



REPUBLIC OF KENYA



**In re Estate of Benard Njeru Kamau (Deceased) (Succession Cause E013 of 2022) [2022] KEHC 14158 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14158 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
SUCCESSION CAUSE E013 OF 2022  
LM NJUGUNA, J  
OCTOBER 19, 2022**

**IN THE MATTER OF THE ESTATE OF BENARD NJERU KAMAU (DECEASED)**

**BETWEEN**

**CAUDESIA WAMBETI NJERU ..... APPLICANT**

**AND**

**ROSEMARY KINA NJERU ..... RESPONDENT**

**RULING**

1. The chamber summons dated November 24, 2021 has been brought before this court by the applicant herein and it seeks for the following orders that;
  - i. Pending the hearing and determination of this cause and distribution of the estate, this Honourable Court be pleased to order that a sum of Kshs 50,000/= monthly be paid to Caudesia Wambeti Njeru, the applicant herein from the estate funds held at Co-operative Bank, Embu Branch, and Account Number 011xxxx.
  - ii. This Honourable Court be pleased to grant orders that it may deem fit and just to grant in the circumstances.
  - iii. Costs be provided for.
2. It is premised on the grounds on its face and it's supported by the annexed affidavit sworn by the applicant on November 24, 2021.
3. In a nutshell, the application is based on the fact that the applicant, a 72 year old has no ability to engage in any income generating activity and has moved this court for the reason that her only source of income being in the form of rental proceeds are derived from one of the assets registered in the sole name of the deceased but which property was developed by both of them during the life time of the deceased. That the proceeds emanate from the rental building on LR Gatari/Githimu/3510



- comprising 11 units of various rental amounts. She has deponed that the estate collects an average of Kshs 50,000/= monthly as evidenced in the statement of accounts from the Rent Collection Agent which is annexed to the applicant's affidavit.
4. It was her case that vide a court order issued on December 16, 2020 in Succession Cause No E034 of 2020 in the Chief Magistrate's Court at Embu, the court ordered that the rental proceeds derived from the property be deposited in a joint account operated by the applicant and the respondent. That the respondent who is a co-administrator and co-signatory to the account has since refused to execute any request for withdrawal of the monies and this has caused her great distress as she mainly depend on the same for survival. The applicant further swore that she has been left destitute to depend on her children for maintenance yet she can derive some income from the rental properties which she together with the deceased built during the deceased's lifetime. Given that this matter may take quite some time before it is finalized, she urges the court to grant the prayers as sought.
  5. The respondent in opposing the application filed a replying affidavit sworn on July 19, 2022 wherein it was deposed that the application lacks merit and is an abuse of the court process aimed at delaying the expeditious disposal of the main suit. That the only pending issue in this matter is the filing of summons for confirmation of the grant as had been previously directed by the trial court. It was her case that in the interest of justice and expeditious disposal of the suit herein, the parties do file their preferred modes of distribution in order for the court to make a final determination on the mode of distribution. She reiterated that the said rental units were developed by the deceased and herself and therefore the applicant is misleading the court.
  6. That her attempts to indulge the applicant in meetings have been unsuccessful and have been met with utmost hostility and harassment. She deposed that out rightly, the applicant has an intention of disinheriting her for the reason that she clearly omitted her name in the Succession Cause herein. This court was therefore urged to dismiss the application herein for the same to be conclusively determined upon parties filing their preferred mode of distribution.
  7. The applicant swore a further affidavit in which she reiterated the contents of the supporting affidavit and further swore that the respondent is untruthful by indicating that she contributed to the development of the rental properties in question unto which she was put to strict proof. That it would be against the interest of justice to proceed with the distribution of the estate before this court provides interim relief as she requires medical and other basic needs. She reiterated that she does not have any source of income for her daily sustenance and if there is any doubt, then she is ready to be put to strict proof on the same. She stated that the deceased used to cater for her upkeep periodically from the proceeds of the said rented units. It was her case that she used to run a posho mill and a shop at the time the rented units were being constructed which directly contributed to the family's finances thus leading to the construction of the said units. That her intention in filing the application herein is to seek for interim relief from this court as the respondent has unjustly denied her what is rightfully hers. She reiterated that together with her family members, they have never been hostile to the respondent and to the contrary, it is the respondent who has been difficult and uncooperative. In her own view, this matter is not yet ready for confirmation of the grant for the reason that there are procedural irregularities which need to be adequately addressed.
  8. When the application came up for hearing, the court gave directions on filing of submissions and both parties complied with the court directions.
  9. The applicant submitted that she deserves to be granted the orders for the reason that she is a dependent and she placed reliance on Sections 27 and 29 of the [LSA](#) and the High Court Decision in the [Re Estate of JNK \(Deceased\)](#) [2017] eKLR. In the same breadth, it was submitted that given that the applicant



is elderly, she can no longer engage in any gainful employment and as a result, she is unable to afford drugs and other basic needs as she suffers ill health. Further, for the reason that the respondent has not been cooperative to ensure the final conclusion of the matter herein, she stands to suffer irreparably and lose her dignity. Reliance was placed on the case of *Re the estate of Simon Ndung'u Njoroge (deceased)* [2005] eKLR.

10. The respondent submitted that the orders sought are undeserved for the reason that the only issue pending before the court is the distribution of the estate. That once the grant is confirmed, the applicant will have the provisions she is seeking for. It was submitted that granting the orders sought would amount to gross injustice if only one dependent is provided for, to the exclusion of all the others and the estate will end up being misused and wasted to the other beneficiaries' detriment. It was further submitted that the applicant has failed to adduce any evidence to support her claim, in that, no medical documents were attached in support of the application.
11. That the applicant is a dishonest litigant as she has other sources of income and that she has been exclusively utilizing some of the properties belonging to the deceased such as motor vehicle make Toyota Corolla KBE 342M and Nissan Datsun pick-up prior to the distribution of the estate and confirmation of grant. In the same breadth, it was submitted that the applicant has taken unnecessarily long to seek for the orders sought in that she moved this court in the year 2021 and it is only recently that the applicant picked up the matter again. The respondent thus prayed that the court should order the parties to file their preferred mode of distribution so that the estate herein is distributed once and for all. Reliance was placed on Section 71(1) of the *LSA* and the case of *Re Estate of Cecil Peter Okumu (deceased)* [2019] eKLR. In the end, it was submitted that the orders sought are not merited for the reason that the applicant has failed to satisfactorily prove her case.
12. The court has carefully considered the application herein together with the affidavits in support of the respective cases and notes that it has been called upon to determine whether the said application is merited.
13. Courts are replete with decisions relating to withdrawal of funds from a deceased person's estate and the principles governing the same. In Succession Cause 1667 of 2007, *Re the matter of the Estate of EMO (deceased)*, an application for withdrawal of funds for the school fees of the deceased's child was made where Nambuye J stated as follows:-

“It is apparent that a dependent wishing to be provided for out of a deceased person's estate before final distribution of the estate has to approach the seat of justice through two avenues. The first avenue is where a petition has been presented and the second avenue is where no petition has been presented:

  - (1) Where a petition has been presented and a grant made, ad colligenda bona, or full grant, but no confirmation made, the dependent addresses the application for provision of a dependent to the court asking the court, to direct the orders to the petitioner grant holder.
  - (2) Where no petition has been presented and no grant issued, the plea for provision is directed to the court.”
14. Further, it is given that the decision on whether to withdraw from the Estate of a deceased person should only be founded on a 'need be basis'. Musinga J in Nakuru High Court Succession Cause 539



of 2001, *In Re the Estate of Simon Ndungu Njoroge (Deceased)* [2005] eKLR stated as follows in respect of an interim application for the withdrawal of funds from the Estate of a deceased person,

“...the applicant should not expect the court to order any payment to her so as to meet her personal financial obligations like repayment of the loan which she obtained from Equity Bank Ltd. Where the court has to intervene to order some interim disbursement of an estate’s funds pending distribution of the estate amongst the beneficiaries, it will only do so to meet some basic necessities of a beneficiary or to alleviate excessive suffering of such a person but not otherwise.”

15. It follows then that the Court faced with such an application should take into consideration the immediate and existing needs of the dependents, pending the determination of a Succession Cause.
16. In the instant case, the applicant has made a plea before this court seeking for orders that this court grants her a sum of Kshs 50,000/= monthly from the estate funds held at Co-operative Bank, Embu Branch, and Account Number 011xxxx pending the distribution of the estate herein which I have considered. In support of her application, she has submitted that she is aged 72 years and in failing health and that she is not in any gainful employment nor is she involved in any income generating activity. The application has been opposed by her co- administrator who is her co-wife citing reason that the applicant is a dishonest litigant as she has other sources of income and further that, she has been exclusively utilizing some of the property belonging to the deceased such as motor vehicle make Toyota Corolla KBE 342M and Nissan Datsun pick-up prior to the distribution of the estate and confirmation of grant.; of importance to note is the fact that the applicant did not deny the averments herein thus leaving this court in a precarious situation whether indeed the orders sought before it should issue. Under Section 29 of the *Law of Succession Act*, the wife of the deceased is recognized as a dependent. Section 27 of the *Law of Succession Act* provides that: In making provision for a dependent the court shall have complete discretion to order a specific share of the estate to be given to the dependent, or to make such other provision for her by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit and I say so for the reason that Section 47 and Rule 73 of the *Probate and Administration* makes provision that nothing shall limit or otherwise affect the inherent power of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of this court. [See *In re Estate of the Late M’thigai Muchangi (Deceased)* [2020] eKLR; *Millicent Mbatia Mulavu & another v Annah Ndunge Mulavu & 3 others* [2018] eKLR].
17. In the case herein, I note that previously, the parties herein had moved the court for letters of administration of the estate of the deceased where the court in a ruling dated June 23, 2021 directed that joint letters of administration do issue to the parties herein and as such, a partial withdrawal in such a scenario would need the consent of the respondent who is a co-wife to the applicant.
18. In the same breadth, I note that from the said application by the applicant, no evidence has been attached to support the orders sought herein. It is trite that the court should only act on evidence adduced before it and not on assumptions [See *Kenya Breweries Limited & Another v Alex Ephraim Induswe* –Court of Appeal Civil Appeal No 215 of 1997]; and that notwithstanding, it is of importance to note that the effect of allowing partial withdrawal from the Estate of the deceased would be to open a Pandora box where other dependants would also emerge seeking settlement of their upkeep which may eventually lead to some beneficiaries being prejudiced and further the same may lead to partial distribution of the estate. [See *In re Estate of Bethuel Mareka Gecaga (Deceased)* [2021] eKLR].
19. The above reasoning is further supported by the fact that the respondent who is a co-wife to the applicant has equally submitted that she contributed directly to the realization of the said asset and as



such, it would be unfair for the court to let the applicant benefit from the same to the exclusion and/or detriment of the other beneficiaries. [See *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR].

20. Further, I note that this application was filed on November 24, 2021 by the applicant herein. It remains unclear why it took the applicant almost a year to set it down for hearing if indeed the applicant was in dire need of medication and provisions of basic needs as claimed and no explanation has been proffered in support of the same. In the case of *Mathews Sankok Shompa v Kenya Commercial Bank Limited and others* Civil Appeal No 529/2004 where the court held;

“I have considered the reason that the plaintiff gave for failure to prosecute is his case. It is clear that the plaintiff was indolent. It is trite that a case does not belong to the advocate but to the litigant. It is the duty of the litigant to pursue his advocate so that his case may be prosecuted. A litigant cannot blame his advocate when his suit is dismissed if he cannot give an explanation of the effort that he made to move his advocate to prosecute his case.....”

21. It is my view, therefore, that the best way forward to ensure this matter is brought to its conclusive determination, is by respective parties filing their preferred mode of distribution to ensure that the beneficiaries acquire what is rightfully theirs. In the end, therefore, the applicant should await the distribution of the estate as per the provisions of the law.
22. In view of the foregoing, I dismiss the application herein for want of merit.
23. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF OCTOBER, 2022.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent

