

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1292 OF 2019

IN THE MATTER OF THE ESTATE OF JOSPHAT OBED NYAGA NJIRU (DECEASED)

FAZIRATI AYUBU NYAGA.....1ST PETITIONER

JOSEPH MUTHIKE NJIRU.....2ND PETITIONER

-VERSUS-

EUNICE WAITHERA NYAGA.....OBJECTOR

RULING

1. The deceased Josphat Obed Nyaga Njiru died intestate on 14th May 2019. On 3rd October 2019 the petitioners Fazirati Ayubu Nyaga and Joseph Muthike Njiru filed this petition seeking the grant of letters of administration intestate. They indicated that they were the widow and brother, respectively, of the deceased. They swore that the deceased had left two daughters (Loise Penina Wakathare and Maryam Wakathare Nyaga) and two sons (Michael Ciuri Nyaga and Ismael Ciuri Nyaga).

2. The objector Eunice Waithera Nyaga filed an objection to the making of the grant to the petitioner on the basis that she was the other widow of the deceased, and mother to Loise Penina Wakathare Nyaga and Michael Ciuri Nyaga whom the petitioner had indicated were beneficiaries of the estate of the deceased. She stated that her existence and status were known to the petitioners, and that since the deceased's death several meetings had been held between them to find a solution to the estate. She complained that the 1st petitioner had not indicated the entire estate of the deceased, and that she had disposed of some of the properties of the estate.

3. The objector and her daughter Loise Penina Wakathare Nyaga filed a cross-petition for letters of administration intestate. In it was annexed the deceased's funeral announcement and programme that showed that the deceased had the objector as 1st wife and 1st petitioner as 2nd wife. The response by the 1st petitioner to the cross-petition was that when the deceased married her in 2009 she found the two children whom the deceased had had with an estranged woman. She admitted that there had been several meetings following the deceased's death. She complained that she had not been consulted during the funeral arrangements. Then she had sold the livestock because it had become difficult to take care of them. She stated that she had been doing business and operating a joint account with the deceased at National Bank.

4. In the present application dated 3rd May 2021 the 1st petitioner sought a special limited grant to enable her access the deceased's Kenya Commercial Bank account No. xxxxxx to pay Kshs.193,400/= to pay school fee for her minor children at Makini School; Kshs.60,000/= per term to pay school related expenses for the minors; and Kshs.60,000/= per month to pay for the children's upkeep. This was opposed by the objector who herself said she was a retiree who sought upkeep of Kshs.60,000/= per month. She, however, did not file application to seek the amount. The 1st petitioner was apprehensive that her twin minors who were aged 11 and in class 5 stood to suffer as she was already in fees arrears and there was danger of the children being kicked out of school. She annexed the children's birth certificates, evidence of school fees arrears and evidence of related expenses.

5. When the petition and cross-petition were filed there was indication that the deceased had an account at the Kenya Commercial Bank. It was, however, not known how much was in the account, and therefore it is not known if the account could service the demands of the 1st petitioner.

6. The fact that two deceased's children by the 1st petitioner attend Makini School was admitted by the objector. She, however, swore that prior to the deceased demise he had taken out both a life insurance cover and an education cover to cater for the children. In either case, she stated, the 1st petitioner was the nominee. When the deceased died, she said, the 1st petitioner had received Kshs.4,000,000/= on account of the life cover and had lodged a claim to receive the education cover proceeds. Further, the 1st petitioner was receiving rental income from some of the deceased's assets at Embakasi. Lastly, when the deceased died there was over Kshs.4,000,000/= at National Bank, Kenyatta Hospital Branch, account No. xxxxxx but that by the time she blocked the operation of the account it had only 70,000/=. The 1st petitioner had not accounted for the money. Regarding this account, the 1st petitioner stated that it was the business account she operated with the deceased and had instructions "Any to sign". That it had constant deposits and withdrawals.

7. I am alive to the rights of the two minors to education. I am alive to the fact that under **Article 53 (2)** of the Constitution and **section 4(2)** and **(3)** of the **Children Act (Cap 141)**, the court has to bear in mind that the best interests of the two children is the primary consideration. However, in the particular circumstances of this case, the objector has demonstrated that the 1st petitioner has had access to the estate and its account, and has substantially benefited from the deceased's life cover, and therefore she cannot say that she lacks the financial means to take

care of the education and upkeep of the children at this stage of the petition.

8. In conclusion, I am unable to exercise my discretion under **section 54** of the **Act** and **rule 12** of the **Probate and Administration Rules** to allow the application. I dismiss the application, but costs shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 15TH NOVEMBER 2021.

A.O. MUCHELULE

JUDGE