



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
SUCCESSION CAUSE NO. 176 OF 2012
IN THE MATTER OF THE ESTATE OF NJOGU MUGO – (DCD)

AND

FAITH WANJIKU NJOGU ...1ST PETITIONER

JOHNSON KINYUA.....2ND PETITIONER

RULING

1. This matter relates to the estate of Njogu Mugo, deceased. A grant of letters of administration in his estate was issued to Faith Wanjiku Njogu on 26.1.2012. She proceeded and filed summons for confirmation of grant. In her supporting affidavit sworn on 2.8.12 she listed herself and her twelve children as the dependants. She proposed to distribute the estate to herself and her twelve children.

2. Before the application could proceed. Affidavit of protests and caveats were filed. The 1st protestor brought in an issue that the deceased had left a will. The petitioner contested the will. The judge directed that the question of the validity of the will be determined first. She further directed oral evidence be adduced. The evidence was adduced before Justice Limo heard the evidence and proposed to visit the scene.

However, before that one of the protestors, Marieta Wangechi Gichuki passed away. She was substituted by Isaac Njogu Gichuki.

3. What is now pending before is an application filed brought under Rule & 73 of the Probate and Administration rules seeking an order that John Munene Njogu one of the beneficiaries be substituted by the applicant Denis Njogu Munene. It is based on the ground that John Munene who is a beneficiary died on 15.2.2013 before these proceedings were concluded. The applicant Denis Njogu Munene is a son of John Munene Njogu.

The said John Munene Njogu is the son of the deceased whose estate these proceedings relate.

4. The application is opposed by Isaac Njogu Gichuki who is the 2nd protestor and has filed an affidavit sworn on 19.11.19.

He depones that the applicant is a grandson of the deceased and therefore not an heir. That the applicant can only claim a share from the petitioner after the conclusion of the cause. That John Munene Njogu was never a party in this cause.

5. The 1st and 2nd protestor opposed the application and state that the applicant is a grandson of the deceased and therefore not a direct heir. The applicant has no locus standi to substitute the petitioner who is his grandmother. This contention is however a misconception as the applicant is not seeking to substitute the petitioner.

6. The parties agreed to file written submissions. For the applicant, it is submitted that the applicant is a grandson of the petitioner. He has obtained letters of administration and litem in the estate of his deceased father, annexure DMN2.

7. He submits that the issue for determination is whether a grandson can inherit from the estate of his grandfather. He relies on the case of **Cleopa Amutala Namayi -V- Judith Were (2015) eKLR** where the court stated that a grandson can inherit from the estate of his grandparent.

It was stated:

“Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents who died intestate after 0.1.07.1981 when the Act came into operation.

The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of their parents.

The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren’s own parents are dead. Those grandchildren can now step into the shoes of their parents and take directly the share that ought to have gone to the said parents.

Needless to say such grandchildren must hold appropriate representation on behalf of their parents (Emphasis Mine).

He also relied on the cases of: -

1. In Re- estate of Wambui Ndutu (deceased) (2017 eKLR.

2. In the matter of the Estate of Veronica Njoki Wakago to (Deceased) (2013) eKLR. Where a similar holding was made.

8. For the 2nd protestors it was submitted though a beneficiary of the deceased, the late applicants father, whose mother is the petitioner was never a party to the proceedings as deponed by the 2nd protestor in paragraph 4 of his affidavit in opposition to the application and as such it is fallacious for the applicant to seek to substitute him as nobody in denying him the right to inherit his late father’s portion particularly because the petitioner is the mother of his late father. That the application is brought in bad faith and to distract the proceedings.

9. It is further submitted that the application does not raise an issue of whether a grandson can inherit from his grandfather as it is clear that he has a right to do so. Subject to qualifications set out in Kakamega High Court Succession Cause No, **457/2005 In the matter of Estate of Joseph Namani Lukungo a.k.a Yusus Namayi.** The other grandchildren will apply to be joined in the suit.

10. I have considered the application. The issue for determination is whether the applicant should be joined in the suit as a beneficiary/dependant.

Section 29 of the Law of Succession Act defines a dependant

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) 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

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

11. This definition includes grandchildren. The definition is given in the order of priority. It depends on who has survived the deceased. The definition does not exclude grandchildren from the list of dependants. However, the grandchildren are not direct or automatic dependants. They inherit from their parents share who are direct dependants and where they prove that they were being maintained by the deceased.

12. In this case there is no dispute that the applicant is the son of a son of the deceased to whom these proceedings relate and nit the applicants part in deceased.

A perusal of the affidavit in support of the application for confirmation of grant will show that John Munene Njogu is listed as one of the beneficiaries. It is not in dispute that the applicants father is deceased and the applicant has obtained a limited grant in the estate of his deceased father.

13. The decision in the case of **Cleopa Amutala Namayi (Supra)** which the protestor has given the condition under which grandchildren will inherit sates that where their parents ae dead, they take the share which should have gone to their parents.

The applicant has stated that he wants to be joined in as a beneficiary so that he can get a share which would have gone to his deceased father who is entitled to a share from the estate of the deceased.

15. The applicants father being a son of the deceased is entitled to a share of the estate of the deceased. This is why the applicant being his only son wants to be included as a beneficiary. The applicant is entitled to the share which would have gone to his father. I find that the application has merits.

15. The applicant submits that the second issue is whether the estate has been distributed. I find that at this stage that is not an issue. The matter is part heard and it is premature to determine any matter touching on the distribution of the estate before all the parties are given a chance to be heard.

In conclusion I order that: -

1. The application dated 2.11.2018 has merits.
2. I allow the application and order that Denis Njogu Munene is substituted as a beneficiary in place of his deceased father John Munene Njogu.
3. Each party to bear own costs.

Dated at Kerugoya this 18th day of October, 2019

L.W. GITARI

JUDGE