



REPUBLIC OF KENYA



**In re Estate of Ogari Simon Nyaundi (Deceased) (Probate & Administration
E152 of 2025) [2025] KEHC 9660 (KLR) (Family) (4 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9660 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

PROBATE & ADMINISTRATION E152 OF 2025

H NAMISI, J

JULY 4, 2025

IN THE MATTER OF THE ESTATE OF OGARI SIMON NYAUNDI (DECEASED)

BETWEEN

PAMELA KWAMBOKA OGARI 1ST APPLICANT

AUSTIN ISINTA OGARI 2ND APPLICANT

AND

CHRISTINE KERUBO OGARI RESPONDENT

RULING

1. The Deceased passed away on 10 September 2024. He died testate, leaving a Will dated 27 January 2024 and Codicil dated 9 February 2024. Grant of Letters of Administration is yet to be issued.
2. The Applicants have filed Summons by Dependants for Reasonable Provision Pending Grant of Letters of Administration dated 23 April 2025 seeking the following prayers:
 - i. Spent
 - ii. That the Honourable Court be pleased to order the Branch Manager of Co-operative Bank of Kenya, Parliament Road Branch, the Branch Manager of Kenya Commercial Bank Kisii Branch and the Branch Manager of NCBA Bank, Junction Mall Branch, each to provide within 7 days of being served a full account of the funds lying in Account 011XXXX400, Account 111*28 and Account 100XXXX918, respectively in the name of Simon Nyaundi Ogari (Deceased);
 - iii. That the Honourable Court be pleased to compel Christine Kerubo Ogari, Antony Matwetwe Ogari and Constantine Nyamboba Ogari to hand over the Deceased's 3 -bedroom residential



house built on LR 1160/616 to Pamela Kwamboka Ogari and Austin Isinta Ogari for use as accommodation for Austin Isinta Ogari, Aiden Nyandieka Ogari and Tetta Bitutu Ogari pending the hearing and determination of Application for distribution of the estate of Simon Nyaundi Ogari (Deceased)

- iv. That in the alternative to prayer 3 hereof the Honourable Court be pleased to order that a monthly sum of Kshs. 1 10,000.00 be withdrawn from either Account No. 01143XXXX400 Co-operative Bank of Kenya Ltd., Parliament Road Branch, or Account No. 1 113870028, Kenya Commercial Bank Ltd. Kisii Branch, or Account No. 100XXXX918 NCBA Bank Junction Mall Branch in the name of Simon Nyaundi Ogari (Deceased) and be released to Pamela Kwamboka Ogari and AUstin Isinta Ogari to cater for the monthly rent and subsistence, pending the hearing and determination of the application for distribution of the estate of Simon Nyaundi Ogari (Deceased);
 - v. That in further alternative to prayers 3 and 4 hereof, and in the event that there are no sufficient funds in the said bank accounts to meet the Applicants' monthly requirements for rent and subsistence, and in the event that the residential house is not available, then the Honourable Court be pleased to order that a portion of the sum of Kshs. 1,200,000/= monthly rent received from the school run on the deceased's property L.R. No. 1 160/616 Karen, be paid to the Applicants for their monthly rent and subsistence pending the distribution of the estate of Simon Nyaundi Ogari (deceased).
 - vi. That the Honourable Court be pleased to order that the sum of Kshs. 192,000.00 used by Pamela Kwamboka Ogari to pay rent for Austin Isinta Ogari, Aiden Nyandieka Ogari and Tetta Bitutu Ogari, the children of Simon Nyaundi Ogari (Deceased) in the months of January, February, March and April 2025 when they were evicted from their father's house at Karen on L.R. No. 1 160/616 by Christine Kerubo Ogari, Constantine Nyamboba Ogari and Anthony Matwetwe Ogari where they had been staying with their deceased father, be refunded to Pamela Kwamboka Ogari;
 - vii. That the Honourable Court be pleased to order that the school fees and school related expenses for Aiden Nyandieka Ogari and Tetta Bitutu Ogari be paid from the deceased's money lying in the deceased's bank account numbers 01 143XXXX400 Co-operative Bank of Kenya Ltd., Parliament Road Branch, or Account No. 1 1 13870028, Kenya Commercial Bank Ltd. Kisii Branch, or Account No. 100XXXX918 NCBA Bank Junction Mall Branch or from the rent payable by Akira Chix School to the estate of Simon Nyaundi Ogari (deceased).
3. The 1st Applicant is the former wife to the Deceased, their marriage having been dissolved by the Court. The 1st Applicant and the Deceased lived separately since 2012. The 2nd Applicant is a son to the Deceased.
 4. In her Supporting Affidavit, the 1st Applicant avers that following their divorce, the Deceased lived with their children, Austin Isinta Ogari and Aiden Ogari, in his home in Karen, erected on LR No. 1160/616, while the 1st Applicant resided with their daughter, Tetta Ogari. Despite their divorce, the Deceased would pay rent for the 1st Applicant for a two-bedroomed apartment, as evidenced by the Tenancy Agreement and Mpesa transactions. It is the 1st Applicant's averment that her sons would not visit her at her residence, but instead she would visit them at their father's house in Karen.
 5. The 1st Applicant avers that when the Deceased as admitted in hospital some time in April 2024, the 2nd Applicant's step brother, Antony Ogari, forcefully evicted them from their home in Karen. They were then forced to move in with the 1st Applicant, where they have been sharing the small space available for



- accommodation. Due to the limited space, the Applicants have been greatly inconvenienced, with the 2nd Applicant and his brother being forced to sleep on the floor since the second bedroom is occupied by their sister and the nanny.
6. The 1st Applicant further avers that when the Deceased passed on in September 2024, the step children continued paying her rent from the rental income received from a tenant on LR 1160/616. However, no payment has been forthcoming since January 2025. Additionally, the 1st Applicant's children are in need of school fees and money for their upkeep.
 7. The 2nd Applicant also filed an Affidavit in support of the Application, reiterating the averments by the 1st Applicant.
 8. It is noteworthy that prior to the hearing of the Application, the 2nd Applicant filed an Objection to the Making of Grant on the grounds that the signature appearing on the Will is not the known signature of the Deceased. Further, the 2nd Applicant avers that the purported witnesses to the Will were not present when the Will was purportedly executed and that the Deceased was not in a proper state of mind as he was physically and mentally ill.
 9. The Application is opposed by the Respondent, Christine Kerubo Ogari, who is the Executor appointed in the Will. In her Replying Affidavit dated 24 May 2025, the Respondent avers that the Deceased resided at the Karen home with her brothers, Antony Ogari and Constantine Ogari. The 2nd Applicant and his brother did not reside in Karen. The Respondent categorically denies that the 2nd Applicant and his brother were evicted from the home.
 10. Further, the Respondent avers that the Will is valid, was properly executed and that the Deceased was of sound mind at the time of executing the Will.
 11. The Application was canvassed orally.
 12. Mr. Nyang'au, counsel for the Applicant, argued that the application was justifiable since the children of the Deceased are in need of school fees. On the other hand, Mr Mugo for the Respondent argued that since the Applicants have filed an objection to the Petition for Grant of letters of Administration, then the matter cannot proceed. There is need to have an Executor appointed first, then the objection can be heard and the Will proved. It was his contention that this application is premature.
 13. In brief rejoinder, Mr. Nyang'au argued that the law allows for an application for reasonable provision before the Grant of Letters of Administration. He submitted that the Respondent is misconceived in thinking that the Applicants want the property. All they want is for the rental income to be apportioned towards catering for their expenses.

Analysis & Determination

14. The first point to address is whether this Application is properly before the Court.
15. Section 26 of the *Law of Succession Act* provides as follows:
 26. Provision for dependants not adequately provided for by will or on intestacy
Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that



dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.

16. Rule 45(1)(2) of the [Probate and Administration Rules](#) provide as follows:

45. Application under section 26 of the Act

(1) Every application to the court under section 26 of the Act shall, where a grant has been applied for or made but not confirmed, be brought by summons in Form 106 in that cause, or, where no grant has been applied for, be brought by petition in Form 96; and the summons or petition and supporting affidavit shall be filed in the registry and copies thereof served upon the personal representative of the deceased:

Provided that, if representation has not been granted to any person, a copy of the petition and supporting affidavit shall be served upon the persons who appear to be entitled to apply for a grant under the Act.

(2) The application shall be supported by evidence on affidavit in Form 15 or 16 stating that no grant of representation to the estate of the deceased has been confirmed and containing, so far as may be within the knowledge of the applicant...”

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(2) The application shall be supported by evidence on affidavit in Form 15 or 16 stating that no grant of representation to the estate of the deceased has been confirmed and containing, so far as may be within the knowledge of the applicant.

17. The gist of the above provision is that an application for reasonable provision can be mounted at any stage, before the Grant is confirmed, and, therefore, the estate distributed. By virtue of section 30 of the [Law of Succession Act](#), no application for reasonable provision is to be entertained after the Grant has been confirmed. To the extent that the application herein was filed prior to the Grant being confirmed makes it a valid application.



18. The next point is whether the Applicants have locus standi. Are they dependants of the Deceased? Section 29 of the Act defines dependants to mean:

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

19. In this instance, the Applicants fall squarely within the definition, thus have locus standi to present this Application.

20. The next issue is around distribution. In testate succession, distribution is as per the Will of the deceased, and it would be clear, from the face of the Will, whether there was adequate, or inadequate, or no provision at all. In this instance, the Will presented by the Petitioner/Respondent makes provision for the 1st Applicant's children as follows at Clause 2:

I jointly give to my children from my second marriage Austin Isinta Ogari, Aidan Nyandieka Ogari an Tetta Bitutu Ogari, a portion of my ranch in Kajiado equivalent to 350 acres from KJD/Loodariak/359 90 Ha and KJD/Loodariak/359. The same can be sold for purposes of purchasing a home under the name of the 3 children jointly or any other purposes as they may deem fit for themselves including school fees. If any child should not be of legal age during the distribution of property, the same shall be held in trust until they become legal age. I further apportion from my Co-operative Bank and Kenya Commercial Bank Accounts Kshs 3,000,000/= to their mother as their guardian to cater for the children's rent and upkeep for a period of 3 years. I leave them with my motor vehicle Toyota Prado KBV 900D.

21. With regard to the above provision, the Codicil dated 9 February 2024 provides as follows:

3. I note that there is a typographical error in paragraph two (2) on the distribution section of my Will with regards to the reference of the property KJD/Loodariak/359 which is repeated twice. I wish to cite that the correct references for the properties are both KJD/Loodariak/359 as well as KJD/Loodariak/815.
4. I wish to vary the allocation of 350 acres assigned to my children Austin, Aidan and Tetta to 340 acres so that I may allocate to my daughter, Edna, as opposed to the previously assigned 20 acres. I make this amendment so as to cater for her three children in equal portions of ten (10) acres each.
5. I wish to re-allocate the motor vehicle KBV 900D Toyota Prado to my sons Anthony and Constantine. I do this as I note the young ages of the children from my second marriage who may not be able to fully utilise the vehicle; further it is only deserving that they are allocated a brand-new vehicle for their use once of age. I therefore leave One Million, Five Hundred (Kshs 1,500,000/=) for the purchase of a motor vehicle for Austin, Aidan and Tetta and upon



whomever attaining the age of twenty-one (21) years, they will have the ability to claim the same on behalf of the others.

22. The Applicants have disputed the validity of the Will.
23. During oral arguments, counsel for the Applicants submitted that there is already provision made for the Applicants in the Will, therefore, allowing the Application would not be prejudicial to the Respondents. Counsel for the Respondents contended that the Applicants cannot have their cake and eat it. They dispute the validity of the Will on the one hand, yet wish to rely on the same to claim some provision for themselves.
24. In this case, the Will, which is disputed, made provision for the Applicants and other beneficiaries. The issue, however, is that the Applicants seek reasonable provision pending the issuance of the Grant and subsequent confirmation. It is clear that there are pressing needs by the family that must be attended to, such as school fees and upkeep of the children.
25. Section 27 of the Act gives this Court the discretion to order a specific share of the estate to be given to a dependant, or to make such provision for the dependant by way of periodic payments or a lump sum, and to impose such conditions as the Court deems fit. Section 28 stipulates the considerations by the Court when making the order:

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

- (a) the nature and amount of the deceased's property;
 - (b) any past, present or future capital or income from any source of the dependant;
 - (c) the existing and future means and needs of the dependant;
 - (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
 - (e) the conduct of the dependant in relation to the deceased;
 - (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
 - (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.
26. I have carefully reviewed the documents produced by the 1st Applicant. There are receipts for rent payments dating as far back as 2012. There is an Invoice from Kabianga High School dated January 2025 for Ksh 13,126/= with respect to Aidan Ogari. There is another invoice from Kilimani Jr. Academy dated January 2025 for Kshs 287,000/= with respect to Tetta Bitutu Ogari.
 27. From the mpesa statements, the 1st Applicant received Kshs 83,000 in August 2024, Kshs 44,700/- in July 2024 and Kshs 15,000/- in May 2024. That comes to an average of Kshs 47,000/= per month.
 28. In view of the foregoing, pending the issuance of Grant and subsequent confirmation, I direct that the Applicants shall have access to the Bank accounts held at Co-operative Bank of Kenya Ltd, Account No. 011XXXX400 and Kenya Commercial Bank Account No. 111XXXX028 only in the following terms:



- i. School fees with respect to Aidan Ogari shall be payable directly to Kabianga High School upon presentation of an updated Invoice to the Bank;
 - ii. School fees for Tetta Bitutu Ogari shall be payable directly to Kilimani Jr Academy upon presentation of an updated Invoice to the Bank;
 - iii. The 1st Applicant shall have access to a sum of not more than Kshs 80,000/= per month, for a period of 6 months, for purposes of meeting accommodation expenses and upkeep for the children.
29. The said sums shall be considered at the time of the confirmation of the Grant. The Applicants will be required to present full accounts. Any further dealing with the estate of the Deceased must be with the authority of the Court or upon full grant of representation.
30. I make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 4 DAY OF JULY 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Applicants: Mr. Nyang'au

For Respondents: Mrs. Wambugu

Libertine Achieng..... Court Assistant

