



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 96 OF 2000

IN THE ESTATE OF RAHAB WANJIKU EVANS

AGNES WAITWIKI ZAMBETAKISAPPLICANT

-VERSUS-

CHRISTINE WANGARI GACHEGE.....1ST ADMINISTRATOR

ELIZABETH WANJIRA EVANS.....2ND ADMINISTRATOR

MARY WANJIKU GACHIGI4TH ADMINISTRATOR

-AND-

KENYA COMMERCIAL BANK LTD.....INTERESTED PARTY

RULING

1. The Court of Appeal delivered its judgment on 18/12/2014, in which it directed that the winding up of the Deceased's estate be supervised by the Deputy Registrar High Court Nakuru and the Resident Judge in Nakuru. Subsequently, numerous applications have been filed in the case, pitching administrators, beneficiaries, and interested parties against each other. Part of those applications were determined in the Ruling of 27/01/2020 while some abated or were withdrawn.

2. The result of extended post-judgment litigation has been the delay in the final winding up of the Deceased's estate. It is this delay that the 12th Beneficiary (hereinafter 'the Applicant') states prompted her to file the Application dated 11/09/2019. The Application was supported by the 1st to 9th Beneficiaries and opposed by the 1st Administrator, the 2nd Administrator, the 4th Administrator, and the Kenya Commercial Bank, (hereinafter 'the Bank'). The other parties did not participate in the Application.

3. The Application seeks the following orders:

1. Spent

2. THAT Kshs. 2,298,915/= be paid out of amounts already deposited in the Court or any other amounts held to the account of the estate to settle outstanding rates and any other penalties and interest that may have accrued in respect of those properties known as Nakuru Municipality Block 7/526, 527 and 528 given to the Applicant.

3. THAT this Honourable Court be pleased to make orders necessary for the progression of the winding up of the estate of Rahab Wanjiru Evans (Deceased) including as follows:

a) That Nakuru municipality block x/xxx be subdivided forthwith and shared in accordance with the order of the Court of Appeal made on 18th December 2014.

b) That shares in Gema and Nyakinyua at Gilgil be ascertained and sold forthwith and the proceeds of sale be shared equally amongst all the beneficiaries of the estate of the deceased in accordance with the order of the Court of Appeal made on 18th December 2014.

c) THAT the Deputy Registrar of the High Court at Nakuru do ascertain and verify proceeds of Bank Accounts held by the Deceased in Kenya Commercial Bank Limited Nakuru, National Bank of Kenya and Grindlays Bank of the United Kingdom etc or

any other identifiable financial institution and upon ascertainment and verification the proceeds be shared forthwith in accordance with the order of the Court of Appeal made on 18th December 2014.

d) THAT the estate's liabilities to the 3rd Parties be ascertained, verified and approved by the Court forthwith.

e) THAT the Deputy Registrar of the High Court at Nakuru do ascertain and verify the status of the suits relating to L. R No. xxx/xxxx (Mavoko) and the court be pleased to give such directions and make such orders as it deems fit regarding the said property.

f) THAT all the movables namely Isuzu FTR, KXF xxx Nissan Tanner KTxxx, Peugeot KPW xxx, xxx Station Wagon, Peugeot xxx Pickup KLM xxx, BMW KYQ 079, assorted scrap metal, new, Massey Ferguson plough, Massey Ferguson Tractor, twelve (12) heads of cattle be valued and sold forthwith and the proceeds of sale be applied in accordance with the order of the Court of Appeal made on 18th December 2014.

4. THAT this Honourable Court do issue a Notice to show Cause to Kenya Commercial Bank Limited and its Managing Director and/ or Chief Executive Officer JOSHUA OIGARA, to attend court on a date set by the court to state why they should not be punished for disobedience of the orders of the Honourable Court made on 25th June 2015 and 5th August 2015.

5. THAT this Honourable Court do find that Kenya Commercial Bank Limited and its Managing Director and/ or Chief Executive Officer JOSHUA OIGARA, are in contempt of its orders made on 25th June 2015 and 5th August 2015 and orders that Kenya Commercial Bank Limited and its Managing Director and/ or Chief Executive Officer JOSHUA OIGARA, do each pay a fine in such a sum as the court may see fit to order and in default of such fine, their movable and immovable assets be attached and sold in execution of this order to satisfy the penalty for contempt and, in addition to the fine, JOSHUA OIGARA be committed to civil jail for six months or such period as this Honourable Court may deem fit and just to order.

6. THAT the costs of this Application be provided.

4. The Application is supported by the grounds on the face of it and the Affidavit of Agnes Waitwika Zambetakis dated 11/09/2019. The Applicant deposes that the import of the Court of Appeal Judgment dated 18/12/2014 was that the proceeds of Bank Accounts held by the Deceased be shared equally among the Beneficiaries after verification by the Deputy Registrar but to date, the same is yet to be complied with.

5. She deposes of her knowledge of the Deceased's two accounts, one current and one a fixed deposit account and states that this Court (Kimaru J) in its Judgment dated 10/07/2007 distributed the principal amount in the current account and ordered that any interest on the said amount be paid out to the beneficiaries on a pro-rata basis.

6. It is also the Applicant's deposition that the Court has made various orders specifically; those dated 25/06/2015 and 06/10/2015 requiring the Advocates of the 1st and 2nd Administrators to inquire into the amounts held in those accounts and requiring the Bank to produce statements of accounts showing interest payable to the estate of the Deceased in respect of the fixed deposit account, respectively.

7. According to the Applicant, despite the Bank being duly served with the aforesaid orders *vide* letters dated 05/08/2015, 28/05/2019 and 31/07/2019, the orders have not been complied with. She states that instead, the Advocates for the Bank have only furnished statements relating to the current account and no reason has been given for this noncompliance making the Bank a stumbling block to the winding up of the Deceased's estate. To the Applicant, any further delay in winding up the Deceased's estate is an injustice to all the Beneficiaries.

8. The Applicant deposes that all outstanding rates on the properties in the estate and those given to the other beneficiaries have been settled in the sum of Kshs. 4,564,977 save the rates pertaining to the properties given to her, ie Nakuru/ Municipality Block 7/xxx,xxx and xxx. She says that she is unable settle the rates on her own which rates now stand at Kshs. 2,298,915 and which continue to accrue interest and penalties.

9. The Application is opposed by Christine Wangari Gachege, the 1st Administrator *vide* her Affidavit dated 04/11/2020. She deposes that the Court's record contains a tabulation showing the status of the Deceased's accounts at the Bank which was served upon the Applicant's former advocates, Waitere and Co. Advocates. She refers to an ongoing investigation inquiring into the debt owed to the National Bank of Kenya and the current status of the Grindlays Bank in the UK, which she says the Applicant could assist with.

10. According to the 1st Administrator, the orders of the Court of Appeal issued on 18/12/2014 have substantially been implemented and any part that has not been implemented is due to reasons beyond the Administrators' control. She gives examples of L.R xxx/xxxx at Mavoko, L. R No. xxx/xxx at Nairobi, Block x/xxx, and Block x/xxx.

11. She deposes further that all the beneficiaries including the Applicant got 5¼ acre plots with titles duly effected in their individual names and more that Kshs. 16,000,000. According to the 1st Administrator, the Bank gave a detailed account regarding the Deceased's fixed and current account status *vide* their letter dated 30/08/2019 whereby the Kshs. 26,493,950 excluding interest was distributed in accordance with Justice Kimaru's judgment dated 10/07/2007, wherein the other beneficiaries excluding the Applicant and other sisters Jane and Lucy who had not been recognized as beneficiaries received Kshs. 3,600,000/- on a prorata basis.

12. It is her deposition that the issue of prorata distribution on interest is being litigated in Suit No, 10 of 2008 which is still pending and that she does not have information on the issue of cows and movables since she was not directly involved in the same.

13. The 1st Administrator also deposes that the estate's liabilities include numerous cases for and against the estate and 3rd parties which are at various stages, besides cash payments as instructions to lawyers and the maintenance of the estate. She however admits that the subdivision of Block 7/491 is pending because of the review orders pending hearing and determination before the Court of Appeal, while Block 4/259, L. R No. xxx/xxx and L. R No. xxx/xxx are subject of litigation before various courts.
14. The 1st Administrator has listed in detail her alleged expenses towards the defending the estate, including those listed in her Further Affidavit dated 21/04/2021. She states that according to the Order of the Court of Appeal, L. R Numbers xxx/xxx and xxx/xxx were to be sold to facilitate payment of the estate liabilities which due to the apparent unavailability of funds, necessitated the filing of review orders in the Court of Appeal.
15. On the issue of payment of rates, the 1st Administrator contends that the Applicant ought to pursue her previous advocates who informed the Court that the rates had been paid. She says that the Kshs. 4,564,977 released to the firm of Konosi Advocates for payment of rates was on account of Elizabeth Wanjiku, Muthoni, Christine and Nyambura and the Applicant needs to avail the status of rates to the Court to demonstrate whether the rates were paid.
16. The 1st Administrator denies any knowledge on the issue of the Gema Nyakinyua shares. She deposes that the Applicant has always turned down numerous invitations to address her concerns despite her -the 1st Administrator's willingness to address issue relating to the estate. She prays that the application be dismissed.
17. In response to the 1st Administrator's reply, the Applicant filed the Affidavit dated 2/12/2020. She insists on the existence of the Grindlays Bank Account, and states that the 1st Administrator has neither disclosed the nature of the investigations into the said account, who is carrying them out nor presented any evidence that any such inquiry is ongoing.
18. She insists that the Bank has only furnished statements relating to the current account and that it is yet to furnish the statement of the fixed deposit account as ordered by the Court. She denies any knowledge of information relating to any of the properties and cites her lack of knowledge as the reason for seeking the Court's intervention.
19. She contends further that the Administrators have not disclosed the reasons beyond their control for failure to conclude the winding up of the Deceased's estate. To her, the present application only relates to the undistributed part of the estate and not the mount already disbursed to the beneficiaries.
20. She contends that not all beneficiaries are parties to Civil Suit No. 10 of 2008 and the argument that the distribution of interest is being litigated in that suit is made in bad faith since the Court has already found it to be incompetent and there are pending applications to dismiss the same.
21. She dismisses the 1st Administrator's purported lack of knowledge on the issue of cows and movables and states that the same feature in the latter's application dated 20/01/2015. She finds the presented documentation in respect of costs to be misleading and states that the costs presented are not those of the estate but rather those of the 1st Administrator as a beneficiary, which she ought to pay on her own as directed by the Court. This belief she says is based on among other factors, the 1st Administrator only having presented the debts and not mentioned the income received as partly detailed in the 1st Administrator's Application dated 20/01/2015 and in the affidavit of Margaret Wanjiru Mburu dated 10/01/2019. She contends that the estate receives over Kshs. 100,000 monthly on persons operating businesses on Nakuru Municipality Block 7/491.
22. The Applicant believes that the 1st Administrator had information regarding the shares in Gema Nyakinyua and her averments regarding the same are made in bad faith. She denies that any monies were released to M/S Waitere Advocates for the purpose of paying rates or that any rates have band she was not expected to pay rates with her funds.
23. She also alleges that the Municipality Block x/xxx and Block x/xxx in respect of which rates are alleged to have been paid belong to 3rd parties. She denies that the sum of Kshs. 4,564,977 received from Court was paid towards rates for her property.
24. She denies ever having been approached regarding the estate or holding any meetings on Plot No. 258. She believes that the matters raised within the application affect all beneficiaries and ought to be addressed by the Court.
25. The Application is also opposed by Elizabeth Wanjira Evans, the 2nd Administrator *vide* her affidavit dated 19/08/2020. She contends that the present application is frivolous and vexatious and ought to be dismissed.
26. She deposes that from the order of 27/01/2020, the Court ordered that all the monies be released to the depositors as such the estate does not have any monies deposited in Court, from which payments can be done.
27. On the issue of the Grindlays Bank Account, she sates that she followed up on the same and never got any feedback on whether there was an account held by the Deceased. On the issue of the KCB Bank Account, the 2nd Administrator deposes that the firm of Mukite Musangi had *vide* their letter of 15/01/2020 confirmed that the entire sum held in Account Number 045xxx together with the interest had been distributed and that she does not know of any other account.
28. According to the 2nd Administrator, there are cases pending against the estate challenging ownership of respective parcels of land. She deposes that she paid out all outstanding rates relating to the properties transferred to all the Beneficiaries including those transferred to the Applicant and that at the time of transferring the said parcels of land to the Applicant, the rates had been paid in full. She believes that the

rates alluded to by the Applicant could have accumulated at the time when the Applicant had unresolved issues with her previous advocates M/S Kangethe and Waitere Advocates

29. On the issue of movables, the 2nd Administrator deposes that the same were attached and sold in a suit No. 1862/2005 against the estate. She also deposes that Nakuru Municipality Block x/xxx was to be distributed but that the Applicant prevented the process of surveying and has resisted any efforts to implement the order for survey and sale.

30. She believes that the estate's liabilities cannot be ascertained and verified in view of the ongoing cases pending in Court against the estate and the winding up of the estate can only be done once those cases have been resolved. It is also her contention that the application has been brought after inordinate delay-six years after the delivery of the Judgment of the Court of Appeal and that circumstances of the case have changed, a large portion of the estate having been distributed.

31. She denies any knowledge of any shares held in Gema and Nyakinyua in Gilgil and says that she never got any leads on the share Certificate. To the 2nd administrator, the Court of Appeal having finalised the distribution of the estate, this Court's role is only to supervise the winding up of the estate. She prays that the application be dismissed with costs.

32. In response to the 2nd Administrator's reply, the Applicant filed an affidavit dated 05/11/2020. Essentially, her contention is that that the 2nd Administrator was party to the proceedings before the Court of Appeal and is aware of the orders requiring the Bank to produce statements in respect of the Deceased's Fixed Deposit Account as well as the distribution of the amounts in the Grindlays Bank Account.

33. She contends that Elizabeth has not made any follow-up of the Deceased's Grindlays Account and that it is in fact the Deputy Registrar who was ordered to follow up on the same and not the 2nd Administrator.

34. She deposes that she has previously accompanied Elizabeth to Court in *Nakuru ELC 154 of 2018: Mercy Wanjiru Mburu versus Elizabeth Wanjira Evans and 8 Others* and she has concealed the identity of the advocates who filed the case in bad faith. She contends that the said case is a dispute between the beneficiaries who were given Nakuru Municipality Block x/xxx, xxx and xxx and does not concern the estate.

35. The Applicant also denies that the estate owes the amounts being claimed in *Nakuru CMCC 443 of 2020: Kiwaka General Merchants versus Christine Wangare Gachege & 8 Others* as shown in Demand Notices from the County Government of Nakuru show that the rates have not been paid. She says that it is within her knowledge that from the rate demand notices, no rates have ever been paid for the Applicant's properties Nakuru Municipality Block x/xxx-xxx.

36. She believes that the movable properties were not sold in 2007 since the same was never raised at the Court of Appeal and that the Administrators did not know about the suit 1862/2005 as the auctioneer did not write to them and they are still registered in the name of the Deceased as shown in Christine Wangari's application filed on 21/01/2015.

37. It is also her deposition that there are many people who run garages and other businesses on Nakuru Municipality Block 7/491 who are not her tenants, and that she was not occupying land when the surveyor is alleged to have visited.

38. She maintains that the Deceased's shares in Gema Nyakinyua in Gilgil have been the subject of these proceedings and the Court of Appeal and they remain unascertained to date. She denies seeking redistribution but rather, supervision of the winding up of the Deceased's estate in accordance with the orders of the Court of Appeal.

39. The Application is also opposed by the 4th Administrator Mary Wanjiku Gachigi. In her affidavit dated 28/06/2021, she contends that the Applicant has come to Court with unclean hands being that she is the biggest contributor to the delay in winding up of the estate.

40. The 4th Administrator attributes the delay to a number of pending applications relating to the matter to wit, an application for review in the Court of Appeal by the Applicant made on 06/03/2019, an application for review by the 1st Administrator on the issue of subdivision of Nakuru/ Municipality Block x/xxx, an application by the 10th and 11th beneficiaries touching on L.R xxx/xxx and an application by the 2nd Administrator challenging the apportionment of properties by the Court of Appeal. These pending applications, the 1st Respondent contends could have an impact on the instant succession cause, a fact she believes the Applicant is aware of. This the 4th administrator contends is buttressed by a ruling of the ELC court delivered on 17/06/2021.

41. The 4th Administrator states that the Applicant has also filed a similar application dated 09/06/2015, in which she believes one of the prayers was for the survey of Nakuru Municipality Block x/xxx where the Applicant currently resides. According to her, the Court directed the firm of M/S Konosi & Company Advocates to follow up on the survey and a surveyor appointed to undertake the work but was met with hostility instigated by the Applicant to prevent the survey, which she contends contributed to the delay.

42. The 4th Administrator also blames the delay on the application for recusal of Justice Ndungu which she says delayed the matter by over one year. It is for the above reasons that the 4th Administrator believes the Applicant is a vexatious litigant who should not be entertained by this Court and the instant application will occasion even more delay.

43. She contends further that the issues raised in paragraphs 3 (c) and 5 of the Application are *sub judice* since they raise similar prayers as those raised in the application dated 09/06/2015 which is still pending and that the same issues have been discussed and dealt with at family meetings: Specifically, the 4th Administrator deposes that the issue of shares at Gema was concluded as they did not have a share certificate, they were unable to trace the holding branch for the Deceased's Grindlays account and the movable properties were disposed via a Court

Order.

44. The 4th Administrator believes that the present application is an attempt by the Applicant to retry the Succession Cause and the Beneficiaries being old risk not benefiting from the estate due to the frivolous applications by the Applicant. She therefore prays that the application be dismissed with costs.

45. Kenya Commercial Bank Limited (the Bank) opposed the application by filing a Notice of Preliminary Objection dated 21/05/2020 on the following grounds:

1. THAT the Plaintiff herein lacks legal standing as required under Section 79 of the Law of Succession Act Cap 160 of the Laws of Kenya to lodge this claim in her capacity as there exists legal Administrators appointed as such by this Honourable court.

2. THAT the present Chamber Summons Application has been drawn by an unqualified person contrary to Section 9 and 34(1)(f) of the Advocates act Cap 16 of the Laws of Kenya.

3. THAT the issues raised in the instant Application is a duplicate of those to be addressed in Nakuru HCCC No. 10 of 2008.

4. THAT the Application should be dismissed with costs to Kenya Commercial Bank Limited.

46. The Bank also filed a Replying Affidavit dated 05/06/2020 sworn by Nicholas Ngari, the Manager Service Quality Control at the Bank's Nakuru Branch. It is his contention that the Annexures to the Supporting Affidavit sworn by the Applicant constitute Evidence and ought to be expunged from the record since they have not been sealed by a Commissioner for Oaths as required under Rule 9 of the Oaths and Statutory Declarations Rules. It is also his contention that the Bank has never been a party to the Succession proceedings herein to warrant a cause of action against it, such as being held in contempt.

47. He deposes that the Bank provided Bank statements upon being served with the order for distribution which led to the effecting of the order as indicated in Paragraph 3(c) of the Application by the Applicant. Further, the Ledger indicates that the request to place Kshs 20,000,000 on a fixed deposit was effected on 15/10/1999 and the said amount earned an interest on Kshs. 108,287.20 which amount was, together with the principal sum held in suspense upon the lapse of the period within which it was to be placed in FDR (*sic*).

48. He states that the practice is that the Bank will receive request to hold amounts in fixed deposit accounts for a period of between 1 and 12 months and subsequently the holder is required to fill out another form to authorise the bank on instructions to carry out on maturity of the deposit term. According to him, the amount is in suspense because no instructions were issued for renewal of the term of the principal amount which the bank later learnt was due to the death of the account holder.

49. He deposes further that the amount was deposited Deceased's current account on 28/09/20017 *vide* a Court Order requiring that amounts held by the Bank be distributed and the Consent filed in Court on 25/09/2007. The amount distributed in the fixed deposit account was distributed included both the principal amount and the interest earned during that period.

50. He denies that there are any orders made on 25/06 2015 and 06/10/2015 which the Bank has failed to adhere to. He contends that to ascertain the real issues pertaining to the Deceased's estate, it is prudent that the Administrators render accounts as far as the amounts distributed from the accounts held at the Bank are concerned. This he states is statutory duty placed on the Administrators. Lastly, he contends that the Bank's CEO has been needlessly dragged into the proceedings without any evidence that he was personally served with the orders and failed to adhere to them.

51. In response to the Bank's Preliminary Objection and reply, the Applicant filed the Affidavit dated 05/10/2020. She asserts that she has brought the application in her capacity as a beneficiary to the estate of the Deceased and enforcement of the orders by the Court of Appeal is not a preserve of the Administrators. She denies that she is a party to the HCCC No 10 of 2008 and the suit was not instituted by Administrators.

52. She also contends that the Bank never resisted the suit against it in HCC No. 10 of 2008 and affirms that the Bank was ordered to declare interest in the fixed deposit account and the current account and after the Bank failed to comply, an application was filed seeking that the Court declare the interest. This according to the Applicant resulted in a consent where the Bank agreed to settle Kshs. 7,400,000 in the said suit, which consent was later set aside because the parties who instituted the suit had no capacity to sue.

53. She maintains that the Judgment of the Court delivered on 30/07/2007 was specific that the amount paid out was to be exclusive of interest and that the assertion that the amount included interest is misleading since there was no order distributing interest.

54. The Applicant also contends that the Bank having previously complied with the Court's Orders of 30/07/2007 cannot purport to disobey the courts orders under the pretext that it is not a party to these proceedings. To the Applicant the orders required the Bank to produce statements relating to the Fixed Deposit Account and having failed to produce the same the Bank remains in disobedience of the orders of the Court.

55. The Applicant finds suspect the statement furnished by the Bank in respect of the current account does not explain the destination of Kshs. 4,100,487 in the account at the time of the closure of the account. She contends that the Bank has also not produced any document evidencing the Deceased's instructions and the terms of the investment at the time of placing the amount in the fixed deposit account. The Applicant is convinced that the Bank can provide the statement for the Fixed Deposit Account since it does not deny being in possession of the same.

56. The Application was canvassed by way of written submissions. The Applicant's submissions are dated 20/01/2021. On whether the Bank's Preliminary Objection is merited, the Applicant submits that she has brought this application in her capacity as a Beneficiary of the Estate and that Section 79 of the Law of Succession Act and Section 9 and 34(1) (f) of the Advocates Act are not applicable in the circumstances.
57. On the merits of her application, the Applicant submits that first, the rates relating to her properties remain unpaid and the estate has more than enough resources to settle the rates. On the issue of subdivision of Nakuru Municipality Block 7/491 she submits that there has been no stay of the order for division of Nakuru Municipality Block 7/491 and the 2nd Administrator ought to have returned to this Court for assistance if there were any difficulties with complying with that order.
58. On the issue of shares in Gema and Nyakinyua at Gilgil, she argues that no reason has been advanced why the shares could not be ascertained and distributed. On the Bank accounts held by the Deceased, the Applicant maintains that the ascertainment and verification of the same ought to be done by the Deputy Registrar and no reasons have not been advanced why the same has not been carried out.
59. On the issue of liabilities to 3rd parties, the Applicant submits that no evidence has been advanced to show that those costs were incurred by the estate and the same need to be ascertained by the Court, while on the issue of movables, the Applicant argues that the 1st and 2nd Administrators seem to contradict themselves on the status of the movables.
60. Lastly, the Applicant maintains that by not furnishing the Court with the statements of the Fixed Deposit Account, the Bank is in contempt of the Court's orders issued on 25/06/2015 and 05/08/2015.
61. The 2nd Administrator's submissions are dated 15/11/2021. She submits that the Court cannot make its orders in vain. This is because neither the Grindlays Bank account nor the Gema and Nyakinyua shares can be ascertained. Additionally, there being nothing left for distribution in the KCB Accounts and orders sought will not serve any purpose. She also relies on the case of **B v Attorney General** in support of her argument.
62. The 2nd Administrator also argues that the Applicant cannot seek assistance from the Court, having also caused delay in the winding up of the estate. She cites the case of **Mereka & Company Advocates v Invesco Assurance Co. Ltd [2015] eKLR**. On the issue of Costs, the 2nd Administrator cites the case of **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR**.
63. The 4th Administrator's submissions are dated 13/10/2021. The 4th Administrator relies on the cases of **Stanley Makau v R [2020] eKLR** and **McShannon v Rockware Glass Ltd [1978] A. C 795** and submits that the Applicant is not entitled to the relief sought because she is forum shopping.
64. The 4th Administrator also points to the ruling of the Environment and Land Court in ELC No. 42 of 2020 where she submits that the Court found it necessary to stay the proceedings pending the outcome of the case before the Court of Appeal. Consequently, the 4th Administrator is of the view that this Court ought to await the outcome of pending applications before the Court of Appeal whose outcome may affect the outcome of this case. She relies on the case of **B v Attorney General [2004] eKLR 431**.
65. Lastly, she argues that the Applicant is a contributor to the delay in execution and has also filed an application dated 09/06/2015 seeking similar orders and that this is evidence of the Applicant changing goal posts when the forum does not suit her situation.
66. The Bank's submissions are dated 08/12/2020. The Bank argues that that the Applicant has no locus to file the present application since under Section 79 and Section 82 of the Law of Succession Act and that only the appointed Administrators have the capacity to institute proceedings on behalf of the estate of the Deceased. The Bank relies on the case of **Re Estate of Ndiba Thande – (Deceased) [2013] eKLR** and **Troustik Union International & Another v Mrs. Alice Mbeyu & Another Nairobi Civil Appeal Number 145 of 1990**.
67. The Bank also submits that the present Chamber Summons ought to be struck out for having been drawn by an unqualified person contrary to Sections 9 and 34(1)(f) of the Advocates Act. It relies on the cases of **Gayatri Industries Ltd v Harambee sacco Ltd [2004] eKLR** and **National Bank of Kenya Ltd v Anaj Warehousing Ltd [2015] eKLR**.
68. It is also the Bank's submission that the issues raised in the present application are similar to those addressed in HCCC No. 10 of 2008 and offend the provisions of Section 6 of the Civil Procedure Act. It cites the cases of **Thiba Min. Hydro Co. Ltd v Josphat Karu Ndwiga [2013] eKLR**, **Republic v Registrar of Societies – Kenya & 2 Others Ex-parte Moses Kirima & 2 Others [2017] eKLR** and **Kampala High Court Civil Suit No. 450 of 1993- Nyanza Garage v Attorney General**. The Bank therefore argues that the present application ought to be stayed pending the hearing and determination of the **Nakuru HCCC 10 of 2008**.
69. On whether the Bank or its CEO should be held in contempt, the Bank submits that it has already complied with all the Court's orders. The Bank maintains that the issue has also been dealt with in HCCC 10 of 2008 and cites the case of **Barclays Bank of Kenya Ltd. V Elizabeth Agidza & 2 Others [2012] eKLR**.
70. The Bank also submits that there is no proof that the Bank's CEO was served with the orders of the Court and contends that in applications for contempt, there ought to be personal service. It cites the case of **Re Breamblevale Limited [1969] 3ALL ER 1062**. On the issue of service, the Bank cites the case of **Isaac J. Wanjohi & Another v Rosaline Macharia [1998] eKLR** and **Civil Appeal No. 95 of 1998 Mwangi Wang'ondu v Nairobi City Commission**. Lastly, the Bank argues that the duty to provide full and accurate accounts lies with the administrators and cites the case of **Re Estate of Julius Mimano (Deceased) [2019] eKLR**.
71. The Preliminary Objection and the responses by the Administrators raise three preliminary issues. First is the *locus standi* of the

Applicant to bring the present Application. The Bank argues that the Applicant lacks the locus to file the present application since she is not an Administrator of the estate. The Applicant's interest emanates from the fact that she is a beneficiary to the Deceased's estate. From the proceedings herein, it is evident that the Applicant differs with the Administrators on the way the winding up of the estate should be conducted.

72. While it is true from the authorities cited by the Bank that only persons with the grant can institute a claim on behalf of the estate, this is not a new claim, but an application within succession proceedings and does not preclude the Applicant from seeking recourse. In that regard therefore, it is my view, the instant Application is properly before this court.

73. The second preliminary issue is whether there are pending applications before the Court of Appeal that could affect the present proceedings. The Pending applications are alluded to by both the 1st Administrator and the 4th Administrator in their respective Replying Affidavits. The first application for review is the one dated 22/06/2015 by the 2nd Administrator seeking a review of the entire Judgment and who whose grounds mainly concern the distribution of various properties.

74. The 2nd Application for review is the application dated 04/03/2019 by the Applicant herein. The main prayer in the application for review concerns the distribution of monies in the KCB Account, in which the Applicant's main contention is that she was left out of the distribution. In addition to the two applications before the Court of Appeal, there are pending proceedings before this Court and the Environment and Land Court relating to the manner of distribution and the effect of the Orders of the Court of Appeal of 18/12/2014.

75. I agree with the sentiments of *Mutungu J* in his 17/06/2021 ruling in the ELC matter, that considering the pending Applications for review, the Judgment of the Court of Appeal cannot be said to be final. The outcome of the said applications may have an impact on the execution proceedings before this Court. The Supreme Court in *Law Society of Kenya v Attorney General & another [2019] eKLR*, opined that where was a matter before a higher court whose outcome had the potential of affecting an ongoing issue before a lower court, it is upon the lower court to await the decision of the higher court before pronouncing itself.

76. It is clear that the Applicant is frustrated by the rate at which the distribution of the estate of the Deceased is happening. In my view, that is a valid frustration. This Court has urged the Beneficiaries to the estate to consider negotiating a settlement to all the issues bedeviling the orderly distribution of the estate out of Court as such a settlement is far more likely to be optimum and holistic. The retail litigation of specific aspects of the Succession Cause by the different Beneficiaries which has been the *modus operandi* of the parties herein since 2000 when the Cause was filed, in the end, benefits none of them. It is a zero sum game. I take this opportunity to yet again urge the Beneficiaries to consider this course.

77. As far as the present application goes, the issues raised by the Applicant can be summed up as follows:

- a. The payment of Kshs. 2,298,915 from the amounts already deposited in Court or any other amounts held in the account of the estate to settle outstanding rates and any other penalties with respect to those properties known as Nakuru Municipality Block x/xxx, xxx and xxx distributed to the Applicant.
- b. The immediate subdivision and sharing, in accordance with the order of the Court of Appeal, the parcel known as Nakuru Municipality Block x/xxx.
- c. Ascertainment, and distribution of shares in Gema and Nyakinyua in Gilgil;
- d. Ascertainment and distribution of monies held in a KCB Bank Limited, Nakuru; National Bank of Kenya and Grindlays Bank of the United Kingdom;
- e. The ascertainment of the estate's liabilities to 3rd parties and that these liabilities be paid upon verification;
- f. The ascertainment and verification of all suits relating to LR No. 337/1004 (Mavoko) by the Court and for the Court to give directions regarding that property; and
- g. The alleged disobedience of Court orders by KCB.

78. The additional question is whether the issues being raised herein are like those raised in *Nakuru HCCC 10 of 2008*. A look at the Plaint dated 05/02/2008 reveals that one of the orders sought in that suit was that the Bank declare the rate of interest in the fixed deposit account, the current account, and the distribution of the same. These are essentially the same orders the Applicant is seeking against the Kenya Commercial Bank in the present Application.

79. Even if the Applicant's argument that she is not a party to the said suit was to be accepted, the issue of ascertainment and distribution of financial assets of the estate were determined by the Court of Appeal and any variation or clarification of those orders would have to be dealt with by the Court of Appeal in the pending applications for review before that Court. Differently put, it is imprudent for the Court to issue any orders against the Kenya Commercial Bank in the present Application. Any remaining issues related to the KCB will be dealt with in *Nakuru HCCC 10 of 2008*.

80. I will now turn to the remaining questions with quick directions on each before globally disposing the Application:

- a. *Should an amount of Kshs. 2,298,915 from the funds of the estate be used to settle outstanding rates and any other penalties with respect to those properties known as Nakuru Municipality Block x/xxx, xxx and xxx distributed to the Applicant?* The answer to this

prayer must be, in all fairness, in the affirmative. No solid reason has been given by any of the other Beneficiaries and Administrators why the Applicant should be saddled with rates and penalties accruing from properties distributed to her yet the other Beneficiaries were not similarly burdened with respect to properties distributed to them. If it is good for the goose; it surely must be good for the gander. Consequently, the Administrators of the estate are hereby directed in the first instance to pay this amount to the relevant authorities failing which the Court will give appropriate directions depending on whether there are any amounts for the estate held in Court.

b. *Should there be an immediate subdivision and sharing, in accordance with the order of the Court of Appeal, the parcel known as Nakuru Municipality Block x/xxx?* The Court of Appeal's final verdict was that some of the identified properties in the vast estate of the Deceased to be disposed of separately with all the beneficiaries sharing equally in the proceeds. The High Court was directed to oversee the process. The High Court, with the concurrence of the parties, elected to dispose of one property at a time by way of a public auction through bids; with the auction advertised in the local dailies. Some of the properties have already been disposed of this way. It seems that the next step is for the Court to call for a docket management conference with all the beneficiaries to decide the fate of the remaining properties. It is not clear why Nakuru Municipality Block x/xxx should be the next property to be disposed of. This prayer cannot, therefore, be granted at this time.

c. *On the question of ascertainment, and distribution of shares in Gema and Nyakinyua in Gilgil as well as funds in accounts in Kenya Commercial Bank; National Bank of Kenya and Grindlays Bank, UK and certain movable properties including cattle:* The task of ascertaining the extent of the estate falls on the Administrators of the estate. Here, the Applicant claims that there are assets which have not been ascertained. Unfortunately, other than bald assertions, the Applicant provides little evidence of the existence of these assets. Beyond requiring the Administrators to exert their best interests to ascertain whether, indeed, these assets exist and to file a report in Court, this Court cannot grant the relief prayed for by the Applicant.

d. *Should the Court order the ascertainment of the estate's liabilities to 3rd parties and that these liabilities be paid upon verification?* The short answer to this one is in the negative. This is a tautological request. It is the legal responsibility of Administrators to ascertain the estate's liabilities and ensure that they are paid before the distribution of the estate is completed. No declaration by the Court is needed for this.

e. *Should the Court order the ascertainment and verification of all suits relating to LR No. 337/1004 (Mavoko) by the Court and for the Court to give directions regarding that property?* Again, the Applicant is inviting the Court to play the role of Administrators of the estate or to, alternately, give directions regarding matters that are not before it. As said above, the task of defending suits respecting the assets of the estate falls on the Administrators. Additionally, the Court cannot give directions respecting matters that are not before it.

f. *Finally, has it been shown that the Kenya Commercial Bank and its CEO have been in contempt of the orders of this Court?* As analysed above, the answer is in the negative. There are not only legitimate questions whether KCB did comply with the orders of the Court (the Applicant thinks it did not; most other Beneficiaries and KCB think it did), but, as demonstrated above, this matter is *sub judice*. As such, the Court cannot reach the conclusion desired by the Applicant in this regard.

81. In the circumstances, the orders that flow from the answers given by the Court to the questions presented above are as follows:

a. The Administrators of the estate shall organize for Kshs. 2,298,915 from the funds of the estate to be used to directly settle outstanding rates and any other penalties with respect to those properties known as Nakuru Municipality Block x/xxx, xxx and xxx distributed to the Applicant failing which the Court will give appropriate directions depending on whether there are any amounts for the estate held in Court.

b. The Administrators of the estate are hereby directed to ascertain and verify the existence of any of the following assets allegedly owned by the Deceased which have not yet been distributed: Share in Gema and Nyakinyua in Gilgil; funds in accounts in Kenya Commercial Bank; National Bank of Kenya and Grindlays Bank, UK and any movable properties including cattle. The Administrators are hereby directed to file a report in Court respecting these assets including the efforts made to trace them and their findings within ninety (90) days of today.

c. All the other prayers contained in the Application dated 11/09/2019 are declined.

82. Each party to bear their own costs.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF FEBRUARY 2022

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.