



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**SUCCESSION CAUSE NO.153 OF 2013**

***In the matter of the Estate of JUSTUS NYAGA CHINDANO (Deceased)***

**LUCY WAMBETI BEDAN.....APPLICANT/PETITIONER**

**VERSUS**

**JAMES NJUE CINDANO.....RESPONDENT/OBJECTOR**

**RULING**

This is ruling on an application of the petitioner Lucy Wambeti Bedan dated 30/1/2015. It seeks for orders that the applicant be allowed to withdraw KShs.150,000/= from the deceased's bank account No. LO1-**[particulars withheld]** at Daima Bank Sacco Society Limited to pay for hostel accommodation and catering fees for her daughter (a beneficiary) at Kenya Medical Training College (KMTC) Nyeri.

The application was supported by the affidavit of Lucy Wambeti Bedan in which she stated that the beneficiary Ruth Moreen Njeru is a first year student at KMTC Nyeri and that she requires funds for hostel accommodation and catering expenses. It has become impossible to access the deceased's account No. LO1-**[particulars withheld]** with Daima Sacco Society because the objector has blocked it. The balance in the account according to a statement printed on 17/1/2014 is KShs.200,321.20. The applicant states that she has no other source of income to cater for the education of the beneficiary and if the order is not granted, the education of the beneficiary will be thrown into jeopardy.

The applicant further states that she is the one who tends and picks the tea bushes from where the proceeds are deposited in the deceased's account and as such the beneficiary is entitled to benefit from the funds.

The applicant filed a further affidavit dated 16/3/2015 in which she stated that the beneficiary is the daughter of the deceased born on 2/6/1994. To the affidavit was annexed a current fee structure from KMTC Nyeri for the year 2014/2015 showing the fees payable as KShs.91,000/= and a bank statement printed on 2<sup>nd</sup> March, 2015 with a balance of KShs.255,984.32. She further stated that the deceased has paid school fees for the beneficiary from primary to secondary school and it is only fair that she continues to get college fees from the deceased's account. She stated that there is a balance of fees amounting to KShs.60,000/= which is unpaid for last year.

The objector/respondent James Njue Cindano filed grounds of opposition dated 16/4/2015 stating as follows:-

1. *There is insufficient evidence that the applicant is a widow of the deceased.*
2. *Dependency and heirship are questionable.*
3. *According to custom, if the beneficiary is the daughter to the deceased she should have been named*

*after the mother of the deceased.*

4. *Annexure LWD I(D) only shows that the deceased held an account at Daima Sacco.*
5. *The three fees receipts marked as annexure LWD (e) do to prove that the deceased paid all school fees for the applicant's daughter from primary to secondary.*
6. *The application has no merit.*

Accompanied by the grounds of opposition was a notice of preliminary objection also dated 16/4/2015 based on the following grounds:-

1. *That the applicant Lucy Wambeti Bedan, the administrator whose grant has not been confirmed and therefore on part of the deceased estate has vested in her for the purposes of distribution to any person.*
2. *Ruth Moreen Njeru (a beneficiary) or Ruth Moreen Njeri Nyaga or Ruth Moreen Njeri is an adult female aged 21 years and therefore sui juris.*
3. *She should made an application in her own capacity in compliance with Section 27, 28 and 29 of the law of Succession Act and Rule 45 of the P&A Rules and Form 106, 15 and 1 of the Forms of Court.*
4. *The application is mounted under the wrong procedure.*

Parties agreed to dispose of the application by way of written submissions which were filed by their counsels. Mr. Njeru Ithiga represented the applicant while the objector was represented by Mr. Morris Njage. The counsels highlighted the submissions on 4/6/2015.

The court will determine this application together with grounds raised by the respondent in the notice of preliminary objection dated 16/4/2015. It is also important to note that the parties argued the said grounds of objection together with the application in their written submissions.

The respondent in his submissions argued that the application is incompetent in that the claim is for the benefit of one Ruth Moreen Njeri Nyaga who is an adult. It was further stated that Moreen should have filed the claim for herself since she is not under any legal disability. She is aged 21 years and holds a national identity card.

It was argued that the application is brought under the wrong provisions of the law namely Rule 49 and 73 of Probate and Administration. Mr. Njage argued that Rule 49 is only applicable where there is no other provision. Rule 45 provides for the procedure of making an application under Section 26 of the Act. He relied on the case of **RE: NGETICH [2003] KLR 84** where the court held that the use of wrong form meant that the application was a nullity *ab initio* and could not be cured by an amendment.

It was further argued by the respondent that the applicant claims to be the widow of the deceased. The marriage is disputed and the respondent states that he has consistently requested for a DNA to prove paternity. The burden of proof lies with the applicant. Ruth Moreen bears a burden to prove the requirement of her educational and daily needs should be catered for from the estate of the deceased. It is also the beneficiaries duty to prove her paternity.

The applicant in her further affidavit annexed a copy of the beneficiary's birth certificate indicating that she is the daughter of the deceased. The respondent argued that the documents tendered were insufficient to prove that the deceased paid school fees for the beneficiary.

Mr. Ithiga argued that the applicant is not attempting to distribute the estate of the deceased but only trying to ensure that the educational needs of Ruth Moreen Nyaga are catered for as it is provided for by Section 83 of the Law of Succession Act. It is the applicant's contention that there is no law prohibiting a personal representative or administrator from making an application for the provision of a dependant. This application was made when the beneficiary was still a minor.

The applicant further argued that the fact that the birth certificate was obtained 17 years after birth does not make it invalid and that its authenticity has not been challenged. The identity card was obtained at the

age of twenty years which is within the law.

The applicant has availed documents from KMTC Nyeri to confirm that the beneficiary is a student at the said institution and that funds are required to facilitate her education. An identity card, fees structures, fees receipts and the deceased account statement from Daima Sacco were annexed. The applicant argues that it is her children and herself who manage the tea estate of the deceased where the funds in the bank account are derived.

It was further argued by the applicant that an application under Section 26 and 27 of the Act should be brought by way of chamber summons. The applicant has therefore complied with the law in this regard.

A perusal of Rule 45 of the P&A shows that an application under Section 26 of the Act where the grant has not been confirmed shall be made by summons in Form 106. This application has been brought by way of chamber summons which is in compliance with the law. Article 159 2(d) of the Constitution provides that courts shall administer justice without undue regard to technicalities. The court will be concerned more with the substance than with the form. An application will not necessarily be declared incompetent for want of form.

The respondent raised the issue of the names of the beneficiary Ruth Moreen Njeri Nyaga also known as Ruth Moreen Njeri arguing that they were contradictory. The applicant in her further affidavit paragraph 3 and 4 clarified that the two names refer to one and the same person which sorts out the discrepancy.

The failure to change the name by the applicant from her maiden name to include that of her husband does not change her status. The court takes judicial notice that in this country, there are many women who have been married for many decades and still retain their maiden names. The change of name must be accompanied by other evidence for proof of marital status. Similarly, the argument that failure to change the name is interpreted to mean that the woman is not married.

It was explained that at the time this application was filed in December 2013, the beneficiary had not attained the age of majority. There was no need of filing a fresh application by the beneficiary after she attained 18. The respondent did not cite any law that prohibits an administrator of the estate from filing an application for the benefit of a dependant under Section 26 of the Act.

It is my considered view that late birth registration in Kenya is within the law and does not render a birth certificate invalid. Registration of persons at the age of 20 is also within the law. In the absence of evidence to the contrary from the respondent, the birth certificate and the identity card of Ruth Moreen Njeri Nyaga must be treated as valid documents.

The birth certificate consists of the name of the deceased Justus Nyaga Chindano as the father. Unless evidence to the contrary is availed, Ruth Moreen Njeri Nyaga is the daughter of the deceased.

The duties of a personal representative in the estate of a deceased are provided for under Section 83 of the Law of Succession Act. The filing and prosecution of this application is not excluded from the category of duties. The applicant possesses the capacity to bring this application even though the grant has not been confirmed. Having been appointed the administrator of the estate, the applicant is authorized to do what it takes in fulfillment of her duties as provided for by the law.

I come to a conclusion that the grounds raised in the preliminary objection have no merit.

The applicant has satisfied the court that the beneficiary is the daughter of the deceased unless the contrary is proved and that there is urgent need cater for the beneficiaries educational requirements. The documents annexed to the application are sufficient to prove that college fees for the year 2014/2015 is owing as well as a balance of Kshs.60,000/= carried forward from the previous year. It is within the duties of an administrator, for the applicant to ensure that the children of the deceased are educated.

It is on record that the applicant was granted a release of KShs.150,000/= on 15/8/2013 to cater for

similar needs of the same beneficiary. There is no change of circumstances or status of the parties in this cause since the previous order was given.

It was held in the case of *E J VS KJ B & ANOTHER [2014] eKLR*. The court held that I did not doubt that the children were sired by the deceased as the birth certificates produced indicated so. The court further held that any school fees must be subject to production of a school fees structure and that the court would not accept a mere letter indicating school fees in arrears.

It is not in dispute that the applicant is the one who generates the funds that goes to the deceased's account with Daima Bank by tending to the tea bushes. There is no evidence from the objector that he has contributed to the generation of that income.

The applicant was appointed administrator of the estate by consent of the parties recorded on 1/7/2013 and which is still in force.

I find the application merited and allow it as prayed.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF NOVEMBER, 2015.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Mr. Ithiga for Applicant/Petitioner**

**Mr. Njage for Objector/Respondent**