



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 547 OF 2012

IN THE MATTER OF THE ESTATE OF JOEL NGUI MWEU (DECEASED)

MWIKALI NGUI.....PETITIONER

VERSUS

MARY KALOLIA MUTISYA.....OBJECTOR

RULING

The Summons

The Petitioner herein is a daughter of the deceased Joel Ngui Mweu (hereinafter referred to as “the deceased”), and she filed a petition for grant of letters of administration intestate on 28th June 2012 with respect to the estate of the deceased. The Objector, who claims to be a daughter-in-law to the deceased, having been married to the late Justus Mutisya who is a son of the deceased, thereupon filed an Objection to the making of the grant of representation to the Petitioner dated 24th July 2012.

The grounds for the Objection are that the Objector is a survivor of the deceased, with equal priority to the Petitioner to petition for letters of administration for the estate of the deceased. Further, that the Objector was not made aware of the filing of this petition by the Petitioner, and that the Objector did not grant her consent to the Petitioner to obtain the Grant of Letters of Administration as required in law.

The Objector subsequently filed a petition by way of cross-application for a grant, an affidavit in support of her petition and an answer to the Petitioner’s Petition all dated 16th August 2012, wherein she reiterated the grounds set out in the foregoing in her petition for a grant of letters of representation intestate for the estate of the deceased.

The Objector listed the children of the deceased as follows;

1. Rhodah Ndunge – Daughter – married
2. Justus Mutisya – Son – Deceased
3. Anna Mulekyo – Daughter – married
4. Mary Wanza – Daughter – married
5. Mwikali Ngui – Daughter – unmarried
6. Mueni Mutua – Daughter – married

She further stated that she was married to Justus Mutisya, and that the Petitioner was fully aware of her relationship with the deceased but deliberately failed to include her name in the list of survivors of the deceased at the time of filing of the petition herein. The Objector also listed an inventory of the properties

of the deceased.

The Response

The Petitioner filed an affidavit in response to the Objector's objection and cross-petition sworn on 10th December 2015, to which was annexed a copy of their area Chief's letter dated 15/5/2012 showing the dependents of the deceased. The Petitioner averred that she has been informed by her Advocate herein, that due to an honest error and/or omission by the Advocate's office typist, the Objector's and Petitioner's names were not printed in the list of beneficiaries on form P & A 5 which was filed in this court on 28/6/2012.

Further, that she filed a fresh form P & A 5 on 23/9/2014 and served the same on the Objector's Advocates on 12/11/2014 giving a full list of the beneficiaries of the deceased's estate. This list includes the Objector's name, being the wife of the deceased's late son, Justus Mutisya

The Petitioner averred that other than a deceased person's spouse, the order of priority/preference that strictly applies to administration of an intestate's estate is in section 66 of the Law of Succession Act, and that the Objector being the deceased's daughter-in-law does not equally stand in priority with the Petitioner when it comes to the administration of the deceased's estate. However, that this notwithstanding, the Objector, being a wife of the deceased's late son (Justus Mutisya), is entitled to the said deceased's said son's share of the deceased's estate as a beneficiary thereof.

The Petitioner further contended that during the deceased's life-time, the objector filed several court cases against the deceased regarding the deceased's properties, and that some of these suits are still pending hearing and determination. She gave the particulars of the said cases as Machakos High Court HCCC No. 20 of 2003, Machakos High Court HCCC No. 41 of 2003 and Kangundo PMCCC No. 208 of 2006, and annexed copies of pleadings filed in the said cases.

According to the Petitioner, it will be the duty of the administrator of the deceased's estate once appointed to proceed with the aforesaid cases against the objector, and under the circumstances, the Objector cannot perform the duties of an administrator/legal representative of the deceased, as there will be a conflict of interest that may prejudice the interest of the other beneficiaries of the deceased's estate.

Nzei & Company Advocates, the learned counsel for the Petitioner, filed written submissions dated 5th March 2015, wherein it was submitted that the Petitioner had not failed to disclose the Objector as a beneficiary, since she exhibited in Court the chief's letter which named the Objector as a beneficiary at the time of filing the Petition, and did not therefore breach Rule 7 or Rule 28 of the Probate and Administration Rules.

Further, that sections 32 upto 42 of the Law of Succession Act give the priority of beneficial interest in an intestate's estate and does not include daughters-in-law of a deceased person. In addition that there is no legal provision that requires a daughter-in-law to be made an administrator where the deceased is survived by children. Lastly, it was submitted that the Objector's objection and cross petition was incompetent as it was filed on 24th July 2012, before the publication of the Petitioner's petition in Gazette Notice No. 13645 on 28th September 2012, contrary to section 68 of the Law of Succession Act.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Objectors and Petitioner. The issue to be decided is who as between the Petitioner and Objector has priority to administer the deceased's estate. The answer to this question is to be found in section 66 of the Law of Succession Act which provides a general guide as to those who will be preferred to administer the estate of a deceased as follows-

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- (a) surviving spouse or spouses, with or without association of other beneficiaries;**
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
- (c) the Public Trustee; and**
- (d) creditors:**

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will. “

The ranking of beneficiaries of an intestate is provided under Part V of the Act, and section 36 of this part specifically provides that where an intestate has left a surviving child or children but no spouse as in this application, the net intestate estate shall be equally divided among the surviving children. It is only where an intestate has left no surviving spouse or children, that the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority under section 39 of the Act-

- (a) father; or if dead**
- (b) mother; or if dead**
- (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none**
- (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none**
- (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.**

Therefore while relatives by marriage can inherit and be administrators of an deceased intestate, they are the last in line in priority in both respects, and only in the event that the deceased intestate has no surviving spouse and children, and even then only to the sixth degree of consanguinity. Applying the above cited provisions of the law, the Objector being related to the deceased by marriage cannot rank in priority to the Petitioner who is a surviving child of the deceased as an administrator of the deceased’s estate.

In addition, even if the Objector were to have priority, it is evident that she will not be in a position to competently discharge the duties of an administrator. Section 82 of the Law Succession Act gives powers to an administrator as personal representative of the estate of a deceased to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate. I have perused the pleadings filed in Machakos High Court HCCC No. 41 of 2003 and Kangundo PMCCC No. 208 of 2006 that were annexed by the Petitioner to her response to the objection and were marked as annexure ‘MN f’, and note that indeed the Objector had sued the deceased in the two suits seeking certain properties from the deceased.

Therefore, not only will the Objector be in conflict of interest as she will then be acting for both the Plaintiff and Defendant in the two suits, but will also not be able to fairly and impartially discharge the duty of getting in all free property of the deceased imposed by section 83 of the Law of Succession Act. She cannot therefore qualify to be administrator of the deceased’s estate as long as the suits she has filed

against the deceased are still subsisting.

The prayers sought in the Objector's Objection dated 24th July 2012 and in the Petition by way of Cross-Application for a grant dated 16th August 2012 are accordingly denied, and as this is a family dispute, each party shall meet their respective costs of the said Objection and Cross-Application.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 11th day of July 2016.

P. NYAMWEYA

JUDGE