



**In re Estate of Charles Gikuhi Sikamoi (Deceased) (Succession Cause  
226 of 2016) [2024] KEHC 2427 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2427 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 226 OF 2016  
SM MOHOCHI, J  
MARCH 8, 2024**

**BETWEEN**

**ANASTASIA WAITHERA WACEKE ..... PETITIONER**

**AND**

**JOEL KANI SIKAMOI ..... 1<sup>ST</sup> PROTESTOR**

**ROSE NJOKI GIKUHI ..... 2<sup>ND</sup> PROTESTOR**

**JUDGMENT**

1. Charles Gikuhi Sikamoi died on the 22<sup>nd</sup> March 2014 at kilome Nursing home leaving behind a surviving spouse and a daughter. The Petitioners moved this court for a grant of letters of administration for the estate of the deceased. Before the same could be granted, the Protestors herein petitioned the court in Nakuru P&A No 232 of 2016 and obtained a grant on 27<sup>th</sup> June 2016.
2. The 1<sup>st</sup> Petitioner Anastacia Waithera Waceke a surviving spouse, moved the court seeking to have the grant issued in the second cause revoked and annulled and on 11th December 2018, the same was annulled and the Protestors were directed to return the grant they had collected. Directions were made that the Protestors be served with the petition for this cause.
3. Upon service, the Protestors initially filed an objection to the issuance of the grant to the Petitioners, and upon consideration, Justice Prof Ngugi as he then was, gave directions on 24<sup>th</sup> June 2021 that a grant be issued to the Petitioners and an application for confirmation be filed within 30 days.
4. Before me is an Application dated 18<sup>th</sup> November 2021, a Summons for Confirmation of grant filed pursuant to Section 71 of the *Law of Succession Act* and Rule 40 of the Probate and Administration Rules) by Anastacia Waithera Waceke a surviving spouse in the estate of the above-named Charles Gikuhi Sikamoi who died on the 22<sup>nd</sup> March 2014 seeking the following reliefs: -



- a. The grant of letters of administration intestate issued / made to Anastacia Waithera Wacheke and Michael Mbugua Wakaria be confirmed.
  - b. That, the costs of this application be provided for.
5. The Application is supported by a sworn affidavit of Anastacia Waithera Wacheke and is premised on the following grounds;
- a) That it is well over six months since the grant herein was issued.
  - b) that there is no objection to the confirmation sought.
6. This court on the 9<sup>th</sup> May 2023 directed that the Applications shall be heard and disposed-off by way of viva voce evidence and written submissions and parties complied as follows;
- a. Hearing was on the 18<sup>th</sup> July 2023 with the 1<sup>st</sup> Protestor Joel Kani Sikamoi testifying for the Protestors and Anastacia Waithera Wacheke testifying for the Petitioners
  - b. Protestors failed to file Written Submission;

### **The protestors Case**

7. The protestor testifies on the 18<sup>th</sup> July 2023 that he was the father to the deceased and that his co-protestor was his wife and mother to the deceased, he is a resident of Nakuru and he adopted his affidavit of protest as his evidence in chief. He urged the court to consider with favour his proposed mode of distribution of the estate of the deceased.
8. Upon cross-examination he stated that his wife Rose Njoki (co-petitioner) retired from the public works department in 2022, conceded that the deceased was married to the 1<sup>st</sup> petitioner and that they were blessed with one daughter.
9. With regard to his proposed mode of distribution as is contained in paragraph 21 of his affidavit of protest the witness concedes that the Nissan Ex-trail and Toyota Voxy motor vehicles could go to the 1<sup>st</sup> Petitioner while stating that the vehicles belonged to the Rosika Trading Company.
10. The witness was cross examined at length on the Next of kin status form that was filed on 25<sup>th</sup> January 2009 long before the deceased was married and was never changed when he got married. He also stated that the 1<sup>st</sup> Petitioner has denied him the rights to his grandchild.
11. The 1<sup>st</sup> Protestor contends that he was a dependant as well as the 2<sup>nd</sup> petitioner and a brother to the deceased and prays that the court allows his protest and distributes the estate as per his proposed mode.

### **The Petitioners Case**

12. In essence, for a party to be deemed as a dependant, under the above section he or she must demonstrate that they were being maintained by the deceased immediately before his or her death.
13. Reference is made to the case of Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others (2016) eKLR, while referring to Section 29 of the [Law of Succession Act](#), the learned Judge had this to say: -

“From the foregoing, a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts”.



14. That in the present case, that is not the case. There is no evidence before the court that the protestors were dependent on the deceased before his death. If anything, it is evident that the Protestors are persons of means earning a living. As at the time of the deceased, the 1<sup>st</sup> protestor was and has been a business and a director of Rosika Trading Company while the and Protestor herein was a civil servant.
15. The deceased herein was also a director of Rosika Trading Company and after his death, the same remains under the directorship of the 1<sup>st</sup> Protestor. The mere fact that the father and son were running a company together is not evidence of dependency. We urge the court to find that the protestors in the circumstances of this case were not dependent on the deceased before his death.
16. The Petitioners herein have listed the known properties of the deceased. The Protestors on their end have listed their known properties. It is trite law that when filing for a petition all documents of ownership of the assets of the deceased have to be attached.
17. In *Adan Chuda Sodev Madina Oshe Jira & another 202 1] eKLR*, the Honourable Court had this to say about properties that subject to distributions in succession matters: -

Section 3 of the *Law of Succession Act* defines an "estate" to mean the free property of a deceased person, while "free property" in relation to a deceased person is defined to mean the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death. In *In re Estate of Job Ndunda Muthike (Deceased) (2018) eKLR* the court (Odunga J) expounding on the said section stated that:

“It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime and in respect of which his interest had been terminated by his death cannot form part of his estate and cannot be the subject of an application for confirmation of grant”.

18. In the Petitioners considered view, “free property” of a deceased person such as land can be proved by documents such as a title deed, allotment letter, lease agreement, sale agreement etc....
19. Some of the properties listed by the Protestors belong to Rosika Trading Company and any dispute arising therein can only be dealt by a civil court through commercial proceedings.
20. The fact that, the deceased was a director does not mean that the assets of the company are subject to distribution.
21. Reference is made in *re Estate of Boniface Mutinda Kabaka (Deceased) (Succession Cause E185 of 2021) [2022]*, the Court had this to say:-

In law there erects a distinction between shares held by a shareholder and the assets (including Bank Accounts) and property of said company. In the celebrated case of *Salmon vs Salmon & Co Limited [1897] ACC* it was held that:

“a limited company enjoys a separate legal existence apart from its shareholders. It can own property, it can sue and be sued, and it has perpetual existence, which means it can continue to exist despite the demise of its owners, the shareholders”. (own emphasis)



22. In *Victor Mabachi & Another vs Nurtun Bates Limited* [2013] ekLR the court held that-
- “This being the case *Mediacom* as a body corporate, is a person *jurisica*’ with separate independent identity in law; distinct from its shareholders, directors and agents unless factors warranting a lifting of the veil”
23. That, the company therefore in law is an entity separate and distinct from the Deceased. The fact that the Deceased held 990 ordinary shares in the company does not make him the owner entitled to company property, in her submissions the 1<sup>st</sup> Petitioner concedes that the assets in question are in fact listed as belonging to the company.
24. In the matter of the *Estate of Gitere kahura & another* (both Deceased) [2018] ekLR the court stated that-
- “The relationship between the .....arising from the said transaction can only be dealt with a commercial court and not this Court. In any case, the same cannot be stated to be forming part of the estate as they were transferred to 3<sup>rd</sup> parties.”
25. The Petitioners submit that, this court in its probate jurisdiction cannot deal with the issues raised with regards to the company and its assets.
26. That the Co-Protestors have referred to motor vehicle registration no KBW 853 U but from the evidence on record, the same did not form part of the estate of the deceased, and the same was not registered in the name of the deceased and if anything, the said vehicle as stated by the 1<sup>st</sup> Petitioner was returned him.
27. All parties agree that motor vehicle registration no 337 J, the bank accounts, and the shares for Britam and KCB should be distributed to the 1<sup>st</sup> Petitioner for her benefit and that of her child. The Petitioners urge the court to find as much.
28. On the issue of the employment benefits from KRA, it is trite law that terminal benefits accrue to the deceased estate, and the law provides that the claim can rightfully be pursued by the legal representative/ administrator. Section 24 (2) of the *Employment Act* 2007 provides that:
- (1) .....
- (2) Upon the death of an employee during the term of a contract of service, the legal representatives of the employee (emphasis added) shall, upon proof of capacity as required by law, be entitled to be paid wages and any other remuneration and property due to the employee as at the date of death within thirty days of submitting the proof.
29. That, the 1<sup>st</sup> Petitioner is entitled to the Insurance Benefits, at the time of filing the form on the next of kin, the deceased herein was not married to the 1<sup>st</sup> Petitioner herein. The said form was filed on 25<sup>th</sup> January 2009. The Deceased herein and the 1<sup>st</sup> Petitioner got married on 16<sup>th</sup> February 2013 and had a child on 27<sup>th</sup> July 2013. The deceased unfortunately passed on 24<sup>th</sup> March 2014 before any updates on the form could have been done.
30. The Protestor herein claims that being the ones nominated, they are entitled to the said benefits solely. We submit that the nomination as next of kin does not make the next-of-kin automatic beneficiary of the funds in issue.



31. The marriage of the deceased to the 1<sup>st</sup> Petitioner herein extinguished the nominations of the terminal benefits. Justice William Musyoka while considering if money that accrues to a nominee named in an insurance policy payable to the estate of the member of the insurance scheme In re Estate of Faith Muita (Deceased) (2016] eKLR stated as follows:

“That the only time nominated funds would fall for distribution in accordance with the law of succession is when the nomination has been revoked by either the subsequent marriage of the nominator or by the death of the nominee before that of the nominator. In both cases there would be no valid nomination, and therefore no nominee would be in place to be paid the proceeds of the policy. In such cases the funds would be estate property vesting in the administrators. Where the nominee dies after the nominator’s death, the nomination would still be valid, and the funds would accrue to the estate of the nominee, and would vest in the nominee’s personal representatives.”

32. The Petitioners submit that, by the death of the deceased, the nomination of the Protestors was cancelled, and as such the said insurance benefits are subject to distribution and not entitled to the Protestors alone. deceased herein left a very young family. As at the time of his death his child was barely 1-year-old and she continues to be raised by the 1<sup>st</sup> Petitioner It would be in the interest of justice if the same are given to the Petitioner to safeguard the interest of the minor's rights to education and other basic requirements.

33. Finally, in the supplementary affidavit filed on 27<sup>th</sup> March 2023, the Protestor have also alluded to the award of Kshs 15, 593,000/= in Machakos HCA No 57 of 2019 to be included in the assets of the deceased.

34. The Petitioners submit that, the Judgment Award do not form part of the assets of the deceased and further, the same are not available for distribution as there is a pending appeal to the Court of Appeal on the same and in view of the foregoing, the Petitioners pray for confirmation of the grant as per the proposed mode contained in paragraph 6 of the Affidavit in support

### **Analysis and Determination**

35. Having considered the evidence on record for and against the confirmation and the Petitioners written submission I am persuaded that the Sole issue that presents itself for determination herein is whether the Protestors are dependants under section 29 of the Law of succession Act?

36. With regards to the failure to file the written submissions by the Protestors, I associate fully with the position held by Matheka J. in Sophia Wanjiru Njuguna v Kyoga Hauliers Kenya Limited [2020] eKLR

It is my humble view that in their submissions counsel for the respondent failed in their duty as given under Section 1A of the Civil Procedure Act which states;

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.” (emphasis mine)



37. Section 29 of the *Law of Succession Act* defines the meaning of dependant as follows: -  
For the purposes of this Part, "dependant" means-
- a) .....
  - 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
38. For the court to find the protestors as dependants, for the court to determine the mode of distribution the principles articulated in Section 28 of the Law Succession Act will be relevant and the said section provides as follows; -
- “In considering whether any order should be made under this par, 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 gifts 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 reason for not making the provision for the dependant.”
39. I have considered the evidence in the court record and on a balance of probabilities, I find the Parents of the deceased and protestors herein suffer grief for the loss of their son but cumulatively considered, an active business relationship between father and son cannot be deemed as proof of dependency under section 29 of the *law of succession act*.
40. With regard to the 2<sup>nd</sup> Protestor who is admittedly recently retired civil servant she cannot have been a dependant to her son while in gainful employment and no evidence of dependency was presented with regards to the deceased brother whom the protestors sought recognition as a dependant.
41. This Court finds and considers the judgment Award of 15, 593,000/- in Civil Appeal No. 57 of 2019 high court at Machakos to constitute an asset in the estate of the deceased.
42. This Court equally finds and considers the employment terminal benefits from KRA of the deceased constitute an asset in the estate of the deceased.
43. The court tried but could not locate cogent and coherent evidence tendered by the protestors in proof of dependency in satisfaction with the requirements of section 29 of the *law of succession Act* thus hereby issues the resultant orders;
- i. The Protestors Affidavit of Protest and Summons Objecting to the making of a grant dated 6th December 2021 is found to be without merit and is accordingly dismissed.



- ii. The Protestors Summons by dependant dated 16th June 2022 is found to be without merit and is dismissed.
- iii. The Petitioner's Summons for confirmation of grant of letters intestate dated 18th November 2021 is found to be with merit and is accordingly allowed.
- iv. This being a family matter, parties shall bear their respective costs.

It is So Ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 8TH DAY OF MARCH 2024.**

**S. MOHOCHI**

**JUDGE**

