



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of David Zarembka (Deceased) (Succession Cause E543 of 2022)
[2024] KEHC 9619 (KLR) (Family) (7 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9619 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E543 OF 2022
SN RIECHI, J
AUGUST 7, 2024
IN THE MATTER OF THE ESTATE OF DAVID ZAREMBKA (DECEASED)**

RULING

1. David Zarembka died on 4.4.2021 at the age of 78 years old. Joy Mutani Zarembka and Thomas Mutindi Zarembka and Thomas Mutindi Zarembka filed for letters of administration in their capacity as daughter and son respectively. On 23.8.2022 they were issued with grant of letters administration dated 23.8.2022. The application Douglas Mbala Shikunzi filed this summons dated 2.3.2023 seeking the following orders:
 1. That this Honourable Court be pleased to certify this Application as urgent;
 2. That the Grant of Letters of Administration Intestate made to Joy Mutanu Zarembka and Thomas Mutinda Zarembka by this Honourable Court on 23rd August, 2022, in this Cause be revoked and/or annulled;
 3. That the Honourable Court declare the Applicant who was left out in the Petition for Grant of Letters of Administration Intestate as the deceased's surviving child with an equal right and entitlement as the Petitioners;
 4. That Further and/or in the alternative, the Honourable Court to issue an order varying the aforesaid Grant of Letters of Administration Intestate so as to include the Applicant as an Administrator of the deceased's estate, alongside the Petitioners;
 5. That the Honourable Court be pleased to issue an order preserving and/or protecting the estate of the deceased pending the hearing and determination of this Application;
 6. That the cost of this Application be provided for, and such other and further relief as this Honourable Court may deem appropriate under the circumstances.
2. The grounds for the application is that during the processing on issue of grant to respondents there was non-disclosure of material facts; by concealment of fact in particular that the applicant was a



- beneficiary of the estate as the deceased had assumed parental responsibility and that all the children of the deceased were not involved. The application is supported by the affidavit of the applicant sworn on 2.3.2023. In supporting affidavit he depones that the deceased Davide Zaremka (deceased) whom he divorced in 1992. Deceased then married Gladys Kamunya Achoria (also deceased). That he was not the biological son of deceased but was adopted by Gladys who was his aunt. That David took up parental responsibility of the applicant and he became a dependant. He therefore became a step son of the deceased and should be included in the administration of his estate.
3. The administrators opposed the application by filing a Replying affidavit sworn on 24.4.2023. The administrators depone that deceased married their mother and later Gladys Kamonya who are both deceased. Gladys Kamonya did not have any children with deceased. Gladys did not also have any biological children. The said Gladys took in the applicants but that the applicant was neither adopted by the deceased nor did the deceased take any parental responsibility to make the applicant a dependant.
 4. By Consent the issue distilled for determination was whether the applicant Douglas Mmbala Shikunzi is a child of the deceased by virtue of his marriage to Gladys Kamonya and therefore a beneficiary of the deceased's estate.
 5. By Consent the issue was canvassed by way of viva voce evidence Douglas Mbaara Shikunzi the applicant testified that his biological mother is Janet Makungu, who is currently married to one Ambani in Vihiga. Janet Makungu is the sister of Gladys Kamonye (deceased). Gladys Kamonya did not have biological children. She took in the applicant who was her sister's son as her child. Gladys was then married to the deceased. While David (deceased) and Gladys were staying together, the deceased David took in the applicant as his child and assumed parental responsibility by paying school fees at United States International University and accommodated him when applicant was studying at Webstar University United States. When applicant relocated to Kenya, David and Gladys allowed him to stay in their house at Greenspan. He testified that David used to refer to him as son and step son interchangeably.
 6. On being cross examined by Mr. Mwendwa for Petitions he confirmed that his biological parents are alive and that he started staying with Gladys when he was 20 years old and therefore an adult. He also confirmed that Gladys did not institute any adoption proceedings in respect to him. He confirmed that he is not mentioned in Deceased's book as a child and that in the obituary he was not named as a child and only recognized the Petitioners as the children.
 7. On the Green span house, he stated that it was bought by deceased and Gladys who allowed him to stay in the house to take care of the house. He confirmed that David in a letter to American Embassy for Visa application had stated that he was going to sponsor his education in the US. In respect to a company called Adozo Ltd he confirmed that a letter dated 29.12.2022 introduced him as a next of kin of Gladys. Joy Mutanu Zaremka testified that David was married to Rhoda and that they had 2 children – Joy and Thomas who are the Petitioners. He knew Douglas as a nephew of Gladys who was married to the deceased David. She confirmed that David was a generous man and would help people in need in payment of school fees.
 8. This is what happened in this case with Douglas but at no time did he acknowledge or take in Douglas as his son. This is clear from his book where he acknowledged the Petitioners and Gladys but does not mention Douglas as a son. Upon hearing the evidence, this court directed Counsel for parties to file written submissions which they did. M/s Bruyo for the applicant submitted that the basis of their application is that the applicant is a child of the deceased as the deceased had expressly recognized him as such and accepted him as a child of his own, assumed parental responsibility. Counsel submitted that the evidence to support this contention is that he referred to him as son or step-son in correspondence.



The deceased also sponsored applicant to relocate to the US where applicant stayed with him and when he relocated to Kenya Deceased gave applicant exclusive use of house in Nairobi and also farm in Vihigi to do farming. Counsel finally submits that by virtue of David's marriage to Gladys who had 'adopted' the applicant, applicant became a child of the deceased and therefore a dependant.

9. Mr. Mwenda for the Respondent/Petitioner submitted that the burden is on the applicant to show that the deceased had accepted him as a child of his own and assumed permanent parental responsibility. He submits that by the time deceased Gladys, the applicant was 21 years old and therefore an adult. The applicant has his biological parents alive and there are no proceedings of adoption or guardianship by Gladys. Counsel submits that applicant was recognized by the deceased as part of his extended family but he specifically recognized the Petitioners as his children in his book authored in 2011. Counsel submits that the applicant admits that his biological parents are alive and that when his time comes will inherit from them. Counsel submits that application is seeking to inherit from the estate of deceased and later his parent's property which will be double inheritance and therefore double or unfair enrichment.
10. From the evidence and submissions I find the following facts admitted or not contested:
 1. That the applicant is not a biological child of David and Gladys (deceased).
 2. The applicant is not a biological child of Gladys Kamonya but a son to her sister – Janet Makhungu.
 3. At the time of marriage of Gladys to David applicant was 21 years old and therefore an adult.
11. Is the applicant a dependant of the deceased? Section 29 of the [law of Succession Act](#) defines who a dependant of the deceased is. It Provides:
 - a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death:
 - b. such of the deceased's parents, step-parents, grandparents, grandchildren, stepchildren, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death. [Emphasis added]
12. Whereas in this case a person seeks the court to find that he is a dependant of the deceased the burden is on him to bring himself within the definitions of a dependant as per the provision of section 29.
13. Thus, in applying the aforementioned provision, the High Court in [FWK \(Guardian ad 'item for TK and SN Minors\) v MWM another](#) (Succession Cause E012 of 2021) [2022] KEHC 16610 (KLR) (20 December 2022) (Ruling) held that:

" The standard and burden of proof provided by the [Evidence Act](#) ought to be discharged: he who alleges must prove. Section 107 of the [Evidence Act](#) places the burden of proof on the party that alleges. In [Gatirau Peter Munya v Dickson Mwenda Kithinji 3 Others \(2014\) eKLR](#) the Supreme Court held inter alia: The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not ljust a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The



evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.

It is thus incumbent that the applicant do prove on a balance of probabilities that the minors were the biological children/dependants of the deceased" [Emphasis added]

14. The applicant admits that he is not the biological child of David the deceased. He was not also a biological child of Gladys Kamonya the wife David married. This contention is that the deceased as I understand is that the deceased took him as a child and that he treated him as such during his lifetime. To prove that he has to bring himself in the ambit of Section 3 (2) of the law of Succession Act which provides:

References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. [Emphasis added]

15. The application seeking to avail himself of the provisions of Section 3(2) must tender evidence to establish:
- a. e of the applicant.

Whether the deceased expressly recognized applicant as a child. On this limit the applicant both in his evidence and submissions contends that the deceased expressly recognized him as a child. He provided as evidence email dated 16/7/2014 in which he refers to as deceased refers to him as "our son" American Embassy dated 18.2.2000 in which he introduced him as a step son and that he will sponsor him as he studies in S.....college Washington DC.

16. The Petitioner contends that the reference to son and step son interchangeably shows that the deceased had not recognized him as a child. They contend that the deceased indeed in other documents including in his book only recognized the applicant as part of the Gladys family and only named the petitioners as his children in 2011.
17. While in some documents the deceased referred him as son or step son in the book authored in 2011 the deceased only named the Petitioners one douglas Kabaengwa and described him as among the people he adopted for the purpose of educating them. The applicant is not mentioned anywhere as a son. This is a book authored in 2011 and the deceased while acknowledging all others did not mention him as a son.
18. The deceased also recognized his former spouse, Ms. Rodah Wayua Zarembka, the mother of the petitioners, and her father, at page 318 of the book. It therefore goes without saying that the deceased was a sober and very transparent individual. Nothing stopped him from recognizing the objector as a child by whatever means he had acquired that relationship with him.

b. Whether the deceased voluntarily assumed the permanent parental responsibility.

19. The applicant contends that David the deceased voluntarily assumed permanent parental responsibility. He avers that during his lifetime the deceased took up the responsibility of paying for his education, hosted him in his house while in the united states and gave him exclusive use and possession of the house at Greenspan LR Nairobi/Block 82/8759 and use of Land Isakho/Lubao 2034 for agricultural purposes.



20. The respondents while admitting that the deceased undertook to support the applicant in his education, they point out to the generosity of deceased not only to the applicant but to other deserving people. In respect to the applicant's occupation of Greenspan house they aver that he was a caretaker on behalf of the deceased who was staying in the states. They submit that there is no evidence that deceased David gifted the house to the applicant.
21. For an applicant to avail himself of the provision he must demonstrate the parental responsibility assumed by the deceased and secondly that he voluntarily did so and finally it was of a permanent nature. In this application the applicant stated that deceased undertook to pay education expenses for him at USIU and in the U.S. He admits he was 21 years old then. The payment of school fees to a person does not in my view alone show that the payer has assumed parental responsibility and that the recipient is a child for purposes of succession. Kenyans in their generous nature pay school fees for needy children as undertaking to fund education expenses to deserving children. If that was so, our philanthropists who out of generous heart support needy students will upon their desks be swarmed by beneficiaries of the generosity claiming a share of their estate.
22. The great Kenyan Philanthropist Maria Chendaoki will be having thousands of 'children' claiming beneficial interest in his assets. On the issue of occupying the deceased's house in Greenspan as a ground for showing that David took parental responsibility.
23. I find that without basis as it is clear and he admits that he was given occupation temporarily while taking care of the property. An application who avers that the deceased assumed parental responsibility, he must show that it was permanent, temporary, periodic and occasional. Support does not amount to assumption of permanent responsibility.
24. The *law of Succession act* makes provision forby a child of the deceased who is recognized as a dependant where a child is not the biological child he can only inherit from the deceased if the deceased recognized or accepted the child as his own or voluntarily assumed permanent parental responsibility of the person. I do not find that the deceased David assumed permanent responsibility over the application. I therefore find that the application Douglas Mmbala Shikuunzi is not a dependant of the deceased David Zarembka and therefore not a beneficiary to his estate.
25. Having found that the applicant Douglas Mmbala Shikuunzi is not a dependant and beneficiary of the estate of David Zambka, find that Summons for revocation dated 2nd March 2023 without merit and is hereby dismissed. Each party to bear his or her own costs.

DATED AT NAIROBI THIS 7TH DAY OF AUGUST 2024.

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S. N. RIECHI

JUDGE

