



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 490 OF 2016

IN THE ESTATE OF THE LATE JOSEPH MUNGAI KIBERA (DECEASED)

GLADYS WANJIKU MUNGAI1ST APPLICANT

JUDY WANJIRU MUNGAI.....2ND APPLICANT

VESRUS

MICHAEL MUNGAI.....1ST RESPONDENT

PETER MUNGAI.....2ND RESPONDENT

BONIFACE MUNGAI.....3RD RESPONDENT

JUDGMENT

1. The Applicants and the Respondents are all children of the Deceased, Joseph Mungai Kibera. The other children are Nancy Muthoni Mungai and two who are deceased; Joseph Mungai Waceke and Robert Mungai.
2. The Petition for Letters of Administration was first filed in Court on 09/08/2016 by Michael Ndirangu Mungai and Peter Mungai Kabili, the 1st and 2nd Respondents herein and a Grant of Letter of Administration issued on 20/02/2017 by Ndung'u J.
3. Subsequently, on 13/05/2019, the 1st Applicant filed a Citation, citing the two Administrators for failing to apply for confirmation of the grant within the prescribed time. The same was heard and the Grant revoked on 28/05/2019. However, on 03/12/2019, the parties agreed to reinstate the Grant of Letters of Administration and have the two Applicants added as Administrators.
4. On 09/03/2020, I directed the parties to meet and try to resolve the dispute out of Court seeing as it is that there was no dispute about the extent of the estate or the beneficiaries to the estate. I also directed that in case the parties were unable to resolve the dispute, the same be referred to Mediation. The result of a meeting held among the parties was that they were unable to agree on the mode of distribution. They therefore wish the Court to determine the mode of distribution.
5. From the Summons for Confirmation of Grant dated 23/07/2019, only two issues remain for determination. That is, whether the grant of letters of administration ought to be confirmed as prayed and what should be the Mode of Distribution. On 10/06/2021, the parties agreed to have the matter be determined based on affidavits and submissions

6. The Applicants depose that all the beneficiaries have agreed to the mode of distribution; specifically, that all the eight beneficiaries receive an equal share of the only listed asset of the estate; Dundori/Lanet Block 2/141. They also depose that all beneficiaries have agreed that the Applicants be appointed as Administrators of the estate. Also filed with the Summons for Confirmation was a Consent to the Confirmation of Grant and Mode of Distribution.

7. In Response to the Summons for Confirmation, the Respondents filed an Affidavit of Protest dated 18/12/2019 and a Further Affidavit dated 09/07/2021, both sworn by the 2nd Respondent. The Respondents deny having consented to the mode of distribution proposed by the Applicants. They however admit that it took them a long time to apply for confirmation of the grant. The reason given for this delay, they say, is that after a resolution in 2017 to have a family meeting and discuss distribution of the estate, the Applicants used the area chief to disrupt the process and thus they were unable to settle on anything. This issue is, however, no longer live it having dissipated when the parties agreed to reinstate the grant.

8. The Respondents allege that the Applicants have been intermittently intermeddling and causing frustration and malicious destruction of property, including demolition with the intention of causing illegal subdivision and eviction and bringing strangers to the ground with the intention selling the property. The Respondents also say that they never realized the passage of time but still have good faith in wanting to distribute the estate.

9. The Respondents do not want the Administrators replaced. They are of the view that the Applicants' appointment will cause more hardship since, they say, the Applicants have refused to participate in family meetings to mediate the situation.

10. Another argument advanced by the Respondents is that the Applicants are married and unlike them (the Respondents), they have benefited from their husbands' properties. They therefore say that if the sole asset of the estate is distributed as proposed, they would lose their only home, which they have been taking care of since the Deceased's death. They suggest that the land be subdivided into 4 equal portions, 3 portions be granted to the Respondents and the one portion be shared by the rest of the beneficiaries.

11. The Respondents also say that a substantial portion of the land is soggy due to a seasonal stream thereby reducing the land available for distribution. They contend that their suggested mode of distribution was not based on the desire to discriminate against their sisters but based on many considerations. Among these considerations the Respondents contend, is the value of the portion to be distributed among the other beneficiaries is higher, the intention of the other beneficiaries is to sell and share the proceeds, the Respondents intend to settle on the land and that the aggregated value of the Respondents' portion would be equal to that of the other beneficiaries.

12. In their rejoinder dated 10/01/2020, the Applicants find the Respondents' suggested mode of distribution to be inept, retrogressive, and discriminatory against the daughters of the Deceased. They contend that all children of the Deceased are entitled to benefit equally from the estate of the Deceased. They ask that the Court follows the Decision in ***Mary Rono v William Rono & Another [2005] eKLR***.

13. They say that other than the property listed herein, the Deceased also had 8 Hectares of unregistered land in Nyandarua where the 1st Respondent continues to reside, a farm in Gilgil, Cows and a Lorry. The Applicants contend that at the time of filing the Summons for Revocation, the Respondents had unilaterally sold the said properties. They want the Respondents to render accounts for the same and the said properties be returned to the Deceased's estate. They also allege that the Respondents are now running away from the mutually agreed mode of distribution. Suffice it to say that I found little evidence that the Deceased's estate had other assets other than the parcel of land known as Dundori/Lanet Block 2/141 (Tabuga).

14. In their submissions dated 17/02/2020, the Applicants reiterate their affidavits. They place reliance on the case of ***Mary Rono v William Rono & Another [2005] eKLR***.

15. Section 38 of the Law of Succession Act provides that where an intestate has left a surviving child or children but no spouse, the net intestate estate is to devolve upon the surviving child or among the surviving children subject to the provisions of sections 41 and 42 of the Act. The Court of Appeal dealt with the issue of married children of the Deceased in **Stephen Gitonga M'murithi v Faith Ngira Murithi [2015] eKLR**. The Court, applying the provisions of Section 38 of the Law of Succession Act stated thus:

Applying the above principles to both the learned trial Judges' reasoning and distribution, it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the Law of Succession Act by discriminating against the married daughters of the deceased. See Rono versus Rono & another [2008] 1KLR (G&F) 803.

16. On the Respondents' assertion that the Applicants intend to sell their share of the property, it is not up to the Respondents to decide how the Applicants use their share of the estate. Additionally, the suggestion that the Applicants are married and therefore have the benefit of their husband's property, in my view, goes against the provisions of Article 27 of the Constitution which prohibits discrimination based on marital status.

17. Indeed, more than two decades into the twenty-first century the arguments advanced by the Respondents jar upon the decent and modern ear. Equal rights between male and female descendants of a Deceased have been statutorily guaranteed in Kenya since 1981 when the Law of Succession Act was enacted. It was constitutionalized in Constitution of Kenya, 2010 in Article 27. It has been enunciated in a number of judicial pronouncements which apply both Kenyan and international law including the 1981 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). To read in a legal brief – 40 years after Kenya's ratification of CEDAW and 11 years after the promulgation of our Transformative Constitution – an argument that female children should not inherit from their father because they are married and should, therefore, depend on their husband's inherited property is a deeply disturbing experience. So is the infantilizing attitude towards women exhibited in the argument that female descendants of the Deceased should not inherit equal portions of their father's land because they are merely interested in selling the land for pieces of silver and gold.

18. In short, the Respondents' arguments require no more extensive censure except to remark, rather melancholically, that this necessary judicial pillorying of the Respondents' attitude towards women's inheritance rights is not likely to be the epitaph of the patriarchy from which it is borne. It merely announces that the work of liberty is far from being finished.

19. Finally, although the Respondents claimed that their proposed mode of distribution is also influenced by the topography of the property and the relative values of the property, they presented no credible evidence to show that is true. Indeed, it is curious that they proposed subdivision into four portions in which they – three men – get three fairly equal portions while the Applicants and the other female descendants get to share the fourth portion. That formula fails both the substantive and *prima facie* case for equal distribution.

20. In the circumstances, the Summons for Confirmation of Grant dated 23/07/2019 is determined as follows:

a. The grant issued herein is confirmed on the following terms: the parcel of land known as Dundori/Lanet Block 2/141 (Tabuga) shall be divided equally among all the beneficiaries to the estate of the Deceased namely:

- i. Michael Ndirangu Mungai**
- ii. Peter Mungai Kabili**
- iii. Boniface Ng'ang'a Mungai**
- iv. Gladys Wanjiku Mungai**

- v. Nancy Muthoni Mungai
- vi. Judy Wanjiru Mungai
- vii. Estate of Joseph Mungai Wacheke
- viii. Estate of Robert Mungai

b. The Administrators shall, within 90 days of the date hereof, arrange for the County Surveyor to demarcate the parcel of land in accordance with order (a) above.

c. Each beneficiary to pay equally for the surveyor and other attendant fees necessary for the survey, demarcation and issuance of new titles.

d. Each party to this Cause shall bear its own costs.

21. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF DECEMBER, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.