



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 681 OF 2002**

**IN THE MATTER OF ESTATE OF KENNETH NJAGI JOSIAH (DECEASED)**

**DEBORA WARUE NJERU.....APPLICANT**

**VERSUS**

**JOSIAH KARIUKI NGARI.....1<sup>ST</sup> RESPONDENT**

**SHEILLAH IMELDA KARIMI.....2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. The applicant herein filed the instant application dated 17.12.2019 and wherein she seeks that this court do substitute herself as the administrator of the estate of the deceased herein in place of Mariam Gachoki Njeru the current administrator who is now deceased and that the powers of Mariam Gachoka Njeru (now deceased) under the grant in respect of the estate of the deceased herein be vested to her. She further prayed for the costs of the application to be in the cause.

2. The applicant's case is that a grant of letters of administration was made to Mariam Gachoki Njeru on 3.12.2002 but the said administrator died before the completion of the process of administration. That the applicant is desirous of completing the said process and all the other beneficiaries have consented to her appointment/ substitution as the administrator in place of the said Mariam Gachoki Njeru who was her mother.

3. The respondents opposed the application and in so doing raised a preliminary objection under section 81 of the Law of Succession Act on the grounds that the court appointed three administrations and there are two living administrators capable of administering the estate of the deceased herein and further that the powers and duties of Mariam Gachoka Njeru abated upon her demise and they cannot vest on the applicant who is a stranger to the estate being a sister of the deceased Kenneth Ngari Josiah.

4. The parties took directions to canvass the application and the Preliminary Objection simultaneously by way of written submissions.

5. The applicant submitted that she is the sister to the deceased herein and the daughter to the late Mariam Gachoka Njeru and who is now deceased. Further that the Law of Succession Act provides that the powers and duties of the personal representative vests on the survivor on death of one of them and that such an administrator cannot be substituted unless there is a good reason. Reliance was made on the case of **Nelson Muchangi Wachira –vs- Dadson Githinji Wachira & another (2006) eKLR.**

6. That the good reason warranting substitution of the deceased administrator is the fact that there is need to complete the administration process and further that the respondents are intermeddling with the estate and which intermeddling has been reported to Siakago Police Station and an application in that respect filed in this court. It was further submitted that all the other beneficiaries had consented to the applicant being made the co-administrator save for the respondents herein who are hell bent on misappropriating and intermeddling with the estate of the deceased herein and who have abused their powers and duties under the law.

7. The respondents on their part filed their submissions and wherein it was submitted that under Section 81 of the Law of Succession Act, where there is death of one of several administrators, the powers and duties of such administrator vests in the surviving administrators and substitution of a deceased administrator is required only in instances where there has been a grant of letters of administration which involves continuing trust and there is a sole surviving administrator who is not a trust corporation. As such, it was submitted, since there are surviving administrators, the powers of the deceased administrator shifted to the surviving administrators (respondents herein).

8. Further that since there was no continuing trust in the instant case, there is no justification for the applicant being made a co-administrator. Reliance was made on the case of **Simon Kinuthia Kariuki –vs- Benson Kimani & 2 others (2005) eKLR** Further that the applicant is a

stranger to the estate as she is not a child of the deceased but the sister and thus she has no vested interest on the deceased's estate and neither is she a dependant of the estate within the meaning of Section 29 of the Law of Succession Act.

9. It was submitted further that, the applicant had not tendered evidence to prove that the beneficiaries had consented to her being made a co-administrator and that she is not a honest person. Further that the respondents herein are children of the deceased person herein and thus they have greater priority over the estate herein as opposed to the applicant and as provided for under Section 66 of the Law of Succession Act.

10. I have considered the application, the preliminary objection raised by the respondents and the rival written submissions.

11. As I have already pointed out, the applicant seeks that she be substituted in the place of her mother who was a co-administrator of the estate herein and being the mother of the deceased whose estate is subject of these proceedings. It is not in dispute that the respondents are children of the said deceased and neither is it in dispute that the respondents are both surviving co-administrators of the deceased's estate. The deceased died on 13.02.1999 and by virtue of section 4 of the Law of Succession Act, his estate and administration thereof is subject to the provisions of the Law of Succession Act. **Section 81** of the said Act provides that; -

***“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:***

***Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.”***

12. What is clear from the above provision is that the Act does not contemplate substitution of a deceased co-administrator. The powers and duties of such deceased co-administrator vests in the surviving co-administrator. As such, in the instant case, upon the death of Mariam Gachoka Njeru, her duties and powers automatically and by operation of law vested in the surviving co-administrators. From the wording of the section, there is nothing like substitution unless there is a continuing trust and there is only one surviving executor or administrator in which case the court shall appoint additional executor or administrator.

13. In the persuasive authority of **In re Estate of Tuaruchiu Marete (Deceased) [2019] eKLR**, Justice F. Gikonyo expounded on the instances where an additional administrator can be appointed to substitute a deceased administrator. The Learned Judge held that;-

***“[11] There are however situations where an additional administrator should be appointed. For instance where there is a resulting trust, a sole surviving administrator is required to apply for an additional administrator to be appointed which failing the court will appoint on its own motion. Similarly, where the intestate is polygamous, death of one of the administrator may require a replacement for purposes of the house he represented. Or for a good cause and in the best interest of all persons concerned the court may appoint an additional administrator of an estate. This is in discretion under section 66 of the Law of Succession Act. Therefore, there is no complete prohibition of appointing another administrator in addition to a surviving administrator or administrators. Nothing wrong in the appointment of the first administrator herein.”***

14. It therefore means that where there is good cause and in the best interest of all the persons concerned, the court may appoint an additional administrator where one of the co-administrators is deceased. In the instant case, the applicant submitted that the respondents are intermeddling with the estate of the deceased and which matter has been reported at Siakago Police Station and thus misusing the powers bestowed upon them by this court and as such it is in the interest of justice that this court do intervene and appoint the applicant as a co-administrator so as to ensure the completion of the process of administration. This was the “good cause” which the applicant relied on in justifying the application herein.

15. Indeed, intermeddling with the estate of a deceased person is a criminal offence created under section 5 of the Law of Succession Act. However, it is trite that a criminal case must be prosecuted in a criminal court and evidence tendered to the standard of “beyond any reasonable doubts.” Before this is done, the suspect (alleged intermeddler) is always presumed innocent. In the instant case, apart from the applicant alleging intermeddling, there is no evidence of any conviction on the part of the respondents for the same. Despite the applicant having filed an application dated 19.11.2020 seeking orders that the respondents be held guilty of the offence of intermeddling, the same has never been prosecuted and neither is there any sufficient evidence to persuade this court that, beyond any reasonable doubt, the respondents are intermeddling with the estate. I say this while being aware of the fact that this is not a criminal court to determine on the said offence.

16. Further, I note that the applicant is a sister of the deceased. She seeks to be appointed as a co-administrator of the deceased's estate so as to administer the estate with the children of the deceased. Section 66 of the Law of Succession Act provides for the general guide as to who should be appointed as an administrator of the estate of a deceased person. As the respondents rightfully submitted, she ranks lower in priority than the respondents herein. It is therefore not clear as to why she wants to administer the estate of his deceased brother whereas there are surviving children of the deceased.

17. In my view, she has no interests in the said estate which can warrant granting of the orders sought. From the Chief's letter dated 22.11.1999 and which was annexed to the petition for letters of administration, it is clear that the deceased was survived by six (6) children and at that time, the youngest was ten (10) years old. Such a person is as at the date herein more than thirty (30) years old. If the children feels that the estate of their father is being mismanaged, they are the ones who ought to come to court for orders that they be appointed as co-administrators or even for the respondents to be removed from their office.

18. However, that is not the case in the instant case. Despite the applicant having deposed that the beneficiaries have consented to her being a co-administrator of the estate, there is no such consent which was attached to the application and nor did the said beneficiaries swear any affidavit in support of the applicant's application or giving away their rights to be appointed as administrators. In **Nelson Muchangi Wachira v Dadson Githinji Wachira & another (supra)**, Khamoni J held that; -

***“.....It is not enough for the Applicant Nelson Muchangi Wachira to depone in his affidavit that other beneficiaries have consented. It is important for each beneficiary to confirm that position through his affidavit. The Applicant may have consented to replace the administrator in question but that is not enough.....”***

**19.** It is my view that, irrespective of the fact that this court has discretionary power to substitute a deceased co-administrator in the circumstances as were discussed by the court in **In re Estate of Tuaruchiu Marete (Deceased) (supra)**, in the instant case, the applicant did not proffer a good cause to warrant this court to grant the orders sought herein.

**20.** The application therefore fails and it is hereby dismissed.

**21.** However, this being a succession cause and pitting an aunt against her nieces, each party shall bear her own costs.

**22.** It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF JULY, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondents