



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO.343 OF 2015

IN THE MATTER OF ESTATE OF DISON BABI NZIOKA alias BABI JOSIAH (DECEASED)

BETWEEN

FRANCIS MUTUNGA BABI.....PETITIONER/RESPONDENT

AND

ISAAC NZIOKA.....PROTESTOR/APPLICANT

BERNARD MUTIE MUSAU.....INTERESTED PARTY

RULING

1. By an affidavit of protest sworn by the Protestor herein, **Issac Nzioka Babi**, averred that the Petitioner is his step brother while the deceased, **Dison Babi Nzioka Alias Babi Josiah** is his father. The deceased was married to two wives, **Esther Babi** (1st wife) who is deceased and **Patricia Kavindu Babi** (2nd wife).
2. The Protestor objected to the grant of letters of administration intestate issued by this court on 8th September, 2018 on the grounds that the petitioner, **Francis Mutunga Babi**, petitioned for letters of administration without the consent of the 2nd house. According to the Protestor, the Petitioner never gave his brother and himself the consent to sign yet the same had their signatures which were appended by the said petitioner without their knowledge.
3. It was further averred that the petitioner omitted some of the beneficiaries from the petition who are three daughters of the deceased, two from the first house while one is from the second house.
4. It was therefore the Objector's position that it is in the interest of justice that his mother, **Patricia Kavindu Babi**, be included in the grant as a co-administrator with **Francis Mutunga Babi** to represent her house.
5. The protest was however opposed by the petitioner, **Francis Mutunga Babi**, who averred that the beneficiaries of the estate including the protestor herein duly consented to the making of the grant to him and that the protestor has even appended his signature on the consent to the confirmation of the grant which is yet to be filed. It was averred by the petitioner that before the filing of the petition, all the willing beneficiaries including the Protestor duly gave their consent to his being appointed as administrator of the estate. The petitioner denied that he petitioned for letters of administration without the consent of the 2nd house and further averred that the allegation that he appended the signatures of the protestor and his brother on the consent is an unfounded insinuation of forgery and thus scandalous and untenable.
6. According to the petitioner, the Protestor is not entitled to front for **Patricia Kavindu Babi** who is not objecting having consented to his being appointed an administrator. It was averred that the three daughters of the deceased having not expressed their willingness to be included in the petition were omitted but are free to be heard under the provisions of Rule 41(1) of the **Probate and Administration Rules** in which case, he would not be opposed to their inclusion in the distribution of the assets.

Determination

7. I have considered the summons, the affidavits both in support of and in opposition to the application and the submissions filed.
8. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

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;

9. Section 66 of the ***Law of Succession Act***, Cap 160, Laws of Kenya provides as follows:

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.

10. Section 39(1) of the Act which falls under Part V deals with situations where the intestate has left no surviving spouse or children and provides that:

Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

11. In this case, it is clear that the Petitioner herein did not rank in priority to the surviving widow of the deceased. It is clear that the Petitioner could only lawfully petition for grant upon receiving a consent from the said widow, or upon citation having notified the said widow of his intention to petition for grant in respect of the deceased's estate. This must be so because Part VI Rule 26(1) of the ***Probate and Administration Rules*** on the other hand provides that:

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

12. In this case, there is filed with the petition a consent to the making of a grant of administration intestate to person of equal or lesser priority which is purportedly signed by the said widow. The said widow has not challenged the averments made in the said consent that she agreed to the petitioner petitioning for the grant.

13. As for the omission of the three daughters, section 51 (2) of the ***Law of Succession Act*** provides that:-

An application shall include informations as to-

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

14. While the petitioner accedes that the names of the said three daughters were omitted, he nevertheless contends that the said daughters did not express their willingness to be included in the petition but are free to be heard under the provisions of Rule 41(1) of the **Probate and Administration Rules** in which case, he would not be opposed to their inclusion in the distribution of the assets. The said Rule provides that:

At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.

15. With due respect to the petitioner, the said rule cannot be deemed to be a cure to the failure to comply with the mandatory provisions of section 51(2)(g) of the **Law of Succession Act**. The daughters of a deceased person are not just “**any other person interested**”. They are children of the deceased and as was held by the Court of Appeal in the case of **Mwongera Mugambi Runturi & Another vs. Josephine Kaarika & 2 Others (2015) eKLR**:

“This Court has long accepted that a child is a child none being lesser on account of gender or the circumstances of his or her birth. Each has a share without shame or fear in the parents’ inheritance and may boldly approach to claim it. What Rono -V- Rono (2005 IEA 363 decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya 2010. See also Grace Wachuka -V- Jackson Njuguna Gathungu (2014) eKLR 100.”

16. Therefore, the failure to disclose the existence of daughters in a petition amounts to concealment from the court of something material to the case and that may warrant the revocation of a grant. However, as was held in **Re The Estate of the Late Suleman Kusundwa [1965] EA 247**:

“The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased’s property as he was entitled to dispose of by will under the applicable law of inheritance.”

17. Whereas it is true that the 2nd widow of the deceased has not taken any issue with her omission as an administrator of the estate of the deceased, in my view for the purposes of transparency, it is prudent that she be made a joint administrator of the estate of the deceased. In the premises, I direct that the three omitted daughters of the deceased be and are hereby added as beneficiaries of the estate of the deceased and the said Patricia Kavindu Babi is hereby appointed as a co-administrator of the estate of the deceased together with the Petitioner, Francis Mutunga Babi.

18. As the dispute pits members of the same family, there will be no order as to costs.

19. It is so ordered.

Read, signed and delivered in open Court at Machakos this 6th day of November, 2019.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

Mr Mukula for Mr Mulwa for the Petitioner/Respondent

Mr Muthama for the Protestor

