



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

SUCCESSION CAUSE NO 56 OF 2015

IN THE MATTER OF THE ESTATE OF ESTHER WANGUI CHEGE (DECEASED)

JOHN CHEGE KOMBO.....2ND ADMINISTRATOR

AND

JOHN NGENGA MBARA.....3RD ADMINISTRATOR

VERSUS

TAABU MZEE MOHAMED.....APPLICANT

RULING

Introduction

1. Esther Wangui Chege, the deceased in this Succession Cause, died on 16th January 2021. Mzee Mohamed, the widower, and John Chege Kombo, a nephew, applied for grant of letters of administration.
2. Following an objection filed on 16th June, 2015 by John Njenga Mbara, who claimed to be the brother of the deceased, a grant of letters of administration was issued by court to Mzee Mohamed, John Chege Kombo and John Njenga Mbara on 23rd September 2016.
3. On 19th March 2017, Mzee Mohamed the widower and administrator died leaving his daughter, Taabu Mzee Mohamed, surviving him. Taabu Mohamed is therefore the stepdaughter of the deceased.

1st Application dated 28th September, 2017

4. Taabu Mzee Mohamed filed an application by Chamber Summons in her capacity as the daughter and personal representative of her late father to be approved as a joint administrator of the estate of the deceased herein. Taabu Mohamed had also applied to administer the estate of her father.

2nd Application dated 5th October 2017

5. In quick succession, and before appointment as Co-administrator, Taabu Mohamed applied for confirmation of the Letters of Administration issued on 23rd September 2016 in which the Co-administrators are John Njenga

Chege and John Njenga Mbara.

6. In this application the applicant proposed that the deceased's estate be divided into three equal shares between the Estate of Mzee Mohamed, John Chege and John Njenga Mbara. With regard only to Land Parcel No Naivasha /Maragishu Block 11/723 (Karai) she proposed it be given to the estate of her deceased father Mzee Mohamed. The applicant further identified liabilities to Kenya Commercial Bank (750,000), Equity Bank (1,200,000) and Sundry Creditors.

7. The court directed that the applications be disposed of through affidavit evidence and written submissions parties complied

Issues for determination

8. The issues in dispute are as follows:

- a) Whether a deceased administrator can be replaced by a personal representative.
- b) Whether Mzee Mohamed, the deceased administrator of the deceased's estate was married to the deceased; and if so, whether he or his estate is entitled to a beneficial interest in the deceased's estate.
- c) Whether the application for confirmation of grant is liable to be accepted by the Court.

Analysis and Determination

Whether a deceased administrator of an estate can be replaced as administrator by his personal representative and whether the deceased was married to the deceased.

9. The applicant contends that the law contemplates the death of an administrator and provides for replacement thereof. She points to **Sections 66, 75A, 81 and 84** of the **Law of Succession Act** and **Rules 49 and 59** of the **Probate and Administration Rules**.

10. As to whether the personal representative of the deceased administrator Taabu Mzee has locus to approach the court to replace the deceased administrator, the applicant urges that the parties are not disputing her locus; that what they dispute is whether or not he was given his lease.

11. As I understand it, the applicant has applied to administer the estate of the deceased by virtue of the following relationships. First, she argues that her father, the deceased administrator who she seeks to replace, was the husband of the deceased. Second, she argues that by virtue of that husband and wife relationship, her father was entitled as a beneficiary of his deceased wife's estate. Thirdly, she submits that she is the daughter of the deceased administrator and thus the stepdaughter of the deceased.

12. The applicant availed the following documents to prove the relationships which she sought to establish:

- a) "TMM2", a Certificate of Reversion to Islam dated 16-04-2005, stamped by Naivahsa Jamia Mosque, showing that Esther Wangui Chege (the deceased) had reverted from AIC faith to Islam and adopted the name Halima.
- b) Together with the above certificate, is a Certificate of Marriage, No. B009928 evidencing the marriage between Halima Esther Wangui Chege and Mohamed Mzee. Their date of marriage is shown as 18th August, 1974.
- c) A Grant of Letters of Administration dated 25th May 2017 Ad Litem issued to Taabu Mzee Mohamed and

Almas Mohamed in respect of the estate of Mzee Mohamed. It entitles the applicant to administer Mzee Mohammed's Estate.

13. By the aforesaid documents the applicant has, in my view, established the marital relationship between the late Mzee Mohamed and the deceased. Elsewhere, the applicant has asserted that she is the daughter of the late Omar Mohamed. However, she did not attach her birth certificate as proof thereof, nor did she assert that the deceased in this estate was her mother.

14. In answering the question whether the applicant has locus to fill the shoes of her father Omar Mohamed as administrator of the estate of Esther Chege Wangui, the first step is to note that there is a subsisting grant issued in respect of the said estate. The administrators are indicated as Omar Mohamed, John Chege Kombo the 2nd Administrator, and John Njenga Mbara the 3rd Administrator. Upon the death of Mzee Mohamed the latter two are the continuing administrators.

15. The next point of concern is to determine whether the applicant is sufficiently connected or related to the deceased to enable her to play any role as an administrator.

16. It is not in dispute that the deceased died intestate on 16th January, 2015. It is also not in dispute that she was survived by Mzee Mohamed, her husband. Although the other co-administrators have expressed doubt concerning the said marital relationship, I think that issue is now, *prima facie*, proved by the marriage certificate availed by the applicant. No other surviving spouse or children of the deceased, Esther Wangui Chege, have been identified or alleged in these proceedings.

17. The deceased administrator Mzee Mohamed, whilst he was an administrator of his deceased wife's estate, had certain legal obligations and responsibilities. In terms of **Section 79** of the **Law of Succession Act**, he was one of the personal representatives of the estate of the deceased. As such the estate of the deceased would be deemed in law vested in him together with his co-administrators.

18. What happens upon the death of an administrator" Under **Section 81** of the **Law of Succession Act**:

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them.”

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.” (Emphasis added)

19. As things stand presently, the surviving co-administrators are vested with all the powers of administrators. If there is a continuing trust, the co-administrators have no power to do any act or thing in respect of the trust. A continuing trust is a trust wherein the trustees hold the estate assets or part of them for the benefit of a beneficiary over time, for example a minor.

20. I have perused the original petition for administration of the deceased's estate. One of the beneficiaries listed is Hannah Wanjiku Nyoro, indicated at the time as a minor aged 13 years. Accordingly, the administrators were and are holding the estate's assets in a continuing trust. As such there must be no less than two administrators administering the estate, which is the case at present.

21. In the present situation, the estate of the deceased is properly represented for purposes of administration.

However, it should be noted that Mzee Mohamed, whilst he was an appointed administrator, was also not only a personal representative of the deceased's estate, but also her surviving husband.

22. **Section 2** of the **Law of Succession Act** defines "*personal representative*" as follows "*means the executor or administrator of a deceased person.*" Amongst the duties of a personal representative or administrator are those set out in **Section 83** of the **Law of Succession Act** as follows:

- "a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral;*
- b) To get in all free property of the deceased including debts owing to him and moneys payable to his personal representatives by reason of his death;*
- c)*
- d) To ascertain and pay, out of the estate of the deceased, all his debts*
- e) Within six months from the date of the grant, to produce the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account..." (Emphasis added)*

23. It is clear from the above provision that the administrators were under obligation to provide a full and accurate inventory of the assets and liabilities of the deceased's estate. From the evidence availed, it is clear that the deceased administrator, Mzee Mohammed, took the key role – as deceased's husband – of sorting out her debt and calling in her estate. All the information concerning these aspects was in his knowledge and maintained by him. An account thereof was not given to the court or, apparently to his co-administrators. In the circumstances, the applicant, as the personal representative of the deceased's estate, is in a prime position to obtain information on the accurate and correct inventory of the assets and liabilities of the estate of her late father's wife.

24. This will assist in the determination of the full extent of the net interstate estate of the deceased. As will be seen later, the co-administrators have so far failed to provide a proper inventory of the assets and liabilities of the estate, with the surviving co-administrators blaming Mzee Mohamed for not accounting for the estate. This court believes that incorporating the applicant as administrator will ensure that proper and accurate information will be availed from her deceased father's estate which she is administering, to enable the estate of Esther Wangui Chege to be effectively and efficiently wound up and administered.

25. Under **Section 66** of the **Law of Succession Act**, where a deceased has died intestate, the court has a 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...."

I think that this is a proper case in which the applicant, as personal representative of the deceased's administrator's estate, should also participate as administrator in the deceased's estate. In any event, in her Further Affidavit filed on 6th June, 2018 at paragraphs 10 and 11, she has asserted that she has information concerning assets of the deceased of which the co-administrators have no knowledge.

26. Accordingly, I shall order that the applicant shall be appointed a co-administrator with the existing surviving administrators. Her envisioned and specific role will be ensuring compliance – in priority and expeditiously – with **Section 83 (e)** of the **Law of Succession Act**, namely to obtain information held by the deceased administrator or his estate concerning the estate of the deceased, Esther Wangui Chege.

27. I am aware of the proviso in **Section 66** of the **Law of Succession Act**, that when exercising the discretion to appoint an administrator in the best interests of all concerned, the court must exercise its discretion in accordance with the general guidelines as to the order of preference set out in **Section 66** (a) – (d) of the **Law of Succession Act**.

28. In the present circumstances, the applicant is being appointed, inter alia, to enable identification of the assets in terms of the Law of Succession Act, which the deceased's spouse – the applicant's father – acquired, and any interests he may have dealt with as surviving spouse during the two years he administered the deceased's estate before he passed on. Her role is therefore to account to the court.

29. In terms of **Part V** of the **Law of Succession Act**, the scheme of distribution was well articulated by Musyoka J in **Re-Estate of Peter Ambani Matanywa (deceased) [2019] eKLR**. There, the learned Judge said:

“27.... The scheme of distribution under Part V is that the property is shared out amongst the kin of the deceased. Where the deceased is survived by a spouse and children take priority over everyone else. Even as between the spouse and the children, the spouse appears to take priority. The design is that the principal destination of the assets is the children, but they would have no direct access to the property during the lifetime of the spouse.

Whether the application for Confirmation of Grant can be granted by the Court

30. I now move on to the final issue whether the application for confirmation can be granted by the court. This is the applicant's 2nd Application (Summons for Confirmation dated 5th October, 2017).

31. In that application the applicant identifies the deceased's assets to be as follows:

a) Those liable to be divided equally between the 3 co-administrators including the applicant should the applicant be deemed to be a co-administrator:

- Parcel Naivasha Maraigishu Block 17/164
- Account No. 042 115 368 870 Kenya Commercial Bank
- Account No. 011 091 163 14800 Cooperative Bank of Kenya
- Account No. 100 325 584 2 KWFT Naivasha
- Account Nos. 020 010 148 4139 and 056 026 099 99 26 Equity Bank

b) Those liable to be distributed solely to the applicant alone viz: Parcel No. Naivasha/Maraigishu Block 11/723 (Karai).

c) Liabilities of the deceased to be shared equally between the administrators.

The applicant has not indicated whether she has included the assets mentioned by her in Paragraphs 10 - 11 of her Further Affidavit filed on 6th June, 2018.

32. The summons for confirmation is objected to by the co-administrators.

33. John Chege Kombo, the 2nd Administrator and deceased's nephew, in his Affidavit in reply argues that Mzee Mohamed, whilst alive and as co-administrator of the estate was paid various amounts of money from the

deceased's bank accounts and other creditors; that in effect such receipts by Mzee Mohamed amount to shares distributed to him from the deceased's estate; that Mzee Mohamed collected rent monies for the deceased's estate which have not been accounted for; and that there was a family agreement by which the deceased's estate was to be distributed in a different manner from that proposed by the applicant.

34. John Chege presented several documents and receipts by creditors; and also correspondence with banks showing bank balances in the deceased's accounts as follows:

- Cooperative Bank Account Number 011 091 163 148 00 balance 234/- CR
- KWFT Inuka Account balance 2,600/- CR
- Equity Bank Account Number 020 010 148 4139 Nil
- Equity Bank Loan Account Loan balance 27,381/- DR
- Equity Bank Account Number 056 026 099 926 balance 161,257/- CR
- KCB Account Number 041 115 368 870 Dormant nil balance

35. Further, the documents show that Equity Bank presently holds title number Naivasha/Maraigishu Block 17/167 (Mugane) which has a registered charge for Kshs. 2,250,000 as at 30th October 2017. There was also an alleged running account which the deceased operated with Naivas Supermarket Ltd from which payments of Kshs 852,798.65 and Kshs 53,760/.03 were apparently made subsequent to the deceased's death.

36. John Chege Kombo finally asserted in his affidavit in reply to the summons that the deceased had properties in Embu and Kisumu, which had not been disclosed in the summons for confirmation. As no documentary evidence of these properties was attached, it is impossible for the court to take any position in connection therewith.

37. John Chege Kombo filed a Further Affidavit on 15th February 2019 in which he asserts that the whole family of the deceased agreed at a meeting on how the deceased's property would be administered in accordance with the wishes of Mzee Mohamed, the deceased's husband.

38. Finally, John Chege Kombo annexed minutes of a meeting purporting to contain the inheritance wishes of the deceased Esther Wangui Chege.

39. The 3rd Administrator, John Njenga Mbara filed an affidavit on 9th January 2018. He asserts that the deceased was his sister; that she was unmarried; that Mzee Mohamed was not entitled to inherit from the deceased's estate; and that Mzee Mohamed had signed an agreement in front of the Chief agreeing to distribution of the deceased's land parcels as follows:

- a) Naivasha/Maraigishu Block 11/723 (Karui) to be subdivided between John Chege Kombo, Moses Chege Njenga and Kimani Mbara.
- b) Naivasha/Maraigishu Block 17/164 (Mugane) be shared between Esther Wangui Kinyanjui, Hannah Wanjiru Nyoro and James Nderitu Njenga.

40. He attached documents "EWC1" that purports to be a sale agreement between her and one Stanley Kamau Thuo; "EWC2" Minutes; "EWC3" a letter by John Chege Kombo and John Njenga Mbara purportedly received and stamped by KCB Naivasha seeking to pay a Kshs. 332,300/= loan of the deceased by monthly instalments of

Kshs. 10,000/=; “EWC4” and “EWC5” being deposit slips into KCB Account Number 1103588788 for May and June 2017 in the amounts of Kshs. 10,000/= each.

41. The 3rd Administrator also alleges that Mzee Mohamed was paid Kshs. 900,000/= by Naivas Supermarket on behalf of the estate of the deceased of which he ought to refund Kshs, 583,340/=. That some of the deceased’s bank accounts have a nil balance; that the deceased has debts with Equity Bank and a charge over Naivasha/Maraigishu Block 11/723 (Karai) in favour of KCB for a loan she took; and that all those matters need to be taken into account in the distribution; and finally that Mzee Mohamed did not properly account for the deceased’s estate.

42. In addition, the 3rd Administrator urges the court to amend the grant by removing the name of Mzee Mohamed and retain only him and John Chege Kombo as joint administrators of the deceased’s estate. He asserts that the deceased had other property which was left to Mzee Mohamed’s other family; and that the applicant is not related in any way to his sister, the deceased.

43. Accordingly, the 3rd Administrator deposes at Paragraph 28 of his affidavit that due to the improper accounting for the assets of the estate by Mzee Mohamed:

“...bringing in his daughter (Taabu Mzee) will compound the problem because my co-administrator and I are the ones to account to the Court [for] the assets of the estate upon paying the debts owed.”

44. In her reply to the allegations deposed to by the 2nd and 3rd administrators, the applicant in her further affidavit filed on 6th June 2018, averred that her wish is to represent the interests of her late father in the estate of his deceased wife; that her late father and the deceased had been married since 1974; and that she:

“10 [has] information in regards to other assets that they (the administrators) are not aware of which clearly means my late father was and will always be part of Esther Wangui Chege’s estate.”

45. The applicant further asserted that such other assets:

“11 Include dividend cheques worth approximately Kshs. 150,000/= and an equity account number 0200 56212 5957.”

46. In addition, the applicant stated that as far as she was concerned, her late father used to collect rent from rental houses since he and the deceased got married. Further, that she was not aware of any properties owned by her late father or the deceased in Embu or Kisumu as alleged by the 2nd Administrator.

47. I have carefully considered all the information availed by the parties. It is patently clear that the application for confirmation is prematurely filed. First, for the reason that the applicant had not been admitted as an administrator at the time she applied. Secondly, the proviso to **Section 71(2)** of the **Law of Succession Act** is to the following effect:

“Provided that in case of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons entitled; and when confirmed the grant shall identify all such persons and their respective shares.” (Emphasis added)

48. Here, the court has already noted that there is clear indication that the assets and liabilities of the deceased’s estate have not all been identified and called in for distribution. Further, it is clear that the identities of the persons beneficially interested have not been settled, and this will need to be done.

49. Both of the continuing co-administrators indicated that there had been no proper accounting for the estate by the deceased administrator. Further, that the applicant had indicated that there were assets of the estate which she knew of which were unknown to the co-administrators.

50. In addition, the co-administrators have not consented to the confirmation through their affidavits opposing the same. Under **Rule 40 (8)** of the **Probate and Administration Rules**, Form 37 is required to be filed duly executed by the surviving beneficiaries consenting to the confirmation. In absence of such consented form, the grant cannot be confirmed. The application is premature and incomplete.

51. In my view, with regard to the proposed distribution of the deceased's estate, no rationale or justification has been given for the distribution proposed by the applicant. In particular, the proposed distribution of the whole of Land Parcel No. Naivasha/Maraigishu Block 11/723 (Karai) to Mzee Mohamed, and the identification and distribution of the liabilities of the deceased is not explained.

This is particularly significant in light of the fact that neither assets nor liabilities have been fully accounted for on behalf of the estate.

52. In the circumstances, the application for confirmation is hereby disallowed.

Disposition

53. Ultimately, and for all the foregoing reasons, the orders the court deems to be appropriate in this case are as follows:

- a) The application by the applicant to be joined as a co-administrator of the deceased's estate is hereby allowed.
- b) The applicant's role in the administration shall, in particular, be to ensure compliance with Section 83(e) of the Law Succession Act, and specifically to obtain information from the deceased administrator's estate concerning the estate of the deceased Esther Wangui Chege, and to ensure that a full and accurate accounting of the assets and liabilities of the said estate is duly availed to court.
- c) The applicant's application for confirmation of grant is hereby declined as premature and incomplete.
- d) The parties are ordered within sixty (60) days to disclose and provide to the court a full and accurate account of all the assets and liabilities of the deceased's estate; and, until such time as the court shall be satisfied as to the accuracy of the assets and liabilities, no application for confirmation shall be made or considered.
- e) The parties are, together with beneficiaries thereof, at liberty to consent outside court on an amicable arrangement for distribution of the estate of the deceased.

54. Each party shall bear their own costs herein.

Administrative directions

55. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

56. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

57. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 28TH DAY OF SEPTEMBER, 2021.

R. MWONGO

JUDGE

ATTENDANCE LIST AT VIDEO/TELECONFERENCE:

- 1. MR. P. K. NJUGUNA FOR 2ND ADMINISTRATOR**
- 2. JOHN CHEGE KOMBO 2ND ADMINISTRATOR WITH NJUGUNA**
- 3. JOHN NJENGA MBARA 3RD ADMINISTRATOR IN PERSON**
- 4. NO REPRESENTATION FOR KOBIA MICHUBU FOR THE APPLICANT**
- 5. COURT ASSISTANT - QUINTER OGUTU**



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