



In re Estate of Susan Gathoni Wanjiru (Deceased) (Succession Cause E316 of 2023) [2023] KEHC 23258 (KLR) (Family) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E316 OF 2023
PM NYAUNDI, J
SEPTEMBER 29, 2023**

BETWEEN

CATHERINE WANJIRU NDUNGU APPLICANT

AND

JAMES NDUNGU MAINA RESPONDENT

RULING

Introduction

1. By Notice of Motion dated July 27, 2023 presented Under Section 1A, 1B, 3 & 3A of the *Civil Procedure Act*, and Order 40 Rules 1-3,4,5,10 and Order 51 rule 1 of the *Civil Procedure Rules*, the Applicant seeks orders as enumerated on the face of the Application. The Application is supported by the Affidavit of the Applicant sworn on February 27, 2023.
2. The Application is opposed by the Affidavit sworn by the Respondent on April 5, 2023.

Background

3. The Applicant is the daughter of the deceased. She avers that the Deceased prior to her death executed a will in which she appointed Peter Gacheru Wanjiru as Executor. The said Peter Gacheru Wanjiru has since renounced his rights as Executor and donated those rights to her.
4. The Applicant avers that the intermeddling by the Respondent, (who she states cohabited with the deceased) has necessitated this Application and that unless the orders sought are granted the Estate is at risk of being wasted.
5. In opposing the Application, the Respondent avers that he is the husband to the deceased and that the Application is based on falsehoods.



6. The Respondent also submits that the Application is defective as the Applicant lacks locus standi to present the Application.
7. The Respondent also denies that he intends to dispose of the properties of the deceased and contends that not all the properties listed belong to the deceased.
8. The Court directed that the Application be canvassed by way of written submissions and the parties filed their respective submissions.

Summary Of The Applicant's Submissions

9. The Applicants submissions are dated May 8, 2023. The Applicant avers that she is the executor of the deceased's will and identifies the following as the issues for determination-
 - a. Whether the Applicant has locus to present this application before this court
 - b. Whether the Respondent has intermeddled with the deceased estate thus the validity of the suit
10. On the first issue, the Applicant avers that as a beneficiary of the estate she has the capacity to move the Court and relies on the decision of Odunga J. (as he then was) in *Re Estate of Benson Maingi Mulwa (deceased)* [2021] eKLR. She argues that she presents the Application as daughter, beneficiary and executor of the will of the deceased.
11. On the second issue, the Applicant contends that the Respondent is intermeddling with the estate and relies on the decision of Musyoka J in *Veronica Njoki Wakagoto (Deceased)* [2013] eKLR.

Summary Of Respondent's Submissions

12. The Respondents submissions are dated May 20, 2023. The Respondent identifies the following as the issues for determination-
 - a. Propriety of the Notice of Motion Application

It is submitted that the Application is defective as it is presented under provisions of the *Civil Procedure Act* and Rules that do not apply to Succession matters. The Respondent relies on the decision in *Re Estate of Sarastino M'chabati M'ukabi (Deceased)* [2019] eKLR and *Josephine Wambui Wanyoike -vs- Margaret Wanjiru Kamau & Anor* [2013] eKLR
13. On whether or not the Court can issue injunction orders as sought the Respondent relies on the decision in *Re Estate of Mwangi Nganga (Deceased)* [2005] eKLR and submits that the Applicant has invoked the wrong provisions of the law and therefore cannot get the relief sought.
14. The Respondent also raises issue with the form of Application, stating that the same is incurably defective having been presented as a Notice of Motion instead of Summons as required by the Act and relies on the decision of Estate of Mwangi Nganga cited above.
15. On the merits of the Application it is submitted that the Applicant cannot be an executor as the purported renunciation does not comply with the law.
16. On whether or not the Respondent has intermeddled it is submitted that the Applicant has not proved that the properties listed belong to the deceased and that further since some of the properties are held by the Deceased and Respondent as joint tenants, it is impossible for the Respondent to intermeddle as he as a proprietary interest. It is submitted that the Applicant has not established that the Respondent has intermeddled with the estate of the deceased



Analysis And Determination

17. Having carefully considered the pleadings filed herein alongside the rival submissions, authorities cited and the applicable law, I discern the following as the issues for determination
 - a. Whether the Applicant has locus standi to present the Application
 - b. Whether the Application as presented is competent
 - c. Whether the Respondent is intermeddling with the estate of the deceased
 - d. Whether the Court should grant the orders sought
 - e. Who should pay costs
18. On the 1st issue, the Applicant submits this Application in her capacity as Executor. She submits that the appointed Executor having renounced his rights as executor and vested them on her she is competent to present the Application.
19. I will reproduce here the 'Renunciation' by the said Executor

Mr. Peter Gicheru Wanjiru

Po Box 3247-01002

Thika

Tel: 0722248624

To Whom It May Concern

Being the sole executor of the will of my late sister Susan Gathoni Wanjiru, I do hereby give the rights of executor to her first born daughter in the name of Catherine Wanjiru Ndungu. Everything that concerns the estate of Susan Gathoni Wanjiru will be in the hands of her daughter. This has been necessitated by my busy schedule. (Annexed is a copy of my ID card)

Yours Sincerely

Peter Gicheru Wanjiru

20. Rule 18(1) of the Probate Rules provides for the manner in which an executor can renounce the right to probate vide Form 101. The Renunciation on record is not dated, the signature of the Executor is not witnessed, it does not refer to the will with sufficient detail. It doesn't state for instance the date of the will. Finally, it does not explicitly state that the Executor is renouncing his rights as an Executor and that he has not intermeddled with the Estate.
21. For the reasons stated I find that the alleged renunciation does not meet the required format and therefore the Applicant cannot be said to be the Executor of the will of the deceased.
22. It is conceded by the parties that no Petition has been filed with respect to the estate of the deceased. The question therefore is whether the Applicant has the locus to present the Application.
23. The facts in the instant case are almost on all fours with those in *Edema & 2 others v Edema & 5 others* (Miscellaneous Succession Cause E001 of 2022) [2022] KEHC 9960 (KLR) (6 July 2022) (Ruling) in which the Applicant sought orders against the Respondents for intermeddling. As in the instant case the Applicants in that case presented the Application in the absence of Letters of Administration.



24. On locus standi, the Court cited with approval the decision in *Alfred Njau v City Council of Nairobi* (1983) KLR 625 where the Court of Appeal stated-

locus standi literally means a place of standing and refers to the right to appear or herd[sic] in court proceedings and to say that a person has no locus standi means that he/she has no right to appear or be heard in such and such proceedings.

25. The Court further referred to the decision of Dulu J. in *In the matter of the Estate of Geoffrey Meitamei Lonina (Deceased)* [2012] eKLR where the Court stated

Indeed, under Section 45(1) and (2) of the *Law of Succession Act* (Cap 160) this Court has powers to protect the assets of a deceased person. However, in my view only an administrator or an interested party in an existing administration cause, can apply for protection of the deceased's assets. In the present matter, no application for letters of administration has been filed under Sections 51, 53 or 54 of the *Law of Succession Act*. Therefore, in my view, the provisions of Section 45 of the Act cannot be brought into play by the applicant. She has no legal standing in law to bring the present application. On that account, I find that the application is misconceived.

26. I am persuaded by the reasoning in the above cited authorities and would find that the application is incompetent for having been filed before a grant of letters of administration was obtained.

27. Having found that the Applicant lacks locus standi to present the Application, the other issues identified for determination have no feet to stand upon.

28. The Application is therefore dismissed.

29. I note that the parties herein are father and daughter, I am of the view that the parties should attempt to resolve this matter through court annexed mediation. Accordingly, I direct that the matter be mentioned before the Deputy Registrar Court Annexed Mediation on October 4, 2023 for the Appointment of a mediator.

30. The matter will be mentioned before Court on October 31, 2023 to report on the status of the mediation.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2023.

P M NYAUNDI

JUDGE

