



REPUBLIC OF KENYA



**In re Estate of Samuel Kimotho Kariuki (Deceased) (Succession Cause
1307 of 2002) [2024] KEHC 2516 (KLR) (Family) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1307 OF 2002
PM NYAUNDI, J
MARCH 8, 2024
IN THE MATTER OF THE ESTATE OF SAMUEL KIMOTHO KARIUKI (DECEASED)**

JUDGMENT

1. Before this Court is for summons for Confirmation of Grant dated 23rd April 2018 in which the 1st Administrator/Applicant sought the following orders:
 1. That the Grant of Letters of Administration Intestate made to Samuel Njoroge Kimotho and Beth Wanjiru Njau on 14th March 2018 be confirmed before the expiry of 6 months.
 2. That the Estate of the deceased herein be distributed in terms of paragraph eight (8) of the supporting affidavit as well as the draft sub-division plan annexed thereto.
 3. That the costs of this application be provided for.
2. The summons was supported by the Affidavit of even date sworn by the Applicant/1st Administrator, Beth Wanjiru Njau.
3. The Objector/2nd Administrator, Samuel Kimotho Kariuki filed an affidavit of protest to making of Grant dated 16th July 2018. He averred that he was objecting the grant on behalf of the families of his late brothers, Asaph Kariuki Kimotho and Amos Njoroge Kimotho and the family of James Njuguna Kimotho.

Background

4. This succession cause relates to the Estate of Samuel Kimotho Kariuki (hereinafter the deceased) who died intestate on 29th November 1999.
5. The Deceased was survived by the following;
 - a. Hannah Njambi Kimotho – wife (deceased).



- b. Asaph Kariuki Kimotho – son (deceased).
 - c. Violet Wangui Kimotho – daughter.
 - d. Margaret Ngendo Njoroge- daughter in law.
 - e. Beth Wanjiru Njau- daughter.
 - f. Jane Gathoni Kariuki- daughter (deceased).
 - g. Samuel Njoroge Kimotho- son.
 - h. James Njuguna Kimotho –son.
6. The Estate of the Deceased was said to be comprised of the following properties;
- a. Ondiri/Farm/Scheme/5 measuring approximately 3.742 Hactres;
 - b. 1470 shares in ICDC Investment Company Ltd;
 - c. 485 shares in Centum Investment Company Ltd; and
 - d. Cash at Bank – Account No. xxxxx Post Bank.
7. Following the demise of the Deceased, Asaph Kariuki Kamotho and Samuel Njoroge Kimotho petitioned for letters of administration intestate on 28th May 2002. The grant was issued to them on 22nd October 2002. Asaph Kariuki Kamotho died in 2006 leaving behind one administrator. Before the grant was confirmed, Beth Wanjiru Njau filed summons for revocation of grant dated 1st February 2016. The matter was referred to mediation and by consent, it was agreed that the grant issued to Asaph Kariuki Kimotho and Samuel Kimotho Kariuki be revoked and the same be issued to Samuel Kimotho Kariuki and Beth Wanjiru Njau. A grant was issued in their names on 14th March 2018.
8. Beth Wanjiru Njau then filed summons for confirmation of grant dated 23rd April 2018. Before the grant was confirmed, Samuel Kamotho Kariuki filed a protest dated 16th July 2018.
9. The 1st Administrator’s proposal is that the deceased’s estate be shared equally among the children of the deceased. The 2nd Administrator argues that distribution of the estate equally among all the deceased’s children will result in demolition and dispossession of their families who have settled on the deceased’s property. It was his contention that the daughters of the deceased are married women who have their family properties and are therefore not entitled to inherit from the deceased’s estate. He argued that the deceased had indicated how the land was to be subdivided but he died before the subdivision and transfer was done.
10. Beth Wanjiru Njau and Violet Wangui Kimotho filed supplementary affidavits dated 25th March 2019 and a further supplementary affidavit dated 12th February 2021. Beth deponed that her marriage does not affect her right to own property. She averred that the deceased sold a plot in Mai-a-ihii to Violet Wangui Kimotho. That the subdivision did not show who was to inherit the deceased. She dismissed claims that the deceased only intended to have the sons inherit his property. During the course of these proceedings, their other sister, Jane Muthoni Kariuki died and left four children. The four children should inherit Janes’ portion.
11. Violet Wangui Kimotho averred that the deceased was allotted a plot in Kiambu. He had difficulties to develop it and he sold it to her at a consideration of Kshs. 50,000. She was later given an allotment letter and has been making payments to Kiambu County Council.



12. The summons was canvassed by way of *viva voce* evidence.

Summary of Evidence

13. The Protestor, Samuel Njoroge Kimotho testified on 12th March 2019 as PW1. He relied on his witness statement dated 16th April 2018, a replying affidavit sworn on 9th March 2016 and the affidavit of protest as his evidence in chief. His evidence was that the deceased had procured land control documents and he intended to transfer land to him. He told the court that the deceased did not sell the shop to his sister, Violet Wangui. All his sisters are married and none of them stays in the deceased's property except for Violet Wangui who stays in the deceased's shop. They won a dispute on compulsory acquisition on the deceased's property
14. During cross examination, he stated that while he was an administrator, he did not distribute the deceased's estate because the deceased distributed it when he was alive. He stated that the deceased's intention was to sub-divide the land into 5 portions and transfer the same to his sons only. Their late mother was to get a portion from the said land. He stated that his sisters are married and cannot claim a share from the deceased's estate after 40 years now that everyone has built on their portion.
15. PW2 was James Njuguna Kimotho. He adopted his witness statement dated 16th April 2018 as his evidence in chief.
16. During cross examination, he stated that the deceased declared how he wanted his property to be distributed in 1978 but he died in 1990 before implementing them. He stated that his sisters can inherit the deceased's property if that was the deceased's wish. The deceased divided the property according to birth order with the eldest getting the largest share. He stays on the portion the deceased allocated him. He lived with his mother since he is the youngest son.
17. During re-examination, he stated that the deceased filled the Land Control Board form but he died before finalizing it. He stated that his sisters did not raise a claim between 1990 and 2016 and when the deceased was allocating land to the sons, they did not ask for a portion. The land is 10 acres but half of it is sloppy or Stoney.
18. The Objector closed his case and the Applicants testified next. OW1, was Violet Wangui Kimotho. She adopted her sworn affidavit dated 24th March 2019 as her evidence in chief. She told the court that the deceased's properties should be distributed as per the Applicant's sworn affidavit. She separated from her husband and went back home when the deceased was still alive. The shop was owned by the deceased but he allowed her to repair and occupy it. He later sold it to her for a consideration of Kshs. 50,000. The shop was transferred into her name in 1991. She produced an application for change of ownership marked as VWK2. The sale agreement was destroyed by a fire.
19. During cross examination, she stated that before she moved to the shop, her father allocated her a house in the farm. Her brothers and their children have built on the deceased's property. She told the court that she has nowhere to stay with her children and she is only interested in her inheritance. James took possession of their parents house and has refused them to continue cultivating on their portions. The deceased sub-divided the land before he died but he did not allocate it to any individual.
20. In re-examination, she stated that the deceased's property should be distributed equally between the deceased's children regardless of the number of children each has.
21. OW2 was Beth Wanjiru Njau, the 1st administrator. She relied on her affidavits sworn on 29/4/2018, 26/3/2019 and 12/2/2021. Her proposal is that the land should be distributed equally among all the children of the deceased. Each member should get arable and rocky land. she stated



that the deceased's shares should be sold and proceeds be shared equally between the beneficiaries. She stated that her brothers and their sons have each constructed on their portions and that there will be no displacement if the property is shared as proposed. She and her sister cultivate a portion on the lower farm. Her evidence is that the deceased sold the plot at Mai-Mahui to Violet. The deceased did not sub-divide the property but only identified the portions they should live in. Their late sister's portion should be inherited by her children.

22. During cross-examination, she stated that she was not aware that the deceased asked for Kshs.5000 and a jerry can of honey from any of her siblings.
23. At the close of the oral hearings, the parties were directed to file submissions. Both have complied.

Analysis and Determination

24. I have carefully considered the oral evidence, the Applicant's submissions and the proposed modes of distribution by the parties. In my view, two main issues arise for determination:
 - i. Does the Plot No.1-Mai-A-Ihii Trading Centre constitute a gift inter vivos to Violet Wangui Kimotho to be factored in when considering distribution?
 - ii. How should the Estate of the Deceased be distributed?
 - iii. Who should pay costs?
25. It is contended by the Protestor that Violet Wangui Kimotho was gifted Plot No. 1 Mai A Hii Trading Centre and that therefore this is a gift inter vivos that should be factored in when making the decision.
26. Violet Wangui Kimotho by affidavit sworn on 25th March 2019 presented the following
 - a. Change of Ownership form addressed to Kiambu County Council
 - b. Forwarding letter dated 31 October 1991 forwarding the Application for change of ownership form
 - c. Letter of Allocation dated 30th July 1992
 - d. Receipts for payment received by Kiambu County Council dated 2nd February 2009 and 17th August 1992
27. I note that the reason given for change of ownership is I am not able to develop it because I have gone (sic) to Rift Valley that is where I stay
28. It is trite law that gift inter vivos must be established by evidence. It was so held *In Re Estate of the Late Gedion Mantih Nzioka (Deceased)* [2015] eKLR where it was held that: -

“For gifts inter vivos....gifts of land must be by way of registered transfer or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”
29. Having regard to the reason given for the transfer of ownership, the fact that there is evidence that the Applicant proceeded to make payments to Kiambu County Council and in the absence of evidence that demonstrates the land was given as a gift, I find that the subject parcel was not a gift inter vivos.
30. I find that there is no evidence to show that the Applicant was gifted the subject parcel of land.



31. On how the Estate of the deceased should be distributed, the parties are agreed that all the shares be sold, and proceeds shared equally among the beneficiaries. It is also common ground that that the Cash at Bank be shared equally among the beneficiaries.
32. The point of contention is how Land Parcel No. Ondiri/ Farm Scheme/ 5 should be distributed among the beneficiaries. Whereas in evidence the Protestor submitted that the daughters of the deceased should not get a share of the parcel of land in submissions they abandoned this position, and it was conceded that by constitutional, legislative provision and judicial precedent, the daughters of the deceased are entitled to a share of the estate of the deceased.
33. It is submitted that the Court should consider the factual situation on the ground and that the Protestor and the other brothers along with their sons, in accordance with the wishes of the deceased have proceeded to construct homes on the land and that the Court should not allow the distribution as proposed by the Applicant as the same does not factor in the developments by the sons of the deceased.
34. It is submitted that if the Court were to distribute the parcel of land in the manner proposed it would occasion difficulty to the Protestor, his brothers and their families.
35. The Protestor submits that the Applicant and the other sisters be allocated the portion of the land that is unoccupied along with the homestead of the deceased.
36. The Applicant on the other hand proposes that each of the beneficiaries get an equal share totaling 1.25 acres with each beneficiary getting 0.25 acres on the upper part and 1 acre on the lower part. It is their submission that each beneficiary should get an equal share of the deceased's land.
37. Courts have on numerous occasions interpreted Section 38 of the *Law of Succession Act* and Article 27 of the *Constitution* of Kenya to find that a distribution of estate that fails to make provision for daughters of a deceased person whether or not married runs afoul of the Constitutional edict of non-discrimination and is therefore not permissible.
38. In *Stephen Gitonga M'Murithi vs Faith Ngira Murithi* [2015] eKLR the Court of Appeal held
“...Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children irrespective of gender and whether married and comfortable in their marriage or unmarried. ...”
39. The Protestor plea that the Court does not interfere with the status quo on the ground runs afoul of the provisions of Section 45 of the *Law of Succession Act*, which provides
 1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of the deceased
40. The Protestor concedes in evidence that even after obtaining the Grant they did not move to distribute the estate as all the sons had taken occupation in accordance with the wishes of their deceased father. It is not in dispute that the deceased died intestate, the law applicable to the distribution of his estate is Section 38 of the *Law of Succession Act*.
41. The actions of the Protestor, his brothers and their families amount to intermeddling and the Court cannot sanitize or validate those actions. This Court has no discretion to exercise in the matter.



42. *In Re Estate of John Musambayi Katumanga- Deceased*[2014] eKLR the Court held as follows:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

43. I will only defer distribution of this parcel of land as I am alive to the fact that this is a family, and the Court should endeavor to make orders that facilitate cohesion in families (where possible) rather than widen the rifts. I will therefore defer the subdivision to allow for a report from subject matter experts who will guide the Court on what equal distribution of the parcel under the circumstances looks like.

44. In light of the foregoing I make the following orders

- a. That Plot No.1-Mai-A-Ihii Trading Centre was not a gift inter vivos and therefore does not fall for consideration in distribution the estate of the deceased
- b. That the shares set out in paragraph 6 of the Supporting Affidavit sworn on 23rd April 2018 be sold and the proceeds shared equally among all the beneficiaries; that is
 - i. 1470 shares in ICDC Investment Company Limited
 - ii. 485 shares in Centum Investment Company Limited
- c. The Cash at Post Bank Account No. 21972 be shared equally among all the beneficiaries.
- d. The shares due to deceased beneficiaries namely Asaph Kariuki Kimotho, Amos Njoroge Kimotho and Jane Gathoni Kariuki to be distributed to their surviving children in equal shares.
- e. With regard to Land Parcel No. Ondiri/ FarmScheme/ 5 distribution is deferred pending report of the County Land Surveyor and County Land Valuer Kiambu County on the value of the land and current occupation and use of the land.
- f. The report (s) above to be furnished to Court within 30 days from the date hereof. The Costs of the Surveyor and the valuer to be shared equally amongst all the beneficiaries.
- g. Mention on 8th May 2024 to:-
 - i. Confirm report of the Kiambu County Surveyor and Land Valuer are received by Court.
 - ii. To identify the beneficiaries under d) above
- h. This being a family matter each party will bear their own costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF MARCH 2024.

P. M. NYAUNDI

JUDGE

In the presence of:



Sylvia Court Assistant

