



REPUBLIC OF KENYA



**In re Estate of Kamukii Mwethi (Deceased) (Succession Cause 94 of 2017)
[2022] KEHC 13071 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 94 OF 2017
MM KASANGO, MM KASANGO & MM KASANGO, JJ
SEPTEMBER 22, 2022
IN THE MATTER OF THE ESTATE OF KAMUKII MWETHI
(DECEASED)
(FORMERLY NAIROBI SUCCESSION CAUSE NO 2825 OF 1999)**

JUDGMENT

1. This Succession Cause has been in the corridors of the courts since 1999. The cause relates to the estate of KAMUKII MWETHI (deceased). He died on 5th December, 1999. That was 54 years ago the beneficiaries have been kept out of their inheritance for all those years, and some have died while waiting. The distribution of this estate has not been accomplished to date. The deceased was a polygamist married to four wives, namely:-

Gathoni Kamukii – 1st House

Wambui Kamukii – 2nd Wife

Nyaguthi Kamukii – 3rd Wife

Njeri Kamukii – 4th House

2. The grant of letters of the administration were granted on 2nd December, 2002. The grant was confirmed on 23rd November, 2020. The administrators are PETER KINYANJUI MWAURA, JOHN KINYANJUI MWAURA and EVANS MWAURA KAMUKII.
3. That confirmation triggered the summons for revocation of grant, filed by PHILLIS NJAARI MBURU (hereafter Phillis). The summons is dated 17th December, 2020.
4. Phillis through her affidavit in support of the summons described herself as a beneficiary of this estate by virtue of being a daughter in law of the deceased. She was married to Stephen Mburu Kinyanjui (deceased). Her husband was a son of the 4th House. She stated she was not informed when an application was made to substitute her deceased husband, who was an administrator of this estate. Further, that the summons for confirmation excluded her deceased's husband and heirs of this estate.



The Chief's letter she exhibited in her application shows that her deceased husband left surviving him, Phillis and three children. Further, Phillis stated that since she was not notified of the confirmation of the grant, she was condemned unheard. Phillis also faulted distribution because the portion given to the 4th House was registered in the sole name of her brother in law, namely Evans Mwaura Kamukii (hereafter Evans). Phillis said she has resided at the suit property that is, KIAMBAA/KIHARA 680, for 30 years.

5. Phillis also stated that 1st and 2nd house are not entitled to inherit the suit property because they benefited from gift inter vivos, during the colonial period, whereby the deceased gave them parcels of land KIAMBAA/KIHARA/688 and KIAMBAA/KIHARA/T.84. That none of the 1st and 2nd House families reside on the suit property.
6. Phillis provided her preferred schedule of distribution of the deceased's estate. In that schedule Phillis suggests that the suit property be subdivided:-
 - a. 5.95 to be shared equally between Evans and Phillis.
 - b. 595 to Grace Wanjiru Guitati.
7. The essence of the replying affidavits of Peter Kinyanjui Mwaura (Peter) from the 2nd House and John Kinyanjui Mwaura (John) from the 1st House is that the distribution, which was confirmed through the confirmed grant was to the 1st, 2nd and 4th House. The reason for the exclusion of the 3rd House was because the wife from the 3rd House bore one daughter, Grace Wanjiru Guitati (Grace). That the said Grace applied seeking declaration she was entitled to share in this estate but the court held she was not entitled.
8. Grace filed an affidavit stating that she filed an appeal against the decision that finds she was not entitled to share the estate and that therefore no distribution should be made in this estate.

ANALYSIS AND DETERMINATION

9. There is no doubt that Phillis and her children are entitled to share in this estate. Section 38 of the Law of Succession Act, Cap 160 provides:-

“Where intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Section 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided amongst the surviving children.”
10. The deceased husband of Phillis survived the deceased in this estate. It follows he was entitled to share the estate and by extension Phillis and her three children. The administrators of this estate knew of the existence of Phillis. They ought to have involved her in the distribution of the estate.
11. Phillis has moved this Court to revoke the grant on the basis the administrators concealed her existence.
12. Peter and John prayed that the grant should not be revoked but rather that the interests of Phillis be accommodated in that confirmed grant.
13. As stated before, this succession has been before court since 1999, but the deceased died 54 years ago. The court in this matter has been engaged in objections filed from time to time. Although in most circumstances, the right action could be to revoke a grant where a beneficiary is concealed, I believe that would not be in keeping with Article 159(2) (b) which requires justice should not to be delayed. The suit property is divisible amongst three houses, excluding the 3rd House. It is therefore appropriate hard to order a fresh grant be issued dividing the suit estate as provided under Section 40 of Cap 160.



14. Phillis intimated that the 1st and 2nd Houses benefited from gift inter vivos. No evidence which meets the civil standards of proof, was produced by Phillis to prove that assertion. Phillis herself said she had been on the suit property for 30 years yet she talks of those gift inter vivos which she alleged were given in the colonial period. It means she has no first-hand knowledge of her allegation and there was no evidence to corroborate what she stated. The titles attached to John’s affidavit of 26th March, 2021 do not support Phillis’ evidence. There is no evidence that those titles belonged to deceased. The court rejects the evidence offered by Phillis of gifts inter vivos. Further, and more importantly, Justice W. Musyoka in his Ruling of 2nd June, 2017 determined the suit property is the only asset of this estate.
15. Phillis in her proposed distribution of the estate included Grace Wanjiru Guitati (Grace). Grace is a daughter of the 3rd House. Grace herself has filed affidavit and submissions claiming she is entitled to share the estate. The issue here is that Grace is reaching a point of being declared vexatious litigant. Grace has had determined her entitlement to share this estate since 2009. The different actions she mounted are well described in the Ruling of Justice W. Musyoka of 2nd June, 2017. I will reproduce parts of that Ruling as follows:-

- “ 1. On 18th December, 2015, I delivered a ruling herein wherein I dismissed an objection to the making of a grant, which objection had been brought at the instance of Grace Wanjiru Guitati, arguing that she was a daughter of the deceased and therefore entitled to a share in the estate of the deceased.
2. The question as to whether Grace Wanjiru Guitati was entitled to a share in the estate of the deceased had been dealt with earlier in 2002, when Rawal J on 29th November, 2002 dismissed a similar objection by Grace Wanjiru Guitati based on the law that applied to the estate of the deceased as at the deceased of his death. Rawal J had Wanjiru Guitati to have a share in the estate of the deceased. A grant was then issued to the petitioners upon the dismissal of the objection in 2002. The said grant was later revoked and it was then directed that a fresh one be made on application, it was at that stage that Grace Wanjiru Guitati made a similar objection. I held on 18th December, 2015 that the second objection was not viable as the finding of Rawal J on 29th November, 2002 was still valid so far as the entitlement of Grace Wanjiru Guitati to a share in the estate of the deceased was concerned. I opined that that issue could only be revisited on review.
3. Grace Wanjiru Guitati then lodged an application dated 21st March, 2016, seeking review of the order made on 29th November, 2002. Her application is premised on Constitutional provisions, among others. She argues that the law that applied at the date of the deceased’s death discriminated against her on the basis of her gender.

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10. The inevitable conclusion that I will draw on the application before me is that the same has no merits. I hereby dismiss the same. The respondent shall have costs thereof. The estate comprises of only one asset, Kiambaa/Kihara/680, the cause herein shall accordingly be transferred to the High court at Kiambu for disposal of any pending business.”



16. The learned judge faulted grace for not having sought the review in time of the order issued in 2002 which determined she was not entitled to share the estate.

17. The present claim by Grace is res judicata as provided order Section 7 of the Civil Procedure Act. That Section states:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

18. The claim made by Grace is rejected.

19. There was suggestion that Evans is suffering mental illness. It is therefore necessary to remove him as an administrator.

DISPOSITION

20. Having considered the summons dated 17th December, 2020 I hereby invoke Section 47 of Cap 160 and grant the following:-

a. The grant and confirmed grants issued on 23rd November, 2020 are hereby cancelled.

b. Fresh grant shall issue to PETER KINYANJUI MWAURA and JOHN KINYANJUI MWAURA.

c. That grant is hereby confirmed as follows:-

i. KIAMBAA/KIHARA/680 shall be shared as follows:-

ii. JOHN KINYANJUI MWAURA,
WILLIAM NGETHI MWAURA and

JOHN KINYANJUI KANGETHE to equally share 1/3 of that property.

iii. PETER KINYANJUI MWAURA and
SAMUEL MBUGUA MWAURA to equally share 1/3 of that property.

iv. EVANS MWAURA KAMUKII
PHILLIS NJAARI MBURU to equally share 1/3 of that property. Phillis Njaari Mburu shall hold her share as a life interest.

d. The claim by GRACE WANJIRU GUITATI over this estate is rejected.

21. There shall be no orders as to costs.

RULING DATED and DELIVERED at KIAMBU this 22nd *day of SEPTEMBER, 2022.*

MARY KASANGO

JUDGE

In the presence of

Coram:

Court Assistant : Mourice



For John Kinyanjui &

Peter Kinyanjui :- Mr. Karoki

For Phillis Njaari :- Mr. Mwaura

For Grace Wanjiru :- Mr. Gitonga

RULING delivered virtually.

MARY KASANGO

JUDGE

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