



REPUBLIC OF KENYA



In re Estate of Timothy Macharia Mahindi (Deceased) (Succession Cause 958 of 2015) [2024] KEHC 4500 (KLR) (Family) (5 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE 958 OF 2015

MA ODERO, J

APRIL 5, 2024

IN THE MATTER OF THE ESTATE OF TIMOTHY MACHARIA MAHINDI (DECEASED)

JUDGMENT

1. Before this court for determination is the summons for confirmation of Grant dated 30th June, 2021. The said summons was filed by the two Administrators of the Estate namely Dennis Mahindi Macharia And Dennis Maina Macharia.
2. The Summons was supported by the Affidavit of even date sworn by the 1st Administrator. The matter was canvassed by way of written submissions. The 1st Administrator filed the written submissions dated 7th January, 2023 whilst the 2nd Administrator relied upon his written submissions dated 9th November, 2022.

Background

3. This succession cause relates to the estate of the late Timothy Macharia Mahindi thereafter referred to as “the Deceased” who died intestate on 14th December, 2014 at the Nairobi Womens Hospital.
4. Following the demise of the Deceased his widow Sylvia Muthoni Macharia filed a Petition dated 9th April, 2015 seeking Grant of letters of Administration Intestate. In her Affidavit in Support of the said petition the widow named the following as the survivors of the Deceased;-
 - a. Sylvia Muthoni Macharia - Widow
 - b. Kelvin Mahindi Macharia - Son
 - c. Dennis Maina Macharia - Son
 - d. Crystal Njeri Macharia - Daughter
5. The Assets comprising the estate of the Deceased were listed as follows:-



- i. Dagoretti/Riruta/6550
- ii. Dagoretti/Riruta/6263
- iii. Umoja C 103
- iv. Motor vehicle make Peugeot 504 Registration KAC 203 H

Total Value - Kshs. 1,000,000

6. On 11th August, 2015 a Grant of letters of Administration Intestate was made to the widow Sylvia Muthoni Macharia, which Grant was duly confirmed on 7th June, 2016.
7. Thereafter on 26th September, 2016 one Dennis Mahindi Macharia who claimed to be the biological son of the Deceased filed a Summons for Revocation of Grant.
8. The Objector claimed That he together with his sister Grace Wamuyu Macharia were both children of the Deceased having been born as the result of a relationship /marriage between the Deceased and their mother one Lindsay Njeri Macharia. Accordingly the objector argued That the Grant issued to Sylvia Muthoni had been obtained fraudulently through concealment of material facts.
9. Following the conduct of DNA tests which confirmed That Dennis Mahindi Macharia and Grace Wamuyu Macharia were infact the biological children of the Deceased the summons for revocation of Grant was compromised by way of a consent entered into by the parties on 18th February, 2021.

The terms of the consent were as follows:-

“By Consent

- i. The grant issued to Sylvia Muthoni Macharia herein on 11th August, 2015 be and is hereby revoked marking the Summons for Revocation of grant on record as settled.
 - ii. Upon granting prayers (i) above Dennis Maina Macharia and Dennis Mahindi Macharia be and are hereby appointed as administrators of the estate of the late Timothy Mahindi Macharia.
 - iii. That Dennis Mahindi Macharia and Grace Wamuyu Macharia the objectors herein be listed among the beneficiaries of the deceased estate.
 - iv. Parties be at liberty to file Summons for confirmation of grant with the proposed mode of distribution.”
10. Following That consent the two Administrators filed the summons for confirmation of Grant dated 30th June, 2021. The parties are unable to reach consensus on the mode of Distribution of the Estate. Indeed I note That the consent dated 29th June, 2021 has only been signed by two (2) out of the six (6) beneficiaries.

Analysis And Determination

11. I have carefully considered this summons for confirmation of Grant as well as the written submissions filed by both parties.
12. The 1st Administrator submits That the Deceased had only one legal wife and vehemently denies the claim by the 2nd Administrator That the Deceased was a polygamous man who had two (2) wives.



13. Regarding the property known as LR Dagoretti/Riruta/6263 the 1st Administrator submitted That the same does not form part of the estate of the deceased as the said Property is registered to Ferrari Real Estate Limited.
14. That although one of the directors of Ferrari swore an Affidavit indicating That the property was being held in trust for the Deceased the second director did not swear a similar affidavit therefore I find That the said property is not available for distribution.
15. The 2nd Administrator insisted That the Deceased was a polygamous man who had two (2) families. He asserted That all the assets ought to be distributed in accordance with the schedule of Distribution annexed to the Affidavit in support of the summons for confirmation of Grant.
16. Regarding the property known as Dagoretti/Riruta/6263, the copy of Title Deed/Annexure 'DMM 4' clearly indicates That the said property is registered in the name of Ferrari Real Estate Limited. Thus the property does not belong to the Deceased.
17. The fact That one of the Directors of Ferrari one Margaret Wangari Manyara who is a sister of the Deceased swore an Affidavit dated 27th July, 2022 indicating That the company held the said property in trust for the Deceased is neither here nor there. Such an Affidavit cannot confer ownership of the property to the Deceased. In any event there is no indication in the Title Document That the property is being held in trust for any person.
18. Secondly the other Director of Ferrari one David Wainaina Njoroge has not sworn any Affidavit to confirm the averments made by his Co-director.
19. The certificate of incorporation of Ferrari Real Estate Limited (Annexure 'DMM 3') indicates That the company was incorporated on 7th July, 2011 as a company limited by shares.
20. The CR12 does not list the name of the Deceased as a Director and/or shareholder of the Company. Indeed there is nothing to show That the Deceased had any interest in said company.
21. The fact of the matter is That the parcel of land known as, Dagoretti/Riruta/6263 belongs to a limited liability company. It does not form part of the estate of the Deceased. Any claim which the 2nd Administrator has to the said parcel of land cannot be ventilated under this Succession Cause.
22. This court is sitting as a Probate Court whose mandate is to oversee the distribution of the estate to the genuine beneficiaries. It is not for the court to delve into questions of ownership of land. That is a matter which falls under the exclusive jurisdiction of the Environment and Land court. The question of the relationship if any which the Deceased may have had with Ferrari Limited falls under the realm of company law and can only be determined in the Commercial and tax Division of the High Court.
23. The second property under consideration is LR Dagoretti/Riruta/ 6550. The 1st Administrator submits That this was the matrimonial home occupied by the Deceased and the widow Sylvia Muthoni Macharia.
24. The 2nd Administrator in his submissions raises the issue of the Deceased having a second House. In my view this is a matter which has already been considered and dealt with by the parties when disposing of the summons for revocation of Grant. Nowhere in the consent was it agreed That the Deceased had two (2) wives and this so called second widow Lindsay Njeri Macharia was not recognized and / or included in the consent as a widow/beneficiary of the estate. In light of the consent entered into on 18th February, 2021 my view, is That the matter is now Res Judicata.



25. It has not been denied That plot 6550 was the matrimonial home of the Deceased and the wife. It is alleged That this property was willed to the Deceased by his late father Jackson Mahindi Gitonga vide the written will dated 7th September, 2011.

26. A copy of the said written will appears on Annexure ‘DMM6’. Clause 10 of the said will provides as follows:-

“I direct my executors and trustees to pass my interest in the property namely Dagoretti/Riruta/346 to Timothy Macharia Mahindi and his wife Sylvia Muthoni Macharia in case I do not pass it to him during his lifetime.”

27. Section 35 (1) of the Law of Succession Act provides as follows

“ 35 Where an intestate has left one surviving spouse and child or children.

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 remarriage to any person. [Own emphasis]

28. In the case of TAU Katungi -v- Margretje Latungi & Another (2014) eKLR the court stated That:-

“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.....”

In the same case the court went on to state That

“Life interest confers a limited right to the surviving spouse over the intestate estate. He or she does not enjoy absolute ownership over the property. They cannot deal with it as if it was their own. By virtue of section 37 of the Act, a surviving spouse cannot during the life interest dispose of any property subject to That life interest without the consent of all the adult children, co-trustees and the court. This is meant to safeguard the interest of the children who are the ultimate beneficiaries of the property the subject to the life interest. It is in this respect That the life interest operates as a trust over the property of the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children.” [Own emphasis]

29. According to the law of Succession the surviving spouse is entitled to a life interest in the matrimonial home. The matrimonial home is therefore not available for distribution until the surviving spouse dies and/or remarries.



30. Finally regarding Plot Number Umoja 1/C103, the same is said to have belonged to the widow Sylvia Muthoni who sold it. It is therefore not available for distribution. In any event no evidence has been tendered to prove That this Umoja plot ever belonged to the Deceased.

Conclusion

31. Based on the foregoing this court makes the following findings;-

1. That the property known as LR Dagoretti/Riruta/ 6263 does not form part of the estate of the Deceased and is not available for distribution.
2. That the property known as Umoja Plot C 103 does not form part of the estate of the Deceased and is not available for distribution.
3. The remaining assets being Dangoretti/Riruta/6550 and motor vehicle Peugeot 504 Registration KAC 203 H shall devolve to the widow Sylvia Muthoni Macharia who will hold the same in trust for the remaining beneficiaries.
4. This being a family matter each side will bear its own costs.
5. It is so ordered.

DATED IN NYERI THIS 5TH DAY OF APRIL, 2024.

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MAUREEN A. ODERO

JUDGE

