

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 3172 OF 2015

IN THE MATTER OF THE ESTATE OF SEAN LAWRENCE GAVAGHAN (DECEASED)

ELIAS MAGUTU.....1ST PETITIONER

TERESA WAMBUI.....2ND PETITIONER

AND

LEIGH JADE GAVAGHAN.....1ST RESPONDENT

LAUREN SARAH GAVAGHAN.....2ND RESPONDENT

R U L I N G

1. Sean Lawrence Gavaghan whose Estate is in issue died on 10th May, 2014. Representation to his estate was sought in a petition lodged in this court on 18th December, 2015 by Leigh Jade Gavaghan, Lauren Sarah Gavaghan, Ellias Magutu Waiganjo and Teresa Wambui Magutu in their respective capacities as daughters and guardians of the minor daughters from the 2nd house of the deceased respectively.

2. The Deceased was expressed to have been survived by a widow and six daughters namely:

- i. R W G - daughter (minor)
- ii. E N G - daughter (minor)
- iii. Leigh Jade Gavaghan - daughter
- iv. Lauren Sarah Gavaghan - daughter
- v. Coral Maxine Gavaghan - daughter
- vi. Amber Gavaghan - daughter
- vii. Vera Gavaghan - widow

He was also said to have died possessed of:

- i. Personal and household effects
- ii. Barclays bank of Kenya A/c No. [Particulars Withheld]
- iii. Final dues from Rusinga management Co. Ltd
- iv. Motor vehicles: KNU 709 and KMR 594

v. Motorbike KAC 767 D

vi. East African Breweries Limited 429,228 ordinary shares

vii. Ethiopian Airlines refund of ticket

The grant of letters of Administration intestate was issued to the Respondents on 4th May, 2016.

3. On 4th July, 2016, Ellias Magutu Waiganjo and Teresa Wambui Magutu (hereinafter referred to as the Petitioners), filed summons for confirmation of Grant notwithstanding that six months had not lapsed. The application is premised on grounds that some of the beneficiaries of the estate are minor children aged 4 and 6 years respectively and are in need of upkeep and the Administrators wish to distribute the estate to be able to cater for the needs of the minor children.

4. In his supporting affidavit sworn on 4th July, 2016, Ellias Magutu Waiganjo on behalf of one Administrator averred that both he and his wife are the legal guardians of R W G and E N (minors). That the deceased had two families one of which had the two minors who are under the care of Elias Magutu and his wife and the said minors depended on the deceased and the Petitioners.

5. The Petitioner averred that the two minors are still in school and the following liabilities are due to the estate:

i. 2014 - School fees for 2 children at [Particulars Withheld] Kindergarten Kshs.171,000/=

ii. 2016 - School fees for 1 child at [Particulars Withheld] Kindergarten Kshs.85,000/=

iii. School fees for 1 child at [Particulars Withheld] Academy for one year (Ruby 2016) Kshs.25,200/= per term.

iv. Upkeep for two children at Kshs.80,000/= per month (from 10/5/2014 to date) – Kshs.1,920,000/=

v. Legal charges for this cause – Kshs.700,000/=

vi. Travelling expenses for beneficiaries to court for confirmation of grant – Kshs.10,000/=

6. The Petitioner proposed that after all the deductions of the expenses from the deceased's account have been made, his estate be distributed as follows:

Name	Description of Properties	Share of Heirs
R W G E N G	Personal and household effects	60%
Leigh Jade Gavaghan, Lauren Sarah Gavaghan, Coral Maxine Gavadhan	Funds in Barclays bank of Kenya A/c No. [Particulars Withheld] Final dues from Rusinga management Co.	

Amber Gavaghan	Ltd	40%
	Motor vehicles: KNU 709 and KMR 594	
	Motorbike KAC 767 D	
	East African Breweries Limited 429,228 ordinary shares	
	Ethiopian Airlines refund of ticket	

7. To fortify the Petitioners' argument their Counsel Miss. Thungu referred to **Succession Cause No. 399 of 2007- Estate of the Late Musambayi Katumanga** in which Musyoka J stated that:

“Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the Law of Succession Act, the children would divide the estate equally amongst themselves.”

8. Counsel also referred to the decision in **Rono vs Rono and another (2005) 1 EA 363**, where Omolo J. A stated as follows:

“...while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act does not provide for that kind of equality.”

9. In reply Fiona Jane Elms counsel for the Respondents co-administrators swore on their behalf an affidavit dated 2nd November, 2016 with their authority. In the affidavit she deponed that the affidavit filed by the Petitioners was filed without the leave of the court. Counsel pointed out that the Petitioners attached in their application, letters from the minors' school but failed to attach receipts for the school fees to ascertain the exact fees for each of the minors. That the medical Cover attached is a mere brochure and there is no evidence to show that the deceased paid for medical cover for the Minors when he was alive.

10. Counsel further stated that while the Respondents do not wish to deny the Minors their entitlement, the demands made should be reasonable and just as the Respondents are aware that the deceased used to pay school fees for the Minors but nothing more. Counsel also submitted that the deceased's net intestate

estate which is valued at Kshs.132, 000,000 is tied up in shares which he inherited from his grandmother, one Hilda Tofte.

11. Counsel under the instruction of the widow made a proposal for the deceased's estate to be divided into eight shares. By doing so, the widow would receive 2/8 or 25% of the net intestate estate upon termination of her life interest and appointment of the whole of the said net estate immediately. Each of the deceased's six daughters would receive 1/8 or 12.5%. The Applicants would thus receive 25% of the estate on behalf of the minors immediately, instead of waiting for the life interest of the surviving spouse to extinguish by remarriage or death.

12. Counsel set out the medical and educational needs of the widow and her four daughters respectively, together with loans owed with regard to the education of the four eldest daughters and opined that the 8% share proposed by the Applicants for each of them would not suffice to meet their needs.

13. The grant having been issued on 4th May 2016, the required period of six months has since elapsed, and the Administrators need not invoke special provision of the law for the confirmation of grant, necessary where the required time has not lapsed. From the pleadings, the Applicants are applying under **Section 35 (3) of the Law of Succession Act (Cap 160) Laws of Kenya** for the Court to determine what share of the Deceased's net intestate estate they should receive on behalf of the Minors.

14. **Section 35 (1)** of the **Law of Succession Act** provides that the Surviving Spouse is entitled to a life interest in the whole residue of the net intestate estate, which determines upon her death or remarriage. Additionally **Section 35 (2)** provides that the Surviving Spouse has a power of appointment of all, or any part of the capital of the net intestate estate. **Section 35 (5)** further states that subject to any appointment, when the surviving spouse dies or remarries the whole of the residue of the net intestate estate is divided amongst the deceased's children.

15. The court is in agreement with M/s. Fiona Elms in her submissions that this cause can be distinguished from that of Musambayi Katumunga upon which the Applicants relied. There is only one widow in this estate and she would therefore be entitled to a life interest in the estate. She has foregone her life interest to release the whole estate for immediate distribution. The mother of the minors has made no claim either to being a widow of the deceased nor to being entitled to share in the estate. There is also no dispute that the six daughters referred to herein, two of whom are minors, are all daughters of the Deceased.

16. Based on the figures provided by the Applicants, an estimation of the needs of the Minors until they attain 18 years of age are as follows:-

- i. Liabilities: school fees for the two children for the year 2014 for the two children Ksh. 171,000
- ii. School fees for the year 2016 Ksh. 161, 100
- iii. Past upkeep owing Ksh. 1,920,000
- iv. Future upkeep at the same rate (KSH 80,000 x 12 months) x 14 years = Ksh. 13,440,000
- v. Future school fees, although no figures were given but from the Respondent's proposal this would translate to Ksh. 85,500 x 12 years = Ksh.1,206,000 and Ksh. 85,500 x 14 years = Ksh. 1,197,000 giving a final total of Ksh. 17,915,100.

17. From the above calculations the approximate past, present and future needs of the Minors till they attain the age of 18 years are in the region of Ksh. 20 Million, which is 15% of the approximate net intestate estate of Ksh. 132 Million. This is far below the 60% that the Applicants have asked the Court to Order. The Widow has proposed that the Minors receive 25% which translates to about 33 Million as an immediate and final distribution.

18. From the record there is no evidence that the Deceased's maintenance of the two minors went beyond the payment of school fees but that is neither here nor there. The court notes however that their mother is alive and should also contribute to their upkeep. Having anxiously considered the facts and the rival arguments by the counsels on record I am satisfied that the proposal made by the Respondents is reasonable, and is the one which meets the ends of justice in the circumstances of the cause.

19. In the result the court grants orders as follows:

- i. The grant issued on 4th May, 2016 to Leigh Jade Gavaghan, Lauren Sarah Gavaghan, Elais Magutu Waiganjo and Teresia Wambui Magutu be and is hereby confirmed.
- ii. Vera Gavaghan the widow of the deceased having elected to release the entire estate for immediate distribution is to receive 25% of the net intestate estate.
- iii. Each of the Deceased's six daughters shall receive 12.5% of the net intestate estate. The Applicants will thus receive 25% of the net intestate estate on behalf of the Minors.
- iv. There are no orders as to costs.

It is so ordered.

SIGNED DATED and DELIVERED in open court this 7th day of February 2017.

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L. A. ACHODE

JUDGE