



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Boniface Gathege Macharia (Deceased) (Succession Cause 10 of 2020) [2022] KEHC 11471 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEHC 11471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 10 OF 2020
FN MUCHEMI, J
JUNE 30, 2022
IN THE MATTER OF THE ESTATE OF BONIFACE GATHEGE
MACHARIA (DECEASED)
BEATRICE NDUTA WARUIRU (SUING ON HER BEHALF AND AS
NEXT FRIEND OF THE MINOR CHILD
MCCAIN MACHARIA).....INTERESTED
PARTY/APPLICANT
VERSUS
SAMUEL MWANGI
GATHIGA.....RESPONDENT/ADMINISTRATOR**

RULING

Brief facts

1. The application for determination is dated December 10, 2021 brought under article 53(2) and 159 (2) (d) of the *Constitution*, section 4 (3) of the *Children's Act*, sections 26, 27, 28 and 83 of the *Law of Succession Act* and rules 45, 46 and 73 of the *Probate and Administration Rules* seeking for orders for reimbursement of kshs 316,700/- and kshs 135,000/- paid by the applicant as school fees and maintenance respectively for the minor. The applicants further seeks for provision of school fees in the sum of kshs 58,000/- from the estate of the deceased and an order directing the administrator to honour the deceased's parental duties to the minor towards the monthly maintenance and school fees as decreed in Children's Case No 68 of 2009 pending the confirmation of the grant.
2. In opposition to the application, the respondent has filed Grounds of Opposition dated April 26, 2022.
3. The applicant thereafter filed a Further Affidavit dated May 11, 2022 in response to the replying affidavit.



The applicant's case

4. The applicant is the mother to the minor and it is not in dispute that the deceased was the father. Prior to the deceased's death the children's court in Nyeri Children's Case No 68 of 2009 the court decreed that the deceased has parental responsibility over the minor, the applicant was granted legal and actual custody over the minor with access granted to the deceased. The court further decreed that the applicant and the deceased shall equally contribute towards food and clothing of the minor with the deceased remitting kshs 5,000/- per month. The parties were directed by the court to share equally the educational expenses for the minor with the applicant providing for the educational accessories and the deceased paying for the school fees of the minor. Both the applicant and the deceased were to share medical expenses for the minor equally.
5. The applicant contends that the respondent met his shared parental responsibility as decreed by the court until his untimely death. Since January 2, 2020, when the deceased passed on, parental provision due from the deceased has not been honoured. Consequently, there is currently a due total sum of kshs 316,700/- and kshs 135,000/- being school fees and maintenance respectively.
6. The applicant states that she is currently self-employed running a small grocery business from which she has solely supported herself and the minor. Since the pandemic her small business has suffered great loss and she is currently unable to secure the requisite fees to enable the minor to continue his education uninterrupted. Moreover, the minor has suffered great distress during the past academic year being chased from school for unpaid school fees arrears. She further contends that due to the nature of her business, she is only able to offset the fees by making small deposits at the end of the week which puts the minor at risk of being chased away from school and failing to sit end of year examinations.
7. The applicant further states that a grant of representation to the estate of the deceased was applied for by the respondent on July 20, 2020 and a grant of letters of administration issued to him on November 4, 2020 but the same has not been confirmed.
8. The applicant states that she is aware that the deceased in his last will bequeathed the minor with a parcel of land in Mweiga and a residence which has rental income. Furthermore, the deceased bequeathed his other children with his moveable property including the deceased's motor vehicles, the monies in his bank accounts and he gave authority for withdrawal of kshs 1,000,000/- from the account on a yearly basis. The applicant further contends that she is aware that the deceased gave instructions in his will that all the money and interest that shall be standing to his credit in all bank accounts under his name at the time of his death, shall exclusively be used for running of his business affairs.
9. The applicant avers that despite the gift bequeathed to the minor, the parental responsibility of the deceased continues through the executor of his will and currently the administrator duly appointed by the court.
10. The applicant further states that she has struggled in the interim to borrow and meet her contribution and that of the deceased's towards maintenance and the educational expenses for the minor but it has now become impossible to continue pending the confirmation of the grant and hence she makes the instant application in the best interests of the child.

The respondent's case

11. The respondent contends that the applicant having rejected the income generating assets shows that she is self-reliant. Further the respondent states that the court orders on child maintenance were specific and the assets bequeathed are more than enough to meet these obligations. As such, the respondent



avers that the application is bad in law and an abuse of the court process and the respondent contends that he shall raise a preliminary objection on a point of law for the same to be struck out.

12. The applicant filed a Further Affidavit and states that she has not at any time being given any assets of the deceased whether income generating or otherwise. She further states that she is aware that the deceased bequeathed the minor with land to be carved from title no Mweiga/Kamatongu Block 7/5 Rungare and a portion of the deceased's residence in Nyeri, but despite the gift, the minor has not been adequately provided for. Further, she states that she is aware that one of the properties bequeathed to the minor generates rental income at a monthly rate of kshs 15,000/- which is paid to the firm of Gathiga Mwangi & Co Advocates. The applicant further avers that she is aware that the deceased has other rental incomes such as:
 - a. Maru A Building plot no Nyeri/Municipality BLK III/28 located at Nyeri town which comprises of a restaurant, boarding and lodging with 47 self-contained rooms, for 600/- per night;
 - b. Three shops on the ground floor with a monthly rent of kshs 40,000/- each;
 - c. Plot no Nyeri Municipality BLK III 214 also known as Dan Selection Building which comprises of 5 shops with a monthly rent of kshs 20,000/- and 15 units containing 2 bedroom residential houses with a monthly rent of kshs 12,000/
 - d. Plot no LR no 15178/20 that holds a portion of the deceased residence in Nyeri, specifically where the deceased used to live bequeathed to the minor, 10 units containing 2 bedroom residential houses with a monthly rent of kshs 15,000/- each;
 - e. Mercedes Benz lorry KBQ xxxx 997 tipper and caterpillar Crawler tractor KHMA xxxx all giving monthly incomes.
13. The applicant reiterates that the child maintenance orders were specific and that since the deceased's demise, she has not received any maintenance from the estate of the deceased. The applicant states that the deceased through his administrator has a parental responsibility of the minor child. Further, she states that the welfare of the minor is of paramount importance and as such requiring immediate attention as otherwise the child would continue missing school and his rights will be infringed.
14. Parties canvassed the application by way of written submissions.

The applicant's submissions

15. The applicant reiterates what she deponed in her affidavits and relies on the cases of *E J vs K J B & Another* [2014] eKLR; *R N M vs R M N* [2017] eKLR and *In Re Estate of J K C (Deceased)* [2018] eKLR and submits that this court has the discretion and powers to grant the orders sought for the provision of the minor's school fees and maintenance pending the confirmation of the grant.

The respondent's submissions

16. The respondent relies on his grounds of opposition and submits that he is not holding any funds for the estate and therefore the demand for kshs 316,700/- has no basis as he is not in a position to fulfil it if the court was to order the same. The respondent further contends that the family assets and businesses were a going concern in the hands of the family members and his role was only to effect the deceased's wishes.
17. The respondent states that he can only have the moneys to release if the court allows the disposal of the properties bequeathed to the minor. He further states that he can invest them in a fixed deposit



account in the bank and give the applicant not less than kshs 300,000/-. The respondent submits that the applicant has rejected his bequest and thus the only option is to wait for the conclusion of the probate matter.

18. The respondent relies on the case of *Caltex Oil Kenya Ltd* [1989] KLR and submits that this court has no jurisdiction and the matter ought to be determined in the children's court. Further, he makes reference to article 53(2) of the *Constitution* and section 4(3) of the Children's Act and submits that the minor has refused and rejected the bequest made to him by the deceased.
19. The respondent further submits that the authorities relied on by the applicant do not relate to the facts in this case. In all the authorities, the courts knew the source of funds before directing the administrators to make the payments whereas in the instant case, the respondent has no source of funds and this issue can only be resolved after the confirmation of the grant. As such, the respondent prays that the application be dismissed with costs.

Issues for determination

20. The main issues for determination are:-
 - a. Whether the court has jurisdiction to determine this application.
 - b. If the court finds that it has jurisdiction, the issue will be whether the applicant is entitled to the orders sought.

The law

Whether the court has jurisdiction to determine the dispute

21. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows:-

I think that is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

22. Clearly if this court lacks jurisdiction the matter will be at an end as the court will have to down its tools and take no further step.
23. A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
24. The Supreme Court of Kenya in the case of *Samuel Kamau Macharia vs KCB & 2 Others*, Civil Application No 2 of 2011 stated thus:-

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere



procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in *the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application no 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

25. Article 165(3) of the Constitution confers the High Court with jurisdiction and provides:-
(3) Subject to clause (5), the High Court shall have-Unlimited original jurisdiction in criminal and civil matters;
26. The children’s court on the other hand is established by section 73 of the Children’s Act which provides:-
There shall be courts to be known as the children’s courts constituted in accordance with the provisions of this section for the purpose of:-
Conducting civil proceedings on matters set out under Parts III, V, VII, VIII, IX, X, XI and XIII.
27. The substratum of this matter revolves around the estate of the deceased and thus the appropriate forum to address this would be the High Court. I therefore find that the court has jurisdiction to determine this application.

Whether the applicant ought to be granted the orders sought

28. It is not in dispute that the minor is a son to the deceased and he was bequeathed in the will made on October 18, 2019, being two properties that is Parcel 25 of Mweiga/Kamatongu Block 7/5 Rungare as well as the deceased’s current residence to be divided equally and a portion to go to the minor. The only issue of contention is the minor’s school fees and his maintenance. I have looked at the deceased’s will and note that most of his estate in in form of immovable properties with three bank accounts in Equity, Standard Bank and Safari Savings Account. The deceased bequeathed money in his accounts to his daughter and son from another marriage I suppose and further directed that Kshs 1,000,000/= to be withdrawn annually from his savings account to be used for the running of his business affairs. I have also noted that some of the immovable properties host businesses which generate income but none of this properties or businesses have been bequeathed to the minor.
29. The deceased gave specific instructions on the use of the Kshs 1,000,000 to be withdrawn from his account. This is the fund that the applicant is targeting for school fees of the minor. The administrator vehemently opposes the application on grounds that there is no specific funds to meet the needs of the applicant and the minor.
30. In my considered view, for the court to allow the proposed fees of an estimated amount of Kshs 500,000/= to be withdrawn from the annual business funds, would be to interfere with the written and last will of the deceased which would be outside this court’s mandate. The applicant has a chance to either contest the will or to join hands with the administrator to have the grant confirmed without further delay. Thereafter, she will have the time to re-organise her financial affairs. In this regard, I direct that a hearing be fixed by either of the parties for the application for confirmation of grant dated April 16, 2021.



31. It is not in dispute that the deceased had been ordered to pay for maintenance and education of the child alongside the applicant in Nyeri Children's case no 68 of 2009. The said orders are still valid and can still be enforced against the estate of the deceased in the children's case. This option is still available for the applicant in my considered view subject to substitution of parties in that case.
32. Having considered all the foregoing I find that this application lacks merit and it is hereby dismissed with no order as to costs.
33. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 30TH DAY OF JUNE, 2022.

F MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO-LINK THIS 30TH DAY OF JUNE, 2022

