



REPUBLIC OF KENYA



In re Estate of the Late Charles Ndung'u Waithaka (Deceased) (Succession Cause E110 of 2021) [2023] KEHC 20613 (KLR) (12 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE E110 OF 2021**

TA ODERA, J

JULY 12, 2023

**N THE MATTER OF THE ESTATE OF THE LATE
CHARLES NDUNG'U WAITHAKA (DECEASED)**

BETWEEN

CHARLES WAITHAKA NDUNG'U APPLICANT

AND

CHARLES WAITHAKA NDUNG'U APPLICANT

RULING

1. The administrators herein Grace Wanja Ndungu And Charles Waithaka Ndungu filed summons dated December 17, 2022 seeking confirmation of grant of letters of administration issued on December 5, 2021 and all the properties of deceased to devolve to Grace Wanja Ndungu as per the proposed mode of distribution on the Supplementary affidavit of the administrators sworn on December 17, 2022 and filed in court on January 7, 2023 and the consent to making of the grant dated December 17, 2022.
2. The summons came up for hearing on June 12, 2023 and all beneficiaries were present in court and concurred with the proposed mode of distribution.
3. This court noted that the following land parcels are encumbered;
 - a. Nakuru/Municipality/23/30 is charged to savings and loans limited for Kshs 500,000/=.
 - b. Nakuru/Municipality / 2/395 is charged to Kenya Commercial Bank for Kshs 30,000/= .
 - c. Nyandarua/Upper Gilgil/104 is charged to Kenya Commercial Bank for Kshs 30,000/=.
4. Miss Ndungu for the petitioners informed the court that the same would be discharged upon confirmation of grant herein and a letter dated June 17, 2023 from Christine Keter Branch Manager Kenya Commercial Bank Nakuru Branch was later filed in court.



5. Section 3 of the Law of Succession Act Cap 160 Laws of Kenya defines “Estate” as free property of a deceased Person.
6. In the matter of the estate of Job Ndunda Muthike deceased Succession Cause 112/2014 (2018) eKLR free property was defined as follows:

“Coming back to the definition of free property, in view of what we have stated above it is quite clear that the phrase connotes not only personal property of a deceased person but also property which was in his possession or control or under his power and the disposal of which would legally have required his authority but for his death- “
7. If the deceased had during his lifetime dealt with the property in a manner that he could not freely dispose it off, it does not form part of his free property was held in the Matter of the Estate of the Late Silas Kagina Gichovi – Deceased, Christopher Ndaru Kagina v Esther Mbandi Kagina & Another (2016) eKLR – Justice Mativo held : -

“Also if a deceased person has during his lifetime sold, transferred, disposed or in any way manner given out his properties either in exchange of consideration or as gifts intervivos, such gifts or properties whether transfer had been registered or not do not form part of the deceased estate. Infact the law of succession in my view protects ad preserve transactions made by the deceased during his lifetime.”
8. The letter dated June 17, 2023 filed herein does not assist in this case as it is not a discharge.
9. It is my considered view that only free properties of the estate are available for distribution as was held In re Estate of Makokha Idris Khasabuli (Deceased) [2019] eKLR- Judge W Musyoka held that Payment of debts would include clearing any loans the deceased had with any banks or other persons, and where assets are encumbered by charges and mortgages, by having such encumbrances removed through settlement of debts and liabilities, for such encumbered assets cannot possibly be distributed at confirmation before the encumbrances have been cleared.
10. The administrator herein were appointed on December 5, 2021 and it was their duty to ensure that the debts are cleared and the encumbrances lifted before coming for confirmation. This was not done. The letter from the Bank Manager does not help so it does not amount to freeing the said parcels which are still charged.
11. I proceed to partially confirm the grant for the free estate of the deceased save for land parcel numbers Nakuru/Municipality/23/30, Nakuru /Municipality 2/395 and Nya/Upper Gilgil/104 which are encumbered. The administrators are hereby ordered to take the necessary steps to have the said parcels freed for distribution within six months from today. Mention on January 24, 2021 to confirm compliance.

T.A. ODERA - JUDGE

12/7/2023

SIGNED AND DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

No appearance for Applicants.

Court Assistant: Carolyne Cheruyot.

T.A. ODERA - JUDGE

12/7/2023

