

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(FAMILY DIVISION)

SUCCESSION CAUSE NO. 3 OF 2018

IN THE MATTER OF THE ESTATE OF ELIUD TIMOTHY MWAMUNGA

JUDGMENT

1. The deceased herein died testate on **9<sup>th</sup> June 2018**. The deceased was survived by the following beneficiaries: Priscilla Chizi Mwamunga, Esther Sau Hoveka, Samuel Mazera Mwamunga, Elizabeth Malemba Mwamunga, Josiah Chola Mwamunga, Michael Mwaiga Mwamunga, Lois Kaindi Mwamunga, and Sheila Manga Mzungu. The deceased had several assets and liabilities. In his will dated **15<sup>th</sup> day of April 1983**, the decedent appointed the **Barclays Bank Trust Company of Kenya Ltd** as the executor of his will
2. The court appointed **Samuel Mazera Mwamunga** and **Josiah Chola Mwamunga** as the executors of the estate of the deceased on **17<sup>th</sup> March 2021**, in place of the Public Trustee who had been appointed in 2019, following the renunciation of the probate of the will by the executor appointed under the will.
3. In the ruling delivered on 30th September 2022, the court declared Ms **Sheila Manga Mzungu**, the objector, to be the biological daughter of the deceased and, therefore, a beneficiary of the estate. The court disallowed the prayer for revocation and directed the executors to file an application

for confirmation of the grant within 30 days of the ruling. The court stated that any person aggrieved by the proposed mode of distribution outlined in the summons for confirmation of the grant could file a protest. Furthermore, it ordered the executors to value the estate to determine its worth and settle liabilities before distribution.

4. Dissatisfied with the said decision, the executors appealed to the Court of Appeal, and on 21st February 2025, the appeal was dismissed. Subsequently, a summons for the confirmation of the grant dated 9<sup>th</sup> April 2025 was filed.
5. Sheila Manga Mzungu objected to the summons for confirmation of the grant via affidavit sworn on 7<sup>th</sup> May 2025. She stated that the court directed the administrators to file proper accounts, which they did, but that they neglected to provide supporting documents. She contended that on 1st March 2023, the court ordered the parties to appear before the Deputy Registrar to confirm and audit the accounts. She averred that the said order was not complied with, and thus the issue of accounts remains pending, rendering confirmation of the grant premature and malicious.
6. She further stated that during the period of the hearing of the appeal, the administrators sold some properties, the proceeds and distribution of which have not been disclosed and/or brought to the attention of the court. Ms Mzungu contended that the summons for confirmation was filed with the intention of dragging the matter, as the mode and nature of distribution had not been disclosed. She contended that the summons does not specify liabilities in actual figures or how beneficiaries will receive their shares.

Further, the administrators had not disclosed the costs of the suit in both the Court of Appeal and this court, which are substantial, and the same had not been taken into account, although they form part of the liabilities.

7. She urged the court not to confirm the grant and order the administrators to furnish the court with a full and frank statement of account, and the mode of distributions of the estate.
8. When the matter came up for hearing on 6<sup>th</sup> October 2025 the directed the parties to file written submissions in regard to the protest addressing the following issues; provide brief history of the matter and highlight key decisions, submit on the legal effect of the renunciation of executorship by Barclays, submit further on whether there is need for a company to be formed and if the estate should be liquidated and to provide appropriate case law for consideration by the Court.
9. The objector, through her counsel, Ambwere T. S & Associates Advocates, filed written submissions dated 8<sup>th</sup> October, 2025. Counsel submitted on one issue for determination, namely: whether a company to manage the residuary estate should be set up.
10. Counsel relied on Sections 53(a)(ii) and 56(2) of the Law of Succession Act and submitted that the executor, **Barclays Bank Trust Company of Kenya Limited**, renounced executorship under Section 59 of the said Act. He submitted that the will was silent on the appointment of another trustee or executor, where the named executor was unable to act. Furthermore, the will did not allow the beneficiaries to appoint another

trustee. He contended that the will can be interpreted as reflecting the deceased's intention to safeguard the residuary estate for his children, all of whom are now adults. Mr Ambwere submitted that it may not be practical to keep the estate in trust, especially given the strained relations between the children of the marriage and their stepsister. Counsel contended that the beneficiaries are now over 50 years old and therefore not the children envisaged by the deceased when he drafted the will in 1983.

- 11.** Counsel further submitted that the objector's stepsiblings had demonstrated that they do not require a trust to manage the estate. They had been managing the estate since the deceased's death, and the proposal to establish a trust at this stage was an afterthought, aimed at frustrating their stepsister and delaying distribution. He urged that clause 7 of the will sets out instructions for administering the residuary estate. The deceased's final intention was for his children to inherit equally. If a grant of letters of administration with a will annexed was issued and an administrator appointed to distribute the estate, the beneficiaries would be free to do as they wish with their shares, including forming a trust.
- 12.** Counsel submitted that it was the objector's wish to have the estate distributed equally to the beneficiaries and the administration finalised. He contended that the objector had suffered since the death of her father, whereas the other beneficiaries are staying and residing in the estate; their families are supported by the income of the estate, thus they have nothing to lose if the matter drags on for years.

- 13.** The administrators, through their advocates, **WG Wambugu & Co. Advocates**, filed their written submissions dated **14<sup>th</sup> October 2025**. Counsel submitted that since the deceased died testate and the executors had renounced executorship, the court ought to issue a grant of letters of administration with will annexed.
- 14.** Counsel further submitted that, since the Court declined to revoke the grant in its ruling of 30th September 2022, the answer to the third issue can be found in the will of the deceased dated 15th April 1983, specifically at clauses 1, 7, and 8. She stated that the will speaks for itself and is not ambiguous; it is clear that the deceased intended to create a trust and a company to hold the residuary estate and its income in trust for all his children who were then alive and, upon reaching the age of twenty-one years, if there was more than one child, in equal shares.
- 15.** Counsel relied on section 53(a)(ii) of the Law of Succession Act and submitted that renunciation by an executor appointed under the will does not ipso facto invalidate the will. Counsel urged the court to allow the administrators to incorporate a company to hold the estate in trust, in accordance with the deceased's wishes and Section 3D of the Trustee (Perpetual Succession) Act 2021.
- 16.** When the matter came up for highlighting of submissions on 16<sup>th</sup> October 2025, Mr Ambwere, learned counsel for the objector, submitted that clause 7(b) of the will is the area of concern. He stated that the testator intended that the estate would be shared equally. The beneficiaries were minors, and the testator appointed Barclays Bank as trustee. The deceased

did not envision a company; if he had wanted to set up a trust, he would have done so. Counsel urged that no clause in the will allows the same. If there is a company, the matter will be in court indefinitely, and there will be no end to litigation.

- 17.** Counsel submitted that the property should be distributed and the estate wound up.
- 18.** Ms Wambugu, counsel for the executors, submitted that the executors were seeking to confirm the grant. She urged that the affidavit in support of the summons sets out the names of the beneficiaries, including the objector.
- 19.** Counsel relied on Section 53 of the Law of Succession Act and submitted that, in confirming a grant with a written will annexed, the court considers the wishes of the deceased as set out in the will. Therefore, the estate should be distributed according to the will, whose language is clear. Even if they had the option to create a trust company, they would still need to confirm the grant. Counsel urged the court to confirm the grant.
- 20.** In reply, Mr Ambwere stated that there was no intention of establishing another company.
- 21.** I have considered the protest, the depositions submitted in support of or in opposition to it, and the oral and written submissions of the parties. I must decide whether the protest has merit.

22. I note at the outset that a considerable amount of time has been spent on the issue of accounts. This court, in its ruling of 5<sup>th</sup> May 2025, stated that:

**“I note that the administrators complied with the court orders by filing a list of valuation reports dated 17<sup>th</sup> February 2023, as well as reports and financial statements for the period from June 2018 to 31<sup>st</sup> December 2023, dated 20<sup>th</sup> February 2023 and filed on 21<sup>st</sup> March 2023.”**

23. The court found there was compliance. The said ruling was issued after the parties appeared before the Deputy Registrar of this Court twice and also before this honourable court on several occasions. Therefore, the claim that the orders to submit, file, and/or supply the court with full accounts of the estate have not been complied with or are still pending is false and must therefore fail.

24. What was the effect of the renunciation of executorship by the Barclays Bank Trust of Kenya Ltd? To answer this question, I will examine the relevant provisions of the Law of Succession Act. Section 53 of the said Act states that:

A court may—

**(a) Where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—**

**(i) Probate of the will to one or more of the executors named therein; or**

**(ii) If there is no proving executor, letters of administration with the will annexed; and**

**(b)if and so far as there may be intestacy, letters of administration in respect of the intestate estate.”**

**25.** Renunciation of executorship is provided for in section 59 of the Act.

The same states that:

**“Any person who has been appointed by a will as an executor thereof may, either by oral declaration before the court or by writing under his hand, renounce executorship, and shall thereafter be finally precluded from applying for grant of probate of that will.”**

**26.** Section 63 of the Act provides for where an executor appointed in the will has renounced executorship. It states that:

**“When a deceased has made a will, but—**

**(a)he has not appointed an executor; or**

**(b)the only executors appointed are legally incapable of acting, or have renounced their executorship, or have died before the testator or before receiving a grant of probate of the will, or have failed within the time limited by a citation to apply for probate thereof; or**

**(c)all proving executors have died before completing administration of all the property to which the will applies,**

**a universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted**

**to him of the whole estate, or of so much thereof as may be unadministered.”**

**27.** In Clause 1 of the will the testator appointed Barclays Bank Trust Company of Kenya Limited as the executor and trustee of his will and his wife as the guardian to his infant children. In clause 7 he bequeathed all the residue of his real and personal estate both movable and immovable of whatsoever nature and kind to his wife Priscilla during her life or widowhood and after her death or remarriage the company to hold the residuary estate in trust for all his children who are then living and who attain the age of twenty one years if more than one in equal shares. In clause 9, he stated that no income received prior to his death or the death or remarriage of any person entitled under the will to the income of his residuary estate or any part thereof shall be apportioned or treated as capital.

**28.** I have carefully read the will of the deceased. It seems to me that the deceased intended to provide for his issues indefinitely and believed that a trust company would be an ideal way to achieve that goal. Although Barclays renounced the role of an executor, the present executors' decision to establish a trust company aligns with the deceased's wishes as expressed in his will. The testator, exercising his testamentary freedom, expressed his wishes clearly. The role of the Probate Court is to give effect to those wishes.

**29.** I am in agreement with the counsel for the executors that renunciation by a named executor does not invalidate the will. That is, in

fact, the essence of section 53(a)(ii) of the Law of Succession Act, which I have quoted above. Further, the law gives the court power to issue a grant of letters of administration with will annexed. In this case, the court appointed two administrators to distribute the estate. The appointed executors desire to confirm the grant and to incorporate a trust company. I must point out that such a company may only be formed once the grant is confirmed.

30. I am guided by the case of **In re Estate of Fr. Joseph Kariuki Njino (Deceased) [2023] KEHC 3307 (KLR)**, where the court relied on sections 59 and 63 of the Law of Succession Act and stated: -

**“A residuary legatee is a person named in the will to receive the residue of the deceased’s estate, while a universal legatee is a residuary legatee that receives the entire residuary estate. It therefore needs to be established whether the deceased’s will had a residuary or universal legatee, and if not, who among them has priority to apply for a grant of letters of administration with will annexed.”**

31. The upshot of the foregoing is that the protest has no merit. The same is dismissed. I direct that the summons for confirmation of the grant be fixed for hearing forthwith so that the instant matter can be concluded.

32. I make no orders as to costs, as this is a succession cause between siblings.

33. It is so ordered.

**Dated and signed in Mombasa, this 20<sup>th</sup> day of February 2026.  
Delivered virtually through Microsoft TEAMS.**

**Gregory Mutai  
JUDGE**

In the presence of:

Mrs Wambugu, for the Executors/Respondents;

No appearance for the Objector; and

Ms Bancy – Court Assistant.

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