



REPUBLIC OF KENYA



**In re Estate of Dysseler Mireille Lesoipa (Deceased ) (Succession Cause  
40 of 2019) [2022] KEHC 3373 (KLR) (21 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 3373 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 40 OF 2019  
TM MATHEKA, J  
APRIL 21, 2022**

**BETWEEN**

**ATTORNEY GENERAL ..... APPLICANT**

**AND**

**HARI GAKINYA & COMPANY ADVOCATES ..... RESPONDENT**

**RULING**

1. On 4<sup>th</sup> October, 2019, a Petition for letters of administration with Written Will annexed was filed by John Hari Gakinya with respect to the estate of Dysseler Mireille Lesoipa.
2. In the Affidavit in support of the Petition Mr. Gakinya deponed that the deceased died on 15<sup>th</sup> July, 2019 at MP Shah Hospital as evidenced by the annexed Certificate of Death and that the deceased had left a Written Will dated 15<sup>th</sup> November, 2018. The Written Will was annexed setting out the deceased's assets, the beneficiaries to the estate, the mode of distribution and the name of the Executor as the firm of Hari Gakinya and Co. Advocates.
3. The Will also indicated that the testator's body was to be cremated within 24 hours of her demise at the cost of her estate.
4. There was also a letter dated 25<sup>th</sup> September, 2019 from the office of the Assistant Chief, Willie Muthee Bress of Baharini Sub-location, indicating that the deceased hailed from Bondeni Location in Nakuru East Sub-County.
5. On 11<sup>th</sup> November, 2019, a grant was issued to the firm of Hari Gakinya & Co. Advocates. A Summons for Confirmation of Grant was filed on 21<sup>st</sup> November, 2019.
6. On 19<sup>th</sup> December, 2019, all the beneficiaries were present except Daniel Moens, however, the Directorate of Criminal Investigations (DCI) through No.65625 Sgt. Franklin Kiraithe filed a Notice of Motion supported by his affidavit. The gist of the application by Directorate of Criminal



Investigations is that they had received information that there were suspicions ongoing with the deceased estate, in particular that the Will was a forgery, and they needed a bit of time to supply the court with the results of their investigations.

7. He deponed that initial investigations from two (2) persons listed as beneficiaries brought up two (2) different answers, one, the alleged driver of the ‘deceased’ told him that he had driven the ‘deceased’ to the airport, yet another of the beneficiaries, told him that the ‘deceased’ had died.
8. In the peculiar circumstances of the case, it was necessary to stay the proceedings to allow the Executor to be served with the application for his response as the allegations made by the DCI were serious.
9. Later, vide a letter dated 3<sup>rd</sup> November, 2020 the State Department of Interior and Citizen Services Civil Registration Services in Ministry of Interior and Coordination, Ref. No.CR/ADM/VER/VOL.1/2019/10 stated that the Certificate of Death S/No.160028/Entry No.0261922811 used to bring this petition was not authentic.
10. Another letter from MP Shah Hospital dated 31<sup>st</sup> December, 2019 indicated that the deceased was never treated at their facility and any documents concerning her treatment at the facility had not been issued by MP Shah Hospital.
11. On 15<sup>th</sup> February, 2021, the court was informed that Mr. Hari Gakinya and one of the beneficiaries, Lucy Waithera Njuguna were found, through DCI investigations to have been involved in the disappearance of the deceased herein and were facing related charges in court in Nairobi.
12. Meanwhile, Mr. Karanja Mbugua for the Executor sought to have the Summons for Confirmation of the Grant heard.
13. This motion appears to have provoked the Hon. Attorney General to file the Notice of Motion dated 15<sup>th</sup> October, 2021 under Article 156 (5) of *the Constitution*, Sections 6 and 7 of the Attorney General Act, Sections 8 and 9 of the *Law Reform Act*, Order 53 rule 1 (1), (2) and (3) of the Civil Procedure Rules, all enabling laws, seeking the singular order that the Hon. Attorney General be joined in this matter as an interested party.
14. The application is supported by the Affidavit of Sonia Wanjeri, State Counsel. Ms. Wanjeri depones that the AG seeks to be joined pursuant to Article 156 of *the Constitution* of the Attorney General Act. That it is both in the interest of justice, and the public interest that the Hon. Attorney General be joined in this cause, for the following reasons: -
  - i. That it has come to the attention of the Hon. Attorney General that this cause is based on documents obtained illegally, through fraud and concealment of material facts and the Hon. Attorney General has the duty to maintain and protect the integrity of public documents and records. That as a party to this cause the Hon. Attorney General must be in a position to shed light on the forged public documents which form the substratum of this cause.
  - ii. That the documents have been found, through the investigations by DCI to be forgeries, the Certificate of Death, has been rejected both by the State Department of Civil Registration, and, the MP Shah Hospital and the letter by the Assistant Chief has been denied by the said Assistant Chief who stated that he wrote it based on the certificate of death.
  - iii. That the ‘Executor’ of the beneficiaries, had been charged with the murder of the deceased in this cause in *Nairobi Criminal Case No. 10 of 2020 – Republic vs Lucy Waithera Njuguna And Nairobi Criminal Case No.15 Of 2020 Republic Vs John Hari Gakinya*



- iv. That the fact that the respondent was bent on executing the purported Will of the deceased, in view of the foregoing, necessitated this application.
15. Ms. Wanjeri annexed to her application the letters from the State Department of Civil Registration the letter from MP Shah Hospital, a copy of the Certificate of Death and a copy of the Statement by the Assistant Chief Baharini Sub-location.
16. The application is supported by the Further Affidavit of No.93501 Sgt. Oliver Nabonwe. He deponed to the investigations of the case upon receipt of information relating to the documents used to file the cause. He deponed that the purported Will of the deceased was subjected to forensic examination by a document examiner who confirmed that the signature on the Will was not made by the deceased, that the respondent earlier had been charged with the murder of the deceased following investigations by DCI officers; that immediately after the disappearance of the deceased, the two, the respondent and one of the beneficiaries had taken possession of the deceased's properties including her house, motor vehicle registration number KBP 298E, her mobile phone, assorted bank cards, passport with stamps that she had travelled to India on 12<sup>th</sup> December, 2018 and returned on 30<sup>th</sup> June, 2019, which was not the case. He asked the court to apply Section 76 of the Law of Succession Act.
17. The application is opposed through the Affidavit of John Hari Gakinya sworn on 21<sup>st</sup> November 2021. His averments were on the law and precedent dwelling mainly as to who is an interested party and when a party can be joined as an interested party. He began by pointing out that the Law of Succession Act did not have any provision for Notice of Motion, that the case in a Succession Cause can only be moved by way of Summons. He proceeded to make points of law, that proceedings under Laws of Succession Act are sui generis they are not Civil or Criminal proceedings and other than the provisions under Rule 63 (1) of the Probate and Administration Rules imported from the Civil Procedure Rules, no other provisions could be imported for application, and not order 53 of Civil Procedure Rules. He referred the court to the matter of the Estate of Ruth Wamucii (deceased) Nairobi High Court Probate & Administration No.10112/1992, that in succession proceedings the only parties known are petitioners, objectors, beneficiaries, caveators, creditors, citors, citees etc. and there was no provision for interested parties.
18. Citing Article 156 of the Law of Succession Act, he deponed that there was no provision for the joinder of the Attorney General, in a Succession Cause. He cited SKOV Estates Ltd & 5 Others vs Agricultural Development Corporation and Another (2015) eKLR and Marigat Group Ranch & 3 others vs Wesley Chepkemei & 19 others (2014) eKLR, where Sila Munyao J, dealt with application for joinder of interested parties. He cited the holding of the Supreme Court in Trusted Society of Human Rights Alliance Vs Mumo Mutemo (2014) eKLR, Francis K. Muruatetu & another Vs Republic & 5 others on who is an interested party. In addition, he cited: -Black's Law Dictionary's definition of an interested party: The definition in the Mutunga Rules, Legal Notice LN No.117/2013 of an interested party. Mativo J's rendition in Kenya Medical Laboratory Technologies Board & 6 Others Vs A.G & 4 others (2017) eKLR. Supreme Court in CCK & 4 others Vs Royal Media Services Ltd & 7 Others (2014) eKLR. Meme Vs Republic (2004) IEA 124
- Relying on the foregoing he deponed that the application by the Hon. Attorney General had to fail because; This was a private matter with no public interest, the applicant did not have any identifiable stake, legal interest or duty in the proceedings.
19. Parties filed written submissions to support their rival position.
20. The Hon. A.G. set out two (2) issues for determination: -Whether the application should fail for want of citation of the proper provisions of the law, and whether the A.G. should be joined as a party.



21. The respondent did not set out issues for determination, however, upon my reading of the submissions and the consideration of the affidavits, and the authorities cited, it appears to me that the issues for determination are: -
  - i. Whether the application is properly before me.
  - ii. Whether the Hon. A.G. can be joined in a Succession Cause in the manner he seeks to be joined herein.
  - iii. Who should bear costs?
22. Article 156 of *the Constitution* establishes the office of the Attorney General. Article 156 (5) and (6), it states that: the A.G. shall have the authority with leave of court to appear as a friend of the court in any civil proceedings where the government is not a party, and that the Attorney General shall promote and protect the rule of law and defend the public interest.
23. Section 6 of the Office of Attorney General Act No.49/2012 provides for the powers of the Attorney General, these include at Section 6 (2) (a) the power to, with the leave of court, appear at any stage of the proceedings appeal, execution on incidental proceedings before any court/tribunal.
24. Article Section 7, it states that the Attorney General shall have the right of audience in proceedings of any suit or inquiry of an administrative body which the Attorney General considers: -
  - (a) To be of public interest and involves public property or
  - (b) .....
25. It is argued by the respondent that none of these provisions allow the Attorney General to properly place the application before me. Worse still that the Attorney General relies on the wrong provisions of the Civil Procedure Code. That the fact that the Attorney General has not cited the provisions of Section 47 of the *Law of Succession Act* & Rule 73 of the *Probate & Administration Rules*, this court cannot invite itself to invoke the same in order to consider the application by the Attorney General.
26. For the applicant, it is argued that it is a Constitutional imperative that court's concern themselves with substantive justice and not matters of procedural technicalities. That *the Constitution* stands supreme to all the other laws as provided for under Article 2 (4).
27. The applicant proceeds to submit that this court has the inherent power under Section 47 and of the *Law of Succession Act* and Rule 73 of the Probate & Administration Rules to consider this application.
28. I do not wish to spend much time on the procedural failures of the application and fact that *the constitution* makes provision for parliament to enact laws for a reason, and parties are bound to cite the appropriate and correct laws upon which their claims lie. Suffice it to say that it is also my duty to exercise judicial power to achieve the ends of justice, and to see what the real issue is before me even in the absence of those statutory citations.
29. In this case the Attorney General is of the view that the respondent should not be allowed to execute the Will, in this cause, and the Attorney General, is the one with the information to stop that, that besides, that the Attorney General is required by law to intervene, because the cause has been brought in violation of the law.



30. Clearly, under Section 47 of the [Law of Succession Act](#):-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

This Court is empowered to entertain any application and under Rule 73, the court has the inherent power to ensure that the ends of justice are met. The Rule 73 of the Probate & Administration Rules states: -

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

31. The court does not need to be nudged to exercise its inherent jurisdiction. Hence it is my view that the application is properly before this court.

32. On the question whether the Attorney General should be joined as an interested party, the respondent argued that there is no place for interested parties in Succession Causes. That the Law of Succession does not recognise any party known as an interested party. I must state here that this is misleading.

33. A simple word search of the term interested party in the [Law of Succession Act](#) pops 4 references to that term: -Section 75 (2) on continuing trust, where an interested party can apply. Section 76, on revocation of grants, where an interested party can apply. Section 83, on the duties of personal representatives where at(h) an interested party can apply to have the personal representative produce a full and accurate inventory of the assets and liabilities of a deceased person, and account of the dealings therein at(i), where an interested party can apply to have the personal representative produce to court a full and accurate account of the completed administration.

34. Clearly therefore, the Law of Succession recognizes that other than petitioners, objectors, citees, citors, protestors etc, there can be parties who are described as interested party who can participate/bring applications in the succession cause.

### **Back to the Hon. Attorney General**

35. To demonstrate when a party can be joined in a matter, the applicant cited *Meme vs Republic* (2004) I EA: - where the court observed that a party could be joined in a matter where;

- (i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.

36. That the Attorney General had demonstrated through the evidence of the forged documents, the Murder Charge against the respondent that he had an identifiable stake in the matter. That the presence of the Attorney General “will aid the court in this matter in ensuring that the deceased’s estate not only devolve to the rightful beneficiaries, but more importantly that the court would not be used to propagate an illegality.”



37. That the function of the Attorney General to “review and oversee legal matters pertaining to the administration of estates and trusts” per Section 5 (1) of the Office of Attorney General Act demonstrates the fact that the presence of the Attorney General in this matter is foreseen by the provisions of Section 2 (1) of the Law of Succession Act.
38. On his part, the respondent relied on numerous authorities demonstrating the definition of an interested party, reiterating the averments of his Affidavit. He cited authorities where courts had declined to join parties as interested parties and the grounds upon which a party could be joined as an interested party, all in all that an interested party is one who has an identifiable stake/legal interest/duty on the proceedings, though he or she was not a party to the cause ab initio. He/she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his/her interest will not be articulated unless he himself/herself appears in the proceedings and champions his/her own cause (See *Trusted Society of Human Rights Alliance vs Mumo Matemo & 5 Others* (2014) eKLR).
39. Has the Hon. Attorney General placed himself in the foregoing description? What is the Attorney General’s identifiable stake/legal interest? How will he be affected by the decision herein? What interest does he have in the matter that must be articulated by the Attorney General himself?
40. It is argued for the applicant that his duty is to protect the rule of law, to protect the integrity of public documents, and the public interest as it is provided for in the constitution and the law. The respondent argues that the Attorney General is not empowered to join proceedings as an interested party but as a friend of the court, and only in civil proceedings. Let me say that those are the clear words of the Constitution at Article 156 (5) of the Constitution.
41. Firstly, the Attorney General has not applied to join these proceedings as a friend of the court.  
“Amicus curiae” – someone who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because the person has a strong interest in the subject matter.” See Black’s Law Dictionary 10<sup>th</sup> Edition page 102.
42. Secondly, these are not civil proceedings. There are authorities galore to that effect that the Civil Procedure Code is only applicable to Succession proceedings to the extent that Rule 63 (1) of the Law of Succession Act allows.
43. The Court of Appeal has said as much in Josephine Wambui Wanyoike Vs Margaret Wanjiru Kamau & Another (2013) eKLR. That places succession proceedings apart, and hence they would not be open to the Attorney General to apply to appear as a friend of the court.
44. It is my view that the provision of Section 5 of the Office of Attorney General Act with respect to the administration of estates is more legislative than participatory in specific succession causes.
45. Under Section 7 of the Attorney General is empowered to take part in matters that are of public interest/involve public property or involve the legislature/the judiciary or an independent department or agency of the government. To start with the latter, it is evident that the property involved here belongs to the estate of Dysseller Mireille Lesoipa if indeed she is deceased.
46. Is this a public interest matter? Does it involve public property?
47. Is it a public interest matter? Section 7 (2) of the Office of Attorney General Act states that the Attorney General shall.... satisfy the court of the public interest or public property. The fact that the documents used to file the matter herein were obtained illegally, are subjects for forgery and the executor of the Will is charged with murder, are matters of public interest, in the sense that the state is involved in



the prosecution of the persons suspected of perpetrating the identified illegalities. The Republic in the Criminal Cases facing the respondent in my view stands, in for the public interest as the outcome of those proceedings will indeed have an effect on the outcome of the proceedings herein. The Attorney General, does represent public interest, but in the circumstances of this case he has not demonstrated that he has a legal duty, to appear in the cause. There is no demonstrable public interest in the cause itself to warrant his joinder. His joinder will not result in the settlement fall the questions involved in the proceedings with to respect the determination of the beneficiaries, their specific shares and the distribution of the estate. The issue of the illegal or fake documents will be settled in the criminal case where the public interest is in view very well taken care of, as can be seen from the investigations conducted by the DCI.

48. Is it a matter of public property? The answer is no. The issue relates to the private property of an individual.
49. The position that the Attorney General can only join certain proceedings as a friend of the court was held by H. A Omondi J (as she then was) In *Centre for Human Rights and Mediation vs County Government of Uasin Gishu & another; Commission on Revenue Allocation (1<sup>st</sup> Interested Party) & Another* [2019] eKLR.

“As for the Attorney General who is listed as the 2<sup>nd</sup> Interested Party, his role is set out in Article 156 (4) (b) of *the Constitution* as the principal legal adviser to the government of Kenya, and his task basically is to represent the national government in court or in any other legal proceedings to which the national government is a party. The only exception is where he seeks to appear as a friend of the court in civil proceedings to which the government is not a party, then he shall seek leave of court to appear as a friend of the court. The petitioner has not demonstrated the role the Attorney General plays in the county legislation, particularly the Uasin Gishu County Equitable Development Act. I agree with Mr Yego that the 2<sup>nd</sup> Interested Party is unnecessarily enjoined in these proceedings, and is hereby struck out.”

50. So what happens next?

The respondent did not respond to any of the factual averments made in the affidavits supporting the application. He did not controvert any of the said facts, and yet they have serious implications as regards his position as the executor of the deceased's alleged will.: -

- i. The fact that he is facing a murder charge for the death of the person whose Will appoints him as executor.
- ii. The fact that the Will was found to be a forgery.
- iii. The fact that the Certificate of Death, was found not to be authentic by the State Department of Civil Registration.
- iv. The fact that the MP Shah Hospital denied that the said Dysseler Mireille Lesoipa was ever a patient in their facility or even received any treatment there, yet it is indicated as the issuer of the information in the certificate of death.
- v. The fact that the Assistant Chief who wrote the introductory letter stated that he never knew the deceased, did not know her residence, and only wrote the letter because he saw a Certificate of Death.

All these facts are sitting, staring at the court in this cause uncontroverted by the respondent, yet the respondent wants this court to proceed with the confirmation proceedings of the grant issued to him.



51. Is it possible, that in view of these uncontroverted facts, the court can simply turn a blind eye, and proceed as though they did not exist?
52. The court is forced to take judicial notice of their existence and to proceed on the basis that that is how it is.
53. Section 47 of the [Law of Succession Act](#) states that the court has jurisdiction to hear and determine any application and make such orders as may be expedient. This read together with rule 73 of the Probate and Administration Rules which saves the court powers inherent jurisdiction to make orders necessary for the ends of justice/prevent abuse of the process of court enables o me to proceed and make the orders I think would in the circumstances, serve the interest of justice.
54. Section 76 of the [Law of Succession Act](#) gives this court the power to suo motu, at any time revoke/annul a grant of representation whether or not, where the grant was obtained fraudulently by the making of a false statement, by means of untrue allegation of fact. I have set out the facts deponed in the supporting affidavits, which stand uncontroverted and can therefore, only be presumed to be the facts. These facts not only hold the hand of this court, but compel it to proceed to revoke the grant of representation issued to the respondent herein.
55. What next?  
That leaves the estate herein without an administrator and that is not envisaged by the [Law of Succession Act](#). With a will said to be a forgery the estate remains testate until it is established otherwise.
56. This cause presents the court with peculiar circumstances where the subject of the cause could be dead or missing. Nevertheless, the estate of the deceased cannot be left without an eye watching over it. It is my view that the eye of the Public Trustee would be the most appropriate to watch over the estate as there are no known family members of the deceased who could be called upon to take over the proceedings.
57. For the fears of the Attorney General with respect to this estate ought to be legitimately be addressed. The Public Trustee is an appointee of the Attorney General as per Section 5 of the [Public Trustee Act](#) Cap 168. Under Section 27 the Attorney General may make rules to among other things define the duties of the Public Trustee, through the [Public Trustee Act](#), the Public Trustee can, and does represent the Attorney General in Succession Matters, where the Public Trustee is appointed.
58. My view is that this is a case that falls within the provision of Section 7 of the Pubic Trustee Act where the court is empowered, in certain circumstances it considers fit, to grant letters of administration to the Public Trustee.
59. Having said the foregoing, I find and hold as follows: -
  - i. That the application for the Attorney General to be joined in this cause as an interested party is not tenable as the Attorney General has not demonstrated the public interest/public property involved.
  - ii. The Attorney General has not demonstrated that he falls within the defined parameters of an interested party in this cause.
  - iii. The application is refused.
  - iv. The respondent did not controvert any of the facts in the Supporting Affidavit and those facts bring the grant herein within the parameters of Section 76 (a) (b) and (c) of the [Law of Succession Act](#).



- v. The grant of representation (Probate) issued to the respondent be and is hereby revoked.
- vi. That this circumstances of this case bring it within the purview of Section 7 of the *Public Trustee Act*. A Grant Letter of Administration Intestate to issue to the Public Trustee pursuant to Section 7 of the *Public Trustee Act* to deal with the estate pending the resolution of the issues herein
- vii. The Public Trustee to appear in Court within 15 days of issuance of the grant of administration of intestate, for directions
- viii. The application for joinder is refused, with no orders as to costs.
- ix. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF APRIL, 2022.**

**MUMBUA T. MATHEKA**

**JUDGE**

**In the presence of;**

CA Edna

Mr. Karanja Mbugua for Respondent

Ms. Wanjeri for Office of the Attorney General

