



**In re Estate of Lenrick Augustus Guy (Deceased) (Succession Cause E019 of 2020) [2023] KEHC 1846 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1846 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE E019 OF 2020  
G MUTAI, J  
MARCH 3, 2023**

**BETWEEN**

**JUDY NAOMI THOM ..... OBJECTOR**

**AND**

**PAMELA ELIZABETH GUY ..... PETITIONER**

**RULING**

**Introduction**

1. Lenrick Augustus Guy (hereafter “the Deceased”) was a British national. He died on the 1<sup>st</sup> day of October, 2020, at Kings College Hospital, London, the United Kingdom. At the time of his death he was married to Pamela Elizabeth Gordon also known as Pamela Elizabeth Guy (hereafter “Pamela” or “the Petitioner”). It is a common ground that the deceased had a daughter called Tracy-Anne Melleisia (hereafter “Tracy-Anne”).
2. On 1<sup>st</sup> November, 2020 this court (Per Onyiego, J) directed Pamela to file a Petition for Grant of Letters of Administration intestate within 10 days of the said date. The order was made after the Objector herein, Judy Naomi Thom (hereafter “Judy Thom”), filed citation proceedings vide which she stated that she cohabited with the deceased at Diani in Kwale County prior to his death and that they had 2 children, “ZAG”, a son born on 1<sup>st</sup> January, 2020 and “KDG”, a son born on 15<sup>th</sup> April, 2012.
3. The Petition for Letter of Administration Intestate was filed on 25<sup>th</sup> November 2020. In the said Petition Pamela named Tracy-Anne and herself as the only dependents of the Deceased and listed the following as his only known assets: -
  - i. Shares Guy McMillan Associates Ltd;
  - ii. Bank account No. 0120121600xxxx, held at the National Bank of Kenya Ltd, and
  - iii. Motor vehicle registration number KBU XXXX.



She gave the estimated value of the Deceased estate as being Kes.1,500,000.00 She also indicated that the deceased had no known liabilities.

4. The Petition was filed despite the fact that the consent of a person with equal or less priority, that is to say Tracy-Anne Mellesia Guy White had not been obtained due to the short period of time allowed by the Court for the Petition to be filed.
5. Judy Thom filed Notice of Objection to Making of Grant dated 16<sup>th</sup> December, 2020 together with and affidavit in support thereof on 13<sup>th</sup> January, 2021. In the said affidavit she acknowledged Pamela as the wife of the Deceased. She produced the birth certificates of her 2 sons (wherein the Deceased has been named as the father of the said children) and Form CR12 of a company known as Nikky Tembo Investments Ltd (C.117268), a limited liability company said to own the following properties: -
  - i. Plot No.1511 Diani, said to contain a Villa and 2 cottages;
  - ii. Plot No 456 Diani, said to be a 5-acre piece of land;
  - iii. Plot Nos. 3992, 3993, 3996, 3997, 3998, 4000, 4001, 4004, 4005 and 4008; and
  - iv. Plot Nos 3999 and 4012.
6. She deposed that despite the fact that the deceased was a majority shareholder in Nikky Tembo Investment Limited, his shareholding hadn't been listed as his asset in the Affidavit in Support of the Petition for Letters of Administration Intestate filed by Pamela.
7. It appears that the objection to the making of a grant to Pamela was never served on her advocates. Vide Summons dated the 3<sup>rd</sup> day of May, 2021 she sought to have the Deputy Register of this court compelled to gazette the Petition she filed on 25<sup>th</sup> November, 2020 and also for the court to appoint her as an Interim Administrator pending the hearing and determination of the said application. Her contention was that the estate of the Deceased was wasting away and administrator was therefore needed to protect the interests of his estate.
8. Judy Thom filed a Notice of Motion application dated 11<sup>th</sup> day of June, 2021 vide which she sought injunctive orders preventing Pamela, her agents, servants or assigns "by way of temporally injunction from taking possession of, selling transferring, auctioning off, or dealing in any other manner..." with the properties she listed as belonging to the estate pending the hearing and determination of the said application (Prayer No. 2), and pending the hearing and determination of the succession cause. In support of the application Judy Thom averred that Pamela, by herself or by her agents had disposed of the properties owned by a company called Nikky Tembo Investment Ltd, which company was partly owned by the Deceased. She produced what she said were DNA result for her 2 children, birth certificates, letter from the chief, Diani Location, Form CR12 dated 26<sup>th</sup> October, 2020 in respect of Nikky Tembo Investment Ltd and the certificate of titles of various properties she deposed were owned by the said company.
9. Interim injunction was granted by this honorable court on 14<sup>th</sup> June, 2021 pending the hearing and determination of the said application.
10. The Petitioner/Respondent opposed the said application. Pamela averred that she did not know Judy Thom nor her children. She impugned the DNA report purporting to show Judy Thom's children as having been sired by the Deceased on the grounds that there was a lack of proven chain of custody of the tested samples. To her knowledge, she stated, she had been in a monogamous relationship with the Deceased. She further averred that her husband would have told her of the existence of another family in Kenya once he became aware of the terminal nature of his ailments, something he never did.



11. Although Pamela conceded that Nikky Tembo Investment Ltd was jointly owned by her and the deceased she stated that the said companies properties had been purchased with her money and that the deceased had been her dependant and charge at the time on his death. In paragraph 15 of her affidavit she stated that “the ability of my late husband to remain in Kenya would not have been possible without my income and significant level of support”. In support of that contention she produced her bank statements. She accused Judy Thom of acting with malice and sought the help of this honorable court to “protect the Estate of the Deceased from interference by strangers who seek to reap from benefits of an Estate who which they did not own or contribute to”. She therefore sought the dismissal of the said application.
12. Pamela also filed a Replying Affidavit sworn on 26<sup>th</sup> November, 2021, vide which she opposed the Notice of Objection to Making of Grant in respect of the Deceased’s Estate dated 10<sup>th</sup> December, 2020. This affidavit raised the same issues as the affidavit she swore on 28<sup>th</sup> October, 2021. She attached to the latter affidavit her marriage certificate as well as a letter dated 4<sup>th</sup> November, 2021 written by Suleiman Yusuf, Assistant Chief Gombato Sub- Location, Diani Location which indicates that Lennrick Augustus Guy and herself “were once a couple (husband and wife ) prior to the demise of Lenrick Augustus Guy”. She also urged the court to dismiss the objection as it wasn’t compliant with rule 15(5) of the *Probate and Administration Rules*, 1980 as the Objector hadn’t filed an Answer to the Petition or a Cross Application for a Grant to the estate of the Deceased.
13. When The matter came up for mention on 1<sup>st</sup> November, 2021 the court, pursuant to the consent of the parties’ advocates, directed that the Objection herein be canvassed by way of viva voce evidence. Hearing was slated for 8<sup>th</sup> December, 2021 in open court. The matter didn’t proceed and was adjourned to 1<sup>st</sup> February, 2022 when Judy Thom and Pamela testified.
14. Judy Thom restated what she had mentioned in her affidavits. She produced documents in support of her objection. She admitted that Pamela was the legal wife to the Deceased. She contended that she filed the objection to protect her children and sought a 50% share for them in the Deceased’s estate. She denied that she was seeking anything for herself.
15. Pamela relied on her statement. The substance of her statement has been alluded to above. She admitted that Leslene Kwame, whose samples were used in preparation of Judy Thom’s DNA report, was her husband’s sister. She testified that she had been prevented from accessing the join account she had with the Deceased by Judy Thom and she was only able to do so after a great struggle. She denied knowledge of the alleged children of the deceased.
16. At the end of the hearing advocates for the parties Mr Waziri Omollo, for the Objector and Ms. Mugure, for the Petitioner, entered into a consent vide which fresh DNA test was ordered with samples taken from Tracy-Anne Mellesia Guy and ZAG and KDG. The previous DNA results were thus discarded.
17. The court directed that the extraction of samples be done within 30 days of the said date and that samples be submitted to KEMRI for analyses to determine the paternity and relationship between the Deceased and ZAG and KDG.
18. There is in the court file 3 DNA results from KEMRI. They all show that samples were taken on 22<sup>nd</sup> March, 2022 with the test being completed on 25<sup>th</sup> March, 2022.
19. When the matter came up for mention on 9<sup>th</sup> May, 2022 Ms Mugure, for Pamela, sought to have the author of the DNA report summoned court for purposes of cross examination. The court allowed the said application. Ms Eva Aluvaala was cross examined on the report on 18<sup>th</sup> July, 2022. She testified



that she had received and analyzed the report made by the staff of her employer, KEMRI. It is her testimony that the samples were extracted from two of the siblings and that those of Tracey Anne had been collected in a laboratory in the United Kingdom (hereafter “UK”) identified by them. She testified that they had done a request to a lab in the UK to extract samples. The samples had then been couriered to Kenya in a package with tamper proof tape. She further testified that it is normal for them to receive samples from laboratories abroad and to carry out tests. It was conclusion of her report that ZAG and KDG were Tracy-Anne’s siblings.

20. The matter was mentioned before me on 14<sup>th</sup> February, 2023. As Pamela’s counsel’s had filed their written submissions, and in view of the fact that the Objector opted not to submit, but to rely wholly on DNA results I reserved the ruling for 24<sup>th</sup> February 2023. I wasn’t able to do so on he said date and adjourned my ruling to today.

### **Submissions by parties.**

21. As earlier indicated Judy Thom’s counsels opted not to file written submissions. They placed total reliance on the DNA reports prepared by KEMRI. The DNA report show that ZAG and KDG, the children of the Objector are siblings of Tracy-Anne Mellesia Guy.
22. The Petitioner submitted that the Objector did not proved her case. She further submitted that the deceased has only 2 dependants, Tracy Anne Mellesia White and herself. Regarding the DNA tests that were carried out Pamela submitted that Tracy Anne never came to Kenya for her samples to be collected nor were relevant documents proving chain of custody of the samples said to have been collected from her produced. It was thus urged that the DNA reports that were produced lacked probative value and should not be relied upon.
23. In particular, the Petitioner questioned how Tracy-Anne had been identified and the chain of custody of her DNA samples. It was submitted that in the absence of other evidence the minors are strangers to the estate of the Deceased and are therefore not beneficiaries of the same.
24. Regarding properties alleged to be owned by Estate of the Deceased it was submitted that the Judy Thom hadn’t proved that the deceased owned shares in Nikky Tembo Investment Ltd. I was also submitted that shares in limited liability do not fall under the armpit of the Family Court. Pamela thus prayed that I dismiss the objection.

### **Issues for determination**

25. I am in agreement with the Petitioner’s counsels that there are 2 issues for determination herein to wit: -
  - (a) who are the beneficiaries of the Deceased? and
  - (b) What assets form part of the estate of the deceased?

### **Who are the beneficiaries of the deceased?\***

26. Judy Thom and Pamela agree that Pamela and Tracy -Anne Mellesia are the dependands of the Deceased for the purpose of these succession proceedings. Their point of departure is in regard to ZAG and KDG; Pamella denies that these two are the children of Lenrick Augustus Guy.
27. Although the DNA test shows that ZAG and KDG are the siblings of Tracey-Ann Mellesia the said results have been questioned for want of chain of custody and also for there being no evidence that it was actually obtained from Tracey-Anne.



28. I have considered evidence of Ms Eva Aluvaala of KEMRI AID Lab in light of the order that this court issued on 1<sup>st</sup> February, 2022. The report she presented shows that she compared the samples taken from ZAG with those of Tracey-Anne and found the probability of siblingship being 98.7. That of KDG and Tracy Anne had probability of siblingship being 98.4. KDG and ZAG were found to have probability of siblingship of 99.96%.
29. Ms Aluvaala explained that they used photographs and birth certificates to identify the minors. She testified that Tracey-Anne was identified by the documents she provided. Her samples, she stated, were extracted in a laboratory in the United Kingdom and couriered to Kenya in a tamper proof tape.
30. I am convinced that the method of collection and dispatch of the samples from the United Kingdom to Kenya was secure. I am also convinced that Tracy-Anne was properly identified. The test was done by a reputable independent body and by professionals who did not know the parties herein, prior to these proceedings. I have no reason to doubt the DNA results produced in this court.
31. Judy Thom produced birth certificates of the minors. These birth certificates bear the name of the Deceased as the parent of ZAG and KDG. *In the Re Estate of JMK (Deceased)* [2021]eKLR, L.A Achode, J (as she then was) said in paragraph 21 as follows: -
- “the Petitioners have not challenged the birth certificate adduced by the applicant which names the deceased as the father of the two minors. Further there is no indication that the provision of Section 12 of the Birth and Deaths Registration Act requiring the consent of the father or proof of marriage between the mother and the father before the father’s entry into the Certificate of birth wasn’t complied with in the registration of the minor”.
- The court, in that case, found that that the registration of a person as a father in a birth certificate was persuasive evidence of paternity.
32. It is my opinion that the DNA test results, together with the unchallenged birth certificates, show that the minors are the children of the deceased.
33. As the children of the deceased KDG and ZAG are dependents within the meaning of that word in Section 29 of the *Law of Succession Act*. As such dependants KDG and ZAG should be listed in the Petition for Letters of Administration Intestate as such. This was not done in this case.

#### **What are the assets of the estate of the deceased?**

34. Pamela averred in her witness statement that she incorporated Nikky Tembo Investment Ltd with the deceased with both of them as shareholders. I note that the Form CR 12 produced by the Objector does not show that the Deceased was a shareholder. Curiously it indicates twice that Pamela Elizabeth Guy had 250 shares (for a total of 500 shares). There appears to be errors in the records kept by the Business Registration Services/ Companies Registry. I am inclined to hold that the Deceased had shares in the said company. I therefore find, in view of the averments that the Pamela made, that the Deceased had shares in Nikky Tembo Investment Ltd.
35. Are shares in a limited liability company asset that can be distributed in a succession cause? In the case of *Re Estate of Gitete Kahura & Another (Both deceased)* [2018] eKLR the court stated thus: -

“The relationship between the deceased persons and the company was that they were shareholders in the company by virtue of the two shares they held. The fact of being shareholders did not constitute them owners of the property of the company. That remained property of the company for their sole interest in the company was with the shares. It



is the said shares that were available for distribution herein amongst the survivors of the deceased....The jurisdiction of the Probate Court lies in the distribution of the shares, but not in the liquidation of the company or the distribution of its assets.”

36. *In the estate of Charles Karuga Koinange* (2017) eKLR the High Court stated that “shares held in a limited liability company by the deceased persons are assets which the deceased’s family has power to distribute in the succession cause relating to the deceased’s estate”.
37. It is noteworthy that in the Petition for Letters of Administration Intestate Pamela lists as the assets of the Deceased shares he had in Guy McMillan Associates Ltd. I cannot therefore agree with the contention in the written submission that “issues relating to a registered company are not realm of succession and those issues are governed by the Articles of Association of Nikky Tembo Investment Ltd”. With respect the Petitioner may not approbate and reprobate this point in her submissions as she appears to be doing.
38. From the foregoing it is clear that the shares the Deceased had in Nikky Tembo Investment Ltd are the assets of the deceased which should be listed in the Petition for Grant of Letters of Administration of the Estate of Lenrick Augustus Guy.
39. Pamela deposed that she invested immensely in Nikky Tembo investment Ltd and paid for his upkeep when he was in Kenya. In support of her contention she produced bank statements. I take notice of the fact that couples often send each other money and that it may not be possible to establish at this point what each amount the Deceased received from Pamella was for. The concern of this court, at this point, is in respect of the estate of the Deceased and its administration. The Contestation as to who contributed what, for what purpose and the respective entitlement of the Deceased and Pamella is a matter that would be best canvassed before the commercial court in a suit that Pamella may file against the estate of the Deceased for true accounting of her contributions.
40. Judy Thom’s and Pamela’s counsels argued the objection despite the fact that Rule 15 of the Probate and Administration Rules hadn’t been fully complied. I do not agree with Pamela’s counsel that the fact that Judy Thom did not file an Answer to Petition and Cross Petition for grant of representation is fatal. To hold that it is fatal would be to pay undue regard to procedural technicalities contrary to Article 159 of *the Constitution* of Kenya, 2010. I do not see any prejudice that the Petitioner suffered as a result of want of full compliance with the Probate and Administrations Rules.
41. Having found that the deceased was the parent of ZAG and KDG, both of whom are minors, it then becomes necessary to appoint 2 administrators in view of the resultant trust that is created.

## **Disposition**

42. The upshot of this is that the Objection has merit and is hereby allowed.
43. I order that the Petition for Letters of Administration Intestate filed by the Petitioner on 25<sup>th</sup> November, 2021 be amended to include:
  - i. ZAG and KDG as dependants of the Deceased;
  - ii. Shares held by the Deceased in Nikky Tembo Investment Ltd (once the number thereof is ascertained);
44. I further order that Judy Naomi Thom be added as a Co-Petitioner, in the Petition for Letters of Administration Intestate, strictly so that she can safeguard the interests of ZAG and KDG.
45. As this is a family cause parties shall bear their own costs.



Orders accordingly.

**DATED, DELIVERED AND SIGNED AT MOMBASA THIS 3<sup>RD</sup> DAY OF MARCH, 2023**

.....

**GREGORY MUTAI**

**JUDGE**

In the Presence of:-

Mr. Mureithi for the Petitioner (present virtually)

No appearance for the Objector

Judy Naomi Thom (present virtually)

