



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**MISC. APPLICATION NO. 19 OF 2015**  
**IN THE MATTER OF CHILDREN'S ACT AND RULES**  
**AND**  
**IN THE MATTER OF CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF J N AND E M (MINORS)**  
**N G M..... APPLICANT**  
**VERSUS**  
**A G..... RESPONDENT**

**R U L I N G**

1. The Applicant N G M, through Notice of motion dated 8<sup>th</sup> April 2015 brought pursuant to section 1A, 1B, 3A and 18 of Civil Procedure Act and enabling provisions of law prays that this Honourable Court be pleased to order transfer of Children's case No.70 of 2015 at Tononoka to Meru Chief Magistrate's Court for hearing and determination and that pending the hearing of the application for the transfer case No. 70 of 2015 Tononoka be stayed.

2. The application is premised on the grounds on the face of the application interalia; that the Applicant met the Respondent at Mombasa and stayed together upto January 2015; that the two have two children namely J N aged five (5) years and E M aged eight (8) months; that the two separated on 22<sup>nd</sup> January 2015 and the Applicant and children came to live at Meru; that the 1<sup>st</sup> child is in school while the 2<sup>nd</sup> is breast feeding; that the Respondent has filed a case in Tononoko Court, Mombasa for legal custody of the children; that the Applicant has travelled to Tononoko court at high expense with children and that in the interest of justice the matter ought to be transferred to Meru for hearing. The application is supported by Applicant's affidavit dated 8<sup>th</sup> April 2015 which has reiterated the ground on the face of the application and which the Applicant has attached annexures "NGM1", "NGM2" and "NGM3" showing that the 1<sup>st</sup> child is a nursery going child and that the Respondent does not support her and her children. Annexures "NGM4" is a copy of the plaint filed on 19<sup>th</sup> February 2015 and "NGM 5" notice of motion dated 16<sup>th</sup> February 2015 filed at Tononoko Court, Mombasa. "MGM6" is a letter of admission of J N at [Particulars withheld] Academy dated 20<sup>th</sup> March 2015 showing he was admitted at the nursery on 20<sup>th</sup> January 2015.

**i. that this honourable court be pleased to order the petitioners to distribute the shares of the 1<sup>st</sup> applicant L K to herself and that of the minor E M to the 2<sup>nd</sup> applicant to hold in trust for him until he acquires the age of majority.**

**ii. That this honorable court be pleased to make an order allowing the 1<sup>st</sup> applicant to collect rent from her husband's property; that is the Driving School which was closed, renovated and now rent out to tenants.**

**iii. That this honourable court be pleased to order the petitioners to order the accounts of the estate upto date.**

**iv. That costs of this application be provided for.**

2) The application is premised on the grounds on the face of the application interalia; that the 1<sup>st</sup> applicant is daughter-in-law to the deceased whereas the 2<sup>nd</sup> applicant is the granddaughter; that the deceased bequeathed some of his properties to the applicants children namely **L K** aged 17 years and **E K** 12 years; that grant was confirmed in 2010 but the petitioners are yet to distribute the same to the rightful heirs; that the properties bequeathed to the applicant's children are not being used for the benefit of the said minors for example plot No. [Particulars withheld] and [Particulars withheld] at Kaaga is lying in waste yet it would have been utilized to generate income for the children, that initially the 1<sup>st</sup> applicant used to farm on the said land and used the produce for domestic consumption and the surplus for sale but the 1<sup>st</sup> petitioner who is her mother-in-law has chased her from the said plot and locked the gates denying her access; that the administrators are not utilizing the said properties for the benefit of the minors and it is only prudent that the administrators be compelled to distribute them in the applicant's name to hold in trust for the said minors **E K** and the 2<sup>nd</sup> applicant, that some of the properties, that is; Meru Municipality Block No. 11/165 and L.R. No. Meru Town Block 1/348 are supposed to be utilized for the purposes of paying school fees for the deceased's grandchildren as per the will but the same is not being done as the applicant's daughter's school fees is yet to be paid; that the applicant's husband **E K** was bequeathed the driving school which was closed; and renovated for the purposes of renting out but he is not in a position to manage it as he is currently admitted at a rehabilitation centre; that in view of the above the applicants pray that the court allow them to be collecting rent from the above property as the same was being used to cater for the welfare of their children.

3) The application is supported by affidavit dated 23<sup>rd</sup> May, 2014 sworn by **L K M** who has deponed that the deceased grandfather bequeathed her several properties in his will, that the grant for confirmation of letters of administration was granted to petitioners way back in the year 2010 but have failed to distribute the estate to the beneficiaries; that she was bequeathed a share in plot No. Kaaga/[ Particulars withheld] and L.R. NO. Ruiiri/ [Particulars withheld] which she would like to utilize; that the petitioners are not utilizing the said properties for her benefit and if given her share she would put it into good use now; that her father **E M** is unable to take care of her and her sibling due to his condition which has made him to be committed to a drug rehabilitation institution; and that she would like the petitioners to be ordered to render accounts for properties that they were authorized to administer for the purposes of paying her school fees.

4) The respondents are opposed to this application. The respondents filed a relying affidavit dated 18<sup>th</sup> June, 2014 in which they have deponed that the applicants application is seeking to alter the terms of the will; that there is no property bequeathed to **L K** alone and any transfer will involve other persons who should be made parties to this application; that plot No. [Particulars withheld] and [Particulars withheld] are to be jointly and severally owned by **E K** and **E K** and would go against the will to transfer to one of the beneficiary alone; that whenever they attempted transfer they met some opposition from beneficiaries and an application is pending in court as per annexure "JKM2"; that the complaints and the issue of the driving school are within MERU COUNTY as one of the beneficiaries is using force to take over all the property as per letters annexures "JKM3"; that the matter should be brought separately by way of originating summons and not in this succession cause and that the application should have joined other beneficiaries.

5) .Both parties filed written submissions on the application dated 23<sup>rd</sup> May, 2014. The applicant's submissions are dated 3<sup>rd</sup> November, 2014 and 24<sup>th</sup> March, 2015 whereas the respondent's submissions are dated 7<sup>th</sup> January, 2015. I have very carefully considered the application; the supportive affidavit, the replying affidavit and respective submissions by both Counsel. The issue for consideration is:-

*i. Whether the applicants have cause of action under the Law of Succession Act and whether the applicants have loci standi in this succession cause?*

*ii. Whether the Succession Cause was decided and file closed?*

*iii. Whether the applicants prayers can be granted without altering the deceased will?*

6) The Counsel for the respondent is of the view that the applicants have no cause of action under the sections of the Law of Succession Act quoted in their application and further they have no loci standi in this Succession Cause. He contends that this Succession cause was decided and the file closed and as such he submitted that the applicants as beneficiaries should move the court by way of originating summons under Order 37(1) of the CPR which provides:-

***37. (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.***

7) The applicants Counsel countered the respondents counsel submission by submitting that the applicants have locus standi to file the application as the law of Succession allows anyone with an interest in the cause to file an application submitting further that the 2<sup>nd</sup> applicant is a beneficiary whereas the 1<sup>st</sup> applicant has filed an application on behalf of a minor E M. The Counsel further submitted that this the Succession cause has not been finalized as the estate is yet to be distributed and an account filed in court.

8) Under Rule 63 of the **Probate and Administration Rules** it is provided:-

***63. (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons***

***to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, X I, XV, X VIII, X XV, XLIV and X LIX, together with the High***

***Court (P practice and procedure) Rules, shall apply so far as relevant to proceedings under these Rules.***

***(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in***

***relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.***

9) The provisions of Civil Procedure Act and/or Civil procedure Rules which are applicable in Succession Cause are specifically spelled out under Rule 63 of the Probate and Administration Rules. Order 37 of the Civil Procedure Rules dealing with originating summons which the respondents are seeking to rely on is not one of the orders spelled under Rue 63 of the Probate and Administration Rules. The wording of **Order 37(1) of Civil Procedure Rules** is very clear; "that is to say the determination, **“without the administration of the estate or trust”(underlining mine).** In my view and my understanding of the said

Order, a matter can be filed in court for determination of any other issue without seeking administration of the estate. That where a matter is for administration of an estate or distribution of an estate the law applicable is clearly stated to be the Law under the Law of Succession Act and not the laws provided for under the Act. I therefore agree with the applicants that they have come to the court properly.

10) **S.26 of the Law of Succession Act** on application by dependent or on his behalf may be filed by way of summons and not by way of originating summons. **Section 26 of the Law of Succession Act** provides:-

*“26. 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.”*

11) Section 29(a) and (b) defines the “dependant” to mean”-

*29(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*

12) The applicants being grandchildren are by virtue of **Section 29 of the Law of Succession Act** “dependants” to the deceased estate herein and entitled to make an application as they have done. I am therefore of the view that the applicants have locus standi to file present the application as dependants.

13) **Section 47 of the Law of Succession Act** provides that High Court has jurisdiction to entertain any application and determine any dispute under the Act and pronounce such decrees and make orders thereon as maybe expedient. The High court in my view can entertain any application and determine any dispute related to an estate of a deceased person brought under this Act whether grant has been confirmed or not (**see Section 76 of the Law of Succession Act**).

14) **Rule 73 of the Probate and Administration Rules** provides:-

*73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

This according to my understanding of the aforesaid rule means that court is obligated in determination of probate and administration matters to do substantive justice and not to determine matters on technicalities.

15) **Article 159(2),(d) of the Constitution of Kenya, 2010** is very clear and specific that justice shall be administered without undue regard to procedural technicalities. I am of the view that courts should endeavor to do justice without dwelling on technicalities which may result in injustices.

16) The respondents upon having been granted confirmed were obligated to distribute or to retain in trust all assets remaining after payment of expenses and debts(if any) and complete the administration of the estate within 6 months from the date of confirmation of the grant and produce to the court a full and accurate account of complete administration. Any interested party can make an application for a full and accurate inventory of the assets and liability and accurate accounts of all dealings.

17) Section 83(f),(g),(h) and (i) of the Law of Succession Act provides:-

***(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;***

***(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.***

***(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, 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;***

***(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of***

***the completed administration.”***

18) In view of the fact that the estate has not been distributed as per deceased will to date that full and accurate inventory of the assets and liabilities of the deceased estate and a full and accurate account of all dealings are yet to be delivered to court the applicant as interested parties are right in their submission that the deceased estate has not been decided and closed as submitted by the respondents. I therefore find and hold that the deceased estate is not fully distributed and closed.

19) The applicants application as drawn is not seeking to alter the deceased will in anyway. The 2<sup>nd</sup> applicant who attained the age of majority is entitled to have her shares transferred to her forthwith as there is no reason why the respondents would continue to hold on to the same while the applicant is suffering and not benefitting by the respondents refusal to effect transfer.

20) The 1<sup>st</sup> applicant is seeking to hold in trust the share of her minor son *E M* until he acquires the age of majority and to collect rent from her husband's property; that is the Driving School which was closed, renovated and has now been rented out to tenants simply because her husband is currently undergoing rehabilitation in Nairobi. She needs money for upkeep and payment of school fees for her children. I have very carefully considered the application and I am satisfied the applicants application is merited.

21) The upshot is that the applicants application is granted. I grant orders as follows:-

***i. The petitioners/respondents do forthwith distribute and transfer the shares of the 2<sup>nd</sup> applicant L K M to her.***

***ii. The 1<sup>st</sup> applicant jointly with the 2<sup>nd</sup> applicant to forthwith collect rent from the 1<sup>st</sup> applicant's husband's property that is the Driving School which was closed, renovated and has now been rented out to tenants for the benefit of E K and his children pending the time he would be able to manage the premises.***

***iii. The petitioners to render accounts of the estate from the date they took over upto date. The accounts to be filed and served upon the applicants within 30 days from today. There be liberty to apply.***

iv. *Each party to bear its own costs.*

DATED, SIGNED AND DELIVERED AT MERU THIS 7<sup>TH</sup> DAY OF MAY, 2015.

**J. A. MAKAU**

**JUDGE**

**Delivered in open court in the presence of:**

1. M/S Nelima for applicants

2. M/S Gituma for respondents

C/clerk Penina/Mwenda

**J. A. MAKAU**

**JUDGE**