



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Elijah Ndambuki (Deceased) (Succession Cause  
23 of 1993) [2024] KEHC 7639 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7639 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 23 OF 1993**

**FR OLEL, J**

**JUNE 24, 2024**

**IN THE MATTER OF THE ESTATE OF ELIJAH NDAMBUKI (DECEASED)**

**BETWEEN**

**JOSEPH MUTISYA MUASYA ..... 1<sup>ST</sup> PETITIONER**

**GEORGE KISIO KIETI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ESTHER NDAMBUKI ..... OBJECTOR**

**RULING**

**A. Introduction**

1. Before court for determination is a summons application dated 26<sup>th</sup> July 2021 filed by the Objector/ Applicant seeking for full and accurate accounts and filed pursuant to provisions of Rule 49 of the [Probate and Administration Rules](#), section 47, 76(d), 83(g) and 95(a) & (b) of the [Law of Succession Act](#), Cap 160 laws of Kenya and all other enabling provisions of law. The specific prayers sought were that;
  - a. Spent
  - b. Spent
  - c. That the Honourable court be pleased to order the respondents to produce to court the full and accurate inventory of the assets and liabilities of the deceased and the full and accurate accounts of all dealings therewith up to the date of such account.
  - d. That the Honourable court be pleased to make a finding that the respondents being the Administrators of the estate of the deceased have committed an offence under the [Law of Succession Act](#) and hence they are not fit to be administrators of the Estate.



- e. That the grant issued to the Administrators herein on 17.09.2028 be revoked and the said administrators be replaced by Esther Ndambuki, a daughter of the deceased.
2. The application is supported by the grounds on the face of the said Application, the supporting affidavit, and supplementary affidavit of the Applicant, and is opposed by the Petitioners/Respondents through their replying Affidavit filed by the 1<sup>st</sup> petitioner on 21.09.2023.

### **B. The Application.**

3. The applicant described herself as the daughter of the deceased and a beneficiary to the estate herein, while the respondents were the grandsons to the deceased. Ever since the administrators/respondents were appointed to manage the estate, they had collected rental income and used the same, selectively to the exclusion of the other beneficiaries. It was therefore necessary that they be directed to render full and up to date accounts of all dealings of the estate to the beneficiaries thereof and thereafter be replaced as administrators for they had failed in their duty and mismanaged the said estate.
4. In response, the 1<sup>st</sup> respondent did aver that the application as filed was unmeritorious, frivolous and constituted an abuse of the process of the court as they had not mismanaged the estate and had always given full accounts of the estate to the beneficiaries at a family meeting held every two months and that it was the applicant who had always opted to keep off such meetings for reasons best known to herself. He further alleged that the applicant has always been trying in cahoots with interested buyers to sell of the estate assets, a position the family had never approved of and was not in the best interest of over 10 beneficiaries of the said estate.
5. All decisions regarding the estate were made by the 10 beneficiaries, and clearly it was the objector/applicant who was on a wild goose chase and was trying to frustrate the smooth administration of the said estate. The respondents therefore urged the court to find that the said application was unmerited, contained puffs of hot Air and be pleased to dismiss the same.
6. In response to the replying affidavit filed, the Applicant further did file her supplementary affidavit, where she deponed that the respondents had not disputed the fact that the deceased was a polygamous man and had 3 households. Both the respondents were from the 2<sup>nd</sup> house, and were grandchildren, where as she was a daughter of the deceased and was equally entitled to benefit from the said estate. The entire estate collected Kshs 70,000/= per month and that translated to Kshs 840,000/= per year. The respondents had been administrators from 17<sup>th</sup> September 2018 and had collected rent for 6 years, totaling to Kshs 5.04million, which they needed to account for.
7. The respondents had used this rent exclusively for their benefit and at no point had they given the applicant her share nor had she refused to accept the same. She further averred that at no point too have the respondents called and held any family meeting to discuss estate affairs and if indeed it was true that such meeting had been held, nothing would have been easier than for the respondents to annexure minutes of such meeting to confirm attendance and discussions held thereat.
8. The respondents had therefore clearly mismanaged the estate of the deceased and she prayed that they be removed as administrators thereof. Further she reiterated that she ranked in priority over the said grandchildren and given that the deceased had 3 homes it would only be fair and just that all homes be represented as administrators. She prayed that the respondents be replaced as administrators of the Estate with Esther Mumbi Ndambuki, Micheal Ndambuki & Julius Ngope Ndambuki.



### C. Determination

9. I have reviewed all the pleadings filed in support of the application, and in opposition thereto, the submissions filed by both parties and deduce that the only issues for determination are; whether there is enough evidence placed on record to direct the Petitioners/Respondents to give full and accurate accounts of rents collected on behalf of the estate and secondly whether the Petitioner's/Respondents should be replaced as administrators' of the Estate.

#### I. Whether there is enough evidence placed on record to direct the Petitioner's/Respondents to give full and accurate accounts of rents collected on behalf of the estate

10. The applicant alleges without proof that the respondents collect Kshs 70,000/= monthly from the deceased estate as rent and do not account for the same. The respondents on the other hand confirm that they indeed render accounts to the estate every two months during jointly held family meetings, which the applicant had refused to attend. They further averred that the applicant had the selfish motive of selling of part of the estate property to the detriment of the estate and its ten (10) beneficiaries. The court notes that the accounts allegedly rendered by the respondents to the family were not specified but it can be safely assumed, the same includes rent collection from the Estate property.

11. Section 82 of the *Law of Succession Act*, Cap 160 captures the for power of personal Representative;

Personal representatives' Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- a. To enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

- i. any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
  - ii. no immovable property shall be sold before confirmation of the grant
- (c) To assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
  - (d) To appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and



liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that except so far as otherwise expressly provided by any will—

- i. no appropriation shall be made so as to affect adversely any specific legacy;
- ii. no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

12. Section 83 of the *Law of Succession Act*, Cap 160 further provides for the duties of the administrator(s);

Personal representatives shall have the following duties;—

- a. To provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;
- 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. To pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- 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 to 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;
- f. Subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case maybe.
- g. Within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
- h. To produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, 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;



- i. To complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.
13. It is obvious that the powers of the administrators under the Law of Succession Act, are vast, but he/she must ensure that the estate of the deceased is well looked after, collect and collate the asset of the estate and after confirmation of the grant, to the vest a specific legacy in the legatee thereof. He/she/they must also complete administration within six months from the date of confirmation of the grant, or such longer period as the court may allow, in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.
14. The rectified certificate of confirmation of grant herein was issued to the respondents on 24<sup>th</sup> September 2018 and as per the schedule attached thereto the estate properties were to be distributed as follows;
  - a. Mitamboni/mitamboni/1401 was vested to Jacob Kioko;
  - b. Mitamboni/mitamboni/3166 was to be vested to Philip Mbithi Ndambuki;
  - c. Mitamboni/adjudication Section Plot No 1414; each family member was to remain in his plot, where they occupy;
  - d. Plot No 12 at Tala market measuring 30 x 100 ft was to be sold to offset the Objectors debt of Kshs 500,000/=
  - e. Plot No 13 (A & B) at Tala Market were to be sold and the proceeds distributed amongst the heirs equally.
15. The respondents therefore should have distributed the estate as provided under the schedule and provided accounts within six months after the rectified grant was issued. Obviously, this has not been done and it runs foul of the express provisions of Section 83(g) of the Law of Succession Act. I do therefore direct the petitioners/respondents to provide comprehensive estate accounts as to how the estate was distributed and if they are yet to complete the distribution process to further provide accounts including rents collected from Plot No 12 and 13 (A & B) Tala Market from September 2018 to the date of filing the said report, which report will be filed within 60 days from the date of this ruling.

**Whether the petitioner's/respondents should be replaced as administrators of the Estate.**

16. The applicant did aver that she was a daughter of the deceased, while the respondents were grandchildren and therefore ranked in priority over them in succession hierarchy. Secondly both respondents were from the deceased 2<sup>nd</sup> house and the 1<sup>st</sup> and 3<sup>rd</sup> house of the Estate were not represented as administrators and the respondents were taking advantage and were running the estate contrary to their expectation. This averment by the applicant was not denied by the respondents, specifically on the issue of lack of representation of the 2 other houses of the deceased.
17. The applicant has not shown/proved that the proceedings to obtain the grant was defective and/or that the grant was fraudulently obtained. However, it should be noted that under Section 76 (d),(ii) & (iii) of the Law of Succession Act, the court can still proceed to revoke the grant where the person to whom the grant was made has failed after due notice and without reasonable cause to either proceed diligently with the administration of the Estate and/or failed to produce to the court within the time



- prescribed, any such inventory or accounts of administration as is required by provisions of section 83 (e), (g) of the *Succession Act*, or provided false accounts.
18. In this instance the respondents have failed to prove that indeed they have administered the estate in the proper manner, nor have they provided accounts to prove the same. Grant cannot be revoked unless they are given notice and the 60 days so provided will serve as a notice, that unless they provide proof of proper administration of the estate, the court will be at liberty to revoke the said grant and issue a fresh one as appropriate.
19. Finally, Section 47 of the *Succession Act*, Cap 160, provides that;
- “The high court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such degree and make such orders therein as maybe expedient.”
20. Rule 73 of the *Probate and Administration Rules* also provide that;
- “Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of justice or to prevent abuse of the process of the court.”
21. The objective of this court is also to uphold substantive justice and adding the applicant and a representative of the third house as joint administrators of the Estate will not cause any prejudice to the parties herein. That also provides “sufficient reason” within the meaning of Rule 44 of the *Probate and Administration Rules* to justify granting of the orders related to who shall administer the estate.

## **Disposition**

22. Flowing from the above, the orders that commend themselves under the circumstances herein are as follows
- a. Prayer (3) of the summons dated 26<sup>th</sup> July 2021 is granted and the respondents are directed to provide court with full and accurate account of the estate inventory and full and accurate accounts of all rents collected from the estate property from September 2018, when they were appointed as administrators to the date of filing the said report (which as directed above will be filed within the next 60 days after delivery of this ruling).
  - b. A new rectified confirmed grant shall issue adding the applicant herein Esther Ndambuki as a co administrator and shall also include one more representative of the of the (1) or (3) house of the deceased as parties shall advice. This order will remain suspended for 60 days pending filing by the parties details of who will represent the unrepresented house.
  - c. That in the interest of justice and based on Section 47 of the Succession Act, Cap 160 and Rule 73 of the *Probate and Administration Rules* ; I do direct that the administrator’s herein and the applicant Esther Ndambuki, to open a Estate rent account at KCB -Machakos branch and all rents due from July 2024 and all unpaid rent arrears will be deposited in the said account hence forth and shall not be released until further orders of this court in 60 days regarding who the new administrator’s will be.
  - d. This being a family matter, each Party will bear their own costs.
23. It is so ordered.



**JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 24<sup>TH</sup> DAY OF JUNE, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 24<sup>TH</sup> DAY OF JUNE, 2024.**

In the presence of;

Esther Ndambuki for Applicant

Mr. Odero for Respondent

Sam Court Assistant

