



**In re Estate of George Githinji Kamwaki (Deceased) (Succession Cause 2685 of 2011) [2024] KEHC 4426 (KLR) (Family) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4426 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 2685 OF 2011  
HK CHEMITEI, J  
APRIL 11, 2024  
IN THE MATTER OF THE ESTATE OF GEORGE GITHINJI KAMWAKI (DECEASED)**

**BETWEEN**

**REGINA WAMBUI GITHINJI ..... APPLICANT**

**AND**

**THE PUBLIC TRUSTEE ..... RESPONDENT**

**RULING**

1. This ruling relates to the application dated 22<sup>nd</sup> March, 2023 filed by the Applicant, Regina Wambui Githinji; seeking for orders that:
  - (a) Spent.
  - (b) The orders issued on 5<sup>th</sup> December, 2022 confirming the grant issued to The Public Trustee be set aside.
  - (c) The Administrator be compelled to file and serve fresh summons for confirmation of grant upon all beneficiaries.
  - (d) The Administrator be restrained from administering and/ or continuing to administer the Estate of Githinji Kamwaki Alias George Githinji Kamwaki (Deceased) pending hearing and determination of this Application and the fresh administration and distribution herein.
  - (e) Costs of this application be in the cause.
2. The application is supported by supporting affidavit sworn by Regina Wambui Githinji on 22<sup>nd</sup> March, 2023 and further affidavit sworn on 16<sup>th</sup> May, 2023, 2023.



3. In a nutshell, she avers that she is the deceased's wife and that the grant was confirmed without her's and her children's knowledge because they were not served with the summons for confirmation of grant as per the orders issued by Hon. Musyoka J on 20<sup>th</sup> September, 2018. That David Ndegwa, a child, of the deceased through his first wife has refused to comply with court orders to account for the revenue generated from Mukurweini property.
4. The application is opposed by replying affidavits sworn by David Ndegwa (undated) and Philip K. Cheruiyot sworn on 18<sup>th</sup> April, 2023 who aver inter alia that the Public Trustee, through their advocates on record, invited all the beneficiaries to deliberate on the distribution of the estate vide letter dated 7<sup>th</sup> July, 2017 but the applicant and her advocates failed to show up.
5. The Public Trustee filed the summons for confirmation of grant in compliance with the court orders of 20<sup>th</sup> September, 2018 and the applicant, through her advocates, was served with the consent for confirmation of grant and the mode of distribution which they failed to return duly signed consents to the public trustee. They did not also file and serve an alternative mode of distribution nor did they file a protest against the summons for confirmation of grant. The Public Trustee acted within the law and sections 35 and 40 of the [Law of Succession Act](#).
6. Further mention notices were served upon the applicant's counsel on record. The applicant and her children are in occupation of commercial assets that form part of the deceased's estate that generates approximately ksh 200, 000/= per month yet she has refused to comply with this court's order to account for the revenue generated from these assets from 2011 when the deceased's died.
7. The Respondent has filed written submissions dated 15<sup>th</sup> September, 2023 and has placed reliance on the following:
  - a. Section 40 (1) of the [Law of Succession Act](#) which provides that, "Where an intestate has married more than one wife under any system of law permitting polygamy, his personal and household effects and residue of the net estate, shall, in the first instance be divided among the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children."
  - b. Section 40 (2) of the [Law of Succession Act](#) which provides that, "The distribution of the personal and household effects and residue of the net interest within which each house shall then be in accordance with the rules set out in Sections 35 – 38."
  - c. Section 35 (1) (b) of the [Law of Succession Act](#) which provides that, "Where intestate has left one surviving spouse and children (1) Subject to the provisions of s. 40, where an intestate has left a surviving spouse and child or children, the surviving spouse shall be entitled to (b) A life interest in the whole residue of the net intestate estate."
  - d. Section 35 (5) of the [Law of Succession Act](#) which provides that, "Subject to the provisions of s. 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death or in the case of a widow remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."
  - e. Section 76 of the [Law of Succession Act](#) which provides as follows:
 

"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-



- a. That the proceedings to obtain the grant were defective in substance.
- b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.
- c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
- d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either-
  - i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
  - ii. To proceed diligently with the administration of the estate; or
  - iii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
  - iv. That the grant has become useless and inoperative through subsequent circumstances.”
- f. *Re estate of Ainea Masinde Walibengo (Deceased)* (2017) eKLR where the court stated that, “I am of the view that s. 40 of the *Law of Succession Act* will apply in the circumstances of this case. Meaning that the court will distribute the estate of the deceased according to each house taking into account the number of children in each unit including surviving widow.”
- g. *Re Estate of John Musambayi Katumanga (Deceased)* (2014) eKLR where the court stated that, “The spirit of Part V, especially s3, 35, 38 and 40 is equal distribution of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in s.35 (5) and 38 is equally.”
- h. *Re Estate of Kamau Mwenda (alias) Kamau Mwenda Mugekenyi (Deceased)* (2019) where the court stated that, “From the record the distribution has stalled as the applicant to allow distribution. The court found that the mode of distribution in the confirmed grant most reasonable as the estate was equally distributed to the heirs.” It further stated that, “the courts do not act in vain so that even if the order confirming the grant was set aside and the protest is allowed based on the grounds found in the application the court will no doubt arrive at the same conclusion.”

## Background

8. This matter originates from the orders issued by Hon. Musyoka J on 20<sup>th</sup> September, 2018 as follows:



- a. That the Public Trustee is hereby directed to file and serve her application for confirmation of the grant made to her on 24<sup>th</sup> February, 2017 within ninety (90) days.
  - b. That for the purpose of the said confirmation application, the Public Trustee shall presume that the deceased died intestate.
  - c. That the second wife, Regina Wambui, upon being served with the said confirmation application, and if she shall not agree with the terms that the Public Trustee shall propose on distribution of the assets, shall be at liberty to file an affidavit of protest founded on, among other things, her allegation that the deceased had died testate so that the court can determine the question as to whether the deceased died testate or not.
  - d. That the petitioner, David Ndegwa and Charles Mwangi, are hereby directed to file, within thirty (30) days, a true and accurate account of her handling of the Ngong property from the date of the deceased's death to date.
  - e. That the respondent, Regina Wambui, is hereby directed to file, within (30) days, a true and accurate account of her handling of the Ngong property from the date of the deceased's death to date.
  - f. That the Public Trustee is hereby directed to cause a valuation of all the assets of the estate and a report thereon to be filed herein within thirty (30) days.
  - g. That the Public Trustee shall only file confirmation application after the valuation reports and accounts have been filed and served on all parties.
  - h. That in the meantime, the registry is hereby directed not to accept any other or further applications by the parties, save for the confirmation application, without leave of the Judge.
  - i. That the matter shall be mentioned before the Presiding Judge after ninety (90) days of this order for compliance and further directions.
  - j. That each party shall bear their own costs, but the costs of the valuations ordered in (f) above shall be borne by the estate.
  - k. That any party who is aggrieved by the orders that I have made herein shall have the liberty to move the Court of Appeal appropriately within the next twenty – eight (28) days to challenge the same.
9. There is a notice of appeal filed by Regina Wambui Githinji dated 28<sup>th</sup> September, 2018 against the Ruling of the Honourable Justice W. Musyoka delivered at Nairobi on 20<sup>th</sup> September, 2018.

### **Analysis and Determination**

10. I have carefully considered the application, the responses as well as the written submissions filed by the parties and the issues for determination, as crafted by the respondent, are:
- a. Whether the grant was obtained fraudulently or illegally.
  - b. Whether the estate was administered diligently and grant confirmed.
11. There is on record, valuation reports dated 3<sup>rd</sup> April, 2019 (Ministry of Lands – Kajiado North) and 4<sup>th</sup> July, 2019 (Ministry of Lands – Nyeri) filed by the Public Trustee in compliance with order (f) above. However, there is nothing on record to show that David Ndegwa, Charles Mwangi and Regina Wambui Githinji filed their accurate accounts in compliance with orders (d) and (e) above. The Public



Trustee was ordered, in mandatory terms, to only file the summons for confirmation of grant upon filing and service of both accounts and the valuation reports. On this limb, I find that all the parties to this suit are in contempt of this court's orders.

12. There is no evidence of how the estate has been administered for this court to make any meaningful conclusion. Had the parties filed their respective accounts this court would have made some findings.
13. At the same time contrary to what the applicant states, there is no evidence of any pending appeal before the Court of Appeal. This court shall therefore proceed on that premise.
14. I think it will be remiss for this court to accede to the application without the parties complying with Hon. Musyoka J orders. This court cannot sanitize their abuse and willful disobedience of the same.
15. In light of the foregoing, the grant shall only be revoked on the following conditions:
  - (a) David Ndegwa Githinji and Regina Wambui Githinji within 30 days from the date herein must comply with the orders of 5<sup>th</sup> December 2022.
  - (b) The Public Trustee within 14 days after service of the reports from (a) above file fresh application for confirmation of grant and serve all the parties.
  - (c) Failure to comply with the above orders shall consequently have the impugned grant legitimate for all intend and purposes.
  - (d) Each party shall bear its own costs.

**DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 11<sup>TH</sup> APRIL 2024.**

**H K CHEMITEI**

**JUDGE**

