



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO 20 OF 2012**

**IN THE MATTER OF THE ESTATE OF JAMES MAKAU NGINGA (DECEASED)**

**BEATRICE MUKUI MAKAU**

**JOSEPH WAMBUA MAKAU**

**PHILIP KIOKO MAKAU.....PETITIONERS**

**AND**

**ANN KOKI MULANDI.....OBJECTOR**

**RULING**

**Introduction**

1. By Summons for Confirmation of Grant dated 2<sup>nd</sup> August, 2017, the Petitioners herein pray for an order that the grant of letters of administration intestate issued to them on 14<sup>th</sup> July, 2012 be confirmed as per the annexed schedule of distribution.
2. According to the Petitioners the deceased herein died intestate on 14<sup>th</sup> September, 2010 and the grant of letters of administration in respect of his estate was issued to the Petitioners on 14<sup>th</sup> July, 2012. As the prescribed period of 6 months had lapsed, the Petitioners now seek that the grant be confirmed as there are no pending applications for provisions for dependants.
3. It was the Petitioners' case that the only property of the deceased is the parcel of land known as **Machakos/Mua Hills/416** which they proposed to be distributed in accordance with the schedule as the beneficiaries had given their consent to the same.
4. According to the said schedule, the said property was to be registered in the names of **Beatrice Mukui Makau** to hold in trust for herself and for the beneficiaries in equal share. **Beatrice Mukui Makau**, according to the documents filed herein is the widow of the deceased.
5. In response to the protest by **Ann Koki Mulandi**, the Petitioners averred that the said affidavit of protest was made in bad faith and its sole intention was to cause psychological trauma to her. According to her, before he died, the deceased had established matrimonial home on the subject parcel of land and therefore she has a lifetime interest in the same hence it cannot be shared out during her lifetime.
6. It was the Petitioners' case that the Protestor is not a beneficiary of the estate of the deceased she is not a daughter of the deceased whose estate the proceedings relate. Though she makes a claim to a portion of the estate on behalf of the Estate of **John Muthuka Makau**, she as yet does not have letters of administration and therefore lacks the legal standing in these proceedings. The Petitioners further denied that the Protestor was a wife of the said **John Muthuka Makau** and hence the protest was meant to mislead the Court and fraudulently seek to inherit his estate against the law and justice.
7. It was submitted on behalf of the petitioners that **James Makau Nginga** (deceased) left behind the following beneficiaries:

Beatrice Mukui Makau.....wife

Joseph Wambua Makau.....son

Philip Kioko Makau.....son

Regina Syokau Kitaka.....daughter  
Francis Muasa Makau.....son  
Rael Kalondu Paul.....daughter  
Ruth Syowai Mbaluto.....daughter  
Dorcas Nduku Nzioki.....daughter  
Lucas Nginga Makau.....son  
John Muthuka Makau.....son (deceased)

8. In their submissions the Petitioners relied on section 35 of the **Law of Succession Act** which deals with the distribution of a deceased's estate where the intestate has left one surviving spouse and child or children.

9. According to the Petitioners, since the wife of the deceased is by law entitled to a life interest in the whole residue of the net intestate estate, it is therefore outside the law for the protestor to demand, even assuming she was married, that the residue of the net intestate estate be shared out and she be given a share. To them the estate cannot thus be shared at this point because she is by law entitled to a lifetime interest. In this respect the Petitioners relied on **Tau Katungi vs. Margrethe Thorning Katungi & Another [2014] eKLR.**

10. In view of the above, it was submitted that the protest has no merit and pray that the same be dismissed with costs and the estate be distributed as per section 35 (1).

11. There was however an affidavit of protest sworn by **Ann Koki Mulandi**. According to her, she is a beneficiary to the estate of **James Makau Nginga** and yet her consent to the application was not sought. It was her view that since her husband, **John Muthuka Makau** is deceased and the court having pronounced herself in its ruling dated 13<sup>th</sup> June, 2017, it is only fair that the administrators subdivide and transfer her husband's entitlement of the estate to her and her children. She therefore opposed the proposal by the administrators that Beatrice be allowed to hold the estate for herself and her children.

12. On behalf of the protestor, it was submitted that the ruling dated 13/06/2017 confirmed that the protestor was indeed wife to the late **John Muthuka Makau** as such his estate automatically devolves to the protestor. It was submitted on her behalf that a life interest only entitles the surviving spouse to the use and utility of the property the subject of the life interest. The surviving spouse holds the property during life interest as a trustee and stands in a fiduciary position with relation to the property and that the property does not pass to the surviving spouse absolutely. In this respect reliance was placed on **In the Matter of the Estate of Basen Chepkwony (deceased) Nairobi HCSC No. 842 of 1991, The Matter of the Estate of Gathima Chege (deceased) Nairobi HCSC No 1955 of 1996** and in **Re Estate of Rosemary Mukwanjeru Kiria (Deceased) 2016 eKLR** and submitted that the life interest the petitioners talk about is in essence for the final benefit of the children to a deceased person and that the spouse only holds the same for the benefit of the children, this includes **John Muthuka Makau** and since he is late his share of the estate of **James Makau Nginga** automatically devolves to his wife (the protestor herein) and his children. The Protestor appreciated that she is not entitled to the estate of the late **James Makau Nginga** as of right but rather the estate of the late **John Muthuka Makau** who is a beneficiary under the estate of his father, the late **James Makau Nginga** as provided under sections 35 and 37 of the **Law of Succession Act**.

13. To the Protestor, it is evident from the ruling delivered by this Honourable court that the protestor herein was and still is entitled to the estate of her late husband, as such all that was to devolve to him, from his father ought to devolve to his wife to hold in trust for his children.

#### **Determination**

14. The matter before me is the distribution of the estate of the deceased, **James Makau Nginga**. It is not in dispute that the applicable section of the **Law of Succession Act** is section 35 thereof which provides that:

***(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—***

***(a) the personal and household effects of the deceased absolutely; and***

***(b) a life interest in the whole residue of the net intestate estate:***

***Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.***

15. That section has been the subject of various judicial pronouncements. In **Tau Katungi vs. Margrethe Thorning Katungi & Another [2014] eKLR** where **Musyoka, J** at page 4 paragraph 15-18 stated that:

**“15. The deceased person in this cause died intestate in 1991. His estate therefore fell for distribution in accordance with Part V of the Law of Succession Act, Cap 160, Laws of Kenya. He was survived by a spouse and children and therefore the relevant provision is Section 35 of the Law of Succession Act. Section 35(1) provides as follows:-**

**“... where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-**

**a. The personal and household effects of the deceased absolutely and**

**b. A life interest in the whole residue of the net intestate estate:**

**Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”**

16. “Life interest” is not defined in the Law of Succession Act. *Black’s Law Dictionary*, ninth edition, West, 2009, defines it as “an interest in real or personal property measured by the duration of the holder’s or another person’s life.” In the context of Section 35 it is an interest held by the surviving spouse during their life “in the whole of the residue of the net interest estate.” Its effect is that the surviving spouse first enjoys rights over the property and at his or her death the property passes to other persons. In the context of Section 35, the widow is entitled to enjoy rights over the residue of the net intestate estate, that is after taking away the chattels and settlement of liabilities, during her life time with the property passing to the children upon her demise or remarriage of she be a widow.

17. The effect of Section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated.

18. The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled to right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance. The other aspect is that life interest ties up with the concept of matrimonial property: the said property would in most part be property acquired during marriage and with the contribution of the surviving spouse. Direct devolution of such property to the children would deny the surviving spouse of enjoyment of their own property.”

16. Similarly, **In the Matter of the Estate of Basen Chepkwony (deceased) Nairobi HCSC No. 842 of 1991, Koome, J** (as she then was) held that where the property in issue is land, it cannot be registered in the name of the surviving spouse absolutely since she only enjoys a life interest and holds the same in trust for the children and other heirs. Further in **The Matter of the Estate of Gathima Chege (deceased) Nairobi HCSC No. 1955 of 1996, Kamau, J** stated that the ultimate destination of the property the subject of the life interest is to the children in the event of the demise of the surviving spouse.

17. The same principle was restated in **Re Estate of Rosemary Mukwanjeru Kiria (Deceased) 2016 eKLR** where it was observed that:

**“Under the above provisions, the surviving spouse only gets the chattels absolutely, and is only entitled to a life interest on the rest. The ultimate destination of the property the subject of the life interest is to the children in the event of the demise of the surviving spouse as provided in Section 35(5) of the Law of Succession Act and also as was held in *the Matter of the Estate of Gathima Chege (deceased)*...Section 37 of the Act allows the surviving spouse during life interest, subject to the consent of all the co-trustees and all the adult children or the consent of the court, to sell any of the property the subject of the life interest for their own maintenance. Where the subject property is immovable, the consent of the court is mandatory. The surviving spouse holds the property during life interest as a trustee and stands in a fiduciary position with relation to the property. The property does not pass to the surviving spouse absolutely. Where the property in issue is land, it cannot be registered in the name of the surviving spouse absolutely since she/he only enjoys a life interest and holds the same in trust for the children and other heirs. This was the holding in *the Matter of the Estate of Basen Chepkwony (deceased)*.”**

18. What these authorities provide is that upon the death of a spouse, the surviving spouse is entitled to the personal and household effects of the deceased absolutely. However as regards, the whole residue of the net intestate estate, he/she is only entitled to a life interest. This means that the surviving spouse’s interest in the said residue is commensurate to the duration of her life. In other words he/she holds the same in trust for the children and other heirs who are the ultimate beneficiaries thereof. Therefore once the spouse dies or remarries, if a widow, the rights of the children and the other heirs crystallises.

19. It is therefore clear that the Protestor cannot demand at this stage that the portion of her late husband **John Muthuka Makau**, be distributed to her since even her husband from whom she claims, had he been alive would not as yet been entitled to be registered as the proprietor of the same despite being a beneficial interest holder. To register the said portion into the Protestor’ name would defeat the purpose for which the law confers the life interest in a spouse which is to safeguard the position of the surviving spouse.

20. As to whether the Protestor is the wife of the said **John Muthuka Makau**, the Court vide its ruling of 13<sup>th</sup> June, 2017 found that the Protestor was a wife of the late **John Muthuka Makau** and that her children were the children of the said **John Muthuka Makau** and that they were entitled to his share of the Deceased’s estate. Therefore once the share of the said **John Muthuka Makau** crystallises pursuant to the law, the protestor and her children, subject to the other provisions of the **Law of Succession Act** will be entitled to the portion of the estate that rightfully devolves to the said **John Muthuka Makau**.

21. In the meantime, the grant shall be confirmed to **Beatrice Mukui Makau**, in respect of land known as Machakos/Mua Hills/416 which shall be registered in her name to hold in trust for herself and all beneficiaries in equal shares namely: **Joseph Wambua Makau, Philip Kioko Makau, Regina Syokau Kitaka, Francis Muasa Makau, Rael Kalondu Paul, Ruth Syowai Mbaluto, Dorcas Nduku Nzioki, Lucas Nginga Makau and John Muthuka Makau**.

22. A certificate of confirmation of grant to issue accordingly.

23. There will be no order as to costs and it is so ordered.

**Read, signed and delivered in open Court at Machakos this 23<sup>rd</sup> day of October, 2018.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Muumbi for the Petitioner**

**Mr Muia for the Protestor**

**CA Geoffrey**