



**In re Estate of Benard Njonjo Rubia (Deceased) (Succession Cause
2377 of 2008) [2024] KEHC 2425 (KLR) (Family) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2377 OF 2008
HK CHEMITEI, J
MARCH 7, 2024**

BETWEEN

BRIAN MWITURIA APPLICANT

AND

ESTHER WANGARI WATHUA RESPONDENT

RULING

1. The Applicant's summons dated 15th March 2023 seeks the following orders that:
 - (a) That this court be pleased to review the certificate of partial confirmation issued herein on 26th July 2016.
 - (b) This court be pleased to substitute the name Esther Wangari Wathua, the legal representative of the late Elizabeth Wanjiru Njonjo Rubia as the heir of half of all the properties described in the said certificate of confirmation herein issued on the 26th July 2016 and in addition show as an heir of LR No 13790 Karen.
 - (c) Costs in the cause.
2. The application is based on the grounds thereof and the sworn affidavit of the applicant dated the same date.
3. The Respondent on her part has opposed the application vide her replying affidavit sworn on 20th May 2023.
4. The Applicant filed a further affidavit sworn on 31st May 2023 in response to the above replying affidavit.



5. The court directed the parties to file written submissions which they have done and the court has perused the same extensively together with the cited authorities.
6. The issues herein and which are not contested is that a partial confirmation of grant was issued to the parties on 26th July 2016 leaving one property namely LR No 13790/6 undistributed. The same went for trial and this court found that Elizabeth Wanjiru Njonjo Rubia was not a co-owner of the property.
7. The Court of Appeal vide Appeal Number 193 of 2018 found that she held the property with the deceased as tenants in common in equal shares and therefore entitled to the same. The said Elizabeth Wanjiru Njonjo Rubia who was a co administrator with the applicant has since passed on and the Applicant and the Respondent issued with letters of administration over her estate on 27th July 2022.
8. Of significance in this matter which is undisputed by the parties was the decision of the Court of Appeal afore cited which went ahead and stated that:

“It is our determination therefore that the appeal has merit and must succeed. Accordingly, we declare that the appellant is entitled to 50% of LR NO 13790/6. In addition to life interest in the property and order that LR NO 13790/6 be subdivided and half of it be registered in the appellant name while the other half to devolve to the respondent upon death or remarriage of the appellant.”
9. It is also worthy to note that the other property namely Tezo/Kibarani/Tezo Konjora Block 1/413 in the name of the deceased remained unresolved and that the Applicant prays that the same be divided between her and the estate of the late Elizabeth.
10. From the Applicant’s affidavit it appears that the issue has been ongoing and the parties have exchanged several correspondences on how to execute the matter after the Court of Appeal judgement. The Applicant further supports his argument to have the matter dealt with expeditiously since he has a sick child who requires urgent medical attention.
11. The Respondent on her part has deponed that together with her siblings namely Nancy and James Willie Wathua they were all to be affected by the application and they were heirs to their deceased sister estate by virtue of section 39 of CAP 160.
12. Her further opposition to the application is premised on the fact that no action in the estate can take place unless and until the Court of Appeal gives a go ahead. She went ahead and opposed any sale of the property as proposed by the applicant unless the same is first of all subdivided and professional input of surveyors, planners and valuers are obtained.
13. That thereafter the half of the property shall be transmitted to the estate of the late Elizabeth via her legal representatives.
14. In his further affidavit the applicant obtained some information from the County Government of Nairobi which indicated that the Karen area where the property is situate does not permit a sub division of the land below half an acre. Effectively meaning that the land in question cannot be divided without breach of the law.
15. The court has perused the submissions on record. The Respondent’s contention although it does not oppose the findings by the Court of Appeal does argue on some legal requirements which must be complied. The same essentially mirrors what she raised in her opposing affidavit.
16. She argues that there were no directives that the property was to be sold and that if that is to be undertaken then the parties must approach the Court of Appeal.



17. The Respondent further submits that both properties namely the Karen and Tezo ought to be divided in the ratio of half where the Applicant gets his half and the Respondent and her siblings gets her other half.
18. The Applicant's submissions basically support his affidavit and the further affidavit.

Analysis and determination

19. Having stated as much I think it is proper to state that the two parties herein have no problem with the findings by the Court of Appeal. The same splits the properties into two, that is, between the Applicant and the late Elizabeth. Had she not passed away I think they will still have agreed on the division as indicated by the said court.
20. The Applicants already are administrators of her estate and in simple terms they are ready to manage and collect Elizabeth's estate which is half as directed by the Court of Appeal.
21. As rightly submitted by the Respondent this court has the mandate to execute the Court of Appeal decrees. The decree stated that the parcel in dispute be split into two. The said court did not give further directives as in my considered view the court was not invited into the sharing process arena.
22. In any case what was before it was basically to come into a finding on whether the appellant had a right in the estate.
23. What then ought to be done? Should this court await another decision of the appellate court before determining the applicant's application? I do not think so. The Court of Appeal to the extent that it made its decision is more less functus officio unless moved. It is the responsibility of this court to proceed and help the parties execute the grant.
24. Now that the estate of Elizabeth has its heirs as claimed by the Respondent, it means that whatever she was entitled to, that is half, they shall get it and proceed to divide among themselves in a manner that they will choose. The Applicant shall have his half share unhindered and shall deal with it in the manner he deems fit.
25. Put in a simple way without going into much legalities let the parties who are two in this case enjoy the use of the two properties.
26. There is however a caveat, namely, the same cannot be split into two as it will breach the by-laws as stated by the letter dated 11th July 2023 from the Nairobi City County. There are of course developments therein which again pause another challenge.
27. I agree with the submissions by the Respondent that a professional valuers and surveyors ought to have been invited to give their opinion. I think this is the right moment to call their expertise.
28. The best way in my view is what was suggested by the Applicant and indeed supported by the Respondent, namely value the property and have it sold and the parties share out the amount in two equal parts, that is, the Applicant's half and the other half to the estate of the late Elizabeth. The Respondent and her siblings will share out among themselves in the manner they will agree.
29. In the premises and unless there is another formula which the experts may suggest, the best way is to have it disposed. Nothing in my view stops either of the parties after a proper valuation has been done to buy off the other if necessary.
30. Consequently, and in line with the provisions of Article 159 of the *Constitution* and in particular the speedy determination of this matter the court allows the application and directs as follows:-



- (a) Esther Wangari Wathua is the legal representative of the estate of the late Elizabeth Wanjiru Njonjo Rubia and thus entitled to half share of the properties described in the grant dated 26th July 2016 by this court.
- (b) Esther Wangari Wathua pursuant to (a) above holds half share of LR No 13790/6 and LR No Tezo /Kibarani/Tezo Konjora Block 1/413.
- (c) A full and final grant be issued as stated in (b) above
- (d) Land parcel number Tezo /Kibarani/Tezo Konjora Block 1/413 shall be divided equally between the Applicant Brian Mwituria and Esther Wangari Wathua and in the event that the same is an indivisible a professional valuer shall value it and the parties shall be at liberty to dispose it and share the proceeds in two equal portions after deductions of any liabilities and or any outgoings.
- (e) Land parcel number LR 13790/6 together with any developments thereon shall be valued by a professional valuer and the same be sold and the proceeds shall be shared out between the Applicant and the Respondent equally after paying out any liabilities or outgoings.
- (f) The parties shall be at liberty to agree on any valuer of their choice and in the event of any disagreement each of them shall be at liberty to appoint their own valuer and the costs of undertaking the above exercises shall be met equally between the parties and deductible after the above sale.
- (g) The parties are hereby granted 90 days from the date herein to comply.
- (h) Parties be at liberty to apply.
- (i) Costs shall be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 7TH DAY OF MARCH 2024.

H K CHEMITEI

JUDGE

