



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 361 OF 2008**  
**IN THE MATTER OF: ESTATE OF JOYCE MAKUNGU (DECEASED)**  
**BETWEEN**  
**BRIOAN KADIMA.....APPLICANT**  
  
**VERSUS**  
  
**JACKSON WILLIAM MUSERA**  
**EDITH ODINDO.....RESPONDENTS**

**RULING**

**INTRODUCTION**

1. The applicant, a son of the deceased herein, has filed an application by Summons for revocation of Grant dated 14th April 2014 seeking that the Grant of Letters of Administration made to the respondents, respectively his step father who was married to his deceased mother and step mother, on 20th May 2009 be revoked on the grounds that the grant was obtained by making a false statement and by concealment of material facts and that:

1. That the 2nd administrator was not a dependant of the Estate and she has not been a dependant of the Estate.
2. That the list of dependant includes strangers as the deceased had only three (3) children.
3. That the Estate is not being used for the benefit of the children of the Deceased.
4. That the 2nd Administrator is to be replaced by the Objector, being a son of the deceased.

2. The 1st respondent filed a replying affidavit on 28th May 2014 in which he confirms significantly as follows:

1. He was legally married to the deceased and to the 2nd administrator, respectively, as the first and second wives, and had three children with the deceased first wife, namely Faith Ambuso, Collins Mijere and Produce Gogani.
2. That he was the proprietor of the parcels of land Isukha/Lubao/2115 and Isukha/ Lubao/2234. [The title document for the latter parcel 2234 indicated that the deceased and the 1st respondent were joint registered proprietors, while the former 2115 is registered in the name of the deceased.]
3. That the persons claimed to be strangers in the petition were his children with the 2nd wife, the co-administrator herein.
4. That the objector had benefitted from the estate more than other beneficiaries, and had received –
  - i. Dividends of Jogoo Sacco shares

- ii. Payment of Jogoo Sacco share 280,000/- Cooperative bank, Kakamega.
- iii. Pension scheme 100,000/- deposited in applicants National Bank account.
- iv. Payment of University fees of 30,000/-
- v. MPESA [mobile money transfers].

5. That the respondent had constructed for the applicant a semi permanent house for his use.

6. That the objector had other estate at his biological father's place in Busia and, in his view, it was unlawful to claim two estates.

7. That he had applied for Grant with his surviving wife in compliance with the requirements of the law where minors are involved.

8. That he objected to the inclusion of the applicant in the administration of the estate as he was not his blood relative.

3. In an affidavit filed on 28th May 2014, the 2nd respondent principally asserted a right to "be administrator of property acquired in our matrimonial home that I also contributed to in acquiring."

4. The 1st respondent has filed a supplementary affidavit sworn on 24th June 2016 where he points out that the applicant was disclosed in the petition as a beneficiary and was a minor at the time of the petition who could not therefore be joined as an interested party or as an administrator of the estate and then discloses his entire defence to the petitioner's suit at paragraphs as 12-14 as follows-

"12. That the deceased and the 2nd administrator were both my wives having been married under customary law and they both have my children who too were disclosed in the petition and Isukha/Lubao/2115 and Isukha/Lubao/2234 in question were acquired during the subsistence of the said marriages and all the children of the marriage have equal rights and entitlement to them. Myself and the 2nd respondent only acted in good faith and in accordance with section 58 (1) (a) of the Law of Succession Act cap. 160 in applying to be made Co-administrators to the Estate of the Deceased and there being a continuity trust, we hold the immovable properties in trust for all my other children. There is no law that forbids me and my surviving wife from holding the immovable properties in trust for our children.

13. That as co-administrators we have not at all dealt with the mentioned properties or any of the estate of the deceased to the detriment of the applicant or the other surviving children and the applicant has not shown to the contrary.

14. That the applicant has failed to disclose to this Honourable Court the following very crucial information which will assist this court in considering whether to transfer this suit as sought:

- a) that he has a home and resides on parcel no. Isukha/ Lubao/2115 where he has a house;
- b) that he authorized the Director of Persons, Ministry of Finance to pay the deceased's dues to me as his father and remaining parent;
- c) That he was paid the deceased's shares at Jogoo Cooperative Sacco; and
- d) That he was given Ksh.90,000/- by me which was deposited in his account."

5. While the application for revocation was pending hearing and determination, the applicant filed an application under section 26 of the Law of Succession Act for adequate provision from the Estate. It is this application for reasonable provision that is the subject of this ruling.

**THE APPLICATION**

6. By Summons dated 3rd September 2014, the petitioner son of the deceased sued the administrators of the Estate for adequate provision under section 26 of the Law of Succession Act, seeking the following specific orders:

1. That the matter be certified as urgent and service be dispensed with in the first instance.
2. That the respondents do provide an account of the administration of the Estate of Deceased JOYCE MAKUNGU ASAVA.
3. That such reasonable provision, more specifically Ksh.21,500 or such sum as the court thinks fit, be now made for the applicant Brian Kadima, as a dependant of eh Deceased JOYCE MAKUNGU ASAVA, to cater for educational expense at the Kisii University every school semester out of the Estate of the Deceased.
4. That further Ksh.29,000/- be paid from Estate of the Deceased JOYCE MAKUNGU ASAVA to enable the

applicant purchase a laptop for education at the Kisii University.

5. That the cost of this application be provided for.”

7. The application was supported by the affidavit of the applicant sworn on 3rd September 2014 setting out the facts relied upon in the application, emphasising the needs of the applicant to pay for his university tuition and upkeep, and his inclusion and adequate provision in the sharing of estate of his deceased mother, and alleging continued use of the Estate by the 1stRespondent **“for his personal gain to my exclusion. On or about 18th June 2014, the 1stRespondent harvested sugar cane planted on the two parcels of land known as Isukha/Lubao/2115 and Isukha/Lubao/2234 and the proceeds have neither been disclosed nor shared with the beneficiaries and or dependants of the Estate of the Deceased.”**

#### **RESPONSE**

8. In response to the applicant's Summons for reasonable provision, the 1st Respondent filed a replying affidavit sworn on 17th September 2014 in which he set out the respondents' case in response to the summons for adequate provision as follows:

i. That the applicant had been disclosed as a dependant in the Petition but without capacity as a minor to be joined as a party in the proceedings or to give consent.

ii. The applicant had benefitted from the estate of his biological father as well as received his share of the estate of the deceased herein including monies held by the deceased at the time of her death and a portion of agricultural land Isukha/Lubao/2115 where he had put up his home and cultivated crops.

iii. That the only existing assets of the estate are “two agricultural parcels of land Isukha/Lubao/2115 and Isukha/Lubao/2234 which were acquired during the subsistence of the marriage between me and the deceased and which are now belong held in continuing trust for the other minor children and applicant's siblings who are in school.”

iv. “That there are no accounts for the estate of the deceased since no monies or other benefits are being received or collected on the estate.”

v. That he had planted sugar cane on parcel no. 2234 as a joint owner thereof and intended to use the proceeds to take care of his surviving family.

vi. “That the applicant prayers for provision of an account of the administration of the Estate of the Deceased and for reasonable provisions of Ksh.21,500/-, 29,000/- or such other sums are made maliciously considering that there are no accounts and that the properties indicated are being held in trust [for] the other siblings of the applicant. The applicant is trying to be greedy and his intensions are to frustrate and intimidate the Respondents so that they can bow to his pressure and therefore comply to his malicious demands.”

9. In addition, the 1stRespondent reiterated the supplementary affidavit sworn on 24 June 2014 as aforesaid.

#### **SUBMISSIONS**

10. Counsel for the parties then filed written submissions, respectively dated 23rd October 2014 and 30th October 2014, and ruling was reserved. The Court regrets the delay in delivery of this ruling, which was occasioned by heavy workload of the Court and intervening deployment to other court stations.

#### **ISSUE FOR DETERMINATION**

11. The only issue for determination is whether the court will make an order for reasonable provision for the applicant pursuant to section 26 of the Law of Succession Act.

12. The prayer for an order for account is governed by statute, and a decision declining an order for account against a personal representative would be per incuriam by virtue of section 83 (e) of the Law of Succession Act.

#### **DETERMINATION**

##### **Formal competence of the application**

13. At the outset, the Court clarifies that sections 32 and 36 urged by the Counsel for the Respondents do not apply to this succession. Section 32 exempts the application of the part of the Law of Succession Act on intestacy to agricultural land, crops and livestock only “in various Districts set out in the Schedule” being districts identifiable as having community land holdings and whose succession is dealt with in accordance with section 33 of the Act as follows:

“33. The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased's community or tribe, as the case may be.”

14. Section 36 of the Act applies only where a deceased is survived by a spouse and no child or children, which not the case here. The section is in these terms:

**“36. Where intestate has left one surviving spouse but no child or children**

(1) Where the intestate has left **one surviving spouse but no child or children**, the surviving spouse shall be entitled out of the net intestate estate to—

(a) the personal and household effects of the deceased absolutely; and

(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and

(c) a life interest in the whole of the remainder:

Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.

(2) The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).

(3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39.”

15. The application for reasonable provision herein is properly brought within time before the grant is confirmed in accordance with section 30 of the Law of Succession Act which provides –

**“30. Limitation of time**

No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71.”

16. Section 26 of the Law of Succession Act provides for application for adequate provision for dependants as follows:

**“26. Provisions for dependants not adequately provided for by will or on intestacy**

Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on **the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.**

[Act No. 8 of 1976, s. 5.]”

**Substantial considerations**

17. The applicant is a child of the deceased and there can be no question that he is entitled to inherit the estate of his deceased mother as a dependant within the meaning of the term ‘dependant’ as defined in section 29 of the Act as follows:

**“29. Meaning of dependant**

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;**

(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.”

18. There is also no question that in exercising its jurisdiction to make reasonable provision for a dependant in section 26 application the Court has ‘complete discretion’ to make such orders as the just of the case may require, pursuant to section 27 of the Act which provides as follows:

**“27. Discretion of court in making order**

In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”

### **Application for reasonable provision**

19. In determining a section 26 application the Court is obliged to consider factors set out in section 28 of the Act as follows:

#### **“28. Circumstances to be taken into account by court in making order**

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

**(a) the nature and amount of the deceased's property;**

(b) any past, present or future capital or income from any source of the defendant;

(c) the existing and future means and needs of the dependant;

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

(e) the conduct of the dependant in relation to the deceased;

(f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

(g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

[L.N. 256/1976.]”

Accordingly, for the Court to determine the adequate provision of the estate that should go to the applicant as a reasonable provision an accurate inventory of the estate and the respective value of the estate assets is crucial so as to establish the **“the nature and amount of the deceased's property”**.

### **Size and nature of the Estate**

20. As stated in paragraph 14 of the Supporting Affidavit to the Summons for reasonable provision herein, the Estate of the Deceased is made up of two immovable properties and a life insurance policy. No liquid assets save for the proceeds for sugar sale, which is not ascertained by any account rendered. There was reference to insurance payout, pension payments and to cooperative shares but which had already been received and distributed at the time of this application. An order for payment of any periodic payments may only be effected from proceeds realised from the named immovable assets, or proceeds of sale of sugar produce from the two parcels of land, which has not been disclosed. The Court has not been shown the estate from which it may make provision, and such an order may not be made from sale of the immovable property before the confirmation of Grant. Indeed, one of the assets parcel No. Isukha/Lubao/2115 is where the applicant and the respondents and his siblings reside, and it is obviously not suitable for sale at this stage.

21. But the duty to account is on the administrators who have failed to discharge it. The respondents claim to have given to the applicant all that he was entitled to under the Estate and that the remainder was being held for his minor sibling under a continuing trust. This must be disclosed to the applicant and the Court by a proper account pursuant to section 83 (e) of the Law of Succession Act, and the 1st respondent cannot be heard to say that the applicant has not adduced evidence, or disclosed as to certain matters of the administration of the Estate when he is the one who has defaulted in his statutory duty to account. One cannot benefit from his own wrong-doing.

22. The argument by the respondent that “there are no accounts for the estate of the deceased since no monies or other benefits are being received or collected on the estate” is faulty. The duty to **account** follows all actions taken by an administrator by virtue of his fiduciary position and it does not mean that there is no duty to account where the estate is exhausted or where there is no regular income or benefits received by the estate. It is an account of the dealings with the estate, which include expenditure and disposals of the estate as well as income or benefits received.

23. As Account has not been given the exact wealth of the estate and its administration or distribution so far is not possible to determine. The application for provision for dependency is not well supported with facts as to the size of the Estate and the probable distribution in order to ascertain whether there is adequate provision for the applicant. Such a provision may only be determined with the full facts as to the nature and size of the estate.

24. Moreover, there is a subtle claim in matrimonial property by the 2nd Respondent who the 1st respondent acknowledges as the second wife and co-wife of the deceased, and a not-so-subtle assertion by the 1st respondent that he is one who bought the two parcels of land for his two families. The trial court must consider the effect of this claim in the face of the registration of the deceased as the sole proprietor of parcel no. 2115, which makes her the legal indefeasible owner thereof, and her joint ownership with the 1st respondent of parcel no. 2234, which attracts the principle of **jus accrescendi** upon her death to give title to the 1st respondent. The Court must, therefore, determine the exact nature and extent of the Estate before considering its

succession in accordance with the law on intestacy and the alleged inadequacy thereof in making reasonable provision for the applicant.

25. Accordingly, the Court will defer the consideration adequate provision to enable the compliance by the Administrators with the personal representatives duty to account under section 83 (e) of the Law of Succession Act which provides as follows:

**“83. Duties of personal representatives**

Personal representatives shall have the following duties—

**(e) within six months from the date of the grant, to produce to the court 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;”**

**CONCLUSION**

26. While the applicant is as a child of the deceased a dependant within the meaning of the section 29 of the Law of Succession Act and by virtue of such status entitled to bring a section 26 application for reasonable provision for a dependant, there is no evidence of the size of the Estate to enable the court assess what would be reasonable provision for the applicant. The application is premature when brought before the size of the estate is determined, especially in the case of intestacy and where, as here, the assets comprising the estate are in dispute. In such cases, the administrators must be held to their duty to account to enable the court assess the available estate from which reasonable provision may be made for the applicant. The Court shall, therefore, defer the consideration on the prayer for reasonable provision until a true, full and accurate account is rendered by the administrators in accordance with section 83 (e) of the Law of Succession Act.

**ORDERS**

27. The Summons for reasonable provision of a dependant dated 3rd September 2014 is granted upon terms as follows:

1. The application for provision of accounts is granted pursuant to prayer no. 2 of the Summons dated 3rd September 2014. The respondent Administrators shall render the said Account within thirty (30) days hereof.

2. The prayer for reasonable provision will be considered upon rendition of a true, full and accurate account on the deceased's estate by the respondent administrators.

3. In the interest of expedited determination of the dispute the Summons for revocation of grant dated 14th April 2014 may be consolidated, heard and determined together with the deferred limb of the application for reasonable provision for the applicant.

28. Costs in the Cause.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 14TH DAY OF MARCH 2017.

E K OGOLA.  
JUDGE

Appearances:

Ms. Annette Mbogoh, Advocate instructed by Kituo Cha Sheria for the Applicant.

M/S Mburunyamboye & Co. Advocates for the Respondents.