



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 263 OF 1995

**IN THE MATTER OF THE ESTATE OF MATAYO ORYAMA KABEYI alias MATHAYO
KAVEYI DECEASED**

A N D

**KALORI WASHIKU
MUMBATSIPETITIONER(DECEASED)**

A N D

**NICHOLAS KABEI
OKELLOPETITIONER/RESPONDENT**

V E R S U S

**JANEROSE ANYANGO
WASHIKUOBJECTOR/APPLICANT**

R U L I N G

1. The Notice of Motion dated 31.3.2010 seeks orders that Janerose Anyango Washiku be appointed as an administratrix to the estate of Matayo Oryama Kabeyi also known as Mathayo Kaveyi (deceased).
2. I note that on 10.6.2008 Ochieng J. revoked the grant issued to one Nicholas K. Okello. I also note

that on 24.1.2008, G.B.M. Kariuki J. ordered that an inhibition be placed on title no. **North Wanga/Mayoni/209** which is registered in Okello's name as administrator of the deceased's estate.

3. No Replying Affidavit was filed by Okello to the present Application but grounds of opposition were filed on 23.9.2010 and I note that in submissions filed on 18.11.2010, M/S Onindo Associates Advocates completely misunderstood the gist of the Application before me. It is not premised on a petition under **section 51** of the Law of Succession Act nor is **section 53** thereof relevant to the matter before me. The Applicant may have invoked those provisions but to my mind they do not answer the gap created by the orders of Ochieng J. in revoking the grant at the instance of the present Applicant. The earlier orders of Kariuki J. also ensured that nothing would be done to alienate the only asset in the estate. Rule 73 of the Probate and Administration Rules which has been invoked as follows;

“Rule 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.”

4. The above Rule must be read in the context of **section 47** of the Law of Succession Act which provides as follows;

“S.47 - The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”

5. The import of the above provisions is that in a situation such as the present one, a party can approach the court with a view to determining who should administer the deceased's estate where upon revocation of grant, no administrator was appointed.

6. I gather that the Applicant is a wife of one Kalori Washiku Mumbatsi (deceased) who was the original petitioner and who died before letters of administration were issued to him. He was a son of the deceased in this cause.

7. Okello aforesaid has made the point that he was a grandson of the deceased herein, Matayo Oryama Kabeyi and that he has a prior right to the letters of administration. **Section 66** of the Law of Succession Act provides as follows;

“S.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 in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

8. To my mind, the Applicant has a prior right to be granted letters of administration and I also say so because Ochieng J. deliberately denied Okello the grant and it would be irregular for me to return it to him.

9. In the event, let a fresh grant of letters of administration be issued to Janerose Anyango Washiku. She shall file an Application to confirm it within the next 30 days and serve it upon Nicholas K. Okello within 14 days of filing the same and the latter may then file an Affidavit of Protest if need be, thereafter.

10. A mention date should now be taken for directions to be given as to how this old matter can be concluded. No order as to costs.

11. Orders accordingly.

Delivered, dated and signed at Kakamega this 3rd day of March, 2011

ISAAC LENAOLA

J U D G E