



REPUBLIC OF KENYA



In re Estate of Joseph Leitmann (Deceased) (Succession Cause 501 of 2001) [2024] KEHC 16009 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 501 OF 2001**

**JM NANG'EA, J
DECEMBER 16, 2024**

IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH LEITMANN (DECEASED)

BETWEEN

SUSAN NYAMBURA APPLICANT

AND

LUCY WANJIKU LEITMANN (BEING SUED THROUGH HER DULY APPOINTED NOMINEE TERESIA NJERI NG'ANG'A) RESPONDENT

AND

PIUS MBUGUA NGUGI INTERESTED PARTY

RULING

1. By Chamber Summons dated 6/5/2024 the applicant seeks reliefs as hereunder;-
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That the court does allow the deceased's estate to be distributed to beneficiaries as per schedule shown at paragraph 6 of the applicant's affidavit in support of the application.
 - e. That the administrator of the estate does produce an inventory of assets and liabilities of the deceased's estate as well as statements of account in respect of rent collected from the properties and businesses owned by the deceased.
 - f. That the administrator does produce statements of accounts relating to the deceased's 9 bank accounts.



- g. That the court does appoint a licenced surveyor to survey the deceased's property known as Land Reference No. 4730/59 I.R. 10700/1 to identify portions gifted during the deceased's lifetime and what comprises the estate.
 - h. That the respondent be directed to deposit into court cash deposits in the deceased's bank accounts and any other sums found to be due to the estate.
 - i. That the administrator of the estate does deposit with the court titles to property forming part of the deceased's estate and the same be valued.
 - j. That in the alternative and without prejudice, the administrator be ordered to file within 14 days, an alternative method of distributing the estate taking into account the interests of the applicant as ordered by the court.
 - k. That the costs of the application be provided for.
2. The applicant swore an affidavit in support of the Summons stating that she was the deceased's wife. She avers that the court had revoked Grant of Letters of Administration herein which was confirmed on 11/7/2016 and ordered distribution of the estate afresh taking her interest as the deceased's widow into account. The respondent who is the Administrator of the estate is, however, said to have refused to abide by the court's decision. The applicant now proposes to distribute the estate comprising the said Land Reference No. 4730/I.R. 10700/1, shares in Ukingoni Farm Company Ltd, houses, boreholes, proceeds of sale of vehicles and cash as per schedule exhibited. It is proposed that the applicant together with other heirs named as Michael Leitman, Bony Leitman and Lucy Wanjiku Leitman do share the estate equally.
 3. Neither the Respondent nor the Interested Party (Pius Mbugua Ngugi) who was enjoined to these proceedings filed replies to the application.
 4. Learned Counsel for the parties were invited to file Written Submissions for disposal of the application. Before analyzing the submissions against the application, some history of this old file is necessary.
 5. Grant of Letters of Administration in respect of the deceased's estate issued to the Respondent was confirmed on 11/7/2016. By application dated 23/5/2017 made before my brother H. K. Chemitei, (Judge), the applicant herein thereafter sought revocation of the grant on the ground that she was excluded in the distribution of the estate despite being the deceased's wife. In his ruling delivered on 12/10/2023 Chemitei J found that the applicant was indeed the deceased's wife. The court proceeded to revoke the grant which had also been rectified/amended on 26/7/2016 together with all consequential orders. All sales, disposition, transfers and/or dealings over the deceased's parcel of land in question arising from the impugned grant were cancelled. The court further ordered that any other property of the deceased otherwise wrongly alienated does revert to his name and be distributed afresh taking the applicant's interest into consideration. It was, however, directed that any gifts inter vivos to the extent that they are lawful shall not be disturbed, among other orders of the court.
 6. It is the applicant's contention that the court's orders were not complied with, hence this application.
 7. The applicant laments in her Written Submissions that the respondent is frustrating her bid to get her lawful share of the deceased's estate. It transpires from the submissions that the Respondent has filed Nakuru COCA No. E004 of 2024 (Lucy Leitman v Susan Nyambura Waweru & 3 Others to challenge the said decision of my brother H. K. Chemitei J that recognized the applicant as the deceased's widow and a beneficiary of the estate.



8. The applicant's advocates submit inter alia that an intended appeal or an appeal per se does not in law automatically operate as stay of proceedings. Various judicial determinations including the case of *Kenya Wildlife Service v James Mutembei* (2019) KEHC 10478 KLR is cited in support of this proposition. The court is told that an order for stay of execution has not been sought and obtained.
9. The applicant further contends that as the Administratrix of the deceased's estate, the respondent has the duty to give a full and accurate account of all dealings with the estate. Reference is made to the provisions of Section 79 of the *Law of Succession Act* which ascribe to the executor or administrator of the deceased estate the duty of managing the estate including production of "a full and accurate inventory of the assets and liabilities of the deceased." as well as all other dealings with the estate. The court is told that this is a fiduciary duty on the part of the executor or administrator of the estate, as the case may be, that is discharged for the benefit of all the heirs (see *Re Estate of Mugo Ng'ang'a (Deceased)* 2021 KEHC 13562).
10. As pointed out by the Respondent in their submissions, the applicant concedes that her purported affidavit in support of the Summons was not commissioned by a Commissioner for Oaths. She, however, excuses the error as a clerical mistake attributable solely to Counsel. Among other cases, *Belinda Murai & Others v Amos Wainaina* (1978) eKLR is relied upon as acknowledging that mistakes are sometimes inevitable and that where made they can be corrected. She wants the court to consider the merits of her application in the interests of justice.
11. The respondent's advocates confirm that they have filed the appeal against Justice H. K. Chemitei's Judgment and that there are other suits on the same subject before the High Court and the Environment and Land Court at Nakuru. Counsel submit that in the circumstances this court cannot entertain, "any application for Confirmation of Grant on merit..."
12. The applicant's affidavit in support of her Chamber Summons is attacked as not having been commissioned by a Commissioner for Oaths Contrary to the provisions of Section 5 and 8 of the *Oaths and Statutory Declarations Act*. This law requires inter alia that an affidavit should show the place and date it is taken or made. The respondent contends that the crucial information as well as the Commissioner for Oaths stamp is missing from the applicant's affidavit. Reliance is further placed on several superior court decisions including *Mary Gathoni & Another v Frida Ariri Otolu & Another* (2020) eKLR where for such defect the subject application was struck out, it being deemed that it was not supported by any evidence at all. The respondent urges the court to strike out the application for this reason among others stated in the Submissions.
13. The Interested Party associates himself with the respondent's Submissions dismissing the Application as frivolous and vexatious. He adds inter alia that the application contradicts existing court orders issued in Nakuru ELC No. 72 of 2018 barring interference with the deceased's property.
14. Having read the Application and the filed Submissions, it is common ground that the Affidavit in support of the Application has not been commissioned by a Commissioner for Oaths as required by Law. The following issues accordingly arise for determination;
 - a. Whether the defect in the applicant's affidavit is excusable.
 - b. Whether the orders sought in the application should be granted.
15. As held in the case of *Mary Gathoni supra* failure to commission an affidavit is a serious defect that deprives it of its evidentiary character. Contrary to the applicant's plea that the error could be corrected, any such correction should have occurred before the application was heard. Article 159(2) (d) cannot also come to the aid of the applicant since this is not a mere technical or procedural error. It is



infringement of specific provisions of the Law. In the circumstances, there is no evidence in support of the application.

16. Due to the foregoing I must strike out the application, which I hereby do. As this is a family matter no order is made as to costs.
17. This order notwithstanding, the respondent is not absolved from her responsibility as the Administratrix of the deceased's estate. The Court of Appeal has not stayed these proceedings. Merely because there are other cases touching on the same subject matter before other courts of concurrent jurisdiction does not ipso facto stay the proceedings before this court. The respondent is duty bound to execute the orders of Justice H. K. Chemitei adverted to hereinabove so that the estate of the deceased is finally transmitted to lawful beneficiaries. It is noteworthy that the court has cancelled all transfers of property comprising the deceased's estate.
18. The Respondent will therefore explain to the court the steps she has taken to complete administration of the deceased's estate and specifically the status of implementation of the ruling of my brother Justice H. K. Chemitei. The applicant is also at liberty to properly and lawfully seek appropriate remedies if aggrieved.

J. M. NANG'EA , JUDGE.

RULING DELIVERED VIRTUALLY THIS 16TH DAY OF DECEMBER, 2024 IN THE PRESENCE OF:

The applicant's advocate, Ms Kaimong

The respondent's advocate, Ms Gatecha

The Advocate for the Interested Party, Mr. Opondo

Court Assistant, Lepikas

J. M. NANG'EA, JUDGE

