In re Estate of Peter Macharia Marianjugu (Deceased) (Succession Cause 49 of 1999) [2023] KEHC 18736 (KLR) (19 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18736 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

SUCCESSION CAUSE 49 OF 1999

HM NYAGA, J

JUNE 19, 2023

IN THE MATTER OF THE ESTATE OF THE LATE PETER MACHARIA MARIANJUGU (DECEASED)

BETWEEN

MAGDALENE NJOKI MACHARIA .... BENEFICIARY

AND

MONICAH WAMUHU MACHARIA .... ADMINISTRATOR

RULING

1. The application coming for consideration in this ruling is the one dated June 15, 2022, brought under rules 49, 59 and 73 of the *Probate and Administration Rules*. The applicant is seeking the following orders:-
    1. That this honourable court be pleased to issue an order for the valuation of all the properties of the deceased herein.
    2. That upon issuance of prayer 1 above, the court be pleased to appoint a valuer to undertake the process in the event that the parties are not agreeable on one.
    3. That the court be pleased to factor in the benefits the respondent, Monicah Wamuhu Macharia has ripped from the estate prior to the judgement, the same be reduced from her share and added to the share of the second house.
    4. That the costs of this application be provided for.
2. The application is premised on the grounds on its face and supported by the affidavit of the applicant Magdalene Njoki Macharia who states that she is the beneficiary of the estate of the deceased herein. She deponed that the judgement in respect to this matter was delivered by this court on December 18,

2020 and the court did order that the assets of the deceased be distributed between the two houses according to the number of units in each house.

3. She averred that the first house comprises of seven units while the second house comprises of four units and that for an equitable distribution of the estate of the deceased, it is necessary that all the properties of the deceased be valued and a valuation report prepared to enable them distribute the estate amongst themselves as ordered by this honourable court.

4. She averred that the respondent Monicah Wamuhu Macharia has always benefitted from the lucrative properties of the deceased to their exclusion and that among the properties the respondent has benefited from is the property that was recently demolished by the Kenya Railways.

5. She deponed that the respondent has never rendered any accounts to this honourable court on how she utilized the money ripped from the said assets of the deceased since the demise of the deceased and as such has ripped great benefits from the said properties which the court needs to take account of when distributing the estate to give all beneficiaries an equal standing from the estate.

6. She further deponed that it would be unfair to allow the respondent to get an equal share yet she has benefited from a vast estate of the deceased for over twenty years without giving a penny to her and her children.

7. She stated that the prayers sought are aimed at ensuring that the estate of the deceased is equitably distributed as per the judgement.

8. The respondent Monicah Wahumu Macharia filed a replying affidavit dated April 22, 2022 in response to the application in which she stated that she is an administrator of the deceased estate together with Lucy Ann Wangui Macharia.

9. She deponed that as per the notice of appointment of advocates dated July 2, 2007, the firm of M/S Mirugi Kariuki & Co Advocates who has filed the instant application is not on record for the applicant but on record only for Lucy Ann Wangui Macharia.

10. She averred that on November 27, 2019 they agreed with her aforesaid co-administrator before the court that the applicant herein would be excluded from the estate because she was not a party to the proceedings and that her children and hers would be all lumped together as the deceased's children and the application for confirmation and the protests would be disposed of by way of written submissions.

11. She stated that if the valuation of the entire estate must be undertaken at the request of a non-party then the costs, fees and disbursement thereof should not be met by the estate but by the party seeking the same and that in any event there is no dispute on the value of the deceased's estate worth calling for valuation because the value was clearly disclosed in the affidavit sworn on January 15, 1999 in support of the petition which has never been controverted.

12. She averred that it is therefore unnecessary, expensive and a burden to the estate to subject the estate to some valuation.

13. It was her deposition that after the judgement delivered on December 18, 2020 the next item should have been the issuance of a certificate of confirmation of the grant and any other issues of some unspecified set off dealt with under order 37 of the *Civil Procedure Rules*.

14. She contended that the instant summons should be disallowed because it ought to be urged through an originating summons under order 37 of the *Civil Procedure Rules*.

15. With regard to prayer on costs, she stated that application was not necessary in the first instance and has not been occasioned by the deceased's estate or any of the administrators hence the applicant should be ordered to pay costs.

16. The applicant swore a further affidavit on March 23, 2023 in response to the aforestated replying affidavit. She deponed that Lucy Ann Macharia, a co- administrator of the estate herein is aware of the contents of this application and she is also agreeable to the prayers sought.

17. She contended that on November 27, 2019 the court was to determine the mode of distribution of the deceased's estate and following a judgment of December 18, 2020 the court held that estate would be distributed according to the number of houses and she was recognized as one of the beneficiaries of the deceased's estate and as such she is not a stranger to the estate as alluded to by the respondent. She also disputed that there was consent to exclude her from the deceased's estate.

18. She contended that the firm of Mirugi Kariuki & Company Advocates is properly on record as she instructed it to file an application for dependency and an affidavit dated May 17, 2022 that was filed on May 22, 2012.

19. It was her deposition that in as much as the valuation of the estate was disclosed in the affidavit in support of the petition sworn on January 15, 1999, the court appreciates that that was done over two decades ago and the estate has appreciated in value and thus a fresh valuation ought to be conducted for the estate to be distributed equitably and fairly amongst the beneficiaries recognized in the judgment of the court.

20. As regards the prayer for consideration of the benefits ripped from the estate by the respondent herein, she averred that in the ruling delivered on February 9, 2004 by Hon Justice Daniel K. Musinga the applicant was awarded costs of the application payable by the estate.

21. She averred that further Justice A. K. Ndungu directed the respondent to render accounts for the period of sole administration which accounts were not rendered by the respondent herein.

22. She deposed that it is necessary that all these issues be determined within this cause as the same have arisen from it and it surrounds the distribution of the estate herein.

23. I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein. I take the view that the issues for determination herein are:-

    1. Whether the firm of Mirugi Kariuki & Company Advocates is properly on record

    2. Whether or not the applicant is entitled to the reliefs sought.

24. It is the respondent's contention that the firm of Mirugi Kariuki & Co Advocates is not on record for the applicant herein which position the applicant disputes. According to the applicant the said firm is properly on record as it had previously represented her in a dependency matter and prepared her affidavit dated May 17, 2012. I have perused the file and I do note that the said firm has not filed any notice of appointment of advocates to act on behalf of the applicant.

25. However, in my view there is nothing that requires a formal notice of appointment of an advocate under order 9 rule 1 of the *Civil Procedure Rules*. The said order provides :-

> " 9 (1) Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf: Provided that—

(a) Any such appearance shall, if the court so directs, be made by the party in person; and

(b) where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney- General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act."

26. The order that expressly requires a notice of appointment of an advocate is under order 9 rule 7 of the *Civil Procedure Rules* whereby it states that :-

> " Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications."

27. The above order is clear that it is only in a situation where a party after suing or defending a suit in person, appoints an advocate to act in the case or matter on his behalf, he/she shall give notice of appointment of an advocate or notice of change of an advocate as the case may be. In the instant case, the applicant has never sued or defended in person. The previous application, the affidavit referred to and even this application was filed by the aforesaid firm. It is my view therefore that the firm of Mirugi Kariuki & Co Advocates is properly on record for the applicant.

28. I will move to the next issue.

29. *Vide* a ruling dated December 18, 2020 the court held that the deceased estate is to be shared equally between the two houses of the deceased. The applicant is seeking for valuation to be done before distribution of the estate in compliance with the said ruling.

30. The respondent on her part contends that valuation is unnecessary, expensive and a burden to the estate as value of the deceased's estate was indisputably disclosed in the affidavit in support of the petition that was sworn on January 15, 1999 and that if the same is to be done at the request of a non-party, then that party should shoulder the costs thereof. The respondent also averred that the next item after the delivery of the judgement on December 18, 2020 should have been the issuance of a certificate of confirmation of the grant. In a rejoinder, the applicant contends that she is a beneficiary of the deceased's estate and that the estate of the deceased has since appreciated in value as the last valuation was done over two decades ago and that all issues regarding the estate should be determined within this cause.

31. It is factual that the grant is yet to be confirmed. Section 71 (2) (d) of the *Law of Succession Act*, stipulates:

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of

all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares."

32. Guided by the above section of the law, it is my view that confirmation of the grant should be postponed until the issues raised herein are finalized first.

33. In the said ruling ofDecember 18, 2020, the court found the applicant herein is a beneficiary of the deceased by dint of being a wife of the deceased. The respondent should therefore not insinuate that the applicant is a stranger to the estate.

34. So should the court order valuation of the deceased's estate? Justice W. Musyoka *In re Estate of Teresia Wanjiru Thuo (Deceased)* [2016] eKLR stated as follows with regard to the valuation of the deceased's estate:-

> " On valuation of estate assets, it is not a requirement of the law that an estate be valued before distribution. Indeed, there is no provision on that in the *Law of Succession Act*. However, the same becomes necessary in intestacy with respect to provisions where equal distribution is provided for, such as in sections 35(5), 38, 39(c)(d)and (e) of the Act. To facilitate equal distribution where the estate comprises of numerous assets it may be necessary to have the assets valued..."

35. In *re Estate of Abdulkarim Chatur Popat* [2020] eKLR the court found that a valuation of the estate to determine its actual net worth would become necessary once a finding was made that reasonable provision ought to be made to a dependant so as to arrive at the quantum and nature of such provision.

36. I agree with the applicant that for a just and equitable distribution of the estate to be achieved valuation ought to be done first. The assets of the deceased estate comprises several parcels of land in different localities and motor vehicles. The court takes judicial notice of the fact that value in land appreciates while the value of motor vehicles depreciates as years go by, hence the need for a current valuation to be done to reflect the current value of the assets in issue.

37. The applicant has also asked this court to deduct the benefits the respondent received when she was a sole administrator of the estate. This prayer at this stage is untenable. There is no evidence of the great benefits ripped by the respondent from the estate during the aforesaid period. However, it is imperative to note that the administrators stand in a fiduciary position with respect to the property and the beneficiaries. They stand to account to the court and to the beneficiaries regarding their management of the estate.

38. The respondent is said not to have rendered any accounts for rents received for the period when she was a sole administrator of the estate. It appears like the parties are all ripping from the estate and as much as the administrator is supposed to give accounts, the rest are also required to do the same. That will now open a pandora's box that will delay the matter. My view is that the estate should be distributed urgently so that each beneficiary gets what they are entitled to. Thereafter the parties may seek accounts from each other, as the case may be.

39. In the instant case, the grant of representation of the estate of the deceased was initially issued to the respondent on October 4, 2000 and the same was confirmed on May 12, 2003. Judge D.K Musinga revoked that grant on February 9, 2004, following a successful application lodged by Lucy Ann Wangui challenging the validity of the grant. Subsequently Judge Anyara Emukule issued grant of letters of administration intestate to the respondent and the said Lucy Ann Wangui on July 11, 2011.

40. The distribution of the deceased's estate is long overdue and there is need to expedite the process. In order to achieve the same, the following orders are issued:-

1. That to facilitate distribution of the estate of the estate in accordance with the ruling delivered on December 18, 2020, there shall be valuation of the estate assets before final orders on distribution are made.
2. The estate should be valued by a registered valuer to ascertain the current total value of the estate.
3. The valuer to be appointed by the respondent herein and her co administrator Lucy Ann Wangui within 30 days from today.
4. Once appointed the valuer shall file his/her report in court within 30 days after appointment.
5. In the event that the administrators shall be unable to agree on a joint valuer, let each side, appoint their own valuer within 30 days from the date hereof and such appointed valuers to file their separate reports in court within 30 days after appointment.
6. Alternatively, the parties may ask the court to appoint a valuer from a list that they will provide to the court.
7. The costs of valuation shall be deducted from the estate.
8. This matter be mentioned after 60 days from the date hereof to confirm compliance with the above orders.
9. This being a family matter each parties shall bear their respective costs.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JUNE 2023.

H. M. NYAGA

JUDGE

In the presence of:-

Mr. K. Mbugua for 1st administrator

Ms Kinuthia for 2nd administrator