



REPUBLIC OF KENYA



**In re Estate of Joseph Nderitu Kingori (Deceased) (Succession Cause  
3 & 4 of 2017 (Consolidated)) [2024] KEHC 5897 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5897 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
SUCCESSION CAUSE 3 & 4 OF 2017 (CONSOLIDATED)**

**GL NZIOKA, J**

**MAY 17, 2024**

**IN THE MATTER OF THE ESTATE OF JOSEPH NDERITU KINGORI (DECEASED)**

**RULING**

1. The background facts of this matter are that the deceased died on 6<sup>th</sup> February, 2017 and subsequently, Mariana Njeri Gathenya (herein “the widow”) filed a petition vide High Court Succession Cause No. 3 of 2017, seeking for letters of grant of administration intestate.
2. She indicated that, the deceased had died intestate and was survived by herself as the widow, two daughters; Joyce Murgure and Jane Wangari Nderitu, and four sons; Jeremiah Muthee Nderitu, John Mwangi Nderitu. That the last two sons; Peter Nderitu and James Mukumbi Nderitu were deceased.
3. However, on 30<sup>th</sup> March, 2017, George Ndung’u Kimani (herein “the Executor”) filed a petition vide High Court Probate and Administration Succession Cause No. 4 of 2017, seeking for grant of probate. He deposed that the deceased died leaving a will dated, 6<sup>th</sup> March 2008.
4. The Executor further averred that the deceased left the following survivors: -
  - a. Mary Njeri Gathenya -----wife
  - b. Joyce Murgure -----stepdaughter
  - c. Peter Kironji ----- stepson
  - d. Jeremiah Gathenya-----= stepson
  - e. John Mwangi-----stepson
  - f. Jane Wangari Nderitu-----daughter
5. By an order of the court dated, 20<sup>th</sup> April, 2017 the court ordered that the two matters be consolidated as cross petition and made the Succession Cause No. 4 of 2017 as the lead file.



6. The matter then turned on the issue of the agent to manage the estate. The parties were allowed by the court an opportunity to negotiate and agree on an agent, however they failed to agree whereby the court mandated Peter Kingori trading as Snow white to manage the estate.
7. The Estate agent was ordered by the court to share audited accounts within thirty (30) days of the order of the court dated; 19<sup>th</sup> May 2017. In addition, the parties were given an opportunity to propose two names of Estate agents for consideration for approval. The widow was also allowed to continue withdrawing Kshs. 200,00 every month with the order taking effect from May 2017.
8. By a chamber summons application dated 12<sup>th</sup> June 2017, the Executor sought for review of the orders issued on 19<sup>th</sup> May, 2017 and/or recuse itself and make provision of; Kshs. 800,000 to the Executor for the management of the estate.
9. The application was canvassed and by a ruling dated 6<sup>th</sup> October 2017, the court reviewed the provisions for the widow from Kshs. 200,000 to Kshs. 150,000, and ordered for a one-off payment of Kshs. 150,000 to the Executor. Furthermore, the court Ms. Josphat Ndungu trading as “Skylink Commercial Agency” to manage the estate.
10. The court further ordered that all rents and profits received from the estate be deposited in a bank account No. 0278105105 and accounts thereof be rendered every six (6) months to the Deputy Registrar of the court from 1<sup>st</sup> March, 2018.
11. Furthermore, the court ordered that, the two petitions be treated as cross-petition to each other and each petitioner file an answer thereto inclusive of witness affidavits within twenty-one (21) days and a date for hearing be fixed in the Registry.
12. From the averments in both cross-petitions, it became evident that the validity of the will dated; 6<sup>th</sup> March, 2008 was in issue. That specific issue was canvassed and by a ruling dated 17<sup>th</sup> November, 2022 the court held that, the will is valid and admitted it to probate.
13. The court further stated that, the issues of the adequacy or otherwise of gifts to certain beneficiaries and whether all property of the deceased was captured in the will, were not relevant to the issue of the validity of the will and could be dealt with either under an application for dependency under section 26 of the Law of Successions Act, or by parties’ intestate succession.
14. Pursuant to the aforesaid the widow Mariana, her two sons Jeremiah Muthee Nderitu and John Mwangi Nderitu, and daughter, Joyce Mugure Thuita (herein “the applicants”) filed an application dated 5<sup>th</sup> December, 2022, brought under the provisions of; section 26 and 47 of the [Law of Succession Act](#) (Cap 160) Laws of Kenya and Rules 45, 49 and 73 of the Probate and Administration Rules, seeking for the following orders: -
  - a) That no grant of representation to the Estate of the above-named Joseph Kingori Nderitu (deceased) who died on 6<sup>th</sup> February, 2017 having been confirmed, such reasonable provision be now made for the applicants as dependents of the deceased out of his net estate as the court thinks fit.
  - b) That pending the hearing and disposal of this application an interim order be issued that the 1<sup>st</sup> applicant Mariana Njeri Gathenya do withdraw and or continue to withdraw Kshs. 150,000 per month from the deceased’s account number 8105105 Absa Bank Ltd. Naivasha for her food, subsistence, medication, clothing, upkeep and necessities of life.
  - c) That pending the hearing and the determination of this application all the rent from the property known as Maryland Complex situated on Land Reference 1144/684 Naivasha be



collected and or continue to be collected by Joseph Gitau Ndungu T/A Skylink Commercial Agency and the same be deposited into the account of the deceased number 8105105 held at Absa Bank Ltd Naivasha.

- d) That costs of this application be provided for.
15. The application was supported by the applicants' respective affidavits wherein, they aver in a nutshell that, the widow was a wife of the deceased and married to him in the year 1966 under Kikuyu Customary Law. That they were blessed with six (6) children namely; Joyce, Jane, Jeremiah, John, Peter and James. However, Peter and James are deceased and left no family or dependents. That, the surviving children are biological children of the deceased but not step-children as alleged.
  16. The applicants averred that, the deceased did not provide for the widow in his will as evidenced by paragraph H of the will as such it violates her rights under article 57 of *the Constitution* of Kenya, 2010. Further, the property LR 1144/684 also known as Maryland Complex is her matrimonial home.
  17. The applicants Jeremiah and John acknowledged that, they were bequeathed properties under the will, but argued that the subject properties are under-developed, do not generate any income and are occupied by strangers. That, they are married with children and get an income Kshs. 12,000 from selling second hand clothes which is inadequate to maintain them.
  18. The applicants further argued that, the deceased bequeathed Joyce the Jos-Marion house situated on Plot No. Naivasha Block 2/281, but the house was demolished by the Government in the year 2010 as such it has failed. Further, the other property Nayndarua/Silibwet/607 valued at Kshs. 1,500,000 is undeveloped. That, she is a widow following the death of her husband in the year 2010. Further that she has four children with the last born in secondary school. Furthermore, after moving out of the subject premises, she is stay in rented room at Inyaa trading Centre.
  19. The applicants aver that, they had a good relationship with the deceased but they were not adequately provided for in the will.
  20. The application was opposed by the deceased's daughter; Jane Wangari Nderitu, and her child, George Muhumu, (herein "2<sup>nd</sup> and 3<sup>rd</sup> respondents") receptively.
  21. The respondent opposed the application vide a replying affidavit dated; 13<sup>th</sup> December, 2022 sworn by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in which they averred that, the will has made provision for the widow whereby she resides at Maryland Complex as stated therein and the 2<sup>nd</sup> respondent is to take care of all her needs.
  22. That, in addition the widow benefits from butchery in the name of Shamba La Nyama which generate in excess of Kshs 250,000 a month which she and the other applicants use to the detriment of the intestate property.
  23. Further Since 12<sup>th</sup> April 2017 when she contested the will and after ruling of Justice C. Meoli on 19<sup>th</sup> May and 6<sup>th</sup> October 2017, the widow has received over Kshs 10,400,000 which is enough for her.
  24. That after Justice R. Mwangi declared the will as valid, the widow cannot continue drawing the money from Absa Bank as such it is the 2<sup>nd</sup> respondent who should draw the money, as will vested the property into her possession from 6<sup>th</sup> April 2017 and she is not willing to share it with the widow.
  25. The respondents further argued that the agent has not rendered account to the Deputy Registrar or the Executor as ordered by the court and therefore should not be allowed to continue managing the property and more so after the will was declared valid.



26. Further the widow should not be allowed to continue drawing money as the ruling of Justice C. Meoli has been overtaken by validation of the will and if she is allowed to continue it will be unlawful, and subjugation of the will of the deceased and the order that validated the will.
27. The respondents deposed that there is an appeal in the Court of Appeal, Appeal No. 12 Of 2018 against the order of April and October 2017 which is yet to be heard.
28. Furthermore, the 1<sup>st</sup> applicant's claim under section 26 of Law of Succession Act is untenable as property has been bequeathed to the 2<sup>nd</sup> respondent and is not a matrimonial home.
29. That the widow has by her own admission confessed to having the other applicants' out of wedlock which is relevant in determining issue of dependents. Even then the will speaks volume of the relationship between the 2<sup>nd</sup> to 4<sup>th</sup> applicants with the deceased.
30. That unless there are any verified statement of account from Absa Bank account the sum of Kshs 11.7 million cannot be said to be intestate property because it comes from property 11144/684.
31. The 2<sup>nd</sup> respondent disputed the property Naivasha Block 2/811 being a road reserve and refers to her replying affidavit dated 16<sup>th</sup> May 2019 and a title dated 12<sup>th</sup> January 2001, and argued that if it was acquired for road reserve, the applicant should seek for compensation from the Government.
32. The applicants filed further affidavits dated; 9<sup>th</sup> February, 2023 and averred in a nutshell that, the will makes no provision for the widow in the property L.R No. 1144/484 Maryland Complex despite the fact that she lived there with the deceased from the year, 2006. That she has been neglected by the 2<sup>nd</sup> respondent who has said all rental income belongs to her.
33. The widow averred that money received from the four (4) butcheries and bars was used to build Maryland Complex situated on L.R. No. 1144/684. Further, the amount of Kshs. 150,000 awarded to her is for maintenance and medical treatment. That Shamba La Nyama, is a small hand to mouth butchery business and she ought to be allowed to continue withdrawing the sum of Kshs. 150,000.
34. The applicants, Jeremiah and John denied having been given reasonable provision in the will and reiterate that the 1.26 Acres in Nyandarua/Silibwet/689 is nothing compared to what the 2<sup>nd</sup> respondent was given worth Kshs. 170 million as rent from L.R. No. 1144/684 Maryland Complex.
35. The applicant Joyce maintained that L.R No. Naivasha Block 2/218 is on a road reserve that blocks the frontage of UNIATAS Sacco. That the deceased was served with notice on the same and he filed a suit Nairobi HCCC No. 1313 of 2001 which was transferred to Nakuru High Court as HCCC 308 of 2001, however he did not prosecute it and it was subsequently dismissed.
36. That, in 2010 the Jos-Marion property was demolished. Furthermore, a testator can only bequeath a freehold property however, the subject property was not a freehold property and not open to bequeath.
37. The application was disposed of through filing of submissions by the respective parties which are considered herein. In that regard considering the materials placed before the court, I find that several issues have arisen for consideration: -
  - a. Who is a dependent.
  - b. What is the law where dependent has not been adequately provided for in the will?
  - c. Does the will make sufficient provisions for the widow?
  - d. What is the value of Shamba La Nyama and/or the income therefrom (if any)?



- e. How much money has the 1st applicant received since the date of the order by Hon Justice C. Meoli J and after the validation of the will by Hon, Justice R. Mwongo J.
  - f. Should the 1st applicant the widow be allowed to continue drawing money after validation of the will
  - g. Has the agent filed any accounts as directed by the court?
  - h. Can the court decide the matter herein where the respondent aver there is appeal in Court of Appeal?
  - i. Have the 2 to 4th applicants been adequately provided for in the will.
  - j. Are the 2<sup>nd</sup> to 4<sup>th</sup> applicants biological or step-children of the deceased.
  - k. Is the property Block 2/812 allegedly demolished for being on the road reserve is part of the estate of the deceased and/or whether it is freehold or a leasehold?
  - l. Whether if the court make provision for the applicants it will amount to rewriting the will?
  - m. Whether motor vehicle KAR 409 and the sum of money in the account at ABSA bank are intestate properties.
  - n. Whether property 1.26 acres of LR Nyandarua/Sillbwet/689 has lapsed by virtue of the death of one beneficiary and if it is intestate property.
  - o. Is there any valuation on the assets of the properties?
38. As regards a dependant, the issue is whether the 2<sup>nd</sup> to 4<sup>th</sup> applicants are indeed dependants of the deceased, as they are stepchildren.
39. In that regards, the provisions of section 29(1) (b) of the Law of Succession provides the meaning of a dependant and state as follows:
- “For the purposes of this Part, “dependant” means—
- (b) such of the deceased’s parents, step-parents, grand-parents, 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”
40. The afore provisions recognize step children as dependants if the deceased had taken them in as his own. In the instant matter the deceased made provision for the 2<sup>nd</sup> to 4<sup>th</sup> applicants in the will, which in my considered opinion amount to the deceased having taken them as his own children. Therefore, the argument to the contrary is not tenable as such they qualify as dependants.
41. To revert back to the prayers in the matter, I note that the applicants premised their application on the provisions of sections 26, 27 and 28 of the Act.
42. The provisions of section 26 provide and are analysed here below:
- “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”.

43. The questions that arise are: Have the parties herein established the net estate of the deceased? Have the parties agreed on all assets of the estate and/or which assets are testate and which are intestacy? What about the property that is said to have been demolished and the one whose beneficiary passed on, are they available for distribution? Similarly, what of the money in the ABSA account, the Shamba la Nyama, butchery, vehicles, are they testate or intestate property? Is there a professional valuation thereof of the net estate?
44. Furthermore, section 27 states as follows:
- “In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.
45. Again is it possible to order for a specific share where the net estate is unknown?
46. Furthermore, 28 stipulates the circumstances to be taken into account by court in making order and states: -
- “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 defendant;
  - (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.
47. If the issues raised herein for determination have not been fully canvassed, then the court cannot be able to deal with the issue of adequacy or inadequate provisions for any of the dependants.
48. To resolve that issue there is need to know all assets of the deceased. The will has provided for some of the assets, however, there is a dispute on certain properties that need to be resolved for the court to determine whether they form part of the estate of the deceased or not.
49. In that regard the following property are unclear: -1.26 Acres out of Nyandarua/Silbwet/689 bequeathed to Peter Kironjo whose death predeceased the testator, Jos-Marion House (Naivasha Municipality Block 2/812) whether it was demolished, the money in ABSA account, amount received



by the window as maintenance, Shamba la Nyama Butchery, motor vehicle KAR 409K and the amount of Kshs 11,700,000 whether intestate property held by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent

50. In my considered opinion, these issues can be resolved vide viva voce evidence where witnesses are called, examined and cross examined and documents produced to support the respective cross petitions.
51. Further, if the Executor has gotten a grant of probate he can file an application for confirmation of grant where the applicants herein can file a protest or objection proceedings.
52. Based on the aforesaid, prayer (1) of the application cannot be granted.
53. As regard prayer (2), the order was issued by the court, the same can only be set aside upon an application to the court. The respondents have not applied for the same or review thereof. I have carefully read the decision of Justice R. Mwongo and it did not set aside that order. In any event, there is divergent views as to whether the confirmation of the validity of the will automatically devolved the property upon the beneficiaries named therein.
54. As regard prayer 3 for continued provisions for the 1<sup>st</sup> applicant, it suffices to note that, the same is a subject of the order of the court made on 6<sup>th</sup> October, 2017. That order has not been set aside. The argument by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is that the same automatically terminated upon the order of the court dated 17<sup>th</sup> November 2022.
55. The question is: Does a valid will automatically confer and vest the property therein in the named beneficiaries or are they required to take any other procedural provisions provided for under the Act and Rules of Probate and Administration.
56. The provisions of section 51 of the Act that deals with an application for grant stipulates inter alia;
  - “(1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.
  - (2) Every application shall include information as to—
    - (a) the full names of the deceased;
    - (b) the date and place of his death;
    - (c) his last known place of residence;
    - (d) the relationship (if any) of the applicant to the deceased;
    - (e) whether or not the deceased left a valid will;
    - (f) the present addresses of any executors appointed by any such valid will;
    - (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
    - (h) a full inventory of all the assets and liabilities of the deceased; and
    - (i) such other matters as may be prescribed.



- (3) Where it is alleged in an application that the deceased left a valid will—
  - (a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either—
    - (i) an authenticated copy thereof shall be so annexed;  
or
    - (ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;
  - (b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.
- (4) No omission of any information from an application shall affect the power of the court to entertain the application.”

57. In addition the provisions of section 53 of the Act states that;

“A court may—

- (a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—
  - (i) probate of the will to one or more of the executors named therein;  
or
  - (ii) if there is no proving executor, letters of administration with the will annexed; and
- (b) if and so far as there may be intestacy, grant letters of administration in respect of the intestate estate.”

58. The provision of section 68 provide for objections to application of grant and states that:

- “(1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.
- (2) Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross application within a specified period.”

59. Be that as it may, the provisions of section 71 of the Act provide for confirmation of the grant as follows:

- “(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of



representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets”.

60. The question is: Have the 2<sup>nd</sup> and 3<sup>rd</sup> respondents applied for the confirmation of grant herein? If the answer is in the negative can the court distribute or confer upon them the power to deal with the estate of the deceased to the exclusion of all other persons?
61. In conclusion I defer prayer (3) that, it is also a subject of the other two applications and I deal with it under application of 9<sup>th</sup> December 2022. Those are orders on 1<sup>st</sup> application dated dated 5<sup>th</sup> December, 2022.
62. The second application dated; 9<sup>th</sup> December, 2022 was filed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent under the provisions of section 47 of the Law of Succession Act (Cap 160) Laws of Kenya and Rules 49 and 73 of the Probate and Administration Rules, 1980. The applicants seek for the following orders: -
- a) That, Mr. Joseph Gitau Ndungu T/A Skylink Commercial Agency do provide accounts of the rents and profits received from tenants on account of the management of L.R. 1144/684 beginning 6th October 2017 to date.
  - b) That, Mr. Joseph Gitau Ndungu T/A Skylink Commercial Agency do cease from proceeds from collecting rent and proceeds from Maryland Complex located on L.R 1144/684 forthwith as the validity of the will has been proven.
  - c) That, ABSA BANK LIMITED do provide statements of account of deposits made into account number 0278105105 from 6th October 2017 to date as well as the account balances as at the date of death of the deceased being 6th February 2017.
  - d) That, Jane Wangari Nderitu be allowed to have access to the account held at ABSA Bank QueensWay Branch Account Number 0278105105 and the funds therein.
  - e) That, Mr. Joseph Gitau Ndungu T/A Skylink Commercial Agency do provide accounts of each tenants monthly rental payments in respect of Maryland Complex located at L.R 1144/684 from 6th October, 2017 to date.
  - f) That, the objector in succession cause no. 4 of 2017 ceases from receiving Kshs. 150,000 effective from 17th November 2022.
  - g) That, the executorship of the Estate of the late Joseph Nderitu Kingori to vest in the Deputy Registrar of the Court.
  - h) That, the Deputy Registrar of the Court to execute all the instruments necessary to effect the transfer of the bequests made in the will.
    - i) That, the sum of Kshs. 11,700,000 in the respondents' supporting affidavits in support of their application for dependency dated 5th December 2022 is not intestate property.
    - j) That, the costs of this application be provided for.
63. The application was supported by the 2<sup>nd</sup> respondent's affidavit wherein in a nutshell she avers that, the ruling of Mwongo, J on 17<sup>th</sup> November, 2022 determined that the deceased's Will was valid and therefore she is the sole beneficiary of L.R. No. 1144/684 Maryland Complex. That, a will takes effect from date of the death of the testator.
64. That the mandate of Ms. Josphat Gitau Ndungu T/A Skylink expired 17<sup>th</sup> November, 2022. Further, no accounts have been filed with Deputy Registrar in accordance with the orders of Hon, Justice Meoli



- J, dated 6<sup>th</sup> October, 2017 and neither has the Deputy Registrar and/or the executor demanded for the same.
65. Furthermore, the executor has not applied to extract the grant of probate following the ruling of 17<sup>th</sup> November, 2022 and has therefore refused to assume executorship. That the Deputy Registrar to be the Executor.
  66. The application was opposed vide the replying affidavit dated 9<sup>th</sup> February, 2023 sworn by the widow in which she avers that, the order of Hon. Justice Meoli, J of 19<sup>th</sup> May, 2017 is still in force. That her matrimonial home is at Maryland Complex situated on LR No. 1144/684 where she lived with the deceased.
  67. That when a person dies leaving a will, property vests in an Executor who administers the estate in accordance with section 79, 80 and 82 (c) of the [Law of Succession Act](#).
  68. Further the account at Absa Bank was not bequeathed to Jane Wangari Nedritu and therefore she cannot have access to it. She reiterated that Jane Wangari Nderitu has failed to provide for her as directed in the will and therefore the Kshs. 150,000 she getting is for upkeep and medical bills.
  69. Furthermore, the application herein is meant to sabotage her summons for provision of maintenance and is only fair she is allowed to continue drawing the money.
  70. The application was further opposed by the replying affidavit of Ms. Josphat Gitau Ndungu T/ A Skylink Commercial Agency, named therein as the 1<sup>st</sup> interested party, who averred that, he was appointed by the court and his appointment can only be revoked by the court and not a party to these proceedings.
  71. That he has been briefing all beneficiaries on accounts and has been attending their meetings and shared reports on the management of the subject property. He annexed to the affidavit statements from November 2019 to October 2022.
  72. That the applicant through a family agreement on 9<sup>th</sup> August 2019 directed him to remit rent in the ratio of 30:70 to Absa Bank and Family Bank respectively which he complied with.
  73. He further averred that, the applicant herein, Jane Wangri Nderitu has been interfering with his work, visiting his office and demanding to be given part of the money collected. Furthermore, he has received letters 25<sup>th</sup> November, 2022, and 2<sup>nd</sup> December, 2022 from Jane Wangari Nderitu directing him to cease from collecting rent and another letter from widow's Advocate with conflicting information. He annexed both letters to the affidavit. He urged the court to stop applicants and other beneficiaries from interfering with his work.
  74. However, the applicant herein in a supplementary affidavit argued that, testate property does not vest to the executor. Further, that the accounts produced are proof of embezzlement and are unverifiable and unsubstantiated
  75. The application was disposed of through filing of submissions by the respective parties considered herein. Notably, the 1<sup>st</sup> applicant, Jane Wangari Nderitu submitted that, she was not served with replying affidavit of the Interested party. That, the agent has colluded with other parties to embezzle the estate funds and there are no accounts filed from April 2020 to date being three years.
  76. That the Executor is not an Administrator, that Administration envisages intestate and an Executor's role is execution of the wishes of the testator. Further, section 47 of the [Law of Succession Act](#) and Rule 73 of the Probate and Administration Rules, allows the court to do away with the Executor and replace him with the Deputy Registrar to forestall an illegality and meet the ends of justice.



77. Furthermore, the Executor is answerable to the court for misappropriation of rental income by the widow and the estate Agent as per section 45 (2) (b) of the [Law of Succession Act](#). Further, Section 82 (d) (i) and (ii) prohibits an Executor from misappropriation of the estate.
78. The applicants argued that the Executor has not filed replying affidavit to both of the applications and that his executive summary of facts and skeleton submissions are not pleadings. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested party did not respond to the summons dated; 9<sup>th</sup> December 2022.
79. The respondents in response submitted that, the issue of dependency is still pending before the court and therefore Ms. Josphat Gitau Ndugu T/A as Skylink Commercial Agency who was appointed by the court should continue to manage the estate.
80. It was reiterated that the bank account at Absa Bank was not bequeathed to the applicant Jane Wangari Nderitu. Further, the applicant has not given a reason why the widow should stop drawing Kshs. 150,000 as her maintenance and upkeep.
81. That, the deceased's property cannot vest in the Deputy Registrar but vested in the Executor from the time of the deceased's death. Further, the Deputy Registrar cannot sign the transfer instruments as it is the mandate of the Executor under section 82 (c) and (d).
82. The Executor on his part submitted that, he has not been named as a respondent and therefore would only deal with the application of 9<sup>th</sup> December, 2022 as it is the only one dealing with issues touching on him.
83. He submitted that, the prayers for the estate to vests in the Deputy Registrar and for the Deputy Registrar to execute all instruments are not tenable because it amounts to usurping the Executor's role.
84. That, he has not expressed the desire to renounce executorship as provided for under section 59 [Law of Succession Act](#) and unless he does so, no grant can be issued to any other person under section 62 of [Law of Succession Act](#).
85. Further, section 55 of the [Law of Succession Act](#) states that there can be no distribution of estate grant is confirmed and section 71 which provides no grant can be allowed until after six (6) months unless permitted by court.
86. That, the instant application was filed on 9<sup>th</sup> December 2022 after the ruling was delivered on 17<sup>th</sup> November 2022 therefore the stipulated period under law has not passed for the application of confirmation of grant. As such the as there is no evidence of indolence on the part of the executor and the application is premature.
87. After considering the materials placed before the court, I find that the following issues arise for consideration:
  - a. Whether the mandate of the agent terminated automatically upon the delivery of the ruling of Justice R. Mwangi, or if he required to return to court for termination.
  - b. Whether Maryland Complex is a matrimonial property under the definition in the law [Matrimonial Property Act](#) 2013
  - c. Whether the has been drawing excess of Kshs. 150,000
  - d. The role of an Executor in relation to testate succession or a will of a testator
  - e. Whether all the parties responded to the application; and whether the failure to respond formally renders the issues raised as admissible, conceded and/or unopposed



- f. Whether there has been evidence of intermeddling by the respondents in Maryland Complex property
  - g. Whether the order of Meoli J is still valid or was overtaken by the ruling by Mwongo, J
  - h. Whether the agent has been accountable/complied with order of the court, accounted to the parties as deposed in his affidavit.
  - i. Whether the applicants have been intermeddling with the mandate of the agent
88. I have considered the application in the light of materials placed before the court and I note that as regards the agent's mandate to continue collecting rent, the order of Hon. Justice C. Meoli is still in force and needs to be vacated by the court or the agent's role terminates upon confirmation of the grant and distribution of the estate.
89. Even then there seem to be a lot of interference with the work of the agent as evidenced by the letters produced by the agent instructing him to deposit money in an account not provided for in the court order and the appointment of another agent and/or the directions on how to distribute the income.
90. The maxim of equity states that; "he who goes to equity must come with clean hands", so when it is evident that both parties are not adhering to court orders then this court's power will not be invoked to remedy the self-created circumstances.
91. The agent cannot cease collecting rent unless and until the grant has been confirmed and property in issue vested in the 2<sup>nd</sup> respondent or acts of impropriety established. I decline to issue orders terminating the agent's mandate.
92. As regard the prayer for the agent to provides accounts, I note that, the order of Hon. Justice C. Meoli stated that the accounts be rendered to the Deputy Registrar, every six (6) months from 1<sup>st</sup> March 2018. There is no evidence that he has complied with that order and therefore the order must be complied with. The agent must provide true and accurate audited accounts to Hon. Deputy Registrar as ordered within 21 days of the date of this order and copy in the applicants and respondents. The said accounts shall include the accounts from Absa Bank alongside the audited accounts of income from Maryland Complex property. If the bank declines to issue them, the Honourable Deputy Registrar can call for them. That takes care of prayer (3).
93. Pursuant to prayer (4), I order that after validation of the will, the 2<sup>nd</sup> respondent be allowed access to the information relating to the income and expenditure of sums of money collected and the balances. However those accounts shall be filed with the Hon. Deputy Registrar and copied to the applicants and respondents. Prayer (5) of the subject application is taken care of under application (1).
94. As regard prayer (6) that the widow cease receiving Kshs 150,000, it is the finding of the court that unless and until the grant is confirmed the respondents cannot lock out the 1<sup>st</sup> applicant from the benefit accruing to her in relation to the Maryland Complex property.
95. Even then it is not far-fetched to allow her draw the funds as the will implores the 2<sup>nd</sup> respondent to take care of her and unless there is evidence that she is doing so, which evidence has not been provided, the maintenance sum cannot be withdrawn. Furthermore, there is no application to review the order that allowed her the maintenance.



96. The prayer seeking appointment of the Deputy Registrar to execute the duties of the Executor is not tenable. The provisions of section 83 (g) of the Act states:
- “(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration”
97. The afore provision do not recognize the power of the Hon. Deputy Registrar where the Executor is still in the office, therefore the Executor should do what is expected of him. That deals with prayer (7) and (8) which will be a subject of distribution during confirmation of grant or affidavit of protest or conclusion of the application under section 26 of the Act. Prayer (9) the costs be in the cause.
98. The third application is dated 2<sup>nd</sup> February, 2023 filed by Jane Wangari Nderitu and her son George Muhuhu under the provisions of section 45 and 47 of the *Law of succession Act* (Cap 160) Laws of Kenya, and Rules 26, 49, 54(1), 56 and 73 of the Probate and Administration Rules wherein they seek for orders:
- a) That this application and the application dated 9th December 2022 be both certified as urgent and the same be heard contemporaneously.
  - b) That the 1st, 2nd, 3rd 4th and 5th respondents be precluded and restrained from intermeddling with the properties bequeathed to the applicants namely Maryland complex or L.R 1144/684 NAIVASHA, NAIVASHA MUNICIPALITY BLOCK 2/858, and 3.5 acres comprising developed land of NYANDARUA/SILIBWET/689.
  - c) That the applicants be allowed the immediate unlimited access and possession of the properties known as L.R 1144/684 NAIVASHA, NAIVASHA MUNICIPALITY BLOCK 2/858, and 3.5 acres comprising developed land of NYANDARUA/SILIBWET/689 in furtherance of the orders of the Court of 17th November 2022 by Mwongo, J. admitting the will dated March 2008 to probate.
  - d) That the Officer Commanding Station Naivasha Police be and is hereby ordered to superintend over the compliance of the orders of access and possession of the properties bequeathed in the will to the applicants namely Maryland complex or L.R 1144/684 NAIVASHA, NAIVASHA MUNICIPALITY BLOCK 2/858, and 3.5 acres comprising developed land of WANDARUA/SILIBWET/689 for the maintenance of law and order.
  - e) That the costs of this application be costs in the cause.
99. The application was supported by the affidavit of Jane Wangari Nderitu wherein she averred in a nutshell that, the respondents have been forcibly and illegally occupying the properties L.R. No. 1144/684, Maryland Complex and Nyandarua/Silbwet 689.
100. Further, they have threatened to harm or kill her if she attempts to dispose them off. That she has reported the threat to the police station OB 75/13/1/24. She argues that by their actions they are in contempt of the order of the court. She attached a video in flash disc and news coverage where 1<sup>st</sup> respondent and her Advocates were making misleading statements claiming that the will was invalid. That it shows how far they can go to try and deprive her of her property and invited the court to watch the video.



101. The application was opposed vide a replying affidavit dated 9<sup>th</sup> February, 2023 sworn by the widow and her daughter, Joyce Mugure Thuita in which they averred that, the applicants defied an order to negotiate.
102. Further, on 13<sup>th</sup> January 2023, the 1<sup>st</sup> applicant went to L.R. No. 1144/684 Maryland Complex, accompanied by her daughter and two (2) men who she introduced as Auctioneers and stated that, they had gone to collect rent from or carry away one of the tenant's goods. That, when the 1<sup>st</sup> applicant saw them, she screamed that it her property and that she won't share it with them and in return the widow's daughter in law screamed and members of public came and the applicant left. That on 30<sup>th</sup> January 2023, people from the news came to follow up on the events of 13<sup>th</sup> January 2023.
103. The respondents alleged that, in the year 2018, the 1<sup>st</sup> applicant made similar allegations of threats to her life at Naivasha Police Station and she was summoned, however she was told to go home without any further action.
104. The respondents reiterated that, the order of the court was for the agent to collect rent and no one else. Further, the will vests in the Executor who is the Administrator of the estate.
105. However, the applicants filed a supplementary affidavit sworn Jane Wangari Nderitu in which she averred that, the widow and her children are not entitled to any property and that is why she refused to negotiate as she does not want to share her property with them. That, the issue of whether the property was a road reserve should go to the Environment and Land Court.
106. The application was disposed of through filing of submissions by the respective parties considered herein. The applicant, Jane Wangari Nderitu, submitted that, the will allows the widow to live but not to interfere with the beneficiaries use of the property through use of violence.
107. That the widow's intermeddling amounts to taking possession and yet she has no right to collect rent. If the respondents are allowed to collect rent the court will be aiding in illegality.
108. That, the doctrine of ademption/lapse is not relevant and the court lacks jurisdiction once the title is in deceased name. That, the court has no power to re-write a will of a deceased person. Further, that the Executor cannot to be allowed to execute the property.
109. The respondents submitted that, the application dated 2<sup>nd</sup> February 2023, is based on misunderstanding and mistaken belief that once a will is admitted the properties vest to the beneficiaries immediately. That, property vests in Executor of a will under sections 82 and 83 of the [\*Law of Succession Act\*](#) and that, the will does not give automatic access to possession.
110. It was argued that, the widow cannot be intermeddling as L.R. No. 1144/684 Maryland Complex has been her matrimonial home from 2006. In any event, the applicants do not give full details of intermeddling by the respondents.
111. Having considered the rival arguments, I realize that it is evident that the parties herein are not respecting court orders and whereas there is active litigation in court they are taking the law into their hands and by conduct directly contravening court orders and being contemptuous.
112. It is noteworthy that, so long as this matter is unresolved, the parties must respect the provisions of the valid will and desist from interfering with the property bequeathed under the will, until the court orders otherwise. Any violation of the same should be dealt with under the law. The conduct of the parties will impact a lot on the main question of provisions for dependants. I say no more.



113. The will does not make any provision for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in relation to property LR 1144/684. The will is valid and has not been successfully challenged, therefore any intermediating by these respondents is unlawful and illegal and their counsel should advise them that any intermediating amounts to trespass. Further, until the court rules on the prayer for provisions for dependency, they should keep off.
114. To the contrary, the widow has a right under the will to stay there, but is yet to receive rights of ownership or possession thereof, and must respect the will as it is. However, the 1<sup>st</sup> applicant is under a duty to provide for her and I believe the Kshs. 150,000 allowed by the court fulfils that purpose as for now.
115. Similarly, there should be no interference with tenants as evidenced by letters written appointing an agent when the court appointed agent is still on record.
116. Further if indeed there have been threats to the life of the 1<sup>st</sup> applicant the police must act on the report made and investigate the matter to establish whether the report is viable or not. The investigation results will also assist resolve some of the issue herein.
117. As regards prayer (2), the 1<sup>st</sup> applicant should be allowed access to the property bequeathed to her under the will until otherwise directed after confirmation of the grant. As for prayer (3) the authority of the Officer Commanding Station at Naivasha is limited to investigation of the criminal case and shall not delve into succession matter. For prayer (4) the costs be in the cause.
118. In summation, I order that the Executor should carry out his mandate towards distribution of the deceased's estate. The Agent to provide audited accounts as ordered. The costs of all application shall be in the cause.
119. It is so ordered

**DATED, DELIVERED AND SIGNED THIS 17<sup>TH</sup> DAY OF MAY 2024.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Mutonyi for the applicants

Mr. Wairegi for the Executor

Ms. Koki Mbulu for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

Ms. Ogutu: Court Assistant

