



In re Estate of George Musau Matheka (Deceased) (Succession Cause 470 of 1990) [2023] KEHC 18351 (KLR) (Family) (24 April 2023) (Ruling)

Neutral citation: [2023] KEHC 18351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 470 OF 1990
EKO OGOLA, J
APRIL 24, 2023
IN THE MATTER OF THE ESTATE OF GEORGE MUSAU MATHEKA (DECEASED)
IN THE MATTER OF
ISABELLA GICHUGU MATHEKA APPLICANT**

RULING

1. The applicant moved this court by way of Summons dated February 8, 2023. The applicant prays for this court to grant the following orders:-
 - a. That the honourable court be pleased to grant the applicant permission to sell the land parcels described below (collectively referred to as the properties) as provided under section 37 of the [Law of Succession Act](#):
 - i. Title No. Muputi/Kiima Kimwe/3623;
 - ii. Title No. Muputi/Kiima Kimwe/580;
 - iii. Title No. Muputi/Kiima Kimwe/870;
 - iv. Kilifi Madeteni/476;
 - v. Syokimau Farm Ltd-LR 12715/54;
 - vi. Twiga Chemicals Ltd;
 - vii. Nzukini Scheme Phase IV-Plot Nos. 159-165;
 - viii. Athi River Petrol Station-LR 337/195;
 - ix. Machakos Town/Block II/412;



- x. Konza Ranching-Plot No. 305, 1520 and 1381;
 - xi. Kasigau Ranching;
 - xii. Mombasa Nyali-LR MN/I/3256;
 - xiii. Emali Town-Plot No. 277;
 - xiv. Aimi Ma Kilungu- Plot Nos. 810 and 919;
 - xv. Malili Ranch- Plot 139 and 425;
 - xvi. Makueni Unoa/538; and
 - xvii. Kalama Mwanyani.
- b. That cause of this application be in the cause.
2. The Summons were supported by the applicant's supporting affidavit dated December 30, 2022 and further supporting affidavit dated March 18, 2023.
 3. The applicant is the surviving spouse of George Musau Matheka (deceased). The deceased is also survived by four children namely, Rita Mueni Ndinda Matheka, Robert Kala Matheka, David Nzioki Matheka, and Stephen Masai Matheka. The applicant and Rita Mueni Ndinda Matheka are the co-administrators of the estate. The letters of Administration were confirmed on December 10, 2013 and further rectified on July 2, 2018. It is the applicant's case that she acquired life interest in the abovementioned properties hence, she would want to sell the properties abovementioned.
 4. In her further affidavit, the applicant deposed that she also has a life interest in land known as Konza North I/160 and Machakos Town Block II/420. These two properties were not listed in the Summons. However, she prays for permission to sell them. She deposed that the four children have consented to the sale of these additional properties.
 5. Further to this, the applicant deposed that there were errors on the Summons. That is, the property listed as Title Number Muputi/Kiima/Kimwe/870 ought to be Title Number Muputi/Kiima/Kimwe/1870.

Determination

6. I have considered the summons, affidavits and annexures filed. Section 35 of the *Law of Succession Act* stipulates that where an intestate has left one surviving spouse and children, the surviving spouse shall be entitled to inter alia a life interest in the whole residue of the net intestate estate. Section 37 goes on to provide for the powers of the surviving spouse during life interest. It states as follows:-

“A surviving spouse entitled to a life interest under the provisions of section 35 or 36, with the consent of all co-trustees and all children of full age, or with the consent of the court, may, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.”
7. The four surviving children have given their written consent for the applicant to sell the properties listed in the Summons. The applicant has deposed in her further affidavit that the surviving children have consented to the sale of the additional two properties not included in the Summons. However,



there is no written consent from the children confirming this. Matters of land mostly in succession cases are volatile. The court cannot take the applicant's deposition as the true mind of the four children.

8. Further to this, the applicant deposed in her further affidavit that there was an error on the Summons as the property is known as Title Number Muputi/Kiima/Kimwe/1870 instead of Title No. Muputi/Kiima Kimwe/870. If this property was not correctly named in the Summons, then the Summons should have been amended according to the *Civil Procedure Rules*. One cannot amend their Summons vide averments in an affidavit.
9. I hereby grant prayer (a) in the Summons dated February 8, 2023 with no orders as to costs.
It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of April 2023

E.K. OGOLA

JUDGE

In the presence of:

Mr. Barasa h/b for Mr. Gachigi for the Applicant

Gisiele Muthoni Court Assistant.

