



REPUBLIC OF KENYA



**In re Estate of Nicholas Mworja Mwereria (Deceased) (Succession Cause 143 of 2009) [2024] KEHC 14649 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14649 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 143 OF 2009  
EM MURIITHI, J  
NOVEMBER 21, 2024**

**IN THE MATTER OF THE ESTATE OF NICHOLAS MWORJA MWERERIA (DECEASED)**

**BETWEEN**

**JANET KAREGI MWORIA ..... 1<sup>ST</sup> PETITIONER**

**BISHOP WILLIAM MURIUKI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KENNETH KIMAITA ..... RESPONDENT**

**AND**

**BETTY KAJUJU MUTWIRI ..... APPLICANT**

**RULING**

1. By Chamber Summons dated 19/6/2024 brought under section 47 of the [Law of Succession Act](#) and Rule 73 of the [Probate and Administration Rules](#), Elvin Koome Mworja (hereinafter called the 1<sup>st</sup> applicant) sued the 1<sup>st</sup> petitioner herein and Patrick Gitonga T/A Gent Bazaar Wines And Spirits, Eric Tatua T/A Golden Communications, Amos Kimathi T/A Green Valley Printing Works, Richard Koome T/A Mobile And Computer Repair, Sammy Macharia T/A Hikvision And Hadijah Mollu (the 2<sup>nd</sup> to 7<sup>th</sup> respondents respectively) seeking that:

1. Spent
2. Spent
3. The honorable court be pleased to commit to civil jail for a period of six months the 1<sup>st</sup> petitioner/respondent Janet Karegi and the tenants that is the 2<sup>nd</sup> to 7<sup>th</sup> respondents for disobedience of the court order/ruling dated 25<sup>th</sup> day of APRIL 2024.
4. Spent



5. The honorable court do issue orders of injunction restraining Mr Kenneth Kimaita one of the beneficiaries of the estate from collecting and receiving rent and or interfering in any way with the running of Lr No Block 11/165.
  6. The honorable court be pleased to issue an order directing the 1<sup>st</sup> petitioner and Mr Kenneth Kimaita to deposit the rent collected/received from the tenants in the month of May and June with Mosmak Agencies.
  7. The court do make an order directing that pending the hearing and determination of this application, the 1<sup>st</sup> petitioner be directed to pay the school fees of Elvin Mworira Michael Muriuki and Chantalle Velmar Mwendwa amounting to Kshs. 110,780, Kshs. 25,985 and Kshs. 42,950.
  8. Cost of this application be provided for.
2. The application is premised on the grounds on the face of it and supported by an affidavit sworn by the 1<sup>st</sup> applicant on even date. He avers that having learnt of the 1<sup>st</sup> petitioner's ailment which necessitated her admission at Grace Park Hospital from 31<sup>st</sup> July to 8<sup>th</sup> August, he wishes to withdraw his prayer for contempt against her. The 1<sup>st</sup> petitioner needs round the clock care and has been assigned a care giver. The 1<sup>st</sup> petitioner also suffers from dementia, malnutrition and arthritis as is evident from the attached medical documents.
  3. The applicant filed a supporting affidavit on 19/6/2024 in support of his application.
  4. The 1<sup>st</sup> petitioner swore a replying affidavit on 11/7/2024 in opposition to the application. She denies disobeying court orders and affirms that she has been paying school fees for all her grandchildren, including the 1<sup>st</sup> applicant herein. In fact, the 1<sup>st</sup> applicant has been receiving Kshs. 13,000 monthly from the 7<sup>th</sup> respondent since 2018. She appointed Mosmark Agencies to assist her to collect rent but the said agency should not take away her powers as the executor and administrator. Pursuant to the orders of 25/4/2024, she is unable to manage the finances or even pay school fees because the agency cannot release the money to her unless the court orders so. Her son Kenneth Kimaita only runs errands for her whenever need arises but he does not collect any rent as claimed.
  5. The 2<sup>nd</sup> petitioner, Bishop William Muriuki opposed the application vide his affidavit sworn on 26/7/2024. He avers that pursuant to the court orders of 25/4/2024, Mosmark Agencies remitted rent paid by the tenants of B11/165 in July which has settled the school fees of the beneficiaries who were in need. He accuses Kenneth Kimaita of collecting rent from the said property for so many years and benefitting from it illegally. In his view, since the grandchildren and the beneficiaries of the aforementioned property have attained the age of majority, they should directly benefit from it through their personal account. The said Kenneth Kimaita has locked the 1<sup>st</sup> petitioner in her home thus denying all family members access and his attempts to have a dialogue with the 1<sup>st</sup> petitioner in order to safeguard the wishes of the deceased have been met with a lot of hostility and resistance from Kenneth Kimaita.
  6. In her supplementary affidavit and another affidavit sworn on 30/7/2024 and 21/8/2024, Betty Kajuju Mutwiri, a beneficiary accuses Kenneth Kimaita of running down and mismanaging the estate in the pretext of assisting the 1<sup>st</sup> petitioner, hence the need for orders barring him from interfering and administering the estate. There is a pending electricity bill of Ksh. 200,000 with respect to Plot No. Kaaga 1135, 1136, 1137 and 1138, which arrears have been occasioned by Kenneth Kimaita's actions of illegal connections and failure to settle previous bills. The 2<sup>nd</sup> petitioner was appointed as an administrator of the estate by Justice Kasango on 8/4/2010. Due to mismanagement, no income



is being generated from Plots No. 1137 and 1138, which was to be used to pay school fees for the grandchildren and the upkeep of the 1<sup>st</sup> petitioner. L.R No. Meru Municipality Block 11/165 is not realizing its potential owing to interference and mismanagement by the 1<sup>st</sup> petitioner and her son Kenneth Kimaita. The 1<sup>st</sup> petitioner is unable to continue administering the estate due to her mental and physical infirmities, thus the prayer to have her discharged of her duties. It is evident from the schedule prepared by MOSMARK that some tenants have been remitting rent to it and others directly to Mr. Kimaita's MPESA and KCB account.

## **The 2nd Application**

7. By Chamber Summons under certificate of urgency dated 7/8/2024 under sections 47, 83 and 84 of the Law of Succession Act and Rules 73 and 45 of the Probate and Administration Rules, Betty Kajuju Mutwiri (hereinafter called the 2<sup>nd</sup> applicant) seeks that:
  1. Spent
  2. This honorable court be pleased to make an order reliving the 1<sup>st</sup> respondent/petitioner of her duties of administering the estate of the deceased on account of both physical and mental disability and that the 2<sup>nd</sup> petitioner with the assistance of the chief of the area do continue to administer the estate of the deceased to completion.
  3. This honorable court do issue an injunction restraining the 2<sup>nd</sup> respondent/beneficiary from interfering whatsoever with the administration of the estate of the deceased and more particularly Plot No Block 11/165 And Plots No 1137 And 1138 Kaaga.
  4. The honorable court do issue orders allowing the beneficiaries of Meru Municipality/block 11/165 and the court appointed agent Mosmark Agencies access to the said premises and especially the lodgings/rooms for purposes of taking audit of the same.
  5. The court do issue an order allowing all beneficiaries and especially the children of the deceased, the nurse/care giver, other family members and friends unlimited access to the home of the 1<sup>st</sup> respondent/petitioner who is ailing for purposes of visiting her and ensuring she is well taken care of.
  6. This honorable court do issue an order allowing the appointment of an auditor to take an audit/inventory of the books/accounts of Meru Municipality 11/165.
  7. The orders herein be enforced with the assistance of the officer commanding Meru Police Station.
8. The application is premised on the grounds on the face of it and supported by an affidavit sworn by the 2<sup>nd</sup> applicant on even date. She avers since the grant was confirmed on 8/3/2010, the 1<sup>st</sup> petitioner has failed to administer the same diligently and in accordance with the will. The 1<sup>st</sup> petitioner has failed to submit Plots No. Kaaga 1122, 1127, 1130, 1131, 1132, 1133 and 1134 to their rightful beneficiaries. The 1<sup>st</sup> petitioner and Kenneth Kimaita have begun constructing on Plots No. Kaaga 1132, 1133 and 1134 belonging to Kenneth Gitobu Mworira and the granddaughters respectively. The 1<sup>st</sup> petitioner is ailing both physically and mentally and is of advanced age therefore incapable of continuing to administer the estate. The 1<sup>st</sup> petitioner illegally and unlawfully appointed Kenneth Kimaita to assist her to administer the estate yet there is a 2<sup>nd</sup> petitioner who was appointed for that purpose. The 1<sup>st</sup> petitioner failed to furnish the court with accounts as ordered on 18/2/2023 and Kenneth Kimaita locked the doors to the lodgings on Meru Municipality Block 11/165 thus denying the beneficiaries



and the agent access. Kenneth Kimaita has paid himself Ksh. 1,500,000 from Meru Municipality Block 11/165 to the detriment of the beneficiaries of the property.

9. The applications were urged orally and a ruling reserved.

### **Determination**

10. Having considered the application and the affidavits on record, the issue for determination is whether the applications are merited.
11. On 11/7/2024, the court discharged the 2<sup>nd</sup> to 7<sup>th</sup> respondents/tenants in the application dated 19/6/2024 on the understanding and undertaking that they would comply with the orders of the court in this matter.
12. One of the prayers sought by the 2<sup>nd</sup> applicant in her application dated 7/8/2024 is to discharge the 1<sup>st</sup> petitioner of her role as an executor of the will. This court dealt with a similar quest by the 2<sup>nd</sup> applicant in her application dated 28/12/2022 where the court by its ruling dated 28/9/2023 rendered thus;

“At the onset, the court has considered when there is power to remove an executor from executorship and appoint an administrator in her place. With respect, I do not think there is power to appoint a person to be an executor in place of the executor appointed by a testator. While the court may remove an executor an executor for inability to perform the powers and duties of the personal representative under section 82 and 83 of the *Law of Succession Act*, it canoe be permissible to appoint a person as an executor under the Will. It can only be valid to appoint an administrator in the same way as in a petition for Letters of Administration with Will annexed who implements the will of the testator without having been named as attestator. Such an administrator of course, has powers from the date of the appointment as an Administrator unlike the Executor whose authority begins from the date of the Will. However, to revoke the grant of Probate and remove the executor as prayed in Prayers Nos. 1 and 2 of the Summons herein, there must have been, in the context of the ground of non-performance, default in terms of section 76 (d) of the Act...The power to revoke a grant for non-administration and failure to produce accounts is conditional upon prior notice and want of reasonable explanation as the power in section 76 (d) crystallizes where the personal representative “has failed, after due notice and without reasonable cause” to do any of the acts set out therein. It also appears that in accordance with the Codicil to the Will dated 9/7/2007, the 2<sup>nd</sup> respondent’s involvement is all justified when there is a dispute, in accordance with Clause 1 thereof as follows:

1. The executor of my said Will will be assisted by chief George Koome and Bishop Muriuki in case of any dispute regarding the administration of my estate. In the case of the properties subject of the application herein, the Codicil has guided that the family committee shall deal, as follows: 2 Paragraph 23 and 24 be deleted and replaced as follows:
  23. The Family Committee and Executor of this Will will decide how the hotels for the properties namely Meru Municipality Bloc 1/144, Meru Municipality Block 11/165 And Meru Municipality 1/348 will be managed for the benefit of the beneficiaries.”
13. The court must exercise extreme restraint in interfering with the testamentary freedom of a testator to appoint an executor of their choice, unless in the clearest of cases. The Court cannot substitute its view of an executor for that of a testator who chooses the person to execute his Will, unless it can be



shown by cogent evidence that the appointed executor is incapable, unwilling or unable by reason of any infirmity to proceed with the administration and distribution of the estate according to the wishes of the deceased testator.

14. The court's own assessment of the 1<sup>st</sup> petitioner's mental capacity when she appeared in court is that she is of sound mental disposition and quite capable of administering the estate to completion. While she may need physical assistance for heavy lifts of the administration, she is quite lucid and aware of the matters arising in the due administration of the estate according to the Will.
15. This court finds that it has not been shown on the evidence any failure, after due notice, without reasonable cause on the part of the 1<sup>st</sup> petitioner, to diligently complete the administration of the estate.
16. Had it been established that the 1<sup>st</sup> petitioner had deliberately failed to discharge her duties in administration of the estate, then this court would not have hesitated to invoke its jurisdiction under section 47 of the *Law of Succession Act* to ensure the ends of justice are met.
17. The parties are still at liberty to come up with a 3<sup>rd</sup> person to assist the 1<sup>st</sup> and 2<sup>nd</sup> petitioners/ administrators in accordance with the consent order issued on 20/9/2024.
18. The court has already dealt with the issue of payment of school fees for the grandchildren of the deceased by its rulings of 20/12/2023 and 25/4/2024 and it will not belabor the issue any further.
19. The 1<sup>st</sup> petitioner is accused of deliberate disobedience of court orders by not only failing to remit the rent proceeds to the appointed agent but also neglecting to pay school fees for the school going grandchildren.
20. The court has hitherto cautioned the parties herein that court orders must be obeyed by all and sundry and any disobedience thereto by any party will be dealt with firmly and decisively. It bears repeating that a court order must be complied with wholesomely as a party is not at liberty to choose what parts of an order to obey and what to ignore.
21. It is urged that some beneficiaries have since attained the age of majority and it would be prudent to permit them to run their own affairs and manage their bequest under the Will. The remedy is in the giving effect of the terms of the Will in an expedited fashion so that the bequests can take effect for the benefit of the beneficiaries.

## Orders

22. Accordingly, for the reasons set out above, the 1<sup>st</sup> and 2<sup>nd</sup> applications dated 19/6/2024 and 7/8/2024 are compromised in the following terms:
  1. Prayer No. 2 of the 2<sup>nd</sup> application seeking to discharge the 1<sup>st</sup> petitioner of her role as an executor is declined.
  2. An order of injunction is hereby issued restraining Mr. Kenneth Kimaita and other beneficiary from collecting, receiving rent and/ or interfering in any way with the administration of the estate and more particularly LR No. Meru Municipality Block 11/165, Plots Nos. 1137 and 1138 Kaaga.
  3. The beneficiaries of the estate, the nurse and/or the care giver, other family members and friends are hereby granted unlimited visitation rights to the home of the 1<sup>st</sup> petitioner.
  4. All pending and future school fees for the grandchildren to be promptly paid as and when they fall due.



5. In terms of section 83(g) of the *Law of Succession Act*, the 1<sup>st</sup> petitioner is hereby required to complete the administration of the estate within 6 months from the date hereof.
26. The 2<sup>nd</sup> respondent is ordered to unlock the lodgings/rooms on LR No. Meru Municipality Block 11/165 for ease of access by the appointed agent and/or the beneficiaries to assess their habitability.
27. Liberty to apply.

Order accordingly.

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Gikunda Anampiu for the Petitioner/Respondents.

The 2<sup>nd</sup> Petitioner in Person.

Ms. Nelima for the Applicant.

