



REPUBLIC OF KENYA



**In re Estate of James Kagwa Murungu (Deceased) (Succession Cause
13 of 2020) [2023] KEHC 1148 (KLR) (6 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 13 OF 2020
JN ONYIEGO, J
FEBRUARY 6, 2023**

BETWEEN

IRENE CAROLA GOSSMAN APPLICANT

AND

STEPHEN MUSYOKI WAMBUA OBJECTOR

AND

ESTHER WANJIRU MURUNGU RESPONDENT

RULING

1. The deceased herein died intestate on May 3, 2019 while domiciled in Munich Germany where his body was cremated and the remains sent and buried in Kenya. Consequently, Esther wanjiru Murungu claiming to be his mother petitioned for a limited grant of letters of administration Ad colligenda bona vide kwale Cm's court succession petition No 16 of 2019. Subsequently, the said grant was issued on July 31, 2019 to the said Esther who claimed to be the sole survivor to the deceased as the deceased had no wife nor children.
2. Later, one Irene Carola Gossman claiming to be the widow to the deceased filed a summons dated September 30, 2019 before the high court at Mombasa vide succession cause no. 30 of 2019 seeking revocation of the grant issued in Kwale CM's court on grounds that it was obtained fraudulently and through concealment and non-disclosure of material facts thereby failing to disclose that the deceased had a wife who in law had the right in order of priority to petition for a grant. She also prayed for Esther to render an accurate account of the administration of the estate and that she be appointed as the sole administrator.
3. After hearing the said application, the court delivered its ruling on January 17, 2020 thus upholding the same. Consequently, on March 3, 2020, Irene proceeded to petition for a full grant through



succession cause No.13 of 2020 in which she listed herself as the sole beneficiary. A grant of letters of administration intestate was made and issued on June 10, 2021.

4. Before the grant could be confirmed, Irene the administrator died thus leaving the estate without an administrator. Subsequently, Esther wanjiru mother to the deceased claiming to be the sole surviving beneficiary to the estate filed a petition dated January 20, 2023 seeking a limited grant of letters of administration Ad colligenda bona for purposes of collecting and preserving the estate which was allegedly going into waste and being mismanaged by a caretaker by the name of musyoki Stephen. She also sought orders directing the said Musyoki to render a true statement of accounts in respect of the rent collected from the estate; keys to mvs KBR252 toyota, KBE 142L nissan matatu KAW 362 N be deposited in court; original title deeds in respect of plot No 1179, 1199 and 730 Diani be deposited in court and, equity bank Diani branch be directed to provide a statement of accounts in respect of the deceased 's account/s held therein.
5. The application is anchored on the averments contained in the affidavit in support sworn on January 20, 2023 by the applicant and grounds set out on the face of it. The application is basically hinged on the ground that the deceased having not left a child to inherit his estate and the only wife having died, she was the only immediate and close relative in order of consanguinity to take out a grant of representation and therefore inherit the estate.
6. Having been served with the application, the care taker one Stephen Musyoki filed a replying affidavit sworn on January 25, 2023 thus stating that a grant of letters of administration ad colligenda bona issued to the applicant Esther Wanjiru had on January 17, 2020 been revoked by the Hon Thande J in succession case No 30 of 2019 hence the applicant cannot seek another one. He claimed that on February 12, 2020, the late Irene did appoint him through a power of attorney as her estate manager with powers to collect rent and deposit the same in the bank and undertake maintenance of the estate.
7. He went further to state that after Irene died, her brother Gunter Richard Gossman was appointed by a Germany court as the administrator of her estate hence the person with the power to inherit the estate of his sister.
8. When the matter came up for hearing, Mr Rene for the applicant basically adopted the averments contained in the affidavit in support of the application. Equally, Mr Tindi reiterated the content of the replying affidavit.
9. I have considered the application herein and the response thereof. The only issue for determination is whether the applicant has satisfied the grounds for grant of letters of administration ad colligenda bona. There is no dispute that the deceased left his wife Irene now deceased as the only person surviving him. Unfortunately, the deceased and Irene were not blessed with any child biological or otherwise. It is true that justice Thande did and correctly so, revoke a grant originally given to the deceased's mother Esther by the kwale court. Indeed, the mother was not entitled to take out a grant while the deceased's wife was still alive.
10. However, the situation has since changed with the death of the wife to the deceased. The question is, who then takes precedence in replacing Irene? Or, in the absence of children or a spouse, who is next in rank in order of priority? To answer that question, section 66 of the law of succession will come to play. Section 66 does provide as follows;

“Preference to be given to certain persons to administer where deceased died intestate-

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration



shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference -

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

11. Courts have severally held the position that a trial court has the ultimate discretion in the appointment of an administrator subject to the guidelines spelt out under Section 66 of the Law of Succession Act. In Re estate of Muthoni Njoroge (deceased)(2021)eKLR and In re Estate of Festo Akwera Kusebe(deceased)(2019)e KLR both courts upheld the position that under section 66 of the LSA, a spouse ranks in priority in petitioning for a grant of representation.
12. It is apparent from the above quoted provision and case law that in the absence of a spouse or children to the deceased, a parent is the next person to petition for a grant. In the circumstances of this case, there is no child nor wife surviving the deceased. To that extent, the applicant herein being the mother to the deceased pursuant to Section 39 of the law of Succession Act is the only immediate person to take out a grant. The care taker has no right to claim any beneficial interest over the estate. The question of having been appointed as an estate manager by the deceased is deemed to have extinguished with her death. The alleged power of attorney appointing him as the estate manager determined with the death of the deceased as the donor.
13. The claim that there is a brother to Irene who has been appointed as an administrator in Germany in respect of the estate of Irene is neither here nor there. Irene's estate is independent of the deceased's estate hence Gunter Richard cannot claim the right to administer the estate of the deceased his brother in-law.
14. Having held as above, the next question is whether the orders sought can apply. An application for a limited grant ad colligenda bona is clearly provided under section 67 of the law of succession Act which provides that;

“Notice of application for grant
 - (1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.
 - (2) A notice under subsection (1) shall be exhibited conspicuously in the court-house, and also published in such other manner as the court directs.
15. It is true that currently, the estate is without an administrator. Obviously, it is likely to go into waste or mismanaged. The care taker is not answerable to the court as he is not an administrator hence not a court agent. However, the correct procedure would have been to have the grant revoked under Section 76 (e) of the law of succession and then followed by issuance of a grant debonis non. Since the grant



has become useless and inoperative, the same has to be revoked first under Section 76(e) of the *law of Succession Act* before issuing any other grant. There cannot be two grants at the same time. In exercise of the discretionary powers bestowed upon this court, and further given the inherent powers donated to this court by section 47 of the *law of succession Act*, I am inclined to revoke the grant herein which has become inoperative and useless under section 76(e) and issue a grant of letters of administration debonis non to the applicant herein Esther Wanjiru instead of the ad colligenda bona.

16. Consequently, the appointed administrator shall with immediate effect start administering the estate which shall include collecting and depositing in court all rental income collected from the estate pending confirmation of the grant. She shall where necessary spend reasonable amount to maintain the estate. The current caretaker Mr. Stephen Musyoki shall take an inventory of all the deceased's assets and hand them over to the new administrator.
17. The appointed administrator to apply for confirmation of the grant as soon as possible.

Dated, signed delivered virtually at Mombasa this 6th day of February 2023

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J.N.ONYIEGO

JUDGE

