



Maina (1) Acting on her own behalf and as family representative of the children of the Deceased and his first wife the late Josephine Wangatu; (2) Kennedy Ndifatha Maina (3) Zacharia Kurukwa maina, the Successors of the Late (4) Margaret Warau Maina (5) Judy Muthoni Ndegwa Maina and (6) John Gitu Maina v Maina (Succession Cause 16 of 2023) [2025] KEHC 17640 (KLR) (27 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 16 OF 2023**

RM MWONGO, J

NOVEMBER 27, 2025

IN THE MATTER OF THE ESTATE OF PATRICK MAINA STANLEY GITU (DECEASED)

BETWEEN

ANN WANJIRU MAINA (1) ACTING ON HER OWN BEHALF AND AS FAMILY REPRESENTATIVE OF THE CHILDREN OF THE DECEASED AND HIS FIRST WIFE THE LATE JOSEPHINE WANGATU; (2) KENNEDY NDFATHA MAINA (3) ZACHARIA KURUKWA MAINA, THE SUCCESSORS OF THE LATE (4) MARGARET WARAU MAINA (5) JUDY MUTHONI NDEGWA MAINA AND (6) JOHN GITU MAINA APPLICANT

AND

FLORENCE NJERI MAINA RESPONDENT

RULING

Background

1. The deceased died on 30th July 2023. The respondent filed a petition for probate dated 26th September 2023. It was accompanied by a copy of a Will dated 05th September 2018 alleged to be that of the deceased, and a list of assets in his estate. The applicant challenged the petition through an objection dated 20th March 2025.
2. While the petition was pending determination, the applicant filed an application challenging the deceased's signature on the alleged Will and seeking forensic examination of the deceased's fingerprint on the original Will. The application was heard and determined; the court ordered forensic examination of the fingerprint on the Will against the deceased's fingerprint records held at the National Bureau of Registration. This was done and a report was filed by the forensic examiner.



3. While that was pending, the applicant moved the court for a limited grant to enable them access Kshs.250,000/= out of the estate. The court allowed the application for that purpose only. The applicants are back in court with similar applications for access to funds, even though the hearing of the substantive petition is pending, and no executor/administrator has been appointed in the estate as yet.

The Applications

4. The applicant filed summons dated 05th June 2025 (the 1st application) and 27th October 2025 (the 2nd application). Both applications seek special provision for the needs of the dependants.
5. Through the 1st application, she sought the following orders:
 1. That the applicants be provided with a sum of Kshs.500,000/= per month for all their monthly upkeep expenses pending the determination and distribution of the estate. The money be paid to Ann Wanjiru Maina to share with Kennedy Ndifatha Maina and Zacharia Kurukwa Maina as the three were wholly dependent on the deceased person before his death;
 2. That the Applicants be provided with one motor vehicle KCP 204E-Double Cab Pickup from amongst the vehicles of the estate for their daily use from amongst the following motor vehicles KDK 050J-Prado, KCP 204E-Double Cab Pickup, KCP 443W-Pickup and KBP 638E Pickup;
 3. That the applicants be provided with a one-off payment of Kshs.150,000/= to be used for digging and building a new pit latrine in the home of the first family of the late Josephine Wagitu Maina to replace the collapsed one;
 4. That the Applicants be provided with a one-off payment of Kshs.50,000/= to repair the leaking roof of their mother's house in which Ann Wanjiru Maina is currently housed.
6. The application was supported by grounds in the supporting affidavit thereof detailing the hardships which the first house is facing. The applicant demonstrated that the estate of the deceased is vast and it is still growing from the ongoing businesses. That the monthly income from rents and the various businesses is over Kshs.8,000,000/= and the children of the first house should be sustained from the estate pending its determination.
7. On 31st July 2025, the applicant's advocate moved the court through an oral application seeking that the petitioner/respondent be issued with a grant ad- litem to enable access of Kshs.250,000/= from the estate which money would be paid to the applicant. This application was allowed and a grant ad- litem was issued for the limited purpose of accessing the sum of Kshs.250,000/= which was paid to the applicants.
8. Through the 2nd application, the applicant sought the following orders:
 1. The applicants be made and application dated 5th June 2025 for urgent provisions and the same is yet to be considered as they were only given Kshs.250,000.00 which has run out;
 2. That the Application dated 05th June 2025 is extremely urgent and requires immediate consideration by the Honourable Court;
 3. That pending the hearing and determination of the application dated 5th June 2025, the Honourable Court be pleased to order and it is hereby ordered that the Respondent pays the Applicants Kshs.250,000.00 per month for their upkeep and maintenance of the First family's home; and



4. That costs of this application be in the cause.
9. The application was supported by grounds in the supporting affidavit thereof detailing the hardships which the first house is facing. The applicant stated that the first house is entitled to this money for their sustenance since the estate is vast.

Preliminary Objection

10. The respondent opposed both applications through a preliminary objection on grounds that:
 1. The orders sought by the Applicants on the two applications do not lie, as they seek distribution of the deceased's estate when no executor/Administrator of the estate has been appointed by the court;
 2. The Respondent has not as yet been appointed Executor/Administrator of the estate of the deceased; and
 3. The two applications are a non-starter and should be struck out.

Submissions on the Preliminary Objection

11. The parties gave oral submissions stating that the applicant is seeking distribution of the estate before an executor/administrator is appointed. She relied on the case *Morjaria v Abdalla* [1984] KECA 44 (KLR) and argued that she does not have a grant ad colligenda bona but rather, a specific grant for accessing Kshs.250,000/= from the estate one time. Therefore, the applicant cannot be given any further provision from the estate until it is determined.
12. The applicant submitted that the preliminary objection is misconceived as it does not address the applications before court. That the applications are not seeking disposal of the estate, rather, money for survival for the beneficiaries of the estate pending its determination. That the applicant has demonstrated that the respondent is controlling the assets in the estate and she called upon the court to exercise its discretion under section 29 of the [Law of Succession Act](#). She stated that the applications seek provision for dependants of the deceased pending determination of the estate. She urged the court to dismiss the preliminary objection and allow the applications.
13. In rebuttal, the respondent stated that the applicant has not stated which specific bank account the money she seeks is to be drawn from. That the estate does not have a specific bank account in its own name because an executor/administrator has not been appointed yet.

Issue for Determination

14. The issue for determination is whether the preliminary objection has merit.

Analysis and Determination

15. A preliminary objection must raise a point of law which, once determined, may determine the whole suit. This was established in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 thus:

“....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of



limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

16. The main ground of the preliminary objection is that the applicants are seeking distribution of the deceased's estate when no executor/Administrator of the estate has been appointed by the court. She also argued that the orders sought have the effect of determining the estate to some extent and so it would preempt the court's work which is pending. It has been alleged that the respondent is controlling the whole estate, whilst the applicant and her family lack funds for basic things.
17. The 2 applications before the court are not seeking a limited grant for the purpose of accessing funds. The applicant is seeking maintenance from the estate pending its determination. This money is meant to be a monthly provision towards the needs of the applicant and her family pending determination concerning the estate. The court had already made provision for some of these expenses once before through a limited grant. However, it is not clear to the court where the money sought is to be drawn from since there are many accounts of the deceased and his companies.
18. Going forward, it is of utmost importance to have an executor/administrator put in place. This will enable any drawings, if necessary, to be made through the office of the executor/administrator who can legally and properly account to the Court. It is clear that if the applications are entertained, the estate may deplete before it is distributed accordingly. In *In re Estate of Joseph Karimi Karuhi (Deceased)* [2015] KEHC 8036 (KLR) the court declined to make an order for withdrawal of funds from the estate. The Judge was apprehensive that if the order was granted, it would lead to depletion of the estate before a full grant was issued.

Conclusions and Disposition

19. As matters now stand, the size and scope of the estate is unknown to the Court as there is no administrator or executor to gather in the estate and account for it. Before the Court can make provision for dependants, the Court must take into account the circumstances indicated in Section 28 of the LSA which provides:

“In considering whether any order should be made under this Part, and if so what order, the court shall have regard to:

- (a) the nature and amount of the deceased's property;
- (b) any past, present or future capital or income from any source of the dependant;
- (c) the existing and future means and needs of the dependant;
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- (e) the conduct of the dependant in relation to the deceased;
- (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.”

20. This, the Court cannot do what is requested for dependants when the estate has not been called in and accounted for. Indeed, there must be a clear indication of what in the estate is capital, and what



is income. This is information that can be availed to a Court only by a person having the power of representation of the estate of the deceased. That is not the case here

21. Accordingly, it is my considered view that the preliminary objection has merit and it must be allowed. In the same vein, the applications dated 05th June 2025 and 27th October 2025 must be and are hereby, dismissed.
22. In the circumstances, the court hereby orders that the petition be heard in priority and expeditiously and, in any event, within 90 days hereof.
23. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 27TH DAY OF NOVEMBER, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Morris Njage for Petitioner

Wangira for Applicants 1, 3 & 5 Objectors

Kang'atta for Objectors

Francis Munyao - Court Assistant

