



REPUBLIC OF KENYA



**In re Estate of Nicholas Mworja Mwereria (Deceased) (Succession Cause 143 of 2009) [2023] KEHC 22998 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22998 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 143 OF 2009  
EM MURIITHI, J  
SEPTEMBER 28, 2023**

**IN THE MATTER OF THE ESTATE OF NICHOLAS MWORJA MWERERIA (DECEASED)**

**BETWEEN**

**BETTY KAJUJU MUTWIRI ..... APPLICANT**

**AND**

**JANET KAREGI MWORIA ..... 1<sup>ST</sup> RESPONDENT**

**BISHOP WILLIAM MURIUKI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The is a ruling on an application dated 28/12/2022 expressed to be brought under sections 47 and 76 of the [Law of Succession Act](#) and Rule 73 of the [Probate and Administration Rules](#) seeking specific orders as follows:

- “1. That the Certificate of grant of probate and the resultant Certificate of confirmation of grant of probate issued on 8/3/2010 be revoked.
2. That the executrix of the estate of the deceased namely Janet Karegi Mworja be removed and be replaced with John Kimathi Mworja.
3. That the court issues an order directing that a management company to be formed for the proper administration of the estate of the deceased and be structured in a manner that it takes into account the interests of all the beneficiaries.
4. That the estate of the deceased be fully redistributed in respect of the assets identified as:

Meru Municipality Block 11/165



Meru Municipality Block 1/44

Meru Town Block 1/348

Plot No 1137 and 1138 Rentals

5. That the court issues such appropriate orders as may be necessary for the effective administration of the estate assets.
  6. That costs of this application be provided for.”
2. The grounds of the application are set out in the application as follows:
- “(i) The estate is being run down by the executors who were appointed and they have been unable, unwilling and or incapable to render account and or offer proper management of the assets.
  - ii) It is arising from this that there is need to remove one of the executors of the estate as well as distribute the estate fully. This will free the beneficiaries from any further acts of wastage of the estate. The applicant seek to replace her mother as an executrix.
  - iii) The estate since 2010 has not had harmony and the executors have not been able to bring the beneficiaries together and have a meeting of minds. In light of this I seek the estate be fully distributed upon the replacement of one of the executors.”
3. The supporting affidavit sets facts relied to justify the removal of the executor primarily as follows:
- “2. One of the administrators is my mother Janet Karegi Mworira. My father had died testate and the estate is yet to be fully distributed despite the assets being identifiable as per the Will.
  3. The grant was issued and confirmed on 8/3/2010 as per the deceased's will. (Annexed here a copy of the certificate of confirmation of grant marked Exhibit 1 A and the Will marked IB respectively).
  4. That estate assets that are yet to be fully distributed are:  

Meru Municipality Block 11/165  
Meru Municipality Block 1/44  
Meru Town Block 1/348  
Plot No 1137 and 1138 Rentals
  5. The estate assets are being run down by the executors who were appointed and they have been unable, unwilling and or incapable to render accounts and or offer proper management. This hassled the Certificate of grant of Probate
  6. It is arising from this that there is need to remove one of the executors of the estate as well as distribute the estate fully. This will free the beneficiaries from any further acts of wastage of the estate. I seek to replace my mother as an executor.



7. The estate since 2010 has not had harmony and the executors have not been able to bring the beneficiaries together and have a meeting of minds. In light of this I seek the estate be fully distributed upon the replacement of one. of the executors.”
3. The 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on 8/5/2023 alleging that the applicant is the stumbling block to the implementation of the Grant as eh fails to attend family meetings thereon, contribute to renovation of estate rental properties and asserts that despite having grown elderly and sickly she has given accounts on the estate, annexing 2014 accounts and that she has been paying school fees for the deceased’s grand children from proceeds of plot nos. Meru Municipality Block 1/348 and Plots 1137 and 1138.
4. The 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn on 26/4/2023 indicating that the 1<sup>st</sup> respondent had failed to positively respond to his requests, as co-executor, for accounts and calls for meetings with the family members with a view implementing the Will., pointing out that plot Meru Municipality Block II/165 left to the benefit of deceased’s grandchildren should directly benefit the children who had become of age. He added by a further replying affidavit of 19/5/2023 that “my co-executor is in total disregard of the rule of law and has declined to pay college fees for Elvin Koome & Brian Rogers who are direct beneficiaries of BlockII/165.
5. A beneficiary Elvin Koome Mworio supported the application by an affidavit sworn on 27 /4/2023 alleged that the Petitioners had refused to pay for his school fees and that one Ken Kimaita was collecting rent illegally and had purported to sign an agreement for lease to Safaricom of an estate yet he was not the administrator.
6. Counsel for the parties then made written and oral submissions on the application and ruling was reserved.
7. At the outset, the court has considered whether there is power to remove an executor from executorship and appoint an administrator in her place. With respect, I do not think there is power to appoint a person to be an executor in place of the executor appointed by a testator. While the court may remove an executor for inability to perform the powers and duties of the personal representative under sections 82 and 83 of the *Law of Succession Act*, it cannot be permissible to appoint a person as an executor under the Will. It can only be valid to appoint an administrator in the same way as in a petition for Letters of Administration with Will annexed who implements the Will of the testator without having been named as attestator. Such an administrator of course, has powers from the date of the appointment as an Administrator unlike the Executor whose authority begins from the date of the Will. See section 80 of the *Law of Succession Act*.
8. However, to revoke the grant of Probate and remove the executor as prayed in Prayers Nos. 1 and 2 of the Summons herein, there must have been, in the context of the ground of non-performance, default in terms of section 76 (d) of the *Act* which provides as follows:

“(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

- (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or



- (ii) to proceed diligently with the administration of the estate;
    - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular....”
9. The power to revoke a grant for non-administration and failure to produce accounts is conditional upon prior notice and want reasonable explanation as the power is section 76 (d) crystalizes where the personal representative “has failed, after due notice and without reasonable cause” to do any of the acts set out therein.
  10. It also appears that in accordance with the Codicil to the Will dated 9/7/2007, the 2<sup>nd</sup> respondent’s involvement is all justified when there is a dispute, in accordance with Clause 1 thereof as follows:
    - “1. The executor of my said Will will be assisted by chief George Koome and Bishop Muriuki in case of any dispute regarding the administration of my estate.”
  11. In the case of the properties subject of the application herein, the Codicil has guided that the family committee should deal, as follows:
    - “2. Paragraph 23 and 24 be deleted and replaced as follows:
      - 23. The Family Committee and Executor of this WILL will decide how the hotels for the properties namely Meru Municipality Lock I/44, Meru Municipality Block Ii/165 And Meru Municipality Block I/348 will be managed for the benefit of the beneficiaries.”
  12. On the evidence, it has not been demonstrated that there has been due has failed, after due notice and failure “without reasonable cause”to diligently complete administration. The Court will, therefore, give the executrix an opportunity to complete the administration and distribution of the estate, and to render full and accurate and updated accounts of the administration of the estate from the date of death of the deceased when the power of executorship commences todate.
  13. I should agree with the 1<sup>st</sup> respondent that the issue of provision for George Gitonga is subject to demonstration that he is a grandchild of the deceased within the meaning of the Will, and this aspect of the dispute must be determined on evidence later.
  14. However, there is a case for the payment of college fees for the deceased’s grandchildren heirs to Meru Municipality Block II/165. It cannot be justified that the beneficiaries under a Will suffer lack of education for which the property is expressly reserved under a Will. That would be subverting the will of the testator. The Court must make necessary order to implement that bequest.
  15. The personal representative of a deceased person, in position of the 1<sup>st</sup> Respondent, is under a duty under section 83 (g), (h) and (i) of the Act to –
    - “(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in



respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.

- (h) 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 dealings therewith up to the date of the account;
- (i) 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.”

16. If as alleged by the Counsel for the 1<sup>st</sup> Respondent the estate of the deceased is 99% distributed, the 1<sup>st</sup> respondent should quickly be able to complete administration and distribution and produce final accounts within the six months. The Court, therefore, directs the completion of administration and production of accounts in terms of section 83 (g) (h) and (i) of the [Law of Succession Act](#) with in six months from the date of the order herein.

### Orders

17. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The Applicant’s Application dated 28/12/2022 is declined.
2. In terms of section 76 (d) the Court gives notice to the 1<sup>st</sup> Respondent to complete administration and distribution of the estate and produce full and final accounts of the administration from the date of commencement of the executor’s authority, Pursuant to the duties of a personal representative under section 83 of the [Law of Succession Act](#), the Court directs that the Executor shall with file accounts as required under section 83 (g) (h) and (i) of the [Law of Succession Act](#), within six months from today.
3. The Court directs, in the interests of best interests of the child and in terms of the Will of the deceased that the 1<sup>st</sup> Respondent do pay within the next 30 days, the college and other school fees for the grandchildren of the deceased as may be due, with liberty to apply.
4. Mention for compliance and further directions on 15/2/2024.
5. Each party shall bear its own costs.

Order accordingly.

**DATED AND DELIVERED ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

