



REPUBLIC OF KENYA



In re the Estate of Peterson Mwangi Njuguna (Deceased) (Succession Cause E004 of 2023) [2024] KEHC 10004 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEHC 10004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
SUCCESSION CAUSE E004 OF 2023
SN MUTUKU, J
JUNE 20, 2024**

BETWEEN

SIMON MUGO MWANGI 1ST APPLICANT

EVELYNNE NJERI MWANGI 2ND APPLICANT

SAMUEL NJUGUNA MWANGI 3RD APPLICANT

AND

CATHERINE NJERI MUCHIRI RESPONDENT

AND

EVANS NYANG' AYA INTERESTED PARTY

RULING

1. This Ruling relates to the Chamber Summons dated 17th January, 2024 brought under Sections 47 & 76 of the *Law of Succession Act*, Rule 73 of *Probate and Administration Rules*, Order 9 Rule 12 of the *Civil Procedure Rules, 2010*, the inherent powers of the Honourable Court and all other enabling provisions of the law, for orders that:
 - i. Spent.
 - ii. Spent.
 - iii. That pending the hearing and determination of the application herein the Honourable Court be pleased to order Catherine Njeri Muchiri, the Executrix herein, to produce copies of titles, statements of accounts showing expenses incurred, liabilities & income, details of active mortgages, loans and bank statements of accounts of the deceased/estate as from 22/08/2022 to date.



- iv. That the Law Firm of Mr. Kariah Wanjue Advocate and Kariah & Company Advocates be disqualified from acting in this estate either for the executrix or any other party.
 - v. That the Honourable Court be pleased to issue orders restraining and/or barring Mr. Evans Nyang'aya, the interested party, from transacting the accounts of the deceased and/or performing any other activities relating to or intermeddling with the estate herein.
 - vi. That the Honourable Court be pleased to remove Catherine Njeri Muchiri from acting as the executrix of the will of the deceased and Simon Mugo Mwangi, Evelynne Njeri Mwangi and Samuel Njuguna Mwangi to be appointed to jointly act as the executor/executrix accordingly.
 - vii. That the cost of this Application be provided for by Catherine Njeri Muchoro personally.
2. The grounds in support of the Application are that Mr. Evans Nyang'aya no longer possess the Power of Attorney to handle the affairs of the estate because that Power of Attorney lapsed upon the death of the deceased; that there is conflict of interest in the firm of Kariah & Company Advocates continuing to handle the affairs of the estate of the deceased for the reason that they were the deceased's advocates who prepared the Will witnessed by Mr. Kariah Wanjue Advocate; that the Gazette Notice published on 20th April 2023 and Form 73 had errors and identified Catherine Njeri Macharia as the widow of the deceased leading to the issuance of the Grant of Administration Intestate to her on 26th July 2023.
 3. The Applicant further stated that the beneficiaries demanded from the Executrix to be supplied with the accounts of the estate reflecting liabilities and income but were directed to Evans Nyang'aya who informed them that they had no right to know the same; that Evans Nyang'aya has been operating bank accounts in the name of the deceased and purporting to be repaying mortgages of the estate without sharing details of the same; that the estate is being intermeddled with hence the request for disclosure of statements of accounts that Kariah Wanjue & Company Advocates is highly likely to be called as a witness in this matter and as such the said firm cannot remain on record for the estate.

Replying Affidavit

4. In opposition to the application, Catherine Njeri Muchiri filed a Replying Affidavit dated 24th January 2024 in which she has deposed that the application is incompetent, vexatious, misleading and lacks basis. That the deceased died testate appointing her as the sole Executrix as confirmed by Grant of Probate issued on 26th July, 2023. Upon perusal of the Grant her advocates noticed that the court had erroneously issued letters of administration intestate and she moved with speed to rectify the same. That this was explained to the applicants and their advocate on record. That the clerical errors on the Kenya Gazette have also been explained as shown in the correspondences attached and therefore the errors were not of her doing or that of the advocates but emanated from the Court Registry.
5. She further deposed that she is not taking instructions on the affairs of the estate from Mr. Evans Nyang'aya; that the Power of Attorney given to Evans Nyang'aya lapsed upon the demise of the deceased; that she instructed the Evans Nyang'aya to assist her in managing of the deceased's estate which is vast as he had knowledge of the estate's expansive holdings including its assets and liabilities and that at all times Evans Nyang'aya has been her agent upon her instruction. She denied there had been any transfer of the deceased's properties.
6. She deposed that upon the deceased's demise one Simon Njuguna Mwangi accessed the deceased's safe in his residential house in United States of America and took its contents including original title deeds which he has refused to release to her to date. Further that the firm of Kariah and Company Advocates are not involved in the management of the deceased's estate save only as to give her legal advice and that she is willing and ready to give account of the deceased's estate if ordered by this Honourable Court.



Further Affidavit

7. Simon Mugo Mwangi filed a Further Affidavit dated 12th March, 2024 in which he has deposed that Mr. Kariah Advocate and Evans Nyang'aya have not responded to the Application hence the allegations against them remain uncontroverted. That it is illegal for the Executrix of the estate to retain Evans Nyang'aya without seeking court's leave as he has been transacting various accounts of the deceased. He further states that there is an application filed by the Executrix for purposes of embellishing the Will by depriving a beneficiary of his bequest in plot 2173 and seeking to hand over the same to third parties and that Mr. Kariah is abusing confidential information that he acquired as an advocate to curtail the rights of the beneficiaries in an effort to waste the estate.
8. The Executrix also filed a Further Replying Affidavit dated 28th March, 2024 in which she deposed that Simon Mwangi is not of sound mind and has been a dependant of the estate even before death of the deceased. That a monthly allowance of 6,000/- used to be paid to him until November, 2023 when his sister Evelyne Njeri Mwangi started complaining about the said allowance and demanded that the payments be stopped. Deposed that Evans Nyang'aya was a signatory to the deceased's accounts since 2005 and the Power of Attorney was only specific to the estate of the deceased's wife.
9. She denied the allegations that she has varied the deceased's Will and stated that it is only this court that has such powers. She stated that in executing her fiduciary duty as the Executrix, she has moved with speed to file Summons for Confirmation of Grant Probate and that she has made a proposal to fast track the distribution of the deceased's estate as per his wishes.

Applicants' Submissions

10. The Applicants' submissions are dated 9th April, 2024. They have submitted that the Executrix should supply accounts and documents sought as provided for under section 83 (e) and (h) of the *Law of Succession Act*; the Executrix has failed to give them a statement of accounts even upon their request and stated that she would only do so under a court order; that she has been frustrating them by hording information to herself; that it is the first time they are hearing of other properties not captured in the deceased's Will which she managed to trace however none of the properties is disclosed and that the Executrix ought to be ordered to supply documents sought in the Application.
11. On Whether Mr. Evans Nyang'aya, the interested party should be removed from participating in the affairs of the estate, it was submitted that he is a stranger to the estate and should not be allowed to deal with the estate and that though the Executrix has stated that Evans Nyang'aya is her Principal Agent the same has no legal backing and he is intermeddling with the estate. They cited *In Re Estate of Krishan Murti Maini (Deceased)* [2011] eKLR where it was held that:

“It is therefore clear that when a court issues letters of administration or grants a probate of written will, such letters or grants are issued personal to the person applying to administer the estate of the deceased. The person applying for letters of administration or grant of probate cannot on his part delegate the powers granted to him by the court to someone else to administer the estate (in the case where the deceased died intestate) or to execute the will (in the case where the deceased left behind a written will) on his behalf.”
12. The third issue is whether Kariah Wanjue Advocate and Kariah & Company Advocates should be disqualified from acting for any party in the estate. It was submitted that the said advocate acted for the deceased when he was alive and drew the Will; that after the demise of the deceased, Kariah Advocate started acting for the Executrix; that the advocate did not respond to the application and has only



done so in the submissions which is irregular and the averments should be expunged as they raise fresh factual issues not contained in the affidavit and that Mr. Kariah Wanjue Advocate is conflicted in this matter and must be disqualified because he is serving his personal interest and not that of the estate; that he presided over a meeting where Nyang'aya was illegally appointed as a co-executor and that he misguided the Executrix and abused confidential information received as counsel for the deceased.

13. It was further submitted that Mr. Peter Kariah Wanjue is a potential witness as he could be called upon to clarify the position of the estate prior to the demise of the deceased and that he can also be called upon to explain the issue of mortgage payments as funds were drawn from the account to pay for the mortgage. The Applicants cited Rule 8 of the *Advocates (Practice) Rules*.
14. On whether the Executrix should be removed, they submitted that she should; that the Executrix has always excluded the Applicants from knowing the affairs of the estate and that she has also failed to render accounts in compliance with section 83 of the *Law of succession Act*. They cited *In re estate of the Late Mwaura Makuro (Deceased)* [2021] eKLR where it was held that:

“The production of accounts is a key component of the administration process of a deceased person’s estate. From the moment a grant is issued to a personal representative of a deceased person, the grant holder becomes responsible to the Court in the carrying out of the duties of administrator. Accounts are an accountability tool that will tell the Court whether the administrator has been faithful to the role entrusted to him or her. When an administrator fails to file accounts as required, questions as to the integrity of the process are bound to arise as in the present case. The law has empowered the Court on either of its own motion or on the application of any interested party in the estate, to order an administrator to produce 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.”
15. They submitted that the Executrix illegally appointed Evans Nyangaya as a co-executor and she also positioned herself as the widow of the deceased and that she continued to withdraw funds for mortgaged properties while the same had been insured thereby meaning that the mortgage payments ought to have stopped and that the Executrix embellished the Will in attempts to distribute parts of the estate to third parties and therefore the executrix should be removed.

Respondents’ submissions

16. The Respondents’ submissions are dated 2nd April, 2024. They have submitted that prayer 3 of the Application is not disputed as regards the production of the title deeds that are within the Executrix’s actual possession.
17. The Respondents raised the following issues for determination:
 - i. Whether the Respondents especially the interested party herein have and are intermeddling in the deceased’s estate?
 - ii. Whether by virtue of Order 9 Rule 12 of the *Civil Procedure Rules, 2010* the Law firm of Kariah Wanjue Advocate and Kariah and Company Advocates can be disqualified from acting in this estate either for the Executrix or any other party?
 - iii. Whether this Honourable Court should remove Catherine Njeri Muchiri from acting as the Executrix of the Deceased’s Will and Simon Mugo Mwangi, Evelynne Njeri Mwangi and Samuel Njuguna Mwangi to be appointed to jointly act as the executors/executrix accordingly?
 - iv. Who should bear the cost.



18. The Respondents submitted that in the initial stages, this cause was not contested; that on 4th September 2022 when the Will was read in the presence of all beneficiaries and witnesses, a family meeting was held and several issues were resolved including, but not limited to, the retention of Evans Nyang'aya to continue his role of managing the estate but under instructions and/or authority of the Executrix; the estate to continue paying the mortgages for the two properties with mortgage facilities; that the Executrix has engaged the applicants on the main decisions regarding the estate; that the actions of the Executrix and that of Mr. Evans Nyang'aya cannot be said to amount to intermeddling but was for the furtherance of the preservation of the estate and actualization of the wishes of the deceased in accordance with the Will.
19. The Respondents cited section 80(1) of the [Law of Succession Act](#), which provides that:
- “a grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.”
20. They also relied on section 83(a-i) of the [Law of Succession Act](#) on the powers of the Executor/Executrix of the estate and [Re Estate of Thiongo Nginyayu Muthiora \(deceased\)](#) [2013]eKLR and [Kothari v Qureshi & another](#) [1967]EA 564 as well as [Halsbury's Law of England](#) 4th Edition, Vol.17 Paragraph 729 and 730 to emphasize on the powers of the Executrix.
21. On the second issue it was submitted that there Mr. Kariah Wanjue, Advocate, the managing partner of Kariah & Company Advocates drafted the Will of the deceased but is not a witness or beneficiary in the said Will and therefore there is no conflict of interest on the part of the firm. It was submitted their firm is not involved in the day to day management of the estate other than offering legal counsel; that the mistakes and errors being referred to by the applicants was not occasioned by them but by the court's registry a fact they have explained in their Replying Affidavit.
22. They further submitted that Order 9 Rule 12 of the [Civil Procedure Rules](#) cited by the Applicants is not applicable in these circumstances as this is a succession matter; that the said order provides for removal of an advocate from acting for a client on the basis of bankruptcy, unsound mind and upon death, the advocate stated that he is neither of these.
23. In addressing the third issue, the Respondent submitted that the actions of the Executrix have been geared at preserving the estate of the deceased; that further, the Executrix has been able to establish other properties of the deceased which were not captured in his Will; that the Will has not been challenged and that the authority of the Executrix emanates directly from the Will and that the Applicants have failed to meet the evidentiary and legal threshold of removing the Executrix.
24. On the issue of cost, they relied on section 27 of the [Civil Procedure Act](#) that costs follow the event and submitted that in this case the Respondent is the successful party and ought to get costs (see [Cecilia Karuru Ngayu v Barclays Bank of Kenya & another](#) [2016] eKLR).

Analysis and Determination

25. The issues popping out for determination relate to:
- i. Production of title deeds and statements of accounts by the Executrix.
 - ii. Disqualification of the firm of Kariah & Co. Advocates from handling the affairs of the estate of the deceased.



- iii. Barring or restraining Mr. Evans Nyang'aya from handling the affairs of the estate of the deceased.
 - iv. Removing Catherine Njeri Muchiri from acting as the Executrix of the estate and appointment of Applicants as administrators.
26. I have taken time to read and understand the issues in this matter. Both parties have submitted at length on the issues arising. They have also backed their respective cases by averments contained in their pleadings. I have noted that the errors in the Gazette Notice identifying the Executrix as the widow of the deceased and which are attributed to the Executrix and the firm of Kariah & Company advocates have been explained to the satisfaction of the court. These errors were made in the Court Registry and were rectified in time without any prejudice to the beneficiaries.
27. On the issue of production of titles and statements of accounts relating to the estate, the Respondents have explained at length that she is ready to produce accounts. She has also explained that she was able to establish other properties not contained in the Will. I have not seen any evidence showing titles to properties that the Executrix is accused of withholding.
28. Section 3 of the [Law of Succession Act](#) defines “personal representative” to mean the executor or administrator, as the case may be, of a deceased person. section 79 of the [Law of Succession Act](#) which provides that “The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”
29. Further, the duties of a personal representative are spelt out under section 83 of the Act as follows:
83. Duties of personal representatives
- Personal representatives shall have the following duties—
- (a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;
 - (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
 - (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
 - (d) to ascertain and pay, out of the estate of the deceased, all his debts;
 - (e) within six months from the date of the grant, to produce to the court 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;
 - (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
 - (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.

- (h) 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) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

30. One of the duties spelt out above is to produce to the court 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. The Executrix stated that she is ready and willing to do so. She ought to have done it within six months upon the issuance of the grant and need not have waited for a court order to do so. I will revisit this issue in this Judgment.
31. Should Mr. Kariah and his firm be disqualified from representing the estate? It was their case that there is conflict of interest as he is likely to be called as a witness in this matter. The Applicants have stated that the said advocate has not responded to the allegations made against him, that he has done so at the point of submissions. It is their case that the averments contained in pages 5 and 6 of the submissions be expunged.
32. Submissions are not pleadings. Counsel did not swear an affidavit to explain what is stated in the submissions. It is trite that parties are bound by their pleadings. In this case therefore the factual issues being raised at submissions stage should not be taken as pleadings.
33. Order 9 Rule 12 of the [Civil Procedure Rules](#) which this application has been brought under provides that:

Removal of advocate from record at instance of another party [Order 9, rule 12]

- (1) Where an advocate who has acted for a party in a cause or matter has died or become bankrupt or cannot be found or has failed to take out a practicing certificate or has been struck off the roll of advocates, or is otherwise unable to act as an advocate, and the party has not been given notice of change of advocate or notice of intention to act in person in accordance with this Order, any other party to the cause or matter may, on notice to be served on the first-named party personally or by prepaid post letter addressed to his last known place of address, unless the Court otherwise directs, apply to the Court for an order declaring that the advocate has ceased to be the advocate acting for the first-named party in the cause or matter, and the Court may make an order accordingly.
- (2) Where the order is made, the party applying for the order shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) a copy of the said order and procure the order to be entered in the appropriate court, and also leave at the appropriate court a certificate signed by the applicant or his advocate that the order has been duly served as aforesaid; and thereafter, unless and until the first-named party either appoints another advocate or else gives such an address for service as is required of a party acting



in person, and complies with this Order relating to notice of appointment of an advocate or notice of intention to act in person, any document may be served on the party so in default by being filed in the appropriate court.

- (3) Any order made under this rule shall not affect the rights of the advocate and the party for whom he acted as between themselves.

34. From my reading of this provision, it is clear that it does not apply to this case as the applicants are seeking disqualification on the basis of conflict of interest.

35. The Applicants have cited Rule 8 of the *Advocates (Practice) Rules 1966*. I believe they mean Rule 9 which provides as follows:

“No advocate may appear as such before any Court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if while appearing in any matter it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear.

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears”.

36. The Court of Appeal in *Albert Chaurembo Mumba & 7 others v Maurice M. Munyao & 148 others* [2015] eKLR reiterated that the burden is upon the party seeking to bar an advocate from acting in a matter to prove the existence of factors such as conflict of interest, actual or potential breach of the duty to protect confidential information, or misconduct giving rise to the anticipation of real mischief or real prejudice. In other words, to establish the factual basis for such apprehension or anticipation.

37. The burden of proof therefore lies on the Applicant to prove conflict of interest. I did not find any evidence from the Applicants demonstrating conflict of interest on the part of Mr. Kariah and/or his firm.

38. On barring or restraining Mr. Evans Nyang’aya from handling the affairs of the estate, I have considered the case for the Applicants and that of the Respondents, I have not found evidence controverting that statement that the Applicants during a family meeting agreed to have Mr. Evans Nyang’aya retained to continue with his role of managing the estate but under the instructions of the Executrix, among other issues discussed in that meeting. The Applicants did not adduce evidence to negate that they attended that meeting and agreed to the retention of Evans Nyang’aya. Besides, the Executrix has explained that she was the one administering the estate and not Evans Nyang’aya.

39. Should the Executrix be removed? Catherine Njeri Muchiri was appointed as an Executrix by the deceased in his Will. On removal of an executor/executrix, it was held in *In re Estate of Himatlal Jevatlal Mehta (Deceased)* [2020] eKLR that:

“The *Law of Succession Act* and its Rules make no provision for “removal” of an executor as sought by the Applicants herein. The only way a person to whom a grant of representation in respect of the estate of a deceased person has been issued, can cease to be a legal representative, is through an application for revocation of such grant. Section 76 of the Act and Rule 44 of the Rules make provision for revocation of a grant of representation....”



40. I will now pose the question whether Evans Nyang'aya and Catherine Njeri Muchiri have intermeddled with the estate? *In re The Matter of the Estate of David Julius Nturibi M'Ithinji (deceased)* (2012) eKLR, the Court stated as follows in respect to intermeddling:

“In the case of *Gitau and 2 others v Wandai & 5 others* (1989) KLR 23, Tanui J, as he then was stated as follows:-

‘According to Section 45 of The *Law of Succession Act*, Cap.160 intermeddling with the property of a deceased man consists of taking possession, disposing or otherwise intermeddling with any free property.’

I agree with the finding of the Honourable Judge in the way he defined intermeddling, however, I would like to add any act that purports to dispossess or result into wastage of deceased estate or causes loss or damage or makes it impossible for administrator to administer the deceased estate by a person who is not authorized by The *Law of Succession Act* or by any written law or by a grant of representation under the said Act is an act of intermeddling with free property of a deceased person.”

41. I have scrutinized the evidence tendered by way of submissions and the pleadings of the Applicants. I find no evidence that the Executrix and Evans Nyang'aya have acted in any manner that may be termed intermeddling with the estate as defined above.

42. I agree with the Respondents that the Applicants have failed to meet the evidentiary and legal threshold of removing the Executrix. They have also failed to demonstrate that they deserve the orders they are seeking. Consequently, save for the issue of accounting, the Chamber Summons dated 17th January is hereby dismissed with costs to the Respondents.

43. For purposes of accounting, section 83 (h) of the *Law of Succession Act* requires personal representative 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. This court therefore directs that the Executrix, shall within 60 days and not later than 20th August 2024 and before the grant is confirmed, present before this court a full and accurate account of all dealings with the estate of the deceased up to the date of the account.

44. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE 2024.

S. N. MUTUKU

JUDGE

In the presence of:

1. Mr. Abidha for the Applicants
2. Mr. Kariah for the Respondents

