



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION DIVISION
SUCCESSION CAUSE NO. 1196 OF 2008
IN THE MATTER OF THE ESTATE OF A M A (DECEASED)

F F M

A M PETITIONERS

V E R S U S

A M A

A M A OBJECTORS

RULING

1. The Deceased A M A (hereinafter referred to as the Deceased) died on 30th March 2008. The Deceased who professed the Muslim faith was predeceased by his parents and died intestate leaving behind four dependants namely:-
 - i. **F F A** - **Widow**
 - ii. **L A M** - **daughter aged 8 years**
 - iii. **M A** - **son aged 7 years**
 - iv. **A A M** - **daughter aged 2 years**
2. In June of 2008 the widow, (hereinafter referred to as the Petitioner), filed a petition for grant of Letters of Administration, whereupon the Objectors/cross-Petitioners filed a cross-petition dated 17th October 2008, seeking orders that they be appointed as administrators and also that they be included in the list of beneficiaries. They however abandoned their claim for dependency before the Kadhi's Court.
3. The parties gave *viva voce* evidence in which the Petitioner testified that she and her children and A M (hereinafter referred to as the co-Petitioner) reside in Liverpool, United Kingdom (UK) and that the co-Petitioner is her brother-in-law by virtue of being her sister's husband. She denied that she and the co-Petitioner were dishonest or that they have intermeddled in the Estate of the Deceased as stated by the Objectors.
4. The Petitioner asserted that the Objectors were not suitable to be appointed as administrators of the Estate as they had intermeddled in the Estate of the Deceased and in the process the 1st Objector, A M A, transferred a garage situated in Nanyuki belonging to the Estate to himself.

Further that the Objectors had neither spoken to her, nor supported her, nor communicated with the children of the Deceased since the Deceased died. The Petitioner set out the list of the assets she had identified as belonging to the Deceased in her affidavit dated 22nd April 2009, and asserted that there is nothing to prevent her from administering the Estate of the Deceased in accordance with Islamic Law. She stated that although she resides in the UK she would be able to travel to Kenya when necessary and would also consult on phone.

5. The Petitioner confirmed that she and the Deceased owned maisonette No. 5 on L.R No. **[particulars withheld]** in Nairobi, which was registered under her name, but that she had since sold it and bought a property for her children in the UK. This she said, was in accordance with the Deceased's wishes. She denied selling a car belonging to the Estate.
6. The first Objector, a brother to the Deceased, testified that there was no animosity between the Objectors and the Petitioner, but gave three reasons why he objected to the Petitioner being appointed a sole or joint administratrix to the Deceased's Estate. First, the Objector stated that the Petitioner had intermeddled in the Estate by selling maisonette No. 5 situated on L.R. No. **[particulars withheld]**, when she was supposed to hold it in trust for her children and also by selling motor vehicle Reg. No. **[particulars withheld]** belonging to the Estate. Secondly, the Objector contended that the Petitioner is illiterate and may sign things she does not understand and lastly he complained that the Petitioner included in the list of assets, properties that did not belong to the Estate of the Deceased.
7. The Objector urged that for the foregoing reasons, it is the Objectors who are fit to be appointed as administrators of their late brother's Estate to the exclusion of the Petitioner. Further that if appointed they do not intend to get any beneficial interest, or to inherit from the Deceased's Estate, but will instead safeguard the Estate to ensure that the children of the Deceased realise their dreams as their father would have wished.
8. Parties filed brief written submissions. Mrs. Wambugu learned Counsel for the Petitioners urged that under the provisions of **S.66 of the Laws of Succession Act (Cap 160 Laws of Kenya)**, the court has the discretion to appoint an administrator. She also pointed out that **S.3(4)** of the aforesaid law vests this court with the jurisdiction to determine the issue in dispute. Mrs. Wambugu asserted that the Objectors have no locus in law to apply to administer the Estate of the Deceased especially after abandoning their claim for dependency. She urged the court to find that the objection has no merit to justify the exercise of the courts discretion as by law provided.
9. Mrs. Wambugu relied on the following list of her authorities:-
 - i. **The Constitution of Kenya, 2010**
 - ii. **The Law of Succession Act Chapter 160 Laws of Kenya**
 - iii. **Cecelina Nyoroka M'ikiugu v Beatrice M'marete [2006]eKLR**
 - iv. **In Re The Matter of The Estate of Aggrey Makanga Wamira (Deceased) [2000]eKLR**
 - v. **In Re Estate of Bernard Njonjo [2041]eKLR**
 - vi. **In Re Estate of Mbai Wainaina (Deceased) [2015]eKLR**
10. Mr. J. M. Mwangi learned Counsel for the Objectors, also responded with brief submissions on issues of law and in particular, the provisions of **S.66 Laws of Succession Act**. He contended that **S.66** does not apply to succession involving Muslim law and that the Quran gives the order of priority with the male children being at the apex. He pointed out that **S.2(4) Law of Succession Act** provides that **part VII** of the Act only applies where the respective provision is not inconsistent with Muslim law.
11. Mr. Mwangi urged that under Muslim law the brothers assume a fundamental role in the administration of an Estate, particularly where there are minor children involved. He argued without prejudice that the court's discretion in the appointment of an administrator is final and the order of preference of persons entitled to be so appointed under **S.66** does not override the court's

discretion.

12. Mr. Mwangi submitted that in the exercise of its discretion, the court should be guided by the evidence on record, regard being had to the conduct of the persons seeking to be appointed as administrators. He argued that the Objectors' evidence showing that the Petitioners were dishonest had not been rebutted and that therefore the court should not exercise its discretion in their favour as it would not be in the best interest of the children.

13. I have considered the application and the objection thereto and it is met that I restate the relevant law on intestacy to begin with. Under **Part V** of the **Law of Succession Act Cap 160 Laws of Kenya, S.35(1)** thereof provides as follows:-

“Subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to:-

- a. **the personal and household effects of the deceased absolutely; and**
- b. **a life interest in the whole residue of the net intestate estate:**

Provided that if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person.

As pointed out by Mrs. Wambugu **S.66** of the Law of Succession Act gives the court discretion in the appointment of the person/s who will administer the Estate of the Deceased. **S.66** aforesaid states 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 the other beneficiaries;**
- b. **other beneficiaries entitled to intestacy, with priority according to their respective beneficial interests as provided by Part V;**
- c. **the Public Trustee and**
- d. **creditors.”**

14. The undisputed facts of this cause are that the Petitioner is the only widow of the Deceased and that she and her family reside in the United Kingdom. It is also not disputed that the Petitioners and the Objectors profess the Muslim faith and that the distribution of the Estate will be subject to Muslim law.

15. The Objector has asked the court to find the Petitioner unsuitable because of alleged dishonesty having sold a mansionette which she was meant to hold in trust for her children and a car belonging to the Estate. She is also accused of having also included in the list of assets property that does not belong to the Estate. The Objector also fears that the Petitioners' illiteracy may be a hindrance to the proper administration of the Estate. The Petitioner on her part has asked the court to find the Objectors unsuitable to administer the Estate because they have remained incommunicado since her husband died in 2008, have not supported her and the children in any way and have gone ahead to transfer some of the assets of the Estate into their own names.

16. Since the question of distribution of the Estate will be determined in the Kadhi's court, the only question for determination before this court is who, between the Petitioners and the Objectors should be appointed as the administrators of the Estate of the Deceased?

17. Faced with a cause in which the capacity of a widow to administer her Deceased husband's Estate was in issue Madan J (as he then was) in **Re: Kibiego [1972]EA pg 179** had definite views as

follows:-

“Whatever Cotran’s source of Nandi law may be, I am of the opinion that in today’s Kenya, in the absence of a valid reason such as grave unsuitability, a widow of whatever race living in the country, is entitled to apply to the court for the grant of letters of administration, more so when the children, as in the instant case are minors. A widow is the most suitable person to obtain representation to her Deceased husband’s Estate. In the normal course of events she is the person who would rightfully, properly and honestly safeguard the assets of the Estate for herself and her children. It would be going back to the medieval conception to cling to a tribal custom by refusing her a grant which is obviously unsuited to the progressive society of Kenya in this year of grace. A legal system ought to be able to march with the changing conditions fitting itself into the aspirations of the people which it supposed to safeguard and serve.”

18. It is my view that the Objectors have not demonstrated the inability that would render the Petitioners incapable of administering the Estate of the Deceased as by law required. The fact that the Petitioner sold massionette No. 5 on L.R No. *[particulars withheld]* and bought a property for the same children in the United Kingdom may have been as a result of misunderstanding the strictures of a trust and does not smuck of sinister motive. The second question of property wrongly included in the list of assets is an easy one to deal with and will be addressed at the time of distribution.

19. On the evidence on record I find no grave unsuitability of the widow in this case to administer her late husband’s Estate. There are provisions for safeguarding the Estate in the event of her remarriage. There is no medical report to confirm that she is suffering from any incapacitating ailment. Her illiteracy is not a bar and will in any case be alleviated by her co-administrator. From the evidence the Petitioner has kept her children, fed, clothed, housed and in school by managing her own properties and the funds left by the deceased in Lloyd’s bank UK for the last seven years, all by herself inspite of her illiteracy, without any support from the Objectors. By virtue of **S.39 (1) Law of Succession Act**, the brothers of the Deceased are remote relatives since the Deceased was survived by a widow and children. They do not have priority or even equal right to administer the Estate over the widow.

20. Having studied all the evidence and the rival submissions placed before me and having examined the list of authorities referred to and the relevant provisions of the Law of Succession Act, I am disposed to make the following orders:-

- a. **That the cross-petition dated 17th October, 2008 is without merit and I hereby dismiss it with costs;**
- b. **That I hereby confirm F F M and A M to be the administrators of the Estate of A M A (Deceased);**
- c. **That a grant of letters of administration intestate shall issue to them accordingly.**

SIGNED DATED and DELIVERED in open court this **6th day of July 2015.**

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L. A. ACHODE

JUDGE