



REPUBLIC OF KENYA



**In re Estate of Naomi Nyakio Pearce alias Naomi Nyakio Kitamuni (Deceased)
(Succession Cause E036 of 2021) [2024] KEHC 4620 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
SUCCESSION CAUSE E036 OF 2021
SN MUTUKU, J
APRIL 11, 2024**

RULING

1. Pending determination are three matters: the Objection dated 25th June 2021 filed by David William Arthur; the Notice of Motion dated 6th November 2023 brought by the Administrators seeking to strike out the Objection and the Notice of Motion dated 12th December 2023 brought by the Administrators seeking partial grant of letters of administration in respect of Ngong Township/Block 2/272 and leave to execute a sale agreement in respect of that property.
2. This honourable court directed that the three pending applications be canvassed together through oral evidence. This court received evidence from Joyce Nalantel Lesingo, one of the administrators, on 12th March 2024. The Objector was absent despite having been notified of the hearing date through email communication as confirmed by this court.
3. The Objection is dated 25th June, 2021. The Objector, David William Arthur, described himself as the husband of the deceased with whom he had 2 children. He set out the grounds of objection as follows:
 - a. That the petition for grant was filed in total secrecy upon material non-disclosure and concealment of all relevant facts and in total disregard of the objector and his children who are beneficiaries of the estate of the deceased.
 - b. That according to the document purporting to be the last will and testament of the deceased, the deceased died partially intestate and partially testate, a fact that the petitioners Mary Wairimu Lisingu, Joyce Nailantei Lesingo and Samuel Nampaso Lesinko have failed to disclose to the court.
 - c. That the petitioners have not disclosed to the court the existence of the objector herein despite knowing he is the surviving spouse of the deceased and the biological father of the children of the deceased who are under his care in Canada being Colleen Margaret Arthur aged 15 years and of birth Certificate Number xxxx and Regina Leann Arthur aged 10 and of Birth Certificate Number xxxx.



- d. That the petition herein is defective in that it does not set out the liabilities and beneficiaries of the estate and the annexures have not been certified.
 - e. That the objector filed a citation to profound the document purporting to be the last will and testament of the deceased in Nairobi HCP & A No. E1121 of 2021.
 - f. That Kajiado HCP& A No. E036 of 2021 ought to be transferred to the High Court at Nairobi and consolidated with Nairobi HCP & A No. E1121 of 2021 since the deceased was domiciled in Nairobi at the time of her death and the bulk of the estate assets are in Nairobi County being:
 - a. Nairobi Block 114/124 Mwiki, Nairobi County.
 - b. Nairobi Block 144/125 Mwiki, Nairobi County.
 - c. Kariobangi South, Jua Kali Sector B/175.
 - d. L.r 209/8285/269 Kariobangi North, Nairobi County.
 - g. That the petitioners are not fit/proper persons to whom grant of representation should be issued.
 - h. That the petitioners have colluded since the death of the deceased and intermeddled with the estate of the deceased and in particular, without any grant of representation, the petitioners have intermeddled with the income of the estate and appropriated it to themselves without regard to the interests of other beneficiaries of the estate.
 - i. That the foregoing issues have been raised in an application brought by way of summons in Nairobi HCF MISC E120/2021 seeking to restrain the petitioners from intermeddling with the estate of the deceased, and which application is coming up for directions on 20th July, 2021.
4. The objection was opposed via a Replying Affidavit of Mary Wairimu Lisingu dated 2/9/2021, which she swore on her behalf and on behalf of two other two executors. She has deposed that the Objector is unknown to them; that the deceased died testate; that prior to her death the deceased was living separately with her children; that the Objector has not demonstrated that he was married to the deceased and that he has never been aware of the deceased's properties as she was dealing with her properties personally.
 5. It is further deposed that as executors they cannot intermeddle with the deceased's estate; that they are not aware of any proceeds generated from the deceased's assets; that the petition is rightfully filed within the correct jurisdiction as the deceased's properties are within the jurisdiction of this court; that at the time of writing her will, the deceased took care and recognition of her children in the said will and that the objection as filed is fatally defective and an abuse of the court process.
 6. It is the case for the testators that there was no undue influence on the deceased at the time of making the will; that at the time of making the will the deceased was of age and of sound mind; that the burden of proofing fraud lies with the person who alleges the same and that the Objector has not proved fraud in making of the will.
 7. It was her averment that the Objector is on a fishing expedition having filed several other matters before the High Court at Nairobi soon after it came into his knowledge of this instant succession cause.
 8. Joseph Kasaine Lesinko also filed a Replying Affidavit dated 2/9/2021 in which he stated that he is a brother to the deceased. That the deceased lived in Canada most of her life and when in Kenya would



- live with him at Kibiko, Ngong. That the deceased was married in Kenya prior to her travelling to Canada. That the objector is a stranger to them however they are aware that the deceased had children with him. That they are not aware of any marriage between the deceased and the Objector.
9. The Objector filed an affidavit in reply dated 28th October, 2021 in which he has deposed that the deceased's siblings know very little of their life in Canada. That he lived with the deceased for 16 years as husband and wife before her demise. That the deceased recognized him as a husband and identified him as such in various bank transactions. That the deceased's family also recognized him as such.
 10. He further stated that the deceased visited Kenya only three times since 2005, in November 2005 for three weeks, again in October 2009 and then in September 2020 and that it was during the last visit that she got ill and passed away on 6th October, 2020.
 11. The Objector listed the properties forming the estate of the deceased under paragraph 18 of his affidavit. It was his case that most of the deceased properties are in Nairobi County and that it is only one property that is in Ngong, Kajjado County. It is his case that the deceased property known as Kariobangi North, Nairobi/209/8285/269 is not mentioned in the deceased's will, neither is it listed in the Affidavit in support of the petition for grant of probate dated 6th May, 2021.
 12. It is also his case that the siblings of the deceased are intermeddling with the above-mentioned property which is a six storied block of flats comprising of several rental units. It is his case that the deceased sister Joyce Nailantei Lesingo has been depositing rental income from that estate into her personal account. That the only property that has been bequeathed to the deceased children is Kariobangi North Plot Number 626/629 Komarock road and that the said property is still registered in the name of the seller. It is his averment that the Will has not considered the best interest of the children. That he has concerns over the validity of the purported will.

Application dated 6th November 2023

13. The above Notice of Motion seeks the following orders:
 - a. Spent
 - b. That the Objection to the making of grant filed by the Objector and dated 25th June, 2021 be struck out on grounds that the same discloses no reasonable cause of action, is scandalous, frivolous and vexatious and the same will prejudice, embarrass and or delay the fair trial of the action and is otherwise an abuse of the process of the court.
 - c. That the cost of the application be borne by the Objector.
14. The application was supported by the grounds on the face of it and on the supporting affidavit sworn by the administrators on even date. It was their case that the Objector has not challenged the legality of the last Will of the deceased. That the Objector is a stranger to them. That he has never been to Kenya nor has he ever been introduced to the deceased family. That the objection is only aimed at frustrating the distribution of the deceased estate. That the objection does not disclose reasonable cause of action and that it is causing great hardship to the administrators and beneficiaries of the deceased. That the objector acted malafides in filing the objection proceedings. That the Objection should be struck out with costs. That it is just and expedient that this application is allowed.



Application dated 12th December 2023

15. The Applicants/Administrators filed the Notice of Motion and brought the same under section 71(1) and (3) of the *Law of Succession Act*, Rule 40(1) and 73 of the *Probate and Administration Rules*, section 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions for orders that :
 - a. Spent
 - b. That the partial grant of letters of administration be issued to the Administrators/Applicants in respect of only one property namely Land Parcel No. Ngong Township/Block 2/272.
 - c. That leave be granted to the applicants to execute a sale agreement and dispose off land parcel No. Ngong Township/Block 2/272.
 - d. That the costs of this application be in the course.
16. The application was supported by a joint affidavit of the executors. It is their case that the deceased died leaving a valid written will dated 14th October, 2020 where she appointed the applicants/administrators as executors. It is their case that prior to her demise the deceased was taking care of her family and all her siblings in Kenya. That prior to her demise she had been hospitalized at various hospitals. That her body was detained for over a month due to huge hospital bills.
17. They have deposed, further, that being left with no option they sought to utilize title No. Ngong Township/Block 2/272 to stand as security to a well-wisher to secure some funds to enable them pay for the hospital bills and accord their sister a decent send off. That this property has been bequeathed to the deceased sisters who have all consented to its sale so as to pay the pressing pending bills now due and owing. That they have identified a potential purchaser. That it would be just and expedient that this court do issue the orders sought so that the estate and all the beneficiaries are not subjected to harassment from the persons who loaned the estate money.
18. They further stated that there are other pending bills including land rates and water bills which have not been paid for a long time. It is also their averment that the creditors have now issued demand notices to the beneficiaries with the aim of attaching the estate and/or their personal belongings. That no prejudice shall be occasioned if the partial grant is issued. The application is made in utmost good faith and in the interest of all the beneficiaries of the deceased estate.

Evidence

19. The matter proceeded for hearing on 12th March, 2024. Where Joyce Nailantei testified that the deceased was her elder sister who lived in Canada. Before her demise the deceased had visited Kenya to bury her father when she got ill and was hospitalized. She was treated at Nairobi South hospital, Coptic and Kenyatta National Hospitals. It is her case that the deceased was in good mental health when she made the Will. The deceased appointed Mary Wairimu Lisingu, Joyce Nailantei Lesingo and Samuel Nampaso Lesinko as the executors of her Will.
20. She stated that the deceased had two daughters who lived in Canada. She said that she did not know that the deceased had a husband. It is her testimony that the deceased had a debt of Kshs. 3,000,000 and they could not be allowed to remove the body from Kenyatta National Hospital necessitating them to borrow money to bury the deceased.
21. She testified that the grant has not been confirmed, hence their application seeking partial grant to enable them sell part of the property to offset the debts. She stated that the family consented. She prayed that the court confirms the grant and dismisses the objection.



22. In addition to evidence, the executors filed submissions in support of their case. The submissions are dated 14th March, 2024. I have read the submissions which have reiterated the averments in the pleadings and the testimony of Joyce Nalantel Lesingo. I need not repeat the same here.

Analysis and Determination

23. To enable me to understand the history of this matter, I took time to read the entire file. Two causes have been filed in respect to this estate. There is Nairobi Succession Cause No. E120 of 2021. As far as the record in the Nairobi matter shows, no grant was issued in Nairobi. Pending determination in the Nairobi matter is the Summons by David William Arthur, the Objector, seeking restraining order against the people he has named in that application from intermeddling with the estate of the deceased.
24. The file was transferred to Kajiado pursuant to a consent order dated 10th February 2022. The pending application had not been determined as far as I can see from the record.
25. There is Kajiado Succession Cause No. E036 of 2021. It contains Petition for Grant of Probate filed by Mary Wairimu Lisingu, Joyce Nailantei Samuel Nampaso Lesinko seeking a Grant of Probate as executors named in what they attached to that Petition as the Last Will and Testament of the deceased dated 14th October 2020. After gazettment of the same, the court (Mwita, J) issued a Grant of Probate with Written Will on 28th July 2021.
26. Before the Grant was confirmed, an objection was filed by David William Arthur who has described himself as the husband of the deceased. That Objection has attracted the Notice of Motin dated 6th November 2023 by the executors seeking to strike out the Objection. The executors have also filed Notice of Motion dated 12th December 2023 seeking partial grant to enable them to sell Ngong/Ngong/2/272 to offset hospital and other bills related to the estate of the deceased.
27. The Objector was absent during the hearing. This court was shown email exchanges between counsel for the executors and the Objector who is acting in person. He operates from Ontario Canada and the record shows that this court, aware of the distance and the time differences between Kenya and Canada, had considered taking evidence of the Objector through virtual link but during the hearing he was not present. The court took evidence of Joyce Nailantei. The executors filed submissions leading to this Ruling.
28. Suo moto, this court has decided not to determine this matter and deliver a ruling due to certain challenges arising from reading the entire two files. There are certain issues arising from these proceedings that led me to hold back and not prepare and deliver this ruling. I am constrained to state those issues here, being careful not to prejudice any party.
29. I have made a conscious decision that this matter is not ripe for a ruling. Justice demands that this court defers the ruling until all the parties are heard. This decision is informed by the fact that there are minor children involved, children of the deceased and the Objector. These children live with the Objector. I have no other evidence to show otherwise.
30. It is only after hearing all the parties, the executors and the Objector, afresh, that this court will be able to determine the matter and come up with a ruling that either party can rely on for any future action. It is my view that determining this matter now will be closing the door for the Objector and the minor children. The issues I am referring to and which I am constrained to state here, will become clear in my ruling after I have taken evidence of all the parties concerned.



31. I am aware that the executors are claiming to have bills to settle. If those bills must only be settled by liquidating some of the assets of the estate of the deceased, then this must wait for the determination of this court. In the meantime, let status quo be maintained in respect of the estate of the deceased.
32. Further, under the provisions of section 83 (h) of the *Law of Succession Act*, which requires the personal representatives to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account, I order the executors to comply with that provision and present before this court the following:
- a. A full and accurate inventory of the assets and liabilities of the deceased held in Kenya at the time of her death.
 - b. A full and accurate account of all dealings therewith from the date of her death to date.
 - c. This shall be done in the next 30 days.
33. This court will fast track the hearing of this matter to cater for the best interests of the two minors. To avoid further challenges, the service of all court summonses to the Objector, who has no legal counsel, will be processed through the Office of the Deputy Registrar of this Court. I so order.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF APRIL 2024.

S. N. MUTUKU

JUDGE

