



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

SUCCESSION CAUSE NO. 7 OF 2018

IN THE MATTER OF THE ESTATE OF BENJAMIN MALUKI MAKAA (DECEASED)

CECILIA MAKAA MWAKE.....APPLICANT

VERSUS

JACKLINE MWENDE BENJAMIN.....1ST RESPONDENT

ANTHONY MAITHYA MUSILI.....2ND RESPONDENT

RULING

1. By application dated 20/12/18 the Applicant Cecilia Makaa Mwake seeks the Orders –
 - (1) That the Letters of Administration Ad Litem made to Jackline Mwende Benjamin
 - (2) and Anthony Maithya Musili on 24/4/2018 be revoked and given to Applicant.
 - (3) Costs also be provided for.
2. The application is based on section 76 of Laws of Succession Act and Rule 44 (1) Probate and Administration Rules.
3. The application is anchored on grounds that;
 - (i) *The 1st Respondent made false allegations in application for Letters aforesaid.*
 - (ii) *That she is a stranger to the deceased and*
 - (iii) *That the applicant is the mother of the deceased and next of kin of the deceased.*
4. The application is also supported by the affidavit of Cecilia Makaa Mwaka sworn on 20/12/2018 which reiterates the aforesaid grounds.
5. The application is opposed by the 1st Respondent Jackline Mwende Benjamin sworn on 19/3/019.
6. She in brief avers that she married the deceased 5 years ago and even adopted his name Benjamin as she was referred to as Jackline Mwende Benjamin.
7. She applied and was issued with deceased death certificate and thereafter instituted the succession cause. They have 2 children namely; Enock Mua Benjamin and Mutava Kania Benjamin.
8. She annexed burial programme document which recognised her as wife and her one child Enock as the 2nd child had not been delivered but was in the womb. Thus she avers hat she is the rightful person to seek grant for her deceased estate.
9. The parties agreed to canvass the application via written submissions which they filed and exchanged:

APPLICANT SUBMISSIONS:

10. The applicant submits that, she is the biological mother and the only parent to one Benjamin Maluki Makaa (Deceased) who met his untimely death on 28th October 2017 as a result of road traffic accident which occurred on the same day at Garissa town.
11. Before his demise the deceased resided at Garissa town where he operated boda boda business to earn a living. The deceased is the applicant's first born and died at the age of twenty five (25) years and was not married. The applicant was depended on the deceased who used to support her.
12. On the date aforementioned when the deceased was involved in the aforesaid road traffic accident his body was collected by his elder brothers namely; Nicholas Kyalo Makaa, Benard Ngui and Kimanzi Makaa who also resided and worked for gain in Garissa town who together with police officers from Garissa Police Station took the body to Garissa Referral Hospital Mortuary.
13. The deceased's aforesaid brothers on the same day transferred the body to the deceased from Garissa to Migwani Sub-District Hospital within Kitui County. At the said hospital postmortem of the body of the deceased was carried out to establish the cause of his death which verification and identification of the body was done by the deceased uncle one Justus Muthini Mwake.
14. The deceased was buried on 4th November 2017 at his parent's home at Kyathambu village, Kavuvwani Sub-Location, Kavuvwani Location within Mwingi West Sub-County. After the burial of the deceased his mother herein the applicant started the process of acquiring a certificate of death for the deceased in order to be able to pursue compensation on behalf of the deceased estate.
15. The applicant went to Migwani Sub-District Hospital where she was informed that the returns in respect of the deceased death had been forwarded to the Office of the Registrar of Persons at Mwingi and therefore she was supposed to go and inquire for the same from that office as well as returning the deceased's identification card to the said office.
16. The applicant proceeded to Mwingi Sub-County Registrar's Office where upon inquiring about the certificate of death of her son she was informed that the said office did not have the records and she was advised to follow up with the Registrar's Office at Garissa where the accident took place.
17. The applicant thereafter proceeded to the Office of the Registrar of Persons at Garissa where she was informed that a lady by the name Jackline Mwendu Benjamin had collected certificate of death for the said Benjamin Maluki Makaa.
18. The applicant was not able at that point to understand how the certificate of death was issued without the deceased ID card being returned to the Registrar of Persons and who could have obtained the same unless he/she is a member of her family and with her consent.
19. The said Jackline Mwendu Benjamin being unknown to the applicant, the applicant was advised to report the matter at Garissa Police Station and she therefore proceeded to the said police station where upon making the report she was told that the same lady by the same name had also obtained police abstract and P3 form from the said police station claiming to be the deceased wife and claiming that she intended to file a suit in pursuit of compensation on behalf of the deceased estate and the applicant was advised to go and make inquiries of the same at Garissa Law Courts.
20. The applicant upon visiting Garissa Law Courts and making inquiries at the courts registries she established that the said Jackline Mwendu Benjamin and one Anthony Maithya Musili (brother to the said Jackline Mwendu Benjamin) had obtained a Grant of Letters of Administration Ad Litem vide **GARISSA HIGH COURT SUCCESSION CAUSE NO. 7 OF 2018** claiming to be the wife to and beneficiary of the deceased estate.
21. The applicant also did establish that the said Jackline Mwendu Benjamin and Anthony Maithya Musili had also filed another case which is Civil Suit No. 11 of 2018 (Jackline Mwendu Benjamin and Another vs Mohamed Aden Hassan) claiming compensation on behalf of the deceased estate.
22. The applicant also confirmed that the said Jackline Mwendu Benjamin had fraudulently obtained certificate of death of the deceased, P3 forms, police abstract among other documents which she used as the list of documents in the said claim.
23. It is the applicant's submission that the Grant of Letters of Administration Ad Litem obtained vide SUCCESSION CASE NO. 7 OF 2018 were fraudulently obtained due to the following reasons:-

- (a) The Grant of Letters of Administration Ad Litem was obtained through concealment of true facts about the deceased.*
- (b) The petitioners in the said grant are strangers to the applicant, and the 1st petitioner was never married to the deceased.*
- (c) Prior to his death the deceased was a bachelor.*
- (d) The petitioners never attended the burial ceremony of the deceased nor were they seen during the mourning season.*
- (e) The certificate of death in respect of the deceased was unprocedurally obtained due to the fact that upto date the deceased identity card is with his mother herein the applicant.*
- (f) The second petitioner in the succession cause aforementioned is a brother to the said Jackline Mwendu Benjamin and not a relative of the deceased and both are strangers to the deceased family.*

(g) Both the Succession Cause and the Civil Suit aforementioned were never disclosed to the deceased family until when the applicant came to know about the matters as she was pursuing the death certificate of his son the deceased.

24. The applicant kindly invites Court to take notice that even if the said Jackline Mwendu Benjamin could have been married to the deceased, at the time of obtaining the Grant of Letter of Administration Ad Litem she could have petitioned the court together with a member of the deceased family and not his brother or a member of her father's household.

25. The reasons as to why the 1st Petitioner chose to petition the court for the Grant of Letters of Administration Ad Litem together with her own brother is questionable and enough evidence that there was total concealment of true facts in this matter.

26. Secondly the reason as to why the petitioners did not return the deceased identity card to the Registrar of Persons before obtaining the certificate of death is evidence of fraud on the part of the petitioners. They did not approach the court with clean hands or at all.

27. As stated earlier the deceased had brothers residing at Garissa together with him and the petitioners are not known to any of them. No records of marriage between the 1st petitioner and the deceased are known to the applicant nor the applicant's entire family.

28. No Kamba customary rites and practices has even been performed in relation to the 1st petitioner as to her being married to the deceased. She is therefore a total stranger to the applicant. It is therefore the applicant's submission that the only justifiable remedy is to revoke the grant in this matter and have the same made to the applicant.

RESPONDENTS' SUBMISSIONS:

29. The 1st Administrator submits that, she is the widow of the deceased. And in the application for letter of grant, she deponed to the fact that she is equally the widow to the deceased and at the time of filing the same she had two children with the deceased having gotten married to the deceased five (5) years ago.

30. The 1st Administrator further submits that they lived both in Garissa town where they both worked and Kavuvoni village in Mwingi where they had put a matrimonial home. The children at the time of petitioning for the letters were aged 4 years and three months respectively.

31. She submits that, her annexure JMB2 a copy of the burial programme for her later husband she was acknowledged by the family and the burial committee that she was indeed the widow of the deceased, her first born child who was then 4 years was equally acknowledged, this fact confirms that indeed the Objector has throughout been economical with the truth and has sinister motives.

32. She submits that, immediately after burial together with her then born child, she was kicked out of their matrimonial home by the Objector with the assistance of her brothers so as to depict the picture of the deceased having died as a bachelor and with no children to depend on.

33. **She submits and relies on** the provisions of section 66 of the Law of Succession Act Cap. 160 which 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 spouse, with or without an 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.”

34. She contends that, section 66 of the Laws of Succession gives priority to her in as far as grant of letters of administration is concerned.

35. She submits that, he who alleges must prove the allegations. The Objector in this case failed to demonstrate that indeed the 1st Administrator is not the widow of the deceased and therefore alleged false information must fail because the same is not supported by evidence. In **Succ Case No. 19 of 2014, Hon. Justice Majanja** (annexed herewith) while dismissing a similar suit stated that:

“The Applicant had the duty to prove any grounds set out in section 76 of the Laws of Succession Act before the grant issued can be revoked which the objectors had failed to prove.”

36. She submits that, the Objector as a mother cannot be given priority where there exist a spouse as in this case and her allegations of false information by the 1st Administrators is only intended to derive a benefit through the back door contrary to the provisions of the law.

37. It is also her submissions that she should be given priority and was therefore entitled to the issuance of the grant that was issued on the 28th February, 2018 as the same was issued legally to her.

38. Lastly she submits that, courts have over years adopted a practice that where a suit is to be filed in respect of the estate of the deceased person where in particular children were also involved, it has always been a requirement that two administrators have to be appointed so that the best interest of the children of the deceased can be well taken care of.

39. In this case, the 1st Administrator submits that she had to apply for letters alongside her brother the 2nd Administrator whom she found capable in assisting her to file a suit for compensation.

ISSUES, ANALYSIS AND DETERMINATION

40. After going through affidavits and submissions herein, I find the issues are; ***whether the applicant has made a case for revocation of grants herein? If above in negative, what is the appropriate order to make? What is the order as to costs?***

41. The court notes that the contested grant is only an enabling instrument for the pursuit of the proceeds of compensation of deceased estate due to his death occasioned by a road traffic accident.

42. The grant is limited to the aforesaid objective and /or task but not to administer the estate of the deceased.

43. However the issue of who has priority to pursue the same task becomes the core issue. The provisions of section **66 of the Law of Succession Act Cap. 160** which 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;

- surviving spouse or spouse, with or without an association of other beneficiaries.

-other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V.

-the public trustee, and

-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.”

44. Clearly the surviving spouse or spouse, with or without an association of other beneficiaries has the priority.

45. The next question is that, is the 1st administrator such a person contemplated by the aforesaid provisions?

46. According to the applicant, the 1st administrator was a stranger to the estate of the deceased and unknown to the deceased family.

47. However 1st administrator’s averments and submissions that she was deceased surviving widow and got 2 issues with deceased is un-rebutted. She demonstrated that during the burial of the deceased she and her born child were recognized as the family of the deceased.

48. If there was fraud as alleged by the applicant, we should have been told the action taken against her and any other participants in its perpetration.

49. The allegation that she was not married via Kamba customary law does not hold water in bestowing her status of a spouse. She could as well be a wife by cohabitation as she avers that, they had cohabited for 5 years plus with deceased before his demise and even applicant and her family recognized her during burial of the deceased as his spouse.

50. She was however chased away after the burial. In any case, after the proceeds are recovered, the distribution of deceased estate can be subject of the full hearing to determine the deceased heirs.

51. However to safeguard the interest of the applicant who is deceased mother, it would be fair to include her in the civil suit as the beneficiary of the estate of her deceased son. This is so because she averred that her deceased son used to assist her when he was alive and same was not re-butted by the respondents.

52. Thus the court makes the following orders ;

(i) The application is dismissed.

(ii) The court directs that the applicant to be listed in Civil Suit No. 11 of 2018 (Jackline Mwendu Benjamin and Another vs Mohamed Aden Hassan) claiming compensation on behalf of the deceased estate as a beneficiary.

(iii) No orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 21ST DAY OF MAY, 2019.

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CHARLES KARIUKI

JUDGE