



REPUBLIC OF KENYA



**In re Estate of Lawrence Nginyo Kariuki (Deceased) (Succession Cause
336 of 2020) [2021] KEHC 12527 (KLR) (Family) (20 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 12527 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 336 OF 2020
AO MUCHELULE, J
DECEMBER 20, 2021**

BETWEEN

JAMES ANTHONY KARIUKI APPLICANT

AND

ALEX NDORIA KARURI 1ST RESPONDENT
AUSTINE WACHIRA KARUNGO 2ND RESPONDENT
WINFRED KARIUKI 3RD RESPONDENT
BRENDA NYAMBURA KIRAGU 4TH RESPONDENT
JANE ALICE WAMBUI KIRAGU 5TH RESPONDENT
SILAS MACHARIA NGINYO 6TH RESPONDENT
MARGARET WANGARI NGINYO 7TH RESPONDENT
SARAH MUKUHI NGINYO KARIUKI 8TH RESPONDENT
ROSE WANJIRU KARIUKI 9TH RESPONDENT
SCHOLASTICA NJERI KARIUKI 10TH RESPONDENT

RULING

1. The deceased Lawrence Nginyo Kariuki died on February 24, 2020 at the Aga Khan Hospital in Nairobi. A petition dated June 5, 2020 for the grant of probate of written Will was filed before this court whose petitioners were his widow Margaret Wangari Nginyo Kariuki (7th respondent) and children James Anthony Kariuki (applicant), Silas Macharia Kariuki (6th respondent), Scholastica Njeru Kariuki (10th respondent) and Jane Alice Wambui Kiragu (5th respondent). These were the



- named executors and trustees in the said Will. The petition was filed through M/s Oraro & Co Advocates.
2. Brenda Nyambura Kiragu (4th respondent) filed an objection to the grant of probate. Her case was that she was a daughter of the deceased whom she had acted for for a long time and who was a confidant. She deponed that the purported signature of the deceased on the Will was a forgery; that the deceased was not of his free will at the time of the alleged Will; that he was under influence and dictated instructions which did not represented his intentions, wishes and dispositions as this departed from his long standing conviction that upon his death his estate would be shared equally by all his children; and that it was impossible for the deceased to have had a Will and exclude his two children (Brenda and another) and only provide for Margaret Wangari Nginyo Kariuki and her children. She was represented by M/s Murage Juma & Co Advocates.
 3. Another objection was dated September 21, 2020 and brought by Winfred Wanjiru Kariuki (3rd respondent) and her children Alex Ndoria Karuri (1st respondent) and Austine Wachira Karungo (3rd respondent). Her case was that she and the deceased got married in 1984, and the two sons are the products of the marriage. She challenged the signature on the Will, saying that it did not belong to the deceased. She said that the Will was not properly attested and that the witnesses thereto were unknown; the Will did not have a complete inventory of the deceased's assets; and that the Will was not valid as it did not provide for her and the children. The objection was filed through Magee Law LLP Advocates.
 4. A petition dated October 7, 2020 for letters of administration *pendente lite* was filed by James Anthony Kariuki through Victor Lee Advocates, saying that because of the special circumstances of the case a full grant could not be waited for. He stated that since the death of the deceased tenants were paying rent to third parties who had not been appointed by the court; non-shareholding directors and minority shareholders in companies in which the deceased was a majority shareholder were passing invalid resolutions and carrying out illegal financial transactions. He wanted the grant in order to protect and secure the estate before a full grant had been issued. James Anthony Kariuki acknowledged in his supporting affidavit that Brenda Nyambura Kiragu, Alex Ndoria and Austine Wachira were children of the deceased.
 5. Brenda Nyambura Kiragu on February 9, 2021 filed another petition for letters of administration *pendente lite* seeking to protect the estate of the deceased from wastage and intermeddling.
 6. Lastly, there is a petition dated February 21, 2021 for limited grant *ad litem* filed by Margaret Wangari Nginyo Kariuki, Silas Macharia Kariuki, Jane Wambui Kiragu and Scholastica Njeri Kariuki seeking that the grant enables them to represent the deceased in Mombasa ELC No 100 of 2009 Lawrence Nginyo Kariuki v Abdul & Aziz Balala & Others; Kajiado ELC HCCC No 1690 of 2016; and Thika Appeal ELC No 12 of 2018 Lawrence Nginyo Kariuki v Eva Catherine Mumbi Mathangani and the County Government of Kiambu (formerly SPM Limuru ELC No 10 of 2018).
 7. The matters are all pending resolution. The validity of the Will has been challenged. The estate has no executors or administrators.
 8. There was an application dated August 24, 2020 by way of notice of motion brought by Brenda Nyambura Kiragu against Jane Alice Wambui Kiragu, Silas Macharia Kariuki and Margaret Wangari Nginyo Kariuki (as respondents) and Serah Mukuhi Nginyo Kariuki, James Antony Kariuki, Rose Wanjiru Kariuki, Scholastica Njeri Kariuki, Alex Ndoria Kariuki and Austine Wachira Karungo (1st to 6th interested parties). The application was contested, and heard by Justice SN Mutuku who delivered a ruling on July 27, 2021 in which she restrained the respondents and their agents and/or servants from intermeddling and/or interfering with the deceased's estate including his bank accounts domiciled



at Consolidated Bank of Kenya and I & M Bank Limited until there is grant of probate or letters of administration intestate. The court ordered the respondents to account for all the funds and/or proceeds they had collected and/or relieved from the deceased's estate since his demise, and how they had utilized, spent or preserved the same. A forensic audit of the deceased's estate was ordered. If there was no account, the respondents were to refund to the estate all and any of the proceeds they had withdrawn from the deceased's accounts and/or misappropriated.

9. On July 12, 2021 Justice SN Mutuku took note of all the pending applications in the cause and directed the two petitions for letters of administration *pendente lite* be heard in priority. She directed the parties to file written submissions on the same and then come for the highlighting of the same.

10. When the counsel appeared before Justice SN Mutuku on September 22, 2021, there was the issue whether counsel had complied with the filing of written submissions and the petitioners informed the court that they had appealed the ruling of July 27, 2021 to the Court of Appeal and wanted to urge the application for the stay of part of the prayers issued pending the hearing and determination of the appeal. A similar application had been made in the Court of Appeal. It was at that point that the court informed the parties that it was proceeding on transfer and was not able to deal with the matter. The court stated: -

“.....I am on transfer and am not able to handle the file.”

The court asked the presiding judge to give it to another judge.

11. When this matter was filed I allocated it to Justice Dulu. When he was transferred I allocated it to Justice Achode (PJ). When severally she was not available owing to her administrative duties the parties asked for another judge. I allocated it to Justice SN Mutuku. After she handled the application mentioned above and gave directions on the priority of the pending applications, she was transferred. I allocated the cause to Justice Maureen Odero. She recused herself because of having handled a commercial matter relating to the estate. I allocated it to Justice Thande. She recused herself on the basis that some of the parties in the cause were known to her.

12. It is with this back ground that I come to the present application dated October 13, 2021 by the applicant James Anthony Kariuki who sought-

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“2. That this honourable court be pleased to direct and or order that the file/ cause herein (Succession Cause No 336 of 2021 in the Matter of the Estate of Lawrence Nginyo Kariuki) be transferred from Nairobi High Court Family, Registry to the Kajiado High Court, registry for hearing and determination by Lady Justice Stella Mutuku, the previous court having conduct of the matter.”

From the tenure of the application, the applicant is uncomfortable with either Justice Achode (PJ) or myself hearing the cause. As for Justice Achode (PJ) there is an *exparte* order that she granted to the petitioner that offended him. As for me, the complaint is that severally the matter came to me with applications and I neither certified them as urgent nor gave any orders.

13. The applicant says that the only judge who, on receiving the file, read and understood it well was Justice SN Mutuku. It was deponed that when she was seized of the matter the parties made tremendous progress with a view to ensuring the expeditious disposal of the cause. Unfortunately, he deponed, she was transferred. These are the reasons why they seek that I direct and order that this file and cause be transferred to the High Court at Kajiado for the judge to handle it to finalization. The application was



brought under sections 1A, 1B and 3A of the Civil Procedure Act, order 47 rule 6 of the Civil Procedure Rules, section 47 of the Law of Succession Act and article 159 of the Constitution.

14. The application was supported by Brenda Nyambura Kiragu whose replying affidavit sworn on November 11, 2021 stated as follows in paragraph 5-

“5. That I am informed by my advocates which information I verily believe to be true that in the intervening, though this matter was being handled by Hon Justice Dulu, my advocates noticed that from the e-filing portal the file was severally and unprocedurally listed before Hon Justice Muchelule which caused my advocates to raise a complaint with the Deputy Registrar about interference with the file causing the file to be relisted before the court seized of the matter, Honourable Justice Dulu. A copy of my Advocate’s email is herewith and marked as “BNK 1’.”

15. The others who supported the application were Alex Ndoria Karuri, Austin Wachira Karungo and Winfrey Kariuki.

16. I should mention that the proponents of the application indicated that because Justice Achode is quite busy as the Principal Judge and that I have been nominated to go to the Court of Appeal, if the application is not allowed the division will not have a judge to expeditiously handle this cause.

17. Jane Alice Wangui Kiragu, Silas Macharia Kairuki, Margaret Wangari Nginyo, Sarah Mukuhi Nginyo Kariuki, Rose Wanjiru Kariuki and Scholastica Njeri Kariuki opposed the application. Their case was that Justice SN Mutuku has since left the division upon her transfer to Kajiado, and that she was the one who, upon transfer, declined to handle the matter any further and asked the presiding judge to reallocate it. As a judge in Kajiado, they said, she has a much wider docket, she is busy, and would have little or no time for this cause. One of the reasons why the applicant wanted the matter to go to Kajiado was because the deceased had two properties in Kajiado and there is some ELC litigation in Kajiado Court as a result. The response by the respondents was that the deceased’s main property interest was in Nairobi, Kiambu and Mombasa and that his companies were based in Nairobi, and the executors reside in Limuru in Kiambu and the objectors in Nairobi and its environs. Therefore, it was deponed, the parties had no connection with Kajiado. The matter may be heard virtually, as was suggested by the applicant, but, according to the respondents, if it becomes necessary to have open court hearing that will present an inconvenience. They urged the court to retain the matter at its registry where it was filed. The respondents stated that Justice SN Mutuku handled only one application, of the various pending applications; that upon her transfer, any judge in the Division should be able to deal with the matter.

18. The respective counsel filed written submissions and/or addressed the court orally, and various decided cases were cited. I have considered them. They are familiar decisions.

19. I want to mention four preliminary points. One, despite the busy schedule that Justice Achode (PJ) runs in administering the entire High Court, and despite my nomination to go to the Court of Appeal, which happened two years ago, we continue to sit and hear and determine cases in this Division. This is the first time parties have based their application on these. Secondly, I have not sought to hear this case. It is me who kept allocating it to the judges in the Division. When the applications in the cause came to me under certificate of urgency it was either when I was on duty or when the duty judge was not available. Because I was not the trial judge I was hesitant to give any interim orders, and, in any case, I did not think, on perusal of the respective applications, there was a case for an *//ex parte//* order. I realized from day one that this was a highly contested matter, and it was necessary to have both sides heard before any order could issue. Thirdly, this matter has hardly begun. There is a contested Will, and that,



in my view, is where the parties should concentrate. It must be decided at this early stage whether the deceased died testate or intestate. The executors of the Will or the administrators of the estate should be able, upon appointment, to gather, collect and secure the estate, and remain accountable to the court and to the respective beneficiaries. Lastly, the Family Division prides itself for having very experienced judges in matters succession. This is what the judges handle daily. This cause is not at all complicated. It is the parties that want it to look complicated.

20. Judge SN Mutuku was in the middle of an application in the cause when her transfer came. She informed the parties and handed over the file. She indicated she would not handle it any further. This is what normally happens when a judge gets transferred to another station.
21. There will be occasions when a judge is transferred and when he/she has substantially progressed a case to near conclusion, or when all that is left is a ruling or judgment to be prepared and delivered. A discussion is had between the judge and the incoming judge or presiding judge about such matters and how they can be finalized. With the concurrence of the parties, where the matter has not been concluded, an arrangement is made for the judge to return on a future date to finalise that matter. Sometimes parties have agreed, in exceptional cases, to go to the station where the judge has moved to finalise the case.
22. There is no specific provision in the Civil Procedure Act and Rules or under the Law of Succession Act for the transfer of a matter from one High Court station to another. Specifically dealing with a succession matter, a petitioner may file a petition at Nairobi Probate and Administration Registry when the deceased was resident, for instance, in Nyeri and where his estate is located. The court in Nairobi will transfer the cause to Nyeri for hearing and disposal. The deceased may have had property in Nyeri and in Nairobi. The court will determine where most of the property is located and where most of the beneficiaries reside. It may or may not transfer the matter.
23. In civil cases, there is guidance in law as to where a suit should be filed. The court will consider where the defendant lives or does business and where the subject matter in dispute is located. It may on its own motion, or on application, transfer the matter to the relevant High Court.
24. Dealing with the instant cause, when the petition was filed before this court and the objections filed, there was no issue about whether or not this court was the right forum jurisdictionally to hear and handle the matter. I have indicated that this is a fresh matter, and seeing the battle lines, it is going to be a long-drawn litigation, especially because the deceased left a substantial estate and the family is not small. Given that the deceased had substantial interest in companies, there will be disputes in the Commercial Division and this division. Lastly, I have indicated that Justice SN Mutuku graciously handed over the file to the division in the presence of the parties.
25. Given everything that I have said in the foregoing, I will forward this file to the Honourable the Chief Justice to appoint a judge who is not a member of the Family Division to take over the case and hear it to finalization. When and if the appointment is done, I will inform the parties.
26. I make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DECEMBER, 2021

AO MUCHELULE

JUDGE

