



In re Estate of Margaret Wanjiru Kihanya (Deceased) (Succession Cause E1752 of 2021) [2024] KEHC 15519 (KLR) (Family) (22 February 2024) (Ruling)

Neutral citation: [2024] KEHC 15519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E1752 OF 2021
EKO OGOLA, J
FEBRUARY 22, 2024
IN THE MATTER OF THE ESTATE OF MARGARET WANJIRU KIHANYA (DECEASED)**

BETWEEN

PETER KIHANYA MUIRURI 1ST ADMINISTRATOR

LUCY NJOKI KIHANYA 2ND ADMINISTRATOR

AND

STANLEY T NDUATI 1ST PROTESTOR

SIMON KARANJA NGUGI 2ND PROTESTOR

RULING

Background:

1. Before this Court is a summons for confirmation of grant filed by the 1st and 2nd Administrators/ Applicants, Peter Kihanya Muiruri and Lucy Njoki Kihanya; dated 6th April, 2023 seeking for confirmation of grant before the lapse of the statutory 6 months and stating that all the beneficiaries to the deceased's estate agree with the early confirmation. They have also filed the following accompanying documents:
 - a. Affidavit in support of summons for confirmation of grant sworn on 6th April, 2023.
 - b. Replying affidavit sworn by the 2nd Administrator/ Applicant on 26th June, 2023.
 - c. Summons dated 21st July, 2023.
 - d. Supporting affidavit sworn by the 2nd Administrator/ Applicant on 21st July, 2023.
 - e. A replying affidavit sworn by the 2nd Administrator/ Applicant on 26th July, 2023.



- f. A further affidavit sworn by the 2nd Administrator/ Applicant on 5th December, 2023.
 - g. Written submissions dated 13th December, 2023.
2. The 1st Protestor, Stanley T. Nduati, has filed the following documents:
- a. An affidavit of protest against confirmation of grant sworn on 8th June, 2023.
 - b. A witness statement sworn on 17th October, 2023.
 - c. A supplementary affidavit sworn on 17th October, 2023.
 - d. A further affidavit sworn on 26th October, 2022.
 - e. A replying affidavit sworn on 8th December, 2023.
 - f. Written submissions dated 8th December, 2023.
3. The 2nd Protestor, Simon Karanja Ngugi, has filed the following documents:
- a. An affidavit of process against confirmation of grant sworn on 18th July, 2023.
 - b. A witness statement sworn on 7th December, 2023.
 - c. A further affidavit sworn on 7th December, 2023.
 - d. Written submissions dated 7th December, 2023.
4. The 1st protestor's, case is that the deceased engaged his legal services to act for her, the beneficiaries and the administrators in Kiambu High Court Succession Cause No. 65 of 2017: Re Estate of Josephat Muiruri Kihanya and to draw a construction agreement between the deceased and a contractor by the name, Simon Karanja Ngugi, the 2nd Protestor herein. Both instructions were successfully and conclusively executed but the deceased failed to pay the respective legal fees earned despite the same being demanded for. He raised various bills of costs that awarded him a total amount of Kshs. 40, 341, 272. 20 as follows:
- a. Kiambu High Court Civil Miscellaneous Application Number E055 of 2021: Nduati & Company Advocates – vs – Margaret Wanjiru Kihanya which awarded him Kshs. 3, 534, 380. 00.
 - b. Kiambu High Court Civil Miscellaneous Application Number E028 of 2021: Nduati & Company Advocates -vs- Margaret Wanjiru Kihanya which awarded him Kshs. 34, 956, 431. 00.
 - c. Milimani High Court Civil Miscellaneous Application Number which awarded him Kshs. 1, 841, 461. 00.
5. The 1st protestor faults the administrators for failing to disclose to this court that the deceased's estate owed his firm the Kshs. 40, 341, 272. 20 aforementioned and prays that:
- a. The debt be identified as a liability on the estate's assets and the administrators, pending the determination of the taxation court; to offer security for fulfilment of the debt owed to the firm failure to which the grant should not be confirmed as confirmation of the grant will grant the administrator's license to distribute the assets of the estate without settling the legal fees owed to the detriment of the firm.



- b. The title deeds and/ or certificates of lease and transfer forms (duly executed by the administrators) to Land Reference Numbers North East of Ruiru Town/ Kiambu 11612/ 98, 11612/ 99, 11612/ 100, 11612/ 101, 11612/ 102 and 11612/ 103 be deposited with the Deputy Registrar of this Honourable Court pending the conclusion of the taxation causes above.
 - c. The affidavit in support of the petition for letters of administration intestate sworn by Peter Kihanya Muiruri on 5th October, 2021 be amended and/ or be supplemented with a further affidavit acknowledging the claim for legal fees by Nduati & Company Advocates as a liability on the estate.
6. The 2nd protestor's case is that the deceased engaged his contractor services vide construction agreement dated 4th April, 2010 for a sum of Kshs. 74, 070, 207. 54. He was paid a commitment fee of Kshs. 1, 000. 000. 00 and the remaining balance of Kshs. 73, 070, 207. 54 remain unpaid. In the course of execution of his instructions, the deceased renegotiated the payment terms of the agreement aforementioned where it was agreed that the deceased would transfer to him some plots as consideration for his services. As at 30th November, 2018, he had done work valued at Kshs. 44, 669, 458.00. He instituted Nairobi HCCOMM E528 of 2020: Simon Karanja Ngugi -vs- Margaret Wanjiru Kihanya, a liquidated claim which was referred to arbitration by virtue of clause 15 of the agreement aforementioned. The deceased died while negotiations were ongoing on appointment of the arbitrator. The debt remains unpaid and his claim is for the whole of the remaining contract sum to be paid.
7. In response to the 1st and 2nd Protestors, the 2nd Administrator/ Applicant responds that:
- a. The 1st Protestor was paid all legal fees earned by the deceased and that he is holding 6 title deeds out of which he has transferred 2 titles himself i.e. L. R. No. 11612/ 51 and L. R. 11612/ 49. He is holding titles for L. R. No. 11612/ 47, L. R. No. 11612/ 48, L. R. No. 11612/ 50 and L. R. No. 11612/ 52.
 - b. The 1st Protestor retained Kshs. 850, 000. 00 being part of the money received by him from purchasers of properties he was selling on behalf of the deceased in lieu of legal fees.
 - c. The 2nd Protestor's claim against the deceased's estate is unwarranted because it has not crystallized as there is no decree passed against the estate and the alleged debt is subject to determination in arbitration which is yet to commence.
8. In response to the foregoing, the 1st Protestors states, with evidence availed, that:
- a. L. R. No. 11612/ 51 and L. R. 11612/ 49 were transferred to him by the deceased on account of the following legal services:
 - i. 2010: Protecting the deceased's interests in Succession Cause No. 523 of 1996 Estate of James Ngengi Migai (hereinafter "Ngengi's Estate") wherein he successfully obtained injunctive orders against the distribution and wasting of her bequest.
 - ii. 2014: Obtaining orders separating the deceased's estate (being a portion of land measuring 158. 147 acres) that had illegally been combined with the assets of Ngengi's estate and having the same extracted and transferred to the deceased.
 - iii. 2018 – 109: Kshs. 850, 000. 00 held as lien for legal services to the deceased in connection to reviewing and executing over 432 leases, the result of sub – division of I. R. 20910 L. R. No. 11612.



9. The 1st Protestor has not denied holding the titles for L. R. No. 11612/ 47, L. R. No. 11612/ 48, L. R. No. 11612/ 50 and L. R. No. 11612/ 52.
10. The 2nd Protestor has not responded to the 2nd Administrator/ Applicant’s response to his claim.

Determination:

11. In re Estate of Mukhoobi Namonya (Deceased) [2020] eKLR, Judge Ong’ino stated as follows:

“...the omission of persons who claim to be claimants from or creditors of the estate is not a ground for revoking a grant. After all, creditors of an estate are entitled to have their debts settled. It is for this reason that debts and liabilities are given priority over distribution of the estate. Debts and liabilities ought to be settled first. Distribution is of the net estate, after the debts and liabilities have been met [Emphasis mine]. The administrators have a duty to identify the creditors of the estate and to pay them off before proposing distribution, or to make provision for them at confirmation of grant. Such claimants and creditors have an obligation to place their claims before the administrators [Emphasis mine], and should the administrators fail to settle the same or acknowledge them, move the Environment and Land Court to prove their claims, since the High Court no longer has jurisdiction to determine questions around ownership of immovable property in view of Articles 162 (2) and 165 (5) of *the Constitution*.

Who exactly is the creditor of the estate or what ought to be treated as a liability of the estate. The most obvious candidates are individuals or entities that transacted with the deceased during his lifetime. Debts that the deceased left unsettled are a burden that the administrators of his estate ought to take care of. Transactions that he left incomplete, such as for sale of land by him or to him, should be completed by the administrators. The administrators are able to do so through the powers conferred upon them by section 82 of the *Law of Succession Act*, being mindful of section 79, which vests the assets of the estate in the administrator. Section 83 imposes a duty on administrators to settle such debts before distributing the estate.

One of the duties of administrators, set out in section 83 (d) of the *Law of Succession Act*, is to ascertain and pay out of the estate all the debts of the deceased. Ascertainment of the debts of the estate is about identifying them, in terms of finding who the creditors were, how the debts were incurred, what documentation is available, before pay out can be done [Emphasis mine]. If the debts arose during administration, and were necessitated by the exigencies of administration, such as where funds were needed to pay for the administration process, in terms of money for court fees, advocates costs, land rents and rates, taxes and attendant expenses, then section 83 (c) of the *Law of Succession Act* would be relevant. That provision requires administrators to pay out of the estate all the expenses of obtaining the grant and all other reasonable expenses of the administration. Where estate assets have been dissipated to address the expenses envisaged in section 83 (c) then it must be stated what these expenses were, how they arose and how they were settled. The same would apply where certain debts and liabilities of the estate needs to be settled and estate assets had to be sold to facilitate the settlement of such debts. Section 83 (d) of the *Law of Succession Act* requires administrators to ascertain and pay, out of the estate, all the debts of the deceased. In addition, section 83, at paragraph (e), requires the administrators to render accounts of their administration within six months of their appointment.”



12. In light of the text above, I find that the 1st and 2nd Protestors have justified claims against the deceased's estate. The 1st and 2nd Administrators/ Applicants have not denied the existence of his claims save that they have given various reasons as to why these claims should not be settled. This court lacks jurisdiction to address the merits and demerits of the said claims and the reasons given against them.
13. The total claim by the 1st and 2nd Protestors amounts to Kshs. 113, 411, 479. 54. Whether those claims are merited will be subject to another process.
14. However, the 1st Protestor's case is fairly ascertainable as his claim arising from briefs given to him by the deceased has been taxed. It is therefore necessary to protect the interest of the 1st Protestor and to that extent, I direct that the Administrators/ Applicants deposit in court six (6) titles commensurate with the outstanding claim of the 1st Protestor.
15. As for the 2nd protestor, his claim is very speculative and is still under arbitration. He claims to have done work over Kshs. 44, 000, 000. 00 and claims a further Kshs. 29, 000, 000. 00 for alleged damages for breach of contract. Although his claim remains speculative and unascertained, there is a possibility that it might succeed, and so this court needs to ensure that the estate is not distributed wholly considering the 2nd Protestor's claim.
16. However, I am not prepared to protect the entire speculation. I will restrict myself to the amount the 2nd Protestor states he is owed, not the amount arising after the alleged termination of the contract. In that regard, I direct the Administrators/ Applicants to identify 6 properties whose approximate worth is Kshs. 45, 000, 000. 00 and deposit the titles to the said properties in this court to act as security for the claims by the 2nd Protestor.
17. Pursuant to the directions issued by this court on 13th February, 2024, the Administrators/ Applicants have deposited 12 titles as security for the claims of the 1st and 2nd Protestors. The securities are as follows:

Security for the claim by Nduati & Company Advocates (1st Protestor):

1. North East of Ruiru town/ Kiambu 11612/ 98.
2. North East of Ruiru town/ Kiambu 11612/ 99.
3. North East of Ruiru town/ Kiambu 11612/ 100.
4. North East of Ruiru town/ Kiambu 11612/ 101.
5. North East of Ruiru town/ Kiambu 11612/ 102.
6. North East of Ruiru town/ Kiambu 11612/ 103.

Security for claim by Simon Karanja Mbugua (2nd Protestor):

1. North East of Ruiru town/ Kiambu 11612/ 95.
2. North East of Ruiru town/ Kiambu 11612/ 96.
3. North East of Ruiru town/ Kiambu 11612/ 97.
4. North East of Ruiru town/ Kiambu 11612/ 16.
5. North East of Ruiru town/ Kiambu 11612/ 17.



6. North East of Ruiru town/ Kiambu 11612/ 18.

18. The parties' advocates were granted the opportunity in court on 15th February, 2024 to verify and comment on the said titles. They all approved them. These twelve (12) titles, now deposited herein, shall remain as security for the protestors' claims.
19. However, the claims by the protestors must crystalize within twelve (12) months from the date of this ruling. That means that these titles shall operate as security for a period of twelve (12) months from today. After that period has expired the Administrators/ Applicants shall be at liberty to distribute these titles or residue thereof to the beneficiaries of the estate in accordance with the confirmed grant.
20. The Administrators/ Applicants are therefore directed to administer the remainder of the estate in terms of the confirmed grant herein.
21. The grant herein is therefore confirmed in those terms.
22. Parties shall carry their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

E.K. OGOLA

JUDGE

In the presence of:

Mr. Mikwa h/b for Mr. Gitonga for the 1st and 2nd Administrators/ Applicants.

Mr. Njoroge h/b for Mr. Nduati for the 1st Protestor.

Mr. Kyalo h/b for the 2nd Protestor.

Gisiele Muthoni – Court Assistant

