



REPUBLIC OF KENYA



**In re Estate of Geoffrey Wangai Githendu (Deceased) (Succession Cause  
15 of 2018) [2023] KEHC 589 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 589 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYAHURURU**

**SUCCESSION CAUSE 15 OF 2018**

**CM KARIUKI, J**

**FEBRUARY 9, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE GEOFFREY WANGAI GITHENDU**

**BETWEEN**

**PETER NDIANG'UI WANGAI (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF PERIS NYOKABI WANGAI - DECEASED) ..... APPLICANT**

**AND**

**ESTHER MWIYERIA MATHI ..... RESPONDENT**

**RULING**

1. The matter before court is an application by the applicant dated January 26, 2011 seeking orders that: -
  - i. Spent
  - ii. Spent
  - iii. That this honourable court do order the respondent to remove all and any encumbrances on title no Nyandarua/Olkalou Central/38XX which the applicant is entitled to and unconditionally transfer Title Nos Nyandarua/Ol Kalou Central/ 38XX, 38XX, 38XX, 43XX to the applicant.
  - iv. That the respondent be ordered to pay the applicant the market value of 1 acre of land from Title No Nyandarua/Olkalou Central/43XX which she sold without the consent of the applicant who was entitled to the same.
  - v. That the respondent be ordered to complete the administration of the estate of deceased within such time to be given by this honourable court.
  - vi. That the costs of this application be borne by the respondent.



2. Which application is grounded on the affidavit of Peris Nyokabi Wangai and the grounds on the face of the application offered *inter alia*: -
  - i. That the applicant is the absolute beneficiary of the entire estate herein.
  - ii. The respondent is misapplying the said estate and is occasioning loss to the same to the detriment of the applicant.
  - iii. The respondent has failed and/or refused to complete administration of the estate herein despite the confirmation thereof having been effected in the year 2004.
  - iv. The respondent is dealing with the estate herein otherwise than as directed by this honourable court.
  - v. The respondent should be ordered to transfer to the applicant the estate that rightly vests into her and fully compensate her for any losses occasioned to the same.
  - vi. The respondent has disposed off part of the estate belonging to the applicant and has further encumbered another part of the estate that the applicant is entitled to and this court should therefore preserve the suit estate pending the hearing and determination of this application
  - vii. That the applicant should be ordered to complete the administration of the estate herein within given timelines ad failure whereof punitive action may be taken against her.
3. The application was further supported by the supplementary affidavit deposed by Peris Nyokabi Wangai sworn on March 1, 2011. On the other hand, the respondent opposed the application *vide* a replying affidavit sworn by the respondent on February 24, 2011.
4. On November 25, 2015, the court directed the respondent to file report detailing the progress of administration of the estate and to account for her administration. The respondent filed two reports namely:-Balance sheet for the year period September 1, 2000 to August 31, 2019. Balance sheet for the year period September 1, 2000 to January 31, 2016.
5. The hearing of the application and the justification of the accounts took place simultaneously the matter proceeded by way of oral evidence.

## **6. Applicant's Submissions**

### **On whether the orders sought in the application were merited?**

7. The applicant stated that the condition that the deceased's wife was to get the balance of the estate if only she survived the deceased was met. Therefore, her right over the balance of the estate was crystallized and she became the beneficial owner thereof as per paragraph 7 (b) of the deceased's will
8. That there was no evidence whatsoever tendered by the respondent to show that any part of the estate or proceeds thereof was given to the applicant and that the respondent went to an extent of using the estate to guarantee loans taken by a company not related to the estate and therefore the application was merited.

### **On whether the executor has proceeded diligently with the execution of the deceased's will as required by the law?**

9. The applicant submitted that the respondent failed to honour this fundamental legal obligation and it is only after the court intervened is the pendency of the application before that the accounts were filed.



Even then, the respondent filed the same after a notice to show cause why she should not be cited for contempt was issued and it is then when she filed fabricated, incomplete and falsified accounts and/or financial reports.

10. It was stated that there are sale agreements even prepared in the name of the applicant selling certain parcels of land through the executor where she has not signed but it was acknowledged by the respondent that indeed land was sold.
11. It was his contention that the law stipulated time within which administration of the estate should be completed and if there is any hardship, then an executor should seek extension of that time from court but before filing of the application the executor had not expressed any hardship in completing the estate.
12. That from the record, it can be seen that there was a protracted litigation involving financial institution that wanted to exercise its power of sale against part of the estate after the respondent used the property to guarantee a loan obtained by a private company

### **On whether the estate accounts filed by the executor were justified?**

13. The applicant argued that the executor failed to justify the items put in the accounting reports and that there was no documentation at all in support of the expenses.
14. That there was no justification for the many alleged travel and subsistence allowances as the executor had advocates duly engaged in handling the legal process including processing of titles to the beneficiaries.
15. Further, the amount of money the executor claims as he compensating for executorship which she referred to as “out of office allowance” is unreasonable considering the size of the estate in question, reliance was placed on *Loise Wambui Njoroge v Albert Thuo Chege & 5 Others* [2017] eKLR relying on the decision in *Laing Estate v Hines* 41 OR (3<sup>rd</sup>) 571 [1998] OJ No 4169

### **Whether the remainder of the state should be transferred to the estate of the applicant herein to be administered as part of her estate?**

16. It was asserted that the applicant survived the deceased and according to the provisions of the will, she was entitled to the balance of the estate whether in terms of the land itself or the proceeds therefrom therefore the remaining part of the estate should be transferred to the estate of Peris Nyokabi Wangai (deceased) to be administered as part of her estate.
17. The applicant submitted that in the alternative the remaining part of the estate should be distributed to the deceased’s children.
18. That legal fees is the only liability that was substantiated by the executor and therefore should only liability to be met out of the remaining estate and that the legal fee for the advocates representing the applicant should also be met by the estate since the applicant filed the current proceedings in pursuit of her rights under the deceased’s will.

### **19. Respondent’s Submissions**

20. The respondent submitted that the testator authorized the executrix to liquidate the remaining part of the estate being 25 acres of Plot No 181 Olkalou Central. The amount of 6 acres realized from the sale was to be paid to the respondent because she played a bigger role to cater for the upkeep of the deceased during his sickness.



21. That in executing her duties the executrix subdivided 25 acres into 5 portions of 5 acres each being 38XX, 38XX, 38XX, 38XX and 38XX.
22. It was stated that the proceeds of sale of 10 acres have already been accounted for in the books of account produced in court which clearly means that the executor is yet to get her share as a beneficiary and she identified parcel proton 38XX as her own to liquidate but it is impossible because the said portion forms part of the property cautioned by PW1.
23. The respondent argued that the application was prematurely brought before the court because the applicant got her share as a beneficiary/wife provided in paragraph 6 of the will and what was remaining is the remainder of the proceeds after the entire estate had been liquidated and expenses paid. She stated that PW1 made it difficult for her to complete administration of the estate as per paragraph 7b of the will because of the caution placed in 2010.
24. It was contended that the applicant's prayer that the remaining estate be transferred to her is not provided for in the will and that any remaining balance should be shared among the surviving beneficiaries.
25. The executor submitted that she had accounted for the partially distributed estate and all the books of account have been filed a produced in court as Dexh 3a and b. that paragraph 1 and 6 of the Will is uncontested since all the beneficiaries have confirmed they received their share as provided. That PW1 and 2 did not produce any evidence in court to prove that they paid for subdivision and issuance of their respective title deeds in their name.
26. The executor reiterated that she has so far sold 10 acres from the 25 acres and she has accounted for the income and expenditure of the estate. Reliance was placed on section 82 and 83 of the [\*Law of Succession Act\*](#).
27. It was stated that PW1 did not provide any document/evidence in court to prove their claim that the expenses tabulated in the accounting report are false and exaggerated and were not incurred as per Section 107 and 108 of the [\*Evidence Act\*](#).
28. The respondent stated that PW1 testified that some beneficiaries have encroached on the remaining estate claiming that it is their inheritance yet they got their respective shares and efforts to have them vacate have been meted with hostility. She prayed that an order be issued by this court against any intermeddler to vacate from the estate and allow the executrix to complete her administration peacefully. Reliance was placed on section 45 of the [\*Law of Succession Act\*](#).
29. In conclusion, the respondent pleaded with this court to lift the caution placed on the remaining estate so that she can liquidate it, settle the expenses and the remainder of the proceeds, if any, be subdivided among the surviving beneficiaries.

### **30. Analysis and Determination**

31. Having analyzed the application filed hereto and the submissions and evidence by the parties in support of their cases, the issues that arise for determination in my opinion include: -
  - i. Whether the applicant has made out a case to warrant the court to order the respondent to remove all and any encumbrances on title no Nyandarua/Olkalou Central/38XX which the applicant is allegedly entitled to
  - ii. Whether the applicant has made out a case to warrant the unconditional transfer of Title Nos. Nyandarua/Ol Kalou Central/ 38XX, 38XX, 38XX, 43XX to the applicant.



- iii. Whether the applicant is entitled to payment of the market value of 1 acre of land from Title No Nyandarua/Olkalou Central/43XX which the respondent allegedly sold without the consent of the applicant who was entitled to the same.
- iv. What orders are available as relates the completion of administration of the estate of the deceased herein
32. The parties submitted on the estate of deceased who died testate leaving the respondent as his trustee and executor as per his will dated April 30, 2000. As per the Will the deceased left behind LR Plot No 1XX Ol Kalou Central, plot 1XX herein which was 55 acres in total. In Clause 4, 5 and 6 he stipulated how 30 acres of plot 1XX would be bequeathed to his wife, sons and daughters.
33. In clause 7 of the will and which is the relevant section of this application, the will provides as follows: -
- “7. I authorize my trustee and executor to sell 25 acres out of plot no 1XX Ol Kalou Central and further to liquidate the proceeds therefrom as follows: -
34. The sale proceeds of 6 acres to be paid to Esther Mwiyeria to compensate her for her role in respect of her money spent by her for my upkeep during my sickness.
35. The proceeds out of 19 acres will be for my upkeep together with my wife and other uses as more specifically provided herein above while any balance will go to my wife in case she survives me.”
36. From the certificate of death produced in court, the deceased died sometime in October 12, 2000 leaving behind his wife and children. From the record, the executor fulfilled her mandate as dictated in clause 4, 5 and 6 of the will and the same is uncontested and what remained is the 25 acres contemplated in clause 7. This is what the applicant alleges was mismanaged and/or wasted by the respondent depriving the applicant her rightful proceed.
37. To understand what transpired to the 25 acres aforementioned, I carefully perused the record and from the respondent’s replying affidavit dated February 24, 2011 she stated that she processed the title deed for the 25 acres of plot 1XX but it became impossible to sell it as one unit and she therefore subdivided it into 5 parcels each i.e. 38XX, 38XX, 38XX, 38XX and 38XX.
38. That she got a buyer for 2 acres and subdivided 38XX into 43XX holding 3 acres and 43XX holding 2 acres and sold 43XX to Peter Kamau Kahugu. She then sold 38XX which is 5 acres to Moses Nderitu making the total amount of acres sold 7 out of 25. She deponed that she had experienced difficulties in selling the remaining 18 acres because one of the beneficiaries, Peter Ndiangui had cautioned all the parcels that were to be sold and had been showing open and physical hostility to potential buyers and that another beneficiary Charles Wangai was wrongly occupying parcel no. 38XX.
39. The respondent continued to state that since her entitlement was the proceeds of the sale from 6 acres and in view of the difficulties in selling she decided to retain 38XX and it is against this parcel which she took out a loan.
40. In addition, she stated that the estates liabilities so far amounted to kshs 3,601,704 yet she was only able to recover kshs 1,175,000/-. In addition, that she directly gave the applicant kshs 245,000/- towards her upkeep and medication and that the applicant also collected Kshs 270,000 from Messrs Kimatta & Company Advocates being part of proceeds for sale of parcels but did not provide any receipts for the same.



41. From the document entitled “annual report and financial statements year ending 1<sup>st</sup> September to January 2016” the respondent on page gave a breakdown of the estate’s income and expenditure. The applicant and PW2 cast doubt on items such as transport and subsistence allowance, medical expenses and upkeep, Peris Nyokabi Wangai. From the material before me and the oral submissions, I am inclined to side with the applicant on this front, apart from the hefty transport and subsistence bill, the executor also paid herself an out of office allowance. It seems to me that most of the expenditures on the estate were in relation to her personal expense tabulated as estate expenses. I am perturbed that she spent more on transport and subsistence and out of office allowance than she was making from the land sales. Moreover, the applicant and PW2 cast further doubt as to the medical and upkeep expenses the executor incurred in respect to the deceased and later Peris Wangai, also deceased.
42. Although the executor derives her powers from the will, she also had a duty to act cautiously and prudently in realizing the wishes of the deceased as expressed in the Will.
43. Section 79 of the [Law of Succession Act](#) states that;
- “The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative”.
44. In addition, section 83 of the [Act](#) imposes a positive duty on personal representatives to specifically render accounts at two stages. The first instance is in the first six months of the administration. It is at this stage that they ought to account as to whether they spent any funds from the estate for the purpose of disposing the remains of the deceased and, if so, how much. State whether they got in or gathered or collected or brought together all the assets that make up the estate. The getting in of the estate is critical, it should precede settlement of debts and liabilities and distribution of the assets. The second instance for rendering accounts is at the completion of administration. The duty is stated in section 83(g) of the [Act](#). The object of the second and final account is to give opportunity to the personal representative to demonstrate that they have complied with the duty in section 83(f) of the [Act](#) of distribution of the estate to the beneficiaries.
45. Whereas it has now been about twenty years since the grant of Probate was issued to the executor/ respondent, the concerns raised by the applicant regarding the alleged wastage or misappropriation of the 25 acres of plot 1XX by the executor appear to be the main bone of contention and the source of acrimony between the applicant and the executor. The original applicant, Peris Wangai approached the court back in 2011 and it seems the administration of the estate took a standstill. It is my opinion that the same can only be resolved once and for all if the applicant on behalf of the estate of Peris Nyokabi Wangai and the executor were to agree on how to deal with the remaining 18 acres or in default of such agreement have the issue resolved by the court as expeditiously and as is practically possible.
46. The applicant sought that the respondent be ordered to pay the applicant the market value of 1 acre of land from Title No. Nyandarua/Olkalou central/43XX which she sold without the consent of the applicant who was entitled to the same. The same emanates from the fact that proceeds of sale from 6 acres out of the 25 acres were to go to the executor according to the will yet the executor had sold 7 acres. Nevertheless, the executor asserted that she had used those proceeds to settle the estate’s liabilities intimating that this did not form part of the 6 acres owe to her. I also would like to point out that she did not lead any evidence to demonstrate the medical expenses incurred and the proceeds of sale sent to Peris Nyokabi.



47. Moreover, the applicant sought to have the remaining parcels of Plot 1XX transferred to him, I shall steer clear of making a determination on the same at this stage until fresh accounts are rendered by the executor as it should be from that account that the court would be in a position to know the extent of the estate after the executor has placed before the court a list of the assets and liabilities that they have ascertained, a list of the assets of the estate that they have gathered or collected or got in, an account of the current position an ownership of plot no 38XX, 38XX, 38XX, 38XX and 38XX subdivided from plot 1XX Ol Kalou Central and an account of the monies that they have expended from the estate on the deceased's and Peris Wangai's medical expenses and/or burials, estate administration and settlement of debts and liabilities and the current liabilities if any that the estate owes.
48. Consequently, and bearing in mind the complaints made by the applicant regarding mismanagement of the Estate, it is my opinion that the interests of justice requires that this court supervises the management of the estate with the aim of ensuring that the same is efficiently managed for the benefit of all the beneficiaries. In the interests of justice, under the inherent powers of the court as saved by rule 73 of the probate and Administration Rules.
- i. The respondent shall within twenty-one (45) days file fresh audited accounts of the income in the estate from the time she took over as executor to date of this ruling with this court's Deputy Registrar. She will file fresh statements giving a true and just account of the assets and liabilities that they have been ascertained, a list of the assets of the estate that they have gathered or collected or got in, an account of the current position and ownership of Title Nos Nyandarua/Ol Kalou Central/ No 38XX, 38XX, 38XX, 38XX and 38XX subdivided from Plot 1XX/ Nyandarua/Ol Kalou Central and an account of the monies that have been expended from the estate on the deceased's and Peris Wangai's medical expenses and/or burials, estate administration and settlement of debts and liabilities and the current liabilities if any that the estate owes. The same shall run from the date the respondent took over as an executor to the date of reading this ruling.
  - ii. All parties shall be served with the same within 14 days of filing.
  - iii. The matter shall be mentioned in thirty (60) days to confirm compliance and for further orders.
  - iv. On costs, I find that since this is a succession dispute involving members of one family, each party shall bear his or her own costs.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**

.....  
**CHARLES KARIUKI**

**JUDGE**

