



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 97 OF 2017

IN THE MATTER OF D M G

G G M..... APPLICANT

VERSUS

M N M.....RESPONDENT

JUDGMENT

1. The deceased D M G died intestate on 5<sup>th</sup> July 2016 at Tigoni. He left a widow M N M (the respondent) and a son K K M. On 25<sup>th</sup> January 2017 the respondent petitioned this court for the grant of letters of administration intestate. The grant was issued on 20<sup>th</sup> March 2017, and confirmed on 20<sup>th</sup> June 2017. The properties in the estate were land parcel KJD/Kaputiei North/[particulars withheld] measuring about 0.0863Ha and money in the A/c No. [particulars withheld] at Equity Bank, Tom Mboya Branch. The respondent and her son were ordered to share the estate equally.
2. On 1<sup>st</sup> September 2017 the deceased's father G G M (the applicant) applied to have the grant revoked and/or annulled. His case was that he and his wife M W G were dependants on the deceased before he died but that the respondent had not provided for them. He stated that he had not been made aware of the petition; that the respondent had filed a petition to divorce the deceased; that immediately she was served with the petition the deceased was murdered; she disappeared following the death of the deceased; and she did not bury the deceased. The applicant stated that the respondent was no longer the wife of the deceased by the time of the death, and therefore was not entitled to the grant or to benefit from the estate. Lastly, it was stated that the death certificate presented to support the application for grant was forged.
3. The application was opposed by the respondent through a replying affidavit dated 17<sup>th</sup> September 2017. The respondent stated that she was the wife of the deceased upto his death; and that the **Divorce Cause No. 434 of 2016** that the deceased had filed against her abated when he died. In any case, she continued, there was no divorce that had been granted against her. She states that the allegation of forgery of the death certificate had not been particularized. Further, she contended that the applicant and his wife were not depended on the deceased; that the applicant was a man of means who was an architect by profession and had successful architectural business, leave alone being the operator of a building company known as Gee Cubed Construction Ltd in which the deceased had 500 shares. Lastly, in terms of priority, the applicant did not rank more or in equal priority than her or her son in relation to the estate of the deceased and application for grant.
4. The respondent, in further opposition to the application, filed a notice of preliminary objection dated 17<sup>th</sup> September 2017. It was on the ground that the applicant had not fulfilled the requirements of **section 29(b)** of the **Law of Succession Act (Cap 160)** and therefore lacked capacity to bring the application. However, **section 29(b)** of the **Act** asked the applicant to show that he and his wife had been taken in by the deceased, and that they were being maintained by him before he died. On the authority of **Mukisa Biscuit manufacturing Co. Ltd -v- West End Distributors Co. Ltd [1969]EA 696**, the objection is not sustainable because it bears factual aspects that would require proof.

5. Counsel filed written submissions on the application, and various authorities were cited. I have considered the sworn evidence and the submissions.

6. The applicant sought to be declared a dependant of the deceased under **section 29(b)** of the **Act**. He was required to produce evidence to show that both he and his wife had been taken in by the deceased, and that the deceased was maintaining them up to his death. He did not, in his affidavit, produce any such evidence. On the other hand, the respondent states that the applicant was a man of means who was operating a professional business and had a construction company whose details were given, The record at the Companies Registry was produced to show that he, his wife and the deceased among others, had shares in the Company. That evidence was not controverted. I find that that the applicant and his wife had neither been taken in by the deceased nor were they his dependants. They were, therefore, not entitled to notice of the commencement of the petition for the grant.

7. **Section 66** of the **Act** sets out the order of priority in regard to persons entitled to the administration of the intestate estate of deceased person. The section gives the court the discretion to determine to whom a grant should be issued. The discretion is guided by the general rule that the spouse or spouses of the deceased with or without association of other beneficiaries rank higher in order of preference, when compared to other beneficiaries, Public Trustee, and creditors. In this case, the deceased had sought to divorce the respondent but the proceedings had not been concluded. She was, therefore, still the wife of the deceased, and ranked higher in preference when compared to the applicant. It follows that the respondent was entitled to petition for the grant of letters of administration intestate.

8. The applicant accused the respondent of having murdered the deceased. That was a criminal allegation that required proof beyond all reasonable doubt after charge in a criminal court. This was not the forum for the resolution of this murder claim.

9. On the allegation of forgery of the death certificate on basis of which the petition for letters of administration was made, the particulars were not given and the affidavit in support of the application did not offer any evidence.

10. In conclusion, I find that the application by the applicant lacks merits. It is dismissed with costs.

**DATED and DELIVERED at NAIROBI this 7<sup>TH</sup> day of FEBRUARY 2018**

**A.O. MUCHELULE**

**JUDGE**