



REPUBLIC OF KENYA



**In re Estate of Edward Maganga Mwang'ombe (Deceased) (Succession Cause 107 of 1991) [2024] KEHC 17007 (KLR) (16 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 17007 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 107 OF 1991**

**G MUTAI, J**

**APRIL 16, 2024**

**IN THE MATTER OF THE ESTATE OF EDWARD MAGANGA MWANG'OMBE (DECEASED)**

**RULING**

1. Before this court are affidavits of protest dated 3<sup>rd</sup> May 2021 and 7<sup>th</sup> June 2021, and 16<sup>th</sup> December 2021.
2. The affidavit of protest sworn on 3<sup>rd</sup> May 2021 is by Joseph Tole, Maganga, who opposes the mode of distribution by the administrator (the Public Trustee) on the ground that it takes into account properties that do not belong to the deceased.
3. He stated that the family agreed on the list of beneficiaries and the properties of the deceased that are capable of distribution and mode of distribution. However, some beneficiaries changed their minds and opted for the proposal of the Public Trustee. He urged the court to distribute the estate as agreed in the family meeting on 30<sup>th</sup> April 2021. He also requested that the accounts of the Public Trustee be looked into by an independent audit firm on behalf of the family.
4. The affidavit of protest dated 7<sup>th</sup> June 2021 is by Thomas Mwangola Maganga, Jane Ozib Francis, Mariam Ngundu Mwamboje, James Mwambela Maganga, Elizabeth Bahati Ongoma and Kingstone Mwawingwa Maganga, who object to the mode of distribution of the estate as proposed by the Public Trustee for the following reasons:-
  - a. The valuation report relied upon by the administrator overvalued some of the assets and undervalued others;
  - b. The administrator included properties that do not belong to the deceased;
  - c. The administrator left out some property, specifically Title No. Chawa/Wusi-Kaaya/869 without any explanation;
  - d. The administrator left out the estate of Charles Mwang'ombe Maganga, whose children live on Title No. Chawia/Kishaamba/679 and gave it to their uncle, meaning they stand to be evicted;



- e. The administrator disregarded all agreements reached by the family in various meetings; and
  - f. The administrator was unfair, allocating prime properties to some families and giving others non-existent properties.
5. They urged the court to share the properties as follows; land, as listed in the schedule of ascertained properties by their brother Joseph Tole Maganga, be shared equally among all the beneficiaries, the shares in Kenya Commercial Bank, Dawida Holdings Ltd, BAT, Rukinga Ranch, Saseny Cooperative Society Ltd and Wenimwana Properties Ltd all be sold and proceeds therefrom be shared equally by the beneficiaries. The share held by the Public Trustee is shared equally among all the beneficiaries. Further, the family is to pursue the disputed properties and, once recovered, to be shared equally.
  6. In response to the affidavit of 16<sup>th</sup> December 2021, Elizabeth Bahati Ongoma filed a response sworn on 10<sup>th</sup> February 2022. She stated that she was a daughter to the deceased herein, as evidenced by her certificate of birth, certificate of baptism, certificate of marriage and a wedding gift signed by her father. She averred that she is satisfied with the list of beneficiaries and assets and the proposed mode of distribution, as per Joseph Tole Maganga's affidavit dated 3<sup>rd</sup> May 2021.
  7. The Public Trustee, in response, filed a replying affidavit sworn by Jafred Erima Maliro on 17<sup>th</sup> October 2022.
  8. In response to the protest by Zacchaeus Shaphat Marimba Maganga, sworn on 16th December 2021, he stated that during the 1st and 2nd family meetings, they all agreed on the rightful heirs of the deceased's estate. However, some changed their minds later and objected to some persons being listed as beneficiaries. He averred that Elizabeth Bahati Ongoma attended the family meeting without any objection. A dispute arose on the assets forming part of the estate of the deceased and the mode of distribution, resulting in the disowning of Elizabeth Bahati Ongoma as a beneficiary or child of the deceased by one Zacchaeus Shaphat Marima Maganga. She then produced a birth certificate to prove that she was a child of the deceased, which was acknowledged by the majority and, as a result, she included her in his supplementary affidavit as a beneficiary/heir.
  9. He stated that he included all properties whose title documents were made available to him in his supplementary affidavit, and if there was any property that was left out, he was willing to include the same upon being furnished with title documents.
  10. He further stated that the 5<sup>th</sup> house was yet to give its proposal on the mode of distribution. He deposed that this succession cause had been in court for more than 30 years, and it was only fair that parties give their proposals on the mode of distribution with a view to reaching an amicable solution to avoid prolonged litigation.
  11. In response to the protest of 7<sup>th</sup> June 2021, he stated that the valuation report represents a fair market price for the assets forming part of the estate of the deceased. Thomas Mwangola Maganga participated in the valuation exercise, having been appointed by the family to represent them, and thus, the issue of over-valuation and under-valuation cannot arise. Mr Maliro deposed that the beneficiaries were at liberty to engage a valuer of their choice for comparison purposes.
  12. He averred that in his supplementary affidavit of 21<sup>st</sup> May 2021, he distinguished properties in the name of the deceased herein and those in the names of third parties and advised on how they should be dealt with. Title No Chawia/Wusi-Kaaya/869 is listed in the schedule of properties as one forming part of the estate of the deceased; however, it is erroneously omitted from his proposed mode of distribution. Further, the beneficiaries are leery of the proposed mode of distribution. Mr Maliro stated that the beneficiaries were at liberty to make proposals on how the estate would be distributed. In the email sent



- on 25th November 2021, Joseph Tole Maganga informed him of the developments regarding Title No Chawia/Wusi-Kaaya/1130 and proposed that the same be allocated to him.
13. He further averred that the mix-up had been caused by the lack of cooperation by the beneficiaries and that he is open to any amendments to the list of assets and mode of distribution.
  14. On the protest of 3<sup>rd</sup> May 2021, he reiterated his position above and stated Joseph Tole Maganga should reach out to the other beneficiaries with a view to arriving at a consensus on the mode of distribution that addresses the various competing interests of each beneficiary.
  15. He stated that there is an ongoing case, to wit Voi CMC ELC Case No 13 of 2019 between Evans Mwarabu & 4 others vs Joseph Tole Maganga & Public Trustee.
  16. Joseph Tole Maganga filed a further affidavit on 16<sup>th</sup> October 2022 vide which he stated that he did not have an objection to the demarcation of the land in Mwatate, Title No Chawia /Kishamba/1130 which had been held by the late Peter Maganga in trust for his siblings and where he had built his house and which also had the graveyards thereon. He proposed that the graveyard have its own title and the title for the remaining parcel to be issued in his name.
  17. He further stated that in the year 2021, he came across a certificate of share in respect of a company known as Dawida Holdings Ltd, which has been omitted from the list of assets of the deceased, and it would be fair if the same is included for just and equitable determination of the cause herein.
  18. The matter was canvassed by way of viva voce evidence.
  19. PW1 Zacchaeus Shaphat Maganga told the court that he was representing House No 5 of Mama Joyce Maganga. He stated that Elizabeth Ongoma isn't a member of their house, contrary to what was alleged. He testified that his brothers did not list her as a beneficiary and that he had been collecting rent for the estate since 1995. She was not listed as a beneficiary; thus, she should be removed from the list of beneficiaries.
  20. He stated that whatever was used by some beneficiaries should be factored in when undertaking the distribution of the estate. Mr Zacchaeus Maganga averred that some parties allocated themselves properties.
  21. It was his evidence that he did not participate in the meeting of 8<sup>th</sup> February 2020, in which Elizabeth was present, as he left in protest. He averred that they had never agreed on who the beneficiaries were and that the list of properties was prepared by Thomas Mwangola Maganga and the Public Trustee.
  22. PW2, Elizabeth Bahati Ongoma testified that she relied on her affidavit sworn on 10<sup>th</sup> February 2022. It was her evidence that she applied for the birth certificate herself while she was already married with a three-year-old child. Further, she attended family meetings as a daughter, and there was no objection with respect to her capacity. She also participated in the appointment of a family representative.
  23. She further testified that her mother was not married to the deceased however, the deceased paid her school fees, took care of her and recognized her as his daughter.
  24. PW3 Joseph Tole Maganga testified that he would rely on his affidavits sworn on 4<sup>th</sup> May 2021, 3<sup>rd</sup> January 2022 and 16<sup>th</sup> October 2022.
  25. It was his evidence that during the family meetings, it was evident that the administrator had not done everything correctly. He stated that he had a claim over the estate. The shares he bought with his father should have been disregarded as he paid for the shares but did not get a share certificate for Dawida Ranch Ltd, a sister company to Dawida Holding Limited.



26. Mr Joseph Tole Maganga testified that valuation should be done so as to ensure equitable distribution of the estate. He stated that the list of asserts in his affidavit was a result of an agreement by the members of the family.
27. PW4 Thomas Mwangola Maganga testified that he was relying on the affidavit he swore on 8<sup>th</sup> June 2021 as his evidence in chief. Further, he proposed a mode of distribution.
28. It was his evidence that Elizabeth was their stepsister and that he had known her since 1967. She was not included in the letters of administration obtained by Christine as well as Jane Ozib and Mariam. She was introduced after the administration was handed over to the Public Trustee. He averred that he was the one who informed the Public Trustee about her.
29. He testified that they did not provide a valuer and that he did not conduct any valuation. They object to the proposed mode of distribution by the Public Trustee as it was not fair and shares were not valued. He suggested that the distribution be as per his affidavit.
30. Upon the conclusion of the hearing, parties were asked to file written submissions vide directions issued by the Court on 17<sup>th</sup> May 2023.
31. Joseph Tole Maganga thought his advocates Sewe Habil & Associates filed his written submissions dated 25<sup>th</sup> July 2023. Counsel reiterated Joseph's position in his affidavits and submitted that a professional valuation ought to be undertaken. Further, Elizabeth Bahati Ongoma should be included in the list of beneficiaries. Counsel urged the court to allow prayer in paragraph 3 of the affidavit sworn on 16<sup>th</sup> October 2022.
32. The 5<sup>th</sup> household, through their advocates Mutisya & Associates Advocates, filed their written submissions dated 5<sup>th</sup> July 2023. Counsel reiterated the position held by one Zacchaeus Maganga and submitted that the 5<sup>th</sup> household cooperated fully and attended all meetings, which shows good faith in handling this matter. It was submitted that Elizabeth Bahati Ongoma is not a beneficiary of the estate of the deceased and that she did not prove the same and, therefore, should be removed from the list of beneficiaries. Further, the list of assets is not correct as some asserts were left out while others have pending cases with respect to ownership which should await the outcome of the relevant court cases.
33. Counsel suggested that the best way forward would be to prepare a joint schedule of all properties agreeable by all parties and, where specific valuations are disputed, to appoint a joint valuer. The assets used by the first house of the late Christine Maganga before the revocation of the grant be discounted from their entitlement/share. The claim by Joseph Tole Maganga that one of the beneficiaries owes him is not a claim against the estate, and the same should be directed to the said beneficiary.
34. The Public Trustee, through its counsel J E Maliro, filed a written submission dated 12<sup>th</sup> July 2023 vide which he submitted on six issues for determination, namely: -
  - a. whether more or not there exists a written will; who are the rightful heirs of the estate of the deceased herein;
  - b. Who are the rightful heirs of the estate of the deceased;
  - c. which are the assets forming part of the estate of the deceased herein;
  - d. whether or not the valuation report herein by Fairlane Valuers Ltd reflects a fair market price for the assets forming part of the estate of the deceased herein
  - e. Whether or not there are liabilities against the estate of the deceased herein; and



- f. and which is the most reasonable and equitable way of distributing the assets forming part of the estate of the deceased herein.
35. On the first issue, he submitted that as stated in his affidavit sworn on 17<sup>th</sup> October 2022, he, together with the family representatives, Elikim Mngodo Herbson Maganga (5<sup>th</sup> house) Thomas Mwangola Maganga (3<sup>rd</sup> house) and Isika Advocates (2<sup>nd</sup> house) ascertained from the bank that there exists no will in the bank in respect for the estate of the deceased herein. The bank confirmed that no will was deposited with it by the deceased herein. Therefore, the deceased's estate should be treated as intestate.
36. On the second issue, he listed the rightful heirs as per household and submitted that the same was agreed on during the 1<sup>st</sup> and 2<sup>nd</sup> family meetings. During the said meetings, it was agreed that the deceased had six wives; however, the 5<sup>th</sup> household changed its mind later, objecting to Elizabeth Bahati Ongoma being listed as a beneficiary of the estate of the deceased. The 5<sup>th</sup> house never objected or challenged the authenticity of her certificate of birth which she produced as evidence. The household of Charles Mwang'ombe Maganga (deceased) had not been left out as he falls under the 2<sup>nd</sup> household in his list of rightful heirs.
37. On the third issue, he reiterated the position in his affidavit and submitted that he accounted, in his affidavits, for all properties whose title documents were made available to him.
38. On the fourth issue, he submitted that the valuation report by Fairline Valuers Limited reflects a fair market price for the assets forming part of the deceased's estate; however, the heirs are free to engage a valuer of their choice for comparison purposes.
39. On the 5<sup>th</sup> issue, he submitted that no evidence tendered to establish any claim against the estate of the deceased by Joseph Tole Maganga, and thus, the claim must fail.
40. On the sixth issue, he submitted that his proposed mode of distribution is reasonable and equitable, having put into consideration the valuation of assets forming part of the estate, the heirs who have developed some of the assets as homesteads and those utilizing some of the assets for commercial purposes as entrepreneurs. He urged the court to adopt his proposed mode of distribution.
41. The beneficiaries, through their advocates, Isika & Associates advocates, filed their written submissions dated 28<sup>th</sup> July 2023. Counsel submitted on three issues for determination, namely, who are the rightful heirs of the estate, what are the assets of the deceased's estate, and what is the most equitable way of distribution of the deceased's assets.
42. On the first issue counsel submitted that the beneficiaries are in agreement with the list of beneficiaries submitted by the petitioners (the Public Trustee) in his submissions and were opposed to the objection by the 5<sup>th</sup> household to Elizabeth Bahati Ongoma being a beneficiary. It was submitted the shares of the deceased beneficiaries should go to their children.
43. On the second issue, counsel submitted that the list of assets had unauthenticated properties, which beneficiaries would have difficulties identifying and obtaining if they were allocated to them. The court should, therefore, adopt the list of assets filed by Joseph Tole Maganga as it accorded with the wishes of the family members. It was urged that any property verified after the confirmation could always be brought to court for distribution purposes.
44. Counsel urged that all the beneficiaries who had been enjoying some of the properties be compelled to account for the same.



45. On the third issue, counsel submitted that the valuation report was not agreed upon by the family and, therefore, cannot be relied on in the distribution of the estate. It was submitted that the court is mandated to distribute the estate equally among the beneficiaries. Counsel thus urged the court to distribute the estate equally among the beneficiaries.
46. I have considered the protests, the responses therein and the rival submissions by parties and the issues that emerge for determination are;
- a. Whether Elizabeth Bahati Ongoma is a beneficiary of the estate of the deceased;
  - b. What properties constitute the estate of the deceased;
  - c. Whether this court should order for valuation;
  - d. What mode of distribution should be
47. This court derives its power from Section 47 of the Law Succession of Act and Rule 73 of the Probate and Administration Rules.

“...The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may, for the purpose of this section, be represented by Resident Magistrates appointed by the Chief Justice.”

Rule 73 :

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

48. It is evident to me that the main issue in this matter is the distribution of the estate of the deceased. The subsidiary issues are the identification of heirs and assets forming part of the estate of the deceased.
49. The Family Court, in the case of re Estate of Julius Ndubi Javan (deceased) [2018]eKLR in discussing the duty of the Probate & Administration Court stated succinctly as follows:-

“The primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries.”

50. On the first issue, Section 29 of the *Law of Succession Act* which provides;

“For the purposes of this Part, "dependant" means—

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and



(c) where the deceased was a woman, her husband, if he was being maintained by her immediately prior to the date of her death.”

51. On the first issue, PW2 produced a certificate of birth, certificate of baptism, and certificate of marriage, all of which list the deceased herein as her father. The said evidence has not been rebutted by any of the parties, including the 5<sup>th</sup> household. All beneficiaries have acknowledged her as a daughter of the deceased and a beneficiary of the estate of the deceased except the 5<sup>th</sup> household represented by Zacchaeus Maganga. Given the preponderance of the evidence it is my finding that she is a beneficiary of the estate of the deceased.

52. I am guided by the case of re estate of John Kihara Njau alias Kihara John (deceased) [2021]eKLR, where the court stated:-

“A child of a deceased who died intestate, therefore, need not prove dependency in order to inherit from the estate of their deceased parent”.

53. Regarding the issue of identification of the properties forming part of the estate of the deceased, this Court notes that there is contestation as to whether all the properties were identified. It is also likely that third-party assets may have been listed in the list prepared by the Public Trustee. In my view, the parties ought to revisit this issue by holding a round table discussion.

54. On whether this court should order a fresh valuation, it is clear that most beneficiaries disagree with the valuation conducted by Fairline Valuers Ltd on the instructions of the Public Trustee. It is, therefore, the view of this court that valuation by a different valuer chosen by the beneficiaries would be helpful.

55. Once the valuation process is concluded, it would be possible for the distribution to be done as the parties will have a basis upon which the estate would devolve.

56. Further, it's my view that this matter should be disposed of expeditiously for the good of all parties and that parties comply with all directions and orders of the court. I am guided by the case of re estate of the late Ishmael Muchiri Nkinyangi (deceased) [2021] eKLR where the court stated: -

“Finally, disputes in the administration of the estate of the deceased persons must be disposed off expeditiously for the good of all the parties. Delay only serves to escalate the dispute and bar parties from enjoying their inheritance. This matter has been pending since 1994. It should come to an end one way or another”

57. Based on the foregoing, the orders that commend themselves to me are the following: -

- a. That Elizabeth Bahati Ongoma is hereby declared as a beneficiary of the deceased's estate;
- b. The Public Trustee and all the beneficiaries from all households are hereby directed to have a round table meeting within 30 days from the date of this ruling with a view to agreeing on the list of properties that form part of the estate of the deceased;
- c. The Public Trustee and the beneficiaries shall appoint a joint valuer to conduct the valuation of the properties agreed upon and file a valuation report within 30 days of the date of valuation;
- d. The Public Trustee and the beneficiaries shall agree on the final mode of distribution of the estate, which agreement shall be filed in the form of an affidavit in court by the Public Trustee within 30 days from the date of issuance of the valuation report; and
- e. No orders to costs.



58. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 16<sup>TH</sup> DAY OF APRIL 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Ms Eveliah, holding brief for Mrs Isika, for Thomas, Mariam, Jane, Christine, Mercy, Grace, Elizabeth, Alice and Ezekiel Maganga;

Mr Maliro, the Appointed Administrator;

Mr Haroon Mwangombe;

Mr Sewe, for Joseph Tole Maganga; and

Arthur – Court Assistant

