



In re Estate of the Late Godfrey Wanyeki Kimeriah (Deceased) (Succession Cause 347 of 2012) [2022] KEHC 16657 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16657 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 347 OF 2012
JN ONYIEGO, J
DECEMBER 16, 2022
IN MATTER OF THE ESTATE OF THE LATE
GODFREY WANYEKI KIMERIAH (DECEASED)**

BETWEEN

NICHOLAS WANYEKI KIMERIA BENEFICIARY

AND

BERNARD WAMBUGU WABURI 1ST RESPONDENT

STANBIC BANK KENYA LTD 2ND RESPONDENT

RULING

1. The deceased herein died testate on 24th April 2012. Prior to his death, he had executed a written will dated 25th October 2003 in which he appointed one Bernard Wambugu Waburi (1st respondent) as the executor. He bequeathed his estate variously to his mother Phoebe Nyambura Wamwea and son Nicholas Wanyeki Kimeriah (beneficiary). Among the assets distributed was money in his bank accounts and his motor vehicle which his mother was to hold for her benefit during her lifetime and in the event of her predeceasing his son Nicholas, the same to revert to his estate and thereafter be inherited by the said son.
2. Following the deceased's death, the executor petitioned for a grant of probate of written will vide a petition dated 23rd August 2012. The same was made on 14th August 2013 and issued on 4th October 2013. Armed with the said grant, the executor sought to and did transfer a sum of khs 15,092,835 from the deceased's account No.xxxx Stanbic bank (applicant/2nd respondent) to his account in the same bank. On 22nd September 2017, the court on its own motion revoked the grant for want of prosecution pursuant to section 73 of the law of succession,
3. Vide Application dated 18th April 2018, the suit was reinstated on 23rd July 2018. Meanwhile, through the application dated 29th May 2018, Nicholas moved the court seeking orders among others that;



Stanbic Bank the applicant herein be ordered to disclose the account to which it transferred the funds to from the deceased's account and to credit back the amount so transferred to the deceased's bank account. Vide a replying affidavit sworn by the executor (1st respondent) on 5th July 2018, he admitted instructing the bank to transfer the said amount to his account as a safety measure given that the applicant had threatened to transfer the same to the public trustee. He averred that the money was safe and intact in his account.

4. On their part, the applicant (Stanbic bank) through its legal counsel Angeline Njuguna, filed a replying affidavit sworn on 6th September 2018 admitting that her employer (applicant) did transfer the amount in question based on instructions from the executor. That they acted on the strength of the court grant issued on 4th October 2013. That upon transferring the said amount, the deceased's account was closed hence the same cannot be reinstated. That the executor having admitted and acknowledged receipt of the money in question, the beneficiary has a recourse in pursuing recovery of the said amount from him (executor).
5. During the pendency of the application of 29th May 2018, the beneficiary filed a notice of motion dated 25th September 2018 seeking orders restraining the executor and Stanbic bank from transferring or withdrawing any funds held in trust for the deceased by the executor in his account number xxxx and xxxx at Stanbic bank. That the executor and Stanbic bank be compelled to debit the two named accounts with a sum of kshs 15,092,835 and to deposit the same amount in court or as the court could order pending the hearing of the application dated 29th May 2018. Consequently, a freezing order was issued on 25th September 2020 pending hearing and determination of the application.
6. Meanwhile, on 23rd November 2020, parties by consent again agreed to; compromise the application dated 29th September 2018 in favour of the application for confirmation being set down for hearing; executor to file application for confirmation before 30th November 2020; after confirmation, the executor with 14 days to execute or initiate transfer of the estate to the beneficiary as per the will and in default the Deputy Registrar to execute necessary transfer documents to complete administration of the estate.
7. On 30th November 2020, the executor applied for confirmation of the grant. The same was confirmed on 1st December 2020 and estate distributed as per the will. On the same day, parties by consent agreed to have the freezing order issued on 25th September 2020 herein lifted and the funds relating to the estate be released and paid to the beneficiary one Nicholas
8. Subsequently, the applicant herein (stanbic bank) filed a notice of motion dated 11th January 2022 seeking to be discharged from these proceedings as they were not a necessary party anymore. The application which is the subject of this ruling is anchored on the grounds set on the face of it and averments contained in the affidavit in support thus stating that; having recovered Kshs 13,466,912 from the executor's account and paid the same to the beneficiary, and, the executor having admitted receipt of kshs 15,092,835, the balance of kshs 1,625, 923 should be recovered from the executor who admitted liability. That they paid the amount in question to the executor based on a lawful court order (grant) hence nothing irregular.
9. In response, the beneficiary filed his replying affidavit on 3rd June 2022 thus opposing the application on grounds that the applicant had no legal authority to deal with the deceased's funds without a confirmed grant hence liable to account for and pay the outstanding amount.
10. When the matter came up for directions, parties agreed to file written submissions. The second respondent /applicant filed theirs on 21st July 2022 reiterating the content of grounds and affidavit in support of the application. However, the respondents did not file their submissions. The beneficiary



represented by Mr. Origi submitted orally thus contending that the applicant having transferred the money illegally from the deceased's account without a confirmed grant is liable to pay the beneficiary.

11. I have considered the application herein and the response thereof. Issues for determination are; whether the estate by extension the beneficiary is entitled to recover of Kshs 1, 625,923 from the applicant; whether the release of the deceased's money to the applicant using unconfirmed grant was lawful and; whether the applicant should be discharged from these proceedings. There is no dispute that the applicant (Stanbic bank) did on the instructions of the executor release the deceased's money held in the deceased's account to the executor. It is also an admitted fact that the executor did not have a confirmed grant at the time of the transfer. The question begging for an answer is whether the transfer of the funds was regular or legal.
12. It is trite law that a grant which has not been confirmed does not confer authority to the holder of the grant in question to dispose any property of the estate until confirmed. To dispose any assets of a deceased person before confirmation and without authority of the court will amount to intermeddling with the estate which is punishable under Section 45 of the law of succession. Section 55(1) of the law of succession does provide that"

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71”
13. In the case of *The matter of the estate of M' Ajogi M'Ikingu alias Ikingu Ajogi(deceased)*(2017) and *In re Estate of Isaac Kaburu Marete(deceased)*(2017) eKLR the court declared disposal of any estate assets before confirmation of the grant as illegal and void abinitio.
14. There is no doubt that the applicant herein (Stanbic bank) had no authority whatsoever to withdraw and transfer funds from the deceased's account to the executor's account. The executor was not a beneficiary under the will hence had no duty transferring the money to his account. If the intention was to safe guard the estate or it's funds, the executor should have had the full amount intact in his account and not to spend. No amount of admission of an illegality will cure an illegality.
15. The executor and the bank through its legal department should have known better that without a certificate of confirmation of grant the executor had no power nor did they have authority to transfer the said amount. It trite that once an act is void, then, it is in law a nullity. It is not only bad, but incurably bad. These were the wise words of lord Denning M.R. in the case of *Macfoy v United Africa co. Ltd*(1961)3 All ER1169
16. Having found that the funds in question were transferred illegally, the only remedy available is for the bank(applicant) to restore the balance of the unrecovered funds to the estate. To that extent, the applicant cannot be discharged from these proceedings as completion of the administration of the estate will depend on their restoration of the illegally withdrawn money to the estate. For those reasons, it is my finding that the application herein is unmerited hence is hereby dismissed with costs to the respondent / beneficiary.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16TH DECEMBER 2022

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J.N. ONYIEGO

JUDGE

