to enable any beneficiary realize his/her rights. The best option in this courts' view is to have the rights and share entitlement of all those entitled to benefit from the deceased's estate determined before any distribution partial or otherwise is made from the estate.

Issue has arisen about the needs and welfare of the child in question. The court, has been informed that the child is out of school. The court, was further informed that this court, had in mind the consideration of the welfare of the child as being paramount and that is why the parties entered the consent referred to herein and annexed for the perusal of the court.

Indeed there exists a consent entered into earlier on by both parties to these proceedings, where by the department of defence was

ordered to be paying fees for the minor so long as the same did not come from the death benefits of the deceased. It is on record that the said consent order was incapable of being enforced and or effected because the Department of defence was not holding any funds for the benefit of the deceased save the death benefits. This is the reason why the application subject of this ruling has been specific, this time round with specific prayers that the said payments be made from the death benefits due to the estate of the late father of the child.

This court, is indeed in agreement with the applicants assertion that the subject child as an undisputed beneficiary to the estate of his late father has an undoubted right to seek provision from the death benefits due to the estate of the late father. However as ruled by this court, in the own cited case, HELLEN KALINGA AND FELISTAS KALINGA (SUPRA), the court, can only realize that right in favour of the applicant procedurally and within the law. Herein although the court, has jurisdiction to realize that right, it cannot do so at this point in time because of the following reasons:-

- (1) There is no grant of representation in place herein, the holder of which who can be directed by the court, to execute the order made for provision for the minor dependant. It therefore follows that before any order is made for provision, there has to be in existence a grant of representation to the estate of the deceased even a temporary one – Ad collogenda bona. It is trite law that the only person entitled to dispose off any part of a deceased persons estate is a person who is a holder of a grant.
- (2) There is a requirement in the relevant enabling provision of law cited, to the effect that before such an order is made, the court, has to have regard to the nature and extend of the estate, the number of beneficiaries, the needs of each beneficiary, as well as their finances if any. Here in, all that the court, has is a list of properties allegedly worth 500,000.00. There is no indication as to how much the proceeds of the bank account, and death benefits amount to, as well as the value of the vehicle. Such details would enable this court, arrive at a fair provision in favour of the child ensuring that the other beneficiaries are not unjustifiably withheld from their entitlement from the estate.
- (3) Indeed an offer has been made by the applicant that she is willing to give an undertaking to refund the same to the other entitled beneficiary should the court, ultimately find that the minor had been provided for from the estate to an extend which encroached on the entitlement of the other beneficiaries. This is an option, however this court, has to bear in mind the fact that litigation should not be prolonged after identification of both the shares and beneficiary. It is therefore prudent for this court not to make provision for a dependant at this point in time, for the reason given that inadequate information has been placed before this court, firstly in terms of the entire value of the estate, and secondly in terms of the financial needs of all the would be beneficiaries especially the contending adults beneficiaries.
- (4) The best course to take herein is to fast track the disposal of the petition and cross petition proceedings to facilitate the identification of beneficiaries and their shareholding since there is only one issue presented for trial herein namely the entitlement or non entitlement of the cross-petitioner.
- (5) For the reasons given in number 1 above the application dated 9/12/2009 and filed on 10/12/2009 be and is hereby refused.
- (6) There will be an order for the matter to be fast tracked and heard on priority so that all the only issue raised is disposed off once and for all.
- (7) Costs will be in the cause.

**Dated, Read and delivered at**

**Nairobi this 12<sup>th</sup> day of March 2010.**

**R.N.NAMBUYE**

**JUDGE**