



In re Estate of Charles Maingi Macharia (Deceased) (Succession Cause E024 of 2021) [2023] KEHC 22628 (KLR) (25 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22628 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE E024 OF 2021
HM NYAGA, J
SEPTEMBER 25, 2023**

IN THE MATTER OF THE ESTATE OF CHARLES MAINGI MACHARIA (DECEASED)

BETWEEN

FRANCIS MACHARIA MAINGI 1ST OBJECTOR

ALFRED WAMBARE MACHARIA 2ND OBJECTOR

AND

CONSOLATA NJERI MAINGI ADMINISTRATOR

RULING

1. The deceased herein Charles Maingi Macharia died intestate at the Kenyatta National Hospital on 21.07.2016 at the age of 67. He was married to two wives, namely; Agnes Wanjiru and Consolata Njeri, the 1st and second wife respectively.
2. The first wife predeceased him. She died in the year 1972. The deceased had two children with her namely Francis Macharia Maingi & Alfred Wambare Maingi who are the objectors herein. He had four children with his second wife, namely; Alice Wanjiru Maingi, Kevin Macharia Maingi, Jacinta Nyambura Maingi, Agnes Njoki Maingi
3. According to the Affidavit in support of petition for letters of Administration dated 8th August, 2017, the aforementioned children and second wife are listed as beneficiaries of the estate of the deceased.
4. As per the same affidavit, the estate of deceased comprised the following assets:-Nyandarua/ Muruaki/597Kiamunyeki Land Dundori/Lanet Block 5/257Dundori/Lanet Block 5/262 (two plots sold and three plots not sold)Kiamunyeki Land Dundori/Lanet Block Vehicle Peugeot 504 Reg. KAE 936ZOld Mutual InsuranceDundori/Lanet Block 5/267, 5/263,5/265, 5/2308 & 5/2306Nyandarua/ Muruaki/598



5. The petition listed the following liabilities:-Ksh.300,000/= being deposit paid by Mr. Francis Mugo for three plots(261) and no sale was entered.Ksh.10,000/= survey fees for Kiamunyeki Land Dundori/Lanet Block 5/257.Ksh.14,000/= title processing fee for Mr. David.Ksh.216,000/= Legal Fees for Gordon Ogolla & Company Advocates.Ksh.80,000/= Mr. Mwaniki title transfer & survey fees for 2 plots.Ksh.40,000/= Mary Nyambura Title transfer 1 plot Kiamunyeki Land Dundori/Lanet Block 5/257.Ksh. 13,000/= Emily title deed transfer 1 plot Kiamunyeki Land Dundori/Lanet Block 5/257.Ksh.40,000/= Mr. Njenga Title transfer Dundori/Lanet Block 5/259.Ksh.13,000/= Mr. Mungai title transfer Dundori/Lanet Block 5/259Total Ksh.726, 000/=
6. Following the deceased's demise, a grant of letters of administration, was issued on 31st July, 2018 to Consolata Njeri Maingi and Francis Macharia Maingi in their capacity as the widow and son respectively.
7. By a Summons dated 29th April, 2019, the above administrators moved this Court seeking the confirmation of the Grant. The consent was only signed by five beneficiaries of the deceased, namely Consolata Njeri Maingi, Alice Wanjiru Maingi, Kevin Macharia Maingi, Jacinta Nyambura Maingi and Agnes Njoki Maingi leaving out two beneficiaries, Francis Macharia Maingi, and Alfred Wambare Maingi.
8. In support of the summons, Consolata Njeri Maingi, an administrator/Respondent herein swore an affidavit in which she set out the proposed mode of distribution as follows:-



Property	Beneficiary	Share
a. Dundori/Lanet Block/2458(Kiamunyeki 'A')	John Maina Ng'anga (Purchaser)	0.075 HA
b. Dundori/Lanet Block/2457 (Kiamunyeki 'A')	David Maina Muchina (purchaser)	0.075 HA
c. Dundori/Lanet Block/2456 (Kiamunyeki 'A')	Mary Nyambura Kuria (Purchaser)	0.075 HA
d. Dundori/Lanet Block/2455 (Kiamunyeki 'A')	Rosemary Wanjiru Nderitu (Purchaser)	0.075 HA
e. Dundori/Lanet Block/2454 (Kiamunyeki 'A')	Rosemary Wanjiru Nderitu (Purchaser)	0.075 HA
f. Dundori/Lanet Block/2453 (Kiamunyeki 'A')	Minneth Wairimu Mureithi (Purchaser)	0.075 HA
g. Dundori/Lanet Block/2452 (Kiamunyeki 'A')	Francis Macharia (Son)	0.075 HA
h. Dundori/Lanet Block/2451 (Kiamunyeki 'A')	Francis Macharia (Son)	0.075 HA
i. Dundori/Lanet Block/2450 (Kiamunyeki 'A')	Mwaniki wa Gichia (Purchaser)	0.075 HA
j. Dundori/Lanet Block/2449 (Kiamunyeki 'A')	Mwaniki wa Gichia (Purchaser)	
k. Dundori/Lanet Block 5/2308 (Kiamunyeki 'A')	Zakaria Kigera Ngigi (Purchaser)	¼ acre
l. Dundori/Lanet Block 5/261 (Kiamunyeki 'A')	Francis Mugo Gatonga(Purchaser)	¼ acre
	Francis Macharia ¼ acre to be sold and cater for estate's debt, succession &survey fees	½ acre
	Alice Wanjiru	1 acre
o. Dundori/Lanet Block 5/263 (Kiamunyeki 'A')	Consolata Njeri Maingi	Whole share



p. Dundori/Lanet Block 5/267 (Kiamunyeki 'A')	Alfred Wambare Maingi & Kevin Macharia Maingi	Equal Share
q. Dundori/Lanet Block 5/265 (Kiamunyeki 'A')	Jacinta Nyambura Maingi & Agnes Njoki Maingi	Equal Share
r. Nyandarua/Muruaki/597	Esther Muthoni	Whole share
s. Nyandarua Muruaki/598	Consolata Njeri Maingi, Francis Macharia, Alfred Wambare Maingi, Alice Wanjiru Maingi, Kevin Macharia Maingi, Jacinta Nyambura Maingi & Agnes Njoki Maingi & 1 acre to be used as the access road and the remainder to be distributed equally	To be shared equally
t. Motor Vehicle No. KAE 936 Z Peugeot 504	Consolata Njeri Maingi	Whole Share
u. Borehole	Consolata Njeri Maingi	Whole Share
v. Old Mutual Insurance Shares	Consolata Njeri Maingi	Whole Share

9. She prayed that all the property be registered in the names of the beneficiaries as stated above.
10. The first Protestor, Francis Macharia Maingi swore an affidavit of protest on his behalf and on behalf of his co-protestor Alfred Wambare on 3rd July, 2019. According to the protestors, the above mode of distribution is unfair, unjust and meant to enrich the respondent and her children.
11. They are however in agreement with the Respondent's mode of distribution in regards to properties a, b, d, e, f, g, h, i, j, k and p above.
12. With respect to the aforementioned Motor Vehicle and shares at Old mutual, the 1st protestor averred that same have already been sold by Consolata Njeri Maingi. It was their proposal that:-Dundori/Lanet Block/2456 be sold and proceeds thereof to be distributed to all beneficiaries in equal share. Dundori/Lanet Block 5/261- ¼ acre be distributed to Francis Mugo Gatonga (purchaser) while 1 ½ acre be distributed to Consolata Njeri Maingi and ¼ an acre to be sold to a vendor acceptable to both houses and proceeds to cater for estate's debts, succession, legal fees and survey fees. Dundori/Lanet Block 5/263 to be distributed in equal shares to Consolata Njeri Maingi and Alfred Wambane Maingi Borehole & Dundori/Lanet 5/267 to be distributed in equal shares to Alfred Wambane Maingi and Francis Macharia Maingi Nyandarua/Muruaki/598 to be equally distributed to Consolata Njeri Maingi and Francis Macharia Maingi to hold in trust for himself and for Alfred Wambare Maingi
13. The protestors averred that the deceased during his lifetime sold a number of his assets and proceeds realized in sale went into catering for the educational needs of the Respondent's children. It was their



- contention that their deceased parents during the lifetime acquired parcel title numbers Dundori/Lanet Block 5/263, Dundori/Lanet Block 5/265 and Dundori/Lanet Block 5/267 and by virtue of being their biological children they are rightfully and lawfully entitled to lay a claim on the said properties.
14. They disputed that the deceased herein in his lifetime sold parcel Dundori/Lanet Block/2456 (Kiamunyeki 'A') to Mary Nyambura Kuria and it is their belief that the respondent intentionally wishes them to inherit portions of land that fetch a lesser market value as compared to her children whom she has strategically positioned to acquire prime properties which action will be unjust and arbitrary considering that her children will still inherit from her upon her demise.
 15. They contended that the court should order a valuation of the house and developments on parcel title Dundori/Lanet Block 5/263 in an effort to reach a just distribution of the deceased's estate between them and the petitioner.
 16. It was their assertion that the deceased and their mother during their lifetime built and lived in the house situated on parcel Dundori/Lanet/block 5/263 and they are entitled to lay claim on the said property.
 17. According to them motor vehicle registration KAE 936 Z and old mutual shares were sold by the petitioner and therefore they are not available for distribution.
 18. The Respondent, Consolata Njeri Maingi, swore a further affidavit in response to the protest on 16th July, 2019. She averred that parcel of land known as Dundori/Lanet Block/2456 Kiamunyeki 'A' was sold during the lifetime of the deceased.
 19. She reiterated that parcel of land known as Dundori/Lanet Block 5/261 should be distributed as she proposed since the land is next to the protestors' residence and other $\frac{1}{4}$ sold to meet all the liabilities of the estate.
 20. She disputed that she has sold the aforesaid Motor vehicle and old mutual shares.
 21. Regarding the borehole, she averred that it has no economic value as she uses it for domestic purpose and that in any event the same falls within Land parcel no. Dundori/Lanet Block 5/265 which has been given to Jacinta Nyambura and Agnes Njoki Maingi
 22. She deposed land parcel Dundori/Lanet Block 5/267 is near the main road and should be distributed to the protestors.
 23. She averred that parcel of land Nyandarua/Muruaki/598 should be subdivided equally and should not be held in trust as all beneficiaries are adults.
 24. She averred that the shares for the 2nd Administrator contain a three bed roomed house which is on Dundori/Lanet Block/2452 and if he so wishes to take any other child's share he may do so and surrender his share to another person.
 25. She contended that the protestors and all other children have all been given 1 acre piece of land in NAKURU and 2 acres in Kinangop.
 26. She averred that Land parcels Dundori/Lanet Block 5/263, Dundori/Lanet Block 5/265 & Dundori/Lanet Block 5/267 (Kiamunyeki 'A') were all acquired in 1976 when the protestors' mother had passed away.
 27. It was her further averment that the matrimonial house claimed by the protestors was constructed in 1976.



28. She proposed that distribution of the estate be done in compliance with section 40 of the *Law of Succession Act*.

Protestors' Case

29. Francis Macharia Maingi, the first protestor, testified that Dundori block 2304 was registered in the 1st administrator's / Respondent's name after the death of the deceased.
30. He is opposed to land parcel Dundori/Lanet Block 2456 being distributed to Mary Nyandarua as she is a sister to the 1st administrator and she never bought it.
31. For Dundori/Lanet Block 5/261, he proposed that $\frac{1}{4}$ of an acre to be sold to offset the valuation fee and the remainder to be given to Alice Wanjiru.
32. With respect to Dundori/Lanet Block 5/263, he said this is where the matrimonial home is situated, where they grew up and they ought to have access to it. He then proposed that the respondent should hold a life interest over it.
33. With regard to the borehole, he prayed that 50 x 100 plot with a bore hole to be excised and held by all parties in equal shares.
34. He proposed that Dundori/Lanet Block 5/267, which is 2 $\frac{1}{2}$ acres in size to be wholly given to Alfred Wambane as he buried his wife there.
35. As regards Dundori/Lanet Block 5/261 and 263 he proposed that it should be distributed to Kelvin Macharia and Alice Wanjiru.
36. Regarding Dundori/Lanet Block 5/265 he proposed that it should be given to the 1st house since the respondent sold 5 acres under 257 and 259 to educate her children and they did not benefit from it.
37. In regards to Nyandarua/Muruaki/ 598 he said it is 5 acres in size and proposed that both families be given equal shares.
38. He stated that the shares in old mutual should be shared between two families.
39. In cross examination he stated his mother passed away on 25th February, 1972.
40. He confirmed that Dundori/Lanet Block 5/265 and 267 were purchased after the demise of their mother.
41. He similarly confirmed that the matrimonial home was constructed after death of their mother and that the respondent had lived there for 40 years.
42. He said the respondent should hold a life interest over the matrimonial home and his co protestor Alfred to inherit it since as per the kikuyu customs the last born is left in the matrimonial home. He confirmed in the second house Kelvin Macharia is the last born son.
43. He said the deceased gifted him a parcel of land no. 2452 and 2451 with a house thereon. He said the house was constructed by his father and confirmed no other child was gifted a house.
44. He confirmed the sale agreement between the deceased and Mary is dated 16th June, 1989 and that he has not lodged any compliant on the said agreement. He also confirmed that Mary's sister lives on the land in question.



Respondents' Case

45. Consolata Njeri Maingi testified that she got married to the deceased in 1982.
46. Regarding plot 2456, she produced a sale agreement to demonstrate that Mary Nyambura bought it from the deceased. She also stated that Mary constructed her house thereon during the deceased's lifetime.
47. In regards to Dundori/Lanet Block 5/261, she stated that it is 2.2 acres in size and Francis Mugo had purchased $\frac{1}{4}$ acre of it. She proposed that the purchaser should be given his share and $\frac{1}{4}$ acre to be sold to cater for debts.
48. Regarding Dundori/Lanet Block 5/263, she confirmed matrimonial home is situated there. She said all of the deceased's children can access it and that upon her demise she will leave it to the child of her choice.
49. With respect to Dundori/Lanet Block 5/267, she said it is 2.2 acres in size and that she has distributed it to Alfred Wambane Maingi and Kevin Macharia Maingi who have already taken occupation of their respective portion.
50. With regard to Dundori/Lanet Block 5/265, she stated that it is 2.2 acres in size. She proposed that a land with a bore hole to be excised from it and the remainder to be distributed between Jacinta and Agnes.
51. In regards to Nyandarua/Muruaki/ 598, she proposed that it should be distributed to all the six children equally.
52. Regarding Old Mutual shares, she proposed that it can be shared equally amongst the 6 children.
53. She proposed that land parcel 263 be given to her as she is in occupation of it.
54. In cross examination, she disputed that she has favored her children. She said for the land she has she will leave it to the children who will assist her.
55. She told court that the borehole can be accessed by all but would want it registered in her name.

Submissions

56. The protestors filed their submissions on 12th June, 2023 whereas the Respondent's submissions were filed on 7th July, 2023. I have read the submissions and duly considered them. Both parties reiterated their position in regards to mode of distribution as contained in their respective affidavits and evidence before this court.

Analysis and Determination

57. I have carefully considered the evidence on record, the documents filed and the submissions by each party. The only issue for determination is the mode of distribution of the estate.
58. In a case of this nature where the deceased died intestate and was a polygamous man survived by more than one widow and children, the anchor on distribution of his estate is section 40 of the [Law of Succession Act](#) which, provides as follows;

“(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 wife surviving him as an additional unit to the number of children.

- (2) The distribution of the personal and household effects and the residue of the net interest within each house shall then be in accordance with the rules set out in sections 35 to 38”

59. The principles applicable were expounded in the case of *Rono v Rono* Civil Appeal No. 66 of 2002, where Waki J.A. stated inter alia that:-

“More importantly, section 40 of the *Act* which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in section 3 of the *Act* as a “family unit comprising a wife and children of that wife.”

60. In the case of *Esther Wanjiku Burugu v Margaret Wairimu Burugu* Civil Appeal No. 319 of 2002, the Court of Appeal sitting in Nakuru observed that the provision does not state that the division of the estate must be equal and that it specifically states that although the distribution of the estate of a polygamous person is in the first instant to be among the houses, it nonetheless specified that that would be done according to the number of children in each house.

61. *In Re Estate of John Musambayi Katumanga – Deceased* [2014] eKLR the court held as follows:

“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.”

62. With the above principles in mind, I will now proceed to determine the aforesaid issue.

63. This Court takes note of the fact that the mode of distribution reflected on the affidavits of both parties herein have provided for the members of the 1st and the 2nd house.

64. The mode of distribution in regards to the following properties is not in contention:-

1. Dundori/Lanet Block/2458 (Kiamunyeki “A”)
2. Dundori/Lanet Block/2457 (Kiamunyeki “A”)
3. Dundori/Lanet Block/2455 (Kiamunyeki “A”)
4. Dundori/Lanet Block/2453 (Kiamunyeki “A”)
5. Dundori/Lanet Block/2452 (Kiamunyeki “A”)
6. Dundori/Lanet Block/2451 (Kiamunyeki “A”)
7. Dundori/Lanet Block/2449 (Kiamunyeki “A”)
8. Nyandarua Muruaki/597



65. I will now consider the mode of distribution in regards to the properties in contention.
66. The Protestors want land parcel known as Dundori/Lanet Block/2456 sold and proceeds thereof distributed to all beneficiaries in equal share. The respondent produced a sale agreement showing that the deceased had sold this land to her sister one Mary Nyambura during her life time. The assertion that the said Mary Nyambura constructed a house thereon during lifetime of the deceased was uncontroverted. For the above reasons I will adopt the mode of distribution proposed by the respondent in regards to this property.
67. With respect to land parcel known as Dundori/Lanet Block 5/261, I note that both parties are in agreement that $\frac{1}{4}$ an acre to be sold to cater for estate's debts and succession, legal and survey fees and $\frac{1}{4}$ acre to be given to Francis Mugo Gatonga (purchaser). As regards the remainder, the respondent proposes that $\frac{1}{2}$ an acre to go to Francis Macharia while 1 acre to be given to Alice Wanjiru while the protestors propose that $1\frac{1}{2}$ acre be distributed to Consolata Njeri Maingi. The protestors have not given any reasons for their proposal. The Respondent on her part wants the 1st protestor to get $\frac{1}{2}$ an acre share. I consider her proposal to be reasonable and fair.
68. With respect to land parcel Dundori/Lanet Block 5/263, the protestors want it distributed in equal shares between Consolata Njeri Maingi and Alfred Wambane Maingi for reasons that this is where the matrimonial home is and Alfred being the last born should be left at home in accordance with the Kikuyu customs. This position in my view is discriminatory and repugnant to justice and morality. The respondent on her part propose this property to be solely granted to her and she indicated that upon her demise she will leave it to the child of her choice. She however stated that all children have a right to access it. Considering this is a matrimonial home where all children lived at during their childhood, I will order the respondent to have a life interest over it. That life interest will operate as a trust over the property the subject thereof, for the benefit of all the deceased's surviving children.
69. With regard to Dundori/Lanet 5/267, the protestors in their affidavit proposed that it should be shared equally between them. However, during hearing, the first protestor proposed that it should be distributed to Alfred Nyambane as he buried his wife there while the respondent proposed that it should be shared between Alfred and Kevin in equal shares for reasons that each one of them has already taken occupation of their respective portions. The protestors have not controverted this position and in my view, it is reasonable.
70. The protestors during hearing told court that Land parcel known as Nyandarua/Muruaki/598 should be shared equally between the two families while the respondent stated that 1 acre should be used as access road and the remainder to be shared equally amongst the 6 children. I order this property to be shared equally amongst the deceased's children. The surveyor will determine the size of the land that will be required to give each subdivision access.
71. Both parties during hearing were in agreement that shares in old mutual should be shared equally amongst the six children. I adopt this position.
72. Regarding the borehole, the 1st protestor during hearing told court it should be shared equally amongst all beneficiaries. The respondent is opposed to the same. She wants it registered in her name but amenable to all parties accessing it. The protestor's proposal is reasonable. I order that a reasonable portion of the land where the borehole is be excised and it be registered in the names of all the children. Access to it will also be provided.
73. Regarding Dundori/Lanet Block 5/265, the Protestors proposed that it should be given to the 1st house since the respondent sold 5 acres under 257 and 259 to educate her children and they did not benefit from it. There was no evidence led to back up this position.



74. There was no evidence led to demonstrate that the Motor Vehicle Registration No. KAE 936 Z Peugeot 504 was sold by the Respondent and thus unavailable for distribution.
75. In the upshot, I issue the following orders:-
- a. The proposed Mode of distribution by the respondent, Consolata Njeri Mwangi, in regards to Dundori/Lanet Block/2458 (Kiamunyeki "A");Dundori/Lanet Block/2457 (Kiamunyeki "A"); Dundori/Lanet Block/2455 (Kiamunyeki "A"); Dundori/Lanet Block/2453 (Kiamunyeki "A"); Dundori/Lanet Block/2452 (Kiamunyeki "A"); Dundori/Lanet Block/2451 (Kiamunyeki "A"); Dundori/Lanet Block/2449 (Kiamunyeki "A"); Nyandarua Muruaki/597; Dundori/Lanet Block/2456 (Kiamunyeki "A"); Dundori/Lanet Block 5/261 & Motor Vehicle Registration no. KAE 936 Z Peugeot 504 is hereby adopted as an order of this court.
 - b. The Respondent, Consolata Njeri Mwangi, shall have a life interest over parcel of land known as Dundori/Lanet Block 5/263 which will operate as a trust over the property the subject thereof, for the benefit of all of the deceased's surviving children.
 - c. 50 x 100 piece of land with a bore hole to be excised from the parcel of land known as Dundori/Lanet Block 5/265 to be shared equally by all parties and the remainder of land to be shared equally between Jacinta Nyambura Maingi & Agnes Njoki Maingi.
 - d. The parcel of Land Known as Nyandarua Muruaki/598 to be shared equally amongst the 6 children of the deceased.
 - e. The Administrator to file a full and complete account of administration in terms of section 83(g) of the Law of Succession Act within next six months of distribution of assets.
 - f. The parties shall bear their costs of the suit.
76. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF SEPTEMBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mrs. N. Njoroge for Francis and Alfred

N/A for petitioner

Miss Nyabuto now present

