



In re Estate of David Mwangi Mwarangu (Deceased) (Succession Cause 2114 of 2013) [2023] KEHC 21824 (KLR) (Family) (9 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21824 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2114 OF 2013
MA ODERO, J
AUGUST 9, 2023**

BETWEEN

DORCAS WANJIRU MWANGI APPLICANT

AND

JECINTA HITO GRISHON 1ST OBJECTOR

JOYCEFINE WAMBUI 2ND OBJECTOR

MARY WAMAITHA MWANGI 3RD OBJECTOR

RULING

1. Before this court is the summons for confirmation of grant dated March 13, 2020 filed by Dorcas Wanjiru Mwangi the Administrator of the Estate of the deceased.
2. The objector Mary Wamaitha Mwangi opposed the mode of distribution of the Estate and filed an Affidavit of protest dated July 20, 2020.
3. The matter was canvassed by way of written submissions. The objector filed the written submissions dated December 21, 2022 whilst the Administrator relied on her written submissions dated February 16, 2023.

Background

4. This Succession Cause relates to the estate of the late David Mwangi Mwarangu who died intestate on August 10, 2013. A copy of the Death Certificate serial Number 260600 is annexed to the Petition for Grant of Letter of Administration Intestate dated August 22, 2013.
5. In the said petition it was indicated that the deceased was survived by the following persons:-



- (a) Dorcase Wanjiru Mwangi - Widow
 - (b) Serah Martha Wanjiku Mwarangu - Daughter
 - (c) Gladys Wanjiru Mwarangu - Daughter
 - (d) Nancy Wanjiru Mwarangu - Daughter
 - (e) Loise Wangare Mwarangu - Daughter
6. The estate of the deceased was said to comprise of the following:- Assets
- 1) Nairobi/Block 63/511.
 - 2) Nairobi/Block Tassia II-97/0704/058.
 - 3) Dandora Phase II Plot No. D6914.
 - 4) Plot No. A.118 Umoja Innercore Sector 3.
 - 5) Plot No. 2-102 Mathare North Site and Service Scheme.
 - 6) Plot No. 830020 In Mathare North
 - 7) Embakasi Ranching Company Ltd Certificate No. 3530
 - 8) Dagoretti/Thogoto/T.260
 - 9) Kijabe/Kijabe Block 1/286.
 - 10) Isuzu Lorry KAY 900.
 - 11) Toyota Corolla KAX 873X.
 - 12) Bank Account at Barclays Bank Kariobangi Branch, Nairobi.
 - 13) Bank Account at Co-Operative Bank Kariobangi Branch, Nairobi.
 - 14) Bank Account at Barclays Bank Development House Branch, Nairobi
 - 15) Bank Account No. 041410xxxxxat Family Bank.
 - 16) Bank Account at Equity Bank.
 - 17) Account at Faulu
- Total Estimate value Kshs.3 Million
- Liabilities
- Nil
- Total estimated value Kshs.3 Million
7. The 1st objector Jecinta Hito Grishon, 2nd objector Joycefine Wambui and the 3rd objector Mary Wamaitha Mwangi all filed objections to the Petition for Grant of letters of Administration Intestate, whilst Mary Wamaitha Mwangi the objector herein also filed a cross-petition for grant of letters of administration dated 18th January 2018.



8. The objections were all heard together by Hon. Justice William Musyoka who in his Judgement dated April 11, 2019 and delivered on May 3, 2019 made the following orders:-

- a) That I hereby declare that the deceased was survived by the following as beneficiaries: Dorcas Wanjiru Mwangi, Serah Martha Wanjiku Mwarangu, Gladys Wanjiru Mwarangu, Nancy Wanjiru Mwarangu, Loise Wangari Mwarangu and Mary Wamaitha Mwangi;
- b) That I declare that the 1st objector was not a wife of the deceased and she is consequently not entitled to a share in his estate;
- c) That I declare that the 2nd objector was a dependant of the deceased and is entitled to, and I hereby allocate to her, the following provision-
 - (i) the one unit she occupies in Umoja Innercore Plot A118, and
 - (ii) the shop at a residential building in Tassia Plot A/158;
- d) That I declare Gerishon Njoroge was not a dependant of the deceased and is consequently not entitled to provision from the estate;
- e) That I confirm Dorcas Wanjiru Mwangi as administrator of the estate of the deceased;
- f) That the administrator shall move with due dispatch and apply for confirmation of her grant at which she shall provide for the 2nd objector in the manner stated in (c) above;
- g) That each party shall bear their own costs; and
- h) That any party aggrieved by the orders that I have made herein shall be at liberty to move the court of Appeal appropriately within twenty-eight days of the date hereof.” [own emphasis]

9. By the above judgement the court found that the objector herein was a beneficiary to the estate of the deceased. The court further appointed Dorcas Wanjiru Mwangi as the Administrator of the estate.

10. Following this judgement a Grant of Letters of Administration was on May 3, 2019 made to Dorcas Wanjiru Mwangi. The Administrator then filed the summons for confirmation of Grant dated 13th March 2020.

11. In the summons for confirmation of Grant the proposed mode of Distribution of the Estate is indicated to be as follows:-

No.

Assets

Share

Beneficiary

Nairobi/Block 63/511

Life interest over the asset

Dorcas Wanjiru Mwangi



Nairobi/Block Tassia 11/97/0704/058

Life interest over the asset

Dorcas Wanjiru Mwangi

Dandora Phase II Plot No. D6914

Life interest over the asset

Dorcas Wanjiru Mwangi

Plot No. A.118 Umoja Innercore Sector 3

Life interest over the asset

Dorcas Wanjiru Mwangi

Plot No. 2-102 Mathare North Site and Service Scheme

Life interest over the asset

Dorcas Wanjiru Mwangi

Plot No. 830020 In Mathare North

Life interest over the asset

Dorcas Wanjiru Mwangi

Embakasi Ranching Company Ltd Certificate No. 3530

Life interest over the asset

Dorcas Wanjiru Mwangi

Dagoretti/Thogoto/T.260

Life interest over the asset

Dorcas Wanjiru Mwangi

Kijabe/Kijabe Block 1/286

Life interest over the asset

Dorcas Wanjiru Mwangi

Isuzu Lorry KAY 900

Whole

Dorcas Wanjiru Mwangi

Toyota Corolla KYJ 873X

Whole

Dorcas Wanjiru Mwangi

Bank Account at Barclays Bank Kariobangi Branch, Account Number 9310xxxxx

Whole

Dorcas Wanjiru Mwangi

Bank Account at Co-Operative Bank Kariobangi Branch, Nairobi



Whole

Dorcas Wanjiru Mwangi

Bank Account at Barclays Bank Development House Branch, Account Number 104xxxx

Whole

Dorcas Wanjiru Mwangi

Bank Account at Family Bank Kariobangi South Branch Account Number 0414103xxxxx

Whole

Dorcas Wanjiru Mwangi

Bank Account at Equity Bank

Kariobangi South Branch Account Number

Whole

Dorcas Wanjiru Mwangi

Account at Faulu Kenya Account Number 100305xxxxx

Whole

Dorcas Wanjiru Mwangi

12. The objector though not opposed to confirmation of Grant is opposed to the proposed mode of distribution of the estate.
13. The objector avers that she is a daughter of the deceased from a wife who was not recognized by the court. She further avers that the Administrator omitted the following properties of the deceased from the list of Assets:
 - (i) Plot Nos 413 and 414 both situate I Makongeni Ruai near Makongeni Police Station,
 - (ii) Plot in Ruai near Supa Loaf that was sold to the deceased by the deceased's sister-in-law.
14. The objector is opposed to the Administrator being given a life interest over the assets left behind by the deceased. She states that this would be unfair as she (the objector) is not a biological child of the Administrator.
15. The objector asks that a valuation be conducted before the properties are distributed. The objector proposes that she be allocated Plot No. A118 Umoja Innercore Sector 3 entirely as this in her view is commensurate with what she believes ought to be her share in the estate.
16. The Administrator opposed the protest and filed her reply thereto dated 3rd August 2020. The Administrator asserted that the deceased was not polygamous. That the deceased had only one (1) wife and five (5) daughters and the Administrator readily concedes that the objector is one of the daughters of the deceased.
17. The Administrator denies having left out any assets belonging to the deceased in the schedule of Assets. She states that she has no knowledge of the assets mentioned by the objector.
18. The Administrator asserts that as the only surviving spouse of the deceased, she is entitled to exclusive right and interest over the net estate of the deceased during her lifetime. That such life interest would



only terminate upon her death or if she remarries. The Administrator urges the court to dismiss the Affidavit of protest in its entirety.

Analysis and Determination

19. I have carefully considered the summons for confirmation of Grant dated March 13, 2020, the Affidavit of protest dated July 20, 2020 as well as the written submissions filed by both parties. The only issue for determination is whether the protest filed by the objector has merit.
20. The objector has challenged the mode of distribution proposed in the summons for confirmation of Grant on grounds that she is not a biological child of the Administrator. That she does not wish to have her share in the estate vested in the Administrator to hold in trust for her. It would appear that the objector does not trust that the Administrator will act in her best interest.
21. The objector proposes that she be allocated one property entirely to represent her own share of the estate.
22. It is common ground that the deceased was survived by one (1) widow (spouse) and five (5) daughters who included the objector. This was clearly stated by Hon. Justice William Musyoka in his judgement dated April 11, 2019.
23. The objector is now proposing that the estate be apportioned/distributed as would be the case between two (2) households in the case of a deceased who was polygamous.
24. The question of whether or not the deceased was polygamous and the question of whether or not the objector's mother was a 'wife/spouse' of the deceased are all now 'Res Judicata' having been determined in the ruling of April 11, 2019. The objector did not file any appeal against that ruling nor did she seek any review of the same. The objector cannot now seek to appeal that ruling through the backdoor using her current affidavit of protest.
25. Section 35 of the *Law of Succession Act*, provides as follows:-

“ 35. Where intestate has left one surviving spouse and child or children

1. Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
 - a. the personal and household effects of the deceased absolutely; and
 - b. a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow that interest shall determine upon her re-marriage to any person.

2. A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.



3. Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.
4. Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—
 - a. the nature and amount of the deceased's property;
 - b. any past, present or future capital or income from any source of the applicant and of the surviving spouse;
 - c. the existing and future means and needs of the applicant and the surviving spouse;
 - d. whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
 - e. the conduct of the applicant in relation to the deceased and to the surviving spouse;
 - f. the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
 - g. the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.
5. Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.” [own emphasis]

26. Section 37 provides for the powers of the spouse during life interest:

“

“ 37. Powers of spouse during life interest

A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of



the court shall, 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.”

27. Since the only surviving widow of the deceased is still alive then she is entitled under the terms of section 35 of the *Law of Succession Act* to a life interest in the net estate. It would only be upon the demise or remarriage of the Administrator that the estate would be distributed equally amongst the surviving children of the deceased who include the objector herein.

28. In the case of *Tau Kakungi -vs- Margarethe Thorning Katungi & Another* [2014] eKLR the court in reiterating this position held as follows:-

“The effect of section 35 (1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate...The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent or the departed spouse. She would be left without any means of sustenance.” [own emphasis]

29. The surviving spouse does not however enjoy absolute ownership over the deceased’s assets. He/she holds those assets ‘in trust’ for the children of the deceased.

30. As stated earlier there appears to be some element of distrust on the part of the protestor towards the Administrator. However, the law through Section 37 provides clearly that the surviving spouse cannot sell and or dispose of any of the assets she holds in trust without the written consent of all beneficiaries and the court. Therefore, the protestor’s fear that she may be disinherited is unfounded.

31. This was the position taken by Hon. Justice Mativo (as he then was) *in Re Estate Of Doris Wanjiku Jobro Mwigaruri Alias Doris Wanjiku* [.....] eKLR where the Judge stated:-

“Life interest confers a limited right to the surviving spouse over the estate. He or she does not enjoy absolute ownership over the property. They cannot deal with it as if it was their own. By virtue of Section 37 of the Act, a surviving spouse cannot during life interests dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court. This is meant to safeguard the interest of the children who are the ultimate beneficiaries of the property of the subject of the life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children.” [own emphasis]

32. Therefore, the law does not allow the Administrator to ‘distribute’ the assets which she holds in trust to her own children to the exclusion of the objector.

33. The objector’s apprehension stems from the fact that unlike the other beneficiaries she is not a biological child of the Administrator.



34. Section 35 (2) of the *Law of Succession Act* empowers an Administrator to apportion any part of the Estate by way of gift to any of the surviving children of the deceased.
35. Section 35 (3) allows a child who considers that the power under subsection (2) has been unreasonably exercised or withheld to apply to the court for apportionment of his/her share of the estate.
36. It is manifest that there are trust issues between the parties. The objector does not seem to trust the Administrator to manage the estate assets in her interest. The objector claims that she has certain costs which she needs to meet and it is not tenable for her keep on asking the Administrator for funds.
37. In the case of *Josephine Gatiiria Mutembei -vs- Dennis Murangiri Mutembei* [2017] eKLR the court in dealing with a similar situation stated this:-

“I have considered the evidence on record and submissions by each administrator. I am inclined to determine this matter based on law outlined that the protestor is son to the deceased, is a beneficiary and was dependent on the deceased. Therefore he is entitled to beneficial interest in the deceased’s estate. The fact of his share of the estate being held in a trust by the widow of deceased in life interest is not plausible as he is an adult. If he waits for the 1st administrator’s life interest to expire and then share the estate amongst his younger siblings, he might not live to use and enjoy the beneficial interest of the deceased’s estate. The protestor and 2nd family of the deceased do not seem amiable to each other, so it is possible that working together might be a problem. Secondly, the protestor lives away from the 2nd family and it will be cumbersome to have meetings on this matter. Thirdly, the children of the 2nd family are much younger than the protestor that to wait until they are all adults to distribute the estate is unfair and unrealistic to the protestor. In light of these circumstances and what the law provides; I am of the view that the protestor’s beneficial interest in the deceased’s estate be hived off and be released and/or to be transferred to his name and for his use or disposal...” [own emphasis]

38. This an old matter which commenced way back in the year 2013. The parties have been engaged in court cases every step of the way. There is no meeting of minds between the parties.

39. Section 47 of the *Law of Succession Act* provides as follows:-

“The High court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient. Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

40. Likewise the *Probate and Administration Rules* provides that:-

“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of the justice or to prevent abuse of the process of the court.”

41. In the circumstances I feel it is best that the beneficial interest of the objector be hived out of the estate and released to her.

42. In conclusion therefore I do allow this protest and make the following orders:-

- (1) The property known as Plot No. A118 Umoja Innercore Sector 3 be allocated entirely to the objector.



- (2) In the alternative the Administrator to conduct valuation of the assets comprising the estate. Thereafter the objector's share in the estate be hived off and transferred to her by the Administrator.
- (3) Each party shall meet its own costs for this summons.

DATED IN NAIROBI THIS 9TH DAY OF AUGUST, 2023.

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MAUREEN A. ODERO

JUDGE

