



REPUBLIC OF KENYA



In re Estate of Alexander Kamau Githinji (Deceased) (Succession Cause 53 of 2018) [2024] KEHC 8483 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 53 OF 2018**

A MSHILA, J

JULY 12, 2024

IN THE MATTER OF THE ESTATE OF ALEXANDER KAMAU GITHINJI (DECEASED)

RULING

1. Beatrice Wambui Kamau and Elizaphan Githinji Kamau the Administrators herein filed the Summons for Confirmation of Grant dated 21st March, 2019 brought under Sections 35(5), 74 and 81 of the [Law of Succession Act](#) and Rules 49 and 73 of the [Probate & Administration Rules](#) for orders;
 - a. That the grant of letters of administration intestate made in this matter on 12th September, 2018 to the said Beatrice Wambui Kamau and Elizaphan Githinji Kamau both of P.O Box No. 1326-00618, Ruaraka be confirmed.
 - b. That the estate be divided in terms of the annexed proposed mode of distribution.
2. The application is based on the ground that all the beneficiaries are in agreement that the said grant be confirmed and the property divided in terms of the proposed mode of distribution annexed.
3. In their affidavit in support of Summons for Confirmation of Grant Beatrice Wambui Kamau listed the dependants surviving the deceased as well as the distribution schedule. She averred that all the beneficiaries were in agreement to the proposed mode of distribution.
4. Sarah Wanjiru Gitonga and Moses Ngatia Gitonga objected to the making of the grant vide application and summons dated 26/3/2019 and 17/07/2019 respectively. The said Objections were later withdrawn as they were settled by the estate of the deceased herein.
5. Subsequently, Collins M. Mbatia filed his Affidavit in Protest to the confirmation of grant dated 22nd July, 2019. He deposed that he was the Head of Legal at Progressive Credit Limited. On 24/5/2016, Kshs. 2,110,478.00 was disbursed to the deceased herein and Title No. Ruiru/Mugutha Block 1/T.1311 was offered as security and the same was charged. He stated that the deceased indicated that he was a bachelor in the spousal consent sworn on 20/5/2016. He objected to the confirmation of the grant until the entire loan of Kshs. 4,661,936.10 as at 19/7/2019 is repaid in full as the security being Ruiru/Mugutha Block 1/T.1311 has been listed as one of the properties belonging to the deceased.



6. Beatrice Wambui Kamaufiled her affidavit in response to the summons for objection to the making of grant dated 1/8/2019. She deposed that she was not aware of the alleged debt by the Protestor. Her consent was not sought when property Ruiru/Mugutha Block1/T.1311 was offered as security yet that's where their matrimonial home is situated. That the Protestor had indicated that the loan was to be settled by the insurance but later started the process of realizing its security for non-performance. She stated that the Protestor needs to prove his debt in a court of law for the same to be settled by the deceased's estate. She urged the court to confirm the grant issued by the court.
7. The Summons for Confirmation of grant and the Protest were both heard by way of viva voce evidence.
8. Beatrice Wambui Kamau(PW1) testified that the deceased was her husband. She listed the beneficiaries being Zipporah, Elizaphan and Cornelius. She stated that they signed the consent and agreed that she holds the properties in trust.
9. In cross-examination she testified that she was not aware that the estate owed Progressive Credit Limited the sums demanded. She denied that the deceased was a bachelor as he had a family.
10. Collins Muhia Mbatia(DW2) the Head of Legal at Progressive Credit Limited testified that they want to recover their loan as the insurance failed to pay because the deceased had defaulted in paying his loan prior to his death. The deceased had also indicated that he was single when he applied for the loan.
11. In cross-examination he said that he did not produce the loan application forms. The insurance declined to pay as the deceased was in arrears.
12. Subsequently, parties were directed to file and exchange their written submissions.

Administrator's Submissions

13. The Administrator's submissions in regard to the Protest by Progressive Credit Limited was that the loan as borrowed and disbursed raises serious issues. The Charge was irregular for want of spousal consent. Further it was submitted that it is not clear that the company has been compensated or not. It was submitted that the company needs to prove its case in a civil court as such its claim remains unproved. The court was urged to dismiss the Protest and confirm the grant.

Objector's Submissions

14. The Objector submits that the loan amount, interest and charges remain unpaid to date. That the Petitioner is being dishonest by failing to indicate the debt as part of the liabilities. The Objector submitted that it has a recognizable interest in title no. Ruiru/MuguthA Block 1/T. 1311. The Petitioner was said to bear the duty to follow up with the insurance once the deceased passed on for the insurance to settle the loan. The court was urged not to confirm the grant as the same would occasion great injustice to the Objector as it would be hard to recover its monies under the security. It was submitted that the subject land is not a free property of the deceased the same having been charged by the Objector until the same is discharged. The court was urged to allow the Objector's Protest.

Issues for Determination

15. Upon hearing the parties and taking into consideration the written submissions this court has framed the following issues for determination;
 - i. Whether the subject land is a free property of the deceased
 - ii. Whether to confirm the Grant



Analysis

16. There were three Protests of which two were withdrawn leaving the protest by Progressive Credit Limited which will be referred to as the 3rd Protestor. The 3rd Protestor contends that it has a recognizable interest in title no. Ruiru/Mugutha Block 1/T in that it had advanced a loan facility to the deceased which is supported by a Charge registered over the subject property in the sum of Kshs.2,110,478/-. The 3rd Protestor attached a Certificate of Official Search for the subject property in support of the Charge registered on 24/05/2016 for the sum of Kshs.1,676,995/-; It sought to recover its loan as the insurance failed to pay up because the deceased had defaulted in paying his loan prior to his death.
17. Whereas the Administrators view was that there was need to scrutinize the debt in a civil court to determine the irregularities one being lack of spousal consent; in this case the deceased had indicated on the spousal consent form that he was a bachelor and had proceeded to charge the property which property it was submitted was matrimonial property. The Administrator had also contended that there was also no evidence that the insurance had declined to pay out the proceeds upon the demise of the deceased. The Administrator went on to question the fact that the 3rd Protestor in failing to initiate the process of exercising of its statutory power of sale was not being forthright in making a claim for a loan that had either never been disbursed and or had been settled by the insurance.
18. The applicable law is found at Sections 34 and 3 of the *Law of Succession Act* which gives the definition of free property and it reads as follows:-

Section 34

“ A person is deemed to die intestate in respect of all his free property of which he has not made a Will which is capable of taking effect.”

At Section 3 of the Act provides:-

“In relation to a deceased person means the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by is death;”

19. As per the Death Certificate the same indicates that the deceased died on the 22/12/2017; the Certificate of Official Search produced by the 3rd Protestor is dated 24/05/2016 and indicates that the subject property was charged to secure a loan in the sum of Kshs. 1,676,995/-; this establishes that the deceased having charged the subject property to the 3rd Protestor during his lifetime would not have been legally and freely able to dispose of the subject property and therefore this property was not a free property;
20. Within the meaning of Section 34 (ibid) when a person files a succession cause it must relate to the free property of the deceased; which simply means that the person must have been legally competent to freely dispose of the subject property during his lifetime and that his interest had not been terminated by his death.
21. In this instance and in the absence of a Discharge of Charge this court is satisfied that the subject property does not form part of the free property of the deceased and is satisfied that unless discharged it was no longer free property for distribution.



Whether to confirm the Grant

22. The Administrator herein was under the obligation when filing the Petition to take stock of all the deceased's assets and from material that is made available to ascertain the liabilities of the estate of the deceased; in this instance there was a Certificate of Official Search and she ought to have done due diligence to establish the authenticity of the loan and to ensure that any monies owed especially to banks are paid up and a discharge issued.
23. The two properties cited at paragraph 5 of the Supporting Affidavit made by the Administrator and dated 21/03/2019 are both Charged; In the circumstances the only assets available for distribution are the monies held at Progressive Sacco Limited and Co-operative Bank;

Findings and Determination

24. For the forgoing reasons this court makes the following findings and determinations;
 - i. This Court finds that 3rd protestors Protest has merit and it is hereby allowed
 - ii. This court finds that the property known as Ruiru/Mugutha Block1/T.1311 does not form part of the free property of the deceased
 - iii. That unless discharged this court finds that Ruiru/Mugutha Block1/T.1311 is not available for distribution.
 - iv. The Grant is partially confirmed in terms of the monies held at Progressive Sacco Limited and Co-operative Bank.
 - v. Each Party to bear its/their own costs.

Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 12TH DAY OF JULY, 2024

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Mwangi for the Administrators

Moranga holding brief for Ondabu for the Objector

