



**Eastend Horticultural Producers Limited v Wathuku & 2 others; Gichuki (Objector)
(Succession Cause 60 of 1997) [2023] KEHC 3549 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 60 OF 1997
FN MUCHEMI, J
APRIL 20, 2023**

BETWEEN

EASTEND HORTICULTURAL PRODUCERS LIMITED APPLICANT

AND

CHARLES WANJOHI WATHUKU 1ST RESPONDENT

SIMON NGURE GITHINJI 2ND RESPONDENT

CHARLES MWANGI GITUNDU 3RD RESPONDENT

AND

JAMES MWANGI GICHUKI OBJECTOR

RULING

1. The application dated 28th September 2022 is brought under Sections 47, 54 and 66(c) of the [Law of Succession Act](#) and Rules 59(3), (5) & (6), 63(1) and 73 of the Probate & Administration Rules seeking for orders to nominate and/or appoint the Public Trustee as the administrator of the estate of the deceased herein.
2. The respondents and objector filed Grounds of Opposition dated 16th November 2022 and 30th November 2022 respectively, in opposition to the application.
3. By leave of court granted on 24th January 2023, Charles Wanjohi Wathuku filed a Replying Affidavit dated 6th February 2023 in opposition to the application.

Applicant's Case

4. It is the applicant's case that it is the registered owner of all that property known as Land Reference No. 2280 (I.R. No. 246). The said parcel of land formed part of the estate of the deceased prior to



issuance of grant of letters of administration to Charles Wanjohi Wathuku. The applicant contends that Charles Wanjohi Wathuku was issued with grant of letters of administration on 4th July 1997 and the grant was confirmed on 18th October 2001. It was on the strength of the confirmed grant that the subject property was transferred to the petitioner, who later transferred the land to Goodwood Properties Limited from whom the applicant purchased the land for consideration.

5. The applicant states that vide the judgment of the Court of Appeal in Nyeri Civil Appeal No.s 259 and 337 of 2002, the court set aside the grant of letters of administration to Charles Wanjohi Wathuku and the matter was remitted back to the High Court for determination as to the grant of letters of administration and distribution of the estate. At the moment, there is no administrator in respect of the deceased's estate and neither has any person claiming to be a beneficiary petitioned the court for letters of administration intestate. The applicant states that the only petition for letters of administration before the court is the one of Charles Wanjohi Wathuku.
6. The applicant states that it filed an application dated 21st March 2022 seeking that all the property known as Land Reference No. 2280 (I.R. No. 246) be excluded or expunged from the list of the deceased's assets forming the subject matter of this cause as it is the registered owner having purchased the same for value consideration. The applicant further states that when the application dated 21st March 2022 came up for directions on 4th May 2022, the court directed that the application could only be heard once an administrator is appointed.
7. The applicant therefore prays that the court appoint a public trustee as the administrator of the deceased to enable the hearing and determination of its application. The applicant contends that the other persons alleging to be beneficiaries are the 2nd respondent who claims to be a cousin of the deceased but not of the deceased's clan and the 1st respondent who alleges to be the nephew of the deceased.
8. The applicant states that the parties herein have engaged in numerous court battles since 1997 including but not limited to criminal litigation as to who is the rightful heir and hence all the parties are conflicted to a great extent. It is further clear from the proceedings that this has been a highly contested and controversial matter where beneficiaries and persons who claim to be beneficiaries do not agree and are engaged in constant wrangles which commenced, more than 25 years ago. The applicant therefore prays in the interest of justice of the estate and the parties for this court to intervene and give appropriate orders towards the preservation of the deceased's estate pending the full rehearing and determination of the succession cause.
9. Moreover, the applicant argues that the court has a discretion under Section 66(c) of the [Law of Succession Act](#) to appoint a public trustee in a situation where those entitled to administer the estate make it impossible to effectively administer the estate. Further, the applicant argues that the court ought not to let the current state of affairs continue. The estate ought to be administered and should not be allowed to go for such a long period of time without an administrator. The applicant argues that doing so would mean that any person presently handling the estate property does so illegally and the same amounts to intermeddling of the deceased's estate.
10. The applicant further argues that as it stands the remaining persons alleging to be beneficiaries cannot agree on who the administrator ought to be and thus if they are appointed they would most likely be unable to agree on the administration of the estate. As such, the applicant argues that the public trustee would be suitable to be appointed as the administrator of the estate.



The 2nd & 3rd Respondents' Case

11. The respondents state that the application is an abuse of the court process and an attempt by the applicant to circumvent the court's orders given on 4th May 2022. The respondents further state that the applicant has no locus standi to bring and maintain the instant application. Moreover, the respondents argue that the Public Trustee has not made any application for appointment as administrator of the deceased's estate. The respondents further argue that the Public Trustee cannot be appointed to administer the deceased's estate in view of the pending petition and cross-petition which ought to be determined by the court.

The 4th Respondent's Case

12. The 4th respondent states that the application is hollow, misconceived, fatally incompetent and a nonstarter. He argues that pursuant to Section 66 of the [Law of Succession Act](#), the applicant lacks locus standi to bring and maintain the instant application. Further, the 4th respondent contends that there is a pending petition for letters of administration by Charles Wanjohi Wathuku and therefore the court lacks jurisdiction to grant the orders sought in the instant application. Moreover, the said application is premised on the main ground that no known beneficiary has petitioned for grant of letters intestate, however in light of the pending application for letters of administration by Charles Wanjohi Wathuku, the instant application is baseless.
13. The 4th respondent contends that the applicant, vide its own admission did not purchase the said parcel of land from the deceased and thus the applicant is not a creditor as contemplated by Section 66(d) of the [Law of Succession Act](#).
14. The 4th respondent states that the Public Trustee has not in its own right, applied for appointment as an administrator of the deceased's estate and thus it cannot do so by proxy through the applicant.
15. The applicant filed a Replying Affidavit to the respondents and objector's grounds of opposition dated 16th November 2022 and 30th November 2022 respectively. The applicant reiterates what it deposed in its application and further states that it has the requisite locus standi and legal interest to present the current application and by virtue of Section 47 of the [Law of Succession Act](#), the court has jurisdiction to entertain the application.
16. The applicant argues that since it is the registered owner of land parcel No. 2280(I.R. No. 246), having purchased the same for value consideration, it has a legitimate legal interest in the property of the deceased and can therefore approach the court to appoint the Public Trustee as an administrator of the deceased's estate in order to preserve the estate from wastage. The applicant further argues that pursuant to Section 7 of the [Public Trustee Act](#), the court has the discretion to grant letters of administration to the Public Trustee on its own motion or after having heard the Public Trustee. Thus, the Public Trustee need not apply to court for appointment as an administrator for the court to appoint it as such.
17. The applicant states that pursuant to Article 165(3) of [the Constitution](#), Sections 47 and 66(c) of the [Law of Succession Act](#), the court has the requisite jurisdiction to hear and determine the instant application and the fact that there is a pending petition for letters of administration cannot oust the court's jurisdiction to grant orders sought by the applicant.
18. The applicant urges the court to allow its application as the same is not objected to by the purported beneficiary/petitioner who the objector terms as one being entitled on intestacy. Further, the strife is demonstrated by the objector's affidavit dated 11th November 2022 wherein the objector vehemently



opposes the cross petition dated 20th June 1997 and lays out the reasons why the respondents are not suitable for appointment as administrators of the deceased's estate. As such, the applicant argues that the matter is old and it has been more than a year since the grant dated 4th July 1997 was set aside. It is therefore imperative that the public trustee be appointed as an administrator to preserve the deceased's estate.

The Petitioner's Case

19. The petitioner states that he is a son of the deceased and he was issued with a grant of letters of administration on 4th July 1997. He contends that the instant application is an abuse of the court process as it is not in accordance with the law and procedure of the court. The petitioner states that the application to appoint an administrator as per law is vide a petition for letters of administration and not as the application currently before the court. He further argues that the applicant by not invoking the court's jurisdiction as required by law, is not a mere technicality but is a pure point of law and procedure.
20. The petitioner further argues that Section 66(c) of the [Law of Succession Act](#) prescribes that the court has the final discretion to determine who may administer the estate in order of priority and preference of possible administrators and the Public Trustee is the last resort. Moreover, the petitioner states that the application has not been made by the Public Trustee as required by law and thus the application has not been made in the best interests of all concerned.
21. The petitioner states that the question of whether title to land which form part of the deceased's estate was properly and legally acquired from the estate is a question which would be determined by the Environment and Land Court and not the Probate court and therefore this court lacks jurisdiction to entertain the application.
22. The applicant filed a Further Affidavit dated 2nd March 2023 in response to the Replying Affidavit of the petitioner. The applicant states that the Court of Appeal in Nyeri Civil Appeal No.s 259 and 337 of 2002 set aside the grant issued to the petitioner and therefore all the proceedings leading to the confirmation of grant were set aside and this court ought to consider afresh all the petitions and applications, including the instant one, and make a determination as to the person suitable to administer the estate. Furthermore, the purported petitioner, Charles Wanjohi before making an application to be appointed administrator, has to prove that he is the son of the deceased.
23. The applicant states that pursuant to Section 7 of the [Public Trustee Act](#) and Sections 47 and 54 of the [Law of Succession Act](#) together with Rules 73 of the Probate & Administration Rules, the application is rightly before this court. The applicant further states that the purported petitioner's interpretation of the law is misconstrued. Section 54 of the Act grant the court power to limit any grant which it has jurisdiction to make whilst the fifth schedule provides for forms of limited grant. Thus, the court in issuing any grant of representation which it has jurisdiction to make, may in its own discretion limit the same. The applicant further reiterates that it is not applying for letters of administration of the deceased's estate but for the nomination of the Public Trustee as an administrator of the deceased's estate which application is proper by virtue of Section 47 of the Act and Rule 73 of the Probate & Administration Rules.
24. The applicant contends that Section 66 of the [Law of Succession Act](#) provides that the court has the final discretion as to the person to whom letters of administration shall be granted and the order of preference given is a general guide that does not limit the court's discretion. From the judgment of the Court of Appeal and the court record, the applicant argues that the litigious nature of the litigants and the constant wrangles going amongst them for the past 26 years is evident. In the circumstances, the



Public Trustee would be the only neutral party best suited to preserve the deceased's estate whilst the issue of beneficiaries is determined by the court.

25. The applicant contends that Rule 41(3) of the Probate and Administration Rules applies where there is an issue of ownership of property which forms the deceased's estate and where such an issue arises the succession court is obligated to set aside such property to abide determination of ownership. The applicant further contends that L.R. No. 2280(I.R. No. 246) Nyaribo Farm, belongs to it and is not available for distribution as it was sold about 20 years ago by the purported petitioner himself. The applicant argues that it is grossly improper and contrary to the ends of justice for the petitioner to sell off the property, enjoy the proceeds of the sale and then purport to challenge the sale which point to the unsuitability of the petitioner to administer the estate. In any event, the applicant argues that the proceeds of the sale of the said parcel of land ought to form part of the deceased's estate.
26. The applicant further submits that there is no dispute of ownership as no parties in these proceedings have challenged its ownership of L.R. No. 2280(I.R. No. 246) and further, the question of ownership is not an issue for determination at the current stage and neither is it a prayer sought by the applicant in its application. The applicant contends that the primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries and the estate must be identified and any issues regarding ownership be resolved before such property is distributed.
27. The applicant states that the purported petitioner has not shown that the orders sought to appoint the Public Trustee as the administrator of the deceased's estate shall be prejudicial to the estate or him. The applicant thus urges the court to strike out the purported petitioner's replying affidavit as it does not disclose any justifiable grounds to warrant the court to reject its application.
28. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

29. The applicant relies on the cases of *Khelef Khalifa El-Busaiddi vs Commissioner of Lands & 2 Others* [2002] eKLR and *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another* [2016] eKLR and submits that it has preferred the instant application as the registered owner of all that property known as Land Reference No. 2280 (I.R. No. 246). The said property formed part of the schedule of assets of the deceased's estate prior to the issuance of grant of letters of administration to Charles Wanjohi Wathuku and the applicant has applied to the court to have the said property expunged from the deceased's list of assets. The applicant submits that it has annexed a provisional Certificate of Title No. I.R. No. 246 as proof of ownership of the suit property. The applicant further contends that neither the respondents, the objector, interested parties or the petitioner have contested the authenticity of the said provincial certificate of title. As such, the applicant argues that it has the requisite locus standi, identifiable stake and legal interest to bring the instant application.
30. The applicant submits that the court is clothed with the jurisdiction to entertain the current application. To support its contentions, the applicant relies on Article 165(3) of *the Constitution*, Section 47 of the *Law of Succession Act*, Rule 73 of the Probate & Administration Rules and Section 7 of the *Public Trustee Act*. The applicant further relies on the cases of *Phoenix E.A. Assurance Company Limited v M. Thiga t/a Newspaper Service* [2019] eKLR and *In Re Estate of Cornelio Ndigwa Zakayo alias Cornelius Ndigwa Zakayo (Deceased)* [2021] eKLR to support its contentions.
31. The applicant submits that the court has discretion under Section 66(c) of the *Law of Succession Act* to appoint the Public Trustee in a situation where those entitled to administer the estate make it impossible to effectively administer the estate. The applicant refers to the cases of *Re Estate of*



Dorcas Omena Binayo (Deceased) [2021] eKLR; Re Estate of Peter Eliud Njeru Njagi (Deceased) [2017] eKLR and Re Estate of Nemwel Nyasagare Nyanaro (Deceased) [2013] eKLR to support its contentions. The applicant further argues that as it stands, the parties involved in the succession cause have been unable to agree on who the administrator should be. Each wants to be an administrator while castigating the other. As such, even if they are appointed administrators, the applicant argues that they would most likely be unable to agree on the administration. Thus, the Public Trustee being neutral is the person who is suitable to be appointed as administrator. The applicant states that the court must ensure that the best interest of the estate is taken care of.

The 2nd & 3rd Respondents' Submissions

32. The respondents cite the case of *In Re Estate of Elizabeth Wanjiru Maina (Deceased)* [2020] eKLR and submit that the application is incompetent as the Public Trustee is not a party to the application. He/she has neither been enjoined in the application as a party nor was he/she served with the application thus not giving him/her a chance to be heard.
33. The respondents submit that this court has no jurisdiction to entertain the application as the applicant's claim relates to the ownership of the land known as Land Reference No. 2280 which the applicant alleges to have purchased for valuable consideration. The respondents further submit that there is no doubt that the parcel of land is presently registered in the name of the applicant however, the respondents argue that the applicant ought to ventilate its case in the Environment and Land Court. To support their contentions, the respondents rely on the case of *In Re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR.
34. The respondents further submit that the applicant lacks locus standi to bring the instant application as it has not been enjoined in the proceedings as an interested party or otherwise and further, the applicant did not purchase the property in question from an administrator of the deceased's estate or the deceased himself or a beneficiary/dependent. The applicant alleges to have purchased the property from a third party, Goodwood Properties Limited, which the respondents contend is not before the court.
35. The respondents submit that the court gave orders on 4th May 2022, with regard to the applicant's application dated 21st March 2022 to the effect that the application was stayed pending the appointment of an administrator in this cause. The respondents therefore submit that the applicant is deliberately delaying the determination of who should be appointed as administrator of the estate by returning to the court with the instant application.
36. The respondents contend that the applicant has not provided any evidence before the court to show that the parties already before the court are not doing enough to prosecute this cause and obtain a grant. Further, the applicant has not demonstrated why the Public Trustee and not the parties already before the court should be appointed as administrator of the deceased's estate considering that the Public Trustee is usually appointed as an administrator of last resort.
37. Pursuant to the court's leave on 24th January 2023, the applicant filed further submissions dated 6th March 2023. The applicant submits that the respondents filed grounds of opposition dated 16th November 2022 but submitted on issues which were not on their grounds of opposition. The applicant submits that ownership of L.R. No. 2280(I.R. No. 246) is not the subject of the current application and hence is a deviation from the main issue at hand intended to mislead the court. The applicant cites the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR and submits that parties are bound by their pleadings and thus any submissions made by the respondents that do not form part of their grounds of opposition dated 16th November 2022 ought to be struck out or expunged from the court record.



38. The applicant cites the case of Francis K. Muruatetu & Another vs Republic & 5 Others (2016) eKLR and submits that the purported interested parties neither made a formal application nor did they present identifiable interests for consideration by the court to be joined as interested parties. Thus they lack locus standi as they are not parties to this suit.

The Law

Whether the applicant is entitled to the orders sought.

39. The deceased herein died on 6th September 1996. Charles Wanjohi Wathuku petitioned for letters of grant of administration intestate on 12th March 1997, on grounds that he was a son of the deceased. The respondents herein objected to the petition and filed an answer to the petition and a cross application to the grant. On 4th July 1997, the court issued a grant of letters of administration intestate to Charles Wanjohi Wathuku without hearing the respondents' objection.
40. The respondents herein alleged that the grant was obtained irregularly and as a result the Director of Criminal Investigations (DCI) was prompted to carry out investigations which led to criminal charges against Charles Wanjohi Wathuku in Criminal Case No. 310 of 1999. He was charged with making false documents relating to the estate and was subsequently tried, convicted and sentenced to ten (10) years imprisonment. He appealed against the decision of the trial court in Criminal Appeal No. 97 of 2000 and the appeal was allowed and both the conviction and sentence were set aside.
41. Thereafter several criminal suits and civil proceedings were initiated in respect to the estate. The petitioner was charged three times in Criminal Case No. 2156 of 1996 for stealing two trucks belonging to the estate, a grinder and coffee all valued at over Kshs. 1 million, Criminal Case No. 2806 of 1996 he was charged with stealing from the estate and in Criminal Case No. 1586 of 1997 he was charged with stealing a tractor from the estate. On all three occasions he was acquitted.
42. The respondents thereafter filed an application to revoke the grant issued to the petitioner and the court issued a ruling on 18th October 2001 finding that the petitioner was a son of the deceased and declared him the sole heir to the estate of the deceased. Additionally, the court confirmed the grant of letters of administration issued in favour of the petitioner issued on 4th July 1997.
43. Meanwhile, the respondents moved the court on 7th April 2000, seeking orders that they be given a limited grant to manage the estate as it was going to waste because of the petitioner. The court issued a limited grant ad colligenda bona on the condition that the respondents deposit the money belonging to the estate and not needed for the immediate use to preserve the estate, in a fixed deposit account to earn interest for the estate.
44. The petitioner contested the same and alleged that the respondents were misusing the estate funds and made an application for the respondents to account for the monies. The court made its findings on 16th August 2002, and held that the respondents should return to the estate the sum of Kshs. 4,526,740/-. Being aggrieved with the decision of the court, the respondents each filed a separate appeal in the Court of Appeal being Civil Appeal Nos 259 and 337 of 2002. The two appeals were consolidated and the court rendered its ruling on 27th October 2021. The Court of Appeal set aside the grant issued to Charles Wanjohi Wathuku on 4th July 1997 and all the subsequent proceedings leading to the confirmation of the grant and the matter was remitted back to the High Court for hearing and determination as to the grant of letters of administration as well as confirmation.
45. The history of this succession dispute evidently shows that this is a matter that is very controversial and highly litigious. Furthermore, the parties are engaged in various wrangles and are highly suspicious



of each other. Parties have been involved in both civil and criminal suits which have consumed a lot of judicial time especially in way of numerous applications. Particularly, the 1st respondent filed an application for substitution of one of the respondents, one Githinji Ngure, a brother to the deceased, who died in the year 2015. By virtue of an application dated 23rd February 2006, the petitioner made an application citing the respondents for contempt of court and committal to civil jail for six months. The court found on 26th February 2009 that the respondents were in contempt of court and directed that in order to fully purge their contempt, the respondents were expected to pay the estate Kshs. 8,983,356/- being the value of the earth mover and the income it would have otherwise generated over the years. Meanwhile, on 23rd November 2007, there was an application for leave by the respondents seeking to adduce additional evidence relating to a DNA test. However, the Court of Appeal dismissed the application on 10th December 2010 for the reason that the lengthy delay had apparently affected both quality of the test and could be prejudicial to either party.

46. Thereafter, this court gave directions on hearing of the petition, objection, cross-petition and this application that all be heard together. These directions were later vacated and it was directed that this application be heard first.
47. The applicant now seeks to have the court appoint the Public Trustee as the administrator of the estate citing the fact that the matter is high litigious and controversial and the parties cannot seem to agree on who ought to be administrator. The applicant further argues that even though one party is appointed as administrator, it is highly unlikely that he shall administer the estate efficiently because of the wrangles between the parties. The applicant contends that the matter has taken over 25 years and no administrator has been appointed and further the parties have not taken any steps to petition for the letters of administration since the Court of Appeal rendered its ruling on 27th October 2021.
48. It is trite law that the court has unfettered discretion to determine and or appoint an administrator or personal representative of the estate who shall then be its agent in administering and accounting for the estate until completion of the administrative exercise. However, despite the discretion, the court is guided as to the order of preference in making its determination or appointment of personal representatives by virtue of Section 66 of the Law of Succession Act. It provides:-

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- a. Surviving spouse or spouses, with or without association of other beneficiaries;
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c. The Public Trustee; and
- d. Creditors.

Provided that where there is a partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

49. From the record, the deceased is said to have had two wives but no children. The petitioner alleges that he is a son of the deceased. The 2nd respondent has stated that he is a nephew of the deceased. He was substituted in place of his deceased father, one Githinji Ngure who was a brother to the deceased. The 3rd respondent has stated that he is a cousin while the 4th respondent/objector is a nephew to the deceased. The issue is whether it would be procedural to appoint the Public Trustee as the



administrator given the fact that the petition, cross-petition and objection are to be heard. All these parties must have their day in court to ventilate their cases. Furthermore, pursuant to Section 66 of the Act, the Public Trustee has been listed as an administrator in the 3rd category.

50. The applicant made an application dated 21st March 2022 that is yet to be heard seeking to be enjoined as a party in this cause. The court directed that an administrator in this case be appointed at the opportune time so as to have him participate in any application brought in this cause by other parties. As we stand, the said application has not been determined. The issue of locus standi in this cause on part of the applicant is yet to be determined. However, the next move the applicant made was to file this application. This issue was raised in this application by both the objector and the respondents.
51. The applicant argues that the Public Trustee be appointed to administer the estate so as to facilitate the hearing of this cause. However, since the Court of Appeal rendered its judgement on 27/10/2021 revoking the grant, issued to the petitioner. Parties have filed petitions, cross-petitions and objections that are yet to be heard. It took time for opposite parties to prepare and file their responses. Now that the pleadings on the issue of who will be appointed administrator have closed, a hearing date will be given upon determination of this application. The allegation by the applicant that the other parties in this cause have delayed the matter by not setting it for hearing is far from the truth.
52. From the foregoing analysis, it is my considered view that the Public Trustee ought not to be considered for appointment as an administrator of the estate given that there are petitions, cross-petitions and objections that are still pending hearing and determination brought by persons who claim to be relatives of the deceased. The Public Trustee does not stand higher in priority over the said persons whose claims are still pending. The Public Trustee's office has not by itself demonstrated any interest in this matter. If the Public Trustee was interested in this matter, it ought to have filed a cross-petition.
53. It is my finding that the application dated 28/09/2022 lacks merit and is hereby dismissed.
54. Each party will meet its own costs.
55. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 20TH DAY OF APRIL, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 20th day of April, 2023

