



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Paul Mutemi Kamwaki (Deceased) (Succession Cause
220 of 2015) [2022] KEHC 15680 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
SUCCESSION CAUSE 220 OF 2015
RK LIMO, J
NOVEMBER 28, 2022**

BETWEEN

ERIC JOHN MUTEMI 1ST APPLICANT

SOPHIE NJERI MUTEMI 2ND APPLICANT

AND

AGNES MUMBANU KINAKO RESPONDENT

JUDGMENT

1. This matter relates to the estate of the late Paul Mutemi Kamwaki (deceased) who died on November 23, 2010. The deceased died intestate leaving behind the following dependants: -
 - i. Agnes Mumbanu Kinaku
 - ii. Timothy Muimi Mutemi
 - iii. Elizabeth Muia Mutemi
 - iv. Erick John Mutemi
 - v. Caro Musangi Mutemi
 - vi. Sorphy Njeri Mutemi
 - vii. Judy Tabitha Mutemi
 - viii. Diana Kanini Mutemi
 - ix. Douglas Kyalo Mutemi
 - x. Kate Kavutha Mutemi
 - xi. Nancy Koki Mutemi



2. The Assets listed in the Petition comprising the estate are as follows:-
 - i. Nzambani/Maluma/858
 - ii. Miambani/Nzaaya/271
3. Agnes Mumbanu Kinaku, the Petitioner herein was appointed the administratrix of the estate on February 17, 2015 but the grant was later revoked after the other children of the deceased applied to have the grant revoked and Hon. Judge Mutende revoked the grant. A fresh grant was issued to Timothy Muimi Mutemi, Erick John Mutemi and Douglas Kyalo Mutemi and Agnes Mumbanu Kinako as administrators on March 6, 2018.
4. On March 27, 2019, the 4th administratrix, Agnes Mumbanu Kinako moved this court through Summons for Confirmation of grant dated 26th March, 2019 and made proposals on how the estate of the deceased should be distributed.
5. The 2nd administrator Erick John Mutemi also put in another Summons for Confirmation of Grant dated October 11, 2019 giving an alternative mode of distribution.
6. When the matter was brought up for mention before this court it transpired that all the beneficiaries were in agreement with the proposal made through summons for confirmation of grant dated October 11, 2019 and the 4th administratrix was the only beneficiary dissenting. This court then directed that the earlier Summons for Confirmation of Grant dated March 26, 2019 be treated as withdrawn and the 4th administratrix was given time to file protest to the Summons for Confirmation of Grant dated October 11, 2019. She filed a protest upon which the matter was listed for trial through viva voce evidence.
7. Eric John Mutemi (PW1) stated that he was the 4th born among the children of the deceased. He stated that the three administrators with the exception of the protestor have agreed. He stated that they have provided prove of ownership of assets comprising the estate as well as liabilities accruing on the estate of the deceased in their summons for confirmation of grant which according to him, the protestor has failed to do. With regard to liability, he testified that they included rates and rent owing from some of the assets, costs of maintenance of some assets, cost of renovations as well as costs of monies owed to workers which he estimated to be Kshs 998,505/- at the time of filing the summons for confirmation of grant. He also stated that the administrators had provisions on how the liabilities would be settled in the application. He denied the protestor's allegation that the other beneficiaries had been intimidated into consenting to the mode of distribution as the signature forgery allegation. During cross examination, the witness testified that the developed property which formed part of the estate was vacant with no tenants hence no income. He stated that the proposed mode of distribution accommodated all the beneficiaries and that they all got an equal share of the estate. He testified that the consent to the mode of distribution was signed voluntarily by all beneficiaries.
8. Timothy Mwimi Mutemi (PW2) told the court that he was one of the administrators of the estate. He denied the allegation by the protestor that they had forged the signatures of the other beneficiaries in the consent filed. He also denied the allegations of intimidation. He told this court that the three administrators' proposed mode of distribution was fairly stated that the same was agreeable to the other beneficiaries with the exception of the protestor. He testified that he was not in agreement with the protestor's proposal of selling the commercial plots and sharing of the proceeds among the beneficiaries. Instead he stated that the children of the deceased had agreed to renovate the properties before renting them out and sharing equally the proceeds of rent among all the children of the deceased.



9. Douglas Kyalo Mutemi (PW3) told the court that he was in agreement to the mode of distribution agreed upon by all the children with the exception of the protestor. He stated that he was in agreement with the proposal of having the two commercial properties, Plot 47 and 62 valued to establish their respective values. He also stated that they had included their niece Charity as a beneficiary to acquire her late mothers, (Elizabeth Mutemi's) share. On the issue of forgery of signatures, he stated that it was not unusual for a party to have two signatures as he had two sets of signatures himself. He denied that there was any forgery and that the beneficiaries signed willingly.
10. The 2nd administrator has urged the court to disregard the report filed by the protestor and done by Quince Real Estate Valuers stating that it contained exaggerated figures pertaining to the properties and further that the estimated figures were unachievable in an open market. He submitted that the valuation was based on the value of the properties in their renovated and rehabilitated state with 100% occupancy which is unrealistic and does not reflect the position on the ground.
11. He asked the court to adopt the 1st, 2nd and 3rd administrator's valuation report prepared by Horizon Valuers stating that their valuer gave an open market value of each plot and the prevailing land prices.
12. The Protestor's Case
The protestor on the other hand departed from the position taken by other siblings and blamed the co-administrators for intimidating the sisters.
13. Agnes Mumbanu Kinako (DW1) told the court that she had an alternative mode of distribution of the estate and further that she was disputing the consent cited for the reason that her sisters had been forced to execute the same by their brothers. She also stated that her proposal was to have the commercial Plots no. 47 and 62 sold and proceeds shared equally among all her siblings. She stated that she was not comfortable with the proposal of having the two properties distributed to the sons of the deceased. During cross examination, she stated that she had only listed a schedule of assets as she was not aware of any liabilities accrued to the estate. She asked the court to summon her sisters whom she claimed had been intimidated by the other administrators into signing the consent on distribution. She however stated that she had not reported the alleged forgery to Police or other authorities. The witness also told the court of her own proposed mode of distribution and stated that her proposal was better as it was fair and catered for everyone equally.
14. The protestor in her written submissions has urged this court to order for a fresh valuation through independent valuation by a reputable firm.
15. The Protestor has given the following schedule of distribution mode as a fair one.
 - a. She proposes that the money deposited in National Bank Account No.124351500XXXX, shares at KCB, Safaricom shares at Pater Enterprises Co. Ltd. be shared equally among all the eleven children/dependants of the deceased.
 - b. Plots 47 and 67 Mutito Market be sold and proceeds shared equally among all the children.
 - c. Plots No. 109 & 167 Mutito Market be sold and proceeds shared equally among all children.
 - d. Plot No.2 Kivio Market be sold and proceeds shared equally among all children.
 - e. Miambani/Nzaaye/148-Nancy Koki Mutemi
 - f. Miambani/Nzaaye/468-Sophie Njeri Mutemi
 - g. Miambani/Nzaaye/970-Timothy Muimi Mutemi



- h. Miambani/Nzaaye/271-Douglas Kyalo Mutemi
- i. Miambani/Nzaaye/507-Charity Nduku Mukusa
- j. Miambani/Nzaaye/50-Diana Kanini Mutemi
- k. Miambani/Nzaaye/1044-Agnes Mumbanu Kinako in Charity Nduku Mukusa equal Catherine Kavutha Mutemi shares
- l. Miambani/Nzaaye/5-Judy Tabitha Mutemi
- m. Plot No. 34 Kitoo –Eric John Mutemi
- n. Nzambani/Maluma/838-To be left pending to await outcome of cases in court.

16. The Co-administrators on the other hand has suggested the following mode of distribution;

- i. Amount in National Bank of Kneya A/C No. 12435100XXXX to be shared equally among the beneficiaries
- ii. 2726 Kenya Commercial Bank Shares to be sold and proceeds shared equally among the beneficiaries
- iii. 500 Safaricom shares to be sold and proceeds shared equally among the beneficiaries
- iv. 100 Dater Enterprises Co. Ltd shares to be shared by Eric John Mutemi, Timothy Muimi Mutemi and Douglas Kyalo Mutemi equally
- v. Plot No. 47 and Plot No. 62 Mutito Market (both developed) to be valued and Agnes Mumbau Kinako to be given her share 1/11 of the total value. The said plots to be transferred to Timothy Muimi Mutemi, Eric John Mutemi and Douglas Kyalo Mutemi. The said beneficiaries shall collectively pay for the value of the aforesaid share
- vi. Plot No.109 and 167 Mutito Market and Plot No 2 Kiviu Market (undeveloped) to be valued and utilized to settle liabilities of the deceased as per the schedule of liabilities attached
- vii. Title No. Miambani/ Nzaaya 464-Agnes Mumbau Kinako
- viii. Title No. Miambani/Nzaaya 148-Charity Nduku Mukusa
- ix. Title No. Miambani/Nzaaya 468 Douglas Kyalo Mutemi
- x. Title No. Miambani/Nzaaya/970, Title No. Miambani/Nzaaya/271, Title No. Miambani/Nzaaya/507, Title No. Miambani/Nzaaya/50, Miambani/Miambani/1044 to be registered in the names of Timothy Muimi Mutemi, Eric John Mutemi, Douglas Kyalo Mutemi, Caroline Musangi Mutemi, Sophie Njeri Mutemi, Judy Tabitha Mutemi, Diana Kanini Mutemi, Nancy Koki Mutemi and Catherine Kavutha Mutemi- in equal shares
- xi. Title No. Miambani/Nzaaya/5 –Timonthy Muimi Mutemi, Eric John Mutemi and Douglas Kyalo Mutemi
- xii. Title No. 34/Kitoo- Timothy Muimi Mutemi

17. This Court has considered the 2 proposals and finds that though the fights from the 2 camps appears protracted the suggested modes are almost similar with of course some variations. The provisions of Section 38 of the *Law of Succession Act* provides for how the estate of the deceased in this circumstance should be distributed. It states: -



38. Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, be subjected to the provisions of Sections 41 & 42, devolved upon the surviving child, if there be only one, or shall be equally divided among the surviving children. '3

18. This court has perused through the copies of titles provided by the 1st to 3rd administrators and the copies of the titles of properties/assets comprising the estate, the acreage of the land asset are as follows: -

- a. Miambani/Nzaaya/.....970-0.93 ha
- b. Miambani/Nzaaya/.....507-4.74 ha
- c. Miambani/Nzaaya/.....464-2.05 ha
- d. Miambani/Nzaaya...../468-1.08 ha
- e. Miambani/Nzaaya/.....5-0.71 ha
- f. Miambani/Nzaaya/.....50-0.97 ha
- g. Miambani/Miambani/.....1044-30.6 ha
- h. Miambani/Nzaaye/148-0.86 ha
- i. Miambani/Nzaaya/.....271-2.53 ha

Total Acreage 44.47 ha

19. There was no evidence placed before me to show the acreage in respect to Title No. 34/Kitoo. The protestor has proposed that Parcel goes to Eric John Mutemi while the other administrators proposes that the parcel be given to Timothy Muimi Mutemi. Depending on how big that parcel is each beneficiary should get at least 5 ha going by the above total acreage.

20. This Court has considered the two proposals from the two sides. The protestor during trial went to great lengths in trying to urge this court to find that the consent to mode of distribution obtained by the 1st, 2nd and 3rd administrators were either fraudulently obtained (owing to apparent different ways the signatures appeared from the consent as opposed to other documents filed in this cause) or that the sisters were so intimidated after some fear was put into them. However, the sisters appeared in person in court after being summoned by this court and not only denied the allegations but confirmed that they signed the consent voluntarily. This court finds that the consent accompanying the application for confirmation of grant is valid and was not obtained through fraud or intimidation.

21. This court has considered the proposal made by the 2nd administrator and finds that same is a bit skewed against the daughters of shares. This court would not have interfered with the same due to consent filed but in view of the protest by the protestor, this court is bound to interrogate the proposal fully aware of the dictates of Article 27 of *the Constitution* of Kenya 2010 which forbids any form of discrimination based on gender.

The Article 27 states as follows: -

- i. Every person is equal before the law and has the right to equal protection and equal benefit of the law
- ii. Equality includes the full and equal enjoyment of all rights and fundamental freedoms



- iii. Women and men have the right to equal treatment, including the right to equal opportunities, economic, cultural and social believes.
- iv. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

This court finds that the 2nd administrator has proposed that the protestor be given only Miambani/Nzaaya/464 measuring 2.05 ha as the only parcel of land.

That proposal does not sit well with the cited provisions of Section 38 of the *Law of Succession Act*. While it may not be easy to achieve complete equal distribution owing to different dynamics at play for example where the parcel of land is situated, its valuation etc., this court has made deliberate efforts to try and achieve equity in order to equally cater for each and every beneficiary. Towards that end this court hereby confirms the grant issued on March 6, 2018 and the assets comprising the estate shall be distributed as follows: -

- a. The amount held at National Bank of Kenya A/c No. 12435100XXXX shall be divided equally among the 11 beneficiaries listed under paragraph 6 of the affidavit by 2nd administrator sworn on October 11, 2019.
 - b. The Kenya Commercial Bank shares (2726) shall be shared equally among the beneficiaries listed under paragraph 6 of the affidavit in support of Summons for Confirmation of Grant. In the alternative the shares be disposed and proceeds shared equally among the said beneficiaries.
 - c. 500 Safaricom shares shall be shared equally among all children of the deceased listed under Paragraph 6 of the affidavit of 2nd administrator on October 11, 2019 and in the alternative the shares be sold and proceeds shared equally whichever is more viable.
 - d. That parcel known as Miambani/Miambani/1044 shall be shared equally among all the children of the deceased as listed in paragraph 6 of the affidavit of Eric John Mutemi sworn on 11th October, 2019.
 - e. That Parcel known as Miambani/Nzaaya/507 to be shared equally by Caroline Musangi Mutemi and Sopie Njeri Mutemi
 - f. Parcel No. Miambani/Nzaaya/464-Agnes Mumbau Kinako.
 - g. Parcel No. Miambani/Nzaaya/468-Douglas Kyalo Mutemi
 - h. Parcel No. Miambani/Nzaaya/5-Timothy Muimi Mutemi
 - i. Parcel No. Miambani/Nzaaya/271-Eric John Mutemi to get 2 ha and Catherine Kavutha to get 0.53 ha.
 - j. Title No. 34/Kitoo-Timothy Muimi Mutemi.
 - k. Miambani/Nzaaya/50 Diana Kanini Mutemi
 - l. Miambani/Nzaaya/148/Judy Tabitha Mutemi
 - m. Miambani/Nzaaya/970-Nancy Koki Mutemi
22. There are 2 Prime Properties being Plot No. 47 and 62 at Mutito Market. The parties were at cross-roads on the mode of distribution with 1st, 2nd and 3rd administrators preferring to have the properties



valued and they be allowed to buy off the protestor by paying $\frac{1}{11}$ share in the said plots. The Protestor on the other hand preferred disposing of the plots and sharing the proceeds equally among all the children.

23. This court ordered for valuation of the properties and the valuation was done by both sides and reports as follows: -
- a.(i) Horizon valuers Ltd. sought by 1st, 2nd and 3rd administrators found that;
 - (a) Plot 47 –Kshs. 1,100,000 with forced value of Kshs. 800,000/=
 - (ii) Plot No. 62
Kshs. 1,300,000
Forced Sale Value-1 Million
 - b. The Protestor sought for services of another valuer namely Quince Real Estate Ltd. which valued the properties as follows: -
 - i. Plot 47-Kshs. 3,000,000
 - ii. Plot 62 –Kshs. 3,20,000
24. There is a gulf in between the two valuation report and one wonders how two professionals can value the same property and come up with such a huge disparity in terms of valuation. In the end this court finds that it may not be fair to go by either report. This court will have to get an independent valuer to be identified by the Deputy Registrar with assistance of District/County valuer from the Lands Office Kitui. The valuer shall value all the cited plots to wit Plot 47 and 62 at Mutito Market.
25. This court finds that upon valuation, the said properties including Plot No. 109 and 167 at Mutito Market and Plot No. 2 at Kiviui shall either be disposed of and proceeds shared equally or, as suggested by the 2nd administrator, the 4th protestor be paid off equivalent to $\frac{1}{11}$ share and the remaining beneficiaries to have equal share of the said properties.
26. There were claims that the 1st and 2nd administrators used some money to maintain the properties or improve them. This court is not persuaded that anyone should be compensated because no party approached the court for permission to expend some money on any property in the estate. The expenses incurred if any were unauthorized and was not done with the agreement of all the beneficiaries. The claim may have been made with a view to gaining some leverage during the distribution of the estate which in itself is bad faith.

Having said that this court makes no Order as to costs. Each party to pay own costs but the costs of the independent valuer shall be met equally among the four administrators.

DATED, SIGNED AND DELIVERED AT KITUI THIS 28TH DAY OF NOVEMBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

