



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. E3 OF 2020 Ad Colligenda**

**IN THE MATTER OF THE ESTATE OF THE LATE ROSE NGONYERE IMBAGWA (DECEASED)**

**B E T W E E N:**

**FLORENCE ENGESIA LIKUVI.....PETITIONER/APPLICANT**

**AND**

**(1) NICODEMUS KWAYERA OMAROW**

**(2) KENYA BANKERS SAVINGS AND**

**CREDIT CO-OPERATIVE SOCIETY LIMITED.....RESPONDENTS**

**R U L I N G**

1. The Court has before it an application filed under a certificate of urgency. The Applicant is a Florence Engesia Likuvi. She is petitioning the court for Letters of Administration ad colligenda bono and/or Limited grant for special purposes under **Section 67 of the Law of Succession Act and Rule 36(3) of the Probate and Administration Rules Cap 160 Laws of Kenya**. The Applicant is asking the Court to grant her letters of administration ad colligenda bona of the Estate of the Deceased, Roade Ng'onyere Imbwaga who died domiciled in Sheywe sub-location in Butso on 21<sup>st</sup> September 2019. The Applicant filed her Petition on 11<sup>th</sup> November 2020. On 12 November 2020 the Court gave directions that the Petition is served on the Respondent. Service was not effected until 9<sup>th</sup> February 2020

2. The Applicant says she is the mother of the Deceased and also her next of kin. She states her position in her Petition thus, *“I present this petition in my capacity as the mother and a dependant and or next of kin of the said deceased and by reason of the fact that owing to the special circumstances of the case and the urgency of the matter... (which is) so great that it would not be possible for the court to make a full grant to the person who is by law entitled thereto in sufficient time to meet the necessities of the estate of the deceased.”* The Petitioner's case is premised on the following allegations described as facts:

- (1) That she is the next of kin to the Deceased;
- (2) That she has better right to Petition than the Widower and/or Daughter of the Deceased
- (3) That she was a dependant of the Deceased;
- (4) That she is being prevented from Petitioning by the Husband/Widower of the Deceased;
- (5) That she has been named as the next of kin/beneficiary in certain documents
- (6) That she is in fact the next of kin and the daughter of the Deceased is dependant on her
- (7) That she is seeking a limited grant. She asserts that the Deceased died intestate. She says she does not have a death certificate and only became aware of the date of death from the funeral programme.

3. However in paragraph 2 of the Petition she discloses an intention to administer the whole of the Estate of the Deceased. The part of the Estate that the Applicant in which the Applicant shows particular interest are (a) Shares in the Kenya Bankers SACCO, (b) death gratuity and employment benefits (yet to be ascertained), (c) savings held in the SACCO (yet to be ascertained) and (d) a piece of land (yet to be

ascertained). The Applicant has also exhibited a letter from the Chief of West Maragoli Location.

4. The Applicant says the Deceased was employed by Guardian Bank. The Applicant also asserts that she filed a Succession Cause for Citation No. 3 of 2020 wherein on 22<sup>nd</sup> October 2020 Hon Mr Justice Njagi gave her leave to file a formal application to be allowed to petition. However, she decided to take this route because she does not have money to petition. The Application has exhibited a consent from Faith Selfa Kwayera who is said to be a person of equal or lesser priority, consenting to the Petition by the Applicant. The Consent is signed by Faith Selfa Kwayera. Her birth certificate is exhibited and it demonstrates that the First Respondent is her Father. The Birth Certificate for the Deceased is also exhibited. Surprisingly it was issued in 2017 whereas the Deceased was born in 1974 (according to that certificate). The Applicant asserts that the Respondent was served with the citation and “**he has done nothing**”. The form supposedly showing allocation, has been completed by the Petitioner and not the Deceased. Had the Deceased given instructions as to who would receive those shares on her death, such a document would be held by the SACCO.

5. The Respondent filed his Replying Affidavit on 23<sup>rd</sup> February 2021. He opposes the Application. The Respondent puts forward the following grounds:

(a) He was the husband of the Deceased. He married the Deceased under Luhya customary law on 24<sup>th</sup> December 1997. He has paid the dowry

(b) His daughter is in her second year at JKUAT University and he is maintaining her by paying her school fees and other school needs

(c) He has already filed a Petition in the Kakamega Chief Magistrate’s Court **Succession Cause No. 387 of 2020** but for some reason it has not yet been gazetted

(d) The Petitioner is not a beneficiary of the Estate in particular the benefits from the Deceased’s former employer, Guardian Bank, Biashara Street.

(e) The Petitioner/Applicant is entitled only to the Kenya Banker’s Sacco Shares

6. This matter came before the Court for hearing on 8<sup>th</sup> June 2021. The Petitioner and her representatives, confirm they rely on what was said in the Application. On the basis of the facts before the Court:

(1) The Petitioner has failed to demonstrate that she is the person entitled to Petition, the spouse and child of the Deceased rank higher than her in priority to petition;

(2) The Petitioner has demonstrated that she is a person not fit to act as an administrator. Her statement that the First Respondent has refused to petition is untrue

(3) The Petitioner has failed to demonstrate that she maintains the Deceased’s Child,

(4) The Petitioner has failed to comply with the Orders made in **Succession Cause No. 3 of 2020** and sought instead to take a route where payments were sought without the transperance of a process subject to gazetteement.

7. The Court has called for the files in **High Court Succession Cause No. 3 of 2020** and **Chief Magistrate’s Court Succession Cause No 387 of 2020**. From those two files we find that the Petitioner, Florence Engesia Likuvi and Faith Selfa Kwayera filed a Citation against the Respondent Nicodemus Kwayela under **Rule 21 of the Probate and Administration Rules**. The Petition was filed on 31<sup>st</sup> January 2020. The Two Citors filed a joint affidavit of verification. In that affidavit she said “...*NICHOLAS NICODEMUS KWAYELA, the Citee herein has refused to take out letters of administration and or co-operate with us ..... he is also suck on the death certificate of the deceased and what we have as proof of death is the funeral programme.*”.

8. The second file demonstrates that on 19<sup>th</sup> September 2020 the Respondent herein Nicodemus Kwayelah filed a Petition for the grant of letters of administration, for the Estate of Rose Nkonyere Imbwaga. Unfortunately, the Petition contains an error in relation to the name of the Deceased, however the Affidavit in Support sets out the correct position. The Petitioner names himself and his daughter as the beneficiaries. The assets are valued at One million Kenya Shillings (KSHS.1,000,000.00). The Death Certificate No 0924911 is exhibited. The Petition was advertised in the Kenya Gazette on 12<sup>th</sup> February 2021. On 18<sup>th</sup> March 2021 the Letters of Administration were issued to the Petitioner. On 8<sup>th</sup> April 2021, the Applicant’s Advocates entered appearance on behalf of Faith Selfa Kwayera as Objector and requested an opportunity to read the file. The Application for letters of administration ad colligenda, where it is grounded on a factually true basis, has been superseded by events. Under **Section 66** of the **Law of Succession Act**, the Spouse of the Deceased takes precedence.

9. In his Replying Affidavit, the Respondent states “*THAT according to my knowledge and since my mother-in-law was allocated shares at Kenya Bankers Savings and Credit Co-operative Society Ltd. I felt that I should process the deceased’s benefit to enable my daughter to complete her Education.*”. In the circumstances, the grounds of the application are not made out.

10. For those reasons the Petition is dismissed with costs payable on an indemnity basis.

11. Further, it is declared that the Petitioner, Florence Engesia Likuvi is not a fit and proper person to petition, in the event the First Respondent does not complete the process.

12. It is further ordered that this File shall be consolidated with Succession Cause No 3 of 2020 and both files shall be transferred to the Chief Magistrates Court to be heard with CM's Succession Cause No 387 of 2020, as that was the appropriate jurisdiction for an Estate of KShs. One Million only. The High Court Files are closed.

Order accordingly,

**FARAH S.M. AMIN**

**JUDGE**

**DELIVERED, SIGNED AND DATED IN KAKAMEGA ON THIS THE 3RD DAY OF JUNE 2021 BY MEANS OF MS TEAMS PLATFORM**

In the presence of:

Petitioner/Applicant:

Respondent:

Court Assistant: