



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

SUCCESSION CAUSE NO. 634 OF 2013

IN THE MATTER OF THE ESTATE OF ALBERT MUSYOKA MUETI (DECEASED)

CHRISTINE NZILANI MUSYIMI..... 3RD ADMINISTRATOR

AND

MUETI KALA MUMBE

DORCAS KANINI MUETI.....1ST & 2ND ADMINISTRATORS/ APPLICANTS

RULING

1. This ruling relates to the application under Section 26 of the Law of succession Act dated 1.8.2019 filed by the 1st and 2nd Administrators/ applicants.

2. I had stayed the ruling in respect of the protest by the 1st and 2nd Administrator/Applicants who are the parents of the deceased and who had lodged a protest against confirmation of grant because I needed them to satisfy me as to whether they are dependents of the deceased and thus entitled to a share of the estate of the deceased.

3. This is because in the material part of section 29 of the Law of Succession Act sets out the meaning of the term 'dependant' as follows:

For the purposes of this Part, "dependant" means—

(a)

(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; and

.....’’

4. In the affidavit in support of the summons for dependency, the Applicants/Objectors jointly averred that they were parents of the deceased aged 78 and 75 years respectively. They averred that the deceased maintained them and that they had no other source of income save for the Inua Jamii cash transfer programme where they receive Kshs 2,000/- per month. They listed their annual income as Kshs 24,000/- and listed their present needs as totalling Kshs 30,000/- per month. They averred that the deceased made no gifts to them during his lifetime.

5. In opposition to the application, the 3rd Administrator averred that the respondents are acting out of ill will and malice; that they have their own resources of land and livestock that are enough to sustain them. It was averred that the respondents have rich and wealthy children who cater for their basic needs. It was averred that their needs are exaggerated and that the respondents were not depending on the deceased and therefore the application dated 1.8.2019 be dismissed.

6. Vide submissions dated 15.11.2019, learned counsel for the 3rd Administrator urged the court to dismiss the application by the Applicant/Objectors because she and her minor son were the only dependents of the deceased hence the issue of dependency was an afterthought.

7. Vide submissions dated 22.1.2020 in support of the application, counsel for the Applicants placed reliance on section 28 of the law of succession Act and submitted that the deceased's net estate is not known to the court but that the respondents are aged and have no other source of income. Counsel was in agreement that the only other dependents of the deceased were the 3rd administrator and her son and who were well catered for. Counsel argued that the respondents need Kshs 360,000/- per annum and urged the court to grant them a lump-sum provision out of the deceased's estate.

8. The issue is whether the respondents are entitled to provision out of the estate of the deceased, as in their view, there was no provision for them. Section 26 governs Provisions for dependants not adequately provided for by will or on intestacy. It states that

“ Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”

9. Section 27 of the same Act provides that “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 dependants, or to make such other provision for him by way of periodical payment or a lump sum, and to impose such conditions as it thinks fit.

10. Section 28 states that “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 reason for not making the provision for the dependant.*

11. I have considered the affidavit in support of the application and on a balance of probabilities I find that the 3rd administrator has not brought any tangible evidence as to why she is opposed to the application by the 1st and 2nd administrators. On the other hand, I have seen nothing to convince me that the respondents were being maintained by the deceased. In the case of **Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others [2016] eKLR**, it was observed that “a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.” The evidence of Pw2 was to the effect that the deceased was given land to build on by his father who is Pw1. I also note that Pw2 expressed legitimate expectation to benefit from the estate of the deceased having schooled him. In this regard, I therefore find that the respondents were dependents of the deceased. The fact that the 1st and 2nd administrators have not availed documentary evidence on how the deceased used to support them does not put into question about their claim herein. It is common knowledge that in Africa majority of children do support their parents even in old age. Most parents bring up their children and hope that during their old age the children will be there for them. It is therefore most probable that the deceased used to give them some support contrary to the assertions of the 3rd administrator. Looking at the evidence there seems to be some bad blood between the 3rd administrator and the Applicants since they are not on good talking terms. Even if that could be the case that does not eliminate the fact that they are still related to each other and that the young child when grown up will want to relate with his grandparents. As administrators all of them are expected to consult each other on matters of the estate. The 3rd administrator will be expected to cede some ground and ensure that the Applicants at least get some reasonable provision during the confirmation of the grant. In any case the said 3rd administrator stated in her evidence that she had given the applicants some money during the initial pay-out by the deceased's employer. Nothing is so hard for her to make another reasonable provision to the applicants. In any case it is noted that in the application for grant of letters of administration, the Applicants are listed as beneficiaries and therefore they ought to be provided for as such from the estate. In exercise of inherent powers of the court and in the interest of justice, I direct that reasonable provision be made for the applicants out of the estate of the deceased and not in the manner proposed by the 3rd administrator in the application for the confirmation of grant. Indeed, nothing was provided for the applicants by the 3rd administrator in her summons for confirmation of grant despite being aware that the applicants were listed as dependants in Form P & A 5 of the petition for grant as well as the chief's introductory letter dated 17.4.2013. The 3rd administrator must now reckon with that fact.

12. In the result the application dated 1.8.2019 has merit with the consequence that the protest lodged by the 1st and 2nd Administrators must be allowed with the following orders:

a) The 1st and 2nd Administrators are hereby declared as dependants of the deceased under section 26 of the Law of Succession Act and are entitled to reasonable provision from the estate.

b) The issue of reasonable provision shall be determined at the time of confirmation of grant.

c) The 3rd Administrator is directed to file and serve fresh summons for confirmation of grant in which a reasonable provision for the 1st and 2nd Administrators is captured within the next thirty (30) days from today.

d) As parties are family members there will be no orders as to costs.

It is so ordered.

Dated and delivered at **Machakos** this **19th** day of **May, 2020**.

D. K. Kemei

Judge