

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO.538 OF 2009

IN THE MATTER OF THE ESTATE OF NGETI MBAI (DECEASED)

BENJAMIN MUOKI MULI)

PHILIP MULI)

MUTINDA MWEI).....BENEFICIARIES/APPLICANTS

VERSUS

NYOLO NGETI.....OBJECTOR/RESPONDENT

KANINI NGETI..... ADMINISTRATOR/RESPONDENT

RULING

1. This ruling relates to two applications one dated **12.6.2020** filed on 15.6.2020 and the other dated **15.7.2020** filed on 16th July, 2020. The 1st application by the Applicants is against the administrator and objector. The application is vide summons under section 47 of the Law Succession Act and Rule 73 of the Probate and Administration Rules.

2. The application seeks the following orders:

a) Spent.

b) Spent.

c) Spent.

d) That the court do order that fresh survey be conducted involving all the beneficiaries taking into account the developments by each beneficiary while distributing the estate and minimize interference.

e) Costs.

3. The facts constituting the application as indicated in the supporting affidavit of Benjamin Muoki Muli with the authority of his co-applicants dated 12.6.2020 were that he averred that he just discovered that the grant to the estate to the deceased was issued to the administrator and confirmed on 15.6.2012. He averred that he discovered the same when the administrator visited the parcels of land in the estate where she put up boundaries and erected fences. It was averred that the administrator had closed roads, fenced off portions containing food, houses and personal developments and as a result the beneficiaries cannot access their homesteads with ease or harvest food crops fearing to be arrested and charged with trespass. It was averred that the administrator took the developed portions of the land with fruit trees and leaving the large chunks of land that are undeveloped. The deponent averred that he disputed the manner in which the distribution was being executed. Finally, he averred that he did not contest the distribution of the land.

4. The application was opposed by the Administrator who filed a replying affidavit sworn on 27.6.2020 and filed on 29.6.2020 in which she raised several objections inter alia: that the issue raised is already res judicata as they have been dealt with vide this court's ruling dated 20.4.2020 and thus this court is now functus officio. ;that she should be allowed to finalize the distribution of the estate as the same is at the tail end and should not be interrupted; that the county surveyor did visit the land during the sub division and thus the exercise was above board; that the claim that she is an "iweto" is a belated move by the applicants to frustrate her yet they had always treated her as a full member of the family of the deceased and even consented to her being the sole administrator even during the confirmation of grant; that the respondent's claims should be rejected as it is a regurgitation of matters that were determined.

5. The applicant by way of rejoinder filed a further affidavit deponed on 10.7.2020 where he averred that he had never been served with court papers regarding the succession matter. It was deponed that if the parties are allowed to conduct a joint survey then the issues raised by the applicant shall be resolved.

6. The applications were canvassed by way of written submissions.

		3.088 acres
		3.088 acres
Wamunyu/Kilembwa/54	<ol style="list-style-type: none"> 1. Kanini Ngeti 2. Fredrick N. Ngeti 3. Christine N. Ngeti 4. Urbanus W. Ngeti 5. Patrick N. Ngeti 6. Daniel Munyao 7. Jane M. Kitema 8. Kivuva Ngeti 9. Nyolo Ngeti 10. Matata Ngeti-deceased 11. Mwei Ngeti-deceased 12. Muli Ngeti-deceased 	0.576 acres
		0.576 acres
		0.576 acres
		0.576 acres
		0.576 acres
		0.576 acres
		0.576 acres
		0.576 acres
		0.576 acres
		0.576 acres
		0.576 acres
		0.576 acres

c) *Costs of the suit.*

9. The facts constituting the application as indicated vide affidavit deponed by Urbanus W. Ngeti, the 3rd applicant, are that the applicants are opposed to the disproportionate mode of distribution that is proposed by the administrator. It was deponed by the deponent upon advice from his advocate on record that section 40 of the Law of Succession Act provides that the estate of a polygamous deceased person be divided amongst the houses according to the number of children and any wife surviving the deceased shall be added as an additional unit to the number of children. It was averred that the applicants had equal rights under the constitution and the law of Succession Act to inherit the property of the deceased and it was prayed that the court order that the estate of the deceased be distributed as per prayer two of the summons.

10. The application was opposed vide a replying affidavit deponed by Benjamin Muoki Muli on 17.7.2020. He disagreed with the mode of distribution that was proposed by the applicants. It was averred that the deceased had two families; his 1st wife was Syevose Ngeti who had 4 children; Nyolo Ngeti, Matata Ngeti(deceased), Mwei Ngeti (deceased), Mwei Ngeti (deceased) and Muli Ngeti (deceased). The 2nd wife was Mutheu Ngeti who did not have children and married Kanini Ngeti as an Iweto and resultantly had 7 children being Fredrick M. Ngeti, Christine Ngeti, Urbanus W. Ngeti, Patrick N. Ngeti, Daniel Munyao Ngeti, Jane M. Kitema and Kivuva Ngeti. It was his averment that Kanini Ngeti was supposed to benefit from the estate of Mutheu Ngeti who is her husband as she had no relationship with the deceased. It was averred that the children of Kanini Ngeti were not children of the deceased and could only wait for their mother to get the share belonging to her husband Mutheu Ngeti who was married to the deceased and then she would share to them. It was averred that Kanini Ngeti was guilty of material non-disclosure as she did not disclose to the court that she was an iweto to Mutheu Ngeti and not a wife of Ngeti Mbai. The deponent opposed the proposed mode because the house of Mutheu Ngeti would get a larger share to the disadvantage of the real beneficiaries of the deceased. It was averred that the initial proposal that the land be shared per houses was acceptable and fair and it was proposed that the distribution be effected as follows;

Property Description	Beneficiary	Share
Wamunyu/Kilembwa/56	<ol style="list-style-type: none"> 1. Kanini Ngeti on behalf of Mutheu Ngeti 2. Nyolo Ngeti 3. Matata Ngeti-deceased 4. Mwei Ngeti-deceased 	0.7536 acres
		0.7536 acres
		0.7536 acres

		0.7536 acres
	5. Muli Ngeti-deceased	0.7536 acres
		0.7536 acres
Wamunyu/Kilembwa/150	1. Kanini Ngeti on behalf of Mutheu Ngeti 2. Nyolo Ngeti 3. Matata Ngeti-deceased 4. Mwei Ngeti-deceased 5. Muli Ngeti-deceased	7.4112 acres
		7.4112 acres
		7.4112 acres
		7.4112 acres
		7.4112 acres
Wamunyu/Kilembwa/54	1. Kanini Ngeti on behalf of Mutheu Ngeti 2. Nyolo Ngeti 3. Matata Ngeti-deceased 4. Mwei Ngeti-deceased 5. Muli Ngeti-deceased	1.3824 acres
		1.3824 acres
		1.3824 acres
		1.3824 acres
		1.3824 acres

11. The application was equally canvassed vide written submissions. I have duly considered the said submissions and the issues raised therein.

12. The duty of the succession court has been reiterated in numerous cases and it is distribution of the estate of the deceased. ***In Re Estate of G K K (Deceased) [2017] eKLR Musyoka J held that:***

“The primary function of a probate court is distribution of the estate of a dead person.”

13. The issues for determination are whether a survey was conducted in implementing the confirmed grant as well as the merit of the applications for resurvey and distribution of the estate of the deceased. The applicant’s case in the 1st application is that the distribution was done to the detriment of him and other beneficiaries hence sought resurvey whereas the administrator and Respondents case is that the subject land was surveyed by a surveyor from Machakos County and a report was prepared. In the 2nd application, the applicants seek that the properties be distributed as proposed; a proposal that the respondents oppose in view of the averment that the administrator was not a wife to the deceased.

14. The 2nd application seems to me to be akin to a revisit of the application for revocation of grant that was dismissed by this court vide ruling delivered on 20.4.2020.

15. From the evidence on record, there is a report from Machakos County Survey office dated 15.5.2017 that reveals that a surveyor visited the site on 28.4.2017 in the presence of the family and that the land parcel Wamunyu/ Kilembwa/150 was subdivided into two portions and boundary marked with euphorbia cuttings as shown in an attached sketch map. The said report was considered by this court during the determination of the summons for confirmation and revocation of grant. Considering that this is not an application to set aside or review the confirmation orders, the only issue that appears to be in contention is who is entitled to what share. Quite unfortunately at this stage it is not for me to determine the same as that aspect was properly handled in the ruling delivered on 20.4.2020. Once the portion of land had been subdivided into two portions for each house then it was incumbent upon the respective houses to organize themselves on who gets what share. The applicants appear to be seeking to regurgitate matters that have already been adjudicated upon vide the above ruling and hence the only recourse is by appealing against the same to the higher courts. Further, it is rather belated for the applicants at this stage to raise new issues namely that the administrator was an **“Iweto”** and not a wife of the deceased and ought to benefit from the house of Mutheu Ngeti who married her in a woman to woman marriage under Kamba customary laws yet they had the opportunity to do so during the hearing of the summons for revocation of grant and confirmation. Besides, all the applicants in the two applications duly signed a consent dated 7.3.2011 to the confirmation of grant clearly confirming that they had no problem at all with the administrator. As noted in the court’s ruling the administrator’s proposal to have the assets divided equally between the two houses was fair and appropriate in the circumstances. The

applicants should therefore be expected to cooperate with the administrator in the subdivision exercise that has already been sanctioned by the relevant Machakos County Land Control board. It is expected that such an exercise will cause some discomfort but it must be done so that each beneficiary gets his or her rightful share of the assets. I am not satisfied that the applicants have presented sufficient reasons to warrant the orders sought.

16. In the result, it is my finding that the applications dated 12.6.2020 and 15.7.2020 lack merit and are dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 23rd day of September, 2020.

D. K. Kemei

Judge