REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PROBATE AND ADMINISTRATION CAUSE NO. 17 OF 2018

IN THE MATTER IF THE ESTATE OF ALFRED KIPLAMAI BOR

IRENE ZIPPY C. KIPLAMAI.....PETITIONER/APPLICANT

VERSUS

BENJAMIN KIPTANUI LAMAI.....1ST RESPONDENT

FELIX LAMAI.....2ND RESPONDENT

EMMANUEL KIPTOO LAMAI.....3RD RESPONDENT

AND

NAUMY JEROB BOR.....1ST OBJECTOR

STANLEY KIBET KOGO.....2ND OBJECTOR

RULING

There are submissions for three applications on record. I shall proceed to tackle them in chronological order. The first application is dated 22nd February 2019, the second 22nd March 2019 and the third 1st April 2019.

APPLICATION DATED 22ND FEBRUARY 2019

1. The application sought the following orders in a nutshell;

a) THAT **BENJAMIN KIPTANUI LAMAI. FELIX LAMAI and EMMANUEL KIPTOO LAMAI** (the respondents) by themselves, their employees, agents, assignees and anybody acting for or through them be restrained from leasing, selling and wasting or in any other way interfering with the property known as LR. NO 7946/4 pending hearing and determination of this application.

b) THAT the named parties by themselves, their employees, agents, assignees and anybody acting for or through them be restrained from collecting rental income from the residential property constructed over the estate property known as **ELDORET/MUNICIPALITY BLOCK 14/8500** pending hearing and determination of this application.

c) THAT the two named respondents be directed to render a full and accurate account of the rental proceeds collected from the property known as **ELDORET/MUNICIPALITY BLOCK 14/8500** located in **LANGAS** as at 1ST November 2017 to this date and report to Court within 45 days.

d) THAT the Court makes a finding that **BENJAMIN KIPTANUI LAMAI. FELIX LAMAI and EMMANUEL KIPTOO LAMAI** have committed an offence under **Section 45 of the Law of Succession Act** and be made liable and punished accordingly in relation to the property known as **ELDORET/MUNICIPALITY BLOCK 14/8500** located in **Langas**

e) THAT further, they be ordered to forthwith deposit with the Court, or an interest earning account registered in the name of the Administrator a total sum of **KShs. 2,128,000 (Two Million, One Hundred and TwentyEight Thousand only)** being rent accrued

from 1st November 2017 to date.

f) THAT **BENJAMIN KIPTANUI LAMAI. FELIX LAMAI and EMMANUEL KIPTOO LAMAI** be committed to prison for a period not exceeding one year or pay a fine not **exceeding KShs.10,000 (Kenya Shillings Ten Thousand only)** or both such fine and imprisonment for intermeddling with the property of a deceased person namely **ALFRED KIMLAMAI BOR (DECEASED**).

g) THAT restraining orders do issue against **BENJAMIN KIPTANUI LAMAI. FELIX LAMAI and EMMANUEL KIPTOO LAMAI** from interfering with the quiet occupation by the occupants of the property of the intestate estate of the deceased and allow the administration of the estate to proceed to finality.

h) THAT this court directs the **County Commander Uasin Gishu County** to ensure compliance with these orders.

i) THAT the cost of the application be borne by the Respondents.

2. The respondents oppose the said application on grounds that the petitioner moved this court for grant of letters of administration intestate without involving the other beneficiaries and despite the resolution of the family members on 28/12/2017. The respondents further contend that the said grant was fraudulently obtained in the circumstances the orders cannot issue as some of, and the beneficiaries reside in some of the deceased property and that they would be greatly prejudiced if the orders sought are granted.

APPLICANT'S CASE

3. The applicant cited section **80(2) of the Succession Act** and fortified it with section **82 and 83 of the Succession Act**. She pointed out that it is not in dispute that the petitioner was issued with Grant of Letters of administration intestate on 25th July 2018 evidenced by annexure IK1. Further, that it is not in dispute that the respondents are collecting rent from **ELDORET/MUNICIPALITY BLOCK 14/8500**, based on the respondents' admission in their replying affidavit to the effect that they have been collecting rental income from the estate albeit without letters of administration and have proceeded to distribute the income.

4. The applicant cites section **45 and 79 of the Law of Succession Act** and to argue that only a holder of a grant has authority to handle the property of a dead person and submits that the respondents have intermeddled with the property of the deceased. She cited the cases of **Veronica Njoki (deceased) [2013] Eklr where the judge stated that:**

> ***"The effect of [section 45]…is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence."***

The applicant also cited **In Re Estate of David Livingstone Loka Injene (Deceased) [2019] eKLR** which held that:

> ***"I should state that the mere fact that a person is a child or a spouse of the dead owner of the property does not give them any right or power to deal with the property as if the same belonged to them. The only person who can handle the property of a dead person as if that property belonged to them is the person who holds a grant of representation, for that is a personal representative of the deceased, whether as an administrator or an executor."***

5. The applicant maintains that the respondents are answerable to her as the rightful administrator and they should render an account of the proceeds from the rent collected. As a guidance they referred to **annexure IK2** being a rental valuation of the property **ELDORET/MUNICIPALITY BLOCK 14/8500** indicating that the market rental value of the property was kshs. 166,000/-, per month. Based on the respondent's admission in paragraphs 5 and 6 of their replying affidavit sworn by **Emmanuel Kiptoo Lamai**, they have been collecting rent from December 2017, which confirms that as at **October 2019**they had collected **kshs. 3,818,000**. That the respondents purport to draw authority to collect said rent on the strength of minutes dated 28th December 2017- it is pointed out that the minutes are unsigned. In this regard reference is made **to In Re Estate of Ndiba Thande– (Deceased) [2013] eKLR,** where the court stated;

> ***"When Esther Wambui Ndiba was appointed on 19th April, 2011 as the administrator and personal representative of the deceased, property Dagoretti/Kangemi/25 vested in her by virtue of Section 79, of the Law of Succession Act. She thereby assumed all the right that the deceased had over the property. She is the one who should sue or be sued over the said property. She is the one who should enforce any cause of action, such as trespass, with respect to the said property. She is the one who should contract with third parties with respect to the property. This means that she should be the one letting out the property and collecting rents. She has also, by virtue of Section 79 of the Law of Succession Act, assumed all the duties of the deceased with relation to the said property. She should be the one paying all outgoing with respect to the property."***

6. This court is also urged to note that although mentioned, no bank statements have been annexed thereto. The applicant cites the case of and urges that the respondent should be directed to render accounts to the administrator of the rental proceeds collected.

7. That having established that the respondents are intermeddlers she urges the court to restrain them from further intermeddling. She relies on the case of **in Re Estate of Hajj Mohammed (deceased) [2016] eKLR** and submitted that it is in the interest of justice that the court restrains the respondents so as to preserve the estate from being wasted.

8. The applicant submits that the affidavit sworn by **Emmanuel Kiptoo Lamai on 12th July 2019** is incompetent for failing to comply with the mandatory provisions of **Order 1 Rule 13(2) of the Civil Procedure Rules 2010**. It is mandatory for a party to annex the authority to

depone failure to which renders the replying affidavit incompetent and liable to be struck off. The applicant also relied on the case of **Sammy Achuchi Oduori & Others v Iberafrica Power (EA) LTD [2008] eKLR** where the Court quoted the Court of Appeal decision in **Research International East Africa Ltd versus Julius Arisi and 213 others Nairobi CA that:-**

> ***Applying the provision of order 1 rule 12 (2) CPR, and the court of appeal decision cited above, to the applicants supporting affidavit, it means that in the absence of the deponent, of the said affidavit annexing the authority to so depone to the affidavit, or having one generally filed in the case file, the authority to so depone becomes non -existent. If non-existent, then the supporting affidavit becomes incompetent. Being incompetent it cannot support the application. And without its support the application become invalid as well as incompetent by reason of the fact that it becomes none compliant with the relevant provision of order 50 rule 3 which require such an application to be supported not only by grounds in the body of the application but is also by affidavit. Order 50 rule 3 reads:-***
>
> > ***" every notice of motion shall state in generally terms, the grounds, of the application and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served."***
>
> ***such non- compliance invites the penalty of having the supporting affidavit struck out. Once the affidavit is struck out the application would not be in compliance with the rules and if incompetent it means it cannot be considered as it is a proper candidate for striking out.***

9. That respondents having failed to file a competent response they be deemed as having not objected to the application and the same be allowed at the first instance in so far as it relates to the orders sought.

The application be allowed with costs.

RESPONDENT'S CASE

10. The basis for opposing the application is that the petitioner moved the court for grant of letters of administration intestate without involving the other beneficiaries despite the resolution of family members on 28th December 2017. It is their contention that the grant was obtained fraudulently and the orders sought cannot issue as some of the beneficiaries reside in some of the deceased's property and they would be greatly prejudiced.

11. The petitioner it is argued, has not supported the allegations of intermeddling as required in law. The burden of proof is upon the petitioner to prove the allegations that they have intermeddled and thereafter the burden shifts to the respondents to disprove. That the claim must fail as the petitioner is faulted as having failed to demonstrate intermeddling or intent on the part of the respondents to lease out the property to 3rd parties.

12. As for the petitioner's prayer for orders of accounts by the respondents with regards to rental proceeds collected from the property known as **ELDORET/MUNICIPALITY BLOCK 14/8500 from 1st November 2017**. The respondent cited the case of in the **Matter of David Wahinya Mathene (Deceased) Nairobi HCSC No. 1670 of 2004** and submitted that the petitioner had not established that there was intermeddling this the order for accounts is untenable.

13. The respondents wonder possible that they collected rent way before the family in light of the contents of the minutes of **28/12/2017**. They insist that the petitioner was present during the said meeting and from the minutes it is clear that the respondents were not in receipt of the rental proceeds as alleged. And the order for rendering accounts should be disallowed.

14. As regards the prayer that the **Kshs. 2,128,000/-** be deposited by the respondents in court, the respondents submit that these are mandatory orders for which the petitioner has to demonstrate the existence of special circumstances to warrant such orders as such orders will be granted only in clear circumstances. They rely on the case of **Kenya Breweries Ltd & 2 others vs Washington Okeyo (2002) eKLR . In the case of Kenya Breweries Ltd & 2 others =VS= Washington Okeyo (2002) eKLR,the Court of Appeal held:**

> ***The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:***
>
> > ***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ... a mandatory injunction will be granted on an interlocutory application".***

Furthermore, in the case of **Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at pg. 901 it was stated:**

> ***"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."***

15. That the petitioner has not met the criteria to warrant issuance of this order as this is not a clear case and the same is evident from the various applications seeking to revoke the grant fraudulently obtained by the petitioner as she did not adhere to the law that is, **section 66 of the Law of Succession Act and Rule 26 of the Probate and Administration Rules**. Also, the petitioner has failed to demonstrate that there was intermeddling on the part of the respondents as she has no documentation to support such allegations. Furthermore, the petitioner has not demonstrated intent on the part of the respondents to lease out property to third parties. The bare assertions by the petitioner give this court reason to decline to issue this equitable relief in her favour.

16. The respondent cited the case of **In the Matter of the estate of Francis Muriuki Muchira alias Francis Muriuki Muchera (Deceased) [2018] EKLR** on the principles established in **Giella v Cassman Brown Ltd [1973] EA 358**, saying the petitioner did not demonstrate that she has an arguable case that ought to be tried during the hearing of this case as the allegations of intermeddling have not been substantiated. The petitioner is undeserving of the orders sought due to the fraudulent manner in which she obtained the grant. The petitioner failed to obtain consent of the other beneficiaries and failed to notify other beneficiaries that she petitioned as the sole administrator of the estate. Moreover, Naumy Bor as the surviving spouse had priority to petition for grant. The petitioner in failing to establish a prima facie case is undeserving of the equitable relief sought.

17. The respondent maintains that an injunction should only issue if it is said that the applicant will be greatly prejudiced as opposed to the prejudice on the part of the respondent if the matter is dismissed. That in this instance the petitioner secretly moved the court to petition for grant of letters in total disregard of section 66 of the Law of Succession Act and Rule 26 of the Probate and Administration rules and therefore lacks proper foundation of her claim with respect to issuance of interim relief under section 74 as read with rule 73. If the orders are allowed it will be equivalent to upholding the fraudulent mode of obtaining letters of administration.

The application should be dismissed with costs.

ISSUES FOR DETERMINATION

a) Whether there was intermeddling

b) Whether the respondents should render accounts of rental proceeds from the property known as ELDORET/MUNICIPALITY BLOCK 14/8500

c) Whether the orders for injunction should issue

WHETHER THERE WAS INTERMEDDLING

Section 45 of the law of Succession Act provides;

> **45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**
>
> **(2) Any person who contravenes the provisions of this section shall-**
>
> > **(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**
> >
> > **(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.**

In **Gitau and 2 others – Vs – Wandai & 5 others (1989) KLR 23, Tanui J,** as he then was stated as follows: -

> ***"According to Section 45 of The Law of Succession Act, Cap.160 intermeddling with the property of a deceased man consists of taking possession, disposing or otherwise intermeddling with any free property."***

18. In order to determine whether there was intermeddling the applicant must establish that the respondents took possession of the property of the disposed and/or disposed of it without authority. The applicants submitted that the respondents had been collecting rent from the deceased's estate without letters of administration. They relied on the replying affidavits sworn by Emmanuel Kiptoo Lamai, specifically paragraph 5 and 6. In the affidavit the deponent admitted that they're collecting rent and the authority to do the same was granted by the minutes dated 28th December 2017. A perusal of the minutes annexed as EKL2 indicates that indeed there was a consensus during the meeting that the estate be handled by the respondents pending grant of letters of administration. It is evident that there was an agreement during the family meeting on how to proceed with the succession and the agreement on collection of rent was understandably made in an effort to preserve the estate as the application for grant proceeded. In my opinion a strict application of section 45 would result in a finding for intermeddling but taking into account the intentions of the agreement during the family meeting, I think that in the interest of justice the offence cannot stand.

WHETHER THE RESPONDENTS SHOULD RENDER ACCOUNTS OF RENTAL PROCEEDS FROM THE PROPERTY KNOWN AS ELDORET/MUNICIPALITY BLOCK 14/8500

19. Section 45(2) of the Law of Succession Act an intermeddler is answerable to the rightful administrator to the extent of the properties he

has intermeddled. **Section 45 of the Law of Succession** states the following on intermeddling;

> **i. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**
>
> **ii. Any person who contravenes the provisions of this section shall—**
>
> > **a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**
> >
> > **b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.**

20. In the present instance the challenge is whether the respondents should render accounts to the applicant as there are doubts as to whether the applicant is a rightful administrator on grounds that she obtained the temporary grant of letters of administration without the consent of other beneficiaries. **Section 79 of the Law of Succession** which states;

> **The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.**

21. Whereas this is a moot point, I think I would be failing in my duties as a court if I was to ignore the fact that the respondents admit that thy have been collecting rent – it is critical to know how the money has been used as this will be critical in the final distribution. In my view this limb of the prayer is merited to the extent that accounts be rendered to this court within 21 days hereof

WHETHER THE ORDERS FOR INJUNCTION SHOULD ISSUE

22. The applicant must satisfy the conditions laid down In the case of **Giella –v- Cassman Brown & Company Ltd (1973) EA 358.** The Plaintiff must show that there is a prima facie case with a probability of success and that he stands to suffer irreparable damage. If the court is however in doubt on the foregoing, it will decide the matter on the balance of convenience.

23. The applicant has failed to show that she has a prima facie case. She has failed to prove that there was intermeddling. Further, it is not lost to me that there is an application that challenges how the grant was obtained.

24. Given that the applicant has failed to prove that there was intermeddling, the next issue for consideration is whether she has demonstrated that irreparable harm is likely to occur.

25. The petitioner is said to have allegedly moved the court for letters of administration without informing the beneficiaries. She is seeking equitable relief yet she is accused of approaching the court with unclean hands. The paradox is that, without settling the issue regarding who ought to be granted the letters of administration as well as a proper account of the rent so far collected, then the applicant's interest is also compromised, especially because, she currently has the temporary grant, albeit this being contested. It is argued (rightly so, that granting the orders for injunction as it may amount to sanctifying the irregular process that the applicant used to obtain the grant.

26. I am thus constrained to consider the balance of convenience- where does it lie? If the injunction is not granted, then it means that the respondents can carry on collecting rent to her exclusion and prejudice. I think the pendulum on the scale swings the balance heavily towards the need to preserve the estate pending proper confirmation of grant. I therefore grant orders of injunction as regards collection of rent, but with a rider that the applicant too must not deal in any adverse manner with the contested properties, as there is a pending application for revocation of the temporary grant issued.

APPLICATION DATED 22ND MARCH 2019

27. The 1st Objector **(NAUMY JEROB BOR)** filed an application dated 22nd March 2019 seeking orders that the grant of letters of administration intestate to **IRENE ZIPPY C. KALAMAI** made on 25th July 2018 be revoked. The application was opposed by the replying affidavit of the petitioner sworn on 2nd July 2019. The application has been canvassed through written submissions.

28. The applicants submit that the procedure the respondent **(IRENE ZIPPY C. KALAMAI)** used to obtain the temporary grant was fraudulent or amounted to concealment of something material to the cause. It is not disputed that;

> 1. **Alfred Kiplamai Bor** died on 16/10/2017 leaving behind 3 houses to survive him
>
> 2. The petitioner **IRENE ZIPPY C. KALAMAI** applied for and was issued with a temporary grant on 25/7/2018 in her capacity as a widow of the deceased

29. The basis of the application is that the petitioner failed to obtain consent of all other beneficiaries before she applied for a grant of letters of administration. She also failed to notify them that she petitioned as the sole administrator of the estate. The procedure of obtaining the temporary grant is faulted as being defective in substance. It is acknowledged that under **section 66(a) of the Law of Succession Act**, the surviving widow does not need to obtain consent of the beneficiaries unless they are also surviving spouses. They relied on the case of In the

matter of the estate **of Murathe Mwaria (deceased) Nairobi HCSC No. 825 of 2003.**

30. It is submitted that courts have held how important it is to notify the other beneficiaries of the estate of the deceased before the petition for grant of letters of administration were applied for. They cited the case of **In the matter of the estate of Ngaii Gatumbi Alias James Ngaii Gatumbi (deceased) Nairobi HCSC No. 783 of 1993** the court revoked the issued grant where the petitioner failed to notify other beneficiaries who had priority to apply for letters of administration.

31. The applicants submit that they have demonstrated that the petitioner failed to follow the laid down procedure before the temporary grant was issued to her. The petitioner filed an affidavit of clarification where she claimed that she had been appointed by the children and the widow of the deceased. The same was untrue as not all beneficiaries executed the consent. She deposed that it was important to have an administrator appointed as the National Land Commission had compulsorily acquire part of the estate for development of a highway. No documentary evidence was produced to prove the same.

They cited the case of **In the Estate of Wahome Mwenje Ngonoro (deceased) (2016) eKLR** and submitted that the prayers sought be granted and the grant revoked.

RESPONDENT'S CASE

32. The respondent filed a relying affidavit that had annexures containing affidavits sworn by all beneficiaries from the 1st house save for the 3rd respondent.

33. The petitioner insists that she observed the requirements of **rule 4(2) if the Probate and Administration Rules** and conducted a search on the properties of the deceased and disclosed the full inventory of the assents of the deceased as required under **rule 7(1)(d)**. A death certificate was also supplied as required under **rule 7(2)**.

34. That an application for grant of letters of administration intestate was then lodged at the registry and a notice of the application for grant published in the Kenya Gazette. An affidavit of clarification was filed by the petitioner in compliance of rule 16 as read with **rule 66 of the probate and administration rules**, and there being no objection, answer and cross petition filed the court issued the grant in favour of the petitioner after 30 days in exercise of its jurisdiction under **section 47 of the Succession Act** as read with **Rule 73 of the Probate and Administration Rules**.

35. It is also argued that the applicant has not shown that the procedure in obtaining the grant was defective in substance, as no evidence has been led to prove the allegations of fraud. That the applicants were aware of the application for grant as it was published in the Kenya Gazette. The court perused and considered the applicant's application together with the affidavit of clarification and found in favour of issuing the grant of letters of administration. Further, the applicant was served with the grant of letters of administration intestate and there is an affidavit of service to prove the same. The respondent claims that **Benjamin Kiptanui and Felix Lamai** refused to sign Form 5 saying that a woman cannot be an administrator. They had been nominated as administrators as well as the petitioner. That the aforementioned details were brought to the attention of the court and an affidavit of clarification was filed by the petitioner with form 38B to explain her predicament, so the court went ahead and issued the grant.

36. The respondent draws from the provisions under **section 76(d) of the Succession Act** which provides that the court may revoke a grant of letters of administration intestate where it is established that the administrator has mal-administered the estate, yet in the present instance, no application has been filed alleging the same and neither has the petitioner been cited to render accounts, nor have they demonstrated mismanagement of accounts by the respondent.

She maintains that the applicants are guilty of non-disclosure and thus undeserving of the orders sought. In the alternative the respondents submitted that the 1st and 2nd respondents be appointed as co administrators.

ISSUES FOR DETERMINATION

a) Whether the grant of letters of administration issued to the petitioner should be revoked

b) Whether the respondents should be appointed co-administrators

WHETHER THE GRANT OF LETTERS OF ADMINISTRATION ISSUED TO THE PETITIONER SHOULD BE REVOKED

37. According to section 76 of the Law of Succession Act;

> **A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—**
>
> > **(a) that the proceedings to obtain the grant were defective in substance;**
> >
> > **(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**
> >
> > **(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

38. The applicants challenged the process which the respondent used to obtain the temporary grant. The 1st objector is the only surviving spouse of the deceased and has the priority to apply for letters of administration. Section 66 of the Law of Succession Act provides;

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

Rule 26 of the Probate and Administration Rules provide;

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.

Rule 22 of the Probate and Administration rules provides;

(1) A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto

39. If indeed the applicants rejected the petitioners advances at including them in the petition for grant of letters of administration, then this has not been proved. What emerges is that the petitioner did not cite the 1st objector and thus the application for grant was defective. In addition, she did not obtain consent from all the beneficiaries as evidenced by form 38 filed during the application for grant. She did not notify the beneficiaries of her petition to be the sole administrator of the estate. The process of obtaining the letters of administration was defective and as such I order that the grant which was issued be and is hereby revoked.

APPLICATION DATED 1ST APRIL 2009

The 4th respondent filed an application dated 1st April 2019. He sought revocation of the grant of letters of administration issued to the petitioner. He also sought to be appointed as an administrator to the estate.

APPLICANT'S CASE

40. The applicant based his application on the grounds that he was a beneficiary and that the grant was made without his knowledge. The deceased was his father, and he annexed **a birth certificate SKK1** as evidence of the same. The deceased took care of the applicant since he was born. The applicant contends that he qualifies as a dependant and ought to be included in the petition. Once the application was served

on the petitioners the application was compromised vide a letter dated June 2019 where it was consented that the objector be include as a beneficiary. In essence the application was not opposed by the petitioner. The deceased was indicated as his father in the **marriage certificate no. 119652**, and the deceased witnessed the wedding of the applicant as well. The applicant says that he resides in the estate, and relies on the chief's letter annexed as **SKK 5** is proof that he lived on the deceased's estate all his life. He cited **sections 3 and 2(9b)** of the **Law of Succession Act** and submitted that he had proven that he was a child of the deceased and thus a beneficiary.

RESPONDENT'S CASE

41. The respondents filed a grounds of opposition where they opposed the application on the grounds that it was an abuse of the court process and that the court lacked jurisdiction to hear the application as only persons under section 66 of the law of Succession Act can bring applications under section 76(b). Further, that the applicant had not demonstrated that he had a cause of action.

42. They filed submissions to the effect that the applicant is not a beneficiary. The birth certificate submitted as evidence was issued in 1998 whereas the applicant was born in 1968 and there has been no explanation of the circumstances of the issuance of the certificate. They cited the case of **SM vs SC (2017)** where the court held that just because a person's name appeared on a birth certificate it does not make him the father.

43. The applicant is faulted on grounds that he did not lead any evidence to prove the allegation that the deceased took care of him during his lifetime. They cited the case of **In Re Cecilia Wanjiku Ndung'u** (Deceased) in support of this submission. They cited the case of In the **Estate of Murathe Mwaria (Deceased) Nairobi HCSC No. 825 of 2003** and submitted that the applicant has to prove he is a person under **section 66** who is entitled to apply the grant. Further, the court lacks the jurisdiction to entertain the application.

ISSUES FOR DETERMINATION

a) Whether the court has jurisdiction to hear the application

b) Whether the applicant has proved he is a beneficiary

c) Whether he should be appointed an administrator

WHETHER THE COURT HAS JURISDICTION TO HEAR THE APPLICATION

44. The 1st-3rd respondents opposed the application on the grounds of jurisdiction. Section 66 of the Law of Succession Act gives provisions on the priority of those who are entitled to apply for grant of letters of administration.

> **When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—**
>
> > **(a) surviving spouse or spouses, with or without association of other beneficiaries;**
> >
> > **(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
> >
> > **(c) the Public Trustee; and**
> >
> > **(d) creditors:**
>
> **Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.**

The applicant needs to prove that he was a beneficiary in order for the court to entertain the application.

In **SM v SC (2017) eKLR** the court held;

> ***"The respondent stated that he did not give consent for his name to be indicated as the father of the child in the birth certificate, and the said birth certificate was fraudulently obtained. I wish in that regard to state here that appearance of a person's name as a parent of a child in the birth certificate, where the authenticity of such birth certificate is not established and where a party disputes parenthood, the birth certificate cannot safely be held as prima facie evidence that the person named is the child's parent".***

45. The birth certificate ***per se*** is therefore not sufficient as proof of dependency. Further, the marriage certificate that was produced with the deceased's name as proof of dependency does not, in my opinion, prove that he was indeed supported by the deceased.

Section 29 of the Law of Succession Act provides;

For the purposes of this Part, "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) <u>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</u>**
>
> **(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

WHETHER THE APPLICANT IS A BENEFICIARY

46. I think given the nature of information, evidence, questions and answers that may arise concerning proof that he was being maintained by the deceased immediately prior to his death, or had so been taken care of as to be considered a son of the deceased, it may require viva voce evidence.

WHETHER THE APPLICANT SHOULD BE APPOINTED AN ADMINISTRATOR

45. Given that at this point he fails to meet the requirements to be a beneficiary he cannot be an administrator to the estate, and that limb of his prayer must fail.

E-delivered and dated this 5th of May 2020 at Eldoret

H.A. OMONDI

JUDGE