



Wanjiru (Suing as the legal representative and administrator of the Estate of Francis Njoroge Waweru (Deceased) v Mwalimu National Sacco Society Limited (Succession Cause E1441 of 2021) [2023] KEHC 23285 (KLR) (Family) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23285 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E1441 OF 2021
PM NYAUNDI, J
SEPTEMBER 22, 2023

BETWEEN

MARYANNE NJERI WANJIRU (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF FRANCIS NJOROGE WAWERU (DECEASED) APPLICANT

AND

MWALIMU NATIONAL SACCO SOCIETY LIMITED RESPONDENT

RULING

1. The Application for determination is the Application dated 28th March 2023 supported by the affidavit of the Applicant, Maryanne Njeri Wanjiru sworn on 31/3/2023.
2. In response thereto the Respondent filed Notice of Motion dated 16th May 2023 and Replying Affidavit sworn on and 16th May 2023 by Brenda Kiberenge, the Company Secretary of Mwalimu National Sacco Society Limited.
3. The application is presented under Section 82(1) of the Law of Successions Act, Rules 49, 59(1) and 73 of the Probate & Administration Rules.
4. The Applicant is seeking the following orders: -
 - i. Spent
 - ii. Pending the hearing and determination of this matter, this Honourable Court be pleased to issue a temporary injunction restraining the Respondent, its servants, employees, agents or officers from releasing any funds held in the name of Francis Njoroge Waweru (Deceased) under account number 5497 to any other person other than the Applicant herein;



- iii. The Honourable Court be pleased to issue an Order compelling and directing the Respondent, its servants, employees, agents or officers to forthwith release to the Applicant, all those funds, savings and related benefits payable to Francis Njoroge Waweru (Deceased) under account number 5497 in keeping with the confirmed grant of this honourable Court.
- iv. The Cost of the application be borne by the Respondent.
5. The application is based on the grounds on the face of it. The Applicant has deposed that her husband, Francis Njoroge Waweru, died on 13th November 2020 leaving behind a widow (the Applicant) and four children, two of whom are minors. She is a co- Administrators of the Estate of the Deceased. The Grant was confirmed on 31st May 2022, she is a beneficiary of the estate, which includes funds held by Mwalimu Sacco under account number 5497 in the name of the Deceased.
6. The Respondent had previously transferred Kshs. 60,000 to the Applicant for the purpose of funeral expenses and Kshs. 200,000 to cater for children’s expenses but has refused to transfer the funds held in the deceased’s account to the Respondent despite several requests for reason that she is not the Deceased’s nominee.
7. The Respondent filed a replying affidavit sworn by Brenda Kiberenge on 16th May 2023 where she deposed that the deceased appointed Sabina Wairimu Waweru (his mother) as his nominee on 8th November 1993 and funds claimed by the Applicant are subject to nomination and do not form part of the estate of the deceased. The process for distribution of the funds is set out under the Co-operatives [Societies Act](#) and its subsidiary legislation allowing the Respondent to release funds to a nominee or the personal representative of a deceased’s estate where there is no nominee
8. The Applicant filed a further affidavit in response to the issues raised in the Respondent’s Replying Affidavit. She deposed that inclusion of the funds held under the Deceased’s account with the Respondent was never opposed at the time of application and confirmation of Grant over the deceased’s estate.
9. The applicant also claimed to be a stranger to the nomination made by the deceased and put the Respondent to strict proof thereof and that such nomination should be revoked by the subsequent marriage of the nominator or the demise of the nominee. She married the deceased on 7th August 2004, after the nomination was made.
10. The Respondent had also previously released funds to the applicant after the demise of the deceased without reference to the nominee or requirement of the nominee’s consent.
11. The Applicant swore a Replying Affidavit to the Respondent’s notice of Motions on 7th June 2023 where she deposed that as per the Certificate of Confirmation of Grant, the Funds held under the Applicant formed part of the deceased’s estate which was to devolve to his personal representatives.
12. She also deposed that The [Law of Succession Act](#) confers this court with Jurisdiction to determine the assets of the deceased, beneficiaries, and the mode of distribution. Refusal to release the funds to the Respondent is unwarranted, illegal and based on misinterpretation of the Law which has resulted in the Respondent struggling to meet the financial needs of the family.
13. The parties filed written submissions I have had the opportunity to consider them.



Summary Of Submissions

14. The Applicant submitted that the issues for determination before the Court were whether the Court has jurisdiction to hear and determine the application dated 28/3/2023, whether the funds held by Mwalimu Sacco form part of the estate of the deceased and the party that should bear the costs.
15. On the issue of jurisdiction, she submitted that the current dispute involves the question of whether the funds held are part of the deceased's estate, whether the nomination was revoked by subsequent marriage of the nominator as well as the execution of a confirmed grant. As such, this court has the requisite Jurisdiction as provided for under Section 47 of the [Law of Succession Act](#).
16. She relied on the finding in the case of ABA (suing as mother and next Friend) v Jane Kerubo (2018) eKLR where the Court commented that:

“whether a nominee is a recipient and/or a beneficiary and whether or not a nomination is subject to challenge on the formation of subsequent relationships are matters of law to be determined within a Succession Cause.
17. On the question of whether the funds formed part of the deceased's estate, she submitted that they did as the nomination was revoked by the subsequent marriage of the deceased. She relied on the finding in the case of Re Estate of Faith Muita (Deceased) (2016) eKLR where the court held that:

“The only time nominated funds would fall for distribution in accordance with the law of succession is when the nomination has been revoked by either the subsequent marriage of the nominator or by the death of the nominee before that of the nominator. In both cases, there would be no valid nomination and therefore no nominee would be in place to be paid proceeds of the policy. In such cases, the funds would be estate property vesting in the Administrators.
18. She further submitted that Section 39 (1)(b) and 39 (2) of the [Co-operative Societies Act](#) provides that a Co-operative society ought to transfer the funds of a Deceased member to the Personal Representatives of the Deceased estate if there is no valid nominee to the said funds. Failure to transfer the funds to the Applicant was a breach of that section by the Respondent.
19. She urged the court to allow the Application dated 28/3/2023 and dismiss the application dated 16/5/2023 with costs.
20. The Respondent submitted that the issues for determination were whether the funds held in the account of the deceased formed part of the estate, and who is entitled to them.
21. With regards to the question of whether the funds formed part of the Deceased estate, the Sacco submitted that as per Section 36A of the [Retirement Benefits Act](#), benefits of a nominee should not be included in the estate of a deceased person and the probate court therefore lacks jurisdiction to distribute them.
22. The Sacco also submitted that section 39 of the Co-operative Society Act only required the Sacco to transfer interest to personal representatives of an estate where no person has been nominated.
23. The Sacco also submitted that it is governed by by-laws, which guide the members on nomination of beneficiaries, and which are binding on the Sacco, their members, and their personal representatives. She thus submitted that the deceased's mother, being properly nominated, ought to be the sole beneficiary of the funds held in the deceased's account.



24. The Sacco also submits that the Certificate of Confirmation of Grant is invalid for inclusion of property outside the deceased's estate and for which the court lacks jurisdiction to distribute. They urged the Court to dismiss the application dated 28/3/2023 with costs.

Analysis And Determination

25. Having analyzed the pleadings herein, the rival submissions and the relevant law I discern the following to be the issues for determination-
- i. Whether this court has jurisdiction to determine a dispute regarding funds under nomination in a deceased's estate;
 - ii. Whether there is a valid nomination;
 - iii. Who is entitled to the funds held by the Sacco under the deceased's account; and
 - iv. Who to bear the cost of the applications.
26. On the question of the Court's jurisdiction, Article 165 of *the Constitution* of Kenya 2010 provides the High Court shall have-
- a. unlimited original jurisdiction in criminal and civil matters;
 - b. any other jurisdiction, original or appellate, conferred on it by legislation.
27. Section 47 of the *Law of Succession Act* provides that:
- “The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”
28. In the case of the Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd (1989) KLR 1. The learned judges of the Court of Appeal (Nyarangi, Masime and Kwach JJA, as they then were) at page 14 of the decision stated as follows-
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
29. In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR where the court observed as follows:
- “.... The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets. Disputes of course do arise in the process. The provisions of the



Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants.”

30. The above section clothes this court with wide discretion to hear and determine all disputes relating to the estate of a deceased person.
31. The parties contend with the question of whether or not funds held in the Deceased’s account held by the Sacco formed part of the deceased estate. The funds in question were also included in the schedule of assets in the certificate of Confirmation of grant issued.
32. In the matter of the Estate of David Kiamba Muli (Deceased) (2022) eKLR, the Court pronounced as follows:
 - (43) This Court confirms that the law is that once the deceased during his/her lifetime provides nomination of the recipient of his/her interest, value or property in the event of his/her death, the property is not subject to distribution by the Court. Such property, benefit or proceeds are not available for distribution and shall be released to the nominee as per nomination document endorsed by the deceased as elucidated in the Re Estate of Faith Muita (Deceased) [2016] eKLR .
33. The Respondent avers that the deceased nominated his mother as the sole beneficiary in line with the Law and the Sacco’s by-laws. It is not in contention that the Applicant is the Administrator of the Estate of the Deceased and that the marriage with the deceased took place years after the deceased had nominated his mother as the sole beneficiary of the funds held in his account by the Sacco. The contention is whether the subsequent marriage of the Deceased revoked the nomination.
34. The deceased nominated his mother in the year 1993 and got married in the year 2004 and passed on in the year 2020. For sixteen years of marriage, the deceased did not change his nominee.
35. The question before this Court then is whether there was a valid nominee at the time of the death of the deceased. None of the parties have challenged the process by which the mother of the deceased was appointed as a nominee save for the argument that subsequent marriage vitiated the nomination. The applicant relies on the decision in In re Estate of Faith Muita (Deceased) [2016] eKLR.
36. Section 39(1) of the Co-operative Societies Act provides that:

On the death of a member, a co-operative society may transfer the share or interest of the deceased member to—

 - (a) the person nominated in accordance with this Act and any rules made thereunder; or
 - (b) if there is no person so nominated, such person as may appear to the Committee of the society to be the personal representative of the deceased member
37. It is trite law that property that is subject to a nomination does not form part of the estate of a deceased person. I agree with the Court’s decision in the Matter of the Estate of Carolyne Achieng’ Wagah (Deceased) Nairobi High Court Succession Cause No. 1374 of 2004, clearly stated the law as follows:

“It is the law that funds the subject of a nomination do not form part of the nominators estate, and therefore such funds cannot pass under the will of the deceased or vest in his personal representative. Such funds are not subject to the succession process and should be



dealt with in accordance with the law governing nomination. Nominations are statutory, in the sense of them being specifically provided for by a particular statute.”

38. The Sacco has clearly demonstrated that the deceased made the nomination properly under the *Co-operative Societies Act* and under its rules. At the time of the deceased’s demise, there was a proper nominee on record.
39. I have looked at the decision in Re Estate of Faith Muita (Deceased) (supra) and would respectfully disagree with the opinion that that the subsequent marriage of the nominator would serve to revoke the nomination. That position is not supported by any law. Elsewhere in the same judgment the Hon. Judge states
- (7) One other thing to note about nominations is that they operate under the rules of a particular scheme. Although they dispose of property upon death, they do not comply with the requirements of a will, and they are therefore not subject to the law of succession. The property the subject of a nomination does not form part of the nominator’s estate, for the reason that the funds are meant to be paid to the nominee of the nominator. The person to whom the funds ought to be paid is designated. Nominated funds cannot pass by the will of the nominator. (Emphasis Supplied).
40. If the deceased had intended to substitute his mother, he would have stated so. Subsequent marriage may revoke a will, but it does not have the same legal effect on a nomination. A nomination may be revoked when the nominee pre-deceases the nominator, or when the process of such nomination was flawed such that there is no proper nominee on record. No such evidence has been adduced in this matter to demonstrate that the nominee was improperly nominated or that she is not alive. Only when nomination fails does the property that was to go to the nominee revert to the estate of the deceased.
41. It follows therefore, that the funds held by the Respondent in the account of the deceased do not form part of the estate over which the applicant and her co-administrator hold a confirmed grant. The grant should thus be amended to exclude the funds held with the Respondent.
42. This position is supported by the decision in G.A.A.M & another v M. O. A. O [2016] eKLR, wherein the shares of the deceased in Kakamega Teachers Cooperative Society had been included in the Petition and confirmed grant as assets of the deceased. In dismissing an Application for the Administrators to render an account with respect to the shares the Court stated-
- It was wrong for the share of the deceased in the Cooperative Society to be made the subject of this cause as forming the estate of the deceased. It is not subject to succession proceedings under the *law of Succession Act*.
43. Nothing turns on the earlier payments made to the Applicant, if anything these are monies that the rightful nominee would be entitled to demand from the Respondent.
44. Having found that there was a valid nomination with regard to the shares at the SACCO, I find that this Court does not have jurisdiction over the shares, I have no option but to down my tools.
45. Arising from the foregoing the following orders are made
- a. The Application dated 28th March 2023 is dismissed
 - b. The Certificate of Confirmed Grant is amended to exclude the shares of the deceased in Mwalimu National Sacco Society Limited under account number 5497
 - c. Each party to bear their own costs



It is so ordered

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
22ND DAY OF SEPTEMBER, 2023.**

P. NYAUNDI

JUDGE

In the presence of:

Nthei h/b for Wachira for the Applicant

Muuo h/b for Mulecho for the Respondent

Sylvia Court Assistance

