



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 123 OF 2017

IN THE MATTER OF THE ESTATE OF JK DECEASED

CK.....APPLICANT

VERSUS

MW.....1ST EXECUTOR/RESPONDENT

HJIL.....2ND EXECUTOR/RESPONDENT

RSN.....3RD EXECUTOR/RESPONDENT

PSK.....4TH EXECUTOR/RESPONDENT

AND

DN.....1ST OBJECTOR

RULING

1. C.K, the applicant moved the court by way of summons dated 4th June, 2019 seeking for reasonable provision to be made for her as a dependant of the deceased out of the net estate.

2. The applicant claims to be a daughter of the deceased and though the deceased died testate he had failed to provide for her in his will.

3. The applicant who currently resides in the U.S. contends that apart from being a daughter, she had kept a close relationship with her father and his family and would visit. That upon getting married her father demanded for a blanket from her husband which the husband duly gave and that during one of the visits she fell seriously ill, was admitted in hospital and the deceased paid her huge hospital bill and had promised to take care of her. She is now ailing, struggling to educate her son, and fending for her sick mother.

4. The application was objected to by beneficiaries PSK, VNK and ASK, who filed grounds of objection to the effect that the applicant had failed to produce a birth certificate, any express admission by the deceased of paternity or a DNA certification, further that only once was there proof of assistance from the deceased.

5. Though three beneficiaries objected to the inclusion of the applicant as beneficiary through counsel on record for beneficiaries it was made known to court that V had had a change of heart and together with one other beneficiary; CK they confirmed family interactions with the applicant and said that they considered her as a sibling.

6. The applicant may not have produced a birth certificate, a DNA certification or her mother's affidavit. She however annexed several photographs of herself and the deceased, her mother with the deceased and one of the deceased wife with her; and others with several of the deceased acknowledged children at various times including a picture where the applicant's husband gifted the deceased with a blanket. She has also produced a cheque and a letter from the deceased indicating payment of her hospital bill.

All the above were not countered by any averments on oath and remains unchallenged evidence.

7. The applicant in my view has shown that she had a relationship of father and daughter with the deceased and a sibling relationship with

several children of the deceased, two of whom affirmed that relationship.

8. **Section 29** of the Law of Succession Act Cap 160 (the Act) defines who a dependant is for purposes of Part III of the Act as follows:

“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;

9. **Section 5** of the Act provides that any adult of sound mind is at liberty to dispose of his personal property as he wishes. **Section 26** on the other hand limits this freedom to the extent where in disposing of ones property by will or way of a gift he fails to make reasonable provision for a dependant, in such a case the court is called upon to order that such reasonable provision be made out of the net estate of the deceased.

10. In **Ndolo vs Ndolo Case No. 128 of 1995** the Court of Appeal stated;

“This court must, however recognise and accept the position that under the provisions of Section 5 of the Act, every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by Section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her life time.”

In **John Kinuthia Githinji vs Githua Kiarie & Others Court of Appeal Case No. 79 of 1998** referred to in the **Estate of James Ngugi Mungai** Succession Case No. 523 of 1995 Gicheru JA as he then was quoted C J in **Banks vs Good Fellow 1870 L.R.** as follows:

“The law of civilized people concedes to the owner of property the right of determination by the last will, either in whole or part to whom the effects which he leaves behind him will pass...

A moral responsibility of no ordinary importance attaches to the exercise of the right given. The instincts and affections of mankind, in the past majority of instances, will lead men to make provisions for those who are nearest to them in kindred and who, in life have been the object of that affection....

The same motive will influence him in the exercise of the right to disposal when secured to him by law. Hence arises a reasonable and well warranted expectation on the part of a man’s kindred surviving him, that on his death effect shall become theirs instead of mere strangers. To mock the common sentiments of mankind and violate what all man..... deeming an obligation is moral law.”

11. I find the prayer sought by the applicant is based on her expectation that her father ought to have provided for her. The law caters for such expectation and therefore based on the evidence on record I am persuaded that the applicant being a daughter of the deceased, who has legitimate expectations and whose father had a legal and moral duty to provide for as he did his other kindred, ought to be reasonably provided for, from the vast estate left behind by the deceased and I therefore direct and order that at the point of confirmation of the grant the executors of the will do propose reasonable provision for the applicant from the net estate of the deceased for the court’s consideration and further directions.

12. Costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2020.

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ALI-ARONI

JUDGE