



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Jonah Thumbi (Deceased) (Succession Cause
104 of 2017) [2022] KEHC 11044 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 104 OF 2017
MM KASANGO, J
JULY 28, 2022**

RULING

1. What is for determination in this ruling is how Ksh.18,564,827 is to be shared between the beneficiaries of this Estate. Justice C. Meoli by the judgment dated 5th March, 2020 did determine the surviving beneficiaries of this estate as:-
 - a. George Mbuthia Thumbi
 - b. Esther Njeri Kagundo
 - c. Mary Wairimu Karanja
 - d. Peter Muigai Thumbi
 - e. Karen Wanjiku Thumbi aka Karen Wanjiku Mureithi
 - f. Gladys Nyambura Mwaria and Eunice Wanjiku Mwaria
2. Following that judgment and by consent of all the beneficiaries dated 31st August 2020, one of the estate's property namely, Ruiru Town/70 (hereafter Ruiru Property) was sold for Kshs.65,000,000. The beneficiaries agreed on the partial distribution of that sale proceed and that distribution left an amount of Kshs.18,564,827 undistributed. That amount is invested in the joint names of the three advocates representing the beneficiaries.

Background

3. This case relates to the estate of Jonah Thumbi deceased. He was survived by a widow who was Eunice Wanjiru Thumbi deceased. The widow passed away in August, 2015.
4. By a Ruling dated 27th July, 2018 Justice C. Meoli determined applications filed by widows of sons of the deceased, in this case namely, Esther Njeri Kagunda and Mary Wairimu Karanja (hereinafter Esther and Mary respectively). By the Ruling of 27th July, 2018 which determined the application by Esther and Mary, the court found that deceased's widow, the administrator unlawfully transferred the



deceased's Ruiru property to some of the beneficiaries to the exclusion of others. Consequently, the transfer of the Ruiru property to George Mbutia Thumbi, Peter Muigai Thumbi and Karen Wanjiku Muretihi (hereafter George, Peter and Karen) respectively was revoked and Ruiru property was ordered to revert into the name of Jonah Thumbi Deceased.

5. As stated herein above, with the court's prompting and by the consent of the beneficiaries, the Ruiru property was sold and what now remains for determination is how the remaining proceed of that sale, Kshs.18,564,827 shall be shared amongst the beneficiaries. On 5th March, 2020 the court noted that advocate for Esther and Mary and of Eunice Wanjiku Mwaria and Gladys Nyamuhu Mwaria (hereinafter Eunice and Gladys respectively) had consented that each party to file accounts of their receipt of rental income of the Ruiru Property.

Submissions On Account

6. Parties identified the issues needing determination. Although those issues were only consented to by the advocate acting for Esther, Mary, Eunice and Gladys, the advocate for George Peter and Karen conveyed his acceptance of those issues in the submissions dated 25th October, 2021. Those issues paraphrased are:-
 - (a) In distributing the sum of Kshs.18,564,827 what date should the court consider as effective date of calculating rent collected by the beneficiaries, should it be:-
 - (i) From the date of the transfer of the Ruiru property in the names of George, Peter and Karen, that is, 24th September, 2013; or
 - (ii) From when this Court was moved to revoke the grant issued to deceased widow that is, on 24th August, 2015; or
 - (iii) From the date this Court revoked the grant and cancelled the transfer of the Ruiru property to George, Peter and Karen that is 27th July, 2018.
 - (b) How should the court treat the issue of debts and disputed liabilities?
 - (c) In view of issue (a) and (b) above how should the some of Kshs.18,564,827 be distributed amongst the eight beneficiaries?
7. It is noteworthy to state that following this Court's Ruling of 7th July, 2022 this estate has no proven debts or liabilities.
8. It is important before interrogating the issues to state more background in order to appreciate those issues identified above. Jonah Thumbi, deceased to who this estate relates did leaving surviving him Eunice Wanjiru Tumbi (deceased). A grant to this estate of Jonah Thumbi deceased was issued to his surviving widow and their eldest son Daniel Karanja Thumbi (deceased). Eunice Wanjiru Thumbi deceased, the widow of Jonah Thumbi deceased transferred in her lifetime the Ruiru property to George, Peter and Karen. That transfer, according to Justice C. Meoli, by the Ruling of 27th July, 2018 was "tainted by fraud and deception." The learned judge cancelled that transfer through that Ruling. The cancellation of the transfers was with effect from 27th July, 2018. It is that cancellation of the transfer which led to the different tier treatment of the rental collection of the Ruiru property identified in the issues above. In other words, the protagonist in the present matter desire this Court to determine the date to be used in calculating how much each beneficiary has benefited from the deceased's estate in order to determine distribution of the credit balance of the sale proceed. That is whether the calculation should be from the date of transfer of the Ruiru property to George, Peter Karen; or, from the date of



death of Eunice Wanjiru Thumbi deceased; or from the date when the court was moved to revoke the grant issued to Eunice Wanjiru Thumbi deceased.

9. I confirmed I have carefully considered the affidavits and submissions filed by the parties in regard to the above issues. I have indeed benefited and understood the intricacies in this succession because of these submissions and affidavits.
10. Jonah Thumbi died intestate and deceased left his wife surviving him. That surviving wife was entitled to a life interest of deceased's estate as provided under Section 35 of the [Law of Succession Act](#) Cap 160. I reproduce Section 35 Cap 160 as follows:-

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

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

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

- (2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
- (3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made..”

11. Section 35 Cap 160 was interpreted in the case [In re Estate of Mungai Munyaka \(deceased\)](#) [2017] eKLR thus:-

“Section 35 of the [Law of Succession Act](#) provides for the mode of distribution on an intestate's estate where the deceased is survived by a spouse and child or children...

In interpreting this section, Musyoka (J) in the case of [Tau Katungi -v- Margrethe Katungi & Another](#) (2014) eKLR stated that:-

“The effect of Section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children's right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over



the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated."

Accordingly, since the widow is still alive and has not remarried, her life interest in the property is yet to be terminated."

12. The provisions of Section 35 Cap 160 entitled the deceased's surviving widow to benefit from the life interest of the estate. The widow was therefore lawfully entitled to benefit from the rental income and any other income of properties of the deceased, which included the Ruiru property. It follows that this Court shall not regard the rental income of the Ruiru property, during the lifetime of Eunice Wanjiru Thumbi deceased in determining this matter. Eunice Wanjiru Thumbi deceased died in August, 2015. The period from the date of the death of Jonah Thumbi deceased to August, 2015 shall not be considered when taking account of benefits to beneficiaries to the rental income of Ruiru property. This is even though there is intimation that George, Peter and Karen may have benefited from the rental income, during that period. This is because Section 35(2) Cap 160 the surviving spouse, in this case, Eunice Wanjiru Thumbi deceased is given power to gift in her/his life time all or any part of the capital of net estate to the children. George, Peter and Karen seem to have benefited from the gift of their mother, the surviving spouse.
13. In submitting on account each party has given detailed accounts of the rental income they allege was received by the other. Those submissions and depositions are unsupported by documentation which this Court can rely on to determine definitely the amount each benefited from the rental income. The submissions of Esther that George, Peter and Karen largely benefited from the rental income is liable to be poked with holes. This is because Esther seems to have been 'in charge' of the Ruiru property, whatever that means. This is what Esther stated in evidence in the Environment and Land Court case, case No. 311 of 2017. Esther also contended before Githunguri Magistrate's court Succession Cause No. 62 of 2018, that the rental of Ruiru property was being deposited by the tenants into the bank account of Eunice Wanjiru Thumbi, deceased. I am also inclined to concur with the submissions on behalf George Peter and Karen that Esther has calculated the rental income she alleges is owed to this estate by George Peter and Karen as though the rental income remained static all throughout and that the occupancy remained constant throughout the years. If indeed George, Peter and Karen benefited from the rental income of Ruiru property after the death of Eunice Wanjiru Thumbi, deceased, was that issue not dealt with before the Githunguri Magistrate's courts as stated by George? That submission by George that he, Peter and Karen were ordered by Githunguri Magistrates court to repay the estate of Eunice Wanjiru deceased Kshs.3,782,420 was not controverted by Esther or even by Eunice and Gladys.
14. Although I am of the view that the period the beneficiaries are required to account for the benefit they obtained from this estate is from the date of death of Eunice Wanjiru Thumbi deceased upto the date of cancellation of transfer of Ruiru property, that is by Ruling of 27th July, 2017, I am of the view that that is not an exercise this Court should undertake, if as accepted by Esther that the rental income of Ruiru property, was deposited in the account of Eunice Wanjiru Thumbi deceased and the Githunguri magistrate did order George, Peter and Karen to make good the amount they had withdrawn from that account.
15. Bearing in mind that all the beneficiaries in some way or the other, some in greater amounts than others, benefited from the rental income of Ruiru property and because this Court should not trend into an area Githunguri court has pronounced itself, I am of the view that the amount of the balance of sale proceeds of Ruiru property should be shared equally amongst the beneficiaries identified in the judgment in this matter dated 5th March, 2020.



Disposition

16. I order that Kshs.18,564,827 and the interest earned on that amount be shared equally into six parts as follows:-

1. George Mbutia Thumbi
2. Esther Njeri Kagunda
3. Mary Wairimu Karanja
4. Peter Muigai Thumbi
5. Karen Wanjiku Thumbiaka Karen Wanjiku Mureithi.
6. Gladys Nyambura Mwariaequally with Eunice Wanjiku Mwaria.*

17. There shall be no orders as to costs.

JUDGMENT DATED AND DELIVERED AT KIAMBU 28TH DAY OF JULY, 2022.

MARY KASANGO

JUDGE

In the presence of :-

Court Assistant:- Mourice

For Esther Njeri:-

Mary Wairimu :-

For Gladys & Eunice Mwaria:-

For George Mguthia :-

Peter Mugai :-

Karen Wanjiku :-

Court

Ruling delivered virtually.

MARY KASANGO

JUDGE

