



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Coram: D. K. Kemei – J**

**SUCCESSION CAUSE NO. 149 OF 2003**

**IN THE MATTER OF THE ESTATE OF PAUL MWENGEI NDUYA (DECEASED)**

**RODAH KATHIKWA MWENGEI**

**JULIUS NGUMBAU MWENGEI**

**FRANCIS MWANGANGI MWENGEI.....PETITIONERS/RESPONDENTS**

**VERSUS**

**ROSE WANZA KITELA.....OBJECTOR/APPLICANT**

**RULING**

1. The Objector herein filed an application dated 13/11/2020 seeking the following orders:

(1) *That the court do order the administrators to hand over the original titles for **KALAMA/KATANGI/69** and **MACHAKOS/KONZA BLOCK 1/307** to court so that they can be handed over to the surveyor for purposes of sub-division of the two parcels of land.*

(2) *That the court do issue an order to the effect that the Deputy Registrar do sign all the relevant documents to effect sub-division, transfer and transmission of the properties of the estate.*

2. The application is supported by the grounds set out on the face thereof and by the affidavit of the Objector/Applicant sworn on even date. The Applicant's case is that this court vide its ruling dated 20/03/2018 directed that the estate be shared equally among the beneficiaries and that the administrators were directed to file an affidavit on distribution within three (3) months. It is further the Applicant's case that the Administrators have failed to comply with the court order and have continued to harass her. It is finally the Applicant's case that there is no possibility of the parties agreeing on anything and hence the need for the Deputy Registrar to sign the relevant documents so as to fast track the transfer of the properties to the beneficiaries .

3. The 2<sup>nd</sup> Petitioner filed a replying affidavit sworn on 8/02/2021 wherein he averred *inter alia: that they are not opposed to the sub-division of the estate of the deceased as their only issue has been on the mode of sub-division of the property; that this court's ruling ordered the estate to be shared equally among all the beneficiaries; that the deceased left behind eleven (11) beneficiaries from the first household of Rodah Kathikwa Mwengei (1<sup>st</sup> wife) and eight (8) beneficiaries from the second house of Monicah Kasiva Mwengei (2<sup>nd</sup> wife) as per the chief's letter dated 8/02/2021 annexed as **JMM I**"; that all the beneficiaries except the Objector sat and agreed on the mode of distribution as per the consent annexed as **JMM II**" ; that the Objector is intent on disinheriting some of their siblings as well as the children of deceased siblings against the law; that the Applicant who is a lone ranger refused to join the rest of the family members during the deliberation on the distribution of the estate; that the proposed mode of distribution should be adopted by the court.*

4. Parties filed and exchanged written submissions. The Objector's submissions are dated 8/03/2021 while those of the Petitioners are dated 27/07/2021.

5. Mrs Thoronjo for the Objector submitted that the Petitioners have not complied with the orders of this court vide the ruling dated 20/03/2018 as he failed to file a further affidavit on distribution. It was also submitted that the Petitioners further affidavit has brought a further list of beneficiaries in excess of the previous eight (8) and hence they have bestowed upon themselves powers to distribute the estate to other persons who are not children of the deceased, and thus reduce the Objectors share of the estate. Finally it was submitted that the Petitioners have failed in their duties to discharge the mandate bestowed upon them by law and are holding the Objector to ransom thereby warranting the orders sought.

6. Mrs Muthini for the Petitioners submitted that the Petitioners are not opposed to the distribution of the estate of the deceased save only that they are opposed to the Objector's proposal that the estate be strictly distributed among only eight (8) beneficiaries. It was further submitted that the deceased had 19 beneficiaries as shown by the chief's letter dated 8/02/2021 (JMM I) as per paragraph 6 of the replying affidavit to which the Objector failed to file a rejoinder thereto and hence implying that she does not dispute the existence of 19 beneficiaries as opposed to 8. It was the view of learned counsel that the Objector is out to disinherit nine other beneficiaries excluding the widows. It was also pointed out that the deceased's children have been represented by their wives/husbands or children as per the list of the family members deliberations before the chief on 8/02/2021. It was finally submitted that the court should adopt the proposal of the Petitioners regarding the distribution of the estate of the deceased so as to ensure that no beneficiary is left out.

7. I have considered the rival affidavits and the submissions. It is not in dispute that the Objector herein has filed a summons for revocation/annulment of grant dated 8/12/2011 which was later agreed by consent to be treated as protest proceedings and the Petitioners subsequently filed summons for confirmation of grant dated 27/06/2012 and that both were thereafter canvassed by way of written submissions which culminated in the ruling dated 20/03/2018 whereby the following orders were issued:-

***(1) The assets of the estate of the deceased shall be distributed in equal shares among his children and spouses who survived him.***

***(2) The distribution among the heirs shall be drawn as to coincide as much as practical within the portions of the estate assets already occupied by the respective heirs.***

***(3) Any heir who has sold or poised to sell his share of the estate can only make good such disposal upon confirmation of the grant in accordance with section 82(b)(ii) of the Law of succession Act so the confirmation of grant will only reflect a schedule distribution of the heirs of the deceased as in (1) above.***

***(4) The beneficiaries are at liberty to forego their sharing in the estate which they shall signify by lodging a suitable consent in that behalf in court.***

***(5) The administrators shall, pursuant to section 71(d) of the law of succession Act, file a further affidavit on distribution taking into account the directions given in orders 1 – 4 above within three months (90 days) to allow the confirmation of the grant of letters of administration herein.***

***(6) Costs in the cause."***

It is also not in dispute that the Petitioners did not comply with order No.5 in the said ruling prior to the filing of the present application by the Objector. It is also not in dispute that the petitioners have now filed the requisite further affidavit albeit out of time although styled as a reply to the Objector's present application. It is also not in dispute that the summons for confirmation of grant dated 27/06/2012 is yet to be heard in earnest so as to pave way for the issuance of a certificate of confirmation of grant which would then enable the administrators to distribute the estate. Finally, it is not in dispute that the present application seeks for an order to wrest the task of administration of the estate such as distribution from the administrators and be vested with the Deputy Registrar of this court. This being the position, I find the only issue for determination is whether the Objector's application dated 13/11/2020 has merit.

8. The Objector's application herein presupposes that the grant has been confirmed and a certificate of confirmation of grant has been issued to the administrators who have thereafter refused, neglected or abandoned their duties to administer the estate. However, the true position is that the grant is yet to be confirmed as the summons for confirmation of grant is yet to be determined. It seems the objector has jumped the gun as she ought to wait for the determination of the said summons for confirmation of grant before she can complain that the administrators have not carried out their duties as mandated of them for the benefit of the beneficiaries. As the grant has not been confirmed, the administrators cannot be faulted for failing to distribute the estate of the deceased. The Objector ought to have set down the matter for directions and serve notice upon the administrators who would then be expected to explain why they had not complied with the orders of the court to file and serve a further affidavit on distribution. The Objector could as well have set down the summons for confirmation of grant for hearing and serve the Administrators with the requisite hearing notice as well as her affidavit on proposed mode of distribution. It is therefore clear that the present application is premature and that the same cannot be entertained at this stage of the proceedings as the orders expected to be issued will be in vain and unenforceable. Clearly, the present application lacks merit and must be dismissed. The Objectors must go back to the drawing board and set down the pending summons for confirmation of grant for hearing in the event of failure by the administrators to do so.

9. A perusal of the administrators affidavit in reply to the summons dated 13/11/2020, sworn on 8/02/2021 shows that the same appears to be a further affidavit on distribution of the estate pursuant to the orders made in the ruling dated 20/03/2018 as it has widened the list of the beneficiaries and their proposed shares. Even though the same has been filed in response to the present application, the same could still be deemed as properly filed as a further affidavit on the distribution of the estate. This court has inherent powers under rule 73 of the probate and Administration rules as well as section 74 of the Law of succession are expedient in order to meet the ends of justice. Once the affidavit is deemed as properly filed, then the Objector will be given time to file her proposed mode of distribution within a certain timeline. The interest of justice and expediency requires such direction to be made so that the parties herein can quickly have the pending summons for confirmation of grant wrapped up and thereafter the estate could be distributed to the heirs.

10. In light of the foregoing observations, the following orders are made:

***(a) The Objectors application dated 13/11/2020 is dismissed with no order as to costs.***

***(b) The Petitioners affidavit in reply to the summons dated 13/11/2020 sworn on 8/02/2021 is hereby deemed as a further affidavit on the distribution of the estate of the deceased.***

*(c) The Objector is granted leave to file a response to the Petitioners proposed distribution within 7 days from the date hereof.*

*(d) The Petitioners are granted leave to file further affidavit if need be within 7 days upon being served.*

*(e) Parties to fix suitable mention date for directions at the registry once they have filed and exchanged the relevant affidavits.*

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**D. K. Kemei**

**Judge**