



REPUBLIC OF KENYA



**In re Estate of Kimani Muhoro (Deceased) (Succession Cause  
E1025 of 2021) [2024] KEHC 6307 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6307 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
SUCCESSION CAUSE E1025 OF 2021  
MA ODERO, J  
JUNE 3, 2024**

**RULING**

1. Before this court for determination are the following three applications:-
  - i. Summons dated 24<sup>th</sup> May, 2021 filed by the Applicant NANCY GAKII MAITIMA.
  - ii. Summons dated 19<sup>th</sup> August, 2021 filed by the objectors STEPHANIE ANGELA WANJIKU KIMANI and PHILIP GICHURU NYADIMO.
  - iii. Summons dated 23<sup>rd</sup> September, 2021 filed by the Petitioner NANCY GAKII MAITIMA.
2. The court directed the parties to file written submissions in respect of the three applications.

**BACKGROUND**

3. This succession cause relates to the estate of KIMANI MUHORO (hereinafter referred to as “the Deceased”) who died intestate on 17<sup>th</sup> March, 2021. A copy of the Death Certificate Serial Number 1066389 is annexed to the Applicants supporting Affidavit dated 24<sup>th</sup> May, 2021.
4. Following the demise of the Deceased thereafter the Applicant NANCY GAKII MAITIMA filed a Petition for Grant of letters Administration Ad Colligenda bona dated 24<sup>th</sup> May, 2021. On the same date the Applicant filed this present application seeking interlocutory orders in respect of the estate of the Deceased. Thereafter the two Respondents as Daughter and son respectively of the Deceased filed a Petition dated 4<sup>th</sup> June, 2021 seeking letters of Administration Intestate, in respect of the same estate.
5. On 13<sup>th</sup> July, 2021 the High Court granted letters of Administration Ad Collegenda bona to the Applicant for purpose of getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate”
6. The Applicant avers that she is a widow to the Deceased having been married to the Deceased under Meru customary law in the year 1999. She states that for fifteen (15) years she continually cohabited with the Deceased in a house at Plainsview Estate Nairobi South B on Title Number NAIROBI/ BLOCK 93/1042 as well as at the rural home in Githiga Kiambu County being Githunguri/



- Githiga/1946 where the couple had established a dairy farm which was the Applicants source of income.
7. The Applicant further avers that when the Deceased contracted COVID she was forced into isolation to await the results of tests conducted on herself. That when she came out of isolation she found that the Respondents who are the biological children of the Deceased by other women had commenced the burial arrangements without her involvement and/or input. That the family of the Deceased warned her to leave as she had not borne any children with the Deceased.
  8. The Applicant states that the burial proceeded without her involvement and thereafter the Respondents and the family of Deceased falsely accused her of having stolen the Deceased's motor vehicle causing police to summon the Applicant for questioning.
  9. The Applicant states that after the burial she became depressed and sought refuge with her family, during which time the Respondents forcefully invaded the matrimonial home in South B and locked it up. That the Respondents also invaded and locked up the rural home in Githiga and took over ownership of the 15 cows which she relies on for her livelihood. That the Respondents have now laid claim to all the property left behind by the Deceased.
  10. The Applicant accuses the Respondents of intermeddling with the property of the Deceased. The Applicant now prays that the court issue interim orders of inhibition over all the property of the Deceased in order to preserve and protect the same pending distribution of the estate.
  11. Initially this court referred the matter for mediation but the parties were unable to reach any consent. Therefore the court directed that the present applications be heard.
  12. I will now proceed to deal with each of the three applications individually;
    - i. Summons dated 24<sup>th</sup> May, 2021
  13. By this application the Applicant Nancy Gakii Maitima who claims to be the wife of the Deceased sought the following orders;
    1. SPENT
    2. SPENT
    3. **SPENT**
    4. THAT this honourable court be pleased to issue a temporary injunction to restrain PHILIP NYADIMO GICHURU, STEPHANIE WANJIKU KIMANI, their agents, servants, personal representatives or assigns, and any other person from interfering or intermeddling with the Estate of the deceased in any way pending the hearing and determination of this petition.
    5. THAT an interlocutory injunction do issue to restrain PHILIP NYADIMO GICHURU, STEPHANIE WANJIKU KIMANI the children of the deceased, their agents, and or servants from interfering with the applicant's access, occupation and usage of the matrimonial property on NAIROBI/BLOCK93/1042, the deceased's house, cows and property in possession and



usage of Motor Vehicle Registration Numbers KBN 693C, KBN 019 T, and KBN 212 C pending the hearing and determination of this petition.

6. THAT this honourable court do make any other appropriate orders it may deem proper to make herein.
7. THAT in any event, the costs of this application be awarded to the applicant.”
14. The application which was premised upon Rule 7, 36(1) (3), 49, 63  
(1) and 73 of the Probate and Administration Rules 1980, Section 45, 47 and 54 of the *Law of Succession Act*, Cap 160, laws of Kenya, Orders 40 of the Civil Procedure Rules 2010 was supported by the Affidavit of even date as well as the Supplementary Affidavit dated 20<sup>th</sup> April, 2022 both sworn by the Applicant.
15. The Respondents STEPHANIE ANGELA WANJIKU KIMANI and PHILIP GICHURU NYADIMO both opposed the application through the Replying Affidavit dated 25<sup>th</sup> March, 2022 sworn by the 1<sup>st</sup> Respondent.
16. The Application was canvassed by way of written submissions. The Applicant filed written submissions dated 20<sup>th</sup> April, 2022 whilst the Respondents relied upon their written submissions also dated 20<sup>th</sup> April, 2022.
17. The Applicant claims to have been married to the Deceased through a Meru customary marriage which took place in the year 1999. However their union was not blessed with any issue.
18. The Applicant complains that the Respondents who are the biological children of the Deceased have locked her out of the matrimonial home in Plainview Estate Nairobi South B. That the Respondents want to disinherit the Applicant because she did not bear any child for the Deceased.
19. The Applicant further alleges that the Respondents have interfered with the family business that she was running with the Deceased at Githiga Farm. That the Respondents invaded the farm and sold off all the cows. The Applicant also accuses the Respondents of intermeddling with the Deceased’s estate by transferring funds from the Deceased SACCO, MPESA and MSHWARI accounts.
20. On their part the Respondents vehemently deny that the Deceased was ever married to the Applicant. They state that the Applicant was a domestic worker whom the Deceased had hired to take care of his aging father. That after the demise of the Deceased’s father in the year 2012, the Applicant was employed as a farm manager at the Deceased’s Githiga Farm.
21. The Respondents in turn accuse the Applicant of intermeddling with the property of the Deceased by selling four (4) dairy cows and removing the Deceased’s vehicles to an unknown destination. The Respondents insists that the Githiga Farm belonged to the late father of the Deceased and is still registered in his name. They insist that the Deceased died unmarried and that the chief’s letter submitted by the Applicant and used to obtain a Grant of Administration Ad Collegenda Bona is a fraudulent document.



22. In this application the Applicant is seeking orders to restrain the Respondents from interfering with the estate of the Deceased.
23. The conditions upon which an interlocutory injunction may be granted were enunciated in the case of *GIELLA -VS- CASMAN BROWN CO. LTD* [1973] E. A as follows:-
- “First an applicant must show a Prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on a balance of convenience.”
24. Has the Applicant established such a prima facie case as to warrant issuance of the interim orders sought. The applicant claims to be the wife of the Deceased and as such claims to be entitled to the Grant Ad Litem to collect and reserve the estate. This claim is challenged by the Respondents.
25. The question of whether or not the Applicant and the Deceased were in fact married to each other is an issue that cannot be determined by way of Affidavit evidence. The court would have to conduct a full hearing in order to determine the validity of such claim. In any event no documents e.g marriage certificate has been presented by the Applicant as proof of her marriage to the Deceased. The Applicant purports to rely on a statutory declaration confirming her cohabitation with the Deceased (Annexure ‘NGM ‘2’ to the Replying Affidavit dated 24<sup>th</sup> November, 2022).
26. Firstly cohabitation of a couple is not proof of marriage and secondly this statutory declaration was sworn by the Applicant alone on 6<sup>th</sup> May 2021, two (2) months AFTER the Deceased had passed away. Such statutory Declaration is not proof of the existence of a marital union.
27. In the case of *MARY WANJIRU GITHATU -VS- ESTHER WANJIRU Kiarie* Appeal No. 2001 (Eldoret) Hon. Justice Bosire JA (as he then was observed that
- “The existence or otherwise of a marriage is a question of fact. Likewise whether a marriage can be presumed is question of fact”
28. In the absence of any tangible and/or documentary evidence to prove that she was a wife to the Deceased, the Applicant has failed to establish that she has any claim to the estate. She has not established a prima facie case.
29. Accordingly the Applicants prayers for injunctive orders must fail. I therefore dismiss in its entirety the summons dated 24<sup>th</sup> May, 2021.
- ii. Summons dated 19<sup>th</sup> August, 2021
30. This application was filed by the Respondents STEPHANIE WANJIKU KIMANI and PHILIP GICHURU NYADIMO seeking the following orders:-
1. **SPENT**



2. **SPENT**
  3. The grant ad colligenda bona issued on 13<sup>th</sup> July, 2021 to Nancy Gakii Maitima be revoked.
  4. Any transaction based on the limited grant of letters of administration ad colligenda bona issued on 13<sup>th</sup> July, 2021 be nullified together with any transaction based on the said grant.
  5. The Administrator Nancy Gakii Maitima be barred from continuing to act as an Administrator of the deceased's estate on the basis of the grant ad colligenda issued on 13<sup>th</sup> July, 2021.
  6. The Honourable Court be pleased to appoint the Applicants Stephanie Angela Wanjiku Kimani and Philip Gichuru Nyadimo as administrators to the estate of Kimani Muhoro (deceased).
  7. The costs of this application be borne by the Respondent.
31. The Respondents state that they are the biological children of the Deceased. They aver that the Grant Ad colligenda bona issued to the Applicant on 19<sup>th</sup> August, 2021 was obtained without their involvement and through concealment of material information.
  32. The Applicant opposed that application through the Replying Affidavit dated 24<sup>th</sup> November, 2022 in which she basically attacks the Notice of Objection to making of Grant which was filed by the Respondents.
  33. It is a fact and the record indicates that the Applicant filed a Petition dated 24<sup>th</sup> May, 2021 seeking issuance of a Limited Grant Ad Colligenda Bona to herself for purposes of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate.
  34. On 2<sup>nd</sup> June, 2021 the court directed that the said Petition be served upon other beneficiaries and direction be taken in the Registry. A copy of this order appears as Annexure SAWK-3 to the supporting Affidavit dated 19<sup>th</sup> August, 2021.
  35. The Respondents deny ever having been served with the said petition and therefore submit that the Grant was issued irregularly to the applicant without the knowledge and/or involvement of the Respondents who are genuine beneficiaries to the estate of the Deceased.
  36. There is no evidence that in compliance with the court orders the Petition was served upon the Respondents. The Applicant in her reply does not claim to have effected service of her petition on the Respondents whom the Applicant concedes are the biological children of the Deceased.
  37. It is quite obvious that the failure to serve her petition upon the Respondents was a deliberate act by the Applicant calculated to forestall any objection and in effect to steal a march against the Respondents. It is clear therefore that the limited Grant which was issued to the Applicant on 19<sup>th</sup> August, 2022 was issued irregularly and in contravention of court orders. There Applicant did not reveal to the court that she had failed to serve the Respondents as directed. In the circumstances I find that said limited Grant is for revocation as the same was obtained



through concealment of a material fact i.e the fact that service had not been effected upon the genuine beneficiaries to the estate.

38. The Respondents have sought orders to have all the transactions conducted by the Applicant on the basis of the Grant Ad Colligenda Bona issued to her on 13<sup>th</sup> July, 2021 nullified. Here the Respondents are seeking a blanket order. They have not specified precisely which transactions they wish to have nullified.
39. In RE ESTATE OF JAMES KAGWA MURUNGU (Deceased) [2020] eKLR, the court stated that
- “On the prayer for nullification of any transaction done by the Respondent, the court finds that the Applicant has not stated with specificity what particular transaction is to be nullified. Nothing further need be said on this prayer.....”
40. Similarly in the absence of specifics I find that this particular prayer cannot be granted and the same is dismissed.
- Accordingly I do allow prayers (3) and (5) of the Summons dated 19<sup>th</sup> August, 2021.

**Summons dated 23<sup>rd</sup> September, 2021**

41. This application was filed by the Applicant NANCY GAKII MAITIMA and sought the following orders:-
- “ 1 THAT the Honourable Court be pleased to strike out the Respondents objection to making of Grant dated 11<sup>th</sup> June, 2021.
- 2 THAT this Honourable court be pleased to strike out all attendant applications, summons, pleadings and documents originating, emanating or deriving from the Respondents objection to making of grant dated 11<sup>th</sup> June, 2021.
- 3 THAT the costs be awarded tot eh petitioner against the Respondents.”
42. The Applicant claims that the Notice of objection to making of Grant dated 11<sup>th</sup> June, 2021 is fatally defective as the Respondents failed to pay the required filing fees.
43. The Respondents opposed the application.
44. It is pertinent to note that the Applicant makes no challenge to the Substance of the objections raised by the Respondent. She merely alleges that no filing fees were paid. This would not be a fatal omission. All the Respondents would be required to do is to regularize the position by paying the requisite filing fees.
45. It has been said that striking out is a draconian measure, one which the courts ought to be slow to apply. I find no merit in this application and the same is hereby dismissed in its entirety.
46. In any event in light of my decision in respect to the Notice of Motion dated 24<sup>th</sup> May, 2021 this application has now been overtaken by events as this court is not considering the objection raised by the Respondents.



**CONCLUSION**

47. Finally, I find that the Respondents who are the biological children of the Deceased (a fact which even the Applicant concedes to) have the right to apply for letters of Administration over the estate. The Applicant who claims to be the wife of the Deceased equally has the right to be given an opportunity to prove her claim. I therefore make the following orders;-

1. **The Summons dated 24<sup>th</sup> May, 2021 is dismissed in its entirety.**
2. The limited Grant Ad Colligenda Bona issued to the Applicant Nancy Gakii Maitiama be and is hereby revoked.
3. **The Summons dated 23<sup>rd</sup> September, 2021 is dismissed in its entirety.**
- (4) The Petition for letters of Administration Intestate dated 4<sup>th</sup> June, 2021 filed by the Respondents Stephanie Angela Wanjiku Kimani and Phillip Gichuru Nyademo to be served upon the Applicant within seven (7) days.
- (5) Upon service the Applicant is at liberty to file an objection to the said Petition within seven (7) days.
- (6) Matter will be mentioned before the Presiding Judge Family Division on 19<sup>th</sup> June, 2024 for further directions.
- (7) Each party to pay their own costs.

Dated in Nyeri this 3<sup>rd</sup> day of June, 2024.

.....  
**MAUREEN A. ODERO**

**JUDGE**

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