



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI**

**SUCCESSION CAUSE NO. 2747 OF 2002**

**IN THE MATTER OF ESTATE OF STANLEY FRANKLIN HABWE – DECEASED**

**RULING**

1. This cause relates to the estate of Stanley Franklyn Habwe. He died intestate on 1<sup>st</sup> January 2002. Representation to his estate was sought on 31<sup>st</sup> October 2002 by his sisters, Edna Olive Habwe and Emily Margaret Nwankwo. According to the affidavit in support of the petition, he was survived by a spouse, two children and two sisters. He is said to have died possessed of a property described as LR No. 7788/18. Grant was made to the two sisters of the deceased on 25<sup>th</sup> July 2008.
2. On 7<sup>th</sup> October 2008 the two sisters in their capacity as administrators of the estate sought confirmation of the grant made on 25<sup>th</sup> July 2008. It was proposed that the estate property, LR No. 7788/18, be registered in the names of the three sisters of the deceased and his two children.
3. When the application was placed before Rawal J. on 22<sup>nd</sup> July 2009 the court declined to confirm the grant on the grounds that the consents of the surviving widow and daughter of the deceased had not been obtained, and that the surviving son of the deceased was still a minor and his interest had not been secured in the proposed distribution.
4. To address the concerns raised by Rawal J., the administrators through Edna Olive Habwe, swore an affidavit on 19<sup>th</sup> October 2010. In the said affidavit, the administrator explained that the surviving son of the deceased was no longer a minor. She also indicated that the widow, son and daughter had since signed documents indicating that they had no objection to the confirmation of the grant being issued in the names of the current administrators, Edna Olive Habwe and Emily Margaret Nwankwo. The said documents are attached to the said affidavit.
5. The three documents are in standard language and were purportedly signed by the widow, son and daughter on 26<sup>th</sup> August 2006. The signature of the widow and daughter were affixed before notaries public. The documents are in the following terms:-

***“I am residing in the United States and I am unable to administer the estate of ... Stanley Franklin Habwe. I give full power and authority to Edna Olive Habwe (sister of the deceased Stanley Franklin Habwe) and Emily Nwankwo (sister of the deceased Franklin Habwe) to administrater the estate of ... the deceased Stanley Franklin Habwe.***

***Dated this 26<sup>th</sup> day of August 2006.***

***In the presence of.”***

6. Thereafter the matter was placed before Kimaru J. on 19<sup>th</sup> January 2011. The court for a second time declined to confirm the grant on the grounds that the widow and children had not renounced their right to administration and inheritance. The court gave the administrators the alternative of securing a power of attorney from the widow and the children of the deceased allowing them to administer the estate on their behalf.

7. On 4<sup>th</sup> November 2013, Mr. Nabutete, advocate for the administrators, filed an affidavit sworn on 1<sup>st</sup> November 2013, detailing the efforts he had made to contact the widow and children of the deceased to secure their power of attorney or their attendance in court.

8. It is on the back of this affidavit that the administrators caused the application to be placed before me on 19<sup>th</sup> November 2013.

9. There are two issues to be addressed. Firstly, is the issue of administration of the estate, and, secondly, is the distribution of the estate.

10. When it comes to the right to administer an estate, the surviving spouse has prior right over every other member of the family of the deceased. The provision governing this is *Section 66* of the Law of Succession Act Cap. 160, Laws of Kenya. It gives the court an order of preference that should guide it in determining who should administer the estate. Section 66 provides as follows:-

***“When a person 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...*”

11. The said provision provides an order of priority of persons who are entitled to a grant of simple administration. This order follows the provisions of Part V of the Act, in particular *sections 32, 36, 37, 38 and 40* of the Act. This is meant to be a general guide. The court is not bound by the list. The law gives discretion to the court to determine who merits being appointed administrator of an intestate estate. It can depart from the preferred list in Section 66 for good reasons to be noted. This means that the court can overlook the persons at the top of the list and pick someone at the bottom of the list as administrator.

12. The law puts the surviving spouse of the deceased at the top of the list. This is the position in Section 66 of the Law of Succession Act. This position was reinforced by Madan J in *Re Kibiego* (1972) EA 179, where it was stated that a widow, where the deceased was a husband, is the most suitable person to obtain representation to her deceased husband's estate. Waki J. made similar remarks in *In re Estate of Wamira* (2002) KLR 12, where it was stated that priority in taking a grant of letters of administration intestate should be given to the surviving spouse followed by the children. It was no doubt with the above in mind that Rawal J. on 22<sup>nd</sup> July 2009 and Kimaru J. on 19<sup>th</sup> January 2011 were reluctant to confirm the grant.

13. Under Rule 7(7) of the Probate and Administration Rules a person with a lesser or equal right to administration must obtain the consent of the persons with a prior or equal right to administration. The said provision states as follows:-

***“ 7 (7). 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 the grant to the applicant; or***
- c. ***Been issued with a citation calling upon him either to renounce such right or to apply for a grant...”***

14. In the context of this cause, the deceased was survived by a spouse, children and siblings. Going by the provisions of *Section 66* and Part V of the Act, the widow had a prior right to administration of the intestate estate, followed by the children and the siblings in that order. The children and siblings have a lesser right to that of the widow with respect to the administration of the estate. The widow can be overlooked as administrator if she is not competent for some reason to administrate the estate or because she has renounced her right or has consented to those with a lesser right being appointed as administrators. The same case applies to the rights of the children being overridden by the siblings. This means that for the sisters of the deceased to be appointed administrators of the estate of the deceased, the widow and children should have renounced their right to administration or consented to the sisters of the deceased being appointed as administrators.

15. The petition for grant of letters intestate herein was sought by the siblings of the deceased. At the time they lodged their petition at the registry they included in the bundle a document titled “*Consent to the making of a Grant of Administration Intestate to person of equal or lesser Priority*” signed by the widow and daughter of the deceased on 14<sup>th</sup> May 2002 before a notary public. The son of the deceased did not execute a consent as he was a minor at the time. There are also the documents that I referred to in paragraph 5 above signed by both the widow and the children where they conceded administration of the estate to the administrators herein, Edna Olive Habwe and Emily Margaret Nwankwo.

16. From the record I am satisfied that the persons with prior right to administrate of the estate of Stanley Franklin Habwe have consented to the administrators herein being appointed as administrators of the estate. They can be said to have renounced their rights to administration of the estate. I am satisfied that Rule 7 (7) of the Probate and Administration Rules has been complied with and hold that the administrators herein are properly in office and are competent and qualified to administer the estate.

17. On distribution of the estate the issue is who should be entitled to a share in the estate? According to the affidavit in support of the petition the survivors of the deceased are listed as his children, widow and siblings. The same list appears in the summons for confirmation dated 30<sup>th</sup> September 2008. The question is, are all these three categories of survivors entitled in intestacy to a share of the estate of the deceased?

18. The law on the distribution of the estate of an intestate is Part V of the Law of Succession Act. Under that law, the widow and children of the deceased have priority to the estate over the siblings of the deceased. So long as there is a surviving spouse and children, the siblings of the deceased are not entitled to a share in the estate. *Section 39 (1)* of the Act is quite clear on this, it states that –

***“39 (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, any child or children of deceased brothers and sisters, in equal shares; or if none...”***

19. From the wording of *Section 39(1)* of the Act, the siblings of the deceased in this cause have no right to a share in the estate of the deceased person. That right inures in the widow and children of the deceased unless they have renounced their inheritance. I have carefully gone through the record and I have not come across any document where the widow and the children or either of them have renounced their right to a share in the estate.

20. The only asset making up the estate is LR No. 7788/18. The said asset was acquired by the father of the deceased, Eli Habwe, in 1965. In 1977 it was transferred to Eli Habwe, Ruth Mical Habwe and Stanley Franklin Habwe as joint tenants. Eli Habwe and Ruth Mical Habwe were the parents of the deceased herein, Stanley Franklin Habwe. The said parents died on 11<sup>th</sup> February 1984 and 21<sup>st</sup> April 1996, respectively. Given that the two were joint tenants with the deceased with respect to ownership of LR No. 7788/81, following their deaths their interests in the estate united or merged with that of the deceased by virtue of the principle of survivorship or *jus accrescendi* and became the property of the deceased. The interest of the deceased parents of the deceased was lost as they united with the interest of the deceased, and therefore their interest was not available for distribution as part of their estates. The property is now only available for distribution as an asset in the estate of the last tenant, Stanley Franklin Habwe. The siblings of the deceased therefore have no claim whatsoever to the estate unless or until the widow and children renounce their shares or interests in the estate.

21. I raise this issue because the proposal in the confirmation application dated 30<sup>th</sup> September 2008 is that the property be registered in the joint names of the children and siblings of the deceased. Attached to the application is a draft certificate of confirmation of grant in those terms and a copy of the transfer document in respect of LR No.7788/18 executed by the deceased and his parents on 26<sup>th</sup> August 1976 to create a joint tenancy over the said property.

22. Administrators are also trustees. They hold estate property, which vests in them, for the benefit of others. Those others include heirs, survivors, beneficiaries and creditors. The administrators stand in a fiduciary position with respect to the property and the beneficiaries. They stand to account to the court and to the beneficiaries regarding their management of the estate.

23. I have already found that LR No. 7788/18 is only available for distribution to the widow and children of the deceased. I have also held that the siblings of the deceased would only be entitled to a share in the property in the event of the widow and children renouncing their interest in the estate. In the absence of such renunciation the administrators are bound to hold the said asset for the benefit of the said widow and children of the deceased.

24. In view of everything that I have said above, I hereby made the following final orders:-

1. That the grant of letters of administration intestate made herein on 25<sup>th</sup> July 2008 is confirmed to Edna Olive Habwe and Emily Margaret Nwankwo.
2. That LR No. 7788/18 shall devolve upon Katherine Augusta Tolbert Habwe, Shamir Eli Odera Habwe and Olembo Florence Habwe in equal shares to be held in trust for them by the administrators of the estate.
3. That the costs of the application shall be borne by the estate.

25. It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 2<sup>nd</sup> DAY OF May, 2014.**

**W. MUSYOKA**

**JUDGE**

In the presence of .....advocate for the applicants.