



REPUBLIC OF KENYA



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**In re Estate of Mutisya Mwia (Deceased) (Succession Cause 778 of 2010)  
[2023] KEHC 25641 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25641 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 778 OF 2010  
MW MUIGAI, J  
NOVEMBER 22, 2023  
IN THE MATTER OF THE ESTATE OF MUTISYA MWIA  
(DECEASED)**

**RULING**

**Background**

1. The petition received on 3<sup>rd</sup> November, 2010, in which the petitioners Nzula Mutisya and Manthi Mutisya petitioned this Court for a grant of Letters of Administration intestate of the estate of Mutisya Mwia (deceased) who died on 20th June, 2005 domiciled in Kenya at Katine.
2. Pursuant to the Affidavit in support of Petition for Letters of Administration Intestate, the deceased died intestate and left the following surviving him; -
  - a. Nzula Mutisya- wife-70 years
  - b. Manthi Mutisya- Son-56 years
  - c. Matheka Mutisya- Son 58 years
  - d. Ikanza Mutisya- Son- 56 years
  - e. Mboya Mutisya- Son- 40 years
  - f. Nduku Mutisya- Daughter- 45 years- married
  - g. Mbeke Mutisya- Daughter- 40 years- married
3. The Affidavit in support of Petition for Letters of Administration Intestate full inventory of all assets left by the deceased at the date of his death to be:
  - i. Land parcel numbers:
    - a. Kayatta- 1621 NEW NO. 2956 Matungulu



- b. Tala House-4835/01087
- c. Malili Farm- 1016/298 SHOP 66
- d. Mavoloni 1231 Certificate NO.697
- e. Kamulu- 3952
- f. Kisioni- 1082
- g. Musyi- 2051
- h. Mutini- 2053
- i. Kwambatha- 2048
- j. Yanzoni- 1678
- k. Kwakakunila- 505
- l. Ngoko- 530
- m. Matetani- 1936
- n. Shop at Kangundo Market- 75B
- o. Ithanga- 73
- p. Kwamatingi- 1813

Total estimated value Ten million (10,000,000)

4. By the District Officer's letter dated 13th November, 2009 confirmed that the deceased hailed from Tala location in Matungulu Division and that he (deceased) was survived by following:
  1. Kaswii Mutisya- first wife- deceased
  2. Nzula Mutisya- 2<sup>nd</sup> wife
  3. Manthi Mutisya- Son
  4. Patrick Mthela Mutisya- Son
  5. Ikanza Kithome Mutisya- Son
  6. Maitha Mutisya- Son- Deceased
  7. Mboya Mutisya- Son
  8. Nduku Masila- Daughter- married
  9. Mbeke Kilonzo- Daughter
5. Vide the Gazette notice dated 26th November,2010,Nzula Mutisya and Manthi Mutisya both of P.O Box 1001, Kangundo in Kenya the deceased's widow and son respectively were gazetted for grant of Letters of Administration intestate to the estate of Mutisya Mwia, late of Katine who died on 20th June,2005.



6. Grant for Letters of Administration granted on 1<sup>st</sup> March,2011 were issued by this Court on 30<sup>th</sup> March,2011 to, Nzula Mutisya and Manthi Mutisya as personal representatives of the deceased's estate to render a just and true account thereof as required by law.
7. It is on the court record that the matter was not prosecuted. Court vide its notice to show cause dated 23<sup>rd</sup> June, 2015, notified Nzula Mutisya the Petitioner herein to take the necessary steps to have the matter fast tracked or else the same would be place before the Judge on 6<sup>th</sup> July to 25<sup>th</sup> July, 2015 for further necessary action/ and/or dismissal.

#### **Notice Of Motion Dated 30<sup>th</sup> January,2019**

8. By Notice of Motion application dated 30<sup>th</sup> January,2019 and filed in court on 12<sup>th</sup> February,2019 brought under Section 47 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules Cap 160, the applicant sought order inter alia that the Court sets aside its orders dismissing this cause for want of prosecution and allow the firm of Anya Kalwa & Co. Advocates to come on record for the Applicants herein and to reinstate this cause for further action and final disposal.
9. On the 6<sup>th</sup> June,2019, court granted leave to the applicant to file and the same be served to the respondent.

#### **Notice Of Motion Dated 4<sup>th</sup> June,2019**

10. Vide Notice of Motion application dated 4<sup>th</sup> June,2019 and filed in court on 6<sup>th</sup> June,2019 brought under Section 3A of the Civil Procedure Act, wherein the Applicant sought the following orders inter alia that the Court reinstates the Petition. The Applicant relied on Article 159 of the Constitution and Section 1A and 3A of the CPA, it would be fair and expedient and in the best interest of justice to reinstate the Petition.
11. On 9<sup>th</sup> October,2019 court allowed the application dated 4<sup>th</sup> June 2019 as prayed and the same was reinstated. The administrator was directed to proceed to file summons for confirmation of grant.

#### **Amended Summons For Confirmation Of Grant**

12. By Amended Summons for Confirmation of Grant dated 17<sup>th</sup> November,2021 and filed in court on 18<sup>th</sup> November,2021, wherein the Petitioners/Administrators sought orders that:
  - a. The letters of administration made to the said Petitioners of the Estate in this matter on the 25<sup>th</sup> November,2019 be confirmed in the names of Manthi Mustisya and Ikanza Kithome Mutisya.

#### **Amended Affidavit In Support Of Summons For Confirmation Of Grant**

13. The application was supported by amended affidavit in support of the summons for confirmation of grant dated 17<sup>th</sup> November,2021 sworn by Manthi Mutisya. The heirs of the deceased, full inventory of the deceased estate and mode of distribution are in the body of the Supporting Affidavit herein.

#### **Protest**

14. Vide a letter by Ikanza Kithome Mutisya filed in court on 21<sup>st</sup> July,2022, wherein he disagreed with his brother Manthi Mutisya through his lawyer concerning the sharing of the mentioned estate of Mutisya Mwia, on the ground that the said brother took the decision on his own without involving the other beneficiaries; he used unlawful procedures and there was no equal share among the beneficiaries.



15. As the beneficiaries, their right procedure and preferred mode distribution are in the body of the said letter.

### **Statements By Manthi Mutisya And Muasya Nzola**

16. The statements by the aforementioned are both filed on 28<sup>th</sup> October, 2022 wherein they claimed that the deceased herein had distributed his assets to his wives and everyone was satisfied with the distribution and no complaint was raised. That each household took possession of the land given to them and occupies up to date. It is claimed that the matter is pending court for confirmation grant and they wanted the court to adopt the mode of distribution done by their father to his two wives before he died.

### **Hearing**

17. PW1 was Manthi Mutisya (Administrator) He testified that his father Mutisya Mwia had distributed each between the two wives/widows, Kaswii Mutisya his mother (deceased) and that he is the only child. It was PW1's testimony that Teresia Nzola Mutisya had six (6) children two (2) are deceased. Testifying that each shamba was divided into two parts and that they have nothing to be divided in court and there is nothing left. He was of the view that the properties to remain as per his father's distributions. According to PW1, they met with their lawyers and agreed on properties as per his father's book after Kemei J told them to go and agree.
18. In Cross-examination By Ikanza Kithome Mutisya, PW1 told court that if their father divided the property was he there? Claiming that he called Ikanza Kithome and they found that the property was divided into two (2). PW1 testified that Patrick Matheka Mustisya her elder brother was not in court as they finished the matter in Tala. According to him the problem came from Public trustee and they took money from his father, 121 of 2006- Public Trustee case. PW1 did not have the letter that shows how the land was divided. He was taken to DCI Machakos.
- a. Ikanza Kithome Mutisya- Ithanga 73-20-28 acres,
  - b. Manthi Mustisya- Matungulu- 2052- 120ft triangle- 200ft.
  - c. Veronica Masila- Married does not live at her father's property.
  - d. Anne Mbeke Kilonzo- married does not live at her father's property.
  - e. Matheka (not in court)- Matungulu 1082 built the home
  - f. Mboya (Deceased)- family Matungulu 1082
  - g. Maitha (not in court)- live in Nairobi (1936- Kangundo). The rest of the properties no one deals with them.
19. Ikanza Kithome Mutisya (Protestor) testified that they sat down at home and they were to agree on the way forward as a family, him and his wife were appointed representatives. They are of the 2<sup>nd</sup> house. He told Manthi Mutisya the he had the letter and could show him. Testifying that he did not think the handwriting was his father's.
20. Veronica Told court that they were in Tala, they were told that the properties be divided into equal shares. Claiming that there are five shares in Malili and she only got one (1) share 3 acres of each houses.
21. Court on gave directions that parties file their written submissions on the matter with advocates 14 days each.



## Submissions

### The 2<sup>nd</sup> Administrator's Submissions

22. The second Administrator in his submissions dated 25<sup>th</sup> July,2023 and filed in court on 26<sup>th</sup> July,2023, wherein he submitted that his father the deceased herein had divided his properties to his two wives (Kaswii Mutisya and Nzula Mutisya) on 22/10/1989.
23. He contended that date 13/3/1988 they had agreed concerning Matetani plot No. 1936. Maithya was given the said whole Matetani that is Nzula Mutisya and Kaswii was given her share in Katine Plot No 530. Opining that elders were involved who were Wilson Mutisya, Mabaluka Kithongo, Manthi Mutisya, Maithya Mutisya and they all signed the agreement.
24. Contending that in the year 2005 he had the Succession No H.C. 778 OF 2010 and the High Court Ordered the Administrator to be himself and Nzula Mutisya.
25. He averred that date 29/6/2023 the court read what his father had divided his properties to Ikanza and Nduku and there was a question of Plot No:
  - a. 2048 belongs to Matheka Mutisya.
  - b. Plot No. 2050 Katine Manthi Mutisya and Melly Mboya.
  - c. Plot No. 2051 (Melly Mboya).
  - d. Plot No. 1678 court No. 3 (Machakos) divided into Nzula Mutisya and Kaswii Mutisya today the occupier is Melly Mboya and Manthi Mutisya.
  - e. The judge also asked about plot No. 1082 and he told the court that Matheka Mutisya has settled in that plot, Melly Mboya is also doing farming that is the half share of the plot that belonged to Nzula Mutisya and him going to farm in the other share that belonged to his mother as divided by the elders.
  - f. About Malili Plot No. 1241, the 2<sup>nd</sup> Administrator contended that he told court the Plot has 7.8 acres and showed the court Certificate No. 1016 and he also showed Agricultural No 1241 green cards also commercial plot No. 0092 red card, also Membership card which belonged to his father which bore 5 shares.
  - g. He showed the affidavit of balloting dated 20/6/2012.
26. He contended Ithanga plot no 73 has 28 acres (11.453 Ha) and Regarding Mavoloni No. 1231, the plot belongs to Wilson Mutisya Muia and Kaswii Mutisya. Contending that his father had asked his two wives to question him on anything if one was not satisfied with the distribution and no one asked him about the shares.
27. On shares the 2<sup>nd</sup> Administrator averred that Kwa Matingi (3952) share- a half of the shares to Manthi Mutisya and the other half to Nzula Mutisya Family, Kayatta Plot No. 1621- a half of the shares to Manthi and the other half to Nzula Mutisya family and finally Tala House shares (4935) a half of the shares to Manthi Mutisya and the other half to Nzula Mutisya family.

### Submissions By Veronica Nduku Masila And Ikanza Kithome Mutisya

28. By their submissions filed in court on 25<sup>th</sup> July,2023, in which they submitted that Manthi has been using delaying tactics in order to benefit from family property as his own which is against the law.



Contending that whoever forged her signature in the public trustee file number 121 06 must be prosecuted and that since the demise of their father Manthi has been collecting rent from Kangundo house without sharing with family members, whereby must pay Kshs. 5000/- per month since the passing of their father.

29. They opined that dividends of Tala House, Kwa Matingi and Kayatta kwa Ngondia, Manthi must give Kshs 6000/- each year since 2006 because he has been collecting dividends on his own without sharing with family members.
30. It was averred that all properties sold by Manthi without the consent of family, the occupants must be served with eviction notice, including Malili farm. Further they opined that Manthi must produce to the court Shangilia baba na mama housing project documents which he has been hiding from the rest of the family.
31. They urged that the distribution of Estate of Mutisya Mwia to be done as per the procedure which suites all family members.

### **Determination/Analysis**

32. The Court has considered pleadings filed by parties, the Witness Statements and written Submissions and the issue before the Court is mainly just and equitable distribution of the deceased's estate
33. Section 71 LSA provides for distribution of the deceased's estate as follows;

#### 71. Confirmation of grants

- (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
- (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—
  - (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or.....

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.

34. The Court notes that there is meeting of minds with regard to the beneficiaries of the Estate of the deceased Mutisya Mwia and it is also clear beneficiaries are not in agreement on the mode of distribution of the deceased's estate.
35. Where there is disagreement is in the mode of distribution by beneficiaries of deceased's estate, the Court shall apply the legal provisions that speak to distribution deceased's estate in the relevant circumstances and to ensure equitable fair and just mode of distribution.



36. In *Caroline Njoki Muchiri Vs Jane Njeri Muchiri And Another Succession Cause 1293 OF 2009*, this Court pointed out thus:

“Section 35 of the [Law of Succession Act](#) Cap 160 states; “the surviving spouse shall be entitled to

The personal and household effects of the deceased absolutely 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.

In the instant case the administrator, widow of the deceased is entitled to life interest over the deceased’s estate. Ideally, during their lifetime it is expected that both spouses depended on each other for social and economic support. Life interest is the legal protection bestowed on surviving spouses so as not to be ousted and property withdrawn from them or they are mistreated in any way after the demise of spouses.

37. The deceased herein had 2 wives, that makes it 2 houses. “House” means a family unit comprising a wife, whether alive or dead at the date of the death of the husband and the children of that wife, according to section 3(1) of the [Law of Succession Act](#).

In the case of *Rono v. Rono Civil Appeal No. 66 of 2002*, the court applied Section 40 of the [Law of Succession Act](#) and stated;

“...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....”

38. In order to achieve just and equitable distribution of the estate at times equal distribution seems like the way to go. In the case of *Rono v. Rono (Supra)* – Omolo J. A. had this to say;

“my understanding of that section is that while the net intestate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution has a discretion to take into account or consider the number of children in each house. If parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained and generally seen through life. If such a child whether girl or boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act did not provide for such equality.”

Section 40 LSA provides;

Where intestate was polygamous

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.

39. In the Matter of Re Estate of Benson Ndirangu Mathenge(deceased) Nakuru HCSC NO. 231 of 1998(Ondeyo J), the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The court stated that the first house was comprised of five units while second had seven units. The two houses of the deceased combined and looked at in terms of units made up twelve units. The court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the court into twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children.
40. Further, In the Matter of the Estate of Nelson Kimotho Mbiti(deceased) HCSC NO.169 of 2000, Koome J (as she then was) directed that the estate of a polygamist be divided in accordance with the provisions of Section 40 of the Act. The estate was divided into units according to the number of children in each house with the widows being added as additional units
41. In this case the two wives Kaswii Mutisya and Nzula Mutisya are both deceased and are survived by their children who are the beneficiaries namely Manthi Mutisya, Matheka Mutisya, Nduku Musila, Mbeke Mutisya, Kithome Mutisya(alive) Maitha Mutisya and Mboya Mutisya (deceased).
42. The List of beneficiaries as outlined in the Petition consists of;
  - a. Nzula Mutisya- wife-70 years (deceased)
  - b. Manthi Mutisya- Son-56 years (Administrator)
  - c. Patrick Matheka Mutisya- Son 58 years
  - d. Ikanza Mutisya- Son- 56 years (Administrator)
  - e. Mboya Mutisya- Son- 40 years (deceased)
  - f. Nduku Mutisya- Daughter- 45 years- married
  - g. Mbeke Mutisya- Daughter- 40 years- married
  - h. Maithya Mutisya- son- (deceased)
43. Later, Nzula Mutisya became deceased and the Grant was amended by Consents on 6/11/2019 to the administrators being Manthi Mutisya & Ikanza Mutisya.
44. PW1 Manthi Mutisya through his evidence adduced in Court and Submissions filed on 28/7/2023 took the view that the late father's estate was distributed in 1988 & 1999 to his 2 wives namely;
  - a. Kaswii Mutisya (deceased) in 1988 mother to only child/son Manthi Mutisya
  - b. Nzula Mutisya (deceased) in 2021 mother to the 6 children listed above.
45. The Agreement that contained their late father's instructions on distribution of the estate was not availed. The elders named to have been present during oral statement by deceased on distribution were not called or any shred of evidence presented to Court to consider. If the deceased distributed his estate as the 2<sup>nd</sup> Administrator claimed between the 2 wives and he is entitled to ½ of the estate then there ought to have been valid oral or written Will of the deceased in terms of Sections 5-11 of LSA. In the alternative if all siblings were/are in agreement that the deceased's estate was distributed between 2



houses there would be by now from 2015 Written Consents of beneficiaries to the agreed mode of distribution.

46. The Court record confirms as far back as 17/6/2021, parties through their advocates on record sought opportunity for Family Meetings to amicably resolve the matter regarding distribution of the deceased's estate. In the absence of either of the above the Court being last port of Call shall apply the Law on distribution of the estate.
47. The Protestors to Summons for Confirmation filed 23/1/2020 and amended on 18/11/2021 Veronica Nduku Masila & Ikanza Mutisya filed Protest on 9/4/2021 and found the distribution process and result, unconsultative, unfair and unequal. They proposed that where each beneficiary built his / her home, to remain and have at least ½ acre of the property. The rest be shared equally amongst ALL beneficiaries. Veronica told the Court that in Tala, they were told the estate was to be shared equally. They filed submissions on 25/7/2023 and in summary claimed their signatures were forged in the Public Trustee's case 121 of 2006 and the 2<sup>nd</sup> Administrator sold most properties and delayed distribution of the estate and thee 3<sup>rd</sup> parties on land ought to be evicted.
48. Patrick Matheka Mutisya filed Protest on 26/7/2023 and stated that Plots in Kangundo and Matungulu were subdivided by their late father the deceased and Malili Ranch they sold share 1241 and remained with 1242,1240,1243 & 1239 which were awarded to Nduku Mbeke Kithome & Mwelu Mboya on 9/4/2021. The remaining properties are Tala House Kwa Matingi & Kamulu Komarock. He requested the matter to be referred back home to select Administrator.
49. In the absence of agreement between the parties on the mode of distribution of the estate, the law requires that the estate of the deceased, who was polygamous, be distributed in accordance with Section 40 of the Succession Act. The matter has been in Court since 2010 and to date confirmation of grant was/is not complete, the Court record confirms family discussions were allowed. Litigation must come to an end.

### **Disposition**

50. In the Matter of Re Estate of Benson Ndirangu Mathenge (deceased) supra and applying Section 40 LSA, The 1<sup>st</sup> house consists of 1 son and 2<sup>nd</sup> house 6 children (2 deceased) therefore 7 units; equal/ equitable sharing of the properties that comprise of the estate of the deceased.
51. Therefore, wherever each of the beneficiaries reside have developed and have permanent structures each shall remain on their spot and possibly be added cumulatively ½ acre.
52. The sold properties shall be taken into account in the distribution as part of each seller's beneficial interest.
53. Each Party shall bear own costs.

If any party /parties is/are aggrieved to apply

**JUDGMENT DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 22<sup>ND</sup> NOVEMBER 2023.(VIRTUAL/PHYSICAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

