



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1371 OF 2012

ESTHER WAMBUI NJOREGE.....1ST PETITIONER/APPLICANT

HAWA DIAWARA.....2ND PETITIONER/APPLICANT

VERSUS

MUTARI DIAWARA.....1ST RESPONDENT/OBJECTOR

LUCY MUTHONI NDUNG’U

(Suing as mother and Next friend of Michelle Wambui Diawara).....2ND RESPONDENT

RULING

1. By summons dated 18th October, 2019 brought under Section 79 and 83 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules, the Applicants sought for withdrawal of Kshs. 550,000 from the deceased’s account number 2021546847 Barclays Bank of Kenya Limited for the medical surgery and other charges of the 2nd Petitioner/Applicant.

2. The summons was supported by an affidavit deponed by the 1st petitioner/Applicant, dated 18th October, 2019. She averred that the 2nd Petitioner/Applicant is a beneficiary and one of the Administrators of the estate of the deceased. That on 1st October, 2019 the 2nd Petitioner was admitted at Menelik Medical Centre and underwent arthroscopic surgery on 2nd October, 2019 but was unable to pay the cost of the surgery and other medical expenses. Further, that the medical expenses have escalated to Kshs. 550,000. She averred that the 2nd Petitioner/Applicant was due for discharge but could not be released due to lack of payment of the hospital charges and post admission bill. It was her case that this was sufficient reason for the court to exercise its unfettered discretion and allow the release of the funds.

3. In opposition to the application, the 1st Respondent filed a replying affidavit dated 14th November, 2019. He averred that the hospital admission was a well thought out scheme by the applicant to get finances from the deceased’s estate to the disadvantage of other beneficiaries. He claimed that no ailment had been disclosed by the applicant to warrant the court’s discretion to grant orders to withdraw finances. He urged the applicant to await the hearing of the cause and avoid using unorthodox means to get money from the estate. In addition he stated that there was a pending application for revocation of grant which if successful, would be rendered superfluous if the orders sought are granted without the court’s determination of who the beneficiaries of the estate of the deceased are.

4. Lucy Muthoni Ndung’u in her capacity as the mother and next friend of Michelle Wambui Diawara also filed a replying affidavit dated 27th November, 2019. She stated that the claim for withdrawal of funds to cover medical expenses was fictitious as there was no medical evidence adduced to indicate that the 2nd Petitioner had been in any hospital or had surgery performed on her. Further, that no receipts from any hospital had been adduced. She asserted that the application was an abuse of the Court process and prejudicial to the interest of the other beneficiaries of the estate of the deceased. She urged the court to dismiss the application.

5. Parties filed written submission in support of their respective positions. The Applicants submitted that the withdrawal of the funds would not affect any outcome from the hearing of the summons for revocation of grant. They urged that should it be found that the objector is a beneficiary of the estate of the deceased, then their respective shares can be proportionally adjusted. Further, that the assets of the estate are enough to cater for all beneficiaries. The applicants relied on the cases of **Re Estate of Fanice Mary Khanali Aura (deceased) [2019] eKLR** and **Re Estate of C F P III [2015] eKLR**, where the courts granted orders of withdrawal of funds.

6. The 1st Respondent submitted that since the deceased passed in 2011, the Applicant had not shown that she was dependent on the deceased for her upkeep or maintenance hence there is no basis for the prayers sought. He relied on the case of **Re Estate of Gerishon Kamau Kirima (Deceased) [2015] eKLR** where the Court refused to grant orders of partial distribution of the estate because the other beneficiaries

did not give their consent.

7. The 2nd respondent submitted that the 2nd Petitioner/Applicant is a 38 year old who is gainfully employed and ought to cover her medical expenses at her own cost and should not depend on the estate of the deceased. She relied on the case of **Re Estate of Joseph Gichuki Riunge (deceased) [2017] eKLR** in support of her case.

8. Having carefully considered the pleadings and the submissions of the parties to this matter, it is my view that the substantive issue for determination is whether the application meets the threshold for granting the orders sought.

9. **Section 27 and 28** of the Law of Succession Act provides as follows:

Section 27. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

Section 28. In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

- (a) the nature and amount of the deceased's property;**
- (b) any past, present or future capital or income from any source of the dependant;**
- (c) the existing and future means and needs of the dependant;**
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;**
- (e) the conduct of the dependant in relation to the deceased;**
- (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;**
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.**

10. The deceased person, the subject of these proceedings, died in 2011. Representation to his estate was granted on 10th June, 2014. The scheme of things under the Law of Succession Act, Cap 160, Laws of Kenya, is that once representation is obtained, the personal representative ought to collect and gather the estate upon identification of the assets and liabilities, and ascertainment of the survivors and beneficiaries, and thereafter move the court, within six months, for distribution of the estate through a confirmation application. Six months after confirmation, the personal representative should complete distribution and report to court. The exercise of administration ought to be completed within one calendar year. The primary mandate of a personal representative is distribution of the estate and shall exercise the duties as enshrined in **Section 83** of the Law of Succession Act.

11. It is the 1st applicant's contention that she has been unable to raise funds to pay for the costs of a surgery conducted on the 2nd Applicant on 2nd October, 2019. On record is an invoice dated 1st October, 2019 from Menelik Medical Centre indicating that the sum payable is Kshs. 400,665. There is also a doctor's note from Professor L.N Gakuu dated 4th October, 2019. He states that his patient, the 2nd Petitioner/Applicant herein was admitted on 01/10/2019, taken for surgery on 02/10/2019 and has been recuperating. Further that she would require outpatient review and the total costs will amount to Kshs. 550,000.

12. The respondents are challenging the documents presented for not being authentic as they fail to disclose the ailment suffered. Further, that there is a pending application for revocation of grant and if the orders sought are granted and the 1st respondent is successful in his application, any orders granted would be rendered superfluous. From the record of the medical documents in evidence, it is unclear whether the surgery conducted on the 2nd Applicant/Petitioner was as a result of an emergency or was elective which is not life threatening. The medical documents presented are vague and cannot be exclusively relied upon.

13. It is not in dispute that the 1st and 2nd applicants are wife and daughter of the deceased respectively. The 2nd applicant being a daughter of the deceased does not therefore have to prove dependency. Her dependency is presumed in law. There is a pending application for revocation of grant where the applicant therein claims to be a dependant of the deceased. The question on the number of dependants of the deceased and beneficiaries to the estate is yet to be determined.

14. Regarding lack of consent of the Respondents and other beneficiaries, my reading of sections 27 and 28 of the Law of Succession Act reveals that the court has discretion to decide whether or not to make such provision. The decision in **Re Estate of M'mumuu Metaya (Deceased) [2009] eKLR** and **Re Estate of Gerishon Kamau Kirima (Deceased) [2015] eKLR** the Court opined that it was a necessary requirement for consent to be obtained especially where the other beneficiaries were adults. It is therefore one of the factors that the court may take into consideration before a grant of the orders sought. However, that consent cannot be a condition precedent to the making of such an order otherwise, it would mean that the court's discretion would be fettered by lack of consent. Accordingly, lack of consent of the other beneficiaries is not necessarily fatal to the grant of the orders sought.

15. However, to seek an order for the release of certain sums forming part of the estate to one beneficiary may well amount to partial

distribution. In this cause, the dependants of the estate of the deceased are yet to be determined and there is a pending application for revocation of grant. The share each beneficiary may get after the grant has been confirmed can therefore not be ascertained at this point.

16. If the present application is, for instance, granted and subsequently the grant is revoked, it would be prejudicial to potential beneficiaries to lose part of the estate money by way of partial distribution which occurred without their involvement. The parties should be patient and await the resolution of the application for revocation and annulment of grant.

17. From the foregoing and in the circumstances of this cause, I find that the prayer to release monies forming part of the estate of the deceased pending confirmation of the grant, which amounts to partial distribution cannot be granted at this stage on the material placed before this Court. The application dated 18th October, 2019 is therefore dismissed with no orders on costs.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 4TH DAY OF FEBRUARY, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicants/Petitioners

In the presence ofAdvocate for the 1st Respondent/Objector

In the presence of.....Advocate for the 2nd Respondent