REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 46 OF 2015

IN THE MATTER OF THE ESTATE OF HILLARY WAMBUGU-DECEASED

Immaculate Wangari Munyaga.....Petitioner

versus

Zachary Waweru Ireri.....Objector

JUDGEMENT

Zachary Waweru Ireri (hereinafter referred to as the objector) herein has raised serious objections to the grant of letters of administration to the deceased estate being issued **Immaculate Wangari Munyaga** (hereinafter referred to as the petitioner). The petitioner is a sister in law to the deceased. She was married to a brother to the deceased who passed on. The objector states that his father was a first cousin to the deceased.

The deceased **Hillary Wambugu** died intestate on the 15st day of September 2014 at the prime age of 82 years. He led a celibate life, was an ordained catholic priest, he never married, hence he had no children of his own nor is he survived by parents, brothers or sisters.

The objector claims that the deceased took care of many persons some of whom he alleged referred to the deceased as "father" and "grandfather" respectively. The objector went to the extent of listing some of the deceased properties which were omitted in the petition and claimed that he was close to the deceased to the extent that the deceased entrusted him with his personal documents among them a title deed, driving licence, ATM Cards, national identity cards and his passport. He also claimed that the deceased paid part of his tuition fees. He claimed that the deceased settled the petitioner and her late husband on a 80 acre parcel of land which they sold, an act which caused enmity with the deceased. He claimed that the deceased relied heavily on him and during his last days the deceased asked him to talk to his sister to move into his house, which she did with her two sons whom the deceased took to a boarding school and regarded them as his family and she took care of him till he died, but after the deceased died the petitioner threw them away from the deceased's home.

The petitioner denied the above allegations and also denied that the objector was the deceased's confidant to the extent of entrusting him with personal documents as alleged. She maintained that the deceased had his personal brief case at Mathari Mission and that the objector took the brief case after the deceased was transferred to the Karen Hospital and also misappropriated some cash. According to her, the objector was helped by the deceased just like many other strangers. She denied that the deceased ever wrote a will and averred that it was the protestor who kept on pestering the deceased to write a will. She reiterated that the deceased was survived by her late husband who was a brother to the deceased, herself and a niece by the name **Aflonia Nyambura Kimathi.**

The issue for determination is who among the two should be issued with the grant of letters of administration.

Before I address the above issue, find it appropriate to recall the provisions of Rule **7 (7)** of the Probate and Administration Rules which provides that:-

> *Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—*
>
> *(a) renounced his right generally to apply for a grant; or*
>
> *(b)consented in writing to the making of grant to the applicant; or*
>
> *(c) been issued with a citation calling upon calling upon him either to renounce such right or to apply for a grant.*

Thus, the question that arises is whether or not there exists a person having prior preference within the meaning of the above rule, and if such a person existed, then it was necessary for the petitioner to comply with the above rule. No such information was provided at the time of filing this petition despite the clear provisions of the above rule. I hold the view that it was necessary for the said rule to be complied with because such information is meant to help the court to exercise its discretion. However, I do not think that the said omission is fatal because such an omission can be cured by the party being directed to furnish such information. However, from the affidavits filed in court, I note that the parties are in agreement that the deceased never had a wife, children, parents or close relatives, hence, the court can properly exercise its discretion under section 66 of the act based on the material now before the court.

As the law stands, this court has the final discretion as to whom a grant of letters of administration should be issued to. The relevant provision is section **66** of the Law of Succession Act[1]which provides 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) surviving spouse or spouses, with or without association of other beneficiaries;*
>
> *(c) 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……..…*

Section **39** of the Law of Succession Act[2] provides as follows:-

> *(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-*

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

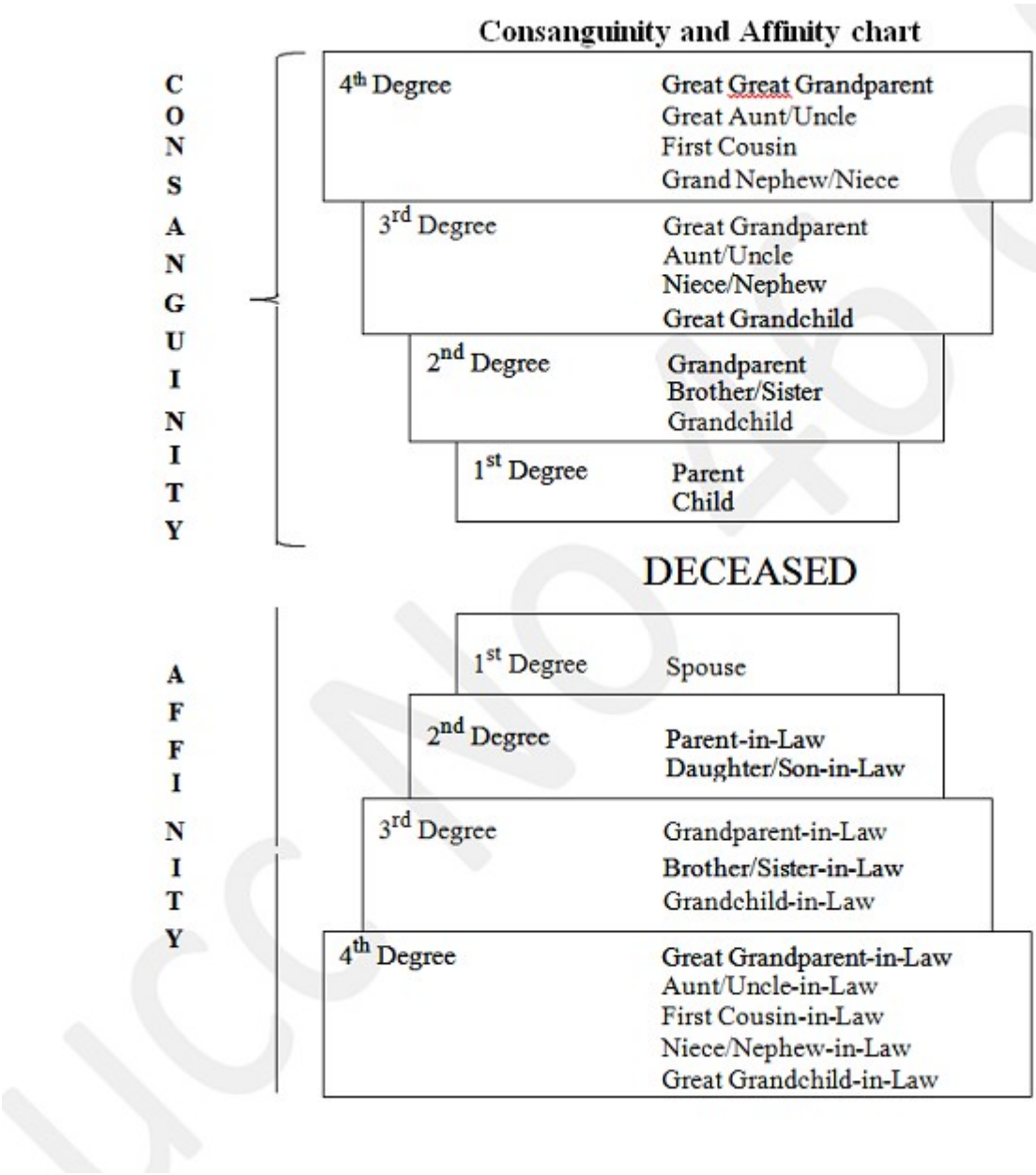
e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the state, and be paid into the Consolidated Fund.

The order of preference is provided for under section **39** cited above where intestate has left no surviving spouse or children as in the present case is clear. The scenario in this case brings into sharp focus the application of the degree of consanguinity and affinity. Even though at this point the dispute before me touches on the appointment of the administrator, from the affidavits filed in court, it's clear the underlying contest is who should inherit the estate of the deceased. Thus, with the foregoing in mind, I take the view that this dispute can be resolved by determining who of the combatants falls within the degree of consanguinity and affinity.

The Black's Law Dictionary[3] defines consanguinity as the relationship of persons of the same blood or origin. The same dictionary defines affinity as the relation that one spouse has to the blood relatives of the other spouse; relationship by marriage or any familial relation relating from marriage.

The law requires that generations be counted from the intestate beginning with the parent up to the common ancestor and then down to the particular relation. It is a mistake, therefore, to assume that all next of kin will be related to the same level of common ancestor. Therefore, if a person is claiming to be a next-of-kin situation, he/she must account for all the reason-able possibilities of relationship in equal degrees derived from each different level of common ancestors.[4] In other words, the term "next of kin," for intestate succession purposes only, is understood in the primary sense of those nearest to the intestate by blood. Thus, the dispute before me can be determined by examining the degree of consanguinity and affinity so as to determine who between the petitioner and the objector is nearest by blood to the deceased. An examination of the consanguinity and affinity chart below will help in determining this issue.



It is evident from the above consanguinity and affinity chart that the petitioner falls in the third degree of affinity. On the other hand, the objector claims that his father and the deceased were first cousins, therefore he claims to be his nephew. The fourth degree includes the grand nephew/niece and first cousin who in this case would be the objectors father, great auntie/uncle and great-great grand parent.

A look at the table of consanguinity pursuant to Rule **7 (1) (e) (iii)** at the back of the Law of Succession Act[5] shows that the first cousins would fall under the fifth degree. Guided by the above chart, I find that the petitioner who is ranked in the third degree of affinity ranks higher in priority among the persons entitled to benefit or petition for letters of administration to the deceased estate.

I find no reason for this court to deviate from the order of priority provided under the chart and also the table on consanguinity at the back of the Law of Succession Act[6] referred to above. I am persuaded that the objection has no merits at all. I am also persuaded that from the material presented to me, this is a proper case for me to exercise my discretion and determine the right to person who should administer the deceased estate. The petitioner being the sister in law to the deceased and the only surviving relative of the deceased within the acceptable degrees of affinity tops the said order of priority. Accordingly, I dismiss the objectors' objection and orders as follows:-

> ***i. That*** *the Objection filed by the objector herein on 15th September 2015 be and is hereby dismissed.*

ii. That *a grant of letters of administration intestate to the estate of* ***Hillary Wambugu****-deceased who died on 15th September 2014 be and is hereby issued to* ***Immaculate Wangari Munyaga****.*

iii. That *the Objector be and is hereby ordered to pay costs of this objection to the petitioner.*

No orders as to costs. Right of appeal 30 days

Signed, dated and delivered at Nyeri this **2nd** day **November** of 2016

John M. Mativo, Judge

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[1] Cap 160, Laws of Kenya

[2] Cap 160, Laws of Kenya

[3] Eighth Edition

[4] Daniel F. Carmack, Common Problem in Administration of Decedents' Estates, 14 Clev.-Marshall L. Rev. 179 (1965)

[5] Cap 160, Laws of Kenya

[6] Ibid