



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 107 OF 1991**

**IN THE MATTER OF THE ESTATE OF JAMES MBAI**

**GATHURI ALIAS GATHURU (DECEASED)**

**RULING**

1. The application dated 24<sup>th</sup> March, 2017 in seeks that the grant of letters of administration intestate made on 5<sup>th</sup> February, 2016 be confirmed. The summons is accompanied by an affidavit, a consent to the confirmation of the grant and a consent to the mode of distribution signed by some of the beneficiaries.
2. One of the administrators, Monicah Wairimu Kamau, filed a protest dated 31<sup>st</sup> July 2017 on 3<sup>rd</sup> August 2017. The protest is premised on the grounds that the mode of distribution proposed is unfair as it leaves out some of the beneficiaries. It is argued that it lists the children of the protestor, who are grandchildren of the deceased, as beneficiaries to share equally in her portion yet other grandchildren are not named in the proposed mode of distribution.
3. The protestor is also not in agreement with the mode of distribution as the applicants did not consult her before they filed it in court. She says that she is in agreement with the proposal made by the surveyors in their report to sub-divide Dagoretti/Uthiru/88 into ten (10) equal shares as per the ten beneficiaries. She urges the court that she ought to be granted, during subdivision of Dagoretti/Uthiru/88, the portion on which her, permanent two storey house stands.
4. In response to the protest, the applicants filed an affidavit sworn on 12<sup>th</sup> September 2017. They state that there are no beneficiaries left out in the mode of distribution. They point out that two daughters, Susan Wahu Mbau and Hannah Wangui Ngui, had renounced their inheritance from the estate, and supported the proposed mode of distribution. They have attached an affidavit of renunciation dated 12<sup>th</sup> September 2017, sworn by the two daughters of the deceased. The applicants oppose the protestor's claim stating that their proposed mode of distribution catered for the protestor adequately.
5. The 1<sup>st</sup> applicant gave sworn testimony on 5<sup>th</sup> December 2017, during which she stated that their proposed mode of distribution was merely adopted from what the family had proposed. She said that the protestor was her late brother's wife. She contended that the protestor failed to attend the meetings held by the family even though she had received an invitation from the Chief. She also said that the protestor had not been ignored; instead she was the one who had chosen to stay away from the rest of the family.
6. The protestor gave sworn testimony on 27<sup>th</sup> February 2018. She stated that her late husband and mother in law made a proposal on how to subdivide parcels numbers Dagoretti/Uthiru/88 and 83. She stated that the 2<sup>nd</sup> Administrator had attacked her, and she pleaded for the court's protection. She said that she was in full support of the surveyor's report dated 20<sup>th</sup> June 2016, that the plots be sub-divided into eight (8) equal portions regardless of sewerage, the matrimonial house and grave site. She stated that this matter had been dragging on since 1991 and urged the court to conclude it once and for all. She said that she was ready to abide by whichever decision was reached by the court.
7. The issue to be determined in this matter is whether the proposed mode of distribution disposes of all the assets of the estate and caters for all the survivors of the deceased. To determine this, it is imperative that it be established who the survivors are and what the assets available for distribution are.
8. The deceased in this matter died on 17<sup>th</sup> February 1990 after the commencement of the Law of Succession Act, Cap 160, Laws of Kenya, and the provisions of the Act therefore apply to its distribution.
9. In paragraph 2 of the affidavit in support of the summons for confirmation of grant filed on 24<sup>th</sup> March 2017, the applicants enumerated the survivors of the deceased. The deceased in this instance had six (6) sons and four (4) daughters as per the statement of facts herein dated 2<sup>nd</sup> June 2016. According to section 38 of the Law of Succession Act, the estate of the deceased should be shared equally amongst his children. The section states that:

*“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”*

10. I have noted that some of the grandchildren of the deceased have been listed as beneficiaries in the proposed mode of distribution. This begs the question whether grandchildren are entitled to inherit from their grandfather’s estate. In the case of *Cleopa Amutala Namayi vs. Judith Were*, Migori HCSC No. 457 of 2005, it was observed that:

*“Be that as it may, under Part V of the Act, grandchildren have no automatic right to inherit their grandparents who died intestate after 01/07/1981 when the Act came into operation. The argument behind this position is that such grandchildren should inherit from their own parents. This means that the children can only inherit their grandparents indirectly through their own parents, the children of their grandparents. The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren’s own parents are dead. Those grandchildren can now step into the shoes of their parents and take directly the share that ought to have gone to the said parents. Needless to say, such grandchildren must hold appropriate representation on behalf of their parents.”*

11. In the present case, some of the children of the deceased have since died. Their share of the deceased’s estate therefore ought to devolve to their survivors or successors, namely their widows and their children, who are grandchildren of the deceased. In this cause, the grandchildren have not presented any representation to the estate of their deceased fathers. The applicants and the other beneficiaries have, however, proposed to apportion part of the deceased’s estate to the survivors of their deceased siblings. The grandchildren are therefore entitled to share in the deceased’s estate through their deceased parents.

12. The protester’s concern is that she is to share her portion with her two sons whereas other beneficiaries who have children have been assigned portions independent of their children. The protester is a widow of Samuel Kamau Mbai, a son of the deceased herein. As a widow of the deceased beneficiary, the protester is entitled to a life interest in the share due to her late husband which shall devolve thereafter to her children upon her death or remarriage. This is by virtue of section 35 of the Law of Succession Act. Grandchildren are not entitled to inherit from their grandparents’ estate for as long as their own parents are alive and listed to share in the estate.

13. It is important to note that two of the beneficiaries, who are daughters of the deceased, filed an affidavit of renunciation stating that they do not wish to share in the estate of the deceased. This leaves eight (8) beneficiaries, three of whom have since died as evidenced by the death certificates filed in this court. Since their widows are still alive, and are properly listed as survivors, it is they who ought to inherit and hold a life interest in their late husbands’ share of the deceased’s estate.

14. One of the deceased’s sons, John Gitau Mbai, is survived by three children, his wife having passed on as well. In this case, his share of the estate devolves to his children to be shared equally by virtue of section 35 (5) of the Law of Succession Act which states thus:

*“Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”*

15. The estate in issue is comprised of Dagoretti/Uthiru/83 measuring 0.051 Ha, and Dagoretti/Uthiru/88. By an order dated 2<sup>nd</sup> May 2017, this court directed Earth Scope Surveys to complete survey work on the two The Surveyors conducted the survey and filed a report dated 20<sup>th</sup> June 2017. In the report it is noted that Dagoretti/Uthiru/83 was too small to be subdivided and shared by the ten beneficiaries listed in the proposed mode of distribution. They recommended that the parcel be subdivided formally. With regard to Dagoretti/Uthiru/88 it was proposed that the same be subdivided into ten (10) equal sub-plots to be shared amongst the family members of the deceased.

16. One of the beneficiaries, AMK, is a minor. He is a grandchild of the deceased through his late father, Robert Mbai Kungu. While the Law of Succession Act envisages equal distribution of the estate of a deceased, where a minor is involved, the court mandated by Article 53 (2) of the Constitution of Kenya to look at the matter through lenses which ensure the best interest of the child is of paramount importance. Some of the beneficiaries herein have painted a picture of persons who enjoy a high standard of living and are therefore not as needy as the minor in question. It is therefore important to consider the plight of the minor in distributing the estate of the deceased.

17. I have considered the law on the matter, the oral evidence of the witnesses and all the proposals on the distribution of the estate filed in this matter. In light of this, I am disposed of the application in the following terms:

**a) that Dagoretti/Uthiru/88 shall be distributed as follows:**

**(i) 0.035 Ha to Monicah Wairimu Kamau during life interest and thereafter to her children in equal shares, and**

**(ii) 0.0164 Ha to AMK to be held in trust by the administrators during his minority;**

**b) that Dagoretti/Uthiru/83 to be shared equally between: -**

**(i) Paul Kahara Kariuki,**

**(ii) James Muchene Mbai,**

**(iii) Noah Njau Mbai,**

(iv) Lois Wanjiku Mbai,

(v) Jane Wambui Mbai,

(vi) the estate of John Gitau Mbai, to be shared equally by his children: Christopher Mbai, Ronald Muchene Gitau and Liza Wanjiru, and

(vii) the estate of Robert Edward Kungu to be held in trust by the administrators for his son Adrian Mbai Kungu during his minority;

c) that the grant on record shall be confirmed in those terms;

d) that each party shall bear their own costs; and

e) that any party aggrieved by the orders made herein shall be at liberty to lodge an appeal against the same at the Court of Appeal within twenty-eight (28) days.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>ST</sup> DAY OF MAY, 2018.**

**W. MUSYOKA**

**JUDGE**