



**In Re Estate of the Late Geoffrey Wangai(Deceased) (Succession Cause 15 of 2018) [2024] KEHC 16296 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16296 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
SUCCESSION CAUSE 15 OF 2018  
CM KARIUKI, J  
DECEMBER 20, 2024**

**N THE MATTER OF THE LATE GEOFFREY WANGAI (DECEASED**

**BETWEEN**

**PETER NDIANG'UI WANGAI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF OF PERIS NYOKABI WANGAI -DECEASED) ..... APPLICANT**

**AND**

**ESTHER MWIYERIA MATHI ..... RESPONDENT**

**RULING**

1. The application before the court is one dated 26.1.2011 filed by Peris Nyokabi Wangai. The executor also filed accounting reports after an order of this court. The applicant passed on before the application was disposed off and was substituted by the administrator of her estate Peter Ndiang'ui Wangai. The application sought orders that:-
  - i. Spent
  - ii. Spent
  - iii. That this Honorable Court do order the respondent to remove all and any encumbrances on Title No. Nyandarua/Ol Kalou Central/3825 which the applicant is entitled to and thereafter immediately and unconditionally transfer title nos. Nyandarua/Of Central/3825,3826,3827 and 4303 to the applicant.
  - iv. That the Respondent be ordered to pay to the applicant the market value of one (1) acre of the land from title no. Nyandarua/Ol Kalou Central/4304 which she sold without the consent of the applicant who was entitled to the same.
  - v. That the Respondent be ordered to complete the administration of the estate within such time to be given by this Honorable Court.



- vi. That costs of this application be borne by the Respondent.
2. The Application was founded on the grounds that:-
    - i. The applicant is the absolute beneficiary of the entire estate herein
    - ii. The respondent is misapplying the said estate and is occasioning loss to the same to the detriment of the applicant.
    - iii. The Respondent has failed and/or refused to complete administration of the estate herein despite the confirmation thereof having been effected in the year 2004
    - iv. The respondent is dealing with the estate herein otherwise than as directed by this Honorable Court.
    - v. The respondent has disposed off part of the estate belonging to the applicant and has further encumbered another part of the estate.
    - vi. The respondent has no cause nor justification why she cannot complete the administration of the estate herein.
    - vii. That the applicant should be ordered to complete the administration of the estate herein within given timelines and failure whereof punitive action may be taken against her.
  3. The application was further supported by the affidavit of Peris Nyokabi Wangai sworn on the 26th January 2011 and a Supplementary affidavit sworn on 1st March, 2011.
  4. On the other hand, the application was opposed vide a replying affidavit sworn by the Respondent herein Esther Mwiyeria Mathi on the 24th February, 2011.
  5. Applicant's Submissions
  6. Issues for Determination
    - i. Whether the orders sought in the application were merited?
    - ii. Whether the executor has proceeded diligently with the execution of the deceased's will
    - iii. Whether the estate accounts filed by the executor were justified?
    - iv. Whether the remainder of the estate should be transferred to the estate of the applicant herein to be administered as part of her estate?
    - v. In the alternative to issue number 4 above, whether the remainder of the estate should be distributed to the children of the deceased?
    - vi. Whether the orders sought in the application were merited?
  7. It was stated that in paragraph 7 (b) of the deceased's will clearly states:-

“The proceeds out of 19 acres will be for my upkeep together with my wife and other uses as more specifically provided herein above while any balance will go to my wife in case she survives me”
  8. The applicant submitted that it is apparent that the deceased did not live for long after the making of the will. It was the testimony of the applicant and even as per the affidavits of the original applicant



- that the deceased did not leave behind any liability. Further, that there is no evidence attached to the Respondent's affidavits or even produced in court to show that the deceased left behind any liability.
9. It was argued that the condition that the deceased's wife was to get the balance of the estate if only she survived the deceased was met. Therefore, her rights over the balance of the estate had crystallized and she therefore became the beneficial owner thereof. She stated in her affidavits and the grounds on the face of the application that the Respondent was dealing with the estate otherwise than required under the will and she was also not getting any support and or maintenance. Also, there was no evidence whatsoever tendered by the Respondent to show that any part of the estate proceeds thereof was given to the Applicant.
  10. The applicant contended that the Respondent went to an extent of using the estate to guarantee loans taken by a company related to the estate. It was therefore their submissions that the application was merited.
  11. Whether the executor has proceeded diligently with the execution the deceased's will as required by the law?
  12. The applicant averred that the answer to this question is in the negative. It was stated that the respondent failed to honor this fundamental legal obligation and it is only after the court the pendency of the application before the court that the accounts were filed. Even then, the applicant filed the same after a notice to show cause why she filed fabricated, incomplete and falsified accounts and or financial reports. Reliance was placed on Section 83 (3) of the *Law of Succession Act*.
  13. It was stated that the deceased's will required that the applicant (now deceased) be maintained from the proceeds of the estate. That there are sale agreements, even prepared in the name of the applicant selling certain parcels of land through the executor where she has not signed but it was acknowledged by the Respondent that deed land was sold. It was asserted that the Applicant swore under oath and clearly demonstrated that she never received any money as maintenance from the Respondent. The latter did not even attempt to rebut this by way of evidence or at all.
  14. The applicant argued that the law stipulated time within which administration of the estate should be completed and if there is any hardship, then an executor should seek extension of that time from court. Before the filing of the application, the executor had not expressed any hardship in completing the estate. From the court record, it can be seen that there was a protracted litigation involving a financial institution that wanted to exercise its power of sale against part of the estate after the Respondent used the property to guarantee a loan obtained by a private company.
  15. It was submitted that the Respondent has also been changing advocates representing the estate and therefore clearly leading to wastage of the estate. From the foregoing, the applicant stated that the Respondent has not exhibited the requisite care, responsibility and diligence in executing her duties.
  16. Whether the estate accounts filed by the executor were justified?
  17. It was argued that the executor failed to justify the items put in the accounting reports. There was no documentation at all in support of the expenses. The Executor had advocates duly engaged in handling the legal process including the processing of titles to the beneficiaries. There is therefore no justification for the many alleged travel and subsistence allowances.
  18. Further, it was averred that the amount of money the executor claims as her compensation for her executorship which she referred as "out of office allowance" is unreasonable considering the size of the estate in question. Reliance was placed on *Loise Wambui Njoroge v Albert Thuo Cege & 5 Others* (2017)



eKLR, the High Court relying on the decision in *Laing Estate v Hines* 41 O.R. (3rd) 57 (1998) O.I. No. 4169 set out the factors to consider in determining compensation to an executor.

19. It was averred that the estate comprised land and therefore did not require any special skill to manage or carry out executor's duties. There were advocates involved in the legal process and the executor's duties just involved giving instructions. Further, it was submitted that the estate is relatively small though the actual value is undisclosed. It is therefore not reasonable for the executor to claim Kshs. 5000/- per hour as per her testimony in cross examination. She is also not an outsider but part of the family members.
20. It was therefore submitted that the accounts as filed by the executor are not justified and all items that are not supported with evidence and the said unjustified allowance claims should be disregarded by the court.
21. Whether the remainder of the estate should be transferred to the estate of the applicant herein to be administered as part of her estate?
22. It was contended that the applicant survived the deceased and according to the provisions of the will, she was entitled to the balance of the estate whether in terms of the land itself or the proceeds therefrom. The applicant therefore submit that the remaining part of the estate should be transferred to the estate of the Peris Nyokabi Wangai (Deceased) to be administered as part of her estate.
23. In the alternative to issue number 4 above, whether the remainder of the estate should be distributed to the children of the deceased?
24. The applicant stated that there is evidence that there is about 15 acres of land remaining as part of the estate and that in the event that the court is not inclined to transfer the said land to the estate of the applicant herein, it is only fair that the same be distributed to the children of the deceased. Further, legal fees is the only liability that was substantiated by the executor and therefore should be the only liability to be met out of the remaining estate.
25. They also submitted that the legal fees for the advocates representing the applicant should also be met by the estate since the applicant filed the current proceedings in pursuit of her rights under the deceased's will.
26. Respondent's Submissions
27. Uncontested issues;
  - i. The Will of the late Geoffrey Wangai Githendu is valid.
  - ii. The respondent is the sole executrix of the estate of the late Geoffrey Wangai Githendu
  - iii. The estate is partially distributed.
  - iv. Paragraph 1 to 6 of the will is uncontested
  - v. All the parties herein are beneficiaries in the will.
  - vi. Contested issues;
  - vii. Whether Esther Mwiyeria as a beneficiary/executrix is entitled to her share of the estate of Geoffrey Wangai Githendu.
  - viii. Whether Esther Mwiyeria as a beneficiary/executrix is entitled to her share of the estate of Geoffrey Wangai Githendu.
  - ix. Whether the application dated 26th January, 2011 filed by Peris/Phyllis Nyokabi is merited.



- x. Whether the executor has accounted for the partially distributed estate.
  - xi. Are the prayers of the applicant, PW1 and PW2 to have the remainder of the estate transferred to the estate of Peris/Phyllis Nyokabi for re- distribution merited?
28. Whether Esther Mwiyeria as a beneficiary/executrix is entitled to her share of the estate of Geoffrey Wangai Githendu.
29. The respondent stated that Section 6 of the *Law of Succession Act* grants the testator discretion over the appointment of the executor. This does not take away her right to inheritance as a beneficiary. Paragraph 7 of the will (marked as DEXH 1) is clear on what the respondent is to get as a beneficiary. The testator authorized the Executrix to liquidate the remaining part of the estate being 25 acres of plot No. 181 Olkalou Central. The amount of 6 acres realized from the sale was to be paid to the respondent. The reason she got a bigger share of the estate compared to other beneficiaries is because she played a bigger role to cater for the upkeep of the deceased during his sickness.
30. It was asserted that in executing her duties, the Executrix subdivided 25 acres into five (5) portions of five (5) acres each being 3825, 3826, 3827, 3828 and 3829. That the proceeds of sale of 10 acres have already been accounted for in the books of account produced in court which clearly means that the executor is yet to get her share as a beneficiary. She identified parcel portion 3825 as her own to liquidate but it's impossible because the said portion forms part of the property cautioned by PW1.
31. Whether the application dated 26th January, 2011 filed by Peris/Phyllis Nyokabi is merited.
32. It was contended that the application by the applicant was prematurely brought before court because the applicant got her share as a beneficiary/wife as provided in paragraph 6 of the will and what was remaining is the remainder of the proceeds after the entire estate had been liquidated and expenses paid. Paragraph 7b of the will authorized the executor to sell 19 acres, pay for upkeep expenses of the deceased and which includes medical/burial expenses, cater for expenses of the applicant which was done till her demise, pay expenses of the estate which remains in debt to date and the balance to go to the applicant. This was never realized because PW1 placed a caution in 2010 even before the suit was filed in 2011. This made it difficult for the executor to complete administration of the estate.
33. It was contended that the prayers by the applicant have the remaining estate unconditionally transferred to her is not provided for in the will. The testator distributed his estate through the will and the applicant ought to have respected it. PW1 and PW2 also requested court the same and the respondent called upon this court to disregard any attempt by the applicant to arm-twist the will of the deceased. The testator did what he thought was right and the role of the executrix is to respect and administer the estate guided by the will. The application as we speak is overtaken by events since the applicant is deceased and so the balance, if any, as provided in paragraph 7b of the will should be shared among the surviving beneficiaries.
34. Whether the executor has accounted for the partially distributed estate
35. It was pleaded that all the books of account have been filed and produced in court as DEXH 38 & b. Paragraph 1 to 6 of the will is uncontested since all the beneficiaries have confirmed they received their share as provided. PW1 and PW2 did not produce any evidence in court to prove that they paid for subdivision and issuance of their respective title deed in their name, this was catered for fully by the executrix and forms part of the estate expenses. With regards to paragraph 7 of the will, the executor has so far sold 10 acres from the 25 acres and she has accounted for the income and expenditure of the estate. Reliance was placed on Section 82 & 83 of the *Law of Succession Act*.



36. It was pleaded that the applicant in their affidavit in response to executrix accounting report dated 4<sup>th</sup> November, 2019 sworn by PW1 claimed that the expenses tabulated in the accounting report are false and exaggerated and were never incurred. During hearing they did not provide any document/evidence in court to prove their claim. The burden of proofing is vested on the person who alleges as stated in the Evidence Act.
37. The respondent pointed out that DWI also testified that some beneficiaries have encroached on the remaining estate claiming that it is their inheritance yet they got their respective share and efforts to have them vacate have been meted with hostility. We pray that an order be issued by this court against any intermeddler to vacate from the estate and allow the executrix to complete her administration peacefully. Reliance was placed on Section 45 of the Law of Succession Act
38. Are the prayers of the applicant, PW1 and PW2 to have the remainder of the estate transferred to the estate of Peris/Phyllis Nyokabi for re- distribution merited?
39. It was argued that the prayers are misplaced, illogical and misinformed. The testator died intestate and so his will should and must be respected unless its validity is contested which is not the case in this suit, or a party is claiming that he/she was not catered for in the will. The applicant was not left out just like the other beneficiaries. Reliance was placed on In Re Estate of Gurdip Kaur Sagoo [2021] eKLR
40. It was stated that the provisions of the will are clear on how the executor should distribute the estate of Geoffrey Wangai Githendu. That the will is clear that the remainder of 25 acres should be sold/liquidated and not transferred to anyone including the applicant.
41. The executrix pleads with this court to lift caution placed on the remaining estate so that she can liquidate it, settle the expenses and the remainder of the proceeds, if any, be subdivided amongst the surviving beneficiaries.
42. In conclusion, it was asserted that the Applicant (now administrator) by dint of this application has an impulsion to interfere/intermeddle with the estate and Respondent's powers/duties as an executrix of the estate of Geoffrey Wangai Githendu. That they are simply driven by jealousy, hatred, dishonesty and selfishness otherwise they would have contested before the estate was distributed partially. They waited until they got their share first then came to court with baseless allegations claiming that the executrix is disinheriting them.
43. It is therefore the respondents submissions that the said application be dismissed with costs to the respondent as the same is premature, unmerited, overtaken by events (applicant is deceased), in contravention of the testator's will, an abuse of the court's process and maliciously brought with an intention of defecting justice. Litigation must come to an end and the respondent submitted that such is the end of the road for the Applicant.

#### **44. Analysis and Determination**

45. Having considered the application herein, the affidavits thereto and the rival submissions, the main issues that arise for determination are:-
  - I. Whether this Honorable Court should grant orders that the respondent to remove all and any encumbrances on Title No. Nyandarua/OI Kalou Central/3825 which the applicant is entitled to and thereafter immediately and unconditionally transfer title nos. Nyandarua/Of Central/3825,3826,3827 and 4303 to the applicant?
  - II. Whether this Honorable Court should grant orders that the Respondent be ordered to pay to the applicant the market value of one (1) acre of the land from title no. Nyandarua/OI Kalou



Central/4304 which she sold without the consent of the applicant who was entitled to the same?

III. Whether this Honorable Court should grant orders that the Respondent be ordered to complete the administration of the estate within such time to be given by this Honorable Court?

IV. Who should bear the costs of this application?

46. It is not in dispute that Geoffrey Wangai Githendu, the deceased herein died testate leaving the respondent as his trustee and executor as per his Will dated 20<sup>th</sup> April 2000. Central to the dispute herein is 25 acres out of LR. Plot No. 181 Ol Kalou Central, plot 181 hereinafter that the deceased authorized his executor to sell. Clause 7 of the will provides as follows: -

“7. I authorize my trustee and executor to sell 25 acres out of plot no. 181 Ol Kalou Central and further to liquidate the proceeds therefrom as follows:-

The sale proceeds of 6 acres to be paid to Esther Mwiyeria to compensate her for her role in respect of her money spent by her for my upkeep during my sickness.

The proceeds out of 19 acres will be for my upkeep together with my wife and other uses as more specifically provided herein above while any balance will go to my wife in case she survives me.”

47. From my comprehension, the deceased intended for the respondent to benefit from 6 acres and/or the proceeds from selling 6 acres of the land and the proceeds from the remaining 19 acres were to be utilized for his and his wife upkeep and any balance was to go to his wife (now deceased). The deceased died shortly after in 12<sup>th</sup> October 2000 and the executor proceeded to fulfil his wishes as stipulated in Clause 4,5 and 6 of his Will.

48. The respondent then proceeded to subdivide the remaining 25 acres into 5 parcels i.e. 3825, 3826, 3827, 3828 and 3829. She got a buyer for 2 acres and subdivided 3828 into 4303 holding 3 acres and 4304 holding 2 acres and sold 4304 to Peter Kamau Kahugu. She also encumbered parcel no. 3825 measuring 5 acres for her own private use.

49. From the written submissions, the respondent asserted that in executing her duties, the Executrix subdivided 25 acres into five (5) portions of five (5) acres each being 3825, 3826, 3827, 3828 and 3829. That the proceeds of sale of 10 acres have already been accounted for in the books of account produced in court which clearly means that the executor is yet to get her share as a beneficiary. She identified parcel portion 3825 as her own to liquidate but it's impossible because the said portion forms part of the property cautioned by PW1.

50. From the ruling of this court dated 9<sup>th</sup> February 2023, the court ordered the respondent to file an account of the current position and ownership of Title Nos. Nyandarua/Ol Kalou Central/ No. 3825, 3826, 3827, 3828 and 3829 subdivided from Plot 181/ Nyandarua/Ol Kalou Central however from what the document filed in court by the respondent titled “Annual Report and Financial Statements Year Ending 1<sup>st</sup> February 2020 to 31<sup>st</sup> December 2022” those details were not clearly availed as requested. The respondent having stated that she has already sold 10 acres and accounted for the proceeds of the sales, I shall assume that what is remaining from the 25 acres is 15 acres.



51. *In re Estate of Julius Mimano (Deceased)* [2019] eKLR, where Musyoka, J stated: -

The personal representative of a deceased person holds a unique position in law. The property of the dead person is vested in them by virtue of section 79 of the *Law of Succession Act*. The effect of section 79, read together with section 82 of the Act, is that the same puts the personal representative on the same footing with an owner of the property, in the sense that he exercises the powers that the legal owner of the property would have exercised were they alive, and suffered the same burden of duties and obligations over the property as the legal owner would have been under were they to be alive. Yet, the property, although vested in them by law, would not be theirs. Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will, in cases of testate succession, and those identified at confirmation of grant, in cases of intestacy. They would also be holding it for the benefit of creditors and any other persons who might have a valid claim against the estate. That would mean that they are trustees of the estate, and, indeed, the *rustee Act*, Cap 167, Laws of Kenya, defines trustees to include executors and administrators. In the circumstances, therefore, the personal representative would stand in a fiduciary position so far as the property is concerned, and owes a duty to the beneficiaries to render an account to them of their handling of the property that they hold in trust for them. The duty to render accounts to beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on behalf of the beneficiaries

52. Accordingly, taking into consideration the parties oral testimonies and having thoroughly analyzed the “Annual Report and Financial Statements Year Ending 1<sup>st</sup> February 2020 to 31<sup>st</sup> December 2022 and the initial statement titled Annual Report and Financial Statements year ending 1<sup>st</sup> September to January 2016” and I have doubts as to estate’s alleged expenses vis-à-vis the income. Just as I had observed in my ruling dated 9<sup>th</sup> February 2023, the respondent incurred hefty unjustifiable bills on transport, subsistence and out of office allowance which she paid to herself.
53. Moreover, I find that in her testimony, the respondent was at a loss when explaining the items on the financial report and the sums incurred therein. It is my considered opinion, that she appeared not be credible nor reliable. She did not prove that the deceased had any medical liabilities that he left behind and in any case those were to be provided for by the sale of the 6 acres that were bequeathed to her. It is unconscionable for the respondent to attempt to convince this court that the proceeds for the sale of the 10 acres went purely to settling the needs of the estate. I reiterate that it is my considered opinion that most of the expenditures on the estate were in relation to her own personal expenses tabulated as estate expenses.
54. Evidently, I am not convinced that the respondent spent the sums alleged on medical treatment and liabilities on the deceased and his wife (also deceased) given the applicant’s and that she sent Peris Nyokabi Wangai, deceased the sums she alleged to have sent. The deceased’s Will was clear that the only the sale proceeds of 6 acres to be paid to Esther Mwiyeria to compensate her for her role in respect of the money she spent for the deceased’s upkeep during his sickness. The respondent owed a fiduciary duty to the beneficiaries of the estate of the deceased and indeed the Applicant, for whose benefit they hold the assets of the estate, to account for their dealings with the same.
55. Accordingly, I note that the respondent sold 10 acres and in her submissions she still identified parcel portion 3825 as her own to liquidate. Going by the deceased’s wishes, it is my considered finding that 6 out of the 10 acres that the respondent sold shall be considered as her bequeathment as stipulated under Clause 7 (a) of the deceased’s Will. Clause 7 (b) of the Will states that the rest was to be for the



deceased's and his wife's upkeep with any remaining balance going to his wife. Therefore, out of the 10 acres sold, there were 4 acres which I have already opined the respondent failed to give sufficient explanation as to how the proceeds from the sale of the same were utilized. However, I am alive to the fact that the respondent incurred legal fees in administrating the instant estate.

56. In view of the foregoing analysis, it is my considered finding that since the balance of the proceeds out of the remaining 19 acres were to go to the deceased's wife (now also deceased) in case she survives him, the remaining portion of the estate should be vested in the estate of Peris Nyokabi Wangai (Deceased). The respondent having taken out titles for the remaining parcels should revert back to Peris Nyokabi Wangai (deceased)'s estate.
57. Additionally, this court takes judicial notice that the respondent herein is also a beneficiary in the aforementioned estate therefore I find that when considering distribution in the estate of Peris Nyokabi Wangai (deceased) the 4 acres shall be excised from her allocation. Concerning costs incurred in the administration of the estate, I am of the considered view that the Respondent ought to have provided proper accounts with necessary documentation and/or receipts detailing such expenditures to be borne by the estate. Since she did not provide the same, in my discretion, I make the following orders;
- i. I assess the same to a sum of Kshs. 200,000/- to include any other professional fees she may have incurred. The respondent will be paid the same out of the deceased's estate.

**DATED AND DELIVERED AT NYANDARUA THIS 20TH OF DECEMBER 2024**

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**CHARLES KARIUKI**

**JUDGE**

