



**In re Estate of Phylis Mukonyo Ndambuki (Deceased) (Succession Cause
1026 of 2011) [2022] KEHC 11583 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 1026 OF 2011
GV ODUNGA, J
JULY 27, 2022**

BETWEEN

JOSEPHAT NDOLO NDAMBUKI 1ST ADMINISTRATOR

DUNCAN MUTUKU NDAMBUKI 2ND ADMINISTRATOR

AND

JULIUS NYAMAI NDAMBUKI PROTESTOR

RULING

1. The deceased, Phylis Mukonyo Ndambuki, passed away on September 12, 2009 at Manyatta-Upper Kiandani and a Petition for Grant of Letters of Administration Intestate to her estate was made by Josephat Ndolo Ndambuki and Duncan Mutuku Ndambuki. On February 8, 2012 this court issued the Grant of Letters of Administration Intestate to the said applicants as administrators.
2. On April 13, 2018, the said administrators filed Summons for Confirmation of the Grant but on April 26, 2018, Julius Nyamai Ndambuki (the Protestor) filed an affidavit of protest against the confirmation of Grant.

Protestor's case

3. In the Affidavit of Protest, the Protestor averred that he is a son of the deceased herein. According to the deponent, the Petitioners herein deliberately failed, neglected and/or omitted to involve or engage him before petitioning for letters of administration. He averred that he has never agreed with the Petitioners on how to distribute the deceased's estate hereof hence the 1st Administrator's averment that he acceded to their proposal was untrue. He averred that the 1st Administrator's affidavit lacks clarity, is confusing and does not even make reference to the deceased as being registered as the proprietor of the alleged assets.



4. According to the deponent, the Summons for Confirmation as framed and filed is patently defective, incompetent and embarrassing. He asserted that there is an unexplained violation of the proviso to section 71(2) of the Law of Succession Act. According to the deponent, the grant hereof is incapable of being confirmed.
5. According to the deponent some of the persons registered as beneficiaries do not qualify as such since they are citizens of the United States of America and they are not interested in the estate hereof. He averred that in the absence of documentary exhibits to show which assets form deceased's estate, it would be an exercise in vain and futility to attempt to confirm the grant herein. The Protestor asserted that the Petitioners ought to engage him in a round table talks to agree on how to distribute the deceased's estate but before that happens the assets must be ascertained.
6. In his witness statement dated January 18, 2021, the Protestor stated that his Protest is in relation to the proposed distribution of parcel number Machakos/Kiandani/355 part of which he claims that he settled on in 1980. According to him, the said parcel of land had not been processed and registered with the land office at Machakos but in 1989 the land office issued a title deed for the said parcel of land.
7. It was the Protestor's case that his late mother gifted him part of the parcel of land and went ahead to donate power to him on July 18, 1995 to continue pursuing the processing of the title deed. He stated that his mother pointed out to him Portion A which measured 0.64 Ha (1.58 Acres) and that none of his siblings including the administrators contested his late mother's decision. According to the Protestor, he has put up a residential block which has more than 20 units on the part of parcel of land which nobody has challenged.
8. According to the Protestor, Portion B which measured 0.28 Ha (0.69 Acres) was given to his nephew, Leonard Mutua Ndambuki since his deceased mother Mutindi Ndambuki was unmarried while Portion C which measured 0.80 Ha (1.97 Acres) was given to Titus Mulindo Ndambuki. He was therefore baffled by the intention of his siblings to push him out of the small portion of land that he was gifted by their late mother and urged the court to distribute Machakos/Kiandani/355 as above stated in tandem with the deceased's wishes.
9. In support of the Protest, the Protestor filed a list of documents dated January 18, 2021 containing a Power of Attorney made on July 18, 1995 and a proposed sub-division of parcel of land number Machakos/Kiandani/355.

1st and 2nd Administrators' case

10. In response to the Protest, the 1st Administrator, Josephat Ndolo Ndambuki swore a further affidavit on 15th May, 2018 wherein he averred that he is a son of the deceased herein and therefore a beneficiary of the deceased's estate. According to the deponent, the Protest is frivolous and vexatious, incompetent and lacks merit, it is full of falsehood and an abuse of the court process.
11. He averred that the Protestor was aware of the Petition process and was engaged in the process in filing various applications which this Court dismissed and duly issued the administrators with the letters of administration Intestate. According to the deponent, as per the proceedings of this Court of February 20, 2017, the Protestor admitted to the court that he had no issue whatsoever with the appointed administrators and that his objection lay only with the manner of distribution, a position which he seemed to have changed when on April 24, 2017 he suddenly stated that he had an issue with the appointed administrators.
12. According to the deponent, in an effort to expedite the matter, Nyamweya J. directed that the Protestor be joined as a co-administrator to make them three (3) administrators, but the Protestor adamantly



refused to be joined together with the administrators and gave no reasonable explanation. He averred that the Protestor has changed his mind since his affidavit in Protest does not raise any objection regarding the appointed administrators hence the administrators ought to remain as appointed.

13. The deponent deposed that the Protestor was present and participated in a Clan Committee Arbitration Meeting held on December 24, 2016 to deliberate on the matter of the distribution of the estate of the deceased whereby discussions were held and a ruling of the Committee was delivered in his presence. According to the deponent, the Protestor actively engaged, participated and contributed to the deliberations of the meeting whereby he was actually the first to submit on his wishes as to how he wanted the estate distributed. He averred that the Protestor was the first to sign the consent to abide by the ruling of the committee hence the Protestor has no valid objection as to the issue of distribution.
14. According to the deponent, the Protestor is well aware that the properties mentioned in the Summons for Confirmation of Grant all belong to and are registered in the name of the deceased and form part of the estate of the deceased and the Protestor has not annexed any evidence to the contrary. It was his position that all persons listed in the supporting affidavit to the Summons for Confirmation of Grant are beneficiaries of the estate of the deceased whether based in Kenya or abroad and are very much interested in the estate of the deceased. He noted that no affidavit was attached to the contrary and that the Protestor is not in a position to speak on their behalf.
15. The deponent averred that the affidavit in Protest is quite ambiguous as it raises no real objection to the Confirmation of the Grant and is merely aimed at wasting this court's time and delaying the course of justice. He urged the court to confirm the grant as the proposal on distribution is fairly done.
16. In a supplementary affidavit, the 1st Administrator averred that in the proceedings and the ruling of the said Clan Committee Arbitration Meeting, the acreage and/or sizes of the individual properties to be given to each beneficiary was determined and sketch maps to that effect drawn in relation to properties known as Machakos/Kiandani/355 and Iveti/Mungala/867. He disclosed that apart from the Protestor, all the other beneficiaries are in agreement that the properties are to be subdivided and distributed as follows;
 - a. Machakos/Kiandani/355
 - Subdivision A & E (0.413 Ha)-Titus Muliondo Ndambuki
 - Subdivision B (0.128 Ha)-Josephat Ndolo Ndambuki
 - Subdivision C (0.361 Ha)-Leonard Mutua Ndambuki
 - Subdivision D (0.468 Ha) - Julius Nyamai Ndambuki
 - Subdivision F (0.213 Ha) - Duncan Mutuku Ndambuki
 - b. Iveti/Mungala/867
 - Subdivision A (0.386 Ha)-Johnson Musyoki Ndambuki
 - Subdivision B (0.069 Ha)-Stephen Ndambuki
 - Subdivision C (0.069 Ha)-Mathew Ndambuki
 - c. Machakos/Kiandani/424(0.33 Ha)- Josephat Ndolo Ndambuki
 - d. Machakos/Kiandani/418(0.27 Ha)- Duncan Mutuku Ndambuki



- e. Machakos/Kiandani/415(0.27 Ha)-Julius, Josephat and Duncan to retain their already occupied areas and the remaining parcel to be divided equally and registered to Titus Ndambuki and Johnson Ndambuki.

Determination

17. I have considered the Affidavit of Protest, the 1st Administrators supporting, further and supplementary affidavits in support of the Summons for Confirmation of grant and submissions filed.
18. Rule 40(6) of the *Probate and Administration Rules* provides that:
Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.
19. The Protest herein is in respect of only the proposed distribution of parcel of land namely Machakos/Kiandani/355 listed in paragraph 6 of the Affidavit in support of Summons for Confirmation of Grant. According to an official search dated October 26, 2011 in respect of Machakos/Kiandani/355, the parcel of land belongs to Mukonyo Ndambuki, the deceased herein. The protestor has not provided ownership documents to the contrary hence his argument that there are no documentary exhibits to show the said parcel of land belong to the deceased herein cannot stand. The 1st Administrator has attached four certificate of official searches and a title deed to show proof of ownership. The parcels of land in my view form part of the estate of the deceased since the documentary evidence attached to the further affidavit show they belong to the deceased herein with no encumbrances. Section 3 of the *Law of Succession Act* defines "estate" to mean the free property of a deceased person.
20. The argument by the Protestor that all the persons listed in the supporting affidavit to the Summons for Confirmation of Grant do not qualify as beneficiaries of the estate of the deceased since they are Citizens of United State of America and are not interested in the estate of the deceased cannot stand. The Protestor has not tendered any affidavits of renunciation to their rights in the estate herein. The Protestor has also not provided names of the beneficiaries who are alleged to be citizens of the United States of America.
21. Section 107 of the *Evidence Act* is to the effect that he who alleges must prove. In this case, that burden has not been discharged by the Protestor.
22. Musyoka J. *In re Estate of Manese Otiemo Eshitubi (Deceased)* [2021] eKLR had this to say:-
“8. With respect to the matter of the daughters who have not yet renounced or waived their right to a share in the estate it will be well to refer to *Christine Wangari Gichigi v Elizabeth Wanjira Evans & 11 others* (2014) eKLR (Nambuye, Ouko and Mohammed JJA), where the court said that failure by daughters of the deceased to participate actively in the litigation over the estate of their parents should not be a disentitling consideration, in the absence of a renunciation by them. *In In re Estate of Joyce Kanjiru Njiru (Deceased)* [2017] eKLR (Gitari J), where two of the daughters of the deceased were said to be not claiming a share in the estate and not opposing the proposed distribution, and therefore, not entitled to a share, and hence were not allocated a share in the application for confirmation of grant, the court went on to make provision for them that notwithstanding.



9. What I am saying, in short, is that if the administrators fail to file affidavits by the daughters to renounce or waive their right to a share in their father’s estate, and or fail to avail them in court to state their position, it should not be assumed that such daughters have no interest in their father’s estate or have impliedly renounced or waived their right by their non-participation. The court will proceed to provide for them, their non-participation notwithstanding, unless or until it sees a document signed by them, where they have renounced their share.”
23. According to the Protestor, her late mother Phylis Mukonyo Ndambuki, the deceased herein gifted him part of Machakos/Kiandani/355 he described as Portion A measuring 0.64 Ha (1.58 Acres) in his witness statement dated January 18, 2021 and Portion B which measured 0.28 Ha (0.69 Acres) was given to his nephew, Leonard Mutua Ndambuki since his deceased mother Mutindi Ndambuki was unmarried while Portion C which measured 0.80 Ha (1.97 Acres) was given to Titus Mulindo Ndambuki.
24. According to the Protestor, their late mother donated to him a power of attorney to finalize the processing of title deed for the parcel of land. Part of the power of attorney read as follows;
- “Power of Attorney
.....
And Whereas:
- 1
 2. The Donor (Phylis Mukonyo Ndambuki) is an elderly woman and is leaving for United States of America and so does not have the time to process the above-mentioned title deed.
 3. The Donor has appointed her third born son one Julius Nyamai Ndambuki hereinafter called the Donee to process and do all things necessary for the finalization of the abovementioned title deed and for the purposes of this title deed only.
- Now Therefore:
- (a)
 - (b) The Donee shall process and sign all other documents in connection with the above-mentioned title deed.....”
25. He stated in his witness statement that his siblings want to push him out of the small portion of land given to him by his late mother. At paragraph 6 it is averred as follows;
- “6. That identification and shares of all beneficiaries entitled to the estate of the deceased have been ascertained and determined to be shared as follows:-
- A.machakos Kiandani/355
- Su-Subdivision A & E -Titus Muliondo Ndambuki
- Subdivision B -Josephat Ndolo Ndambuki
- Subdivision C -Leonard Mutua Ndambuki



-Subdivision D - Julius Nyamai Ndambuki

-Subdivision F - Duncan Mutuku Ndambuki.”

26. The administrators are opposed to the Protest on the basis that the Protestor did consent to the Ruling on distribution of the estate of the deceased by the Clan Committee. According to the administrators, the acreage and/or sizes of the individual properties to be given to each beneficiary was determined and sketch maps to that effect drawn in relation to parcel of land Machakos/Kiandani/355.
27. The 1st Administrator in his supplementary affidavit stated that the Protestor is to get 0.468 Ha once subdivision of parcel of land Machakos/Kiandani/355 is done while Titus Muliondo Ndambuki is to get 0.413 Ha and Leonard Mutua Ndambuki is to get 0.36 Ha. In support of his averment, the 1st Administrator annexed a copy of the sketch map where it is indicated that the Protestor was to get a share of 0.468 Ha. In the ruling of the Committee, it is indicated that the Protestor was to get a total of 1.185 acres in Manza Kiandani 355. Attached is also a handwritten consent to the ruling of the Committee signed by the Protestor.
28. According to the Protestor, he has never agreed to the proposed distribution of Machakos/Kiandani/355 as averred in the 1st Administrator’s supporting. He insisted that he was deliberately, neglected and/or omitted before petitioning for the letters of administration. In his submissions before the Clan Committee, the Protestor stated that he had been excluded and declared dead in the succession cause.
29. Section 51 of the *Law of Succession Act* provides as follows;

“Application for grant

(1)

(2) Every application shall include information as to—

- (a) the full names of the deceased;
- (b) the date and place of his death;
- (c) his last known place of residence;
- (d) the relationship (if any) of the applicant to the deceased;
- (e) whether or not the deceased left a valid will;
- (f) the present addresses of any executors appointed by any such valid will;
- (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;....”

30. Rule 26 of the *Probate and Administration Rules* provides that;

- (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
- (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39,



by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

- (3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.
31. Section 51 and Rule 26 above are couched in mandatory terms. A plain reading of Rule 26 (1) is that for one to comply, a notice ought to be issued to “every other person entitled” to be granted the letters. Rule 26 therefore prohibits the court from granting the letters of administration in the absence of such notice.
32. Musyoka J. *In re Estate of Manese Otieno Eshitubi (Deceased)* expressed himself as follows:-

“ 11. Finally, it may be well to state that where there is no concurrence, even by just one of the survivors, or where some of the survivors have not been involved in the process, the court will have no option but to apply the applicable law. It was said, by the Court of Appeal, in *Justus Thiora Kiugu, & 4 others v Joyce Nkatha Kiugu & Another* [2015] eKLR (Visram, Koome and Otieno-Odek JJA), that an intestate estate could not legally be distributed in any other way other than by the parties agreeing amongst themselves and filing a consent, or by the court following the provisions of the *Law of Succession Act* on intestate distribution. It was stated that where the parties were in total agreement, and recorded a consent on the mode of distribution, the court would have no choice but to adopt the consent, and make it an order of the court. In the absence of a written consent on the mode of distribution, the court would have no discretion but to distribute the estate of the deceased as per the provisions of the *Law of Succession Act*. It was said, in *In re Estate of Juma Shiro - Deceased* [2016] eKLR (Mwita J), that where the beneficiaries had not agreed on the mode of distribution, the court would resort to the provisions of the *Law of Succession Act* to resolve the issue. See also *In re Estate of MM (Deceased)* [2020] eKLR (Gikonyo J), where there was no total consensus amongst the survivors on distribution, the court was guided by the law, and strictly applied the provisions of the *Law of Succession Act*.”

33. I note that the Protestor has never signed any consent to the making of the grant or confirmation of the grant despite his name being listed in the Petition save for the handwritten consent to abide by the ruling of the committee of March 12, 2017.
34. It does not however, necessarily follow that in that event the grant and certificate of confirmation must be revoked or annulled. *In Re the Estate of the Late Suleman Kusundwa* [1965] EA 247, it was held that:

“ The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion



of the deceased's property as he was entitled to dispose of by will under the applicable law of inheritance.”

35. As appreciated by Khamoni, J *In re Estate of Gitau (Deceased)* [2002] 2 KLR 430:

“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the [Law of Succession Act](#) should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.”

36. In this case, the Protestor seems to be more concerned about the distribution of the estate rather than the administration since the offer floated to him to be a co-administrator was declined by him.

37. In its ruling the Committee indicated that the Protestor was reminded that he had signed and agreed to abide by the Committee's ruling which was to be done justly and fairly. In a letter dated November 24, 2011 in the court file signed by Titus Mulindo Ndambuki, Josphat Ndolo Ndambuki, Johnson Musyoki Ndambuki, Regina Mwangeli Ndambuki and Duncan Mutuku Ndambuki, stating that the Protestor was uncooperative in the petitioning of the letters of administration and failed to attend meetings whenever invited. Neither the Administrators nor the Protestor mentioned about this letter but noting that the Protestor claim that he was neglected in the Petitioning of letters of administration, the court is required to take and consider such evidence to analyse the conduct of the Protestor.

38. Before the ruling committee, the 1st Administrator accused the Protestor of intending to take up excess share of land over and above the rest yet they have all equal rights as brothers. In their findings, the Clan Committee found that there was bitterness and mistrust between the 1st Administrator and the protestor. The Committee found out that the Power of Attorney given to the Protestor was specifically to acquire a title deed for parcel of land No. 355 not for demarcation or subdivision purposes.

39. The Committee in the end resolved that the Protestor should have a total of 1.185 acres in parcel of land Manza Kiandani 355 unlike in his statement where the Protestor stated that he was to get Portion A of the parcel of land that measured at 0.64 Ha that translates to 1.58 Acres. The claimed share of the parcel of land 355 by the Protestor is large in size than the share ordered to be given to the Protestor by the Committee in its ruling. The Protestor seem not to have any issue against the handwritten consent he signed to abide by the ruling of Committee. The ruling Committee did add the two administrators to share the parcel of land.

40. In my view, the confirmation of the Grant cannot be stalled by the Protestor who acknowledged the share he was apportioned by the ruling. I find that the administrators are honest and there is sufficient evidence to enable the court find that the Protestor was engaged by the administrators in Petitioning for the letters of administration but he was defiant of the process. The Power of Attorney as found by the Committee only gave the Protestor the power to process the title deed and not to own Machakos/Kiandani/355 nor gift to him any part thereof. I do not find any supporting documentary evidence to find that the Protestor was entitled to 0.64 Ha (1.58 acres) from Machakos/Kiandani/355. The evidence of the Clan Committee ruling has not been displaced by the Protestor.

41. In the end, I find that the affidavit of Protest sworn on April 25, 2018 by the Protestor lacks merit and is dismissed but with no order as to costs.



42. As the parties herein are siblings I refer the matter to the Court Annexed Mediation for the distribution of the estate.

43. It is so ordered

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 27TH DAY OF JULY, 2022.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Ngolya for the Protestor

Mr Mulyuingi for the Petitioner

CA Susan

