



In re Estate of David Kiamba Muli (Deceased) (Succession Cause 21 of 2020) [2024] KEHC 12020 (KLR) (1 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 21 OF 2020**

MW MUIGAI, J

OCTOBER 1, 2024

**N THE MATTER OF THE ESTATE OF DAVID KIAMBA MULI
(DECEASED)**

BETWEEN

EVERLYNE MWENDE KIAMBA 1ST ADMINISTRATOR

BRAIN MUTINDA KIAMBA 2ND ADMINISTRATOR

AGNES NTHAMBI KASYOKA 3RD ADMINISTRATOR

AND

WINROSE EMMAH NDINDA KIAMBA ADMINISTRATOR

JUDGMENT

1. This Court delivered Ruling on the subject herein on 31/5/2022 which of necessity will be reproduced to give perspective on the matter for determination in this instance.

Court Record

2. David Kiamba Muli died on 27th January 2020 vide Death certificate serial No. 0971632.
3. Agnes Nthambi Kasyoka, Everlyne Mwendu Kiamba, Brian Mutinda Kiamba and Winrose Emmah Ndinda Kiamba petitioned for letters of administration and annexed the following documents:
 - a. The Death Certificate of Death Certificate No 0971632 - David Kiamba Muli who died on 27th January 2020 aged 59 years issued at Nairobi.
 - b. The Chief's letter dated 30/01/2020 confirming the list of beneficiaries left behind by the deceased.
4. The Deceased left the following heirs/beneficiaries surviving him:



1. Agnes Nthambi Kasyoka – 1st wife
 2. Everlyne Mwendu Kiamba – daughter
 3. Brian Mutinda Kiamba - son
 4. Juliet Mumbua Kiamba – daughter
 5. Mathew Kasyoka Kiamba – son
 6. Winrose Emmah Ndinda Kiamba – 2nd wife
 7. Mumbua Kiamba – daughter
 8. Muuo Kiamba – son
5. The Deceased left behind property known as;
- a. Masinga/Kangonde/1498
 - b. Masinga/Kangonde/1500
 - c. Machakos/Matuu/1125
 - d. Masinga/Kangonde/1496
 - e. Masinga/Kangonde/1504
 - f. Kiosk No. 45 Matuu Bus Park (Matuu Town)
 - g. M/v Reg. No. KAP 105 Q Toyota Pickup
 - h. Motor cycles Reg. No. (details to be availed)
 - i. Widow & Children Benevolent Fund
 - j. Kwetu Sacco Shares
 - k. KLB royalties for KCPE Top marks series (Mazoezi na Marudio)
 - l. Payments/employment benefits at Kenyatta University (part time employment)
 - m. Britam Insurance benefits (Msingi Poa cover)
 - n. AON Minet Insurance Cover Benefits
 - o. KNUT Benefits burial expenses and Post-burial Benevolent Funds
 - p. Account No. 0390197859093 Equity Bank Matuu Branch (salary account)
 - q. Joint Account with Equity Bank Matuu (Winrose Emmah Ndinda Kiamba with the deceased (details to be availed)
 - r. Death Gratuity (Teachers Service Commission)
6. The grant of letter of administration was issued to Agnes Nthambi Kasyoka, Everlyne Mwendu Kiamba, Brian Mutinda Kiamba and Winrose Emmah Ndinda Kiamba on 11th March, 2021.

Summons For Confirmation Of Grant Dated 12/07/2021

7. The Summons for Confirmation of Grant sought the following prayers:-



- a. The Grant of Letters of Administration intestate in this matter made to Agnes Nthambi Kasyoka, Everlyne Mwendu Kiamba, Brian Mutinda Kiamba and Winrose Emmah Ndinda Kiamba on 11/03/2021 be confirmed.
 - b. That costs of this application be in the cause.
8. The supporting affidavit sworn by Agnes Nthambi Kasyoka (1st Administrator) dated 13th July, 2012 filed on the same date gave a list of the beneficiaries of the deceased and the properties left and she deposed that it has been difficult to ascertain the deceased's exact interest in a majority of the stated assets due to the 4th Administrator's (Winrose Emmah Kiamba) lack of cooperation and frustration and she sought Court's direction and or Orders to file a further affidavit after filing this application so as to include a proposal on the mode of distribution.

Replying Affidavit By Winrose Emmah Ndinda Kiamba Filed On 26th August 2021: (protest)

9. That she is 4th Administrator/Respondent in this cause; and also deposed that the allegation by the 1st Administrator that she is not cooperative is not true and urged the Court not to allow the Applicants any further chance to register a further affidavit on a proposed mode of distribution of the estate as the moves by the Applicants are only calculated to further delay the distribution of the estate while they continued to intermeddle and waste the estate of the deceased and should consider that the Respondent was wholly dependent on the deceased for maintenance and upkeep as the mother and care giver of the deceased's minor and school – going children. She attached a proposed mode of distribution to be adopted by the Court.
10. On 13 /10/2021, this Court took over the matter, the Applicant 1st Administrator through Counsel sought orders of preservation of the assets that comprise of the deceased's estate as outlined in the Petition pending determination of the deceased's interest and value of property and proof of nomination and annexed letters addressed to various Insurance, Sacco and Employer institutions. Counsel for the 4th Administrator was absent. This Court perused the Court record and formed the opinion that there was/is a dispute amongst the administrators of the deceased's estate in carrying out their mandate in gathering and collecting the assets that comprise of deceased's estate and dispute on the nomination by the deceased of the Nominees. Therefore, to maintain status quo and preserve the subject-matter of the dispute pending hearing and determination, this Court granted orders of preservation of all deceased's interest and assets held by the various institutions pending further orders of the Court or confirmation of grant proceedings and issuance of certificate of confirmation of grant.

Summons Dated 18th October, 2021

11. The Applicant sought that;
- a. Spent
 - b. The court to set aside the exparte preservation orders issued on 13th October, 2021 in respect of the benefits held by Kwetu Sacco, Kenya Literature Bureau, AON Minet Insurance, Kenyatta University, Britam Insurance, Kenya National Union of Teachers, Equity Bank and Teachers Service Commission pending interpartes hearing of these Summons.
 - c. That in the alternative to 2 above, the Court to stay exparte preservation orders issued on 13th October, 2021 in respect of the benefits held by Kwetu Sacco, Kenya Literature Bureau, AON Minet Insurance, Kenyatta University, Britam Insurance, Kenya National Union Of Teachers, Equity Bank and Teachers Service Commission pending interpartes hearing of these summons.



- d. The court to set aside the preservation orders issued on 13th October, 2021 in respect of the benefits held by Kwetu Sacco, Kenya Literature Bureau, AON Minet Insurance, Kenyatta University, Britam Insurance, Kenya National Union of Teachers, Equity Bank and Teachers Service Commission pending interpartes hearing of the application.
 - e. The Court to set aside orders of preservation of the estate with respect the benefits held by Kwetu Sacco, Kenya literature bureau, AON Minet insurance, Kenyatta university, Britam insurance, Kenya National Union of teachers, Equity Bank And Teachers Service Commission issued on 13th October, 2021.
 - f. The costs of this application be borne by the Respondents.
12. The application is based on the following grounds inter alia:
1. That on 13th October, 2021 this Court issued orders of preservation of the estate with respect to the benefits held in Kwetu Sacco, Kenya Literature Bureau, AON Minet Insurance, Kenyatta University, Britam Insurance, Kenya National Union of Teachers, Equity Bank and Teachers Service Commission.
 2. That these proceedings relate to the distribution of the assets of the estate of the deceased. The Court does not have jurisdiction to issue preservation orders of the benefits because they are subject of nomination and not available for distribution as part of the estate of the deceased.
 3. That there was material non-disclosure and mis- representation of material facts by the Respondents to lead the Court to believe that the benefits form part of the estate of the deceased.
 4. The Respondent sought the orders for preservation of the estate in bad faith to enable them to continue intermeddling with the estate of the deceased to the detriment of the 4th Administrator/Applicant.
 5. The Respondent came to court with unclean hands and they are therefore not entitled to the orders for preservation of the estate.
 6. During previous proceedings before this Court, and this Court's record will show the Respondents advocates severally made the application for the preservation orders and the Court declined to grant directing that they file a formal application for the Court to consider upon response by the Applicants advocates. The Respondents advocates failed to disclose these previous declined requests by the previous Judge who had been hearing this matter.
 7. The Respondents advocates took advantage of the fact that this Court was new in handling this matter and did not have knowledge of the previous proceedings and also the fact that the Applicants advocates did not manage to log in on the Court's online session due to technical difficulties and therefore there was no objection from the Respondents advocates as had been done before.
 8. The Applicant's advocates did not intentionally fail to log in to the Courts online session and they have always attended court as the Court record can prove/show.
 9. The Respondents advocate failed to disclose that the 1st administrator has in the past instructed the TSC and AON Minet Insurance to pay to her the funeral benefits of KHSs.600,000/- on the false allegation that she was the one who buried the deceased's remains while it was the 4th



Administrator/applicant who did so. The TSC paid the benefits to her while she was not the person entitled to the benefits.

10. That the 4th Administrator buried the deceased pursuant to the judgment of the ELC case Machakos in Machakos ELC suit no. 11/20202 – Agnes Nthambi Kasyoka & others –vs- Naomi Mumbua Muli & Winrose Ndinda Kiamba. A burial dispute which was maliciously instituted by the Respondent against the 4th administrator and the deceased’s mother.
11. Despite the judgment of the Court the 1st administrator colluded with the TSC and the sum of KShs.600,000/- being funeral benefits was released to her. The 1st administrator has adamantly refused to reimburse the benefits which she acquired fraudulently.
12. The 1st administrator continues to block the payment of Kwetu Sacco shares to the 4th administrator/applicant where the deceased had appointed her as the sole nominee. The shares at Kwetu Sacco does not form part of the estate as they are benefits subject of a nomination.
13. Further, the 1st Administrator has instructed the Kenya National Union of Teachers not to pay to the 4th Administrator/Applicant the full post –burial dues under the Burial and benevolent fund while the deceased had appointed the 4th Administrator/Applicant as the sole nominee.
14. The 1st administrator continues to block the payment of the Kenya literature bureau dividends and other benefits to the 4th Administrator/applicant while the deceased had appointed her as the sole nominee.
15. The benefits payable from Britam Insurance were already processed and paid to the 4th Administrator/Applicant as the appointed nominee by the deceased, a fact which within the Respondents knowledge and which they failed to disclose to the court.
16. The application for preservation of Estate is malicious and meant to facilitate the Respondents to continue to frustrate the payment of the benefits to the 4th Administrator/Applicant.
17. That it is in the interest of justice that the orders sought be granted.

Further Affidavit In Support Of The Summons For Confirmation Of Grant Dated 12th July 2021

13. The 1st administrator deposed that there had been several attempts to amicably deal with the administration of the estate of the deceased herein to avoid unnecessary issues but the 4th administrator vehemently refused and that the real motive and intention of the afore said non-cooperation by the respondent came to light when despite being an administrator firstly demanded all payments of all benefits held by the deceased and that the demands were being made or done despite her being duty bound to preserve and protect the estate of the deceased for the benefit of all the beneficiaries.
14. That the Teachers Service Commission (TSC) told the 4th Administrator/Respondent to wait for the court to identify the beneficiaries of the deceased’s estate and issues orders regarding distribution. She sought preservation orders when she got a wind of the 4th administrator’s intentions which were granted.
15. The 4th administrator despite being duty- bound to preserve the estate of the deceased herein sought that the said preservation orders be set aside on allegation that the said benefits were exclusively hers without any evidence of nomination. The court dismissed the application and directed that the 4th administrator provide formal copies of nomination endorsed by the deceased and that the list of documents the certified nomination under the Masaku Teacher’s Burial/benevolent fund and copy of



- teacher's next of kin details issued by the TSC that bear the 4th respondent's name are both one page documents that do not bear the signature of the deceased.
16. That for clarity the Teacher's Service Commission confirmed that authentic and /or complete nomination documents contain two pages, the second of which ought to have been executed by the deceased as well as been witnessed and signed by an agent of the said commission failing which the same is incomplete/unauthentic and that the respondent is seeking to benefit from the estate of the deceased to the exclusion of all other bonafide beneficiaries of the estate.
 17. The Ruling of this Court was as follows in part;
 43. This Court confirms that the law is that once the deceased during his/her lifetime provides nomination of the recipient of his/her interest, value or property in the event of his/her death, the property is not subject to distribution by the Court. Such property, benefit or proceeds are not available for distribution and shall be released to the nominee as per nomination document endorsed by the deceased as elucidated in the *Re Estate of Faith Muita (Deceased)* [2016] eKLR supra.
 44. That is why at this stage of proceedings, the allegation that the properties listed some were to be released to the 4th Administrator as nominee of the deceased is subject to proof of such nomination before the Court cedes the right to distribute such benefits as part of the deceased's intestate estate.
 45. As confirmed by the Applicant in relying on the cited case *Re Estate of Peter Ngugu Muchai (deceased)* [2021] eKLR supra the Court granted an order that the TSC provides a certified copy of the Deceased's file for the Objector to produce as evidence of nomination; the same requirement is applicable in the instant case before the Court cedes its jurisdiction to distribute the deceased's intestate estate where nomination is proved as alleged by tangible and cogent evidence.
 18. The HIGH COURT CIVIL SUIT 7 OF 2023 (NAIROBI HCCC113 OF 2023) was transferred from Nairobi High Court to this Court and to be heard and determined with the instant Succession Case. The Application for determination was/is Notice of Motion filed on 30/5/2023 by the Plaintiff Winrose Emmah Ndinda Kiamba (suing as Legal Representative of the Estate of David Kiamba Muli (deceased) versus Teachers Service Commission (TSC) 1st Defendant/Respondent; Minet Kenya Insurance Brokers Ltd 2nd Defendant/Respondent & Agnes Nthambi Kasyoka 3rd Defendant/Respondent.
 19. The Plaintiff sought the following orders;
 1. The 1st & 2nd Respondents to be directed to reverse the payment of funeral benefits of Ksh 600,000/- and disburse the amount to the Plaintiff/Applicant pending hearing and determination of the application.
 2. The 1st & 2nd Defendants /Respondents be directed to deposit the Group Life Insurance Benefits of the deceased of Ksh 1.050,000/-in Court or in joint interest Account pending hearing and determination of the Application.
 3. The 1st Defendant to be compelled to produce a complete and certified copy of the Deceased's employment file pending hearing and determination of the Application.



4. In the alternative, the 1st Defendant to be compelled to produce a complete and certified copy of the nomination form in favor of the Plaintiff executed by the deceased pending hearing and determination of the Application.
20. The Application is grounded on;

The deceased left behind the Plaintiff and 3rd Defendant's family as he was polygamous. During his lifetime, he initiated divorce proceedings DIVORCE CAUSE 8 OF 2016 PM'S COURT KITHIMANI against the 3rd Defendant in 2016 after he married the Plaintiff in 2011 under Kamba customary law. The deceased changed his nominee from the 3rd Defendant to the 1st Plaintiff in respect of his employment benefits, burial funds and pension held by the 1st Defendant.
21. After deceased's demise, a burial dispute arose and after hearing and determination by ELC Court-MKS NO 11 OF 2020 the deceased was buried by the Plaintiff on their farm Matuu/Matuu/1135.
22. The 3rd Defendant fraudulently and in collusion with 1st & 2nd Defendant/Respondents received Ksh 600,000/- as deceased's burial benefits.
23. Despite adequate notice to the Defendants, that the Plaintiff was to bury the deceased, the Plaintiff protested irregular payment and demanded reversal of payment from the 3rd Defendant to the Plaintiff, the Defendants refused to reverse the payment.
24. The 1st Defendant in 2021 instructed the 2nd Defendant to pay the Group Life benefits of Ksh 1,050,000 and the Plaintiff/Applicant completed and returned the claim documents as directed and to date no payment was made.
25. The Plaintiff asserted that the 3rd Defendant brought the matter to the pending Succession proceedings in respect of the estate of the deceased and the Court in Succession matter distribute these benefits while these benefits are not subject to the jurisdiction of the Succession Court.
26. The Plaintiff/Applicant filed List of Documents among them, the Nomination dated 22/3/2004 & Nomination in favour of the Plaintiff No 245. Judgment of ELC NO 11 OF 2020 of 24/4/2020 and of 27/4/2020.
27. The 1st Respondent, through Dr Julius O. Olayo (testified in Court) vide Replying Affidavit of 20/9/2023 confirmed Teachers Service Commission (TSC) is established by Art 274 (1) CoK 2010 under Section 74 of *Employment Act* TSC is to obtain and manage employees records and Regulation 60 of Code of Regulation of teachers, the employee /teacher has to fill and file Next of Kin Forms. The deceased filled out 2 Forms as follows;
 - a. Next of Kin Form of the Deceased dated 22/3/2004 nominated 3rd defendant and their 3 children marked JO-2.
 - b. Next of Kin Form of the deceased dated 10/6/2016 nominated Plaintiff as deceased's spouse and wife at the time marked as JO -3.
 - c. 3rd Defendant wrote to 1st Defendant letter dated 31st January 2020 and indicated she was one of the beneficiaries of deceased's estate and she included marriage certificate and birth certificates of their children marked as JO-4.
 - d. Annexed was letter from Chief Kangonde Location where the 3rd Defendant and her children were listed and the Plaintiff and her children were listed. The deceased was deemed to have been polygamous. The Chief indicated that 1st wife/widow should bury the deceased at their matrimonial home under Kamba customary law marked as JO-5.



28. On the basis of the above letters, 1st Respondent approved payment by 2nd Respondent to the 3rd Respondent of Ksh 600,000/-. On 2/12/2020, the 1st Respondent received Court proceedings and Order with Court orders directing the Plaintiff/Applicant to bury the deceased and access benefits herein. Annexed is the accompanying letter dated 6/11/2020 marked JO-6.
29. Thereafter, the 1st Respondent instructed the 2nd Defendant not to make any further payments until the Court in the matter herein resolved the dispute.
30. The 2nd Defendant /respondent filed Replying affidavit on 15/8/2023 denied any of the allegations levelled against it . the 2nd Respondent took the view that the matters raised in the Application can only be ventilated during hearing of the substantive suit /Plaint inter partes.
31. The 2nd Defendant is a scheme operator relying on instructions from the client 1st Defendant. The reversal can only be rendered once the Court determines the matter on who is the rightful beneficiary. Due to the Court order preserving the estate of the deceased due to competing claims as to the wishes of the deceased as to his nominee(s), the 2nd Respondent halted any further payments in light of Client's letter of 1/7/2021 marked CM-1.
32. The 3rd Respondent, vide Replying Affidavit of 17/7/2023, annexed copy of Death Certificate of deceased and Chief's letter of 30/1/2020. The 3rd Defendant confirmed that deceased filed Divorce Petition but was not prosecuted and determined. The 3rd Defendant attached the Court order- File -closed issued on 17/12/2020 on account of deceased's demise. The Deceased nominated her as his next of kin and beneficiary to all his assets arising from his employment. The same document was not revoked or cancelled and it is signed by deceased and witnessed on 23/3/2004 in her favour- Copy marked ANK -3.
33. The Court on 11/3/2021 appointed the Plaintiff and 3rd Defendant Administrators of the deceased's estate as per copy of letters of administration issued on 11/3/2021.
34. They jointly planned decent and befitting burial of the deceased and by letter dated 3/11/2020, the 2nd Defendant paid 3rd Defendant her Kshs. 600,000/- as funeral benefits. 3rd Defendant attached copies of receipts to show she paid mortuary fees, grave digging clearing of the bush to create space, hiring domestic labor to cook for all guests and family during that period until the deceased was laid to rest. The 3rd Defendant did not keep full account of all expenses she was in mourning and she delegated to 3rd parties and since the larger family was present in-laws, friends during the difficult period she purchased food and beverages, fruits, milk among other funeral expenses she catered for.
35. The 3rd Defendant reiterated that the deceased was polygamous and visited her children and attached photographs.
36. The 3rd Defendant contested the nomination form of the Plaintiff and sought forensic document examination and detailed Report availed to Court.

Evidence

Dr. Julius Ochieng Olayo Testified On 4/12/2023 As Follows;

37. Director -HR TSC – professional certificates PHD/MBA/Degree HR- Bachelors of law Degree/ Lawyer/Advocate.



38. He is in charge of HR, he handles Human Resource entry confirmation, rewards, exist, recruitment, deployment, transfer. The matter in court the deceased David Kiamba Muli (deceased) employed Graduate Teacher in 1986 and passed on 27/01/2020.
39. The issue of processing benefits last expense – money immediately upon his death to help with the funeral of the deceased. Subsequent to death of deceased last expenses were paid funeral expenses to the next of Kin and as per the Form nominated wife/widow Agnes Kasyoka/siblings named.
40. The Next of Kin Form guided to how/whom the amount of funeral expenses will be paid to. The 2nd nomination form was delivered to the TSC on 10/06/2020 and it was one page and it was not duly signed. The form is of 10/06/2016 in favour of Winrose E. N. Ndungu. He chose to treat this form differently as it was only one page the last page was not provided and was not signed by deceased and witnessed by Agent of the Commission. Ordinarily it should be two pages – in a separate sheet of paper. The 2nd page would be on the flip side of the 1st page. The 2nd Form and the notes Part A is not provided for in the Code of Regulations.
41. The Form submitted on 10/06/2016 ought to be have abided with Code of Regulations of 1st page 1 Note – ought not to be there and is no longer in use. No.3 Secondly, the date of 1st Appointment – of untrained teacher. As at 2016 an untrained teacher was not provided for. He was presented with a document he could not own.
42. A dispute arose out of the two forms in relation to nomination of both the Plaintiff and 3rd Defendant. They gave instructions to Minet ICDC Insurance Service Provider in the management of benefits in administration of the benefits. They instructed Minet ICDC not to make any payment until the matter is resolved.
43. They were provided with 2 Nominations Forms and from his personal assessment, 1st Nomination Form was of 2004 and was valid and in line with 2004 Regulations. He could vouch credibility, integrity and genuine claims of the 1st Form but not the 2nd Form as it did not mirror the Code of Ethics/ Conduct Regulations. 2 Forms – Nomination Forms – Original 2004 2015.

Cross – Examination by Evelyn Kyama:

44. He stated that he was employed in 2020 and Next of kin – stand in for the deceased relative or a friend. They need not be a beneficiary. When he received Last Expense, he had both Forms and received a letter from the Chief and indicated the deceased had 2 wives/widows. He paid on the basis of next of Kin Form of 2004 and he disregarded the 2016 Form as it was not the required Form under the Code of Regulations of Teachers.
45. He was not notified that the 3rd Dependent did not bury the deceased. He was not aware of the judgment of ELC Court of the burial of the deceased.
46. The next of Kin Form the teacher is required to fill the Form and present to the relevant office. The form of 2016 was processed and it was found not to be complete on the part of references in relation to the Next of Kin and we referred to the file. They do vetting and that is why the Form of 10/06/2016 was not authentic. They did not raise it with the teacher/deceased that the Form was incomplete.
47. The bundle/statement of Winrose Emma Ndinda Kiamba – letter dated 3/11/2020 2nd [paragraph read out by Court Assistant – Geoffrey]. Minet ICDC paid as per instructions of TSC to be paid funeral expenses – Agnes Nthambi Kasyoka as per the Form of 2004. The last amount was to facilitate the deceased’s burial. He did not know that the deceased was not buried by Agnes Nthambi Kasyoka



– by the time they got the Court Ruling (ELC) it was after they completed with payment of Next of Kin provisions.

48. Based on the Court documents that were brought they suspended any further payments. The payment was not in error as they complied with the Next of Kin Form of 2004 as per the wishes of the deceased.
49. Plaintiff bundle in 113 of 2023 NBI referred to Machakos High Court – read out the letter. Pursuant to Court order of 24/04/2020 to Ms Winrose Emma Ndinda Kiamba that Kshs.1,050,000/- and court order of 24/04/2020 to pay widow Winrose Emmah Ndinda. This is a communication between the Minet ICDC Ltd and Advocate for Plaintiff Winrose Emmah Ndinda Kiamba. Minet ICDC is one of their agents and unless they authorize them, they cannot communicate on their behalf. From the correspondences it cannot be safe to pay Kshs.1,050,000/- and in light of Court Order they have to await Court's decision.

Cross – examination by Mr. B. Nzei Advocate:

50. The Court Order of 24/04/2020 is not and he has not seen it. The letter is addressed to Law firm of B. M. Musau Advocate and from correspondences then B. M. Nzei Advocate and no other law firm is referred to. Letter of 3/11/2020 at pg. 20 it was not in his place to account for distributed funds. He was summoned to court to produce nomination forms and in relation to the dispute – and it is provided for in Statute – Code of Regulations Subsidiary Legislation for Teachers Service Commission Act. His affidavit of 20/09/2023 – annexed provides Section 60 Kenya Subsidiary Legislation 2015 he had no option but to comply with the Section 60 TSC Kenya subsidiary legislation 2015. The 2 Nomination Forms – one of 2004 and the other 2016 – the one that is properly filled is given and executed is the one Agnes 1st widow. He was not a party/TSC was not a party to the ELC matter judgment no decree was served on us.

Cross – examination by Counsel for the 2nd Defendant Minet ICDC:

51. He stated that the letter annexed to 2nd Defendants Replying Affidavit the letter of 1/07/2021 was not to proceed with certain payment to forestall unnecessary risk. Having an incomplete nomination Form will not bind the TSC Act Regulations as it is not in the summons presented.

Re-examination by Counsel for TSC:

52. As per the service Chief's Officer death of employee and so were to disburse funds for the funeral within 48 hours. After that time there was no dispute and they paid Agnes as there was no Court Order/ dispute.
53. When they received the Court Order of preservation, they stopped the process. They administer 365,000 Teachers country wide. It is normally impossible to scrutinize all the documents.

Determination

54. The Court has considered the application, pleadings and submissions by respective Counsel for the parties. The issue(s) for determination are;
 - a. The application of 30/5/2023 granted or dismissed
 - b. Whether the 4th administrator was duly nominated to be a beneficiary and is/was entitled to the funeral expenses Ksh 600,000/- which ought to be refunded?
 - c. Whether the order of this Court preserving the estate of the deceased including nominations due to ensuing disputes should be set aside or remain in force.



Jurisdiction

55. It is apparent from the Court record and both Court files, that parties and respective Counsel are uncomfortable with the issue of this Court's jurisdiction.
56. In the pleadings and submissions, the parties and/or Counsel insinuated that the nomination dispute is to be heard and determined by the High Court while the Succession Cause be heard by the Succession Court.
57. Article 165 of CoK 2010 provides;
the High Court shall have-
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
58. Therefore, the High Court Machakos has jurisdiction to hear and determine the Civil Suit 7/2023 & Succession Matter 21/2020. This Court applies the jurisdiction of the High Court and/or applies Law of Success Act in Succession proceedings.

Application Of 30/5/2023

59. The Applicant sought orders that 1st & 2nd Respondents to be directed to reverse the payment of funeral benefits of Ksh 600,000/- and disburse the amount to the Plaintiff/Applicant and deposit the Group Life Insurance Benefits of the deceased of Ksh 1.050,000/-in Court or in Joint Interest Account.
60. The 1st Defendant to be compelled to produce a complete and certified copy of the Deceased's employment and/or complete and certified copy of the nomination form in favor of the Plaintiff executed by the deceased pending hearing and determination of the Application.
61. The parties challenged this Court's order of Preservation of the disputed nomination and intimated the Court had no right/jurisdiction to distribute the deceased's benefits as the deceased had nominated as indicated in the Next of Kin Forms.
62. In re Estate of Faith Muita (Deceased) [2016] eKLR Hon W.Musyoka stated in detail as follows on nomination;

“Nominations are devices that operate outside of the law of succession. A nomination is defined as a direction given by a nominator to another person or entity who or which is holding funds on her behalf, to pay the funds on the nominator's death to a nominee appointed by the nominator during the nominator's lifetime. The nomination or direction by the nominator only takes effect after the death of the nominator.

One other thing to note about nominations is that they operate under the rules of a particular scheme. Although they dispose of property upon death, they do not comply with the requirements of a will, and they are therefore not subject to the law of succession. The property the subject of a nomination does not form part of the nominator's estate, for the reason that the funds are meant to be paid to the nominee of the nominator. The person to whom the funds ought to be paid is designated. Nominated funds cannot pass by the will of the nominator. The said funds, the subject of the nomination, cannot vest in the personal representatives of the nominator for the simple reason that they do not form part his or her estate. It is for that reason that the person holding the funds, or the scheme manager, need not require a grant of representation before paying out the funds to the nominee or



beneficiaries. The direction is that the funds be paid out on death, so the person holding the funds should only require proof of death before making the payment. The only time nominated funds would fall for distribution in accordance with the law of succession is when the nomination has been revoked by either the subsequent marriage of the nominator or by the death of the nominee before that of the nominator. In both cases there would be no valid nomination, and therefore no nominee would be in place to be paid the proceeds of the policy. In such cases the funds would be estate property vesting in the administrators.”

63. See also; *In re Estate of Carolyn Acheng' Wagah (Deceased)* [2015] eKLR;
- “It is the Law that funds subject of a nomination do not form part of the nominator’s estate and therefore such funds cannot pass under the will of the deceased or vest in his personal representative, such funds are not subject to the succession process, and should be dealt with in accordance with the Law governing the nomination. Nominations are statutory, in the sense of them being specifically provided for by a particular statute.”
64. This is the position on nominations in an ideal situation where the wishes of the Deceased are clearly set out and the Nomination Form is properly executed and witnessed. In such a case the Court lacks jurisdiction to consider distribution and the wishes of the deceased take precedence. However, where there is contest dispute and challenge to the nomination by deceased as in the instant case where there are 2 Nomination Forms one of 2004 and other of 2016; the matter is held in abeyance pending resolution if nomination not clear and/or not possible to discern deceased’s intention/wishes, then it would be subject to estate property held by Administrators.
65. In the instant case; the parties herein, specifically the Plaintiff and the 3rd Defendant are both appointed Administrators of deceased’s estate, through a Grant and have through the deceased’s employer been nominated in different Next of Kin Forms on different dates and for the 3rd Defendant it is signed by deceased and witnessed and for the Plaintiff only 1 page was presented and it is not signed by the deceased and witnessed. These are 2 documents that are nominating different parties/nominees over the same benefits of the deceased. The Plaintiff insists the original employee file be availed to Court or certified copies of the same. The 3rd Defendant contests authenticity of the same documents and seeks forensic examination. Clearly, the deceased’s wishes are not clear as to who of the two (2) Administrators/widows should get the deceased’s benefits. The Plaintiff states that ALL benefits should be paid to her to the exclusion of 3rd Defendant
66. With regard to the rest of the deceased’s estate, beneficiaries of the deceased have ongoing disputes as to the deceased’s interest value or property in the listed assets in the Petition; some properties are alleged to have been disposed off, others are not free property of the deceased available for distribution as the deceased during his life nominated the beneficiary/recipient of the proceeds.
67. The Summons for Confirmation Application filed on 13/7/2021 is not agreed/consented on by parties therein, the assets available for distribution were listed without further information or detail as to extent of value or interest; the fact of whether they are all available for distribution was/is contested. There was/is no proposed mode of distribution and the beneficiaries failed to file written consents. The Plaintiff/4th administrator filed Protest pending for hearing.
68. There are on record correspondence by the Local Administration that any efforts to have the disputants meet, consult and/or agree on way forward were futile.
69. The Law of Succession attends to testate and intestate estates of the deceased persons. Where there is a valid Will under Section 11 LSA the Court cedes distribution of the deceased’s estate according to the



wishes of the deceased by the Executor of the deceased's Will. This is a testate estate, whereas the Court exercising civil jurisdiction will resolve any conflict or contest of the dispute arising, the distribution is according to the wishes of the deceased.

70. Section 34 LSA defines an intestate estate as follows;

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.

71. This Court confirms that the law is that once the deceased during his/her lifetime provides nomination of the recipient of his/her interest, value or property in the event of his/her death, the property is not subject to distribution by the Court. Such property, benefit or proceeds are not available for distribution and shall be released to the nominee as per nomination document.

72. The allegation that the properties listed some were to be released to the 4th Administrator, as nominee of the deceased is subject to proof of such nomination before the Court cedes the right to distribute such benefits as part of the deceased's intestate estate.

73. In the case *Re Estate of Peter Ngugu Muchai (deceased)* [2021] eKLR supra the Court granted an order that the TSC provides a certified copy of the Deceased's file for the Objector to produce as evidence of nomination; the same requirement is applicable in the instant case before the Court cedes its jurisdiction to distribute the deceased's intestate estate where nomination is proved as alleged by tangible and cogent evidence.

74. Dr. Julius Director -HR TSC testified that He is in charge of HR, he handles Human Resource entry confirmation, rewards, exist, recruitment, deployment, transfer. The matter in court the deceased David Kiamba Muli (deceased) employed Graduate Teacher in 1986 passed on 27/01/2020. The issue of processing benefits last expense – money immediately upon his death to help with the funeral of the deceased. Subsequent, to death of deceased last expenses are paid funeral expenses, next of kin form nominated wife/widow Agnes Kasyoka/siblings named.

75. The next of Kin Form disclosed how/whom the amount of funeral expenses will be paid to the 3rd Defendant based on the 1st Form of 2004. The 2nd nomination Form was delivered to the TSC on 10/06/2020 and it was one page and it was not duly signed by the deceased and witnessed. The form is of 10/06/2016 in favour of Winrose E. N. Ndungu. PW1 chose to treat this Form differently as it was only one page the last page was not provided and was not signed by deceased and witnessed by Agent of the commission. Ordinarily it should be two pages – in a separate sheet of paper. The 2nd page would be on the flip side of the 1st page. The 2nd form and the notes Part A is not provided for in the Code of Regulations.

76. The Form submitted on 10/06/2016 ought to be have been in compliance with Code of Regulations of 1st page 1 Note – ought not to be there and is no longer in use. No.3 secondly date of 1st Appointment – of untrained teacher. As at 2016 untrained teacher was not provided for. He was presented with a document he could not own.

77. A dispute arose out of the two forms. They gave instructions to Minet ICDC Insurance Service Provider in the management of benefits in administration of the benefits. They instructed Minet ICDC not to make any payment until the matter is resolved by this Court.

78. They were provided with 2 Nominations Forms personal assessment, 1st Nomination Form of 2004 was valid and in line with 2004 Regulations. He could only vouch credibility, integrity and genuine



claims of the 1st Form but not the 2nd Form as it did not mirror the code of ethics/conduct Regulations.2 Forms – Nomination Forms – Original 2004 2015S.

79. It is clear from the evidence that the TSC disowned the nomination form which the 4th administrator claims to have been nominated by the deceased as seen in the testimony of the HR director TSC.
80. It is trite law as espoused by Section 107-112 of the Evidence Act that he who alleges must prove. From the evidence on record, the 4th Administrator has not discharged this burden that she was duly nominated by the deceased hence the benefits were not available for distribution. The 2nd form Next of Kin Form is contested.
81. With regard to the reversal/refund of Kshs. 600,000/- by the 1st Defendant to the Plaintiff, this Court finds as follows;
- a. The ELC case determined on where and who should bury the deceased and found the Plaintiff had been there for deceased during his illness and demise. The judgment did not exclude the 3rd Defendant from participating or attending the funeral of the deceased.
 - b. Admittedly, both Plaintiff and 3rd Defendant concede the deceased was polygamous as shown by Chief's letter proceedings in ELC matter and nomination documents 2 each appointing one party.
 - c. The 1st Respondent Deceased's employer considered the correspondence and deceased's employment record the 3rd Defendant's letter, copy of death certificate of deceased, marriage certificate, birth certificates of their children and the Next of Kin Forms which he found the one filled in 2004 was signed by deceased and witnessed naming the 3rd Defendant and 3 children.
 - d. By the time the Plaintiff notified the 1st Respondent of the ELC proceedings Judgment and Court order it was much later after disbursement was made to 3rd Defendant and the deceased's burial done.
 - e. The 3rd Defendant attached some receipts of payments made to facilitate decent burial of the deceased while the Plaintiff also deposed she spent her money to cater for guests who attended the burial.
82. From the above observations, this Court finds that both Plaintiff and 3rd Defendant are wives/widows of the deceased, they both participated and facilitated burial of the deceased. They are both appointed as administrators of the estate of the deceased and the ELC judgment did not determine who would receive funds as funeral benefits. In light of the circumstances, I find the Kshs. 600,000/- was utilized to facilitate the decent burial by the family of the deceased, both plaintiff and 3rd Defendant their children and extended family. Logically, the funds were spent for deceased's burial as intended. The 1st Respondent acted bona fide based on records of the deceased and documents presented. A Court does not act in vain and therefore the reversal and payment of Kshs. 600,000/- is impossible in the circumstances as it is overtaken by events, it was for deceased's burial which was conducted irrespective of who received the funds. This prayer is dismissed.
83. With regard to release of Kshs. 1,050,000/- to the 2nd Defendant confirmed that payment was processed but 1st Defendant wrote vide letter of 1/7/2021 from the 1st Defendant that the matter was/is to await Court determination and opposed the Court's preservation order.
84. This Court will not hold any payments based on contested nomination documents as listed above pending the Plaintiff's request to have the deceased's employment file availed to Court and/or



certified copies of relevant documents availed and the 3rd Defendant's request of the contested 2 nomination forms subjected to forensic examination and both Plaintiff/Protestor and 3rd Defendant/Administrator are heard through viva voce evidence and the matter is heard and determined on nomination under relevant pension, retirement, insurance laws under civil jurisdiction and under Law of Succession on distribution of intestate estate of the deceased. Until then, status quo is maintained.

Disposition

1. The upshot is that the 4th Administrator's application of reversal of payment of Kshs. 600,000/- as burial benefits dismissed.
2. The payment of Kshs. 1050,000 shall await the production of deceased's employment file to Court or certified copies during the hearing.
3. There shall be through DR MHC forensic examination of the 2 contested nomination documents by Document Examiner and Report presented to Court during next hearing.
4. The distribution of intestate estate shall be as per hearing and determination of protest and summons for confirmation of grant interpartes through viva voce evidence
5. Status quo be maintained pending hearing of both civil and succession matters on nomination and distribution of deceased's estate.
6. No orders as to costs it is a family matter.

JUDGMENT DELIVERED SIGNED DATED IN OPEN COURT ON 1/10/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

In the Presence Of

Mr. Nzei - for the Administrators/Respondents

No appearance - for the 4th administrator/Applicant

Geoffrey/Patrick - Court Assistant(s)

