



**Gutuba v Kinyanjui & 2 others (Succession Cause 2574 of 2015)
[2022] KEHC 3279 (KLR) (Family) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3279 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2574 OF 2015
AO MUCHELULE, J
JUNE 29, 2022**

BETWEEN

MARY WAKARI GUTUBA APPLICANT

AND

SUSAN WANJIRU KINYANJUI 1ST RESPONDENT

WINGRACE WANJIKU WAMBUGU 2ND RESPONDENT

ESTHER WANGARI KARABA 3RD RESPONDENT

RULING

1. On September 27, 2021 Justice S.N. Mutuku delivered a judgment in this cause in which the questions regarding who the beneficiaries of the estate of the deceased were, what comprised the estate of the deceased and how that estate was to be distributed, were answered. The applicant Mary Wakari Gutuba was aggrieved by the entire judgment and filed an appeal to the Court of Appeal to challenge it, and have it set aside. With the appeal was filed summons under Order 42 rule 6(1), (2), (3), (4) and (5) of the *Civil Procedure Rules* and section 47 of the *Law of Succession Act* (cap. 160) to have the judgment and all consequential orders stayed pending the hearing and determination of the appeal. The application was opposed by Susan Wanjiru Kinyanjui (1st respondent), Wingrace Wanjiku Wambugu (2nd respondent) and Esther Wangare Karaba (3rd respondent) who essentially want the benefits of the judgment realised.
2. On her part, the 2nd respondent filed summons dated October 25, 2021 to have the court appoint a valuer from Llyoid Masika Ltd, Tysons Limited or Gimio Limited to value the estate to enable its distribution to the respective beneficiaries. The court had directed the administratrices of the estate to have its property valued within 60 days from the date of the judgment. That had not been done. The 1st and 3rd respondent supported the application while the applicant opposed it.



3. The background of this dispute is that the deceased David Mwaura Karaba died intestate on September 11, 2015. He left Thika Municipality Block 1/1774, Thika Municipality Block 1/1775 and Thika Municipality Block 1/919 that were substantially developed with monthly rental income in excess of Kshs.800,000/=. He also left an account at KCB Thika branch. During his life, he married three times. The wives were the 2nd respondent, the 1st respondent and the applicant, in that order. The deceased's mother was the 3rd respondent. It is apparent that the deceased left the following five children:-
 - a. Caroline Wangari Mwaura;
 - b. Angela Esther Wangari Mwaura;
 - c. Esther Lynda Wangari;
 - d. Peter Karaba Mwaura; and
 - e. Judy Wanjiru Mwaura.
4. On October 16, 2015 the 2nd respondent and Angela Esther Wangari Mwaura petitioned this court for the grant of letters of administration. The 1st and 3rd respondents objected to the petition for the grant, and the latter cross-petitioned for the grant. Subsequently, the parties entered into a consent which the court adopted on March 8, 2016. The parties were to open a joint account from which each widow was to draw Kshs.100,000/= monthly and the mother Kshs.50,000/= monthly. On October 3, 2016 the parties entered into another consent which the court adopted. By the consent the three widows and the deceased's mother were appointed as the administratrices of the estate of the deceased.
5. The dispute was subsequently referred to court annexed mediation. An agreement was reached and adopted as the order of the court on June 4, 2018. The agreement was that the 1st and 2nd respondents were not the widows of the deceased and that their two children were not children of the deceased. The cause was subsequently heard through affidavit evidence and written submissions, which led to the judgment of September 27, 2021 that is the subject of the appeal. The court identified the three widows, their children and the deceased's mother to be the beneficiaries of the estate of the deceased. The estate was distributed in the ratio of 3:2:2:1. It was held that the consent orders which had been adopted as the orders of the court had not been varied and/or set aside and were therefore still in effect. The court then postponed the sharing of the estate until the estate had been valued.
6. In the application for stay the applicant stated that, on appeal, she will be arguing that she and her witnesses were not given the opportunity to be heard, the court having taken directions that the matter would be heard *viva voce*. She stated that the court had not considered that she had minor children, compared to the others, and that the 1st and the 2nd respondents had remarried and ought not to have been considered as beneficiaries. The 2nd respondent's response was that the two consents had settled the question of who were the beneficiaries and had recognised the two respondents as widows of the deceased.
7. Regarding the application to appoint valuers, the 2nd respondent deponed that the four administratrices were unable to agree on a valuer which had delayed the valuation and disposal of the case. It was stated that the applicant had intermeddled with the estate. This was denied by the applicant. She stated that the estate had been providing accounts. She further stated that she had been making withdrawals from the account and sharing the same.
8. Counsel for the applicant and counsel for the 1st respondent filed written submissions which I have read and considered.



9. The applicant has a constitutional right to appeal a decision that has aggrieved her. The competing consideration is that the respondents have a judgment which they are entitled to execute. The court has the duty to balance these interests, while making sure that the appeal, if successful, should not be rendered nugatory (*RWW v EKW* [2019]eKLR).
10. Whether or not the appeal has any chances of success is not for this court to estimate. I consider that the application was not brought late, and that no security was offered. If, however, stay is not granted, the estate will be valued and distributed to the respective beneficiaries who may, among other things, dispose of their benefits. This may materially and substantially compromise the interest of the applicant and render the appeal nugatory.
11. The respondents complained that the deceased died in 2015 and the estate as remained undistributed since then. I bear that in mind.
12. Having taken all these factors into consideration, I will stay the execution of the orders of the Court issued in the judgment dated September 27, 2021 for 120 days. This will allow the applicant's appeal to be heard and determined, or for her to approach the Court of Appeal for stay, whichever will be appropriate. The applicant has been indulged, and therefore will pay the costs of her application.
13. As for the application by the 2nd respondent seeking that the estate be valued, it is allowed but shall take effect at the expiry of the 120 days, if the Court of Appeal does not order otherwise. She will have the costs of the application.
14. Whoever is aggrieved has 30 days to appeal to the Court of Appeal.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE 2022.

A.O. MUCHELULE

JUDGE

