



**In Re The Estate of Phillip Njoka Kamau (Deceased) (Succession Cause 497 of 2013) [2023] KEHC 22915 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22915 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 497 OF 2013  
SM MOHOCHI, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**ELIZABETH WANJIKU NJOKA ..... APPLICANT**

**AND**

**JUMA KIPLANGE (DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**TERESIA NJERI ..... 2<sup>ND</sup> RESPONDENT**

**MARGARET DAMAT ..... 3<sup>RD</sup> RESPONDENT**

**LUCY WANJIRU ..... 4<sup>TH</sup> RESPONDENT**

**JOSEPH NJUGUNA ..... 5<sup>TH</sup> RESPONDENT**

**GILBERT KABAGE T/A PATA AGENCIES ..... 6<sup>TH</sup> RESPONDENT**

**IRENE WANJERI NJOKA ..... 7<sup>TH</sup> RESPONDENT**

**SAMUEL GITIMU ..... 8<sup>TH</sup> RESPONDENT**

**RULING**

1. There are two applications before me for determination. The first is an Application dated 16<sup>th</sup> November, 2022 (first Application) filed by the Applicant and the second is an Application dated 18<sup>th</sup> November 2022 (second Application) filed by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents/Petitioners.
2. In the first Application, the Applicant petitions for revocation and or annulment of grant of probate issued to the late Juma Kiplenge on 19<sup>th</sup> November, 2013; a grant of letters of Administration with will annexed to be issued to either the Public Trustee or to Mrs. Elizabeth Wanjiku Waithaka in respect of the estate of the deceased herein Philip Njoka Kamau who died testate on 1<sup>st</sup> May, 2012; and for costs of the Application.



3. The grounds upon which the Application is premised are inter alia that, following the death of the deceased herein, the late Juma Kiplenge was appointed as his sole executor; that the said Juma Kiplenge died on 7<sup>th</sup> October, 2022 before he administered the estate of the deceased herein and thus following his demise the grant of probate issued by this Honourable Court has become inoperative and useless, and must be revoked and another one issued.
4. The Application is supported by an affidavit of Elizabeth Wanjiku Njoka-the Applicant herein, sworn on the even date. She deposed that on 21<sup>st</sup> October, 2022, this Honourable Court directed in the said Nakuru High Court Misc. Suit No.33 of 2016; Elizabeth Wanjiku Njoka Vs. Juma Kiplenge & 12 others that an application be made in this cause for appointment of an administrator to complete the administration and thereafter an application be made in the former for substitution of that legal representative for the said Juma Kiplenge.
5. She averred that the said Elizabeth Wanjiku Waithaka is a scholar and a farmer and is in a position to execute the will of the deceased herein impartially and that where an executor dies before completing the administration of an estate, this Honourable Court can appoint either his children, wives if any, nieces, public trustees, any legatee having a beneficial interest, all the named beneficiaries or a creditor to execute the will of the deceased.
6. She deposed that any of the defendants in the said Nakuru High Court Misc. Suit No.33 of 2016; Elizabeth Wanjiku Njoka Vs. Juma Kiplenge & 12 others cannot serve as an impartial administrator as he or she will find herself in an acute conflict of interest particularly in view of the pending litigation.
7. The Application is opposed. The 2<sup>nd</sup> Respondent Teresia Njeri Njoka swore a replying affidavit in opposition to the application on 14<sup>th</sup> December, 2022, and a further Affidavit on 3<sup>rd</sup> of March, 2023. She conceded that in view of the death of Juma Kiplenge the grant of probate issued to him needs to be revoked and fresh grant of letters of Administration issued.
8. She averred that the entire family of the deceased, save for the Applicant and one or two of her siblings, have met, discussed and agreed that fresh grant of letters of Administration be issued to three (3) surviving widows of the deceased namely; Teresia Njeri Njoka, Margaret Damat and Lucy Wanjiru Njoka together with the deceased son Joseph Njuguna Njoka who are named herein as the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents and they have filed an application dated 18<sup>th</sup> November 2022 to that effect.
9. She deposed that the deceased is survived by three widows and over twenty children all of whom are capable, competent and willing to administer the deceased's estate and therefore there would be no rationale and or justification to have the estate administered by the Public Trustee or by members of the Deceased's extended family as sought by the Applicant.
10. She deposed that Elizabeth Wanjiku Waithaka proposed by the Applicant is a stranger to her and also largely unknown to the rest of the deceased's immediate family and if indeed she is one of the nieces of the deceased as indicated by the Applicant there would be no justification in bringing her to meddle with the deceased's estate while the deceased's immediate family members are available.
11. She averred that she is reliably informed by some family members that the said Elizabeth Waithaka is a daughter of one Mary Muthoni Kamau who is a sister to the deceased herein and the said Mary Muthoni is fighting the estate of the deceased in Nakuru High Court Succession Cause No. 288 of 1989; Estate of Beatrice Nyahangi Kamau as an interested party and therefore the said Elizabeth Waithaka is totally conflicted to be appointed as an administrator of the deceased herein.
12. She averred that the said Elizabeth Wanjiku Waithaka has not sworn any affidavit expressing and/or explaining her interest in administering the deceased's estate and thus it is no doubt the Applicant is



- seeking to administer the deceased's estate through the back door. She prays that the application be disallowed.
13. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents similarly opposed the application via their replying affidavit sworn on 9<sup>th</sup> January, 2023. They associated themselves with the averments of the 2<sup>nd</sup> Respondent and urged this Court to accept their choice as the most reasonable.
  14. The 5<sup>th</sup> Respondent, Joseph Njuguna Njoka, opposed the Application through his replying Affidavit filed on 13<sup>th</sup> December 2022. He fully supported the issuance of grant of letters of administration with will annexed to Teresia Njeri Njoka, Margaret Damat Njoka, Lucy Wanjiru Njoka and himself.
  15. The 5<sup>th</sup> Respondent in his supplementary Affidavit sworn on 23<sup>rd</sup> February 2023 deponed that the Applicant herein is her sister and from the history of this matter she is unsuitable to be appointed as an administrator of the deceased and has no moral or legal authority to suggest who should be the administrator of the deceased estate.
  16. He disputed that he, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have intermeddled with the estate of the deceased as alleged by the Applicant.
  17. He averred that the Court found him unsuitable to serve as an administrator of the estate of Alice Kahaki because of conflict of interest and he believes the Applicant and her nominees are similarly unsuitable for appointment because of conflict of interest.
  18. He stated that he late Winnie Waithira was married to the deceased herein and her estate has an interest in this matter, and that the Administrator of the estate of Winnie Waithira has consented to the appointment of the aforesaid proposed administrators to be appointed as administrators of the deceased's estate. He attached an affidavit of one Samuel Gitimu Njoka, the 1<sup>st</sup> Administrator of the estate of Winnie Waithira Njoka, in support of this Averment.
  19. The Applicant, Elizabeth Wanjiku Njoka, swore a further affidavit on 13<sup>th</sup> March 2023 wherein she averred that the said Winnie Waithira was one of the four women that cohabited with the deceased herein after the demise of her mother and that Samuel Gitimu who is her son is not a son of the deceased herein.
  20. She further deponed that the siblings of the said Samuel Gitimu are not heirs of the estate of the deceased and whatever views they hold regarding the estate of the deceased are irrelevant.
  21. The second application is brought pursuant to Section 76(e) of the *Law of Succession Act* and Rules 44 and 73 of the *Probate and Administration Rules* wherein the 2<sup>nd</sup> to 5<sup>th</sup> Respondents are seeking for revocation and/or annulment of the grant of Probate of written will issued to Juma Kiplenge on 19<sup>th</sup> November, 2013 and the costs of the Application.
  22. The Application is premised on grounds that: -The Petitioners/Applicants herein are surviving widows and a son respectively of the late Philip Njoka Kamau. The Late Philip Njoka Kamau appointed Juma Kiplenge as Executor of his will. Pursuant to the said appointment, a grant of Probate of written will be issued to the Executor on 19<sup>th</sup> November, 2013. The said Executor died on 7<sup>th</sup> October, 2022 and as such, the grant issued to him has since become useless and inoperative. Prior to his death, there was a pending suit Nakuru High Court Misc. Suit No. 33 of 2016-Elizabeth Wanjiku Vs. Juma Kiplenge & Others, against the Estate of the late Philip Njoka Kamau. Most of the Estate remains un-administered owing to the said dispute. There is need to substitute the Executor who is sued as the 1<sup>st</sup> Defendant therein with fresh administrator(s) in order to continue to defend the interests of the Estate of the late Philip Njoka Kamau in the said suit, and to further carry out the duties that were being carried out



by the deceased executor. It is in the interest of justice that the Court intervenes and revokes the grant issued to the late Juma Kiplenge to pave way for a fresh grant to be issued.

23. The Application is supported by an affidavit of Teresia Njoka, Margaret Damat Njoka, Lucy Wanjiru Njoka and Joseph Njuguna Njoka sworn on the even date wherein they reiterated the above grounds.
24. Contemporaneously with the Application, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents filed a petition dated 18<sup>th</sup> November, 2022 wherein they petitioned this Honourable Court for a grant of letters of Administration de bonis non with written will annexed, of the estate of the deceased Philip Njoka Kamau for the un-administered estate.
25. In their supporting affidavit in support of the above petition similarly sworn on 18<sup>th</sup> November 2022, the applicants committed that they will faithfully administer the estate of the deceased in accordance with the law and they will render a just and true account of the estate whenever required by the law to do so.
26. It was their averment that all the beneficiaries of the deceased herein save only for those who have sued the estate in the aforesaid suit, have consented to this petition.
27. They averred that those beneficiaries who have sued the estate in the aforesaid suit cannot rationally seek to administer the Deceased's estate herein as they cannot prosecute and defend the estate at the same time. They prayed that the petition be allowed.
28. The Applicant, Elizabeth Wanjiku Njoka opposed the petition via a replying affidavit sworn on 13<sup>th</sup> December 2022.
29. She averred that the Petitioners are conflicted by dint of being defendants in Nakuru HCC No.33 of 2016; Elizabeth Wanjiku Njoka (Suing as the legal representatives of Alice Kahaki Njoka (Deceased) Vs Juma Kiplenge & others and thus unsuitable to be appointed as legal representatives of the deceased.
30. She deposed that the 1<sup>st</sup> to 3<sup>rd</sup> Petitioners are not widows of the deceased as the deceased never married them but cohabited with them after the demise of her mother.
31. It was her further averment that the contention that the beneficiaries have consented to the petition is not supported by any evidence.
32. The Applicant, Elizabeth Wanjiku Njoka, swore a further Affidavit on 20<sup>th</sup> January, 2023 in response to all the aforesaid Replying Affidavits. She averred that the 4 Petitioners are intermeddlers of the estate of her parents and thus unfit to be appointed as administrators.
33. She averred that all she wants is an impartial and competent person to be appointed as an administrator.
34. The Application was canvassed by way of written submissions.

### **The Applicant's Submissions**

35. The Applicant submissions and supplementary submissions were filed on 13<sup>th</sup> December, 2022 and 7<sup>th</sup> February, 2023 respectively.
36. She reiterated that the Petitioners by dint of being defendants in the aforesaid suit are not eligible to be appointed as administrators because to do so will put them in acute conflict of interest.
37. She contended that the Petitioners want to be appointed so that they may have possession of all the papers of the deceased and use them to make out cases that the properties claimed by the interested party in the aforesaid suit are not part of the estate of the late Alice Kahaki Njoka.



38. She submitted that legal representatives stand in a fiduciary position with respect to the estate of the deceased. To support this position, she relied on the cases of *In Re Estate Of Peter Nzuki Ndeti (Deceased)* (Succession Cause 261 Of 2015) [2022] KEHC 11045 (KLR) (3<sup>rd</sup> August,2022) (Ruling); *In re Estate of David Kyuli Kaindi (Deceased)* [2015] eKLR; *In re Estate of Julius Mimano (Deceased)* [2019] eKLR; *In Re Estate Of Kitele Kitingu (Deceased)* (Succession Cause 574 Of 2005) [2022] KEHC 11826 (KLR) (12 May 2022) (Ruling).
39. She reiterated that 2<sup>nd</sup>,3<sup>rd</sup> and 4<sup>th</sup> Respondents are not widows of the deceased and that the four proposed administrators are intermeddlers with the deceased estate and thus further unfit to be appointed as administrators of the said estate.
40. She urged the Court to dismiss the petition dated 18<sup>th</sup> November 2022 and to allow her application dated 16<sup>th</sup> November,2022.

### **Petitioners' Submissions**

41. The Petitioners filed their submissions on 11<sup>th</sup> January 2023. The 1<sup>st</sup> Petitioner (Teresia Njeri Njoka) also filed her separate submissions on 25<sup>th</sup> April 2023.
42. They submitted that pursuant to the provisions of Section 66 of the *Law of Succession Act*, they should be appointed as the legal administrators of the state of Philip Njoka Kamau.
43. They contended that they are representatives of the five households and are best suited to protect the interest of all concerned.
44. They argued that the proposed appointment of the public trustee should only be considered for appointment after those entitled to administer the estate having been appointed have failed and/or made it impossible to effectively administer the estate as was held in the case of *In re Estate Gurdial Kaur Sibra (Deceased)* [2020] eKLR.
45. The 1<sup>st</sup> Petitioner in support of their position that they are most suited to be appointed as administrators referred this Court to the cases of *In re Estate of Dorcas Omena Binayo (Deceased)* [2021] eKLR & *In re Estate of Wamira* (2002) KLR 12.

### **Analysis and Determination**

46. Revocation of grants is provided for in Section 76 of the *Law of Succession Act*. Under Section 76 (e) a grant will be revoked for having become useless and inoperative. In this cause, the grant herein has become useless and inoperative following the death of the executor, Juma Kiplenge. This is because such a grant cannot be used at all. A grant is a certificate issued to a particular person or individual. It is personal. It can only be used or uttered by the person or individual named in it. In this cause it can only be used by Juma Kiplenge. He cannot now possibly do so as he is dead. The estate cannot be left un-administered forever. (See- *in the matter of the estate of Mwangi Mugwe alias Elieza Ngware (deceased)* and *in the matter of the estate of Mary Wairimu Ngware (deceased)* Nairobi H.C.succession no.2018 of 2001 and *in the matter of the estate of Githaiga Gichuki (deceased)* (2014) eKLR.
47. The said grant is therefore available for revocation, and I hereby do revoke it.
48. Having revoked the grant, the major issue that falls for determination is who is best suited to be appointed as an administrator of the deceased's estate to complete its administration?
49. Section 66 of the *Law of Succession Act* sets out an order of preference to guide the Court when it comes to the appointment of administrators in intestacy. Priority is given to surviving spouses, followed by



surviving children. Siblings of a deceased person, where she is survived by a spouse or children, come way down the list. The provision says:

- “ 66. Preference to be given to certain persons to administer where deceased died intestate When a deceased has died intestate, the Court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—
- (a) surviving spouse or spouses, with or without association of other beneficiaries;
  - (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
  - (c) the Public Trustee; and
  - (d) creditors ...”

50. Patently, therefore, from the above provision, the surviving spouse and children of the deceased have prior right or entitlement in intestacy to administration over the estate of their deceased relative over other relatives. Other relatives of the deceased have a lesser right to administration, and, ideally, they ought not jostle for position with the surviving spouse or the children.
51. Section 66 of the Act should also be read together with Rule 26 of the *Probate and Administration Rules*. Rule 26 requires that where the person petitioning for representation in intestacy has a lesser or equal right or entitlement to administration, he should either get the persons with superior or equal right or entitlement to renounce their right or to consent to him applying or cause citations to issue to them to apply for representation. These provisions are in mandatory terms. Rules 26 of the Probate and Administration Rules says as follows:

“ 26

- (1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
- (2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the Court may require.”

52. In the instant case, the Applicant proposes that grant of letters of administration with will annexed be issued to either the Public Trustee or Mrs. Elizabeth Wanjiku Waithaka whom she described as her cousin. She averred that she is best suited to administer the estate as she is impartial.
53. According to the Applicant the Petitioners are unsuitable to be appointed as administrators by dint of being defendants in the aforesaid suit Nakuru High Court Misc. Suit No.33 of 2016. She believes they are conflicted and cannot administer the estate of the deceased impartially. It is her further position that the said proposed administrators are unsuited for the said appointment since they have intermeddled



- with the estate of the deceased. She also stated that the 2<sup>nd</sup> to 4<sup>th</sup> Petitioners are not widows of the deceased.
54. The Petitioners on their part argued that Pursuant to Section 66 of the *Law of Succession Act* they are best suited to be appointed as administrators of the deceased's estate by virtue of their relationship with the deceased and also because they represent the interests of the deceased's five households.
  55. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents stated that they are widows of the deceased whereas the 5<sup>th</sup> Respondent averred that he is the son of the deceased. They also disputed intermeddling with the estate of the deceased.
  56. I have perused the last will and testamentary of the deceased Philip Njoka, he has listed all his family members. Therein the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are described as the wives of the deceased and it is therefore clear that they are widows of the deceased.
  57. It is not in dispute that the 4<sup>th</sup> Respondent is the son of the deceased.
  58. The contention by the Applicant that the Petitioners by dint of being defendants in the aforesaid suit are conflicted is not backed by any concrete evidence. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* provides that "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
  59. Therefore, there is no basis upon which this Court, can arrive at a finding that the Petitioners are conflicted and cannot administer the estate impartially. This Court is being invited to speculate and declines such an invitation.
  60. The Applicant further referred this Court to her affidavit sworn on 30<sup>th</sup> January 2020 in support of her contention that the Petitioners have been intermeddling with the deceased estate by collecting rents. However, I note that pursuant to the orders issued by my brother A.K Ndungu on 8<sup>th</sup> September 2016 such collection of rent is lawful. The Court in the said orders expressly stated "status quo on collection of revenue and rent shall be maintained and any party so collecting is put on notice that at the appropriate juncture, accounts shall be rendered"
  61. There is no evidence therefore that the Petitioners are intermeddlers in the estate of the deceased.
  62. Going by the provisions of Section 66, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents, have prior right to administration over the Public Trustee or Mrs. Elizabeth Wanjiku Waitaha.
  63. The Petitioners are also representatives of the five households and I have no doubt that they are the right persons to apply for a grant of letters of administration de bonis non for purposes of completing the administration of the estate herein.
  64. Accordingly, the Court rejects the Applicant's proposal and proceeds to make the following orders: -
    - i. That the grant herein made on 19<sup>th</sup> November 2013 is hereby revoked, having become useless and inoperative following the death of the named executor, Juma Kiplenge.
    - ii. That Ms. Teresia Njeri Njoka, Ms. Margaret Damat, Ms. Lucy Wanjiru Njoka and Mr. Joseph Njuguna are hereby appointed Joint-Administrators of the estate of Philip Njoka Kamau (Deceased).



- iii. That a grant with exception, of letters of administration with the Will Annexed, is hereby issued to the Administrators for the purpose of executing the Will and administration of the estate of the deceased.
- iv. The Administrators shall be expected to forthwith within 45 days to prepare and file a comprehensive status update of the estate noting to include All expenses incurred, Revenues collected, assets, liabilities and any other incumbrances on the estate.
- v. That the Administrators shall complete the execution of the Will and administration of the estate including all pending litigations against the estate.
- vi. Any Party Aggrieved by this ruling is granted 30 day leave to appeal.
- vii. That the matter shall be mentioned after 45 days, on the 8<sup>th</sup> December, 2023 for the purpose of a status update of the estate by the Joint Administrators and further directions.
- viii. That costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**S. MOHOCHI**

**JUDGE**

