



REPUBLIC OF KENYA



**In re Estate of Boniface Matonye Mustoki Maingi alias Maingi Matonye Musyoki (Deceased)  
(Succession Cause 19 of 2020) [2025] KEHC 3927 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3927 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 19 OF 2020**

**MW MUIGAI, J**

**MARCH 21, 2025**

**IN THE MATTER OF THE ESTATE OF BONIFACE MATONYE  
MUSTOKI MAINGI ALIAS MAINGI MATONYE MUSYOKI (DECEASED)**

**BETWEEN**

**TERESIA MUNEE RAPHAEL ..... 1<sup>ST</sup> ADMINISTRATOR**

**PASCAL MWIKYA MATONYE ..... 2<sup>ND</sup> ADMINISTRATOR**

**AND**

**FESTUS KIOKO MATONYE ..... 1<sup>ST</sup> PETITIONER**

**VICTOR NDAMBUKI MATONYE ..... 2<sup>ND</sup> PETITIONER**

**MUSYOKI MATONYE ..... 3<sup>RD</sup> PETITIONER**

**RULING**

1. On 22nd June, 2023 this court delivered Ruling and granted orders as follows:-

**Disposition**

1. Summons for Confirmation filed on 23/8/2021 is upheld and the Protest filed on 20/1/2022 dismissed.
2. Land Parcel No. Mitaboni/Mitaboni/2566 and Plot No. 2374 Mitaboni Adjudication Section shall be shared equally/equitably amongst all the children of the deceased.
3. Each beneficiary shall remain on the portion settled on the land developed or cultivated and the said portion shall be taken into account during the distribution of the estate of the deceased.



4. Any beneficiary who is deceased, the share of the child of the deceased shall be apportioned the children of the deceased grandchildren of the deceased herein.
5. No eviction, forceful interference, demolition of permanent structures or destruction of property or crops shall be allowed all beneficiaries, administrators interested parties shall remain in situ pending distribution of the estate of the deceased.
6. Upon certificate of Confirmation of Grant is issued/granted, parties, beneficiaries, administrators and/or interested parties shall obtain surveyors services before subdivision to be approved by the Court. Each party to pay own costs.

### **Notice of Motion**

2. By Notice of Motion dated 5/9/2023, the 2nd Administrator Pascal Mwikya Matonye sought the following orders;

- (1) That the Ruling of this Court delivered on 22/6/2023 be reviewed and/or set aside
- (2) The proceedings of 5/10/2022 to be set aside and the Protest to be set down for hearing.

The grounds are that the 2nd administrator was not informed of the Succession Cause filed by 1s administrator

The 2nd Administrator's advocate was not diligent in his duties and mistakes of Counsel should not be visited upon the client.

### **Replying Affidavit**

3. On 21<sup>st</sup> November 2024 the 1st Administrator Teresia Mune Raphael filed a Replying Affidavit dated 18th November, 2024 and stated as follows-

1. That further to Paragraph 3 above, the Application before this court and as dated 5th September 2023 is completely one of mischief and fraud and purposed to mislead this court, for instance, our elder brother and the therein indicated 3rd Protestor has never consented to the said application which he has purportedly been enjoined as a protestor, he has since filed supplementary Affidavits with this court to confirm that he is not a party to the said Application and he is in agreement with the mode of distribution as determined by this court in the ruling of 22 June 2023,
2. That further to Paragraph 4 & 5 above, the therein indicated Protestor has on 5 Occasions held meetings with all the Beneficiaries of the deceased save for the 1st and 2nd Protestors who have adamantly refused to attend the meetings and to date objecting to the equal distribution of the estate of the deceased and in place of the entire estate inherited by only the male children of the deceased.
3. That further to Paragraph 6 above, the meetings as sanctioned by our elder brother Victor Ndambuki Matonye have always been attended by Magdalene Mueni Joseph, Clementine Mukh Muoki, Clement Njuru Njogu (representing the family of Marieta Ndinda Musyoki-Deceased), Ngina Sila (representing the family of Helen Kanini Sila-Deceased) and himself Victor Ndambuki Matonye.
4. That further to para 7 above and important to note, it is only the 1<sup>st</sup> and 2nd protestors who are in disagreement with the division of the estate and who still want the entire estate of the deceased to be theirs as sons and in complete isolation of other children of the deceased all other



family members and beneficiaries are in agreement with the court's equitable distribution of the estate of the deceased

5. That I am informed by my advocate on record, information I verily believe to be true that since the delivery of the Ruling on 22nd June, 2023, the 1st and 2nd Protestors, being the only disgruntled beneficiaries and who will maintain the estate be subdivided in favour of men and sideline female children of the deceased, the said 1st and 2nd Protestors have never appealed the decision of the court
6. That further to Paragraph.11 above, the application leading to the decision of the court of 22nd June 2023 was an Affidavit of Protest as filed by the protestors herein and indeed the Protestors pleadings were complete and considered during the ruling of the court of 22nd June 2023.

#### **Application Dated 26/7/2024 by**

#### **1<sup>st</sup> Administrator**

4.

- (a) The 1st administrator sought that the Court approves the Surveyors under Laco & Sons Ltd for purpose of proceeding with subdivision, placement of beacons and all related matters to the survey in relation to estate properties Mitaboni/Mitaboni/2566 & Plot No 2374 Mitaboni Adjudication Section in relation to this Court's order issued on 11/8/2023
- (b) The Court to approve the herein submitted and attached Sketch Map & Survey Report by Laco & Sons Ltd in relation to estate properties Mitaboni/Mitaboni/2566 & Plot No 2374 Mitaboni Adjudication Section as forming part of the estate of the deceased person and in relation to Court order of 11/8/2023
- (c) The Court to order Incharge Koma Police Post, to issue security during survey activities of entry into estate parcels and placement of beacons to each and every beneficiaries' allocation under the herein attached sketch map & survey report of the properties Mitaboni/Mitaboni/2566 & Plot No 2374 Mitaboni Adjudication Section in relation to Court order of 11/8/2023

#### **Replying Affidavit - Pascal Mwikya Matonye**

5. On 21st November 2024 Pascal Mwikya Matonye 2nd Administrator/Protestor filed a Replying Affidavit dated 9th October, 2024 and stated as follows-
  1. That on 22/6/2023, this Court delivered Ruling wherein the court made several orders amongst them being that the assets of the deceased shall be shared equally/equitably amongst all the children of the deceased
  2. That additionally, the court ordered that upon the certificate of confirmation of grant being issued/granted, parties, beneficiaries, administrators and/or interested parties would obtain surveyors services before subdivision could be approved by the court.
  3. That the 1<sup>st</sup> Administrator excluded him and the other protesters in procuring surveyors services. Additionally, he and the other protestors were not informed of the survey exercise that was carried out by the surveyors procured by the 1st Administrator.
  4. That he and the other protestors are not agreeable to the sub-division proposed by the 1<sup>st</sup> Administrator which advocates equal sharing of that the deceased's assets between all



beneficiaries since we have heavily invested in a vast acreage of the suit lands and will suffer immense losses should the proposed sub-division be approved by the court.

5. That projects as well as several construction pursuits on the subject parcels of land have been undertaken at their expenses.
6. That during the deceased's lifetime, he assisted him in prosecuting court matters concerning the suit properties and he incurred expenses in legal fees in doing the same. He also took care of parents in their ill health and upon their demise and catered for their funeral expenses.
7. That it will therefore be unfair for the court to approve the sub-division proposed by the 1st Administrator on account of the developments he and the other protestors have made on the suit lands.
8. That the 1<sup>st</sup> Administrator never informed them of institution of the succession proceedings as evidenced by his missing signature on the petition for letters of administration dated 19.08.2020. Equally, the other protestors did not sign the consent to the making of a grant of administration intestate to a person of equal or lesser priority of even status.
9. That they tried holding talks with his sisters prior to the institution of the succession cause in the presence of clan members to reach amicable mode of distribution of the deceased's assets but his sisters variously refused attend the scheduled meeting. The 1<sup>st</sup> Administrator was subsequently issued with letters dated 25.03.2017 and 17.05.2017 concerning her failure to attend the scheduled meetings and was fined by the clan members for the same. A report dated 1.07.2017 was also recorded concerning the failure of his sister to attend scheduled meetings touching on the distribution of the deceased's assets.
10. That firstly, the 1<sup>st</sup> Administrator claimed that they killed her son yet she produced no proof of the same for such a serious allegation. Additionally, no criminal proceedings were lodged against them for the same.
11. That secondly, the claim that they have been taking portions of land and selling them off are also unsubstantiated as no sale agreements have been produced as evidence.
12. That thirdly, 1st Administrator submitted that the deceased's male children decided to share amongst themselves a whopping 150 acres of land and left nothing for the female children, one who has since passed on was left in abject poverty. We dispute the acreage of the suit lands as we are aware that they comprise less than 60 acres as opposed to the exaggerated 150 acres proposed by the 1st Administrator. Evidently, the survey plans produced by the 1st Administrator reveal that the total acreage of Mitaboni/Mitaboni/2566 is 23.3 ha (57.58 acres) and the total acreage for Plot No. 2374 Mitaboni Adjudictaion Section is 2.15 ha (5.31 acres) bringing the total acreage of both suit properties to 25.45 ha (62.89 acres). Additionally, the 1<sup>st</sup> Administrator proposed to get 0.43 ha out of Plot No. 2374 Mitaboni Adjudictaion Section which is double what the other parties are supposed to get which simply goes against her proposal of equal distribution.
13. That fourthly, the allegation that two of the sisters who are unmarried have resided on the suit lands for over 50 years is also untrue. Only the 1st Administrator is unmarried and resides on the suit land. They maintained that Magdalene Mueni resides in Matungulu where she is married, and Clementine Mukii resides in Kilifi where she is married. The 1st Administrator and the other parties are also invited to provide proof of their allegations.



## Applicant's Submissions

### (a) Whether the summons for review and/or setting aside of the ruling delivered on 22.06.2023 is merited.

6. On 20.01.2022, the 2nd Administrator and the protestors filed an affidavit of protest sworn on 19.01.2022. The protestors averred that they were not included in the succession cause which was carried out primarily by the 1st Administrator. The protestors also averred that they were never informed of the said succession cause concerning their father's estate and the petition was equally not availed to them for their signatures. Indeed, the petition does not bear the 2<sup>nd</sup> & 4<sup>th</sup> Administrators and the protestors' signatures. The protestors were therefore excluded and the matter proceeded to completion in their absence. The submissions reiterated all content in the Replying Affidavit verbatim.
7. The protest dated 19.01.2022 was dismissed for want of prosecution occasioned by lack of diligence by 2nd Administrator and the protestors former advocates who not only failed to keep the clients updated on the progress of the protest, but he also filed written submissions late after ruling had already been delivered.
8. Mistakes of counsel should not be visited upon the client, a position that has been reiterated and that is in line with Article 159 (2) (d) of the *Constitution of Kenya*, 2010 and Sections 1, 14, 3 and 3A of the *Civil Procedure Act* which prescribe the overriding objective/the oxygen principle and abhor procedural technicalities, which would in effect defeat justice.
9. In *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others* [2018] eKLR, the Court of Appeal held:

“The Rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”

Equally, in *Belinda Murai & 9 Others v Amos Wainaina* [1979] eKLR, it was held:

“The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

10. Similarly, the court in *Re Estate of Benjamin Okumu Oduki (Deceased)* P(Probate & Administration 411 of 2011 ) [2021] KEHC 9517 (KLR) (29 January 2021) (Ruling) cited the case of *Phillip Chemwolo & Another v Augustine Kubede* [1982-88] KLR 103 at 1040 where Apaloo J.A. as he then was stated: -

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalte of not having his case heard on merit”.

## Respondents Submissions

11. On 21st November, 2024 the 1st Administrator Teresia Munee Raphael filed submissions and stated as follows-

Magdalene Mueni Joseph, Clementine Mukii Muoki, Victor Ndambuki Matonye, Clement Njire Njogu, Ngina Sila and the Respondent herein have sworn Affidavits in agreement with the decision of the court dated 22nd June 2023 and further moved court in their



Affidavits in the application dated 26th July 20024 purpose of having the court approve the survey report and have the surveyors move to the land to distribute the estate of the deceased in terms as ordered by the court. Only two beneficiaries want the estate of the deceased divided as they wish and in total disinheritance of the female children of the deceased, the said include the 1st and 2nd protestors herein

## Pleadings

12. On record is the Protestors' application dated 5th September 2023, was filed almost 3 Months after the decision of the court of 22nd June 2023.

The said 1 and 2nd Protestors literally want the court review it's decision and rule in favor of giving themselves the entire estate of the deceased under land parcels no. Mitaboni/Mitaboni/2566 & Plot No.2374 and leaving the female beneficiaries with zero inheritance, albeit the estate is for their deceased father who died intestate and therein the said female children of the deceased have settled, cultivate the same and have buried their dead.

13. Of interest is the mode of distribution as proposed by the protestors under their para.7 of the 1<sup>st</sup> Protestors Affidavit in the earlier filed Affidavit of Protest dated 19th January 2022; he is literally telling this court to ignore the daughters of the deceased and distribute the entire estate to the male children.

14. In response to the Affidavit of Protest filed with this court, the Respondent herein together with her two sisters who form the only surviving daughters of the deceased filed their Respective Replying Affidavits dated 4th October 2022 and filed on 4th October 2022.

15. The current Protest is malafide and deliberate by the protestors not only to mislead court but equally delay other siblings from getting their rightful share of their fathers' estate; the Protestors have been taking court for a ride and it had to take the intervention of G.V Odunga J to compel the protestors accept this succession to proceed. This is in pursuant to the orders issued in a citation case under Succession No.33/2019 and orders issued on 13th Nov 2019 by G.V Odunga as filed together with the petition.

16. In the current application beforehand and dated 5<sup>th</sup> September 2023, the 1<sup>st</sup> Protestor in his Affidavit reiterated the contents of his earlier application of 19th January 2022 and further stated that;

1. That the protestors were never involved and represented in the citation under citation no.33/2019 before G.V.Odunga J
2. That the Protestors never signed the Petition for letters of administration;
3. That the Protestors never knew of the existence of the current succession cause till later on when it was coming for confirmation;
4. That their previous advocate did not go to court and misled them;
5. That their previous advocates did not file submissions to the Affidavit of Protest.

17. The Respondents relied on *In re Estate of Francis Mwangi Mbaria (Deceased)* [2018] eKLR where the Hon; Teresia M Matheka where she quoted the precedent in; *Stephen Gitonga M'Murithi v Faith Ngiramurithi* 2015 eKLR that:-

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.” Therefore, a son will not have priority over a



daughter of the deceased simply because he is male: all- male and female siblings- are equal before the law and are entitled to equal protection of the Law.” (See Article 27 of the [Constitution](#)).

### Determination

18. Application for review of decree or order [Order 45, rule 1.]
- (1) Any person considering himself aggrieved—by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
  - (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review

19. The Applicant 2<sup>nd</sup> Administrator invoked Rule 63 (1) of [probate & Administration Rules](#) to apply Order 45 [CPR](#)2010 in Succession proceedings.

Be that as it may, the thrust of the application for review is that the 1<sup>st</sup> administrator failed to inform the 2<sup>nd</sup> Administrator of the Petition for Letters of Administration and /or Summons for Confirmation.

20. The 2<sup>nd</sup> Administrator deposed that he should not be condemned unheard as his Protest was not heard and blunders by his advocate should not be visited on him and denied the opportunity for hearing of his protest.

The Court record confirms the following;

- a. On 13/11/2019, Hon G.V.Odunga J (as he then was ) orders that 1<sup>st</sup> Citor & 2<sup>nd</sup> Citee to jointly take out letters of administration.
- b. On 21/8/2020, the Petitioners Teressia Munee Raphael -1<sup>st</sup> Administrator and Pascal Mwikya Matonye 2<sup>nd</sup> Administrator (now Applicant herein) filed Petition for letters of administration intestate. The petition listed beneficiaries of the deceased’s estate, the assets that comprise the deceased’s estate and/or liabilities and Consents of beneficiaries(which some beneficiaries failed to sign specifically 2<sup>nd</sup> Administrator). Annexed was/is Deceased’s Certificate of Death, Chief’s letter listing family members of deceased and copy of Title of suit properties of deceased’s estate.
- c. The Copy of Kenya Gazette of 13/11/2020 and in the absence of any objection, the Court Hon G.V.Odunga J issued Grant of letters of administration of deceased’s estate on 30/12/2020.
- d. Summons for Confirmation of Grant was filed on 23/8/2021 again listed beneficiaries of deceased’s estate, the assets available for distribution and proposed mode of distribution as per Schedule attached to the Summons. The written Consents were by Magdalene Mueni Joseph, Teresia Munee Raphael & Clement Mukii Musyoki, Victor Ndambuki Matonye, Festus Kioko Matonye Pascal Mwikya Matonye & Musyoki Matonye declined/did not sign written consents to the mode of distribution.



- e. Pascal Mwikya Matonye filed Affidavit of protest on 20/1/2022 and disputed the mode of distribution and indicated that the deceased had distributed the properties amongst the sons only as enumerated as per paragraph 7 of the Protest, the daughters were left out except for 1<sup>st</sup> administrator who was allocated 2 acres. The court record shows the Petition for letters of Administration was processed as per the court order of 13/11/2019 by the then G. V. Odunga J.

### **Court Record/Proceedings**

21.

- 1) This Court took over the matter on 28/10/2021, the date given by Hon D.K.Kemei J on 28/9/2021 for Summons for Confirmation to be heard. The beneficiaries appeared in Court for Summons for Confirmation of Grant. The daughters were present, the sons were absent. The Court granted adjournment to those absent, to attend Court, file written Consents or Protests. The Daughters, claimed the matter had taken too long and the sons refused daughters to inherit and refused to come to Court. The Court granted adjournment and ordered Witness Summons to issue and be served to those absent to attend Court on 19/1/2022.
2. On 19/1/2022 this Court did not sit, DR gave them 16/3/2022 on which day the Court was informed that the sons were in Court on 19/1/2022 and both advocates agreed to the next date's attendance. The daughters informed Court that they were aged and wanted the matter concluded as they were 80,70,& 60 years respectively. Since the sons came to court on 19/1/2022, the Court adjourned hearing of Summons for Confirmation to 25/5/2022 for hearing of Protests if there were no consents to the Summons for Confirmation.
3. On 25/5/2022 the Court was unwell and matter rescheduled to 20/6/2022, the Protestor was present but Protest had not been served. The matter was adjourned to 19/7/2022 when only 1<sup>st</sup> Administrator was present and her Advocate. Further Hearing of Summons & Protest was on 5/10/2022.
4. On 5/10/2022, the Protestors were not present in Court nor represented by their Advocate. The Court file was placed aside until 12.17 pm there no information presence or representation of Protestors. Meanwhile Counsel for & 1<sup>st</sup> Administrator were in Court waiting. This Court noted the matter was adjourned severally since Summons for Confirmation was filed. The Court was informed that Counsel for Protestors was in another Court for plea-taking case and/or in ELC. The Court decided to deal with summons for Confirmation and Protest on merit and parties to file and exchange written submissions before Ruling date.
5. Ruling was delivered on 22/6/2023 and Certificate for Confirmation of grant signed on 25/7/2023 that the 2 properties Mitaboni/Mitaboni/2566 7 Plot No 2374 Mitaboni Adjudication Section be distributed equally/equitably amongst all children of the deceased.

22. I have set out the chronological events leading up to the instant application for review and application for survey.

The truth of the matter is that as considered in the impugned Ruling of 22/6/2023, there was/is no dispute as to the list of beneficiaries of deceased's estate, list of assets that comprise of deceased's estate, the only issue is the mode of distribution. The Protestor, 2<sup>nd</sup> Administrator Applicant takes the view that distribution was by their late father and was to sons alone and only 1<sup>st</sup> Administrator was to get 2 acres only. The 1<sup>st</sup> Administrator takes the view that the daughters are discriminated against and



distribution should include all children. The Applicant further claims that he took care of the deceased and incurred expenses that he was not reimbursed and helped deceased secure the properties at his expense and similarly he was not reimbursed and therefore, entitled to lion's share of the properties and not equal or equitable distribution.

23. The 1<sup>st</sup> Administrator emphasized that the Succession Cause has taken long they are aged/aging, the sons sold portions of and threatened them off the properties with intention to deprive them of the said inheritance. The law of succession in force since 1981 deals with administration and distribution of testate and intestate estates. Section 38 and 71 of Law of Succession Act (LSA) applies and Article 27 Constitution of Kenya (COK) 2010 applies.
24. The Court from the above outline finds Application for review was filed on 5/9/2023 and remained in abeyance until 25/7/2024 for unexplained reasons. The Court informed Parties that if they discussed and amicably agreed and consented to the alternative mode of distribution this Court would allow Amended Summons for Confirmation in place of the Certificate of Confirmation of Grant issued by the Court.
25. On 26/9/2024, the Respondents referred to application of 26/7/2024 for adoption of Surveyor's report, but the Court did not have the physical application Surveyors Sketch and Report. The Court left the said application in abeyance and pursued the Review of ruling of 22/6/2023.
26. These are issues that cannot be canvassed in these pleadings they are weighty matters now emerging and ought to be canvassed first before enforcement /compliance of Court Ruling of 22/6/2023 in adopting the surveyors Report.

### **Disposition**

1. From the above chronology of events, the Court finds no error on the face of the record or new development emerging facts or sufficient reason to set aside or review the Ruling of 22/6/2023.
2. The Court relied on legal provisions and case-law on distribution of deceased's estate Article 27 of the Constitution & Section 38 & 71 of LSA
3. The crux of the matter is that the sons insist on sole inheritance while daughters claim inheritance from deceased's estate
4. This Court halts the consideration, approval and implementation of Surveyor's sketch and Report until the impasse deadlock is resolved by Parties beneficiaries administrators either through Court Annexed Mediation within 60 days from today or
5. Filing of Revocation of Grant Application for hearing and determination before Ct No1 Machakos High Court or
6. Filing an Appeal against Ruling of 22/6/2023
7. Status quo shall remain in place for 60 days.
8. The Application for Review of 5/9/2023 is dismissed being a family matter each Party bear its Costs.

**RULING DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 21<sup>ST</sup> MARCH 2025 VIRTUALLY /PHYSICALLY.**

**M.W.MUIGAI**



## **JUDGE**

In the presence of:-

Ms. Talaso holding brief Mr. Mwongela for Protestor/Applicant

