



REPUBLIC OF KENYA



In re Estate of Esther Nungari Kihuithia (Deceased) (Succession Cause 1227 of 2016) [2025] KEHC 9257 (KLR) (Family) (27 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1227 OF 2016
PM NYAUNDI, J
JUNE 27, 2025
IN THE MATTER OF THE ESTATE OF ESTHER NUNGARI KIHUITHIA (DECEASED)**

RULING

1. Before this Court is for summons for Confirmation of Grant dated 12th October 2021 in which the Administrator sought the following orders:
 1. That the Grant of Probate for Letters of Administration intestate made to James Godfrey Wachira on 23rd October 2018 be confirmed as the statutory period of six months has expired.
 2. The costs of this Application be in the cause.
2. The summons was supported by the Affidavit of even date sworn by the applicant/administrator.
3. Before the Summons for Confirmation of Grant was heard and determined, Jamaa Kihuithia Waweru And Jamila Nungari Waweru (the Protestors) filed an affidavit of protest on the proposed mode of distribution dated 13th August 2024. They are opposed to the mode of distribution proposed by the administrator. They argue that the administrator failed to include three bank accounts and 4 shares held by the deceased in the list of assets of the deceased as enumerated in paragraphs 2 and 5 of the affidavit of protest.
4. They also argued that the estate has rental apartments and the beneficiaries have not been told how the proceeds have been utilized for the last twelve years. They asked the court to compel the administrator to provide certified copies of title documents belonging to the estate. That the estate property should be shared equally among all the beneficiaries.
5. The Administrator filed a Preliminary Objection dated 6th November 2024 on the following four grounds;



- i. That the protestors herein lack the requisite locus standi to protest in this matter as they are grandchildren to the late Nunaari Kihuithia and have not acquired the requisite documents to entitle them the right to protest in this matter as required by the *law of succession Act*.
 - ii. That protestors herein have merely stated properties claimed not to have been included in the proposed mode of distribution without any supporting evidence of the same.
 - iii. That, the protest herein is misconceived, scandalous and an abuse of this Honourable court.
 - iv. That, the protest is bad in law and a waste of Court's time and resources.
6. The objectors responded to the preliminary objection by filing a replying affidavit dated 18th November 2024. They averred that they are the grandchildren of the deceased and are representing the estate of their late father David Mburu Kihuithia. They argued that in the summons for confirmation of grant, the administrator recognized them and even allocated them property and therefore, the issue of locus standi is unfounded. They argued that the second ground raised by the administrator is a point of fact and not law. That the preliminary objection is incurable and ought to be struck out.

Objectors Submissions.

7. The Objectors Submissions are dated 15th May 2025. They framed the following as issues to be determined by this court;
- i. Whether the Protestors have the requisite locus standi in the matter;
 - ii. Whether the protest ought to be dismissed for failure to produce supporting evidence of the properties claimed;
 - iii. Whether the protest is misconceived, scandalous, and an abuse of the court process; and
 - iv. Whether the protest is bad in law and a waste of the Court's time and resources.
8. On the first issue, they submitted that the *Probate and Administration Rules* (Legal Notice No. 104 of 1980), specifically Rule 40(6), provides that:
- Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.
9. They argued that the term any person has not been defined and therefore, being the sons of David Mburu Kihuithia who is a son of the deceased, they have an interest in the deceased's estate and therefore the issue of locus standi does not suffice.
10. On the second issue, they argued that the issue of producing evidence at this point is premature and can only be determined at a hearing.
11. On the third issue, it was their submission that their protest raises legitimate questions regarding the deceased's estate and if they are not addressed now, it will result in miscarriage of justice. That the protest was filed in good faith and on time.
12. On the fourth issue, they submitted that the protestors have raised valid grounds in their affidavit of protest and cannot therefore be said that it is bad in law. It was argued that the Respondents Preliminary objection fails to raise a point of law and instead seeks to examine the substance of the Protest which falls outside of the functions of a Preliminary Objection. They urged the court to dismiss the preliminary objection.



Administrator's Submissions.

13. The administrator's submissions are dated 14th May 2025. It was the administrator's submission that although the Objectors are the grand children of the deceased, they have not taken out letters of administration regarding the estate of their father and therefore, they do not have the locus standi to file a protest. He sought to rely on the decision of *Re Estate of M'Ngarithi M'Miriti (Deceased)* [2017] eKLR where the court held that grandchildren of a deceased person have no automatic right to inherit unless they prove dependency or are included by their deceased parent's share. That the objectors have all along been aware of these proceedings and have been adequately provided for.
14. The administrator further submitted that the objectors have not shown any proof by way of title deeds, search certificates or affidavit that some properties belonging to the deceased were left out. Therefore, the affidavit of protest does not raise any triable issues and ought to be struck out with costs. He urged the court to uphold his preliminary objection.

Analysis And Determination

15. I have considered Protest filed as well the submissions of the parties herein.
16. There are two issues for determination;
 - a. Whether the Preliminary Objection is merited.
 - b. Who should pay costs of this Suit?
17. A Preliminary Objection which was defined in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

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... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
18. The question that arises from the preliminary objection is whether the objectors have locus standi to file an affidavit of protest. This question was addressed in the case of *Re Estate of Wahome Njoki Wakagoto* [2013] eKLR where W. Musyoka J held as follows:

Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.



19. Further, the Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR held as follows:

Although Section 35 and 38 of the *Law of Succession Act* is silent on the fate of surviving grand children whose parents predeceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The Law is section 41. If a child of the intestate has pre-deceased, the intestate then that child's issue alive or in centre as mere on that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate take between them the share their parents would have taken had the parent been alive at the intestate's death

20. I am aware of some authorities which advance the view that a grandchild can only claim the share in his/her grandparent's estate if he/she holds a grant of representation over his own late parent's estate. In the case of *Cleopa Amutala Namayi v Judith Were* Succession Cause 457 of 2005 [2015] eKLR Mrima, J observed as follows:

“Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents (sic) who died intestate after 01/07/1981 when the Act came into operation. The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents (sic) indirectly through their own parents, the children of their grandparents. The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren's own parents are dead. Those grandchildren can now step into the shoes of their parents and take directly the share that ought to have gone to the said parents. Needless to say, such grandchildren must hold appropriate representation on behalf of their parents.” (emphasis mine).

21. In my view, having described themselves as a grandchild of the deceased and it not being in dispute that their father died before distribution of the estate of their grandfather, I find that the objectors disclosed a legally recognized interest. I do not agree that the said interest was dependent on his being a legal representative. The only burden that the Appellant was to discharge was to prove the allegations made in their affidavit of protest.

22. In this regard, I am persuaded by the decision of H.K. Chemitei J in In *re Estate of Hellen Wangari Wathiai (Deceased)* [2021] eKLR where while declining to shut out a grandchild from claiming a share in his grandfather's estate on the alleged ground of not holding a grant of representation over his parent's estate, stated as follows:

52. The evidence on record suggest that the Applicant herein brought these proceedings on behalf of his father; Abdi Ibrahim Hassan (deceased) who was the beneficiary to his father's estate. The Applicant's interest emanates from the fact that his father was a beneficiary to the suit property, thus the Applicant being dependent to his father Abdi Ibrahim Ibrahim's estate within the provisions of Section 29 of the *Law of Succession Act*, he acquires an interest in his grandfather's estate; the suit property by virtue of his father's share. Therefore, in the court's view, the instant Application is properly before this court.

53. In my humble view, therefore, it is clear that the applicant had the locus standi and he was rightfully before the court to fight for the interests of the estate of his late father with regard



to the deceased grandmother's estate. The fact that he was a grandchild of the deceased taken care of by his deceased grandmother prior to her death and a dependant of his father's estate has not been disputed.

54. This therefore supports the fact that he and his sister acquired interest over the deceased's grandmother's estate and thus he had the necessary locus standi.....
23. In the case of In *re Estate of Imoli Lubatse Paul (Deceased)* [2021] eKLR, W. Musyoka J stated as follows:
3. In the instant case, the applicant, in the summons for revocation of grant, is a child of a dead son of the deceased herein. The applicant is claiming directly by dint of In *re Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR (Musyoka J) and In *re Estate of Florence Mukami Kinyua (Deceased)* [2018] eKLR (T. Matheka J), and does not require to take out letters of administration to intervene in the estate of her late grandfather, where her own parents are dead. Secondly, apart from case law, the provisions of the *Law of Succession Act* cover these situations. Section 39 of the *Law of Succession Act* makes grandchildren heirs in intestacy, where their own parents, who are biological children of the deceased, are dead. Section 41 of the *Law of Succession Act* is the provision that enables grandchildren to step into the shoes, of their own parents, and to step into those shoes they need not take out letters of administration.
24. In the circumstances, I find that the objectors while claiming as grandchildren of the deceased and claiming their own late father's share of the grandfather's estate, had the requisite locus standi to file an affidavit of protest or any other application.
25. The Objection also states the Protest must fail as the Protestors have not substantiated any of the claims they make as to the existence of bank accounts and shares owned by the deceased. This in my view is not a question of law and at this stage is curable by granting leave to the protestors to file further affidavit with proof of ownership of the assets by the deceased.
26. I also note that 2 other beneficiaries have objected to the confirmation of the grant.
27. In the final analysis, leave is granted to the Protestors to file further affidavit with proof of ownership of the assets they wish to be included as part of the estate of the deceased available for distribution within 14 days from the date hereof. Corresponding leave is granted to the administrator to file supplementary affidavit if required within 14 days of service.
28. The matter will be mentioned on 30th July 2025 to confirm compliance and take directions on the hearing of the Summons for Confirmation.
29. Owing to the relationship between the parties there shall be no order as to costs.
- It is so Ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 27th DAY OF JUNE, 2025.

P. M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Ms. Mukiyi for Respondent/Protestors

Fardosa Court Assistant

