



In re Estate of Francis Kahenya Mbugua (Deceased) (Succession Cause 2359 of 2010) [2022] KEHC 15963 (KLR) (Family) (25 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2359 OF 2010
MA ODERO, J
NOVEMBER 25, 2022
IN THE MATTER OF THE ESTATE OF FRANCIS KAHENYA MBUGUA (DECEASED)**

BETWEEN

HARRISON THUKU KAHENYA APPLICANT

AND

PETER MBUGUA KAHENYA 1ST RESPONDENT

MONICA NYIHA KAHENYA 2ND RESPONDENT

WARANI T/A CASTLELAND PROPERTY CONSULTANTS 3RD RESPONDENT

RULING

1. Before this court for determination is the notice of motion dated December 15, 2016 and later amended on September 22, 2020 by which the applicants Harrison Thuku Kahenya seeks the following orders:-
 - “ 1. Spent.
 2. Spent
 3. That the 1st and 2nd respondents be called upon to render accounts on income and expenditure based on rent collected from the deceased commercial plots on LR No 13527/29 and LR No 13527/31 or any other property of the deceased since his demise either collected through agents or otherwise;
 4. Spent



5. That upon the dispensation with prayers 3 & 4 above, the applicant be paid his dues from the monies collected from the deceased's said properties within thirty days of the order;
 6. Spent
 7. That the court be pleased to equally distribute the entire estate of the deceased herein to the beneficiaries so as not remove the management difficulties expressed herein and give each beneficiary his/her share of the estate;
 8. That consequently upon the grant of the prayers above, the said Peter Mbugua Kahenya and Monica Nyiha Kahenya be made answerable to the applicant to the extent that they meddled with the properties belonging to the estate of the deceased; and
 9. That the costs of this application be in the cause..”
2. The application which was premised upon sections 51(2)(h), 45(1)(2)(b) *Law of Succession Act* cap 160 laws of Kenya rules 44 and 73 of the *Probate and Administration Rules* and all other enabling provisions of law was supported by the affidavit dated December 15, 2016, the further affidavit dated June 22, 2018 as well as the supplementary affidavit dated July 27, 2022 all sworn by the applicant.
 3. The respondent Peter Mbugua Kahenya, Monica Nyiha Kahenya and Mr Warani t/a Castleland Property Consultants opposed the application through the replying affidavit dated June 30, 2021 sworn by Peter Mbugua Kahenya and Monica Nyiha Kahenya.
 4. The matter was canvassed by way of written submissions. The applicant filed the written submissions dated July 29, 2022 whilst the 1st and 2nd respondents relied upon their submissions dated September 13, 2022.

Background

5. This succession cause relates to the estate of the late Francis Kahenya Mbugua (hereinafter ‘the deceased) who died intestate on August 4, 2010 at the Aga Khan Hospital in Nairobi. A copy of the Death Certificate Serial Number 014135 appears as annexure MNK’1 to the petition for letters of administration intestate dated November 24, 2010.
6. The deceased was survived by the following persons:-
 - a. Eunice Wanjiru Kahenya - widow - adult
 - b. Peter Mbugua Kahenya – son - adult
 - c. Stephen Kiarie Kahenya – son - adult
 - d. Monica Nyiha Kahenya – daughter - adult
 - e. Harrison Thuku Kahenya – son - adult
 - f. Jane Nduta Muriithi – daughter - adult
 - g. James Mwaura Kahenya – son -adult
 - h. Lucy Wanjiku Kahenya - son -adult
 - i. Estate of John Karanja Kahenya – (deceased) son adult



7. The estate of the deceased comprised the following assets-

Assets

- a. LR No 13537/128
- b. LR No 13537/29
- c. LR No 13537/31
- d. LR No 13537/208
- e. LR No 13537/205
- f. LR No 13537/207
- g. LR No 13537/210
- h. LR No 13537/211
- i. LR No 13537/195
- j. LR No 13537/200
- k. LR No 13537/201
- l. Barclays Bank Juaja Branch a/c No xxxx
- m. Barclays Bank Juaja Branch a/c No xxxxx
- n. Rental Income – approximately Kshs 400,000.00 per month

Total estimated value forty million (Kshs 40,000,000.00)”

8. Following the demise of the deceased grant of letters of administration intestate was on May 24, 2011 issued to Eunice Wanjiru Kahenya, Peter Mbugua Kahenya and Monica Nyiha Kahenya as joint administrators. The grant was duly confirmed on May 24, 2011 and was later rectified on May 24, 2011. The mode of distribution of the estate was set out in the confirmed grant.
9. The applicant avers that he is a son to the deceased and a beneficiary to the estate. He states that the administrators have been holding secret meetings and have excluded him in the administration. That the 1st and 2nd respondents have been taking advantage of the advanced age of their co-administrator Eunice Wanjiru Kahenya (who is the widow of the deceased) to withdraw monies from the family account No xxxx held at Barclays Bank.
10. The applicant states that although it had been agreed that the income accruing from the estate would be shared equally amongst the beneficiaries he only received his share of the rental income for one (1) year being the year 2015/2016.
11. The applicant avers that the estate of the deceased is comprised of developed commercial plots from which rental income is derived. That the average monthly net income of the estate is about Kshs 100,000, which means that he has been denied a sum of Kshs 4,800,000 for the years 2011 to 2015. He states that despite his efforts to reach out to the administrators they have adamantly refused to pay the applicant his dues from the estate. The applicant denies the claim by the administrators that he owed the estate the sum of Kshs 4,000,000 arising from a loan advanced to him by the deceased.
12. The applicant accuses the 1st and 2nd administrators of intermeddling with the estate of the deceased particularly the rental income collected from LR No 13527/31. He states that the administrators



have mismanaged the estate and have allowed three (3) beneficiaries, namely, Peter Mbugua Kahenya, Stephen Kiarie Kahenya and Jane Nduta Kahenya to carry out illegal transactions in Bank Accounts of the Family Company known as Hebron Investments Limited. That Kshs 1,000,000 cannot be accounted for by the administrators.

13. The applicant averred that there were ongoing criminal proceedings against some beneficiaries at the Thika Law Courts. He urged that the court needed to intervene urgently to prevent further mismanagement and wastage of the estate. The applicant urges that he is diabetic and in need of finances to enable him manage his condition. He prays that the court order the administrators to pay him the amount of the rental income due to himself.
14. On their part the 1st and 2nd respondents deny that they have been mismanaging the estate of the deceased. They state that there exist clear mandates for the management of the family account and that three (3) persons must sign before any transaction can be effected. The respondents explain that there have been deductions from the amount due to the applicant which arise from a loan of Kshs 8,000,000 which he had obtained from their late father which loan is yet to be cleared. The respondents urge the court to dismiss the application entirely.

Analysis and Determination

15. I have carefully considered the application before this court, the affidavit filed in reply thereto as well as the written submissions filed by both parties. The following are the issues which arise for determination –
 - (i) Whether the administrators should render accounts of their management of the estate.
 - (ii) Whether the applicant is entitled to be paid his full dues from the rental income.
 - (iii) Whether the estate should be distributed equally amongst all the beneficiaries.
 - (iv) Whether the respondents are guilty of intermeddling with the estate.

(i) Accounts

16. The applicant prayed that the respondents be ordered to render accounts on the income and expenditure of the estate. He alleges that the respondents have been taking advantage of the age of their co-administrator (who is the widow of the deceased) to make illegal withdrawals and incur unwarranted expenditure in the family account held at Barclays Bank. That all this has been done to the detriment of the beneficiaries to the estate.
17. The Applicant further alleges that there has been no proper accounting by the Respondents for the rental income collected from the two (2) commercial properties of the estate being LR No 13537/29 and LR No 13537/31
18. The Respondents deny involvement in any illegal activities and deny the allegation that their estate was being mismanaged. The Respondents assert that they have been managing the estate diligently and point to the fact that no other beneficiary has complained about their administration of the estate. The 1st and 2nd Respondents took issue with the Applicants decision to single the two (2) of them out for blame when there exists a third administrator of the estate.
19. The Respondents insist that they are able to account or all the rental income derived from the estate. They state that they are not opposed to rendering accounts if so directed by the court.



20. Section 83 (e) and (h) provide for the following duties of personal representatives to an estate –

“Personal representatives shall have the following duties:-

- “e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;”

21. In the case of *In re Estate of Julius Mimamo (Deceased)* [2019] eKLR Musyoka J stated:-

“Section 83 of the Act imposes duties on personal representatives to pay for the expense of the disposal of the remains of the deceased, to get in or gather or collect the assets of the estate, to pay for the expenses of the administration of the estate, to ascertain and pay out all debts and liabilities, and eventually to distribute the assets amongst the persons beneficially entitled. The discharge of these duties would naturally attract an account, in terms of the personal representative stating whether they discharged the said duties and disclosing the expenses that they incurred in the process of discharge. In addition, section 83 of the Act has imposed a positive duty on personal representatives to specifically render accounts at two stages. The first instance is in the first six months of the administration. It is at this stage that they ought to account as to whether they spent any funds from the estate for the purpose of disposing the remains of the deceased and, if so, how much. State whether they got in or gathered or collected or brought together all the assets that make up the estate. The getting in of the estate is critical, it should precede settlement of debts and liabilities and distribution of the assets. Indeed, these duties can only be discharged if there are assets sufficient to settle debts leaving a surplus for distribution. It would also be from the assets collected that the estate would have a pool of resources for administration expenses. Section 83(e) commands the personal representatives to produce in court a full and accurate inventory of the assets and liabilities, no doubt generated from the exercise of getting in the assets and ascertaining the debts of the estate. There is also an obligation to render an account of all their dealings with the assets and liabilities up to the point of the account. The second occasion for rendering accounts is at the completion of administration. The duty is stated in section 83(g) of the Act. The object of the second and final account is to give opportunity to the personal representative to demonstrate that they have complied with the duty in section 83(f) of distribution of the estate to the beneficiaries. The duty to account on those two occasions is imposed by statute. It envisages an account to the court, not even to the beneficiaries. The powers exercised by the personal representative’s flow from a court instrument, the court is entitled to know whether those powers have been properly exercised, and whether the duties imposed have been properly discharged. Being a statutory duty to account to the court, the personal representative does not have to wait for a court order directing them to render account, they must render the accounts as a matter of course. The matter of the duty to render accounts is so critical that default to do so is listed in section 76(d)(iii) of the Act as one of the grounds upon which the court may consider revoking a grant.” (Own emphasis)



22. From the above it is manifest that the Respondents as Administrators and personal representatives of the estate of the Deceased have a 'statutory duty' to render a true account of all their dealings with the estate of the Deceased.
23. It is noteworthy that the Respondents do not object to rendering accounts however they ought to have done so even without waiting for a court order to be issued in that regard.
24. Where as in the present case a question has arisen regarding the management of estate finances, the best way to settle the issue/dispute is to have full accounts available for scrutiny by the court and by all parties. The Administration of an estate should not be shrouded in secrecy. The accounts ought to be rendered regularly as a matter of course in order to promote transparency. I therefore allow prayer (3) of this application.

(ii) Whether the applicant should be paid all his dues from the estate

25. The Applicant urges the court to direct that all rental income due to him from the estate be paid in full. He claims that he has not been paid his share of the rental income derived in the years 2011 to 2015 and states that he is owed an amount of Kshs 4,800,000.
26. The Respondents on the other hand claim that the applicant owes the estate an amount of Kshs 4,000,000 which he is yet to settle and that is why he has not been receiving his share of the rental income. They state that it is dishonest of the Applicant to demand his full dues when he is fully aware that he has outstanding debt due to the estate, which is yet to be settled.
27. The certificate of confirmed Grant dated May 24, 2011 and rectified on July 6, 2011 contained a schedule under the heading "Creditors and Debtors" which schedule provided as follows:-

"It was agreed that Harrison Thuku Kahenya owes Kshs 6,500,00/- to the estate but that the same will be reduced by an amount of Kshs 1,000,000/- to take into account that most of the beneficiaries had borrowed from the Deceased. It was further agreed that Kshs 1,500,000 will be credited to Thuku's loan account as compensation agreed to be due to him as herein after provided. That the balance of Kshs 4,000,000 will be paid by instalments of Kshs 250,000/- per month wef June 2011. The said amount will be paid in to the rent account."
28. The Applicant signed a consent dated May 12, 2011 to the confirmation of Grant. He also signed a consent for summons for rectification of the Grant. By signing the said consents the Applicant was admitting his debt to the estate and was accepting all the provisions of the schedule annexed to the confirmed grant, which set out how his debt to the estate was to be cleared.
29. Annexure "SKK T1" to the Affidavit of Stephen Kiarie Kahenya dated November 23, 1987 (a brother to the Applicant and a beneficiary to the Estate) is a copy of an Agreement dated November 4, 2009 entered into between the Deceased Francis Kahenya Mbugua and his son Harrison Thuku Kahenya (the Applicant herein). By that Agreement the Deceased advanced to the applicant a loan of Kshs 8,000,000. The Agreement is duly executed by both parties. There is therefore ample proof that the Applicant received from the Deceased financial accommodation in the amount of Kshs 8.0 million.
30. Under the terms of the confirmed Grant the loan amount was to be paid back into the family accounts. The Respondents as Administrators of the estate of the Deceased had a duty to call in and collect any amounts due and owing to the Deceased. Thus their demand that the Applicant refund this amount to the estate was proper and cannot be faulted by the court. The Applicant did not tender any evidence to prove that he has repaid the full amount of Kshs 8.0 million. The Administrators on their part also did not tender any evidence of what amount (if any) of the loan was still due and owing to the estate.



31. In the absence of tangible evidence from either side regarding what amount is still owed by the Applicant this court cannot in the circumstances direct that the Applicant be paid his dues from the rental income derived from the estate. Any amount due to the Applicant will have to take into account his outstanding debt to the estate. Such orders will have to wait the filing of full accounts by the Administrators. Accordingly, I decline to make orders in terms of Prayer (5) of this application.

(iii) Distribution of estate

32. The Applicant has prayed to have the entire estate distributed amongst the beneficiaries in order to eliminate the problems currently being experienced regarding management of the estate finances. The Respondents retort that for this prayer to be granted the entire grant would have to be revoked and the agreement on the mode of collection of rents be set aside.

33. This is a matter in which the Grant was confirmed way back in May 2011 almost ten (10) years ago. The confirmed Grant contained a schedule which set out in elaborate detail the manner in which the estate assets were to be managed. The Applicant consented to the confirmation of Grant. As no time did he ever challenge the Schedule to said confirmed Grant.

34. The schedule to the Confirmed Grant also set out the mode of distribution of some of the estate assets. Again, the Applicant did not object. Therefore the estate has already been distributed. The only issue in dispute is the distribution of the rental income. By prayer (7) the Applicant is in effect seeking a re-distribution of the estate.

35. The Applicants prayer to have the estate divided amongst the beneficiaries comes too late in the day. He ought to have filed a Protest to the mode of distribution of the estate if he was not agreeable to the same. I do agree with the Respondents that the only remedy now available to the Applicant is to apply for the revocation of the confirmed Grant. Accordingly, I decline to grant prayer (7) of this application.

(iv) Intermeddling

36. The Applicant accuses the 1st and 2nd Respondents of intermeddling with the estate of the Deceased particularly with the income derived from the two (2) commercial assets of the estate to the detriment of the other beneficiaries. The Respondents retort that as the legally appointed Administrators of the estate they have the mandate to manage the estate and as such cannot be said to be intermeddling in the estate.

37. Section 45 of the [Law of Succession Act](#) provides:-

- “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled



after deducting any payments made in the due course of administration.”

38. In the case of *In re Estate of Julius Mimano (Supra)* Musyoka J stated:

“The personal representatives have authority from the grant of representation they hold whether it is one of probate or of letters of administration, to handle estate property. In so handling it, in view of section 79 of the Act, it cannot be said that they intermeddle with such property.” (Own emphasis)

39. The Applicant has made allegations of the misuse of the estate funds by illegal withdrawals and unwarranted expenditures. He has not in my view, tabled sufficient proof of these allegations. As stated earlier the real dispute here is the question of how much money is due to the Applicant from the rental income. This question can only be answered with certainty once the accounts have been rendered. I therefore decline to grant prayer (8) of the application.

Conclusion

40. Based on the foregoing this court now makes the following orders:-

- (i) The administrator to file in court within sixty (60) days of today's full accounts on income and expenditure based on rent collected from the estate of the deceased wef May 24, 2011 to the present time.
- (ii) Prayer (5) of the notice of the amended notice of motion dated October 21, 2021 is held in abeyance pending the filing of accounts as directed in (i) above.
- (iii) Prayers (7) and (8) of the amended notice of motion dated October 21, 2021 are both declined.
- (iv) This being a family matter each side shall bear its own costs.

DATED IN NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.

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MAUREEN A. ODERO

JUDGE

