



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 16 OF 2018

IN THE MATTER OF THE ESTATE OF MARK KIPTARBEI TOO

SOPHIA JELIMO.....1ST PETITIONER

AND

MARY JEPKEMBOI TOO.....1ST OBJECTOR

MOSES KIPROTICH TOO.....2ND OBJECTOR

CHEPKOECH TOO.....3RD OBJECTOR

SAMMY WAKI MULILI.....4TH OBJECTOR

ALI MARK KIPTARBEI TOO.....5TH OBJECTOR

ARAFAT MOHAMMED BAKARI.....6TH OBJECTOR

AND

ELIZABETH JEPKOECH TOO & 5 OTHERS.....1ST INTERESTED PARTY

JENIFFER JEBET TOO.....2ND INTERESTED PARTY

DANIEL KIPCHIRCHIR TOO.....3RD INTERESTED PARTY

SANDA JEROP TOO.....4TH INTERESTED PARTY

KEVIN KIPKEMOI TOO.....5TH INTERESTED PARTY

SHARON JEPCHUMBA TOO.....6TH INTERESTED PARTY

RULING:

What is pending before the court is an application dated 14th January 2021 seeking order that the Court be pleased to release kshs. 960,000/- to cater for tuition, subsistence and other overheads for the 6th Objector plus kshs. 140,000/- to enable him to purchase a laptop for studying at college. Further, that the court be pleased to issue any such further orders it may deem fit and orders as to costs.

The application was opposed by the 1st and 2nd objectors vide a grounds of opposition dated 5th February 2021 where they opposed the application on the grounds that such maintenance orders could not be issued as the estate has no appointed executor or administrator to execute any such orders. Further, that the paternity of the 6th objector is contested and only when that issue is resolved can such an application be considered. The application is also opposed on the grounds that the application is bad in law and premature.

APPLICANT'S CASE

The applicant contends that he is a biological son of the deceased who had a relationship with Fatuma Ramadhani Hassani who was his

mother. That after a short relationship in 1999 the 6th objector was conceived. The applicant's mother lost contact with the deceased and relocated to Eldoret.

The 6th objector filed a suit at Milimani Children's Court vide case No. 190 of 2011. The deceased swore an affidavit that he was stable and undertook to contribute a monthly upkeep of kshs. 100,000/- for the objector. He made direct deposits of school fees to the 6th objector's former high school, Ofafa Jericho High School

The deceased requested a DNA test to ascertain if the 6th Objector was his biological son. The results came out positive as 99.99%. He accepted the results and continued providing 100,000/- per month as upkeep. It is not in dispute that the deceased recognized the 6th objector as a biological son and continued to support him until his demise. The constitution and cap 160 provides on how and who is to benefit from the estate of a deceased person and the 6th objector is entitled to an equitable share from his father's estate.

The applicant submits that the constitutional basis of the application is articles 53(1), Article 10(1)(2) and Article 21(1)(3) of the constitution. The applicant also relies on the Vienna Declaration and Programme of Action, World Conference on Human Rights Vienna 14-25 June 1993, the Preamble, articles 5,18,45,46,47,48,49,50,51, & 52. Further, the applicant has relied on the Preamble, article 10(3) of the UN International covenant on Economic, Social and Cultural Rights which state special measures of protection and assistance should be taken on behalf of all children and young persons without and reasons of parentage or other conditions.

The applicant relies on the preamble, article 2 of the African Charter on Human and People's Rights, Convention on the Right of the Child and the African Charter on the Rights and Welfare of the Child. The applicant has cited section 4 as read with section 28 of the Children's Act which recognizes the paramount interests of young persons and this can be extended beyond their 18th birthday.

The applicant relies on the case of in Re Estate of John Musambayi Katumanga – Deceased (2014) eKLR, the case of In Re Estate of PWM (Deceased) [2016] eKLR and the case of In Re Estate of Jonathan Kipruto Chemjor (Deceased) [2020] eKLR in support of its submissions.

There are no justifiable reasons why the orders sought should not be granted.

RESPONDENT'S CASE

The 1st and 2nd objector filed submissions on the application. They also opposed the application vide a grounds of opposition dated 5th February 2021.

The respondents submit that maintenance orders cannot be granted as there is no administrator in place to execute any such orders. The respondent cites the case of the Estate of Damaris Njeri Kimani (Deceased) [2014] EKLR and submitted that the application is unmerited and should be accordingly dismissed.

The issue of paternity of the applicant is contested and unresolved. Going by the birth certificate filed in the applicant's list of documents dated 1st December 2020, the name of his father is indicated as Mohammed Bakar Khalid and not the deceased herein.

The applicant has not made any attempt to prove his dependency on the deceased prior to his death as would be required under section 29 of the Law of Succession Act. Until the issue of paternity is resolved, no maintenance orders can be issued as was held In Re Estate of Njue Kamunde (Deceased) [2018] eKLR. The respondent further contends that the application is premature as was held in the case mentioned.

The application is marred with untruths as exhibited by the glaring inconsistencies therein. The transcripts provided indicate that the date of admission to the University was 28th August 2018, the letter of admission itself is dated 28th January 2020 and indicates therein that the orientation programme begins on January 15th 2020; the transcripts indicate the course being administered as Diploma in International Relations and Diplomacy while the admission letter indicates the applicant has been admitted to pursue a bachelor's of arts in international relations and diplomacy. It is doubtful whether the applicant is indeed a student as alleged and whether the documents provided are genuine.

The applicant should bear the costs of the present application given that he has not put forth a case for him being entitled to the orders sought.

ISSUES FOR DETERMINATION

1. Whether the maintenance orders can be issued as the estate has not appointed an administrator.
2. Whether the 6th respondent is a beneficiary of the estate.
3. Whether the orders sought should be granted.

Whether the maintenance orders can be issued as the estate has not appointed an administrator:-

In the case of **In Re Estate Of Damaris Njeri Kimani – (Deceased) [2015] EKLR** the court held;

12. No further orders should be made with respect to the administration of the estate of the deceased before administrators have been appointed or at any rate before a petition for grant has been filed. I even doubt whether the orders now in place are enforceable where they were made on the basis of a citation...

13. ...Orders for her maintenance cannot equally be made so long as there is no administrator in place for there would be no one to execute them.

I am inclined to agree with the decision cited by the respondent and conclude that the orders for maintenance are premature as an administrator is yet to be appointed.

Whether the 6th respondent is a beneficiary/defendant of the estate:-

Section 29 of the law of Succession Act provides;

For the purposes of this Part, "**dependant**" means—

(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, grand-parents, grandchildren, step-children, 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.

The applicant did not annex any proof that the 6th objector is the son of the deceased. The birth certificate in the bundle of documents has the name Mohammed Bakar Khalid as the father of the objector not the deceased. That notwithstanding, the same has not been annexed to the supporting affidavit.

The applicant has not provided the DNA test referred to and therefore paternity is in dispute.

The applicant has not proven that he is a dependant of the estate.

Whether the orders sought can be granted: -

The applicant has not proven that he was a dependent of the deceased. Paternity is also contested. Given that the same has not been determined, the application is premature. Lack of an administrator leaves us with no one to enforce such orders if granted.

In the premises, the application fails in its entirety.

Costs be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 15th day of April, 2021.

In the presence of:-

Mr. Ondieki for the proposed beneficiary.

Mrs. Ndirangu for the objector.

Mr. Mburu for the 1st Petitioner and the 2nd interested party.

Miss Otieno for the 2nd petitioner (1st interested party, 3rd and 7th).

Ms Gladys - Court assistant