



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 48 OF 2015

IN THE MATTER OF: THE ESTATE OF DANIEL OLAL NYAWAWA (DECEASED)

RULING

The application dated 14.12.2016 seeks the following orders: -

1. The matter be certified as urgent and service thereof be dispensed with in the first instance.
2. That the petitioner/applicant herein be re-instated as the administrator of the deceased's estate.
3. That the petitioner's share of the funds being held be released to her for purposes of catering for the needs of her child herein.
4. The costs of this application be provided for.

The application is supported by the affidavit of Purity Sally Mbeti Koskei sworn on 14.12.2014. The respondent, Eunice Mongeli Mwikya, filed a replying affidavit sworn on 9.1.2017.

Miss Mwanja Advocate appeared for the applicant. Counsel submitted that the applicant's daughter is out of school and she is in class eight. She has school fees arrears. The applicant was involved in an accident and has not fully recovered. She is not capable of meeting the child's needs. It is submitted that the deceased was the applicant's husband. The deceased left over Kshs.4,600,000/= which amount is being held by the Public Trustee in Kakamega. The deceased used to work for the Department of Defence.

Mr. Mungao Advocate appeared for the respondent. Counsel opposed the application. It is submitted that the initial petition was for an ad litem grant. That grant has been revoked by the court. The only recourse left for the applicant is to file an appeal or seek review. Further, there were proceedings before the Nakuru Children's Court, suit number 95 of 2006, whereby the deceased denied the paternity of the child. The deceased swore an affidavit in September, 2004 denying paternity. The applicant was not married to the deceased. The alleged affidavit of marriage filed herein was not filed in the proceedings before the Nakuru Court. Counsel further contends that the applicant has tried to influence the distribution of the estate using other means despite the fact that the grant was revoked. The court cannot grant the prayers being sought.

The application dated 14.12.2016 seeks two main orders: -

1. Reinstatement of the applicant as the deceased's administrator.

2. Release of Funds to cater for the applicant's child.

On the first issue of reinstatement, it is clear that the cause herein was filed as an ad litem. The application that led to the issuance of the grant sought a grant limited to the filing and prosecution of a suit. The deceased died in a road traffic accident. The limited grant was issued but was later revoked by this court. The accident occurred in 2015 and there is no evidence that another limited grant has been issued by this or any other court.

In view of the fact that this court revoked the grant, I do find that reinstating the applicant as the administrator will create more confusion. The position has not changed. There are allegations that the applicant was not the deceased's wife. Unfortunately, the respondent who has positioned herself as the only wife of the deceased has not applied for letters of administration. The situation is quite risky as time to institute proceedings as a result of the road traffic accident is running out. I do find that the applicant cannot be reinstated as an administrator. That request is denied.

There is the second issue involving the applicant's child. Counsel for the respondent maintains that the deceased denied that he was the child's father. That denial is contained in the deceased's answer to the children case number 95 of 2006 dated 3.7.2006. I have not been able to see the deceased's affidavit denying paternity. It can however be taken that the deceased contested the paternity of the child. This is reflected in the deceased's reply before the Nakuru Court case.

I have carefully read the affidavit of Eunice Mongeli Mwikya sworn on 9.1.2017 together with its annexures. I have been able to note the following information contained in the annexures. There is a letter dated 8.10.2015 from the firm of Odera Were advocate address to the applicant's former advocates, Maragia Ogaro & Company advocates. Paragraphs numbered (1) and (7) of the said letter reads as follows: -

That your client was not a legal wife to the deceased though the issue the deceased sired with our client out of wedlock is known to my client.

While your client's child is entitled in law to benefit from the estate of the deceased, your client does not have any legal right to claim anything from the estate.

There is a response to that letter from the firm of Maragia Ogaro & Company Advocates. I wish to reproduce two paragraphs from that response: -

THAT our client did not convince or coase anyone to write any letter. In any case, there was a prior letter written by the deputy County Commissioner Likuyani Sub-County dated 01/07/2015 that originated out of a meeting held when both parents were present. Did our client also convince the said deputy County Commissioner?

THAT the said letter states the correct deceased family position as hereunder: -

- i. Purity Mbetе sally Koskei - ID No. [particulars withheld] 1st wife**
- ii. Eunice Mwongeli Mwikya - ID No. [particulars withheld] 2nd wife**
- iii. A I O - 14 years (born out of wedlock)**
- iv. S K - 11 years – daughter**
- v. J N O - 4 years – son**
- vi. D I O - 4 years - daughter**

Apart from the above information, there is a letter dated 16.8.2016 from the Ministry of Finance to the

Public Trustee, Kakamega. The letter gives a list of the deceased's beneficiary. The applicant is included in the list.

My understanding of the matter is that the firm of Odera Were Advocates has been acting for the respondent. On the 14.4.2016, the said Advocates wrote a letter to the Ministry of Defence Nairobi. The letter is hereby reproduced: -

14th April, 2016

Kenya Defence

D.O.D.

NAIROBI

Dear Madam,

RE: IN THE MATTER OF ESTATE OF DANIEL OLAL NYAWAWA (DECEASED)

Reference is made to the above matter and my letter of 14th ultimo.

Could you please let me know the steps which you have taken to release the funds to the widow. My client sat down with the deceased parents and agreed that distribution can be made as follows: -

- | | | |
|----------------------------------|----------|------------|
| 1. Eunice Mwangeli Mwikya | - | 22% |
| 2. A I O | - | 15% |
| <u>3. S K</u> | - | 15% |
| 4. J N O | - | 20% |
| 5. D I O | - | 20% |
| 6. P A N | - | 8% |

The Bank details where the funds are to be channeled had been provided and are in our possession.

Yours faithfully,

ODERA WERE

CC: Client

The above letter is contained in the respondent's affidavit. Apart from the above, there is a letter from the Ministry of Defence dated 29.2.2016 to the director of pension. Both the applicant and her child are listed as beneficiaries. Further, the applicant has annexed the child's immunization card dated 29.4.2004. The child was born on 11.4.2004. the name of the father is given as that of the deceased. This was way back in 2004. It cannot be a fresh document.

Succession causes involves issues relating to the distribution of a deceased's estate. Where the deceased left no property, no succession cause will be filed. Succession disputes involve the mode of distribution of the deceased's estate, the identification of the estate as well as the identification of the deceased's dependents who are entitled to benefit from the deceased's estate.

Section 29 of the Law of Succession Act defines a dependant as follows: -

- 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.**

The firm of Odera Were Advocates is on record for the respondent. The said firm duly wrote a letter indicating that the deceased's parents agreed to have the applicant's child get 15% benefit out of the deceased's estate. The advocates even indicated that the funds were to be channeled to certain respective bank accounts. Had that been done then the applicant could not be seeking her child's school fees through the courts.

Under the Law of succession Cap 160, it does not matter whether the deceased was the biological father of the child or not. All what matters is whether deceased used to take care of the dependant. There is evidence that the Nakuru Court did order the deceased to pay school fees.

Although the application to provide for the child is made in an ad litem file where the grant has been revoked, I do find that dismissing the application on the fact that it is made in such a file amounts to using technicalities to deny the child her constitutional right to education. The child is entitled to complete her primary education. The record shows that even if the child's mother may ultimately be found not to be a beneficiary, the child will be entitled to her share of the estate. There is no reason to continue keeping the child's share while she cannot complete her primary education. There is evidence that the child has accumulated school fees arrears of over Kshs.200,000/= at [particulars withheld] School, Gilgil.

That being the case, I do proceed and make the following orders: -

- 1) The respondent, EUNICE MONGELI MWIKYA, to file a formal succession cause within thirty (30) days hereof and serve the applicant.**
- 2) Should the respondent fail to file and serve such a succession cause within thirty (30) days, the applicant shall be at liberty to file the succession cause and serve the respondent.**
- 3) The Public Trustee, Kakamega to release the full fee balance as well as full fees for Standard eight for the applicant's child, S.K.**
- 4) The released fees shall be taken into account when the deceased estate shall be distributed.**
- 5) The Public Trustee to release the fees directly to the [particulars withheld] School, Gilgil**

In the end, the application dated 14.12.2016 is granted in the above terms. Each party shall meet her own costs.

Dated and delivered in Malindi this 13th day of February, 2017.

S.J. CHITEMBWE

JUDGE