



REPUBLIC OF KENYA



In re Estate of Mary Mbula Muindi (Deceased) (Succession Cause 68 of 2008) [2024] KEHC 13462 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 68 OF 2008**

MW MUIGAI, J

OCTOBER 25, 2024

IN THE MATTER OF THE ESTATE OF MARY MBULA MUINDI (DECEASED)

BETWEEN

MUNGUTI MUINDI ADMINISTRATOR

AND

JAMES MUSYOKA MUINDI ADMINISTRATOR

JUDGMENT

Background

1. The deceased died on 28th January 2004.
2. The Petition was filed on 14/2/2008 and after gazettelement the grant of letters of administration was issued on 7th May 2008 to the Petitioner.
3. The Petitioner filed Summons for Confirmation of grant on 10th March 2009 and Amended Summons dated 4th May 2022 and deposed as follows;

The deceased was said to be survived by;

- a. Munguti Muindi Son
- b. Mukulu Muindi Daughter
- c. Mutisya Muindi Son
- d. Musyoka Muindi Son
- e. Grace Muindi Daughter
- f. Muthoki Muindi Daughter



- g. Muthini Muindi Daughter
- 4. The Properties of the estate were listed as follows and the proposed mode of distribution as follows;
 - a. Plot No 39 Kitanga Settlement Scheme measuring 71.6 Acres- to be shared equally among the beneficiaries

Amended Summons for Confirmation of Grant

- 5. The administrators filed their amended summons for confirmation on 5th May 2022 where they prayed that the grant of letters of administration intestate be confirmed pursuant to paragraph 5 of the affidavit
- 6. That the identification and shares of all the persons beneficially entitled to the said estate be determined as follows Land Parcel Number Machakos/Kitanga 39 measuring approximately 71.5 acres be shared among the following
 - a. Munguti Muindi 17.5 Acres
 - b. Mutisya Muindi Maitha 17.5 Acres
 - c. James Musyoka Muindi 17.5 Acres
 - d. Grace Muindi 6 Acres
 - e. Muthoki Muindi 6 Acres
 - f. Muthini Muindi 6 Acres
 - g. Philip Wambua Musila 1 Acre
- 7. Plot No. 48 Upper Kitanga Trading Centre (Kitanga Settlement Scheme)- Munguti Muindi

Affidavit of protest to Confirmation of Grant

- 8. The 2nd administrator/Protestor averred in his affidavit of protest dated 3rd August 2022 that the amended summons for confirmation of grant had not disclosed all the assets and liabilities of the deceased estate. That the deceased had 3 plots namely Kitanga Commercial Plots No.48, 81 and Plot 39 which was jointly owned by him and the deceased.
- 9. He contended that the Commercial Plot 81 was allocated to 3 members of Kitanga Co-operative Society as co-owners and each one was entitled to a third share of the property. The three owners were the deceased herein, Ann Mukono and Mutio Kasome and Plot 48 was allocated to the deceased as a single owner
- 10. He averred that the 1st administrator was being dishonest in saying he bought the Commercial Plot 48 from the deceased yet it was owned by 3 people who sold to Paul Mutisya and later to Mrs Kitonga and that Commercial plot 81 belonged to 3 people and the agreement annexed was a forged document.
- 11. He contended that the 1st administrator failed to reveal that he was a Co- owner of Plot No 39 where he is entitled to half of the Plot (34 acres) and that his share ought to have been included as a liability of the estate of the deceased considering the deceased had not processed the title to reflect his share at the time of death.
- 12. He stated that his mother, the deceased, and her brother purchased a share at Kitanga Framers Co-operative and the deceased was registered as a member, the deceased then nominated him as the next



- of kin where he was granted the original document from the society. His mother then advised him to refund the brother the amount he contributed towards the share so that the benefit be limited to the family. He also paid Kshs 5229 towards settlement of a loan to be able to benefit from the proceeds of the shares of the society and upon the settlement they were given a go ahead to proceed and get a title.
13. That after his mother's death a dispute arose amongst them the distribution of Plot 39 which was heard by the clan and it was held that the property was jointly acquired by the deceased and him and he is therefore a beneficiary of half of the property
 14. He indicated that he contributed half of the proceeds towards the acquisition of Plot 39 and thus they were joint owners of the property and that joint properties are not to be subjected to succession and thus Plot 39 shouldn't be subjected to succession or in the alternative it be distributed into 2 equal instalments where half goes to him and the other half to be distrusted equally amongst the deceased children.
 15. That the 1st administrator also failed to include medical bills for the deceased and that the sale agreement dated 21st February 2000 is a forged document with forged signatures and the 1st administrator should be charged with intermeddling with the deceased properties

HEARING

PROTESTOR'S CASE

16. PW1, JAMES MUSYOKA MUINDI stated that he filed protest to the summons for confirmation of grant amended dated 4/5/2022. The plots were Machakos/Kitanga /39 Settlement Scheme and 2 Commercial Plots 48 and 81. Plot 81 was owned by 3, Mary Muindi his mother, Mutio Kisome and Ann Mukono. They paid Kshs 1000 to get a share. His mother got money from his brother Kshs 500 and she paid the other 500 a share was Kshs 1000. The share was in the name of the deceased Mary Muindi. He refunded his mother's brother the amount and the land remained in the name of the deceased. and himself. He refunded in 1968. He had evidence- receipt of payment.
17. Kitanga Coop Society had a loan and after that it became Kitanga Settlement Scheme, the members paid Kshs 10,000. In 1979 Kitanga Coop society changed to Kitanga Settlement Scheme. He was to pay Kshs 5,209 and paid Ksh 1,209 and had documents to show what he paid. The documents show the following settlement fund 31/3/85-3207, 5229. He paid through his mother's name as he was not a member of the settlement scheme. His mother nominated him that in the event of her death he was to get the shamba. His mother then gave him the go head to process the title. After the death of his mother in 2004, they had a dispute with his brother. They claimed that the whole shamba was theirs. He called family meeting and they did not agree. The Chairman of the clan took over and it was agreed that the shamba belonged to mother and son. They then went to the tribunal and he was given 5 acres. He appealed and the matter was stopped by his brother who filed a Succession Cause in the High Court. He saw a Surveyor.
18. On cross examination he stated that Plot No 39 and 48 belonged to his mother. He paid his mother's brother for the share of the settlement scheme. He is claiming half of the suit property 39,48 and 81. They went to the wazee and they did not determine. They went to the Clan who said the shamba was for mother and son. The Tribunal said the brother gets 5 acres. The land belonged to his mother but he had a share. There is no agreement between him and his mother that he gets half a share. The amount his mother gave for Philip masila is not in dispute. He did not say his mother gave him all the land. She made him a nominee that if she died the



shamba would go to him. His mother was told to nominate him and that is why she nominated him. His brother refused him to take the land. The Plots Kitanga Settlement Scheme Plot 39, Commercial Plot 48 and 81 belonged to the deceased.

19. PW2, James Maingi stated that he was the chairman of the Atii Anthanzu Clan where they heard a dispute on 20/10/2004 and determined that Musyoka paid the brother of his mother who stated that the money was returned to him by Musyoka. They determined that the shamba was for 2 people Musyoka & Musyoka.
20. Upon cross - examination he said there was a will from the deceased that money was paid by Musyoka to her brother.
21. That marked the close of Protestors case.

PETITIONER'S CASE:

22. Paul Mutisya Kilui adopted his statement of 5/5/2022 as his evidence in court.
23. On Cross – examination he stated that he bought Plot 81 Kitanga Settlement scheme from Mary Mbula Muindi, Ann Mutomo and Kasome. He had not produced any document agreement that he bought the property. He was the Treasure of Kitanga Settlement Scheme.
24. Munguti Muindi the 1st administrator stated that he wished to adopt his statement and exhibits as his evidence. Philip Wambua Musila was paid by their mother and he obtained the same. Paul Mutisya was on Plot 81.
25. On cross examination he stated that they agreed that 17.5 acres goes to him, 17.5 acres to his brother James and the girls get 6 acres each. They got the agreement for sale of land and sold the land and he bought plot 48 and plot 48 agreement was signed by his mother and she put her finger print. Plot 81 was for 3 people. They sold it to the buyer who was in court but they did not have the document. His late mother died in 2004. James Musyoka was older than him. Land Parcel Machakos/Kitanga/39-71.5 acres to be shared amongst the children.
26. Parties filed submissions.

1st Administrator's submissions dated 22.7.24

27. The 1st administrator submitted on two issues. The first was whether the protester was entitled to half a share of the deceased estate and how should the estate be distributed. It was submitted that the Protester had not adduced any evidence to support his assertion that he co –owned the property with the deceased and that the documents produced by the 1st administrator shows that the deceased solely owned the property.
28. Reliance was made to the case of Re Estate of G K K (deceased) [2017] on the primary function of the probate court is to facilitate distribution of the estate of the deceased person.
29. Reliance was also made to the case of Re estate of Stone Kathuli Muinde (deceased)[2016] eKLR to buttress the point that the issue of ownership cannot be determined by a probate court
30. It is submitted that the Protestor has thus not proved his co ownership claims and is not entitled to half the share of the estate
31. Second issue is on how the estate should be distributed, it was submitted that the mode of distribution proposed by the 1st administrator has been endorsed by all the beneficiaries except the protestor who has not provided his preferred mode.



32. Plot 48 should be distributed to the 1st administrator who had bought from the deceased as confirmed in the sale agreement made on 21/2/2000.
33. Plot 81 Kitanga Settlement Scheme, the evidence shows that the same is not part of the estate as it had been sold by allottees the deceased, Ann Mukono and Mutio Kasome. Paul Kilui testified that he bought Plot No 81 and subsequently sold and transferred the same to Mrs Kitonga position confirmed by the Protestor during cross examination.
34. The court was urged to dismiss the protest dated 3/8/2022 and proceed to confirm the amended summons dated 4/5/2022.

PROTESTOR'S SUBMISSIONS DATED 8.07.2024

35. It was submitted that the Property in contention is Kitanga 39 and Commercial property 48 and 81. That he has demonstrated that he paid more than half of the loan amounts and produced all receipts. The Protestor relied on Section 2 of the Land Act 2012 which defined Joint tenancy and its four main essential elements
36. That the 1st administrator went to court with unclean hands to disinherit his siblings and also to take what does not rightfully belong to him. The 2nd administrator had confirmed that he was nominated by the deceased as her successor in the Kitanga Settlement Scheme and that he contributed to the purchase of the properties of the deceased and should be granted half of the property.
37. Reliance was placed on Rule 41(3) and 42(2) of the Probate and Administration Rules which empowers the court before confirmation of grant to remove property which is in contest from the schedule of assets and have the same determined separately. Reliance was made to the case of Francis Peter Njuguna [2016] eKLR and the case of In Re Estate of Tumbo Lavu (deceased) [2019] KLR.
38. Reliance was also made to the case of Priscilla Ndubi and Zipporah Mutiga vs Gerishon Gatobu Mbui Meru Succession Cause No 720 Of 2013 to buttress the primary duty of the Probate Court.
39. It was submitted that disputes regarding ownership in respect of property of a deceased person, the court can set aside the share in the dispute as it awaits the outcome and sale transfer of land disputes can only be determined by the Environment and Land Court.
40. Reliance was made to the case of Kinogu Mukiria (deceased) [2022] to buttress the limb that where issues to be determined are so intertwined that you cannot separate the Succession matter from the Environment matter, the succession court has jurisdiction to determine the matter.
41. It was also submitted that the protest raises valid points and the 2nd administrator has shown the court the nomination certificate dated 5/9/1968 and witnessed by the Cooperative Society and well signed. The Protestor has proved that he contributed to the purchase of the properties by paying the loan and that has not been objected by any party. The Protestor thus has a right to own the property both as a nominee and legal owner by virtue of contribution.

Determination

42. The Court considered the Amended Summons for Confirmation by the Petitioner, Affidavit of Protest to the Confirmation of grant, the testimonies of parties and written submissions and finds that the issues for determination are;
 - a. Whether the protester is entitled to half the property



- b. How the estate property should be distributed.
43. It is not in dispute that the deceased was the mother of the 1st administrator and 2nd Administrator. It is not in contention that the following are estate properties;
- a. Machakos/kitanga/39
 - b. PLOT 48 Kitanga Settlement Scheme
 - c. Kangundo/katitu/644
44. It is also not in contention that the following are the beneficiaries of the estate
- a. Munguti Muindi Son
 - b. Mukulu Muindi Daughter
 - c. Mutisya Muindi Son
 - d. Musyoka Muindi Son
 - e. Grace Muindi Daughter
 - f. Muthoki Muindi Daughter
 - g. Muthini Muindi Daughter
45. The deceased died intestate and the Petitioner filed Petition for Grant of Letters of Administration intestate. Therefore, the estate of the deceased herein is to be distributed as per the provisions of intestacy under *Law of Succession Act*.
46. In this case, the issue in contention is the ownership of the Kitanga Plot No 39 . 2nd Administrator contended that the 1st Administrator failed to reveal that he was a co-owner of Plot No 39 where he is entitled to half of the plot (34 acres) and that his share ought to have been included as a liability of the estate of the deceased considering the deceased had not processed the title to reflect his share at the time of death.
47. He stated that his mother the deceased and her brother purchased a share at Kitanga Framers Cooperative and the deceased was registered as a member, the deceased then nominated him as the next of kin where he was granted the original document from the society.
48. His mother then advised him to refund her brother, his Uncle, the amount he contributed towards the share so that the benefit be limited to the family. He also paid Kshs 5229 towards settlement of a loan to be able to benefit from the proceeds of the shares of the Society and upon the settlement they were given a go ahead to proceed and get a title.
49. That after his mother's death a dispute arose amongst the beneficiaries the distribution of Plot 39 which was heard by the clan and it was held that the property was jointly acquired by the deceased and him and he is therefore a beneficiary of half of the property.
50. He indicated that he contributed half of the proceeds towards the acquisition of Plot 39 and thus they were joint owners of the property and that joint properties are not to be subjected to succession and thus plot 39 shouldn't be subjected to succession or in the alternative it be distributed into 2 equal instalments where half goes to him and the other half to be distrusted equally amongst the deceased children.



51. The protest seems to revolve around ownership of the land. It is not contested that the deceased was a full member of the Kitanga Co-operative Society where she was allotted 3 plots namely Kitanga Commercial Plots No.48, 81 and Plot 39. From the evidence on record; in a nutshell; according to Protestor;
- a. Plot 39- He is Co-owner entitled to $\frac{1}{2}$ (34 acres) and should not be subjected to succession. The matter of sale and refund of monies to his mother's brother made him a nominee as per his mother's instruction or co-owner
 - b. Plot 48 – Was owned by 3 people and at the same time was in deceased's name who sold to Paul Mutisya Kilui and he in turn sold to Mrs Kitonga. The 1st Administrator claimed to have bought the same and the annexed Agreement was challenged as forgery by Administrator.
 - c. Plot 81- Was owned by 3 people including deceased.

Distribution of Deceased's Estate

52. On distribution of estate property, Section 38 of the LSA provides that;
Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

53. In Re Estate of John Musambayi Katumanga – (deceased) [2014] eKLR Hon. W. Musyoka stated as follows;

“(27) The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

54. In the instant matter, distribution of the estate will be implemented upon agreement by beneficiaries or from evidence on record and determined by the Court on the list of beneficiaries, the list of assets that comprise of deceased's estate and is/are available for distribution and the mode of distribution in compliance with Section 55 & 71 of LSA.
55. There are from the evidence on record compelling but parallel submissions on assets comprising of deceased's estate, properties purchased jointly with the deceased and various sale of properties to family members and Purchasers. It is not possible for the Court from the evidence on record to confirm various interests on the properties other than they are assets of deceased's estate and/or available/not available for distribution.
56. The proprietary interests can only be heard determined and confirmed by the Environment and Land Court established under Article 162(2) of [the Constitution](#), 2010 and jurisdiction of the Environment



and Land Court is provided for under Section 13 of the *Environment and Land Court Act* provides that:-

“13. Jurisdiction of the Court

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”

57. In light of the compelling and competing arguments made out by parties, the ownership of Kitanga No 39 seems to be in contest. To leave the matter as is a recipe for disaster as each party shall descend to impose and/or protect its right. Since the issue of ownership is to be determined in the ELC Court it is prudent to hive off the suit property as it is not yet available for distribution due to the ongoing tussle and shall be distributed upon the determination by ELC Court in as this Court is not satisfied that in light of the contest of ownership the property is available for distribution by beneficiaries.

58. This position is fortified by Rule 41(3) as read with Rule 42(2) of the Probate and Administration Rules See In Re Estate of Joseph Mutiso Kithome (Deceased) [2019]eKLR and in Re Estate of Tumbo Lavu(Deceased) [2019]eKLR that the property in dispute can only be separated from the Estate of the deceased before confirmation of grant as follows;

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the Court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and Set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may Thereupon, subject to the Proviso to section 71 (2) of the Act, proceed to confirm the grant”.

59. Unfortunately for the parties herein, and the beneficiaries, the suit property is not the only one named and the other portion of the estate Plot 48 is also disputed in terms of the validity of the sale agreement



produced by the 1st administrator, there seems therefore to be no property to be distributed in the meantime. However, if the parties should choose to place the dispute before the ELC, which bears jurisdiction to determine it, this court may then be moved to distribute the estate accordingly.

DISPOSITION

1. Therefore, there is no contention that the deceased was a member of Kitanga Co- operative Society and was allotted Commercial Plots 48, 81 & 39.
2. Land Parcel Number Machakos /Kitanga 39 measuring approximately 71.5 acres where the Protestor claimed Co ownership and payments made; the documents produced did not confirm he paid for value of ½ the property to be allotted to him. The property will be shared equally/equitably among the following
 - a. Munguti Muindi 17.5 Acres
 - b. Mutisya Muindi Maitha 17.5 Acres
 - c. James Musyoka Muindi 17.5 Acres
 - d. Grace Muindi 6 Acres
 - e. Muthoki Muindi 6 Acres
 - f. Muthini Muindi 6 Acres
 - g. Philip Wambua Musila 1 Acre (Purchaser)
3. Plot No. 48 Upper Kitanga Trading Centre (Kitanga Settlement Scheme) where 1st Administrator claimed he bought from deceased the Agreement annexed is contested as forgery. Unless this claim and other Purchasers' claims is/are established by ELC, the property shall be deemed available for distribution and be distributed equally/equitably amongst the beneficiaries of deceased's estate.
4. Plot 81 which is deemed as co-owned by the deceased and 2 others to be determined what portion belongs to the estate of the deceased by Kitanga Settlement Scheme. It is that portion or whole property that shall be available for distribution equally /equitably to the beneficiaries of the estate of the deceased and subject to any proprietary interests determined by ELC.
5. Each party meet their own costs.

It is so ordered.

JUDGMENT DELIVERED SIGNED DATED IN OPEN COURT ON 25/10/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

