



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION MILIMANI LAW COURTS**  
**SUCCESSION CAUSE 230 of 1998**  
**IN THE MATTER OF THE ESTATE OF NASHON GAKUU MUTHUMBI (DECEASED)**

**R U L I N G**

1. The Matter now before the Court concerns the Estate of Nashon Gakuu Muthumbi. There are several applications on the Court file which had not been dealt with when they were filed. They must be adjudicated upon now.

2. The Deceased died on the 17<sup>th</sup> day of 1997 at Mater Hospital, Nairobi. He was domiciled in Karatina. The Deceased left a Will. There has been no challenge to that Will. In the Will he listed his children as:

- a) Mrs Christine Mumbi Ng'ang'a
- b) Mrs Agatha Nyambura Maitai
- c) Mrs Cecilia Gakenia Waweru
- d) Mrs Muthoni Gakuu
- e) Mrs Nduta Bernard Warigii
- f) Mr Geoffrey Gakuu Muthumbi
- g) Mrs Anne Wangeci Ndegwa
- h) Mrs Lydia Wanjiru Mureithi
- i) Mr Kihurani Gakuu
- j) Mrs Mwarania Kanyi
- k) Mrs Helen Kagendo Murigu
- l) Mr Githui Gakuu

3. The Deceased in his Will very carefully set out the specific legacies he wished to make as follows:

“3. *I make the following specific legacies:*

a) I give to my son Geoffrey Gakuu Muthumbi Title No. KIRIMUKUYU/NGANDU/765 together with the shop which I have built thereon, absolutely

b) I give to my three sons Geoffrey Gakuu Muthumbi, Kihurani Gakuu Githui Gakuu and my only unmarried daughter Jane Muthoni Gakuu Title No. KIRIMUKUYU/NGANDU/766 together with the house and other improvements thereon, to hold the same as joint tenants in the following shares:

*Geoffrey Gakuu Muthumbi*

*Mr Kihurani Gakuu*

*Mr Githui Gakuu*

*Muthoni Gakuu*

c) I direct KIRIMUKUYU/NGANDU/766 (above) be treated as family property and not to be subdivided, sold or transferred to any person who is not my direct descendant

d) I further direct that said property be put to such that KIRIMUKUYU/NGANDU/767 should be subdivided into three equal portions and distributed as per attached sketch plan-

i) Jane Muthoni's portion to be next to Muthumbi's portion;

ii) Kihurani's to be next to Muthoni's portion;

iii) Githui's portion to border the road leading to Kanyama at the end of my land".

In relation to the remainder of his Estate, he said:

*"4. Any property belonging to me and not included in this Will shall be distributed in proportions set out in paragraph 3(b) above"*

4. It would appear that the Testator's Will made his wishes very clear. Sadly, they were never put into effect. As provided in the Will Mr Geoffrey Gakuu Muthumbi did apply for grant of probate with will attached. The Petition was filed on 6<sup>th</sup> February 1998. As required, the Original copy of the Will was lodged and remains on the Court file. Unfortunately, the Testator's sketch referred to in the Will was not attached either to any copy of the Will nor the Affidavit in Support of the Petition. Nevertheless Grant of Probate with Written Will was issued by the High Court in Nairobi on 30<sup>th</sup> June 1998. Even as late as 2015 that Grant had not been confirmed nor any steps taken towards sub-division of the land.

5. On 9<sup>th</sup> March 2015 the other three Beneficiaries under the Will, Kihurani Gakuu, Anne Wangeci Ndegwa and Githui Gakuu filed a Summons for the Revocation and/or Annulment of the Grant on the grounds that the Petitioner had not produced an inventory or account of the Estate, nor had he applied for confirmation of grant within one year. That application was supported by a combined affidavit of the three Applicants. Unfortunately it was not properly attested. In the Affidavit, the Applicants complain that the Respondent has failed to carry out any of the tasks required of him and therefore he should be removed. Each of them offer themselves as an alternative executor. A more worrying aspect of the case is that the Executor demanded payment of KShs.210,000/= from the Beneficiaries to carry out the tasks assigned to him, in particular to effect the transfer of the properties to the beneficiaries. The Application was brought under a certificate of urgency but no orders were made on that day and the Applicants did not list the matter for hearing on a date to be fixed at the Registry as directed.

6. The Executor did not file his Replying Affidavit until 26<sup>th</sup> January 2016. The copy that was filed was in fact dated 12<sup>th</sup> May 2015. By way of response, the Executor did not assure his siblings that he had been taking all the steps necessary to finalise the matter, he chose to raise technical points instead. That is

disappointing in view of the trust that his deceased father had placed in him. He also suggests that the Applicants are to blame because they have been “unco-operative. He provides no particulars. He says he paid a surveyor in 2011. He Exhibits at (g) a map/plan of the proposed sub-division. He does not explain whether that is a new document or the “sketch referred to in the Will. There is no explanation as how the size of each plot was decided, and by whom. He then filed a Summons for Confirmation of Grant dated 12<sup>th</sup> May 2015.

7. The Applicants then filed “Supplementary Affidavits”. The First is sworn by Anne Wangeci Ndegwa on behalf of herself and Kihurani Gikuu. The Affidavit repeats the history of the dispute. It challenges the assertions made in the application for confirmation of grant and also makes legal argument on behalf of her Advocates. I will come to that below.

8. It is clear from that Affidavit that the Beneficiaries would not be consenting to confirmation in the way set out in the Summons. For the Executor to suggest that all that is necessary is to fix a date when all the dependants can consent to the confirmation is unrealistic. In fact the Beneficiaries enumerate various complaints including filing an application over 17 years later to frustrate the revocation. The Beneficiaries also object to the proposed subdivision because it would not allow each of them access to the “family land” set aside by the Will. It also does not allow them reasonable access through the land designated for the Executor. The Beneficiaries complain that the Summons and Affidavit are simply designed to cause further delay rather than, progress matters. In addition the Land Board consents exhibited are only copies and not originals. They have not been explained in the Supporting Affidavit and therefore are unconvincing.

9. Sadly, while this dispute was before the Courts but not making any notable progress, the Executor passed away (on 16<sup>th</sup> February 2016). The Applicants then Petitioned for Letters of Administration with Written Will Annexed. That phrase does not make sense because an administrator is appointed on intestacy, in other words when there is no will.

10. Notwithstanding the shortcomings of the applications and affidavits filed, it is abundantly clear that at present there is no executor of the Will. The Will has not been administered to its logical conclusion, if at all. The Court must therefore appoint an executor or executors to the Will in substitution. The multiplicity of applications has made the matter very messy contrary to the expressed wishes of the Testator.

11. The three Applicants have put themselves forward. They say they are the Children of the Deceased Testator. They say the Executor dies without administering the Will. They promise the court that the “will faithfully administer according to law all the deceased’s estate ....”.

12. The Beneficiary/Applicants rely on **Section 76(d)(i)** for their Application for revocation. They rely on **Order 19 Rule 7** to justify the shortcomings of the combined affidavit. The Court has taken both into account.

13. It is clear from the history of this matter and in particular the second petition that the application for revocation is superseded by events. It has not been withdrawn and therefore it is dismissed. Moving onto the Summons for confirmation of grant of probate. The executor is sadly deceased and therefore must be substituted. That is not the application that the three Beneficiaries have brought. They filed a new petition. The Petition does not inform the Court which family members are surviving. It does not inform the Court whether or not the remaining siblings also agree to the appointment as petitioned for. In that respect the Petition is fundamentally flawed. Further, at the Hearing of the “Amended Application” the Court was informed that there were only three beneficiaries. In fact that is not the full picture. The Will set aside a portion of “family land”. It can safely be assumed that was to be available to ALL the siblings and not just the 4 legatees. In the circumstances, the Petition suffers from material non-disclosure. The Petition therefore must be dismissed.

14. The Estate must be administered by a substitute Executor. The Will does not provide for a substitute but it does say “I direct that all my children live in harmony. It is therefore ordered and directed that this

matter be referred to mediation for ALL the surviving children of the Deceased to appoint one or more substitute executors.

15. For the avoidance of doubt all the applications on the file stand dismissed and each party shall pay its own costs and not draw on the Estate.

**Order accordingly,**

**FARAH S. M. AMIN**

**JUDGE**

**Delivered, signed and dated this 22<sup>nd</sup> day of January 2018**

**In the Presence of:**

**Patrick – Court Clerk**

**Counsel for the Executor:**

**Counsel for Petitioner/Applicants:**