



REPUBLIC OF KENYA



**In re Estate of Bedan Njoroge Nduati (Deceased) (Succession Cause 782 of 2009)
[2022] KEHC 16385 (KLR) (Family) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16385 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 782 OF 2009
MA ODERO, J
DECEMBER 16, 2022**

RULING

1. Before this Court for determination is the summons dated October 25, 2021 by which Simon Mwangi Njoroge (the 3rd Administrator) seeks the following orders:-
 1. “That summons do issue to the advocate who drew the Will to attend court namely Karuru Mwaura trading in the name and style of Karuru Mwaura & Co. Advocates together with the all the executors and Administrators of the Will herein dated September 19, 2005 namely Joel Ndirangu Gathee and Ezekiah Wanjama, so as to attend court to tender evidence on the contents and issues relating to the will.
 2. That the 2nd Administrator namely Julius Chege Njoroge be ordered to produce in court and file by way of a sworn affidavit in court;
 - a. All the title of documents L.R No. 4953/8083 (now known and referred to as Thika Municipality Block 1/594) and Plot SSS/10/144 and all the documents in support of and utilized to cause the transfer of the deceased parcels of land known as L.R No. 4953/8083 (now known and referred to as Thika Municipality Block 1/594) and Plot SSS/10/144 into his name and or nominee(s) and any other properties of the estate which he claims did not belong to the deceased herein therefore rendering the will partially invalid within Seven (7) days of the issuance of the order.
 - b. All the deceased properties title documents mentioned in the Will allegedly owned and or transferred to others including any Sale agreement (s) executed herein by the 2nd Administrator himself, 2nd Administrators' family members and other parties, the Mutation Forms, Transfers forms, Land Board Applications, Land Board Consents, Consents and clearance certificates, Receipt of Stamp Duty paid and payments made herein in furtherance of transfer of L.R No. 4953/8083 (now known and referred to as Thika Municipality Block 1/594) and Plot SSS/10/14 into the 2nd Administrator's



name and or any party claiming under umbrella of the 2nd Administrator and all or any other documents they allegedly utilized in the support transfer of the deceased property contained in the will in their name.

3. That the 2nd Administrator namely Julius Chege Njoroge be summoned to attend court at the earliest to give oral evidence in this matter concerning the deceased properties contained in the Will, which have since illegally and irregularly devolved to him and his family members in an inexplicable manner and mysterious circumstances or in the alternative the 2nd Administrator be summoned to attend court at the earliest opportunity to give oral and tender documentary evidence in this matter as to who are the owners of all the properties in the deceased's will herein which he alleges that deceased willed away and do not belong to the deceased or were never distributed.
4. That a Caution, Restriction and or Prohibitory order do issue by this Honorable Court and a court order restraining/ barring any further dealings of the parcels of land known as L.R No. 4953/8083 (now known and referred to as Thika Municipality Block 1/594) and Plot SSS/10/144 until the hearing and determination of this succession cause.
5. That an order do issues that the Registrar of Land do produce in court all the original _____ records as held in the lands office of all the lands known; as L.R No.4953/8083 (now _____ known and referred to as Thika Municipality Block 1/594) and Plot SSS/10/144.
6. That this Honourable court upon hearing and determination of this application does order the cancellation of all illegal entries entered on the records of the parcels of land known as L.R No. 4953/8083 (now known and referred to as Thika Municipality Block 1/594) and Plot SSS/10/144, entered after the demise of the deceased and an order do issue ordering the reversion of the property known as L.R No. 4953/8083 (now known and referred to as Thika Municipality Block 1/594) into the name of the late Bedan Njoroge Nduati (Deceased).
7. That pending the hearing of any application seeking partial invalidation of the will all members of the 2nd Administrator's (house) be ordered to produce in Court all the documents used to effect the transfer of parcels of land known as L.R No. 4953/8083 (now known and referred to as Thika Municipality Block 1/594) and Plot SSS/10/144.
8. That all the Administrators of the estate herein jointly and or severally do produce and file in court by way of sworn affidavit evidencing :-
 - a. All the original titles and or copies of the deceased's properties in support of the estate as captioned in the will herein confirming that the deceased estate, has not been administered.
 - b. The current user and occupants of the deceased properties herein as captured in the deceased will dated 19th September 2005.
9. That the Director of Criminal Investigations be ordered to investigate and ascertain how the properties of the deceased herein namely L.R No. 4953/8083 (now known and referred to as Thika Municipality Block 1/594) and Plot SSS/10/144 illegally changed hands into the 2nd Administrators and or his family.
10. That the 2nd Administrator namely Julius Chege Njoroge be removed as representative and an administrator of estate of the deceased herein and another of his family member be appointed instead of him.



11. That the 2nd wife and house namely Beth Wanja Njoroge be at liberty to appoint another Administrator instead of the 2nd Administrator so as to act on their behalf if the court deems fit to so grant.
 12. That the 2nd Administrator namely Julius Chege Njoroge be ordered to appear in court for purposes of cross examination of the contents of his application dated September 2021 and the deceased will.
 13. That this court issues directions on the intermeddling of the estate by the 2nd Administrator namely Julius Chege Njoroge and his family members.
 14. That this Honorable Court be pleased to make such further orders as it may deem fit for the end of Justice.
 15. That the costs of this Application be in the cause.”
2. The application was premised upon section 45, 46, 47, 76 of the Law of Succession, Act cap 160 Laws of Kenya and 82 (b) (ii) and Rule 49 and 73 of the Probate and Administration Rules, Order 40 Rule 1, 2 and 9 Civil Procedure Rules and sections 1,3, 3A, Civil Procedure Act, section 10 Judicature Act and rule 3 (1) & (2) High Court (Practice and Procedure Rules) and all other enabling provisions of the Laws of Kenya was supported by the affidavit of even date and the further affidavit dated July 23, 2021 both sworn by the applicant.
 3. The respondent Julius Chege Njoroge (the 2nd Administrator) opposed the application through his replying affidavit dated November 6, 2021. The application was canvassed by way of written submissions. The applicant filed the written submissions dated March 7, 2021 whilst the respondent relied upon his submissions dated December 1, 2021.
 4. Before I proceed I wish to apologize to the parties for the delay in rendering this Ruling. This was occasioned by the fact that the file went missing during my movement from one chamber to another and was only recently discovered. Any inconvenience to the parties is sincerely regretted.

Background

5. This Succession Cause relates to the estate of Bedan Njoroge Nduati (hereinafter ‘the Deceased’) who died testate on December 5, 2006.
6. The Deceased who was polygamous had three (3) wives and was survived by the following persons:-
 - First House
 - Rachel Njeri Njoroge 1st wife (now deceased)
 - Jane Wanjiku Njoroge Daughter
 - Second House
 - Beth Wanja Njoroge 2nd wife
 - John Karanja Njoroge son
 - Monicah Wanjiku Njoroge Daughter
 - Julius Chege Njoroge son
 - Nduati Njoroge son
 - Brian Njoroge Kamau Grandson



Bridgette Wanja Kamau Granddaughter

Third House

Teresia Waithira Njoroge 3rd wife

Monica Wanjiku Njoroge Daughter

Lucy Wanjiru Njoroge Daughter

Geoffrey Chege Njoroge Son

Simon Mwangi Njoroge son

Ann Nyambura Njoroge Daughter

Esther Waithira Njoroge Daughter

Eddy Njoroge Nduati Grandson

7. The Deceased left behind a written will dated September 19, 2005 detailing the manner in which he wished his estate to be distributed. In the said written will the Deceased appointed two Executors, namely Ezekiel Ndichu Kimaitu Wanyama and Joseph Njoroge Kibunja.
8. The said Ezekiel Ndichu renounced his Executorship whilst the other named Executor Joseph Njoroge Kibunja died.
9. Vide a consent adopted into on October 7, 2019, Jane Wanjiku Njoroge, Julius Chege Njoroge and Simon Mwangi Njoroge representing each of the three (3) Houses) were appointed as the Administrators of the estate. A Grant of Probate with written will dated October 7, 2019 was duly issued to the three (Annexure SMN '1' to the affidavit of the applicant dated November 8, 2019).
10. Thereafter on November 10, 2019 the appointed Executors applied to have the Grant confirmed. The 3rd House through the respondent filed an affidavit of Protest dated March 9, 2020 in which they raised reservations regarding the authenticity of the written will left by the Deceased.
11. The 2nd Administrator also filed a summons for partial invalidation of will dated September 15, 2020.
12. By this application dated October 25, 2021 the Applicant states that the issues raised by the 2nd Administrator would be best resolved by way of a viva voce hearing. He claims that The 2nd Administrator has intermeddled with the estate of the Deceased and has improperly transferred properties to his family members.
13. In opposing the application for an oral hearing the respondent avers that the summons is full of misrepresentations and is only meant to delay the hearing of his application dated September 15, 2020. The respondent avers that the attestation and execution of the entire will is not challenged, the summons only seeks to invalidate some claims in the Will.
14. The respondent further averred that the applicants requests for an oral hearing made on November 23, 2020 and February 8, 2021 were denied by Hon Justice Muchelule (as he then was). The respondent denied that he has intermeddled with the estate of the Deceased and denied having improperly transferred estate assets.
15. According to the respondent it is not necessary to call as a witness the Advocate who drafted the Will. He stated that the present application is an afterthought and ought to be dismissed so that the application dated September 15, 2020 may be heard.



Analysis and Determination

16. I have carefully considered the application before this court, the Reply filed thereto as well as the written submissions filed by both parties.
17. I have carefully perused the record and I do not see any indication that a request for viva voce hearing was ever denied by Hon Justice Muchelule (as he then was). On the dates cited by the respondent the Hon Judge merely directed that the file be mentioned before this court.
18. I have considered the various applications which are pending in this matter. The Applicants have raised weighty issues including allegations of intermeddling (which carries a criminal sanction) and fraud all of which require strict proof. In the circumstances, I am of the opinion that the issues raised are best canvassed by way of an oral hearing at which the parties will be allowed to testify and to call witnesses who will be subjected to cross-examination.
19. The applicants request for an oral hearing cannot be said to be actuated by malice. In the case of *Gerald Macharia Njogu v Samuel Macharia Murimu* [2016] eKLR, Hon Justice Mativo (as he then was) in allowing a similar application made the following observations:-

“The law of evidence encompasses the rules and legal principles that govern proof of facts in a legal proceeding. These rules determine what evidence must or must not be considered by the court in reaching its decision, and sometimes, the weight that may be given to that evidence. The law of evidence is also concerned with the quantum, quality and type of proof needed to prevail in litigation....When a dispute reaches court, there will always be a number of issues which one party will have to prove in order to persuade the court to find in his or her favour. The law must ensure certain guidelines are set out in order to ensure that evidence presented to the court can be regarded as trustworthy.

I am fully aware that affidavits are an alternative to oral evidence and are often used particularly in applications. However, the law provides that a deponent in an affidavit can be cross-examined on oath. Further, if credibility is at issue, or if crucial information is not obtainable through the affidavit evidence, then oral evidence will be required as may be necessary. However, where the facts are uncontroversial, an oral hearing is not necessary... The advantage of oral evidence is that the witness is available for cross-examination, and thus the strength of evidence may be tested. That is why reliable viva voce evidence is sometimes given more weight.” (See also *Re Estate of George Nderi Nguu (Deceased)* [2011] eKLR and *Re Estate of M/Ringera/Kingania (Deceased)* [2017] eKLR. (Own emphasis)

20. This is one matter in which I feel that Affidavit evidence will not suffice to properly bring out and test the critical issues to be determined. The deponents of the Affidavits ought to take the stand for cross-examination. Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* empower courts to issue such Decrees and make such orders as may be necessary to meet the ends of justice.
21. In conclusion I do allow this application and issue the following Directions-
 - 1) The summons for confirmation of Grant dated November 10, 2019, the Protest dated March 9, 2020 and the summons for Partial Invalidation of Will dated September 15, 2020 shall all be heard and determined together by way of viva voce evidence in open court.
 - 2) Parties to file and exchange all affidavits and/or witness statements within Sixty (60) days.



- 3) The status quo obtaining now regarding all the properties of the Deceased Bedan Njoroge Nduati shall be maintained by all parties pending final determination of this cause.
- 4) This being a family matter each side shall bear its own costs.

Dated in Nairobi this 16th day of December 2022.

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MAUREEN A. ODERO

JUDGE

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