



REPUBLIC OF KENYA



**In re Estate of Grace Wambui Kimuyu (Deceased) (Succession Cause
896 of 2020) [2024] KEHC 11648 (KLR) (Family) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 11648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 896 OF 2020
PM NYAUNDI, J
JULY 5, 2024
IN THE MATTER OF THE ESTATE OF GRACE WAMBUI KIMUYU (DECEASED)**

BETWEEN

TRIXIA SYATA SYAMBA APPLICANT

AND

NICHOLAS KESTER SYAMBA 1ST RESPONDENT

BENSON WANGURUMO NJONJO 2ND RESPONDENT

CHRIS MARUTI SYAMBE 3RD RESPONDENT

JUDGMENT

1. Grace Wambui Kimuyu died on 26th July 2014 at Meridian Equator Hospital in Nairobi at the age of 63. A grant of probate with will was issued on 23rd February 2021 to Nicholas Kester Syamba, Benson Wangurumo Njonjo and Chris Maruti Tsamba, the executors appointed by the deceased, in her written will dated 29th November 2012..
2. The deceased was survived by the following persons: -
 - i. Nicholas Kester Syamba- son.
 - ii. Caroline Njambi Kimuyu- daughter
 - iii. Trixie Syata Syamba- daughter.
 - iv. Anthony James Muigai-grandson.
 - v. Jude Michael Otunga- grandson (deceased).



Assets.

- i. Maisonette Number 8 Kirichwa Lane Ngong Road, LR.No. 209/407/8.
 - ii. Apartment Number A4 Almond Court, Rose Avenue off Dennis Pritt Road,LR No. 209/4350/2 Kilimani.
 - iii. Ruai House on Plot J78 and J79, bonus plot from J78 and J79.
 - iv. Cianda Plot ½ acre in size LR. No. 5999/59.
 - v. Isinya 2 acres Kajiado/Kaputei [North/29542](#).
 - vi. Shareholdings in Taek Investment.
 - vii. Land Plot Tinganga/CiandaBlock 1/452.
 - viii. Naivasha Site and Service Scheme house on plot no. 785.
 - ix. Shareholdings in Mararo United Investments .
 - x. Motor vehicle No. KBR 084M.
 - xi. Personal effects and household goods.
3. Trixie Syata Syamba, a daughter of the deceased filed an application under Section 26 of the [Law of Succession Act](#) dated 2nd July 2021. She sought an order for reasonable provision to be made to her as a dependant out of the net estate of the deceased. She also asked the court to provide costs for the application.
4. The application was heard and determined by Lady Justice Odero who delivered a ruling on 10th June 2022. The court made the following orders;
- i. That the applicant is hereby declared to be a dependant of the deceased under the terms of Section 26 of the [Law of Succession Act](#).
 - ii. That as a dependant, the applicant is entitled to reasonable provision from the estate of the deceased.
 - iii. The provision be made to the applicant is subject to her satisfying this court that it ought to exercise its discretion in her favour.
 - iv. That the executors to file summons for confirmation of grant within thirty (30) days from the date of this ruling, which summons is to be served upon the applicant.
 - v. The applicant upon service of the summons for confirmation has thirty (30) days to file an objection if she so wishes.
 - vi. That being a family matter there will be no orders on costs.
5. The administrators of the estate filed summons for confirmation of grant dated 11th November 2022. They asked the court to confirm the grant issued to them and the assets of the deceased be distributed as per the deceased's will dated 29th November 2012.
6. Trixie Syata Syamba filed an affidavit of protest dated 2nd December 2022. She protests against the confirmation of grant. In her affidavit of protest, she claimed a share from the deceased's estate as a daughter and a dependant of the estate who had been declared so by this court vide a ruling dated 10th June 2022. She avers that the court held that she was entitled to reasonable provision subject to



her satisfying this court that it should exercise its discretion in her favour. She avers that the deceased left a will bequeathing her property to her grandsons. Before her son died, she was living in a house in Dennis Pritt which belonged to the estate. After her mother died, she rented the house to cater for her needs and her son. When her son died, the executors started managing the house and collected rent. Currently, she is being hosted by a good Samaritan as she has no employment or assets to sustain her. She asked the court that her late son's share devolves on her .

7. In reply to the protest, the 1st administrator filed a response dated 30th August 2023. He averred that the protestor has never lived in the house in Dennis Pritt. That the protestor and the deceased did not have a good relationship. When the deceased was alive, she only supported her grandchildren. At no point did the deceased support any of her daughters That the protestor has not provided sufficient evidence that she should get a share from the deceased's estate. Further, that it would be against the deceased's wishes if she got the share meant for her late son. According to him, the protestor is capable of working and has not explained why she has not been able to get employment since 2014. He urged the court to dismiss the protest and distribute the estate as per the deceased's wishes.
8. The protest was disposed of by way of viva voce evidence.
9. PW1, Trixie Syata Syamba adopted her witness statement dated 29/5/2023 as her evidence in chief. She told the court that the deceased was her mother. Her evidence was that she came to know of the will two weeks after the deceased had died. The deceased did not make any provision for her in her will. The will only made provision for her son who has since died and her nephew. She told the court that she is not employed and is staying with a good Samaritan in Ruai. She needs basic needs like food, clothes and shelter. She told the court that a ruling dated 10/6/2022 recognised her as a dependant. Finally, she stated that the deceased supported her when she was alive.
10. During cross examination, she stated that she is 42 years old. She told the court that she had a strained relationship with the deceased; she was charged with assaulting the deceased and stealing goods worth Kshs. 2.3 million in 2014. The charges were later dropped. She told the court that the deceased had a medical problem and would hallucinate and attack her sometimes. That even though she didn't have a good relationship with the deceased, that would not be a reason not to make provision for her. She works in construction sites and begs people to give her money.
11. In re-examination, she stated that her sister, Caroline Njambi has a medical condition was not also provided for but the Respondent takes care of her.
12. PW2, Jane Muthini Aoko adopted her witness statement dated 29/5/2023 as her evidence in chief. She told the court that she found the protestor sleeping outside her gate sometimes back in December 2019. According to her, she was homeless and she took her in and gave her a place to stay. She later opened up to her and told her that her mother had disinherited her and she had nowhere to go. She traced the respondent and talked to him to assist the protestor. She lives with the protestor and gives her food and clothing. She told the court that the protestor deserves to benefit from the estate of her mother.
13. During cross -examination, she told the court that the protestor is able to fend for herself but the economy is difficult. If the protestor is given her inheritance, she will take care of it.
14. In re-examination, she stated that the protestor told her that she had a good relationship with the deceased.
15. The respondent, Nicholas Kester Syamba testified as RW1. He adopted his affidavit dated 30/8/2023 as his evidence in chief. He told the court that the deceased was his mother and the protestor is his sister. His evidence was that the deceased and the protestor did not have a good relationship. The deceased filed a case against the protestor for assault and theft. The deceased in her will bequeathed her property



to her two grandchildren until they are 30 years old then the remainder of the estate be transmitted to Thomas Barnados Home. He told the court that the wishes of his mother should be respected.

16. During cross-examination, he stated that he has an off and on relationship with the protestor. He last spoke to her around 3 years ago. There was an attempt to settle this matter out of court but he did not agree with her proposal. He told the court that he is aware of the protestor's situation. That the protestor has not demonstrated that she needs to be provided for. He stated that he doesn't benefit from the estate. The protestor's son was a beneficiary of the estate of the deceased when he was alive and he used to channel funds through the protestor. He stopped sending money when the child died. The child died under unclear circumstances. The estate did not contribute for the burial of the child. The deceased wrote the will before the protestor assaulted her. The deceased had a good relationship with their other sister. The share of the protestor's son goes to Thomas Barnado Home. According to him, the protestor should not be recognised as a dependant. the protestor is married and has a child. The estate generates income which is deposited in his account. He uses the money to pay liabilities of the estate.
17. Both parties filed submissions.

Analysis And Determination

18. I have considered the Protest, the Reply to the Protest, oral evidence and the submissions by both parties.
19. The jurisdiction of this Court to deal with an application for reasonable provision by a dependant is stipulated in Part III of the LSA. Section 26 of the Act provides:

‘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.
20. It is common ground that the protestor is a biological child of the deceased. No provision was made for her in the will dated 29th November 2012. The court having held that she was a dependant of the deceased, she was required to satisfy this court that she was deserving of the discretion for provision.
21. The freedom of a testator to dispose of his/ her free property by will is stipulated in Section 5 of the *Law of Succession Act*. This freedom is however not absolute and is checked by Section 26 of the Act by empowering the Court to interfere with a will for the reasons set out therein.
22. Section 27 of the Act provides:

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.
23. The discretion of the Court in an application for reasonable provision is absolute and unfettered, but must be exercised judicially. The factors to be considered by the Court in the exercise of its discretion are stipulated in Section 28 of the Act, which provides:

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 dependant;
 - 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
24. Under Section 5 of the LSA, every person who is of sound mind and not a minor, has the freedom to dispose of all or any of his free property by will. That there are limitations to a testator's testamentary freedom however, is not in doubt. In the case of *Ngetich, In re estate of [2003] eKLR, Nambuye, J* (as she then was) stated:
- “Section 26 of the Act (cap 160) Laws of Kenya stipulates that a will is not absolute where there is contention the Court can interfere and make provision for a dependant let out of inheritance. In exercising those powers given under section 26 of the Act the Court has to bear in mind the provision of section 28 of the Act.”
25. And in the case of *Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR*, while considering the limitations to a testator's testamentary freedom, the Court of Appeal had this to say:
- “This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. (emphasis added)”
26. According to the Court of Appeal, a testator's unfettered testamentary freedom given under Section 5 of the Act may only be interfered with, if his will does not provide for those for whom he was responsible during his lifetime. The Court went on to say as follows, regarding Section 26 of the Act:
- “This section clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his will disinherits his wife who was dependant on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife...While the deceased was entitled to dispose of his property as he pleased, he was not entitled to leave his first two wives Alice and Rose without any reasonable provision for their maintenance. (emphasis added).”
27. From the holding in the *Ndolo* case, it is clear that where a dependant is left without reasonable provision for their maintenance and is rendered destitute, the Court will step in to make reasonable provision for such dependant. A testator's failure to provide for a dependant thereby rendering him destitute is clearly what Section 26 of the Act sought to cure. It is instructive that the Court's power to tinker with the wishes of the deceased is limited to making reasonable provision to an excluded beneficiary and not to give a share that is equal to the other beneficiaries of the estate as of right. As



such, a dependant appeals to the discretion of the Court by demonstrating the need for reasonable provision.

28. Also, In re Estate of Gurdip Kaur Sagoo [2021]eKLR, the Court stated that:- “Where a dependant is left without a reasonable provision for their maintenance and is rendered destitute, the Court will step in to make reasonable provision for such a dependant. A testator’s failure to provide for a dependant, thereby rendering him destitute, is clearly what section 26 of the Act sought to cure.”
29. In this matter the Protestor adduced evidence stating that she was unemployed, has nowhere to call home and has been living with PW2. She told the court that she works in construction sites and relies on well wishers for her day to day needs. PW2 told the court how she found PW1 outside her gate on several occasions. According to her, PW1 looked like a street girl. She was dirty and had an injury inflicted on her. She gave her Khs. 300 and asked her to go back home but she told her that she had nowhere to go. PW2 told the court that out of her good heart, she agreed to host PW1. She provides her with food and clothing. PW2 tried talking to the 1st administrator to assist PW1 but he declined. According to her, PW1 is in a better condition than since she moved in with her and is capable of taking care of herself and her finances.
30. It would appear to me that the Protestor is destitute and has nowhere to call home. Given that she received no bequests in the will and considering the totality of the evidence I find and hold that she is entitled to financial provision from the estate of her mother. By completely excluding the Protestor, the deceased exceeded her testamentary freedom. This court is thus entitled to make orders for the reasonable provision for the Protestor.
31. Having found that the Protestor is entitled to financial provision, I now turn to the issue of the quantum of provision. The Court in John Gitata Mwangi & 3 others versus Jonathan Njuguna Mwangi & 4 others [1999]eKLR said as follows regarding reasonable provision:-

“In order that the Court may be enabled to come to a proper conclusion as to what order it should make, a dependant has the duty to give satisfactory evidence as to his existing and future needs. Without this the Court will not be able to make any sensible order, whether the deceased had made any advancement to the dependant and the circumstance of the deceased’s other dependants are also factors to be considered. The general circumstances ... including the deceased’s ascertainable reasons for not providing for the dependant must also be considered.”
32. The Court is not obligated to interfere with the testamentary freedom of the Deceased and in appropriate cases may decline to do so. In re Estate of Nditu Kihaguru (Deceased) [2022] eKLR, Achode J (as she then was) observed as follows, when she declined to go against the wishes of the deceased when he failed to provide for the Protestors, citing the treatise by Jordan F. R-

“Limitations of the power of testamentary disposition {1907 – 8} 5 Common Wealth Law Review 97 writing for the Court stated: “Children emboldened by the confidence that some share is assured to them in absence of flagrant misconduct, may be tempted to defy parental authority. Any limitation upon a testator’s power to dispose of his earnings as he thinks fit tends to weaken one important incentive to industry and thrift. A testator may be prevented from excluding an utterly worthless member of his family except at the risk of exposing a grave family scandal, which it is perhaps strongly in the interests of innocent members to conceal. The system relegates to a Court of justice discretionary powers in a matter as to the merits of which the testator must in nearly every case be a much better Judge than the Court can possibly be. Complicated questions of fact may arise regarding previous advancements



of the claimant. An opportunity is given for speculative and black mailing actions on behalf of persons who have been properly excluded."

33. The circumstances to be considered by the Court in exercising its discretion are set out in Section 28 of the *Law of Succession Act*, I will consider each, sequentially,

Nature and amount of the deceased's estate

34. The deceased left a sizable estate, the value of which was given as Kshs. 100,000,000 in the Petition. The deceased left a sizeable estate. The value of the estate can only be known if all the properties are valued.
35. The nature and amount of the deceased's property is a key factor in deciding as to whether reasonable provision ought to be made to a dependant and the quantum of such provision. In the case *Lita Violet Shepard v Agnes Nyambura Munga*[2018] eKLR , the Court of Appeal faulted Kimaru, J. for awarding a dependant, the sum of Kshs. 50,000,000/= as reasonable provision when no valuation of the estate had been done.

Past, present and future capital or income of the Applicant.

36. The Protestor testified that she relies on manual jobs and barely has a salary. This is not denied by the 1st administrator/ Respondent. I am inclined to believe that she has no source of income.

Whether the deceased made any advancement to the Applicant.

37. It is common ground that the deceased made no advancement for the Protestor.

The Conduct of the Applicant.

38. The protestor told the court that she had an on and off relationship with her late mother. According to her, the deceased had a medical condition. Occasionally, the deceased would hit her and her son. RW1, the 1st respondent told the court that the protestor assaulted the deceased and she was charged with assault and stealing from the deceased. These charges were however dropped.
39. The protestor told the court that the deceased excluded her from inheriting from the estate because of their issues. On the other hand, RW1 told the court that the deceased made the will before the protestor was charged with assault. It is evident that the relationship between the deceased and the Protestor was somewhat strained to the extent that the deceased excluded the Protestor and her sister.
40. The deceased was categorical at paragraph 3 of her will that-
...my two daughters , the fathers of my grandsons and all their paternal relatives shall not in any way directly or indirectly benefit from my Estate.

The circumstances of the Deceased's other Dependants.

41. In her will the deceased did not provide for any of her children. In this regard therefore, she does not discriminate against the Protestor. 1st Respondent who is a son to the deceased and brother to the Protestor lives in Canada and is doing well financially. He told the court that proceeds from the estate are sent to his account. He says he applies the proceeds in accordance with the will. He denied benefiting from the deceased's estate. The Protestor, on the other hand, is financially challenged.
42. The sorry state of the Protestor is confirmed by her witness, a stranger who has taken her in and supported her to get back onto her feet. In the end, I find and hold that this is a proper case to interfere



with the testamentary freedom of the deceased so as to alleviate the suffering and hardship to which the Protestor is exposed but not in a way that does not negates the wishes of the deceased.

43. The Protestor needs to get back onto her feet, a lump sum payment of Kshs 1 Million is reasonable under the circumstances and should set her on course. Accordingly, I direct that the trustees pay out to the Protestor Kshs 1 Million within 60 days from the date hereof.
44. The Deceased appointed 3 trustees, one has died, the 2nd one has taken a back seat. In the event that the 2nd surviving trustee intends to retire, the Respondent herein should make an application to fill these vacancies within 30 days from the date of this ruling to ensure that the Estate is run in accordance with the wishes of the deceased.
45. Further it emerged that the Executor/ Respondent is receiving the rental income of the Estate into his personal account. This is not desirable, for this reason it is directed that the executor open a separate account for the estate to receive all rental income to the estate.
46. I therefore direct that;
 - i. The Trustee, Nicholas Kester Syamba to apply to appoint 2 additional trustees pursuant to clause 8 of the will of the deceased within 30 days
 - ii. The Executor/ Trustee to open a separate bank account to receive the income generated from the estate within 30 days.
 - iii. Reasonable provision out of the estate of the deceased be made to the Protestor herein by a lump sum onetime payment of Kshs 1 million, payable within 60 days.
 - iv. Save for the provision for the Protestor as provided above the the Grant is confirmed and the estate will be administered in accordance with the will of the deceased.
 - v. As this is a matter involving siblings, it is my view that awarding costs will not promote reconciliation and restoration of family ties. I therefore decline to award costs.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 5TH DAY OF JULY, 2024.

P. NYAUNDI

JUDGE

In presence of: -

Fardosa Court Assistant

Wambui h/b for Nduati for Protestor

Ms Ndirangu for Executor

