



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**MISCELLANEOUS SUCCESSION CAUSE NO. 65 OF 2014**

**IN THE MATTER OF THE ESTATE OF JOSEPH MWANGI GACHOHO (DECEASED)**

**ROSE WANJIRU MWANGI.....APPLICANT**

**VERSUS**

**MOFFAT KAMAU GACHOHO.....RESPONDENT**

**RULING**

The applicant herein filed a Notice of Motion dated 29<sup>th</sup> January 2014 under a certificate of urgency of the same date. It was supported by the applicant's own affidavit which was also sworn on 29<sup>th</sup> January, 2009.

In the motion, the applicant sought for orders that the respondent be compelled to release the certificate of death of one Joseph Mwangi Gachoho and all the necessary documents necessary for filing a succession cause in respect of the estate of Joseph Mwangi Gachoho. In the alternative, the applicant sought this court's order authorising her to file a succession cause in respect of the estate of the deceased without a copy of the death certificate. She also sought temporary orders restraining the applicant from receiving any payment from the properties, rents, bonuses and other benefits from the estate of the deceased until the succession cause for the estate of Joseph Mwangi Gachoho has been processed.

The main ground upon which the applicant's motion is based was stated to be that the respondent is intermeddling with the deceased's estate yet he has failed to file a succession cause in respect of that estate.

The applicant claims to have been the wife of one Kenneth Maina Gachoho who apparently is also deceased. She described the respondent as the deceased's grandson and a brother to her late husband. It would therefore be assumed that her late husband was the deceased's grandson as well.

The respondent responded to this application by filing a notice of preliminary objection dated 7<sup>th</sup> January, 2014 in which he argued, amongst other things, that the application was vexatious, frivolous, malicious and an abuse of the process of court; that the application was incurably defective and that the affidavit sworn by the applicant ought to be expunged from the court records as it was contrary to the provisions of **Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya**. Finally the respondent argued that the applicant did not even have *locus standi* to bring the purported proceedings in court.

The preliminary objection was heard on 25<sup>th</sup> February, 2014. On the material date counsel for the respondent reiterated that the applicant had no *locus standi*. Though the applicant described herself as the granddaughter of the late Joseph Mwangi Gachoho, she also claimed to be the wife of one of the

grandsons of the said Joseph Mwangi Gachoho. According to counsel, under **Section 36** of the **Law of Succession Act**, it is the immediate family members of the deceased who are entitled to the deceased's estate. In his view, if the applicant was coming to court under her late husband's name then she should have sought this court's authority to represent his interests before filing the application herein.

Counsel argued that the application was defective because no law was ever cited and therefore it was not clear under which law the prayers could be granted.

In response to the counsel for the respondent's submissions, counsel for the applicant stated that the applicant had *locus standi* and the application had been brought under **section 2(1)** and **section 45** of the **Law of Succession Act**. Again **Rule 73** of the **Probate and Administration Rules**, so argued the applicant's counsel, gives the court inherent powers to issue any orders in order to meet the ends of justice. In any event the respondent did not cite any law that barred the applicant from making the sort of application that was before court.

I have considered the respective counsel's submissions in support of and in opposition to the respondent's preliminary objection.

One of the issues that have come to the fore in their respective submissions is the applicant's relationship to the deceased whose estate is in issue. As noted she described herself as the deceased's granddaughter and also as the wife of the deceased's grandson. Her status as far as the succession of the deceased's estate is concerned is not very clear from her own affidavit filed in support of the motion. **Section 66** of the **Law of Succession Act**, gives some guidance on persons in favour of whom grant letters of administration intestate may be made; it says thus:-

***66. 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) 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 that, where there is partial intestacy, letters of administration shall be granted to any executor or executors who prove the will.***

The ambiguity in the description of the status of the applicant makes it difficult for the court to rank her beneficial interest amongst the beneficiaries of the estate of the deceased. The court notes that the applicant has, however, acknowledged the respondent's right to petition for letters of administration in respect of the deceased's estate. Her contention on the face of the application that the respondent has declined to petition for the administration the deceased's estate can only imply that the respondent's right to initiate the succession proceedings ranks prior to her right, if she has any, to take a similar action. If this is the position, the right course open to the applicant would have been to cite the respondent to take or reject letters of administration **under 22 (1) and (5)(a)** of the **Probate and Administration Rules** made under **Section 97** of the **Law of Succession Act**. Under **Rule 22(1)** it is provided that:

***A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto***

**Sub-rule 5 (a) of Rule 22** says:

***If the time limited for appearance has expired and the person cited has not entered an appearance in either the principal registry or the Mombasa registry, the citor may-***

- a. ***in the case of a citation under sub rule (1) (that is, of rule 22 cited above), petition the court (if he has not already done so) for a grant to himself;***

If on the other hand the applicant is claiming any right under the name of Kenneth Maina, whom she claimed to have been the grandson of the deceased and also her husband, then it was incumbent upon her to seek the authority of the court through a grant of letters of administration intestate limited to initiating proceedings on behalf of her late husband's estate. This is provided for under section 54 of the Law of Succession Act under which, according to the circumstances of the case, the court may limit a grant of representation which it has jurisdiction, in any of the forms described in the Fifth Schedule. I agree with counsel for the respondent that the applicant lacks *locus standi* to take legal proceedings on behalf of a deceased person if she has not obtained the relevant authority.

In the premises and for the reasons I have given, I hold that the preliminary objection is merited and I hereby allow it. The notice of motion dated 29<sup>th</sup> January, 2014 is accordingly struck out with costs.

**Signed, dated and delivered in open court this 9<sup>th</sup> day of May 2014**

Ngaah Jairus

**JUDGE**