



REPUBLIC OF KENYA



**In re Estate of King'ori John Mwangi (Deceased) (Succession Cause E593 of 2021)
[2024] KEHC 16078 (KLR) (Family) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16078 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E593 OF 2021
EKO OGOLA, J
DECEMBER 20, 2024**

BETWEEN

HOUSING FINANCE COMPANY OF KENYA LIMITED APPLICANT

AND

SUSAN NYOKABI MWANGI RESPONDENT

RULING

1. The application before this court is dated 16th March 2023. The applicant prays for the following orders:-
 - a. This honorable court be pleased to join Housing Finance Company of Kenya Limited as a creditor in the succession cause herein.
 - b. This honorable court be pleased to order payment of monies out of the estate of King'ori John Mwangi (deceased) to settle debts owed to Housing Finance Company of Kenya Limited being Kshs. 114,962,552.91 together with interest at the prevailing rates until payment in full.
2. The application was based on the grounds set out therein and the supporting affidavit of Belinda Ng'ang'a, the applicant's head of the legal department.
3. The applicant deposed that by a charge instrument registered on 24th January 2014, the deceased took out a loan facility of Kshs. 70,000,000 from the applicant/the bank. The security for the loan advancement was L.R No. 209/1413/28 (the suit property). The said loan was disbursed to both the deceased (Kshs. 19,599,613.75) and Hotel Accra Limited (Kshs. 49,884,866.25) as agreed.
4. According to the bank, at the time of disbursing the loan, they were unaware that the suit property was subject to litigation in High Court Succession Cause No. 16 of 1988-In the matter of the estate of Laban King'ori Macharia (deceased).



5. In the said case, the court held that the suit property belonged to the estate of Laban Macharia. However, the said Laban Macharia was only a trustee of the suit property and not the absolute owner. John Mwangi, the deceased herein, was allowed to retain the suit property but ordered to surrender Kshs. 75 million, being the value of the suit property, to the beneficiaries of the estate of Laban Macharia. The court on 22nd April 2016 vacated the registered charge made to the applicant because the charge was done subsequent and contrary to court orders. The court stated that the applicant was at liberty to move against John Macharia's personal property.
6. According to the applicant, the administrators of John Macharia's estate have listed the deceased properties worth Kshs. 925 million. In addition, in one of the administrators' affidavits, they have deposed that, indeed, the deceased owed the applicant approximately Kshs. 94 million. Since the deceased agreed to repay the loan facility to the applicant, his estate is indebted to the applicant.
7. In response to the application, Susan Nyokabi Mwangi, the administrator of the deceased estate, filed a replying affidavit. She deposed that the applicant has never been a creditor of the estate. The respondent further stated that according to the application, the applicant only advanced Kshs. 19,599,613.75 to the deceased and Kshs. 49,884,866 was advanced to Hotel Accra Limited. According to Ms. Nyokabi, at the time of the deceased death, he had repaid the full amount advanced to him. Hence, before the applicant is joined as a party to this suit, it should prove its claim.
8. The respondent deposed that the applicant did not object or protest or apply to be joined in this suit when the administrators petitioned to be appointed as administrators of the deceased estate. In addition, she deposed that since Hotel Accra Limited is a company, this court lacks jurisdiction to determine this issue.
9. According to the respondent, the order dated 22nd April 2016 issued in Succession Cause No. 16 of 1988 does not exist. Also, the bank statements annexed are erroneous and tainted with unjust and exaggerated interests.
10. The parties canvassed the application vide written submissions that I have read and considered.

Determination

11. I have considered the application, the rival affidavits and submissions, and the entire record of the court.
12. The first issue for determination is the nature of creditors in the context of the *Law of Succession Act*. In the case of *In re Estate of Atibu Oranje Asioma (Deceased) (Succession Cause 312 of 2008) [2022] KEHC 11046 (KLR) Musyoka J.* defined creditors as follows:-

“Creditors, in the context of the *Law of Succession Act*, were the individuals and entities that the estate was indebted to, and who had been acknowledged as such by the personal representatives. It also included individuals and entities holding valid court decrees against the estate. Individuals and entities whose claims against the estate had not been acknowledged by the personal representative, and who did not hold any valid court decrees were not creditors of the estate, but mere claimants. Their claims were yet to be proved or established against the estate. The place to establish or prove those claims was not within the succession cause but in separate proceedings.”
13. The applicant is claiming to be a creditor of the estate of the deceased by virtue of a loan facility advanced to the deceased. The administrators of the estate have contested this allegation. According to them, the loan facility advanced to the deceased was fully repaid. Furthermore, the applicant does not



hold a valid court decree against the estate. Therefore, it cannot be said that the applicant is a creditor of the estate but merely a claimant.

14. The probate process is meant to be largely administrative, where the documents lodged in the cause are scrutinised administratively by court officers before certain instruments are processed and executed by relevant judicial officers before being issued to the parties. It is intended that there be minimal court appearance. The whole process is tailored to be non-contentious, and the only contemplated court appearance is at the stage of the confirmation of the grant of representation. In that scenario, there would be no need to join any person or entity to the succession cause.
15. If the cause turns contentious, more so on whether a person is entitled to any part of the estate, is an issue to be resolved without joining other persons to the matter. Such claims should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the Civil Procedure Rules. This could mean filing a suit at the Magistrates' Courts or at the Civil or Commercial Divisions of the High Court.
16. Rule 41(3) of the Probate and Administration Rules stipulates as follows:-

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

17. Notwithstanding the foregoing, it would be unjust to the applicant if the estate of the deceased is wholly administered, and it is later held that it was a creditor of the deceased estate. I am of the view that the beneficiaries will not be gravely prejudiced if part of the estate is not administered.
18. From the foregoing, I dismiss the application dated 16th March 2023. However, I make the following orders:-
 - a. The applicant is at liberty to file a civil suit against the estate of the deceased for the alleged unpaid loan facility within 60 days of this Ruling.
 - b. The administrators are directed to administer the estate of the deceased save for Kshs. 114,962,552.91 being money claimed by the applicant.
 - c. If the applicant fails to file suit within 60 days, as stated in (a) above, the administrators are at liberty to administer the entire estate of the deceased.
 - d. Costs be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024

.....

E.K. OGOLA

JUDGE

In the presence of:



Ms. Kimili for the Applicant

Mr. Mwangi for the Respondent

Gisiele Muthoni Court Assistant

