



In re Estate of the late Joseph Runanu Wamaria - (Deceased) (Succession Cause 16 of 2017) [2022] KEHC 11260 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 16 OF 2017
RB NGETICH, J
MAY 26, 2022
IN THE MATTER OF THE ESTATE OF THE LATE
JOSEPH RUNANU WAMARIA - (DECEASED)**

BETWEEN

NAFTALI KAMAU RUNANU APPLICANT

AND

NOAH WAMARIA 1ST RESPONDENT

BEATRICE WANJIKU 2ND RESPONDENT

MONICA WANGUI 3RD RESPONDENT

JUDGMENT

1. The matter relates to the estate of Joseph Runanu Wamaria who died intestate on November 23, 2014. On May 15, 2017 temporary grant of letters of administration were issued to Noah Wamaria, Beatrice Wanjiku and Monica Wangui in their capacity of being children of the deceased. The petitioners listed LR No 6387/1 (IR 30421) as the only property left behind by the deceased.
2. Dependants of the deceased are listed as hereunder: -

1st House

Charity Kabura Runanu - wife Mary Wairimu - daughter Noah Wamaria Runanu - son Beatrice Wanjiku Runanu - daughter Hannah Wambui - daughter Teresia Muthoni Gitau - daughter Monica Wangui Runanu - daughter Jedidah Wangari Kibiru - daughter Rhoda Njeri Runanu - daughter Jane Gathoni Runanu - daughter David Nderu Runanu - son Paul Kamau Runanu - son

2nd House

Ann Wanjiru - wife Isaac Wamaria Runanu - son Moses Wachira - son Duncan Gakungu Runanu - son Naftali Kamau Runanu - son John Mburu Runanu - daughter



Others Thumbi Wamaria Family

Gibson Wamaria Thumbi Mary Wairimu Thumbi Joseph Kabiro Thumbi Tabitha Wanjiru

3. The consent for filing the petition was signed by Mary, Noah, Beatrice Teresia Monica, Jedidah, Rhoda, Jane, David, Paul, Duncan, Naftali, Joseph and Tabitha.

4. The administrators applied for the confirmation of grant dated December 17, 2018, proposing the estate to be divided as follows:

1st house

Charity Kabura Runanu - wife Mary Wairimu - 21 acres Noah Wamaria Runanu - 15.38 acres Beatrice Wanjuki Runanu - 11.23 acres Hannah Wambui (deceased) - 10 acres Teresia Muthoni Gitau - 9.68 acres Monica Wangui Runanu - 7.55 acres Jedidah Wangari Kibiru - 9.68 acres Rhoda Njeri Runanu - 13.55 acres Jane Gathoni Runanu - 8.68 acres David Nderu Runanu - 5.00 acres Paul Kamau Runanu - 18.38 acres Home - 2 acres Church - 1.00 acre Wairimu Mukera - 1.00 acre Road - 1.50 acre Ann Wanjiru - 20 acres to hold in

trust for the 2nd family

Joseph Kabiro Thumbi - 9.68 acres

5. It is on the strength of the application for the confirmation of the grant that the applicant applied for the revocation of the grant dated April 8, 2019 seeking to have the grant issued to the administrators revoked and the estate of the deceased be re-distributed in a fair and equitable way. Ground for revocation of the grant is that it was obtained through deceit and concealment of material facts; that the beneficiaries did not all consent to the mode of distribution of the estate.

6. The respondent filed replying affidavit dated July 15, 2021. He averred that the applicant had signed the consent to the confirmation of the grant together with his siblings. He averred that the applicant's mother (Ann Wanjiru) was married to the deceased but they divorced and she re-married. He further averred that the deceased only left a share of his estate for the children and not the homestead and the deceased had divided his property before his demise. The respondent further averred that the mode of distribution of the estate of the deceased was transparent and agreed upon by the consent of the parties and denied the allegation that the grant was obtained through concealment of material facts, fraud or coercion.

7. On October 25, 2021, the court gave directions that the matter proceeds by way of *viva voce* evidence.

Applicant's Case

8. PW1 Naftali Kamau Runanu testified that the deceased was his father and that he had 2 wives his mother being the 2nd wife of the deceased. He stated that the 1st wife was blessed with 11 children though one is deceased but left behind a family while his mother had 7 children.

9. He testified that the 2nd house was not involved in the administration of the estate of the deceased and stated his father (deceased) had 152 acres of land which were to be divided equally between the two houses and that he raised an objection when the 2nd house was given 20 acres.

10. During cross-examination, he stated that he was not informed about the succession cause and only heard rumours of the cause and decided to come to court. He also confirmed that his mother was married and later divorced by the deceased.



11. On cross-examination by the court, he confirmed that Samuel Ngure aged 40 years and Serah Mugure aged 44 years are not biological children of the deceased as they were born after the separation. He stated that the dependants from the second house who are entitled to the deceased's estate are: -
 1. Naftaly Kamau,
 2. Duncan Gakuyo,
 3. Moses Wachira
 4. Isaac Wainaina and
 5. John Mburu.
12. At that stage of hearing, the objector was stood down and on December 15, 2021 he continued with his evidence and stated that he wants the property to be shared equally between the two wives and opposed allocation according to the number of the children. He further stated that he wished to have the money in Kenya Commercial Bank to be shared between the two wives though he did not know the bank account number.

Petitioners' Case

13. DW1 Monica Wangui Runanu testified as one of the administrators of the estate. She confirmed that the deceased had 2 wives and her mother Charity Kananu is the 1st wife and had 11 children; the second wife Ann Wanjiru had 7 children. She confirmed that the objector is her step-brother and stated that the deceased also took care of his brother's children and they are entitled to a share of the estate of the deceased.
14. DW1 testified that the deceased distributed his property before his demise. She said the deceased called all his children for a meeting including the objector and all children were satisfied with the distribution and there were no complaints raised after the subdivision of property by the deceased.
15. On cross-examination by Naftaly DW1 stated that before filing the petition, she informed Ann Wanjiru the 2nd wife of the deceased who refused to be an administrator for the 2nd house but agreed to the choice of administrators and the mode of distribution of the estate.
16. In re-examination she confirmed no minutes were taken during the several meetings held. She said the deceased left behind a sketch map of how the property will be distributed. She further stated that the deceased allocated the 2nd house 20 acres of land, 120 acres to the 1st house, 10 acres to the brother's children and 1½ acres to the church. She further stated that the deceased allocated more land to the unmarried children and urged this court to honour the wishes of the deceased.
17. DW2 Ann Wanjiru testified she was married to the deceased and the deceased allocated her family 20 acres before he died which she is comfortable with. She said she informed her children about the allocation and they were satisfied. She said the 20 acres have been distributed to all her 7 children each getting 2.6 acres; she said the families of her deceased children were allocated their share.
18. On cross-examination by Naftali, DW2 said that she was married to the deceased for over 20 years before the divorce. She had 5 children with the deceased and 2 after the separation though she did not re-marry. She said it is only the objector among her children who was dissatisfied with the mode of distribution. She said at the time of separation, she moved out with her children who were young and when the deceased called them for the distribution of the estate, she went along with Duncan Wakunyu.



19. The court examined Duncan Wakunyu's wife Alice Wairimu Wakungu who confirmed that she is the wife of Duncan Wakunyu deceased and said Anne Wanjiru who is her mother in law lives in Rumuritu. She confirmed that she is satisfied with the 20 acres of land given to her family by the deceased.

Applicant's/Objector's Submissions

20. The objector submitted that the distribution of the deceased's estate is inequitable, untenable and biased as the 1st house has allocated itself the largest share of the deceased estate and cited the case of *John Ngugi Karanja v Samuel Njau Karanja* [2016] eKLR Where the court held as follows: -

“My understanding of the above is that the proposal ought not to be discriminatory or biased against any or some of the beneficiaries nor should it be unfair or unjust. The words used in section 35(5) and section 38 of the *Law of Succession Act* are equally as opposed to equitably. The provisions and in mandatory terms the property shall be divided equally among the surviving children.”

21. The objector further submitted that the deceased died intestate and there is no evidence adduced to prove the deceased left behind a will. He further urged the court to distribute the estate under the rules of intestacy and cited the case of the *Matter of the Estate of Elizabeth Wanjiku Munge (deceased)* [2015] eKLR where the court held as follows: -

“From the material before me, the date when the alleged oral will was made is not disclosed in any of the affidavits on record or even in any documents. The persons alleged to have been present when the will was made did not swear an affidavit. The validity of the alleged will cannot, therefore, be ascertained. As there is no proof that there was a valid will I shall presume the deceased died intestate. I shall determine the application before me on the understanding that the deceased died without leaving a valid will.”

22. The objector urged the court to invoke the provisions of part V of the Law of Succession and in particular section 40(1) and distributed the estate of the deceased amongst the children of the deceased and find that there was no evidence tabled before the court to distribute the estate of the deceased to the church and the nieces and nephews of the deceased.

Petitioners' Submissions

23. The petitioners submitted that the applicant's application for the revocation of the grant fails to meet the threshold as enshrined in section 76 of the *Law of Succession Act*; and further submitted that the applicant was actively involved in every step taken by the petitioners in obtaining the grant. They submitted that the applicant with some of his family members signed the consent supporting the filing of the petition as per the requirements of section 51(2) of the *Law of Succession Act* and rule 26 of the *Probate and Administrative Rules*.
24. That the applicant was aware of the succession matter in court which position is confirmed by the applicant's mother who testified before the court and stated that she is contented with what her family has been allocated.
25. The petitioners further submitted that the mode of distribution followed by the petitioners is how the deceased had settled each beneficiary prior to his death, a position which the applicant/objector confirms as he stated that he lives in the portion allocated to him by the deceased.



26. The petitioners submitted that they are opposed to equal distribution as proposed by the applicant and submitted that where beneficiaries do not agree to the mode of distribution then the deceased estate ought to be distributed in accordance with section 40 of the Law of Succession as the deceased was polygamous. Therefore, the estate is to be divided in accordance to the number of children adding each wife as a unit comprising of 1st house 11 units, 5 more children maintained by the deceased before his death and 5 children by the 2nd house.
27. In conclusion, the petitioners submitted that the applicant should be contended with what the deceased gave him before his death as he has utilized the same portion from the time of allocation and urged this court to dismiss the applicant's application with costs.

Analysis and Determination

28. I have considered evidence adduced and submissions filed by parties herein and find the following as issues for consideration: -
- i. Whether the objector has raised sufficient grounds to warrant revocation of grant
 - ii. What is the proper mode of distribution of the estate of the deceased?

(i) Whether the objector has raised sufficient grounds to warrant revocation of grant

29. The application for determination is premised on section 76 of the [Law of Succession Act](#), cap 160 laws of Kenya which provide as follows: -

“section 76 revocation or annulment of grant.

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides either on application by any interested party or of its own motion

- a. that the proceedings to obtain the grant were defective in substance,
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case,
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - ii. to proceed diligently with the administration of the estate or
 - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular or



- e. that the grant has become useless and inoperative through subsequent circumstances.”
30. Grant can be revoked on grounds listed above are disclosed, either on the court’s own motion or on the application by a party. The power to revoke a grant is discretionary and must be exercised judiciously. It is therefore upon the applicant seeking the revocation of the grant to establish that any of the above grounds exist to warrant revocation of grant.
31. The objector’s argument is that the grant was obtained through concealment of material facts. A closer look at the record of the petition filed herein on January 17, 2017 and a consent attached, the applicant appended his signature, a clear indication that he was aware of the succession proceedings therefore the assertion that the petition was filed without the knowledge of the second house cannot stand.
32. On allegation that the grant was obtained through concealment of material fact by the petitioners failing to disclose the existence of the 2nd house, record show that the petitioners listed the 2 families of the deceased together with the other beneficiaries being maintained by the deceased before his death.
33. I do note that the chief’s letter dated August 12, 2015 attached to the petition lists all the beneficiaries of the deceased. It is not true therefore that the petitioners failed to disclose material facts; this ground therefore fail.
34. From the foregoing, the applicant has failed to meet the threshold set by section 76 of the Law of Succession Act to warrant the revocation of the grant. The grant was therefore regularly issued.

(ii) what is the mode of distribution of the deceased’s estate?

35. There is no consensus among the parties herein on how the estate of the deceased is to be distributed. It is not disputed that the second wife was divorced by the deceased. The second wife said she lived with the deceased for 20 years and she sired 5 children with him but got two more children after the divorce. This has not been disputed. It is not also disputed that the second wife was given 20 acres of land by the deceased before he died. The petitioner’s argument and the second wife who is the objector’s mother stated that it was intention of the deceased to give the second house 20 acres which he gave before he died. No written will was availed nor oral will to prove that.
36. From the Chief’s letter attached to the petition the deceased was a polygamous man and was survived by 2 wives and other children who depended on him prior to his death. The deceased having been polygamous man his estate will be distributed in accordance with section 40 of the Law of Succession, 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 net intestate shall, in the first instance, be divided among the houses according to the number of children in each household, but also adding any wife surviving him as an additional unit to the number of the 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 and 38.”
37. From the foregoing, while distributing the estate of the deceased, I will take into account the number of beneficiaries in each house. The 1st house has 11 children and the wife making a total of 12 units. The children of the deceased in the second house are 5. There is no prove of remarriage of the second



wife; she will therefore form additional unit making a total of 6 units for second house. It is not also disputed that the deceased maintained his brother's children; this was confirmed by the chief in his letter. I will consider them as a third family containing 4 units. It is not also disputed that the deceased gave a portion of his land to the church which should be allocated to the church.

38. In the upshot therefore I make the following orders:

1. I decline to revoke grant issued.
2. The deceased's estate to be distributed in the ratio of 12:6:4. The first house has 12 units, second house 6 units and children of deceased's brother 4 units.
3. The church to retain the portion of land allocated to it.
4. Each party bears their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT KIAMBU THIS 26TH DAY OF MAY, 2022

.....

RACHEL NGETICH

JUDGE

In the presence of:

Kemboi - Court Assistant

Applicant - present

Ms. MaryAnne Kariuki for Petitioners/Respondents

