



**Kinoti & 7 others v Samson Kinyua also Known as Samson Gatobu
Ayub; Muguna & another (Interested Parties) (Succession Cause
253 of 2016) [2022] KEHC 11506 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11506 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 253 OF 2016
EM MURIITHI, J
MAY 31, 2022**

BETWEEN

**MONICAH KINAITORE KINOTI 1ST APPLICANT
VENEDICTA GATWIRI 2ND APPLICANT
FLORENCE GAKII AYUB 3RD APPLICANT
JULIA MUCECE 4TH APPLICANT
REBECCA MUKOMUNENE 5TH APPLICANT
ISABELLA KAIMURI KIRIMI 6TH APPLICANT
LUCY RIGIRI MUTUA 7TH APPLICANT
AGNES MWAREGOKI 8TH APPLICANT**

AND

**SAMSON KINYUA ALSO KNOWN AS SAMSON GATOBU
AYUB ADMINISTRATOR**

AND

**ALEX KIGUNDA MUGUNA INTERESTED PARTY
STEPHEN NDEREBA INTERESTED PARTY**

RULING

- [1] By Summons dated March 2, 2021, the applicants who are daughters of the deceased herein seek orders for provision in their deceased's father's estate whose Grant has been confirmed by this court by judgment of November 29, 2018 upon hearing and determination of a Protest to an application for



confirmation of Grant filed by another beneficiary son of the deceased who is the 1st Administrator, and pray, principally, as follows:

- “2. That this honourable court be pleased to stay execution of the Judgement delivered on November 29, 2018 and all consequential orders thereto pending the hearing and determination of this Application.
3. That this honourable court be pleased to review, vary and/or set aside the judgement delivered on November 29, 2018 and provide for the Protestors/Applicants from their deceased father's estate being land parcel No. Kiirua/naari/568.”

[2] The Grounds of the application are set out in the Summons as follows:

“Grounds Relied Upon:-

1. That the applicants herein are the daughters of the deceased herein.
2. That on November 29, 2018 this honourable court pronounced its judgement in this cause.
3. That the protestors/applicants were excluded in the sharing of the deceased father's estate without their knowledge.
4. That the applicants have recently learnt that this honourable court excluded them from the distribution table on a finding that the applicants renounced their interests in the estate since they had signed the consent to distribution which had excluded them from the distribution
5. That it is true that the applicants signed consent to distribution but they were informed by the respondents that the mode of distribution would be as per their deceased father wishes, that is, as per the houses and in the manner that the various houses occupies the estate of the deceased on the ground.
6. That the respondents did not inform the applicants that their proposed mode of distribution had excluded them and therefore due to the trust they had with the Respondents and how their deceased father had raised them in good ~morals, love and unity they did not hesitate to sign the Consents.
7. That the applicants were not aware that this cause was heard through viva voce evidence and various witnesses testified in court without their knowledge.
8. That the applicants signed the consent to distribution in good faith but had no knowledge that the respondent had deceived them with a stratagem to disinherit them. The consent was brought to them at home without the application for confirmation of grant.
9. That unless the applicants [are] provided for from their father's estate, they stand to be disinherited forever.
10. That it is only fair and just that the orders sought herein be granted to meet the ends of justice.”



[3] The application was supported on the facts by the affidavit of 1st applicant (on behalf of herself and the other applicants) sworn on March 2, 2020, principally, as follows:

- “ 3. That we are all the daughters of the deceased herein who died on September 8, 1983. Annexed hereto and marked as exhibit MKK-01 is a copy of the death Certificate.
4. That our deceased father left behind land parcel No. Kiirua/Naari/568 measuring 6.56 Ha or thereabout as his estate.
5. That sometimes in 2018 the respondents came to our homes requesting us to sign consents to enable our deceased father’s estate shared amongst the beneficiaries.
6. That we inquired the Respondents on how the estate was to be shared and they informed us that it was to be shared as per our deceased father’s wishes, id est, as per the houses and as per existing boundaries and mode of occupation on the ground.
7. That the respondents did not show us the application for confirmation but due to the trust we had with respondents we all signed the consents not knowing that the respondents had deceived us.
8. That we have recently learnt that this honourable court delivered its Ruling on November 29, 2018 excluding us from the distribution table without our involvement in the litigation and on a finding that we had renounced our interest since we had signed consent to distribution.
9. That we were not aware that this cause was heard through viva voce evidence and various witnesses testified in court without our knowledge.
10. that we wish to state that we signed consent to distribution in good faith but not aware that the respondents had deceived us with a stratagem to disinherit us.
11. That our deceased father had divided his land into four (4) portions whereof he gave each of his three (3) wives to hold on behalf of their respective households while he retained the other one for himself and all the boundaries were established and road of access created Annexed hereto and marked as exhibit MKK-02) are photographs of the boundaries and road of access.
12. That we invite this honourable court to visit the estate parcel of land (LR No. Kiirua/naari/568) on the ground and attest to deposition in paragraph 11 above.
13. That from the foregoing if the judgement herein is not reviewed and/or varied to provide for us, we stand disinherited forever.
14. That we have been counselled by my Advocates on record which counsel we verily believe to be correct that article 159 (2) of the Constitution embodies the concept of rendering substantive justice in a just and expedient manner



and therefore we urge this Honourable Court not to drive us out of the seat of justice unheard as it is the only available justice system.”

[4] The 1st Administrator Samson Gatobu Ayub filed a Replying Affidavit sworn on October 15, 2021 urging the consent to the distribution earlier signed by the applicants, as follows:

- “1. That I am named as the 1st Administrator in the certificate of confirmation dated February 26, 2019 but the name Samson Kinyua is used.
2. That the set of names appearing in my National Identity Card is Samson Gatobu Ayub and I would like the certificate of confirmation of grant to be corrected to that extent.
3. That I have the authority of the 1st and 2nd interested parties who are my brothers.
4. That the applicants were aware of the matter all the way through the proceedings and they all (and each of them) consented to the mode of distribution.
5. That the 2nd administrator named Ajelica Mwaranla is the mother to 2nd to 7th applicants and when they signed the consent it was clearly understood that they (the 2nd to 7th applicants) would have a life interest in the parcel apportioned to Ajelica.
6. That when the 1st and 8th applicants signed the consent it was understood that if they were interested in any parcel their interest would be addressed through their maternal brother Godfrey Munene M'twerandu who is the 3rd administrator as per the certificate dated February 26, 2019.
7. That the application dated March 2, 2021 is an afterthought and it is brought to delay and derail the finalization of the whole matter.
8. That I have become aware of the application when I was served with a hearing notice dated July 19, 2021.
9. That it has taken duration of almost 3 years since the judgment was delivered on November 29, 2018 for the applicants to move the court. The delay is not explained.
10. That the applicants are misled by Washington Ndiira Mbijlwe who is also a son of Ajelica Mwarania M'twerandu
11. That the purpose of the application is to ensure that the shares as apportioned by the court are reduced and what the applicants will get shall be passed to Washington Ndlira Mbijiwe.
12. That the application is therefore an abuse of the court process in view of the foregoing.
13. That indeed because the applicants signed the consent they could only seek to have the same expunged from the record and if they are not successful they should appeal.
14. That I believe the effect of signing the consent is the same as any consent order.



15. That if the applicants are of the view that they were misled they should be specific as to who misled them, when and what was the statement of misrepresentation.
16. That having been aware of the proceedings they could have asked to be enjoined.”

[5] The 1st applicant on behalf of the applicants filed a further affidavit sworn on 1/11/2021 responding to the respondent administrator’s replying affidavit as follows:

- “3. That we have read and understood the contents of the replying affidavit sworn by Samson Gatobu Ayub on October 15, 2021.
4. That I repeat the contents of the supporting affidavit sworn on March 2, 2021 for their full tenor and effects.
5. That in response to paragraph 4 and 5 of the replying affidavit i wish to state that we held a family meeting whereof one Godfrey Munene M’twerandu (now deceased) introduced the consents to all the beneficiaries including Samson Gatobu Ayub who was present.
6. That as stated in the supporting affidavit sworn on March 2, 2021, we were never shown the mode of distribution and only the consents were given to us to sign. Due to the trust that we had to our brother we all signed them not knowing that we had been deceived. It’s only Samson Gatobu Ayub who refused to sign.
7. That further, I wish to state that we were never served with the Protest filed by Samson Gatobu Ayub and therefore we were never given a chance to participate in such proceedings.
8. That the allegations in paragraphs 6, 10 and 11 of the replying affidavit are not proved or at all.
9. That in response to paragraphs 13, 14, 15 and 16 of the replying affidavit, I wish to state that we signed the consents with clear knowledge that the parcel of land would be distributed in accordance with our deceased father’s wishes.
10. That we verily believe that the mode of distribution was changed after we signed the consents. If at all we were served with the Samson’s protest we would have filed our responses and participate in the proceedings thereof.
11. That we have recently learnt that this honourable court delivered its Ruling on November 29, 2018 excluding us from the distribution despite the fact that we were never involved in the litigation thereof.
12. That in the interest of justice we urge this honourable court to allow our application for review for provide for us from our deceased father’s estate.”

[6] I have considered the application and the respective affidavits filed by the parties as well as the submissions by counsel for the applicant, the respondents having not filed their own submissions.

[7] The applicants had given their consent to the proposed distribution which was rejected by the court in its judgment of November 29, 2018. They allege a scheme to defraud them because they were only



asked to sign the consent without being informed of the proposed distribution, as submitted in their Counsel's Submissions dated 29/1/2022-

“Conclusion

Consequently, we submit that the applicants have satisfied the tests for setting aside the ruling delivered on November 29, 2018 as laid down in the above cited authorities since they have vehemently denied that they had knowledge of the contents of the consents before signing them. The applicants were deceived by the petitioners into signing the consents and took advantage of the trust the applicants had in the petitioners that the parcel of land would be distributed in accordance with their deceased father's wishes but instead ended up being a confirmation of something else.”

Issue for determination

8. With respect, the issue before the court is whether the applicants consented to being omitted from the sharing of their father's estate or put in another way whether the applicants gave up their right to a share of the deceased's estate. Being a constitutional right for women to equality generally and in particular statutory right of inheritance as children of a deceased person without discrimination as to sex or marital status, the court must require clear and cogent evidence of renunciation by daughters of the right to the inheritance to the estates of their parents.
9. The Judgment of court of November 29, 2018 herein rejected the proposed distribution of the deceased's estate according to the alleged wishes of the deceased in allocating specific portions of his property to his three wives, ruling as follows:
 21. “It is clear that during his lifetime, the deceased showed his respective wives specified areas where they were to cultivate and fend their respective families. Did this amount to the deceased sharing or dividing his land during his lifetime? Can that be assumed to be a bequest which survived him?
 22. A property of a deceased is either willed away during lifetime or inherited under the intestacy rules in force. The date when the deceased divided his land was not given. The specific areas allegedly shared to the wives was also not disclosed. All the applicant told the court is that the deceased divided his land into 4 portions out of which, he distributed 3 of them to his 3 wives to use together with their respective children.
 23. To my mind, that cannot be a specific bequest. There was no evidence that he intended to disinherit his children. If his intention was that those portions belong to his wives absolutely to the exclusion of his children, nothing would have been easier than for him to state so in three ways:-
 - a) through a written will,
 - b) procuring separate titles for the said portions in the names of his 3 wives, or
 - c) Calling all his children and elders on a specific date, and declaring before all and sundry that, the portions given to the wives belonged to them absolutely and take steps to dispose of the same to them.
 24. One thing that is clear from the proposed distribution is that the 2nd applicant is proposed to get 6.05 acre. His brother Geoffrey James Gatobu is to get 2.33 acres. The two are supposed to get 8.38 acres leaving the balance of 7.82 acres to be divided amongst the 7 remaining brothers



and the surviving widow, also a son of the deceased is earmarked for 0.71 acres. The question is, was that the intention of the deceased? I do not think so.

25. In my view, what happened is that the deceased being a polygamist knew that the three wives could not live together and use his entire property peaceably for the benefit of his entire family? He therefore settled each wife on her own separate portion to fend for her children leaving a portion for himself. In the meantime, the entire property remained under one title, in his name. This was when he migrated from Thimbiri to Naari and the same state of affairs remained as such until he died in September, 1983. There is no evidence that he divided any portion of his land to any of his children. He left it in the custody and possession of his wives.
26. Having failed to do either of the three dispossessory acts set out in paragraph 22, the property remained to be that of the deceased and he died before he could distribute his land to all or any of his beneficiaries in any manner known in law. He therefore died intestate and his property is to be inherited under the intestacy Rules.
27. The other issue is the 4th portion which the deceased is said to have kept for himself. The applicants alleged that he later gave it to the 2nd applicant. There was however, no evidence to show what size that portion was, the date when he allegedly gave it to the 2nd applicant or that the circumstance under which he gave it to the applicant amounted to an express bequest. That evidence lacking, I hold that the interest in that property merged with the rest of his property upon his demise.
28. The deceased having been a polygamist and having died intestate, his estate is to be distributed in accordance with section 40 of the Law of Succession Act which provides to the effect that the estate is to be distributed equally among all units with the widow making a unit of her own.
29. Accordingly, the estate will be distributed as follows:-
Land Parcel No.kiirua/naari/568 (16.2 Acres)
 - a) Ajelica Mwarania M’Twerandu 1.35 Acres
 - b) Godfrey Munene M’Twerandu 1.35 Acres
 - c) Geoffrey James Gatobu 1.35 Acres
 - d) Alex Kigunda Muguna 1.35 Acres
 - e) Stephen Ndereba 1.35 Acres
 - f) Samuel Kaimenyi 1.35 Acres
 - g) Estate of Gerald Murerwa
(deceased represented by
Gitonga Brian, Linet Karwitha
and Kelvin Muriuki 1.35 Acres
 - h) Washington Ndiira Mbijiwe 1.35 Acres
 - i) John Ndubi - 1.35 Acres
 - j) Harun Kathurima - 1.35 Acres



K) Richard Kithinji -

l) Samson Kinyua -

21. This being a family matter, I will order no costs.

DATED and DELIVERED at Meru this 29th day of November, 2018

A. MABEYA

JUDGE

[10] The applicants were not heard in court during the hearing of the protest by the 1st Administrator, probably because they had already signed their consent to the proposed distribution contained in the application for confirmation of Grant which was then under challenge by the Protest of the 1st Administrator Samson Gatobu. The court acted on their written consent as shown in the excerpt of the Judgment at paragraphs 15-17, below:

15. “I have carefully considered the affidavits on record, the testimonies of the witnesses and the submissions of counsel for the applicants. The issues for determination are; did the deceased divided his property before his demise, if so how? If not, how should the estate be distributed?”

16. The contention by the applicants was that, prior to his death the deceased had divided his land into 4 portions. That he had given to his 3 wives a portion each while he retained a portion for himself which he later gave to Godfrey Munene because of what he had done to the family. That each wife was expected to share the portion given to her with her household. That the proposed distribution was in accordance with the wishes of the deceased.

17. This was strenuously denied by the protestors. One thing that was not in dispute is that the daughters of the deceased are excluded from the distribution. They all signed the consent to distribution which had excluded them from the distribution. This to my mind amounted to an express renunciation of their interest in the estate.”

[11] The applicants had “all signed the consent to distribution which had excluded them from the distribution”. However, this consent was in the context of the proposed distribution in the application for confirmation which though it excluded them from the distribution would divide the estate according to the three houses of the deceased and they would be able to get their share under their respective house. They did not expressly agree to waive their interest in the estate of their father as daughters. They had thought their interest was provided for in the sharing according to their father’s wishes and they had “trust the Applicants had in the Petitioners that the parcel of land would be distributed in accordance with their deceased father’s wishes”. When the court adopted a different mode of distribution, their such trust, they say, was frustrated, and they had to seek their individual specific share in equality with their male counterpart children of the deceased.

[12] The applicants had given their consent, even though unwittingly as alleged by the applicants, to the distribution proposed in the application for confirmation of Grant which was rejected by the court in its Judgment of November 29, 2018. Their consent to distribution, if it were given at all as urged by the respondent administrator, who incidentally was a protestor to the mode of distribution then proposed, was to the distribution of the estate in accordance with the households of the three wives of the deceased, in which case they would their share under their respective household.



[13] It would appear that the applicants were laboring under a mistake as to the true implication of their consent. The Court (Mabeya J.) was right in the circumstances of the case to accept their written consent to the distribution, having not heard the applicants in court but the evidence now given in the supporting affidavits indicate that they were mistaken as to what they agreed to by signing the Consent herein.

Principles for review of judgment

[14] As observed by L. Njuguna, J. in the case cited by the Counsel for the applicants in *Francis Njoroge v. Stephen Maina Kamore* (2018) eKLR –

“Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist:-

- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- (b) There was a mistake or error apparent on the face of the record; or
- (c) There were other sufficient reasons; and
- (d) The application must have been made without undue delay.”

[15] With respect, this is not an occasion for variation or setting aside of a consent. The consent simply related to the proposed distribution in the application for confirmation grant which distribution the court rejected in its judgment of November 29, 2018 when it adopted a mode of distribution other than the one set out in the application for confirmation. Unfortunately, the court did not hear the beneficiaries as it could have under Rule 41 (2) of the *Probate and Administration Rules* when the applicants could have confirmed before the court any consent to renounce their interest in the estate.

[16] The period of three years (actually two years and 3 months) cited by the respondent from the date of Judgment on 29//11/2018 and filing of the application for review of 2/3/2021 is not inordinate having regard to the nature of the succession matters and importance of the interest pursued by the applicants for the inheritance of their deceased parent, as to warrant refusal of the application for review.

Conclusion

[17] It would appear to this court that the applicants were in signing their consent to the proposed distribution in the application of confirmation which did not provide for them laboring under a belief which turned out to be mistaken that the estate would be distributed according three houses of the deceased and that they would get their interest covered under their respective house. The applicants allege fraud on the part of the petitioners in getting them to execute the consent without giving them information as to the proposed distribution. Fraud is a serious allegation and I do not find it proved on a balance of the probabilities on the evidence before the court.

[18] There, however, are sufficient reasons for considering the review of the Judgment in this case, whose effect is to shut out the daughters from inheriting their father. The fact that they were not heard in open court on their wishes as regards distribution of the estate; the fact that the proposed distribution on which the consent was given was according to houses of the three wives of the deceased; and the need to give effect to constitutional and statutory law on equality and right of female children to inherit their deceased parent, all combine to give a compelling sufficient reason to vary the decision of the Court



on the distribution of the estate to include the applicants daughters of the deceased in the sharing formulae.

[19] Section 40 of the [Law of Succession Act](#) prescribes as follows:

- “ 40. 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.
 - (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 sections 35 to 38.”

[20] In allowing this application, the court is, primarily, giving effect to the legal provision for non-discrimination and equality in the rights of inheritance given to children, female or male, of a deceased person under section 40 of the [Law of Succession Act](#), which it considers a sufficient reason to review the decision of the court in the Judgment of November 29, 2018, against the background that the daughters did not know the true impact of the consent not being aware of the then proposed distribution of the estate of their deceased father.

ORDERS

21. Accordingly, for the reasons set out above, the court grants the Summons dated 2/3/2021 in terms of Prayer No. 3 thereof that the Judgment delivered on November 29, 2018 is varied to include the applicants/daughters of the deceased as beneficiaries in equal shares with the other beneficiaries, and, therefore, an order for equal distribution of the Estate among all the children of the deceased and the surviving widow as an additional unit is, pursuant to section 40 of the [Law of Succession Act](#) granted therefor.
22. Consequently, the Estate of the Deceased herein made up of LR No. Kiiirua/naari/568 shall be distributed equally among the following beneficiaries, being all the children, male and female, of the deceased and the surviving widow, the 1st Interested Party herein:

“Land Parcel No. Kiiirua/naari/568 (16.2 Acres) to be share in equal shares among the following beneficiaries:

1. Ajelica Mwarania M’Twerandu approx. 0.81 Acre
2. Godfrey Munene M’Twerandu approx. 0.81 Acre
3. Geoffrey James Gatobu approx. 0.81 Acre
4. Alex Kigunda Muguna approx. 0.81 Acre
5. Stephen Ndereba approx. 0.81 Acre
6. Samuel Kaimenyi approx. 0.81 Acre
7. Estate of Gerald Murerwa (deceased represented by



Gitonga Brian, Linet Karwitha
and Kelvin Muriuki approx. 0.81 Acre

8. Washington Ndiira Mbijiwe approx. 0.81 Acre
9. John Ndubi approx. 0.81 Acre
10. Harun Kathurima approx. 0.81 Acre
11. Richard Kithinji approx. 0.81 Acre
12. Samson Kinyua approx. 0.81 Acre
13. Monicah Kinaitore Kinoti approx. 0.81 Acre
14. Venedicta Gatwiri approx. 0.81 Acre
15. Florence Gakii Ayub approx. 0.81 Acre
16. Julia Mucece approx. 0.81 Acre
17. Rebecca Mukomunene approx. 0.81 Acre
18. Isabella Kaimuri Kirimi approx. 0.81 Acre
19. Lucy Rigiri Mutua approx. 0.81 Acre
20. Agnes Mwaregoki approx. 0.81 Acre

23. There shall be no order as to Costs.

Order accordingly.

DATED AND DELIVERED ON THIS 31ST DAY OF MAY, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Kiautha Arithi & Co. Advocates for the Protestors/Applicants.

M/S Mutwiri Arimi & Co. Advocates for the 1st Administrator & 1st and 2nd Interested Parties.

