



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 1331 OF 2016
IN THE MATTER OF THE ESTATE OF RIYAZ TADJIN RAHEMTULLA DHANJI
(DECEASED)

RULING

1. The deceased died on 18th August 1987. He left a will made on 21st May 2013, in which he had appointed Shahnaz Amin Amershi and Alnoor Kassam, executors. He named Aleya Riyaz Dhanji, his daughter, as sole beneficiary.
2. On 15th August 2016, the sole beneficiary, Aleya Riyaz Dhanji, lodged an affidavit at the registry requesting the court to have citations issued against the two executors to either probate the will of the deceased, or otherwise renounce probate. The citations were duly issued by the court on 17th August 2016.
3. There is no proof that the citations were ever served on the executors, but there is an entry of appearance to the citation, dated 5th September 2016 and filed herein on 6th September 2016, by Shahnaz Amin Amershi, through counsel.
4. While the matter of the citations was still pending, the beneficiary then moved the court by a petition filed herein on 29th August 2016 seeking her appointment as administrator *ad colligenda bona* of the estate of the deceased on the grounds that the estate was wasting yet the executors were delaying in seeking representation to the estate.
5. In response to that petition, Shahnaz Amin Amershi filed an objection to the making of the grant, filed an answer to the petition and a petition by way of cross-application for a grant, all dated 5th September 2016. She asserts in her papers that she was the person properly appointed under the will of the deceased as the executor of his estate; she should be the right person to be appointed as manager and administrator of the estate.
6. In response to those filings, Aleya Riyaz Dhanji, filed an affidavit in reply, sworn on 22nd September 2016, making various accusations against the executor, principally saying that she ought to be consulted as sole beneficiary.
7. On 21st September 2016, the executor filed a Notice of Preliminary Objection dated 19th September 2016. Stating that Aleya Riyaz Dhanji; had no *locus standi* to bring the petition in view of the 5th Schedule of the Act., and that the court is barred by section 62 to issue a grant of representation to any person other than to the executor.

8. The parties argued the matter orally on 28th November 2016. They urged both the petition and the Preliminary Objection.

9. It is not in dispute that the deceased died testate. His will is not being contested. The said will appointed Shahnaz Amin Amershi executor. Where an executor has been appointed by will, and that executor has not renounced probate, no grant of letters of administration ought to be made. Under section 62, the court should not rush to make a grant of letters before citations have been issued on the executors named in the will. For avoidance of doubt the said provision states as follow:

‘When a person who has been appointed by a will as an executor thereof has not renounced executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to renounce his executorship or apply for a grant of probate of the will.’

10. The effect of the provision is that the court ought not to grant of letters of administration in respect of a testate estate to anyone other than an executor unless the executor has renounced executorship or had been cited to either renounce executorship or take up the grant of probate and he fails to do either.

11. In the instant case, the beneficiary caused a citation to issue upon the two executors named in eth will. There is no proof of service of the citation on either of them. However, one of them, Shahnaz Amin Amershi, entered appearance. By the time she was entering appearance, the beneficiary had already filed a petition for grant of grant *ad colligenda bona*, and she, the executrix then objected, answered the petition and cross-applied for the limited grant to be made to her. Going by section 62, it would appear that the executrix has opted to apply for probate instead of renouncing probate.

12. Under section 54 of the Law of Succession Act, the court may limit a grant of representation which it has jurisdiction to make, in any of the forms set out in the Fifth Schedule. A full grant enables the personal representative to collect the estate, preserve it pending payment of debts and distribution, payment of debts and liabilities and eventually distribution. The court may limit a grant to either of these purposes. This applies to grant of probate of a written will. A limited grant may be made to the executor or any other person pursuant to sections 62 and 63 of the Act, limited to collection of assets and preservation thereof, for settlement of debts and liabilities or distribution. A non-executor can only be appointed administrator according to the provisions of section 62 of the Act.

13. The procedure for dealing with citations is set out in Rule 22 of the Probate and Administration Rules. Upon service of the citation, the executor may straight away petition for grant of representation without waiting for any directions from the court, or, if so minded, renounce probate. Where there is no appearance, the citor may proceed to petition for grant to himself or apply to court for the court to direct the citee to apply for probate within the stipulated period of time. The same procedure applies where the citee appears but fails to either renounce probate or to petition for representation within the time allowed.

14. In the instant case, the citor did not file an affidavit of service which would have enabled the court determine whether or not the citee had failed to enter appearance within the prescribed period. The citor proceeded to petition for limited representation. One citee appeared to the citation, and as well as responded to the petition for limited presentation. It would appear that she was served with the citation together with the petition for limited grant. In my opinion there was no compliance with Rule 22 of the Probate and Administration Rules. The citor ought not to have petitioned for representation before first exhausting the provisions of Rule 22. She should have applied for limited probate only after the citee had renounced probate or failed to appear or file for probate within the stipulated time.

15. Furthermore, the executrix had come forward and expressed her willingness to apply for probate by filing an objection, answer to the petition and a cross-application.

16. In the end I am moved to make the following orders:

a. **That a grant of letters of administration *ad colligenda bona* shall issue upon Shahnaz Amin**

Amershi limited to a period of six (6) months;

b. That Shahnaz Amin Amershi is hereby directed to apply for full grant within six (6) months of the date of this order; and

c. That there shall be no order as to costs.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE