



REPUBLIC OF KENYA



**In re Estate of Jonathan Njenga (Deceased) (Succession Cause 378 of 1997)  
[2023] KEHC 1369 (KLR) (Family) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1369 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 378 OF 1997  
MA ODERO, J  
FEBRUARY 24, 2023**

**BETWEEN**

**SALOME NJAMBI NJENGA ..... 1<sup>ST</sup> APPLICANT**

**ESTATE OF ANN WAIRIMU TCHORERET (DECEASED) (THRO' ITS  
ADMINISTRATOR SALOME NJAMBI NJENGA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JANE WANJIKU NJENGA ..... 1<sup>ST</sup> ADMINISTRATOR**

**LEWIS MUCHENE NJENGA ..... 2<sup>ND</sup> ADMINISTRATOR**

**JULIA WANGU WAWERU ..... 3<sup>RD</sup> ADMINISTRATOR**

**RULING**

1. Before this Court is the summons dated April 4, 2022 by which the Applicants Salome Njambi Njenga (the 1<sup>st</sup> Applicant) and Salome Njambi Njenga (as Administrator of the Estate of Ann Wairimu Tchoreret (Deceased) (the 2<sup>nd</sup> Applicant) seeks the following orders:-
  1. That on the basis of the confirmed Grant on record the Administrator do within such reasonable time as shall be set by the Honourable Court give a true and accurate account of the Estate's distribution and in particular:-
    - a. The distribution of LR 3564/2 – Redhill.
    - b. Plot No 214, Mtwapa Scheme - 452
    - c. Chania/Ng'orongu/1037.
    - d. Shares in East Africa Bata Shoe Company Ltd.



- e. Any other assets belong to the Estate.
  2. That further and/or in the alternative, the distribution of the Estate and in particular the distribution of LR 3564/2 Redhill Farm and/or any other asset set out in the Confirmed Grant and to the extent that it does not tally with the terms of the confirmed grant herein, be nullified and the distribution of the said assets(s) be done afresh with the full participation of all the beneficiaries and that such distribution be done within such reasonable period as court shall deem appropriate.
  3. That the costs of this application be borne by the administrators.
  4. That the Honourable Court be at liberty to make such other or further orders as it shall deem necessary to ensure that the estate is distributed not only expeditiously but in accordance with the Confirmed Grant.
2. The application which was premised upon Rule 73 of the *Probate and Administration Rules* was supported by the Affidavit of even date and the Supplementary Affidavit dated July 29, 2022 both sworn by the 1<sup>st</sup> respondent.
  3. The Administrator/Respondents Jane Wanjiku Njenga, Lewis Muchene Njenga And Julia Wangu Waweru all opposed the summons through the Replying Affidavit dated June 27, 2022 sworn by Lewis Muchene Njenga.
  4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated September 28, 2022 whilst the Respondents relied upon their submissions dated October 14, 2022. The Applicant then filed a Reply dated November 14, 2022 to the Respondents submissions.

## **Background**

5. This matter relates to the estate of the late Jonathan Njenga (hereinafter ‘the Deceased’) who died intestate on January 11, 1992. A copy of the Death Certificate Serial Number 233857 is annexed to the Petition for Grant of letters of Administration intestate dated January 15, 1996.
6. The Deceased was survived by the following persons:
  - (1) Mrs Jane Wanjiku Njenga - Widow
  - (2) Lewis Muchene Njenga - Son
  - (3) Salome Njambi Njenga - Daughter
  - (4) Edwin Gitau Njenga - Son
  - (5) Ann Wairimu Tchoreret - Daughter
7. Following the demise of the Deceased Grant of letters of Administration intestate was on May 28, 1997 issued to the widow Jane Wanjiku Njenga, Lewis Muchene Njenga and Edwin Gitau Njenga (both sons of the Deceased). The Grant was duly confirmed on January 18, 2016. The mode of distribution of the estate was set out as below:-



NAME	Description Properties	Share Of Heirs
Jane Wanjiku Njenga Lweis Muchene Njenga Estate Of Edwin Gitau Njenga Salome Njambi Njenga Ann Wairimu Tchoreret	-lr No. 3564/2 Redhill -plot No. 214, Mtwapa Scheme 452 -chania/ng'orong/1037 -shares In East Africa Bata, Shoe Company Ltd	Equally
Jane Wanjiku Njenga	-dagoretti/Uthiru/282 -dagoretti/uthiru/324	

8. On February 14, 2020 the 1<sup>st</sup> Applicant herein filed an application seeking to substitute the widow Jane Wanjiku Njenga with herself Salome Njambi Njenga as Administrator of the Estate on grounds that the said widow was elderly [then aged eighty eight (88) years old] and had medical complications which would compromise her ability to properly manage the estate.
9. The Applicant further stated that following the demise of the third Administrator Edwin Gitau Njenga the other Lewis Muchene Njenga had challenges in administering the estate.
10. Hon. Lady Justice Ali Aroni (as she then was) heard that application and delivered her ruling thereon on October 14, 2021, declining to appoint the Applicant as an administrator but instead appointing Julia Wangu Waweru as the third administrator in place of her late husband Edwin Gitau Njenga. The Grant was then rectified on July 9, 2013.
11. The Applicant acting on her own behalf as daughter of the Deceased and a beneficiary to his estate and acting in her capacity as legal representative to the estate her late sister Ann Wairimu Tchoreret filed this present application.
12. The Applicant annexed to her supporting Affidavit a copy of a confirmed Grant dated February 22, 2022 issued to her in respect of the estate of her late sister (Annexure SN '2') I am therefore satisfied that the Applicant is the legal representative of the said estate and has the requisite locus standi to act on behalf of that estate.
13. The Applicant avers that almost thirty (30) years after the death of the Deceased and several years after a confirmed Grant was issued the estate is yet to be distributed to the beneficiaries. She alleges that out of the forty-one (41) acres which comprise the Redhill Farm only Thirty eight, nine hundred and twenty five (38.925) acres has been distributed and that the Administrators have failed to account for the other two (2) acres.
14. The Applicant further avers that Julia Wangu Waweru has been allocated land yet her name does not appear in the confirmed Grant. That the late Ann Wairimu has not been allocated what was due to her in accordance with the confirmed Grant.
15. Finally the Applicant demands that the Administrators be directed to explain the whereabouts of the following assets all of which form part of the estate of the Deceased but which are not mentioned in the Grant:-



- a) Karen 10 acres – Marula Nursery.
  - b) Kenya Triangle Ranch Ltd – 10 shares land in Voi where one Andrew Matu is Chairman.
  - c) Homeland Freight Clearing and forwarding Shares and where one Paul Wanjiri was our late father’s partner.
  - d) An antique 1925 Chevrolet sold as scrap metal yet it had taken our father eight (8) years to find the original parts for the same.
  - e) Mercedes Bens 230 – Reg No KUG 634.
  - f) Chania/Ngogoro ancestral land.
  - g) Mtwapa plot 214, Scheme 452 – 12 acres
  - h) Shares/assets Kens Metal Manufacturing Exporting Company.
  - i) Bata Shoe Shares.
  - j) East African Breweries Shares (KBL Shares).
  - k) Dagoretti/Uthiru land belonging to our mother.
  - l) Funds held in Standard chartered Bank – Kenyatta Avenue ACC 01-001-56760-004 with Kshs 61,850.00 as at August 1992.
  - m) Priceless artifacts and pieces of art owned by the Deceased.
  - n) A Peugeot car”
16. The Applicant prays that the Administrators be reprimanded and surcharged. That they be ordered to give a true and accurate account of their administration of the estate.
  17. Finally the Applicant prays that if the Administrators are unable to give a satisfactory account of their administration of the estate, then new Administrators be appointed to complete the distribution of the estate.
  18. As stated earlier the Application was opposed. The Respondents contend that the present application is ‘*Res Judicata*’ as it raises issues similar to those dealt with by Hon Lady Justice Ali Aroni (as she then was) in the Ruling delivered on October 14, 2021.
  19. The Respondents assert that the estate has been fully distributed in accordance with the confirmed Grant. That out of the assets mentioned as distributed – Plot No 214 Mtwapa Scheme 452, Chania/ Ngogoro/1037, Share in Bata Shoe Co Ltd no longer exist and are unavailable for distribution.
  20. The Respondent states that the only asset still available was Redhill LR 3664/2 which has been distributed according to the certificate of Confirmed Grant and title issued.
  21. The Respondents further state that two portions of land remain in the name of the Administrators because the Applicant failed to supply her Identity Card Number and KRA PIN Number to facilitate the transfer and registration of the same to herself. That the portion of the estate due to the late Ann Wairimu has not yet been transferred as her beneficiaries are yet to come forward to claim her share.
  22. The Respondent state that out of the two (2) acres of the Redhill Farm which the Applicant claims are unaccounted for one acre was sold to cater for the survey and legal costs whilst the other acre was set aside to cover roads, power way leave and riparian land. That the other properties said by the



Applicant to have been omitted do not exist but if the Applicant is able herself to trace them then the said properties should be included in the Grant.

23. The Respondent claims that this application is merely a backhand attempt to appeal the ruling of October 14, 2021. They urge this court to dismiss the application in its entirety.

### **Analysis and Determination**

24. I have carefully considered the application before this court, the reply filed by the Respondents as well as the written submissions filed by both parties. The two issues for determination are as follows:-
- (i) Whether the application dated April 4, 2022 is *Res Judicata*.
  - (ii) Whether the application dated April 4, 2022 has merit.

### **Res Judicata**

25. The 2<sup>nd</sup> Administrator contends that the summons dated April 4, 2022 is *Res Judicata* as the issues raised thereon were determined by Hon Lady Justice Ali Aroni (as she then was) the ruling delivered on October 14, 2021.
26. The Applicants counter that their application is not *Res Judicata* as it raised issues which are distinct from those covered by Hon Lady Justice Ali Aroni (as she then was) in the Ruling of October 14, 2021.
27. The doctrine of *res judicata* is provided for under Section 7 of the [Civil Procedure Act](#) Cap 21, Laws of Kenya, as follows:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”

28. Therefore in order to satisfy the principle of *Res Judicata* it must be shown that:-
- i) There is a former suit or proceeding in which the same parties in the subsequent suit had litigated.
  - ii) The issued in dispute was directly or substantially in issue in the former suit.
  - iii) That a court with competent jurisdiction had heard the matter and finally determined it.
29. The aim of this doctrine is to discourage endless rounds of litigation over the same issue. There must be finality with regard to any issue brought to court.
30. The ruling of October 14, 2021 was delivered in respect of a Notice of Motion dated February 14, 2020 which had been filed by the Applicant Salome Njambi Njenga seeking *inter alia* the following prayers
- “That Jane Wanjiku Njenga be substituted with Salome Njambi Njenga as a co-administrator of the Estate herein and/or that the said Salome Njambi Njenga be added as a co-administrator of the estate herein”
31. A reading of the current application dated April 4, 2022 clearly reveals that it is not seeking the same prayers as those which were sought in the Notice of Motion dated February 14, 2020. There is no prayer for substitution of an administrator in the instant application.



32. I have carefully perused the ruling delivered on October 14, 2021. In that ruling the Hon Judge dismissed the Applicants prayer to have herself included/substituted as an administrator of the estate in place of her mother Jane Wanjiku Njenga. Nowhere in that ruling did the Honourable Judge delve into the question of whether the estate had been distributed in accordance with the confirmed Grant. Nor did the court decide on the issue of filing of accounts which is an issue in the present application.
33. For the above reasons I find that the ruling of October 14, 2021 did not cover similar issues to those raised in the instant application. The summons dated April 4, 2023 therefore cannot be deemed to be *Res Judicata* and I do so find.

### **Merits of the Application**

34. The Applicants have prayed that the Respondents who are the Administrators of the estate of the Deceased be ordered to give a true and accurate account of their administration of the estate. The applicants take issue with the facts of certain assets as listed in prayer (1) of the summons, were omitted from the Grant and have not been accounted for.
35. The Respondents assert that they have properly administered the estate in conformity with the confirmed Grant dated January 18, 2016. The Respondents further state that some of the assets listed by the Applicants either do not exist or did not belong to the Deceased in the first place.
36. The Respondents herein were appointed as administrators of the estate of the Deceased way back in the year 2013. The relationship between the Administrators of an estate and the beneficiaries is one which is fiduciary in nature. The Administrators are legally obligated to give an account of their administration of the estate.
37. The duties of an Administrator are clearly set out in Section 83 of The *Law of Succession Act*, Cap 160 Laws of Kenya. Sections 83(e) and (9) of the said Act provide as follows:-

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- ((a) .....
- ((b) .....
- (c) ....
- (d) `.....
- (e) 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 dealing therewith up to the date of the account.
- (f) Subject to Section 55 to distribute or 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) 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.” [own emphasis]

38. In the case of *Re: Estate Of Julius Mimano (deceased)* [2019] eKLR, Hon Justice William Ouko stated as follows:-

“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 *Trustee 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.” (own emphasis)

39. The mode of distribution of the estate of the Deceased was clearly set out in the Certificate of Confirmed Grant issued on January 18, 2016. The Administrator ought by Law to have rendered accounts by now.

40. The Applications take issue with the manner in which the estate has been distributed. The 2<sup>nd</sup> Administrator claims that LR No 3564/2 Redhill has already been sub-divided and transferred in accordance with the confirmed Grant whilst LR No 3564/17 and LR 3564/12 are yet to be transmitted to the respective beneficiaries. The Administrators argue that the only property remaining for distribution is LR 3564/2. In the absence of accounts the court is not able to confirm the veracity of the claims being made by the Administrators.

41. In order to clear up the doubts raised by the Applicant and in order for the court to satisfy itself that the Administrators have distributed the estate in accordance with the confirmed Grant it is essential that the Administrators render full and accurate statement of accounts to explain how the estate of the Deceased has been distributed and to explain why some of the assets named in the Grant have not been distributed Six (6) years after the Grant had been confirmed.

42. The Applicant has identified in prayer (1) certain properties which she claims were omitted in the Grant. There is evidence that the Applicant consented to the mode of Distribution of the estate. Why did she not at the time of confirming the Grant raise the issue of the assets which she now claims were omitted instead of waiting until Six (6) years after the confirmation of the Grant to raise the issue of missing assets.

43. It is trite Law that ‘he who alleges must prove’. The Applicants allege that the assets listed in prayer (1) exist and belong to the Deceased, so the onus lies on them to avail proof of their allegation. This the Applicants have failed to do. The Applicants further allege that the said assets have been misappropriated/sold by the Administrators. Not an iota of proof has been availed to prove this very serious allegation. When were these assets sold to whom and for how much? The Applicants have not provided any answers to these crucial questions. The court will therefore be guided only by the assets which are listed in the confirmed Grant. Any other asset is not to be covered in the Accounts, provided by the Administrators.



**Conclusion**

44. Based on the foregoing I find that the summons dated April 4, 2022 has merit. I direct that the Administrators file and serve within sixty (60) days a full and accurate accounts inventory of the assets and liabilities of the estate and render a full account of their handling of the estate from January 18, 2016 to date. This being a family matter each side will bear its own costs.

**DATED IN NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2023.**

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**MAUREEN A ODERO**

**JUDGE**

