



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 1158 OF 2013**

**IN THE MATTER OF THE ESTATE OF RYK (DECEASED)**

**R K Y.....PETITIONER**

**VERSUS**

**J M Y.....RESPONDENT**

**JUDGMENT**

The deceased **RYK** died on 19<sup>th</sup> February 2012. On 29th July 2013 grant of letters of administration were issued to **JMY** widow of the deceased and **RKY** a son to the deceased and stepson to 1<sup>st</sup> administrator.

The Children of **JMY** and the deceased are;

- a. G M Y
- b. F K Y
- c. I M Y
- d. N M Y
- e. O M Y
- f. S V Y

The application for consideration is the summons dated 31st March 2014. The application is brought under section 45 of the Law of Succession Act. The applicant sought the following orders;

- i. That the respondent accounts for the proceeds from the deceased's estate from 2012 to-date.
- ii. That the parties do open joint Bank account to deposit proceeds from the deceased's estate
- iii. That the respondent delivers all the title documents and log books in court within 14 days
- iv. That the court appoints registered estate agents that is mutually agreeable to the parties to handle the management of the deceased's rental properties.

The application is based on grounds that upon the demise of the deceased on 19th February 2012; the applicant and respondent commenced succession proceedings as co-administrators in **Succession Cause No. 1158 of 2013**. That the co-administrators have been enjoying a cordial relationship until the letters of administration were gazette and the grant was issued. That the respondent has now taken it upon herself to administer the estate to the total exclusion of the applicant and receives all the income from the estate absolutely.

In his affidavit in support of the said application the applicant avers that since the deceased died in mysterious circumstances his immediate concern was to get to the bottom of it however the process was lengthy and dragged on for a year. That following the attack on the deceased,

he went to see him in Machakos Hospital where he was admitted and even tried to get an ambulance in efforts to transfer him to MP SHAH hospital. That at the time the respondent understood her role as custodian. That at the close of investigating on revisiting the issue of finalizing the succession process the respondent's reaction was not favorable. That the respondent has been intermeddling with the deceased's estate while receiving all proceeds from the estate for her own gains while completely sidelining him. That the respondent has completely cut him off from all the affairs of the estate He urged the Court to restrain the respondent from further dealing with the estate as her conduct is detrimental to the rest of the beneficiaries.

In his further affidavit dated 14th May 2014 avers that there are children in school who require school fees and hence the proceeds from the estate need to be managed well. He denied allegation that he filed secret succession proceedings in **Succession Cause No. 2204 of 2013** where he left out the Respondent and her children as beneficiaries and instead the Petitioner included his mother; GM, RK (petitioner), VNNY and GNNY are the deceased's 1st wife and daughters respectively and hence are not strangers to the succession proceedings. That he never demanded that the estate of the deceased be divided all he sought was that the respondent account for the proceeds from the estate. That despite intervention from other relatives in resolving the issue on management of the estate of the deceased the respondent has always stormed out. That the respondent has developed Plot No.123 in Kayole estate and while she was married to the deceased she was never involved in any money generating activity. Adding that it is questionable where she got funds to develop the plot. That the respondent has failed to produce evidence to show how much is collected from the deceased's estate nor how much she spends on school fees rent and upkeep of his siblings. He further seeks to know the whereabouts of the funds held in the following accounts;

i. Standard Chartered Bank Account [...]

ii. Barclays Bank Account No. [...]

iii. Co-operative Bank Account No. [...]

iv. Family Bank Account No. [...]

JMY in her further affidavit dated 26th May 2014 averred that GRK was divorced by the deceased along time back. Further that VNNY and GNNY are not children of the deceased and their addition to is calculated to ensure that the Petitioner gets a huge personal share of the deceased's estate. She denies allegations to showing any hostility towards the applicant and claims the applicant is self-centered.

This Court gave a Ruling on the application on 6<sup>th</sup> October 2014 and urged both administrators, the Petitioner and Respondent adhere to **Sections 79-83 of Law of Succession Act Cap 160**. The issue of who comprised of list of beneficiaries of deceased's estate would be determined during an *inter partes* hearing.

## HEARING

JM (PW1) reiterated the contents of her affidavits in Court.

She was married to the deceased in 1989 and found Co administrator aged 10 years and brought him up. She did not find a wife. According to her , the 1<sup>st</sup> wife G was divorced a long time ago. Her 2 daughters are not children of the deceased. The 1<sup>st</sup> family were not recognized during the deceased's funeral. They did not participate in the preparation. She did not know of VNNY and GNNY as children of deceased, she would have brought them up.

GN (PW2) cousin to deceased confirmed G as the deceased's 1<sup>st</sup> wife and they lived in Lungalunga. When they came back she left and went to live at her father's home. He did not know /understand why. He tried to resolve the family dispute but the Respondent refused to attend meeting.

Julius Mwangangi Kivuva,(PW3) retired Chief and District General Secretary of Nzunga Nzau Clan called a meeting and J, R and B are the ones who attended the meeting and could not discuss much

BWK (DW2) in his affidavit dated 27th April 2015 and testimony averred that the deceased was married to GRK and they were blessed with 3 children namely;

i. VNNY

ii. RYK

iii. GNNY

He avers that pursuant to the ruling of this court he tried to facilitate amicable resolution of the co-administrators to no avail as evidenced by his letter dated 20th January, 2015. JM Yeova failed to attend. He urged the court to order the respondent to give an account of how she has dealt with the estate from 2012 to-date. That further owing to the hostility of JMY to the co-administrator and other family members he urged the court to distribute the estate of the deceased to the beneficiaries.

Grace R K (DW5) in her affidavit dated 30th October 2015 and testimony averred that she was married to the deceased on 24/8/1974 and attached marriage certificate was blessed with 4 children namely;

i. VNNY

ii. RK

iii. GNNY

iv. KY

That she stayed married to the deceased until 2012 when he died. She stated that there was no divorce as alleged by JMY. She reiterated that the deceased always went to see the children, paid their school fees, bought food and did all a father does for their children.

GNNY (DW4) in her affidavit dated 30th October 2015 and testimony averred that though the deceased was mostly away from home, he would go home take them food, clothing, school fees and attended to all her needs . Having grown up in the village she was married at an early age and took out her Identification card in the names of her husband. She avers that she is s true beneficiary of the deceased's estate.

VNNY (DW3) also testified and relied on her affidavit filed on 4<sup>th</sup> November 2015 and stated that she is child of the deceased and was born in November 1973 in Kitui and then moved with their family to Lunga Lunga and she attached Baptism card. She said she went to school in LungaLunga and they came back in 1988, she went with her mother to her home and their father went to work and did not stay at home.

RKY (DW1) in his affidavit dated 30th October 2015 and testimony averred that he has 6 siblings from his step mother' side and two from his biological mother' side namely VNNY and GNNY and stated that all the 9 beneficiaries are entitled to inherit the deceased's estate. Further, he stated that a number of the properties in the deceased's estate were developed by the deceased before his demise. That despite his Uncle BWK's intervention between the 2 families to settle the matter of court his stepmother has totally refused. He stated that **Succession Cause No. 2204 of 2013 and 1158 of 2013** were consolidated by this court and he urged the court to order the respondent to give an account of how she has dealt with the estate since 2012.

Issues rose as to the management of the estate and non-transparency of JMK and this prompted the co-administrator RK to file an application dated 31st March 2013 and the court held vide Ruling of 6<sup>th</sup> October 2014, that the administration of the said estate should be transparent and both co-administrators had equal powers in administration of the deceased's estate. The court urged the co-administrators to find amicable way to resolve their differences.

Even after hearing of the witnesses, the families could not agree on the list of beneficiaries and this prompted them to seek the court's indulgence and order the beneficiaries to go for DNA Sibling testing. The same was conducted and a DNA report dated 18th November 2017 was filed in court. The said DNA report revealed that the following were the biological children of the deceased;

**R KY, GY, OY, FY and NY.**

VNNY, GNNY, **IY and SY** were found not to be the biological children of the deceased.

## **SUBMISSIONS**

The applicant in written submissions raised 3 issues for determination.

- i. Whether GRK, VNNY, GNNY are dependants of the deceased?
- ii. Whether SY and IMY should be beneficiaries of the estate of the deceased?
- iii. Whether it was fair and just for JM to shut out RK (co-administrator) from administering the estate of the deceased.

On whether GRK, VNNY, GNNY are dependants of the deceased? It was submitted that GR married the deceased on 4th August 1974 in Nakuru and were blessed with 4 children VNNY, Robert Kavivya, GNNY and late KY. Although JM alleged that GR was divorced the said divorce proceedings were never finalized and there is no decree nisi or absolute produced in Court as evidence. Grace is a wife/widow of the deceased and as such a dependant as provided for under **Section 29 of the Law of Succession Act**. In the case of **Re. J N M (deceased) [2005] eKLR**,

**“... regards the dependency by E M . I will recall her own evidence whereby she testified that she separated from the deceased from 1942 due to what she called constant beatings by the deceased. She moved to her own mother's property at Dagoretti where she lives to this day.**

**According to her, she was not aware of any divorce proceedings. However since there is a certificate of making of Decree Nisi absolute that was issued on 11th July, 1975. I do not wish to belabour the issue, I am satisfied that EM was a former wife of the deceased as provided for under Section 29 of the Law of Succession which 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;**

**EM said that although she was separated and moved from the deceased home at Gatundu the deceased continued to give her**

**money for her own needs and those of her children M and N, I am satisfied that this court should make a reasonable provision for the deceased's former wife.'**

GRYK was married in a monogamous marriage on 24<sup>th</sup> August 1974 and she produced marriage certificate. Although in 1988 she separated from her husband, they did not divorce, she is therefore 1<sup>st</sup> widow of the deceased as wife and mother of the 3 children.

It is not contested that the Respondent was married and lived with the deceased from 1989 and until the deceased's demise. She is also wife widow of the deceased and mother of the 6 children.

It was submitted that VNNY is the first born daughter of GR born in 1973 prior to the union of grace and the deceased and was adequately provided for as the deceased's own child. Her baptism certificate indicates the deceased as her father hence she is a child of the deceased as envisioned by

**Section 3(2) of the Law of Succession Act** which provides,

**"(2)... "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility." hence Veronica qualifies to be a dependent under section 29 of the Act.**

GNNY younger child to G is a legitimate child of the deceased as she was born during the continuance of a valid marriage. In reliance of **Section 118 of the Evidence Act Cap 80** of the Laws of Kenya which provides,

**"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after the dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."**

G's immunization card, Baptism certificate and her certificate of Primary education indicate her surname as Y. It was submitted that GNNY and VNNY are children of the deceased as per the provisions of **Section 3(2) of the Law of Succession Act** and as such should benefit from the estate of the deceased.

On whether **SY** and **IMY** should be beneficiaries of the deceased; it was submitted that report dated 18th November 2017 it is unequivocal that **SY** and **IMY** are not biological children of the deceased and no evidence has been adduced to prove otherwise. These children have lived and been taken care of by the deceased during his lifetime and therefore fall under **Section of Law of Succession Act Cap 160**. They are deemed beneficiaries of the estate of the deceased.

On whether it is lawful for **JM** to exclude **RK** (co-administrator) from administering the estate of the deceased? It was submitted that conflict arose when the co-administrator **RK** wanted to participate in the direct management of the revenue from the rental properties of the deceased's estate. This led **R** to file the application dated 31st March 2013 whose ruling was delivered on 6th June 2014 as follows;

**"the Respondent should administer the estate in a transparent and accountable manner with the applicant . The appointment as administrator is as equals and not one to administrate to the exclusion of the other administrator and then report to the administrator. The respondent and the applicant as administrators should find an amicable way to resolve differences and together administer the estate of the deceased for the benefit of all the beneficiaries."**

**BWK**; brother to the deceased wrote a letter dated 20th January 2015 to **JMY** and **RKY** inviting them to a reconciliatory meeting as per the said ruling but **JY** failed to attend to the said meeting. **J** has to-date continued to deal with the estate to the exclusion of the co-administrator **RYK**.

Further that the said administrator has refused to give an account of the whereabouts of the funds in the following accounts;

- i. Standard Chartered Bank Account – [...]
- ii. Barclays Bank Account No. [...]
- iii. Co-operative Bank Account No. [...]
- iv. Family Bank Account No. [...]

It was submitted that the Respondent's has never been involved in any income generating activities but has developed plot no. 123 Kayole estate and it is questionable where she got the funds to develop the said property. It was submitted that the Respondent defied the orders of this court and has failed to account of her use and management of the estate and continues to control and benefit from the estate of the deceased to the exclusion of the Applicant, his 2 sisters and mother.

The applicant further listed the assets and liabilities of the estate of the deceased as follows;

- i. LR 82/2122/House No.237-8A Tena Estate, Nairobi
- ii. Kayole Estate plot no. B2-121 and B2-122- developed
- iii. Kayole estate Plot no.A1-118, B2-123 and B2-130 partially developed, B2-121 and B2-122 partially developed, B2-123 fully developed and occupied
- iv. Plot No.D3-138 Soweto-partially developed
- v. Plot in Ndumoni Kitui
- vi. Plot No. 56 & 57 Mlolongo Sabaki- partially developed
- vii. Plot in Syokimau-undeveloped
- viii. Plot in Ruai-undeveloped
- ix. Land in Kitui Kyangwithya/Mulutu/844- burial site of deceased
- x. Plot No.31& 32, Lunga,Lunga
- xi. Motor vehicle Reg. No. KAT 509Y Toyota Corolla
- xii. Pick Up Reg. No. KAG 884E Nissan Datsun
- xiii. Standard Chartered Bank Account -[...]
- xiv. Barclays Bank Account No. [...]
- xv. Co-operative Bank Account No. [...]
- xvi. Family Bank Account No. [...]

He urged the Court to be guided by **Section 28** and the principles set out in the **Succession Act Cap 160 Laws of Kenya** and urged the court to take into account the past and present income generated from the estate appropriated by JM and urged the court to distribute the estate of the deceased to the two houses of the deceased. Further, he urged the court to find that IMY and SY are not beneficiaries of the deceased as JM had not adduced any evidence to evidencing any relationship to the deceased.

#### **DETERMINATION**

I have considered the parties pleadings, testimony parties and submissions.

The Issues for determination are as follows;

- a. Who comprises of the list of beneficiaries/dependents of the estate of the deceased?
- b. What assets comprise of the estate of the deceased?
- c. Are the administrators jointly administering the estate of the deceased according to their statutory mandate?
- d. What is the proposed mode of distribution with consents of all beneficiaries?

#### **DISPOSITION**

From the pleadings testimonies and documents filed in Court and the DNA Report this Court finds that the deceased's family comprised of 2 wives/widows and 9 children. Even those whom the DNA found not to be biological children of the deceased, documents filed demonstrate that the deceased had expressly recognized and in fact accepted as his own and for whom he voluntarily assumed permanent responsibility. They are dependents by virtue of **Section 3(2) Law of Succession Act Cap 160**.

On the 2<sup>nd</sup> issue the properties that comprise of the deceased's estate are as outlined by the Petitioner/Applicant and Co administrator RY as outlined above; in his affidavits and photographs apartments in Tena Estate L.R.82/2122/House 237-8A; Kayole Estate Plot B2-123, B2-122, B2-121, B2-130 & Plot D3- 138 & Kayole Estate A1-118. These assets are available for distribution to all beneficiaries of the deceased's estate.

This court had on 6th June 2014 urged the parties to co-operate and jointly administer the estate of the deceased. The applicant has failed to

comply with the said order and has not given any reason for her said non-compliance. Despite intervention from other relatives in resolving the issue on management of the estate of the deceased the respondent has always stormed out of meetings and or failed to co-operate with other family members. The estate of the deceased has rental houses from which only the 2nd administrator collects rent. Although she informed that she used funds to pay school fees and school expenses for her children, the law requires administrators work jointly for all beneficiaries which is not the case.

**Section 83 of the Law of Succession Act Cap 160**, tasks the legal representative to give a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

**Section 83 (h) of law of Succession Act Cap 160** further provides that the court or an interested party can request for a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

Due to the current standoff and non-co-operation between the respondent and the applicant;

This Court orders the co-administrator JM shall give a full account of all dealings of assets of the estate of the deceased from 2012 to-date. The same to be filed within 45 days from the date of judgment to account to beneficiaries and the Court.

The Court orders appointment of a real estate agent to collect rental proceeds from the estate of the deceased pending the confirmation and winding up of the estate of the deceased.

The respective advocates of the administrators shall jointly appoint real estate agent to collect rent receivables and after payment of utilities, statutory deductions and legal expenses avail funds to the beneficiaries and also account to the Court. In default of compliance of the above order, the Deputy Registrar Family Division shall appoint a registered real estate agent to collect rental proceeds from the deceased's rental houses pending the confirmation and winding up of the estate of the deceased.

The applicant has sought orders that the Respondent delivers the title documents to court. I find that the court cannot act as custodian of such important documents and as such order the administrators to jointly open a safety deposit box with a bank of their choice and deposit the documents' therein. For purposes of ascertaining, what assets belonged to the estate of the deceased the co-administrators to file a list of all assets and liabilities belonging to the deceased and annex certified copies of all title documents of the assets belonging to the deceased. This will guide this court during the confirmation of the said grant and distribution of the assets of the deceased.

The Administrators jointly or separately shall after consultations and/or agreement with beneficiaries/ dependents file summons for Confirmation

within 90 days from date of judgment.

Any party that does not consent shall file protest(s) to be determined by the Court. Any aggrieved party to Lodge appeal.

Cost in the cause. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 14<sup>TH</sup> DAY OF DECEMBER 2018.**

**M.W.MUIGAI**

**JUDGE –FAMILY DIVISION –HIGH COURT**