



In re Estate of Zipporah Wairimu Hosea (Deceased) (Succession Cause 115 of 2017) [2024] KEHC 3155 (KLR) (2 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3155 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 115 OF 2017
SM MOHOCHI, J
APRIL 2, 2024**

BETWEEN

JAMES NGIGE NJOROGE 1ST APPLICANT

BETTY KIMANI 2ND APPLICANT

AND

JAMES MUNGAI NJOROGE RESPONDENT

RULING

1. The Public Trustee was appointed as the Administrator of the estate of the deceased vide a Ruling of this Honourable Court on 3rd March, 2022 and subsequently a Rectified Grant of Letters of Administration was issued.
2. The Applicant, Betty Kamau, vide Chamber Summons dated 9th January, 2023 brought under Section 71(3) of the *Law of Succession Act*, and Rule 40 (1) of the *Probate and Administration Rules*, sought confirmation of the Grant made to the Public Trustee in respect of the deceased's estate in the instant matter and it was supported by an affidavit deponed by herself. She deponed that the deceased was survived by the following persons:
 - a. Phillip Kamau Njoroge Son (Deceased)
 - b. Nicholas Ayub Kimani Son (Deceased)
 - c. James Ngige Njoroge Kimani Son
 - d. James Mungai Njoroge Son (Deceased)
 - e. Mila Wangari Njoroge Daughter (Deceased)
 - f. Josephine Njeri Njoroge Daughter



3. That further the property be distributed as follows;

| | | |
|--------------------------------------|---|------------------------------------|
| Kabazi Munanda Block 1/XXX | Josephine Njeri Njoroge Zipporah Wairimu Kamau Milka Wangare Kamau Leah Njeri Kama Hosea Njoroge Kamu | 1 acre 1 acre 1 acre 1 acre 1 acre |
| Subukia /Subukia Block X (Ngamani/X) | Betty Mukubi Kamau James Mungai Njoroge James Ngige Njoroge | 3 acres 3 acres 2 acres |
| Post Bank A/C No KNAK 31005 | James Mungai Njoroge | Whole share |

4. James Mungai Njoroge (died on 24/7/2023) swore a Replying Affidavit in protest on 17th July, 2023. He had no objection with most of the averments in the Affidavit of Betty Kamau save for the distribution of Plot No 541 to be distributed to Josephine Njeri Njoroge.
5. James Ngingi Njoroge swore an Affidavit on 28th September, 2023 with a proposal to the mode of distribution. The only difference with the Applicant's proposal is that Post Bank A/C No KNAK 31005 to be distributed wholly to James Ngigi Njoroge and not James Mungai Njoroge and that Plot No A-5XX Dandora Phase one belongs to his Zipporah Wairimu Ngingi and that it does not form part of the estate.
6. Josephine Njeri Njoroge, a daughter of the deceased herein swore an affidavit of protest on 15th January, 2024. She deponed that the deceased had distributed the properties before her demise and annexed as "JNN 2 copies of the hand written notes and the English translation. She added that James Ngigi Njuguna was given land Molo and one (1) Share in Mlima Mitatu Farmers' Co-operative Society Limited equivalent to 4 acres and annexed the transfer of share as "JNN 3".
7. She also deponed that Plot No 5XX Dandora belonged to the deceased and annexed the property ownership document dating back to 1976. She stated one James Ngingi Njoroge caused the wrong name be entered into the ownership documents that their mother could not write her name and knowing that their mother had a similar name to his daughter. That the document bears the deceased thumb print. That the child was a minor in 1976 and could not have possibly own property. She added that she was the one managing the property from 1978 together with the deceased and was given to take care of until her demise. That she has been paying rates and annexed the receipts. Also, that the deceased owns one (1) share of plot coffee in Subukia which she distributed to the family of Phillip Kamau Njoroge (Deceased) she was in agreement with the distribution in paragraph 5.
8. Josephine Njeri Njoroge, again swore on 21st February, 2024 a further affidavit of protest to correct an averment in paragraph 6 of her affidavit of 15th January 2023 with regard to the English translation annexed thereto and that she had attached the correct English translation Annex JNN 1.
9. Zipporah Wairimu, the daughter of Phillip Kamau Njoroge (Deceased), who was the son of the deceased in the estate herein, swore an affidavit on 11th January, 2024 and stated that with the authority of her siblings, their late father was given 4 acres in Kabazi/Munanda Block 1/XXX and a Coffee plot in Solai and have been in occupation of Kabazi/Munanda Block 1/XXX long before the death of the deceased herein and have no claim in the estate.



10. Fredrick Rukungu Mungai the son of James Mungai Njoroge (Deceased) who was the son of the deceased in the estate herein, swore an affidavit on 12th January, 2024 and stated that with the authority of his family, that his father was given 4 acres of Subukia/Subukia Block XXX (Ngamini) and that they have been living there and are in occupation.
11. Daniel Njuguna Mburu a son to Milka Wangare Mburu (Deceased) who was a daughter of the deceased, swore an affidavit on 15th January 2024 and Perminus Njoroge Kamau the son of Dorothy Njeri Kamau (Deceased), a daughter of the deceased, swore an affidavit on 17th January, 2024 stating that they had the authority of their respective family members and deponed that their families were not claiming any properties of the estate.
12. The Applicant, Betty Kimani vide an Affidavit of Protest sworn on 15th January, 2024 she listed the properties of the deceased as
 - a. Kabazi Munanda Block 1/XXX measuring approximately 5 acres
 - b. Subukia /Subukia Block X (Ngamani/X) measuring approximately 8 acres
 - c. Plot 5XX Dandora
 - d. 1 coffee plot in solai measuring approximately 50 ft by 100 ft
 - e. 1 share in Mlima Mitatu Farmers Co-operatives Society Limited in molo measuring approximately 5 acres
 - f. Post office savings account
13. She further deponed that she wished to retract the averments of paragraph 5 of her affidavit in support of her application of 9th January, 2023 to wit: -
 - a. The averments were not explained to her with regard to the distribution and she appended her signature to the distribution oblivious of the information within the family of the deceased and further that James Ngigi Njoroge had been given a share equivalent to 4 acres in land in Molo.
 - b. That Subukia/Subukia Block X (Ngamani/XX) had been distributed during the lifetime of the deceased. James Mungai Njoroge and Nicolas Ayub Kimani Njoroge, both deceased, each 4 acres and being the widow of Nicholas, she has been in occupation of the land long before the demise of the deceased.
14. That the property be distributed as follows;



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| <i>Kabazi Munanda Block 1/XXX</i> | -Zipporah Wairimu Kamau Daughter of Phillip Kamau Njoroge -Milka Wangare Kamau Daughter of Phillip Kamau Njoroge -Hellen Njeri Kamau Daughter of Phillip Kamau Njoroge -Hosea Njoroge Kamau Son of Phillip Kamau Njoroge -Josephine Njeri Njoroge Daughter of Zipporah Wairimu Hosea Njoroge | 1 acre 1 acre 1 acre 1 acre 1 acre |
| Subukia/Subukia Block X (Ngamani/X) | Family of James Mungai Njoroge (Deceased) to Grace Murigi Mungai to hold in trust Family of Nicholas Ayub Kimani Njoroge (Deceased) to betty Mukuhi Kimani to hold in trust | 4 acres 4 acres |
| Plot 5XX Dandora | Josephine Njeri Njoroge | Whole |
| Coffee Plot Solai Subukia Valley Farmers Co-operative Ltd | Family of Phillip Kamau Njoroge (Deceased) | Equal |
| Money in post office savings account | James Ngigi Njoroge (Deceased) | Whole |
| one (1) Share in Mlima Mitatu Farmers' Co-operative Society Limited | James Ngigi Njoroge (Deceased) | Whole |

15. She further stated that she agreed with the averments of Josephine Njeri Njoroge.

Applicant's Submissions

16. The Applicant's vide submissions dated 6th November, 2023 submitted on two issues; Firstly, on how the estate should be distributed, it was submitted that since the Grant was issued, the Public Trustee has never taken the initiative to have the Grant confirmed. That the Application clearly lists the beneficiaries of the estate and that the names of the beneficiaries had been established during the hearing of the Grant that was revoked and that they have all been entitled to equal shares as per the various proposals.
17. Secondly on whether Plot No 5XX Dandora forms part of the estate of the deceased, it was submitted that the property belongs to the 1st applicant's daughter and it was held by the deceased in trust for Zipporah Wairimu Ngigi who was a minor at the time.



Submissions by the Public Trustee

18. The Public Trustee through submissions dated and filed on 30th November, 2023 submitted that the delay on the part of the Public Trustee was occasioned by beneficiaries of the estate failing to visit the Public Trustee office to give instructions. That under Section 66 of the [Law of Succession Act](#), the Public Trustee is the administrator of last resort but the beneficiaries rank higher.
19. It was submitted that if the parties felt there was delay on the part of the Public Trustee, they should have moved Court to have the Grant revoked under Section 76 (d) of the [Law of Succession Act](#). That the Grant of Representation is vested in the Public Trustee and cannot be confirmed through an application filed by the beneficiaries without revoking the Grant issued and relied on [Re Estate of Chemwok Chemitei \(Deceased\)](#) (2021) eKLR. where the Court cited *Florence Okutu Nandwa & another v John Atembwa Kojwa*, Kisumu Civil Appeal No 306 of 1998. The Application is misconceived in law and ought to be dismissed.
20. The Public Trustee further submitted and prayed to be discharged as administrator of the estate since beneficiaries have not consented to the Public Trustee being the Administrator and that the Court through its own motion or by consent of the parties does appoint an administrator of the Estate.

Respondent's Submissions

21. The Respondent filed submission on 14th February 2024 and submitted that Plot No 5XX Dandora should not be excluded from the estate since the Applicant, James Ngigi Njoroge has failed to prove that there is a Trust Deed over Plot No 5XX Dandora. He emphasized the importance of proving the allegations as was stated in the Ruling of 3rd March 2022 while citing [Intermchemi EA Ltd v Nakuru Veterinary Center Ltd](#) HCC No 165B of 2000 [2001] eKLR and [Peter Kuris & another \(suing as the legal representatives of the Estate of Joan Wambui Ngigi v Thomas Ondili Oduol another\)](#) (2019) eKLR. That there should at least be a document or an agreement creating the trust.
22. The Respondent also submitted that the 1st Applicant knows in hindsight that his daughter bears same name as the deceased Zipporah Wairimu and prayed that the Court does take judicial notice of the customary naming rights of naming children.
23. It was the Respondent's contention that the legal requirements to creation, payment of duty, registration, incorporation etcetera of Trust Deeds have not been established. The legal relationship of the settler transferring ownership the reason for the transfer for the trustee to hold for the benefit of the beneficiary has not been established.
24. Section 76 (d) of the [Law of Succession Act](#) gives the Court the powers to annul or revoke a grant on an application of a party or suo moto on the grounds stipulated therein. The Section provides that:

“ 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 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.”

25. This Court is alive to the fact that of the six beneficiaries to the estate of the deceased only two are alive and as such there is need to conclude the succession for the benefit of the families of the four deceased beneficiaries.
26. The Court notes the submissions by the Public Trustee to the effect that he was unaware of his appointment and desires not to administer the estate and for this crucial deficiency reason, the grant made on 3rd March, 2022 was a nullity and this Court accordingly annuls the same and discharges the Public Trustee.
27. This Court has considered the assertion by the 1st Applicant that, the Plot No 5XX Dandora, does not form part of the estate of the deceased and that the deceased only held the same in trust of her grand daughter who bears her identical name. This Court has not been shown how the 1st Applicant’s daughter acquired this property while a minor, no trust relationship has been laid in proof and as such this Court shall regard the same as forming part of the estate.
28. This Court hereby makes a fresh grant of letters of Administration interstate to Betty Mukuhi Kamau and Josephine Njeri Njoroge as may be necessary for the ends of justice.
29. The Grant of letters of Administration interstate to Betty Mukuhi Kamau and Josephine Njeri Njoroge is further confirmed.
30. This Court equally appreciate that de-facto the estate of the deceased was substantially settled and shall thus allow the distribution as per the proposed mode by the 2nd Applicant as follows;



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| Kabazi Munanda Block 1/ XXX | -Zipporah Wairimu Kamau Daughter of Phillip Kamau Njoroge -Milka Wangare Kamau Daughter of Phillip Kamau Njoroge -Hellen Njeri Kamau Daughter of Phillip Kamau Njoroge -Hosea Njoroge Kamau Son of Phillip Kamau Njoroge -Josephine Njeri Njoroge Daughter of Zipporah Wairimu Hosea Njoroge | 1 acre 1 acre 1 acre 1 acre 1 acre |
| Subukia/Subukia Block X (Ngamani/X) | Family of James Mungai Njoroge (Deceased) to Grace Murigi Mungai to hold in trust Family of Nicholas Ayub Kimani Njoroge (Deceased) to betty Mukuhi Kimani to hold in trust | 4 acres 4 acres |
| Plot 5XX Dandora | Josephine Njeri Njoroge | Whole |

31. The Administrators shall within sixty (60) days move the Court for a rectification to include the Names of beneficiaries for the following assets;
- i. Name from the Family of Phillip Kamau Njoroge (Deceased) to be bequeathed Coffee Plot, Solai subukia Valley Farmers Co-operative Ltd;
 - ii. Name from the Family of James Ngigi Njoroge (Deceased) to be bequeathed money in post office savings account
 - iii. Name from the Family of James Ngigi Njoroge (Deceased) to be bequeathed one (1) Share in Mlima Mitatu Farmers' Co-operative Society Limited.
32. The Administrators are to conclude the distribution within 6 months of this judgment.
33. There shall be no costs, this being a family matter.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 2ND DAY OF APRIL 2024.

MOHOCHI S. M.

JUDGE

