



REPUBLIC OF KENYA



In re Estate of Jonathan Matheka Mutaiti (Deceased) (Succession Cause 409 of 2017) [2023] KEHC 216 (KLR) (24 January 2023) (Ruling)

Neutral citation: [2023] KEHC 216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
SUCCESSION CAUSE 409 OF 2017
GMA DULU, J
JANUARY 24, 2023**

IN THE MATTER OF THE ESTATE OF JONATHAN MATHEKA MUTAITI (DECEASED)

BETWEEN

SYULEE MATHEKA PETITIONER

AND

NDULU MATHEKA 1ST PROTESTOR

MUSYAWA MATHEKA 2ND PROTESTOR

(FORMERLY MACHAKOS HC.P&A NO. 219 OF 2015)

RULING

1. Before me is a contested summons for confirmation of grant of letters of administration dated June 18, 2019.
2. The summons was filed by the petitioners Syulee Matheka, Ndulu Matheka and Musyoka Matheka through counsel Waweru Gatonye & Company, in this succession matter where the deceased had married four (4) wives.
3. The summons was supported by an affidavit sworn on June 18, 2019 by one of the administrators Syulee Matheka in which 33 beneficiaries are listed and 9 land assets are also listed. It is deponed in the affidavit that a previous case Makueni ELC Cause No 21 of 2017 (Syule Matheka vs Alfred Matheka & 3 Others) relating to a dispute on some of the land assets of the estate, had now been concluded and judgment delivered on May 3, 2019.
4. For the avoidance of doubt, the land assets listed in the affidavit were as follows:
 1. Nzai/Mumbuni/6XX (21.83 HA)
 2. Nzai/Mumbuni/6XX (21.84HA)



3. Nzai/Mumbuni/6XX (21.84 HA)
 4. Nzai/Mumbuni/1XX(6.8 HA)
 5. Nzai/Kilili/4X (14.4 HA)
 6. Nzai/Kilili/4X (24.0 HA)
 7. Nzai/Kilili/7XX (4.05 HA)
 8. Nguu Ranch Plot No. 13XX (3.85 HA)
 9. Ikutha/Kitui/4X
5. Also filed was a supplementary affidavit sworn on October 30, 2019 by the same Syulee Matheka annexing a proposed mode of distribution of assets of the estate agreed to and signed by members of the 2nd and 3rd houses, but not by members of the 1st and 4th houses. Those who signed or thumprinted the proposed mode of distribution of assets were Syulee Matheka (wife), Peter Matheka (son), Manthi Matheka (son), Wayua Matheka (daughter), Musyoki Matheka (son) Kyalo Matheka (son) and Mumbue Matheka (wife), Mutunga Matheka (son), Mumbua Matheka (daughter) Mueni Matheka (daughter), Wavinya Matheka (daughter).
 6. To this proposed mode of distribution, members of the 1st and 4th houses filed objections through of an affidavit of protest sworn jointly by Nduku Matheka and Musyawa Matheka on March 6, 2020, in which a different mode of distribution of the assets of the estate was proposed. This affidavit of protest annexes minutes of a meeting of sons of the late Matheka's family said to have been held on September 29, 1996, with attached documents to the said minutes.
 7. The summons for confirmation of grant and the objections proceeded by tendering *viva voce* evidence from witnesses.
 8. Objectors 1st witness was Juliana Ndulu Matheka a wife of the deceased, who adopted her witness statement dated March 16, 2021 and various documents she had filed as her evidence in-chief. She testified that the assets of the estate of the deceased should be distributed in accordance with what had been written by the deceased.
 9. In cross-examination, she stated that she lived at Lutwa on her own land. When shown the mode of distribution of assets proposed in the supplementary affidavit of Syulee, she maintained that her husband had distributed the 9 pieces of land before he died. In re-examination, she said that some of the land parcels had already been registered in the names of children of the deceased, and maintained that she did not consent to the mode of distribution proposed by the administrator (Syulee).
 10. Objectors 2nd witness was Solomon Matheka a pastor, who adopted his witness statement as evidence in chief. He stated that he was a son of the deceased herein and the family secretary, and that his father had divided the land among the sons before he died, but passed away before titles were issued.
 11. In cross examination, he stated that he lived on his late father's land whose title number he did not know. He agreed that he had been a witness in a court case involving land parcels Nos Nzai 6xx, 6xx and 6xx, and that the court decided the dispute in favour of Syulee Matheka, concluding that the three land parcels be included in the assets of this estate herein, but still insisted that his father had divided the land among sons in a meeting held in 1996.
 12. He agreed that Syulee Matheka (2nd wife) had proposed distribution of the assets to the four (4) equal parts, but insisted that he did not support equal distribution.



13. Objectors 3rd witness was Patrick Katiwa Kithinda who adopted his witness statement as evidence in chief, and stated that he was brother in law of the deceased, being cousin a of the younger wife Nduku. It was his evidence that the deceased called him and told him that he had divided his land among the four (4) wives.
14. In cross-examination, he stated that in that meeting held in September 1996, minutes were recorded. He said that the meeting was only attended by sons of the deceased.
15. The 4th objectors witness was Francis Matheka Kata who adopted his witness statement as evidence in chief. It was his evidence that his son was married to the daughter of the deceased and that the deceased informed him that he had held a meeting in September 1996 with his sons, and subdivided his land.
16. In cross examination, he stated that a son of the 4th wife of the deceased had married his daughter. He said that he knew the 9 parcels of land owned by the deceased. In re-examination he stated that the children of the 4th wife had titles only to the land which was given to them.
17. That was the evidence of the objectors.
18. The petitioners, called five (5) witnesses. Petitioners witness No 1 was Syulee Matheka a wife of the deceased and an administrator of the estate. She adopted her witness statement and other supporting documents filed as her evidence in chief. It was her evidence that she filed a supplementary affidavit proposing a mode of distribution of the 9 parcels of land, which she signed with her co-wife Mumbé.
19. It was her evidence that she had been sent away by her late husband and lived at her home of origin before she bought her own land at Kibwezi where she now lived. She stated that her sons Peter Matheka, Mathew and Kyaló were not called to the purported meeting where land was allegedly divided. She proposed that each of the four houses gets a share of the land parcels. She agreed that she was sent away by her husband during President Jomo Kenyatta's reign, but could not remember the year. She agreed that members of the other two houses did not sign her proposed mode of distribution of assets.
20. Petitioner witness 2 was Esther Mumbé Matheka who adopted her witness statement as her evidence in chief. It was her evidence that she was the 3rd wife of the deceased.
21. It was her evidence that the deceased left behind 9 farms, and that her children were Mutunga, Mumbua, Mueni and Wavinya. She stated that her position is that the land be divided among the four (4) houses.
22. In cross examination, she stated that she had parted with the deceased in the year of great famine long before the deceased died. She now lived on a 1 acre plot which she bought.
23. In re-examination, she stated that she had not been divorced by the deceased, and that they had children.
24. Petitioner witness No 3 was Richard Mukunzi who adopted his witness statement as evidence in chief. He was step brother of the deceased. He proposed in evidence that each of the four (4) wives gets a portion of the properties, as proposed by the two wives.
25. In cross examination, he stated that the deceased sent 3 of his four (4) wives away, but while Musyawa returned, Syulee and Mumbé did not return.
26. In re-examination, he stated that the deceased chased his wives in order to marry other wives but all remained his wives.



27. Petitioner witness No 4 was Benedict Manthi Matheka a son of the 2nd wife Syulee Matheka, one of the administrators. He adopted his witness statement as his evidence in chief.
28. It was his position that though members of the 1st and 4th houses did not sign the proposed mode of distribution of assets, the estate should be distributed equally among the four (4) houses.
29. In cross-examination, he stated that the meeting of 1996 was a family meeting but not a meeting for division of assets. He stated that he attended the meeting.
30. When shown the minutes of the meeting, he maintained that the minutes did not contain subdivision of the land assets.
31. Petitioner's witness No 5 was Alfred Matheka who adopted his witness statement as his evidence in chief. It was his evidence that he was a son of the 3rd wife Mumbe, and that he signed the consent to the proposed mode of distribution. His position was that the land be distributed in the 4 houses in equal shares.
32. In cross-examination, he stated that his mother Mumbe now lived on 1 acre plot which was bought by both of them. In re-examination, he stated that though the deceased had indicated his intention to divide the land, he died before he did so.
33. That was the petitioner's evidence.
34. After both sides closed their witnesses' evidence, parties' counsel filed written submissions, which I have perused and considered. The objectors' counsel J A Makau & Company filed submissions on May 25, 2022, while the petitioner's counsel Waweru Gatonye & Company advocates filed their submissions on May 23, 2022. Both parties relied on decided court cases.
35. The first issue is whether the assets in question belonged to the deceased, before he died. There is no dispute on this issue of ownership, as none of the interested parties herein has challenged that original ownership. I find that the assets or parcels of land belonged to the deceased before he died.
36. The second issue is whether the deceased had distributed and transferred some of the land assets before he died. In this regard, I have considered the evidence on record and the rival arguments of counsel on both sides. Though the objectors maintain that 3 parcels of land were given to sons by the deceased, I come to the conclusion that based on the decision in Makueni ELC Cause No. 21 of 2017 (*Syule Matheka vs Alfred Matheka and 3 Others*), no such distribution of land assets was done by the deceased including land parcels Nzai/Mumbuni/686, Nzai/Mumbuni/687, and Nzai/Mumbuni/688. Not having been shown any contrary decision from the Court of Appeal, I have to proceed according to the judgment delivered on May 3, 2019 by the court in Makueni ELC case No 21 of 2017 in which the court found the transfers of the subject land to be irregular null and void. The said assets were thus not distributed by the deceased and formed part of the estate herein.
37. The 3rd issue is what should be the mode of distribution of the deceased's estate.
38. This is a polygamous family, and though there is evidence of two wives living away from the deceased at the time of his death, there was no evidence tendered in court to support a divorce of the said wives.
39. With the facts and evidence tendered before me wherein it is clear that this is a polygamous family, the provisions of section 40 of the *Law of Succession Act* (cap 160) apply to this succession cause. The said section states as follows –



- 40(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any surviving wife as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in section 35 to 38.
40. In my view, the import and meaning of section 40 is equal distribution of assets among each of the children and then adding a surviving spouse to the children, if such a spouse indeed is alive or surviving. It will obviously mean that a house with more children will get more of the assets, unless of course the beneficiaries agree otherwise.
41. In present case, though the administrators/petitioners proposed equal distribution of assets among the four (4) houses, in my view, since there is no unanimous agreement on the issue among the beneficiaries, the distribution will by law have to go according to the number of children. Thus the house with more children will get more.
42. It is acknowledged herein that each of the 4 houses has a living widow and children. It is also acknowledged that the total number of children and widow in each house are - 1st house 7, 2nd house 8, 3rd house 9, 4th house 9 total 33.
43. Thus in my view, in this estate of 33 survivors as above and 9 land assets with four (4) houses, the law requires that each of the 9 land assets be distributed among the 4 houses in the ratio 7:8:9:9, that is 1st, 2nd, 3rd and 4th house respectively. I will thus distribute the assets as provided by the law under section 40(1) of the Act.
44. To conclude therefore, I make the following orders:-
- i. The grant of letters of administration herein is hereby confirmed.
 - ii. The distribution of the 9 land assets will be in the ratio 7:8:9:9 among the four (4) houses, that is 1st, 2nd, 3rd and 4th house respectively.
 - iii. A surveyor will be appointed by the administrators to survey and divide the land assets according to the ratio in (ii) above.
 - iv. Parties herein will bear their respective costs of the objection and confirmation proceedings.
 - v. A certificate of confirmed grant with the above mode of distribution of assets among the four (4) houses to issue.

DELIVERED, SIGNED & DATED THIS 24TH DAY OF JANUARY, 2023, IN OPEN COURT AT MAKUENI

GEORGE DULU

JUDGE

