



In re Estate of Samuel Kahiu Waithaka (Deceased) (Succession Cause E159 of 2021) [2024] KEHC 13052 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13052 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE E159 OF 2021**

A MSHILA, J

OCTOBER 25, 2024

IN THE MATTER OF THE ESTATE OF SAMUEL KAHIU WAITHAKA (DECEASED)

BETWEEN

BEATRICE WAWIRA NJERU APPLICANT

AND

JAGI GAKUNJU RESPONDENT

RULING

1. Before court is the Affidavit of Protest against Confirmation of Grant and Summons both dated 13th September, 2023. The Summons are brought under Sections 66 of the *Law of Succession Act*, Rule 49 of the Probate and Administration Rules and the inherent powers of the court and all other enabling provisions of the law.
2. The main order being sought in both applications is that the court should allow the affidavit of Protest and the Summons by adopting the sum of Kshs. 8,100,000.00 paid by the Protestor to the deceased as a liability to the estate of the deceased and proceed to make provision for its settlement before the estate can be distributed and/or the grant confirmed.
3. In the circumstances, the court consolidates both applications and will proceed to consider the Summons.
4. In her Summons, Beatrice Wawira Njeru sought for orders:-
 - i. Spent
 - ii. That this Court be pleased to adopt Kshs. 8,100,000.00 paid by the Applicant to the deceased as a liability and proceed to make provision for its settlement before the estate can be distributed and or the grant confirmed.



5. The application is based on the grounds that the Applicant paid Kshs. 8,100,000/= to the deceased as deposit pursuant to a sale agreement she entered into with the deceased on 18/2/2021 for the sale of Plot A being a sub division on LR. NO. 155/30 (original No. 155/11/1) South East of Limuru Town and that following the death of the deceased, the beneficiaries are not willing to proceed with the sale transaction as such the Applicant is entitled to a refund.
6. The application is supported by the affidavit of Beatrice Wawira Njeru who deposed that she paid Kshs. 8,100,000/= to the deceased as deposit pursuant to a sale agreement she entered with the deceased on 18/2/2021 for the sale of Plot A being a sub division on LR. NO. 155/30 (Original No. 155/11/1) South East of Limuru Town and that following the death of the deceased, the beneficiaries are now not willing to proceed with the sale transaction as such she is entitled to a refund. She stated that she has documentary evidence of the payments made by RTGS dated 18/2/2021 for Kshs. 3,000,000/- and Kshs. 5,000,000/- and an email dated 28/04/2021 acknowledging receipt of Kshs. 100,000/=. The amount was said to have been utilized to cater for his medical expenses, basic needs by the Respondent in his affidavit dated 16/2/2023. She has demanded for a refund of the monies owed to her by the estate before any legacy.
7. Norrene Njeri Waithaka Filed her replying affidavit dated 2nd November, 2023. She deposed that she is opposed to the Applicant being included as a creditor of the deceased's estate as the alleged agreement included her mother Elizabeth Nyambura who died on 13/5/2020 whereas the agreement was made on 18/2/2021. The said money was deposited in a joint account held between the testate and Muiruri J M and that an audit shows that the said Muiruri withdrew Kshs. 3,053,000/=.
8. The Summons was heard by way of viva voce evidence.
9. Beatrice Wawira Njeru (PW1) wished to adopt the Affidavit of Protest and her supporting affidavit as her evidence in chief. She testified that in 2021 she entered into a sale agreement with the deceased where she paid Kshs. 8,100,000/= which she wants to be refunded with interest with costs. The money paid was used for the deceased's medical expenses as well for the purchase of a car for him. She testified that at the time of signing the sale agreement she had no idea of the demise of the wife to the deceased
10. John Muiruri Mbugua (PW2) testified that he was a Personal Assistant to the deceased. He produced documents relating to the deceased medical treatment. They had a joint account with the deceased where they both were to sign. He produced documents to show that a motor vehicle was bought and that there was a borehole project. Together with the deceased they had a joint account where both of them were required to sign so as to withdraw money.
11. The parties were directed to file and exchange written submissions. Hereunder is a summary of the parties respective submissions.

Protestor's Written Submissions

12. The Protestor submitted that any debt owed by or out of an estate shall be paid before any legacy. The court was said to be tasked with ascertaining the net assets and the net liabilities to arrive at the net estate. Reliance was placed in the case of *In re estate of Barrack Deya Okul (deceased) (2018) eKLR*. The Executor/Respondent was said to have failed to include the debt as a liability despite admitting that the Protestor made payment of Kshs. 8,000,000/= which sum was utilized to cater for the deceased's medical expenses, basic needs and other personal expenses. The court was therefore, said to be clothed with the necessary jurisdiction. It was submitted that the Executor and Norrene one of the beneficiaries have admitted that the Protestor made the payment of Kshs. 8,000,000/= to the deceased which was utilized by the deceased, therefore their argument that the deceased did not utilize all the



money is misconceived. The Protestor's evidence was said to be uncontroverted as the beneficiaries did not call any witnesses. Reliance was placed on the case of *In re Estate of Githaiga Thuku alias Thuku Githaiga alias Livingstone Thuku (deceased)* (2016) eKLR. The court was urged to direct the debt to be listed as a liability the executor having acknowledged the debt. Lastly, that only after settling all the debts of the deceased that the administrator may proceed to distribute the remaining estate to the beneficiaries. Reliance was placed in the case of *In re estate of Grace Wairimu Mugo (deceased)* (Succession Cause 1820 of 2010) (2022) KEHC 13907 (KLR) (Family) (30 September 2022) (Ruling).

Beneficiaries' Written Submissions

13. The beneficiaries submitted that the debt must be proved and that this is not the proper forum to determine the said debt. Reliance was placed in the case *In re Estate of Silas Gituma Musa Mutuaruchiu (Deceased)* (2017) eKLR. Further, that the agreement for sale was allegedly executed on 18 /2/2021 by the deceased and the deceased's wife Elizabeth Nyambura while Elizabeth died on 13/5/2020 and the WILL was executed on 26/6/2021 and the sale was not mentioned and/or the Applicant being mentioned as a creditor as such the court was urged to find that the Applicant is not a creditor. In any case it was submitted that if at all the estate is only liable for the sum of Kshs.3,000,000/- as Kshs.3,100,000/- was taken by Mr. Muiruri. The Protestor's claim was said to lie in the civil/commercial court if she wishes to recover part of the purchase price. Lastly it was submitted that the deceased's wife could not have signed the agreement having died two years before the date of the sale agreement and that the Protestor's rights should not be allowed to override the beneficiaries proprietary rights. The Protestor was urged to prove her debt in a civil suit. Reliance was placed in the case of *In re Estate of Stone Kathuli Muinde (Deceased)* (2016) eKLR.

Issues For Determination

14. Upon considering the pleadings, affidavits and written submissions filed by the parties respectively the issues arising for determination are whether the Protestor is a Creditor of the deceased's estate and whether the debt claimed ought to be paid to the Applicant.

Analysis

15. He who alleges must prove. This principle of law is stipulated in Section 107(1)(2) of the *Evidence Act* that provides thus:
 - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
16. Subsequently, Section 112 of the *Evidence Act* provides thus:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
17. The Protestor/Applicant herein has the burden of proving the existence of the sale agreement dated 18/2/2021 with the deceased herein and that she paid a deposit of Kshs. 8,100,000/= as part payment for the sale of LR. NO. 155/30 (Original No. 155/11/1) South East of Limuru Town.



18. To this end, she submits that it is not in dispute that she entered into a sale agreement with the deceased dated 18/2/2021 where she paid Kshs. 8,100,000/=. She contended that the Respondent has admitted in his replying affidavit that the Protestor paid the said amount which was used to cater for the deceased's medical expenses, basic needs and other personal expenses.
19. What is in contention is that the Respondent admits the amount but the beneficiaries submit that the deceased did not utilize the full amount as paid by the Protestor and that the sale agreement was invalid as by the time of execution of the sale agreement, the wife of the deceased had already passed on yet the agreement bears her signature.
20. During the hearing of the matter, the Protestor produced the sale agreement as well as the RTGS confirmation dated 18/2/2021 for Kshs. 3,000,000/= and Kshs. 5,000,000/= and an email dated 28/4/2021 acknowledging receipt of Kshs. 100,000/=.
21. Mr. Muiruri in his testimony stated that the Protestor paid Kshs. 8,000,000/= into the deceased's account which he jointly operated together with the deceased. He produced the deceased's medical expenses. He further stated that they both had to sign for any withdrawals.
22. This court has keenly perused all the documents relied upon by the parties in support of their various claims. There is no doubt that the Protestor entered into an agreement with the deceased dated 18th February, 2021. The said agreement is also signed by the deceased's wife who was deceased at the time of signing the agreement, be that as it may, that technicality alone cannot on its own invalidate the sale agreement.
23. The Protestor has produced bank transfer documents to prove that she transferred Kshs. 8,000,000/= to the deceased's bank account at ABSA and that Kshs. 100,000/= was sent to Mr. Muiruri's Mpesa.
24. The Respondent being the deceased's executor was said to be aware of the existence of the debt of Kshs. 8,000,000/= but failed to include it as a liability to the deceased's estate as such the Protestor urges the court to include the debt as a liability to the estate of the deceased.
25. Form 3 of the Probate and Administration Rules provides that the Petitioner must make a disclosure if the Estate of the deceased has liabilities or not.
26. Further, Section 86 of the *Law of Succession Act* provides that;-

“Debts of every description enforceable at Law and ordered by or out of the estate shall be paid before any legacy.”
27. This court's considered view is that if the Executor proceeds to obtain the grant as sought without settling the Protestor's debt, the estate shall be distributed to the detriment of the Protestor/Creditor having been left out.
28. In the circumstances, this court finds that the Protestor has proved her debt of Kshs.8,100,000/= and as such she be considered as a Creditor of the deceased's estate.
29. The Protestor claims Kshs. 8,100,000/= as the amount paid to the deceased as the deposit for purchase of LR. NO. 155/30 (Original No. 155/11/1) South East of Limuru Town.
30. The Respondent did not oppose the Affidavit of Protest and/or the summons. The same was opposed by one of the beneficiaries Norrene, who claimed that if at all the estate owes the Protestor, it only owes Kshs. 3,000,000/= as the evidence on record shows that amount to be the only money received by the deceased.



31. Reference is made to the case High Court at Chuka Succession Cause No. 660 of 2015, in the matter of the Estate of Zakaria Nthiga Matumo (Deceased) where Mabeya J. held that the probate court's sphere of inquiry is limited to ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate.
32. Ascertaining what assets belong to the deceased's estate involves the gathering of the net sum of assets and net sum of liabilities, to arrive at the net estate.
33. Rule 7(1) of the Probate and Administration Rules provides that;

“Rules 7. (1) Subject to the provisions of sub-rule (9), where an applicant seeks a grant of representation to the estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate containing, so far as they may be within the knowledge of the applicant, the following particulars -

 - (a) the full names of the deceased;
 - (b) the date and place of his death, his last known place of residence, and his domicile at date of death;
 - (c) whether he died testate or intestate and, if testate, whether his last will was written or oral, and the place where and the date upon which it was made;
 - (d) a full inventory of all his assets and liabilities at the date of his death (including such, if any, as may have arisen or become known since that date) together with an estimate of the value of his assets movable and immovable and his liabilities;
 - (e) in cases of total or partial intestacy -
 - (i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39 (1) of the Act;
 - (ii) whether any and if so which of those persons is under the age of eighteen years or is suffering from any mental disorder, and, if so, details of it;
 - (iii) for the purposes of determining the degree of consanguinity reference shall be made to the table set out in the Second Schedule;
 - (f) the relationship (if any) which the applicant bore to the deceased or the capacity in which he claims;
 - (g) if the deceased died testate leaving a written will, the names and present addresses of any executors named therein; and
 - (h) the postal and residential addresses of the applicant.”



34. The Respondent/Executor admits to being aware of the debt of Kshs. 8,000,000/= owed to the Protestor by the deceased's estate having been a deposit for sale of LR. NO. 155/30 (Original No. 155/11/1) South East of Limuru Town he however failed to include the same as a liability to the estate of the deceased.
35. The evidence on record shows that the Protestor deposited money in the deceased's account which was operated by both the deceased and Mr. Muiruri and that both of them had to sign for any money to be withdrawn from the bank.
36. As earlier indicated, Section 86 of the Law of Succession Act provides that:-
- “Debts of every description enforceable at Law and owed by or out of an estate shall be paid before any legacy”
37. Further, Section 83 of the Law of Succession Act, provides;
- “Section 83. 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 may be;
 - (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. ”

38. The Respondent herein being aware of the Protestor’s debt of Kshs. 8,000,000/= was required by law to ascertain all the free property of the deceased and pay out of the estate of the deceased, all his debts being that he was appointed by the deceased to be his executor and having been issued with a grant of probate of written WILL on 18th July, 2022.
39. The beneficiaries contend that the estate if any should only be liable for Kshs. 3,000,000/= which was received and/or utilized by the deceased however, the Protestor has placed evidence before this court that she deposited Kshs. 8,000,000/= into the deceased’s account and Kshs. 100,000/= was sent to Mr. Muiruri’s Mpesa. This Court however, notes that the Kshs. 100,000/= is not a liability to the estate of the deceased as the same was paid directly to Mr. Muiruri.
40. In the circumstances, and bearing the above, this court is satisfied that the Protestor has proven her debt to the deceased to the tune of Kshs. 8,000,000/=-, the same be listed as a liability to the deceased’s estate and the debt to be provided for payment. Reference is made to the case of In re Estate of Barrack Deya Okul (Deceased) (2018) eKLR.

Findings And Determinations

41. For the forgoing reasons this court makes the following findings and determinations;
- i. This court finds the application has merit and it is hereby allowed
 - (ii) The Executor to include the sum of Kshs.8,000,000/- in the application for confirmation of grant of probate of written will
 - (iii) Each party to bear their own costs.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 25TH DAY OF OCTOBER, 2024.

A. MSHILA

JUDGE

In the presence of;

Julie – Court Assistant

Githua – for Protestor/Applicant

Githui – for the Estate

