



**In re Estate of Robert Kihara Mwaniki (Deceased) (Succession Cause E113 of 2023) [2023] KEHC 18353 (KLR) (Family) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18353 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**FAMILY**  
**SUCCESSION CAUSE E113 OF 2023**  
**PM NYAUNDI, J**  
**MAY 12, 2023**  
**IN THE MATTER OF THE ESTATE OF DR. ROBERT KIHARA MWANIKI (DECEASED)**  
**BETWEEN**  
**ESTHER WANJIKU WANYOIKE ..... 1<sup>ST</sup> PETITIONER**  
**TITUS WACHIRA MWANIKI ..... 2<sup>ND</sup> PETITIONER**  
**AND**  
**ELIZABETH WAMBUI KIHARA ..... BENEFICIARY**  
**RULING**

**Introduction**

1. Vide application dated March 14, 2023 presented under sections 45,47 and 54 of the [Law of Succession Act](#) and rules 59 and 73 of the [Probate and Administration Rules](#), the applicant seeks the following orders: -
  - a. Spent
  - b. That pending the hearing and determination of this application, the applicant be and is hereby granted leave to access the deceased's bank accounts at National Bank of Kenya Account Nos 421xxxxxxx and 010xxxxxxx; as well as FOSA account number 502-xx-xxxx-xx for purposes of drawing Kshs 1,439,000.00 for her school fees as well as upkeep for the months of March-December 2023.
  - c. That pending the hearing and final determination of this application, a temporary injunction be and is hereby issued restraining the petitioners from collecting rent from the deceased properties known as Nairobi/ Block 32/235 ( Golf Course Estate Ngummo) Nairobi Block



157/ 1929 ( Nasra) Apartment 21;LR 209/12108( see far ) ; and Apartment 304 LR 20912108 (see far).

- d. That the applicant be and is hereby granted leave to access deceased's bank accounts at National Bank of Kenya account Nos 421xxxxxxx and 010xxxxxxx; as well as FOSA account number 502-xx-xxxx-xx for purposes for purposes of drawing Kshs 1,439,000.00 for her school fees as well as upkeep for the months of March- December 2023.
  - e. That pending the hearing and final determination of this application, the tenants in Nairobi/ Block 32/235 (Golf Course Estate Ngummo) Nairobi Block 157/ 1929 (Nasra) Apartment 21;LR 209/12108( See Far ) ; and Apartment 304 LR 20912108 (See Far) be and are hereby ordered to deposit rent in a joint account to be opened in the names of the petitioners and the applicant herein.
  - f. That pending the hearing and final determination of the application the 1<sup>st</sup> and 2<sup>nd</sup> petitioners be and are hereby ordered to render accounts of the rent collected from the deceased's rental properties namely Nairobi/ Block 32/235 (Golf Course Estate Ngummo) Nairobi Block 157/ 1929 ( Nasra) Apartment 21;LR 209/12108( See Far ) ; and Apartment 304 LR 20912108 (See Far).
  - g. That pending the issuance of the letters of administration and determination of the rightful beneficiaries herein, the parties hereto be and are hereby ordered to share the rental income deposited in 2 above equally amongst the 2 households of the deceased.
  - h. That costs of the application do abide the cause.
2. The application is supported by the affidavit of the applicant sworn on March 14, 2023 and supplementary affidavit sworn on April 4, 2023. The respondents oppose the application, and the 1<sup>st</sup> petitioner swore an affidavit on March 28, 2023 in response.
  3. The parties agreed to canvass the application by affidavit evidence and written submissions. The applicant filed submissions dated April 8, 2023, The respondents' submissions are dated April 17, 2023
  4. At the hearing of the application counsel for the applicant informed the court that the applicant held a successful fundraiser and the fees was now paid up and therefore not an issue now.

### **Summary Of Applicants Case**

5. The applicant is the eldest child of the deceased. She is a medical student at the University of Nairobi. She seeks access to the deceased's bank accounts so that she is able to meet her educational and other maintenance needs.
6. She relies on the decision on *Lucy Wambeti Dedan v James Njue Cindano* [2015] eKLR, in support of her claim for support.
7. She submits that the acts of the petitioners amount to intermeddling in the estate as they are collecting and utilising rent from the properties of the deceased without the requisite letters of administration.
8. Further the applicant submits that the petitioners are discriminating against her sister and her by not providing for them from the estate while proceeding to provide for the 1<sup>st</sup> petitioner's children.

### **Respondent's Submissions**

9. The respondent identifies 3 issues for determination.



- a. Whether the application dated March 14, 2003 is appropriate
  - b. Whether the applicant has submitted sufficient evidence to warrant the grant of a letter of administration ad colligenda bona or a specific limited grant
  - c. costs
10. The application is presented under section 45, prayers 7,8 and 9 do not relate to intermeddling. The respondent takes issue that the applicant seeks orders to access rental income of the estate of the deceased in the absence of letters of administration.
  11. It is the respondents submission that the applicant can only obtain the orders sought if she had a limited grant. It is conceded that the plaintiff may require fees and other urgent needs, but the proper procedure must be followed.
  12. The respondent contends that apart from the applicant there are 3 other children of the deceased who are minors. The respondent relies on the decision in *Re Estate of Johnson Maweu Kieti (Deceased)* [2021] eKLR.
  13. The respondents submit that for the above reasons the application is incurably defective.
  14. The 1<sup>st</sup> respondent further avers she is supporting the applicant's and her sister's educational needs.
  15. On whether or not the applicant has met the evidentiary threshold, it is submitted that she has been economical with the truths. Basically, the respondent challenges the averment of the applicant as to her status at the University, the year she is in. The respondent relies on the decision in *Re Estate of Daniel A. Korir Kipkurui (deceased)* [ 2021] eKLR. It is further submitted that there is not sufficient evidence to allow the court determine the amount fees owing at the University of Nairobi.
  16. Finally, the petitioner is open to fees being paid out of rental income of the deceased estate and she undertakes to provide an account every 6 months.
  17. In conclusion the respondent prays that the application be dismissed

### **Analysis And Determination**

18. It is not in dispute that the deceased is survived by 4 children namely
  - a. Frank Wanyoike Kihara
  - b. Natasha Wanjiku Kihara
  - c. Elizabeth Wambui Kihara
  - d. Fred Mwai Kihara
19. The applicant and Natasha Wanjiku Kihara are the Children of the objector and Frank Wanyoike Kihara and Fred Mwai Kihara are the children of the 1<sup>st</sup> petitioner.
20. It is also common ground that the estate of the deceased comprises inter alia rental properties namely.
  - i. Nairobi/ Block 32/235 (Golf Course Estate Ngummo)
  - ii. Nairobi Block 157/ 1929 (Nasra)
  - iii. Apartment 21 on LR 209/12108( See Far)
  - iv. Apartment 304 LR 209/12108 (See Far)



21. The bone of contention herein is whether the beneficiaries should have access to the rental income pending the determination of the petition herein. It is common ground that letters of administration have not issued in respect to the estate of the deceased.
22. In the absence of letters of administration any dealings in the estate would amount to intermeddling. The respondent admits that she has received rental income amounting to Kshs 138,600 and has utilised it to purchase cabros and a gate for installation at LR 11287/190 at a total cost of Kshs 504,000.
23. It is not clear on what authority the respondent has undertaken these works. In the absence of letters of administration these actions amount to intermeddling in the estate contrary to section 45 of the *Law of Succession Act*.
24. The applicant avers that she was dependent on her deceased father for maintenance and her other needs. This is not disputed by the respondent as she has even offered to support in the payment of the fees of the applicant and her sister.
25. I agree with the respondent that the application as presented by the applicant is erroneous and cannot yield the orders that she seeks. I am persuaded by the authority cited *Re Estate of Johnson Maweu Kieti (deceased)* [2021] eKLR.
26. I am however persuaded that there is a genuine need to preserve the estate and provide for support of the children of the deceased to enable them continue to access education even as the substantive petition is heard and determined. For this reason and by virtue of the discretionary powers donated to the court by section 47 of the *Law of Succession Act* and rule 73 of the *Probate and Administration Rules* I make the following orders
  - a. A special grant *ad colligenda bona* be and is hereby granted to Elizabeth Wambui Kihara and Esther Wanjiku Wanyoike limited for purposes of collecting rental income and meeting the educational and maintenance needs of the minors pending the determination of the petition.
  - b. That the said expenses be met out of the rental income of the following properties
    - i. Nairobi/ Block 32/235 (Golf Course Estate Ngummo)
    - ii. Nairobi Block 157/ 1929 (Nasra)
    - iii. Apartment 21on LR 209/12108(See Far)
27. That the rental income be shared equally between the 2 houses of the deceased. The respondent to remit half share to the applicant on or before the 12<sup>th</sup> of each successive month effective May 12, 2023.
28. That the respondent to furnish the court an account of rental income collected under (b) from the date of death of the deceased to May 30, 2023, within 45 days from the date hereof.
29. That the matter be mentioned on June 14, 2023 to confirm compliance.
30. The parties to take directions for the hearing of the objection.

It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**P M NYAUNDI**

**JUDGE**

In the presence of:



.....Advocates for the Applicant

.....Advocates for the Respondent

Karani Court Assistant

