



**In re Estate of Katheke Kavila (Deceased) (Succession Cause
654 of 2012) [2022] KEHC 14475 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 654 OF 2012**

MW MUIGAI, J

OCTOBER 24, 2022

IN THE MATTER OF THE ESTATE OF KATHEKE KAVILA (DECEASED)

BETWEEN

KANINI KAVILA MUMEE ADMINISTRATOR

AND

KIOKO MUNYASYA 1ST ADMINISTRATOR

PETER MUEKE 2ND ADMINISTRATOR

JUDGMENT

1. The Administrators filed Petition for letters of Administration intestate on 27/6/2012 and obtained grant on 3/7/2012.
2. The Beneficiary/Applicant now 3rd Administrator/Objector filed Certificate of Urgency on 18/10/2016 where she sought revocation of grant and grant of injunction to stop /prevent meddling with the deceased's estate.
3. The Administrators filed responses and thereafter parties filed written submissions.
4. The Trial Judge Hon. D. K.Kemei J by Ruling delivered on 25th April 2017 revoked the grant and included the Applicant as Co -Administrator. The Trial Judge found that Mitaboni/Mutituni/2298 jointly registered in the names of Katheke Kavila (deceased late wife of Kavila Mumee grandfather to 1st & 2nd Administrators) and Kanini Kavila Mumee Co -wife with deceased to Kavila Mumee was to be preserved by issuance of injunction until distribution of the deceased's estate.

Summons for Confirmation of Grant

5. The Summons for confirmation of grant are dated 16th October 2017 seeking the following orders;



- a. The grant of representation issued to Kioko Munyasya, Peter Mueke and Kanini Kavila Mumebe confirmed
 - b. The costs of this application be provided for.
6. The Summons are supported by a Supporting affidavit dated 16th October 2017 deponed by Kanini Kavila Mumebe, the 3rd Administrator deponed that the people entitled to inherit the assets are;
- i. The family of Mulee Kavila (deceased)
 - ii. The family of Munyasya Kavila (deceased)
 - iii. The family of Mueke Kavila (deceased)
 - iv. The family of Nthenya Kavila (deceased)
 - v. The family of Mwanthi Kavila (deceased)
 - vi. The family of Syong'ombe Kavila (deceased)
 - vii. The family of Mathi Kavila (deceased)
 - viii. Kavee Mueke
 - ix. Kanini Kavila Mumebe – Co-wife
7. She said that the estate of the deceased comprises of the following assets ½ share of Mitaboni/ Mutituni/ 2298 and the other half was registered in her name. The 3rd Administrator proposed that the estate be shared equally among the people listed above.

Affidavit of Protest

8. Through an affidavit of protest dated 20th March 2018 Kioko Munyasya, who is one of the administrators, with the authority of his Co- Administrator Peter Mueke protested the confirmation in which he deponed that Kanini Kavila Mumebe, the Applicant is a daughter to Masila Nganga. He deponed that she was married to their grandfather Kavila Mumebe and they divorced under Kamba Customary Law hence she was no longer a co-wife of the deceased. Thereafter, Kanini Kavila Mumebe got married to Kasinzia Mathendu and was thus not entitled to a share of the deceased estate.
9. He deponed that during the ancient times, acknowledgement of dowry payment was never dated nor signatures appended. He contended that the Applicant was evicted from the property being Mitaboni/mitituni/2298(hereinafter called “the property”) in November 1992 vide an eviction order, that the judgment declared that she was not entitled to inherit the property of our deceased grandfather since she had divorced and was married elsewhere and sired children with the other husband. Kioko Munyasyadeponed that the court file could not be traced and the judgment had been misplaced.
10. He further deponed that the disputed property was registered in the name of their deceased’s grandmother and the Applicant fraudulently obtained registration documents by acquiring ½ share upon the demise of their grandmother and recently moved into the said land prompting MachakosCMCC No736 of2015 which is pending. He also deponed that the Chief’s letter that they used in initiating this succession proceedings did not feature the Applicant’s name.



Response to Affidavit of Protest

11. The Applicant filed an affidavit in response to the protest dated 25th April 2018 in which he deposed that the 1st and 2nd Administrators are the grandchildren of her co-wife, the deceased herein and she denied being divorced from Kavila Mumees as well as the document indicating acknowledgment of dowry by a Masila. She also denied being evicted from the property indicating that she has lived on the land since she got married to Kavila Munees (Deceased) and has brought up her children on land.
12. She doubted the authenticity of the annexed court order as it was not certified, it does not give details of how the purported property eviction was to be carried out, she has never been involved in a court case with one Mulee Kavila, the son of her husband, her name is Kanini Kavilanot Kanini Kasinzia and that she was not aware of any divorce proceedings between herself and her late husband.
13. The Applicant deposed that in 1970s when the survey reached their area, her husband had long passed on and the survey found her co-wife Katheke Kavila and herself on the estate land and their details were entered in the register and a title deed thereafter issued in both their names in equal shares. She contended that the adjudication process was open for any objections to be made and neither Katheke Kavilanor her sons raised any objections and therefore the 1st and 2nd Administrators have no basis to raise the current issues.
14. She deposed that the 1st and 2nd Administrators have extensively sold their portion of land and have further encroached on her portion and that is why they have brought the current arguments that have no legal or factual basis. She opined that the judgment disinheriting her is a creation of the 1st Administrator.
15. The Applicant maintains that she is the legal owner of half of the share of the property and does not need to be in the chief's letter since she is not a beneficiary of Katheke Kavila.

Supplementary Affidavit

16. Kioko Munyasya filed a supplementary affidavit dated 6th September 2018 in which he deposed that the court order dated November 1992 is signed and sealed at the bottom, thus authentic and it was certified as a true copy of the original. He contended that it was the wish of the late Kavila Mumees that Kanini Kavila Mumees should never inherit nor claim any property from his estate.
17. The protest was determined by viva voce evidence.

Hearing

Protestor's Case

18. PW1 was Kioko Munyasya who testified on 21/06/2022 that he had a problem with the summons for confirmation Kanini Kavila Munees should not inherit any property of the deceased's because Kanini left when Kavila died and she was married by another man Kasinzia Mathendu and he paid dowry and they had children.
19. Further, the applicant was evicted from Mitaboni/Mutituni/2298 in November 1992 vide an eviction order. She came back to their home and asked his uncle for a portion to build as they were not coping at home where she built and that is where she is to date.
20. It was his testimony that the case started from Sub-chief, D. O and at the Court's and she was evicted so that was the basis of the protest.



21. Upon Cross – examination he stated that he was born in 1952 and he did not know when Kanini Kavilawas married as he found Kithuki, his grandmother alone, he did not find Kanini. It was his testimony that his grandmother had 9 children as shown at paragraph 2 of the Summons. He stated that all the children of Katheke Kavila are deceased. Kanini Kavila lives at the homestead with her children.
22. It was his testimony that a survey was done and search shows Katheke Kavila and Kanini Kavila, it was entered in 1984 but survey came in 1974. He opined that Kanini went to Lands Office and entered her name and it was registered. He said that it was in 2005 when he did the search and 2012 he filed the case of succession. He did not go to Environment and Land. He told the court that the annexure of Kasinzia Mathendudid not have the date and signature. He contended that although the father is not here, he got the document from her home and they are their neighbors. He further contended that Kanini Kasinzia and her children were evicted from the land and property. The land sold by the deceased.
23. There was no re- examination.
24. PW.2 was Peter Mueke who stated that he opposed the distribution of the deceased's estate. He stated that Kavila left Katheke the property and not Kamee. They are grandchildren family of the Katheke and they are many, he contended that Mitaboni/Mutituni/2298 is so small and not even one (1) acre. He stated that they were there and Kanini was on the land too. He indicated that he did not want the suit property to be divided. Katheke died in 1984, Kavila died many years ago and did not know why Kanini did not challenge the matter before. He contended that they had no evidence to adduce.
25. It was his testimony that the place where Kanini lives, she lives there and will not be asked anything. This is because they cannot challenge what happened a long time ago as they were not there. It was his testimony that if she grows old they are happy to allow her stay there.
26. Upon Cross – examination by Ms Gichuki, he stated that when Kavila died, his mother was not married and that he has not seen her husband. He denied being the one who said that Kanini was married and divorced and stated that it was his elder brother. It was his testimony that Katheke died and Kanini was at the shamba when the case was going on. He stated that the land Registrar stated it is 6 hectares and disagreed with the surveyor. It is not even 1 acre. The petitioner was evicted as per court order and Kanini has been there as the case was ongoing. He stated that Kanini lives and farms on the area about 50"x100". We are discussing the matter of people we did not find. We did not sell any portion of the land and there are consents. There is no name of Kanini or Katheke.

Applicant's/ 3rd Administrator's Case

27. DW.1 Lucia Kanini Kavila confirmed that she signed the Summons for confirmation of 18/10/2017 with thumb print. She indicated that she has annexed the certificate of search. She stated that the pictures were those of her home and children. She opined that she wanted to be given her share and Katheke remain with hers.
28. When she was cross – examination, she stated that she was not married, she went to work to take care of the children so that they could not turn to crime. When she left she did not have dowry paid for her and Kavila also paid dowry for her. Kavila paid for her dowry and he was old and she was young. She denied knowing Kasinzia whom she stated did not pay dowry of 15 goats, 5 cows and Kshs.15/- and the children are not his.



Written Submissions

Appellant Submissions

29. The Appellant filed submissions on 19th July 2022 wherein she reiterated the contents of her affidavit and further submitted that during cross examination, the 1st Administrator could not expound how the document purporting to show that dowry was paid come to his possession and when that ceremony was held. That the purported acknowledgement is neither executed nor attested to and was just a paper with names. It was submitted that a closer look at the purported court order demonstrates that the Plaintiff was one Mulee Kavila and the defendant was Kanini Kasinzia.
30. The Appellant submitted that her husband was Kavila Mumeend not Mulee Kavilaand she is known as Kavila Mumeend not Kanini Kasinzia. As such the attempt by the protestors to link her to the purported eviction orders was without success as the party's names are unrelated, the subject property is not named in the said court order, the order is not certified and have not been authenticated. She denies ever been evicted from her property and knowledge of the court order. The 3rd administrator contended that the suit property was registered in her name and that of the deceased in 1984 yet the order was purportedly issued in 1992 and from the certificate of search as at 1984, she was already a co-owner of the property.
31. It was further submitted that the ownership of the 3rd Administrator has never been challenged and no evidence exists to show that her ownership has ever been subject of a court or tribunal. The court was asked to dismiss the protest and orders do issue that her share be extracted and registered in her names.

Respondents Submissions

32. The 1st and 2nd Administrators filed submissions on 29th June 2022 in which they submitted that Kanini daughter of Masila was married to Kasinzia Mathendu and the rights of Kamba Customary law pertaining to the rights of marriage were carried out. While in their marriage, she divorced her husband and later met their uncle one Mulee Kavila and requested him to give her a portion to settle while looking for settlement.
33. It was submitted that later Kaninistated to extend her structure and cultivating within the said plot Mutituni/mitaboni/2298 without the consent of Mulee Kavilaand when he asked her why she was going against what she requested, she responded and said she is the wife of the late Kavilawho had died around the year 1940 before she met Mulee who welcomed her to their family for assistance.
34. It was submitted that when Muleerealized that Kaniniwas after grabbing his land, he sued her and the court ordered her to vacate the land, her structures were demolished under the supervision of the OCS Machakos Police Station on 13th January 1993 and later she put other structures. It was submitted that the Protester has reinstated the case in court after Mulee Kavila, his brothers Munyasya Kavila, Mueke Kavila and their mother Katheke Kavila had died.

Determination

35. I have considered the pleadings, oral evidence during the hearing and written submissions on record.
36. Section 107 of the *Evidence Act*, Cap 80 of the Laws of Kenya provides that;

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

37. It is not in contention that the 1st and 2nd Respondent are the grandchildren of the estate. The Objectors have alleged that the 3rd Respondent is no longer a co- wife of Katheke Kavila (deceased) as she was divorced by Kavila Mume. A document indicating acknowledgment of dowry refund by a Masila from Kasinzia s/o Mathendu was produced. I have perused the said document and it is not dated and neither is it signed by any witness.
38. This Court is of the view that it is rare for dowry to be paid without at least five witnesses, family members of both families and more so clan/elders being present. There were no other witnesses who were called to testify and clarify whether the payment and refund of dowry was done.
39. PW2 denied saying that the Protestor was married and divorced and he took the view that the Protestor resides on the property and may remain there as they cannot confirm what happened long ago when they were not there. .
40. The second piece of evidence that was used to support their case is an eviction Court order whose authenticity is in question. The document presented in Court was not a clear copy however from this court's perusal, the parties are Mulee Kavila and Kanini Kasinzi who are not members of this family, it does not indicate which court the matter emanates from and who has signed the alleged order. PW1 could also not clearly explain the source of the document he had presented to Court. In addition, the witnesses he alluded to who witnessed the demolition of the 3rd Administrator's property were not called to testify yet the protesters alleged that the demolition took place during the day. On the other hand the Applicant has been on the property and brought the children on the land and resides there to date. There was thus no proof that the protestor was evicted from the property as alleged.
41. This Court finds that none of the allegations in the protest have been proved as a result of which the protest does not have merit and is dismissed.
42. As regards the mode of distribution, the Protesters have admitted that they are the grandchildren of the Deceased herein, their late grandmother who was left the property by their grandfather. The 3rd Administrator/ Applicant has indicated that she owns ½ of the estate property which she is willing to have divided between her children/grandchildren and the other ½ share of the property belonging to the deceased divided among the grandchildren. She produced a certificate of search dated 19th September 2018 that shows how the property was divided.
43. Grandchildren are entitled to the share that would be due to their own parents, in this case ½ half of the estate. This court has stated before *in Re Estate of Wabome Njoki Wakagoto* (2013) eKLR where it was held:-

“Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”



44. There was no debt disclosed in the petition or schedule against the estate of the deceased. Thus no debt will be levied from the deceased estate.
45. This Court notes that the Affidavit of protest has a letter from the Chief dated 14th December 2011. The list of beneficiaries listed in the Summons for confirmation of grant and those in the Chief's letter on record differ. It would be prudent for the Administrators to regularize this position and file for fresh Summons of Confirmation of grant indicating the true position of the estate and the portion available for distribution which is half of Mitaboni/ Mutituni/ 2298. This is as registered as per the Search Certificate produced in the proceedings that culminated with the Ruling of Hon. D. K. Kemei of 25/04/2017.

Disposition

46. This Court therefore find as follows;
- a. The grant of representation issued to Kioko Munyasya, Peter Mueke and Kanini Kavila Mumeend and the injunction issued by D. K. Kemei J to remains in force until the distribution is done.
 - b. The estate property being Mitaboni/ Mutituni/ 2298 be divided into two equal shares, ½ share will be registered in the name of Kanini Kavila Mumeend and her children and the other ½ half will be available for distribution among the beneficiaries of the Estate of Katheke Kavila (deceased).
 - c. Section 66 *Law of Succession Act* & Rule 26 Probate & Administration Rules apply as to beneficiaries and the Administrators.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF OCTOBER, 2022
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W MUIGAI

JUDGE

In the presence of:

No appearance - for 3rd administrator

Kioko Munyasya - 1st administrator

Peter Mueke- 2nd administrator

Geoffrey/Patrick- Court Assistant(s)

