



**Gichamba & another v Kamau (Succession Cause E2273 of 2021)
[2024] KEHC 14992 (KLR) (Family) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E2273 OF 2021
HK CHEMITEI, J
NOVEMBER 28, 2024**

IN THE MATTER OF THE ESTATE OF THE LATE ESTHER NJIGI NYAGA (DECEASED)

BETWEEN

MAGDALENE MUTHONI GICHAMBA 1ST APPLICANT

ANDERSON NJERU NYAGA 2ND APPLICANT

AND

EVANS NJACHA KAMAU RESPONDENT

RULING

Background

1. There are three sets of applications herein. The Applicants have filed two Applications dated 25th July 2022 and 8th October 2023 while the Respondent's application is dated 11th October 2023.
2. In this ruling the court shall endeavor to discuss the three applications and come up with appropriate decisions.
3. The brief background is worth stating here. The deceased herein was the wife of the Respondent Evans Njacha Kamau. She was brutally murdered and the Respondent was charged with her death. The matter is still pending before the Criminal Division of this court.
4. Meanwhile the Applicants sought temporary letters of administration over her estate and the same were granted.
5. The deceased and the Respondent had been blessed with three children who were all minors at the time of her death. The said children were placed under the custody of the Applicants.



6. During the subsistence of their marriage the deceased and the Applicant acquired some properties which were jointly registered in their joint names. There were other properties which were solely owned by the deceased.
7. The court through an application by the Applicants barred the Respondent from accessing the children and further permitted the Applicants to manage the estate.

Applications

8. The first application dated 25th July 2022 by the Applicants seeks the following orders:-
 - (a) That the Respondent be restrained from in any way dealing with land parcels numbers LR 28302/42, 28302/95, 28302/91 and 28302/94 pending the hearing and determination of this cause.
 - (b) That pending the determination of this cause an inhibition be issued against the Chief Land Registrar from making any further entries over property number LR 28302/42, 28302/95, 28302/91 and 28302/94.
 - (c) Pending the hearing and determination of this cause the Respondent his agents and or servants be restrained by way of injunction from collecting rent or interfering with operations of land parcels numbers LR 28302/42, 28302/95, 28302/91 and 28302/94.
 - (d) The court do order the Applicants to manage and collect rent from land parcels number LR 28302/42, 28302/95, 28302/91 and 28302/94 and utilize the same in support of Bernice Nyaguthii, Mike Njenga and Josh Azariah Kiama the deceased children.
 - (e) That the Respondent be ordered to release the deceased motor vehicle registration number KCD 180D to the Applicants.
 - (f) That the Officer Commanding Juja police station be directed to oversee the implementation of the orders herein.
9. The application is based on the grounds thereof and the sworn affidavit of both Applicants dated the same date.
10. The affidavit indicates that the deceased and the Respondent were joined registered owners of the properties mentioned in the motion. By virtue of the Respondent being charged with her death it was imperative that the Applicants who had been granted the letters of administration be allowed to administer the estate on behalf of the three minors.
11. That the three properties namely LR No 28302/91, LR No 28302/94 and LR No 28302/95 had rental houses which generated some monthly rent. It was therefore imperative that this court permits them to oversee them so that the children's needs could be met.
12. The Applicants under paragraph 14 of the supporting affidavit have indicated some of the needs the children required which if allowed the income from the rental units including the former matrimonial home which the police had cleared from being a crime scene could generate sufficient income.
13. They therefore prayed that the application be allowed.
14. The Respondent on the other hand filed a replying affidavit dated 19th May 2023 in which he deponed that the properties mentioned herein were jointly owned by the deceased and him and by law it devolved to him after her demise.



15. He said that he was in remand at the Industrial Area prison having been charged under criminal case number E041 of 2021 and that to the extent that the same was pending he was still considered innocent. He was still willing to take care of his children even after finalizing the case.
16. He accused the Applicants of painting him in a bad light and in any case the matrimonial cause which was still pending had abated after the deceased death.
17. The court has perused the application and the history of this matter and the submissions by counsels on record.
18. Without belaboring much I find that although the Respondent has not been convicted of the offence of killing the deceased herein, his innocence still remain paramount as provided under Article 50 (2), (a) of our Constitution.
19. Secondly the issue of whether he owned jointly the above-mentioned properties is something worth considering herein or more importantly within the Matrimonial Cause number E028 of 2021. Already there is an order of this court permitting the Applicants to be joined as parties.
20. However, the day to day running of the deceased estate is worth a special consideration. The Applicants no doubt are having the three minors after the death of their mother and the incarceration of the Respondent. It is also undisputed that prior to her murder the deceased and the Respondent had divorced formerly.
21. It is thus necessary that the Applicants be facilitated to maintain the three children. The only way to do so is through the proceeds from their parents' estate. The properties mentioned above accrues monthly rent which if well utilized will take care of their daily needs and upkeep including their education.
22. There is no harm which the Respondent will suffer. Already the Applicants have the children and even if he was to be released, I find that the suspicion created after the demise of their mother will be such that the Respondent may not be in a proper position to carry out parental responsibility.
23. Concerning the properties, I do not find any damage the Respondent stands to suffer since the issue of ownership will be determined once the criminal case is finalised. This court is alive to the provisions of Section 96 of cap 160 which states that:-

 “Sane murderer not to share in victim's estate

 (1) Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though the murderer had died immediately before the murdered person.

 (2) For the purpose of this section the conviction of a person in criminal proceedings of the crime of murder shall be sufficient evidence of the fact that the person so convicted committed the murder.”
24. For now, the Respondent is still a suspect and the above section will only apply after conviction.
25. Essentially therefore it will be important to permit the Applicants to manage the estate of the deceased until an appropriate time which in my view after the criminal case has been determined. If it is determined in his favour or not then the provisions of Section 96 above shall be considered.



26. In the premises I do find the above application meritorious and allow it as prayed. The only rider is that the Applicants must keep proper records of how they have received and utilize the rent collected from the premises.
27. The application dated 8th October 2023 on the other hand seeks the following orders:-
 - (a) That the grant of letters of administration issued to Magdalene Muthoni Gichamba and Anderson Njeru Nyaga on 16th May 2022 be confirmed in part.
 - (b) That the estate of the deceased be partially distributed as proposed in the annexed supporting affidavit of Magdalene Muthoni Gichamba and Anderson Njiru Nyaga filed herewith.
28. The application is based on the grounds thereof and the joint affidavit sworn on the same date.
29. The said affidavit has elaborated that the deceased was murdered and the Respondent was suspected and therefore currently facing the murder charges. They have also indicated that the deceased and the Respondent had the three issues earlier mentioned above.
30. As regards the assets, they deponed that the deceased had her own assets and some were jointly registered with the Respondent.
31. The main reason it appears from her affidavit was that since Magdalene was the sole provider for the children there was need to have the grant confirmed in their favour so as to access the portion of the estate. She went ahead to give a proposal on mode of distribution under paragraph 11 of the said affidavit.
32. At the time of writing this consolidated ruling I was unable to find any response by the Respondent.
33. I have perused the application extensively and taking into account the history of the matter herein I do not find any basis to allow the deceased estate to be confirmed in the manner suggested by the applicant.
34. The substantive reason in my considered humble view is that the criminal charges facing the Respondent is still on course. Depending on its outcome the fate of the Respondent will be known thereafter. In other words, he will be considered under the grounds provided under section 96 of *Cap 160 (supra)*
35. Secondly this court has already granted the Applicants the grant which allows them to have unlimited access to the deceased estate. The only authority they are lacking is transferring the capital assets of the estate. There is no hurry to do that for the reason stated above. Even for argument's sake, the minors who are beneficiaries are too young to comprehend the issues bedeviling their mother's estate.
36. The Applicants have not demonstrated to this court of inability to utilize the grant issued in their favour to warrant its confirmation in the manner they have prayed.
37. For the above reasons the application is disallowed. The grant issued to them is already sufficient unless there are some other inhibiting reasons which the Applicants could still move the court any time.
38. The third application by the Respondent Evans Njacha Kamau is dated 11th October 2023 and is seeking orders that there be stay of these succession cause pending the hearing and determination of matrimonial cause no E028 of 2021 between *Esther Njigi Nyaga v. Evans Njacha Kamau*.
39. The same is supported by the grounds thereof and the sworn affidavit of the applicant dated the same date.



40. The substratum of the application is that the court permitted the Respondents herein to be joined as parties in the matrimonial cause and therefore if this cause is allowed to proceed there shall be multiplicity of suits. Those properties namely LR No. 28302/42, LR No. 28302/95, LR No. 28302/91, and LR No 28302/94 are joint properties with the deceased hence the need to stay this cause.
41. The Respondents have opposed the application vide the joint affidavit sworn on 28th August 2024 in which they state that apart from the above joint properties there were also other free assets of the deceased enumerated under paragraph seven.
42. It was their response that this application could not be determined without first dealing with the other two which I have already dealt with.
43. The court has again perused the submissions on record and taking the totality of the issues herein I do not think it is necessary to stay this cause as prayed by the Respondent. This is for the reasons that the matrimonial cause is separate and distinct to the extent that the same deals with the properties jointly acquired by the couple.
44. This cause on the other hand deals with the deceased estate and the applicant will be at liberty to object to any issue raised by the Respondents.
45. At the same time the rules and the laws governing the two regimes of the law are separate and distinct. Probably the question which the parties may answer in the matrimonial cause will be whether in light of the death of the applicant's wife, can the cause still subsist?
46. Meanwhile I do not see any reason why the applicant cannot participate in the proceedings herein. If he was dissatisfied with the application then he ought to voice his concern and not to stay the proceedings.
47. It must be emphasized that to the extent that the applicant has not been convicted he is still innocent and therefore his rights in this cause and in the matrimonial cause are unimpeded.
48. In view of the above observations the court directs that:-
 - (a) The application dated 25th July 2022 is allowed as prayed.
 - (b) The applications dated 8th October 2023 and 11th October 2023 are disallowed.
 - (c) Costs of all the three applications shall be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 28TH DAY OF NOVEMBER 2024.

H K CHEMITEI

JUDGE

