



**In re Estate of Mbuutha Maiti Njiru (Deceased) (Succession Cause
582 of 2015) [2024] KEHC 6478 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 582 OF 2015**

TW CHERERE, J

MAY 23, 2024

IN THE MATTER OF THE ESTATE OF MBUUTHA MAITI NJIRU (DECEASED)

BETWEEN

**NJIRU MBUTHA 1ST ADMINISTRATOR
TABITHA KARAMANA 2ND ADMINISTRATOR
BERNARD T. KINYUA 3RD ADMINISTRATOR**

AND

**JOSEPH BARIO 1ST PROTESTOR
FAITH RIGIRI LAMBII 2ND PROTESTOR
JUDITH NKOROI 3RD PROTESTOR
BEATRICE MWENGA MBUUTHA 4TH PROTESTOR
ROSE MURIIRA 5TH PROTESTOR**

RULING

Introduction

1. By a ruling dated 29th November, 2018, this court gave direction concerning the distribution of Deceased's estate but to date the estate remains undistributed due to numerous applications by parties herein.
2. By chamber summons dated 24th October, 2023, supported by an affidavit sworn by Bernard T. Kinyua (3rd Administrator/Applicant), Administrators/Applicants pray that the estate be distributed according to the its value.



3. Annexed to the supporting affidavit is the Certificate of Confirmation of Grant dated 01st October 2020, government surveyor's report dated 11th October, 2023 and a proposed subdivision plan.
4. Judith Nkoroi and Rose Muriira (3rd and 5th Protestors/Respondents respectively) by a joint affidavit sworn on 29th April, 2024 aver that the surveyor visited the land on 21st August, 2023 for purposes of subdivision but Petitioners/Applicants have by their advocates' letters dated 18th September, 2023, 10th November, 2023 and 03rd April, 2024 to the surveyor frustrated the transmission of the estate and have by their conduct demonstrated that they are not keen to perform their duties of transmitting the estate of the deceased to its beneficiaries. They seek that the surveyor be allowed to implement the grant.
5. I have considered the affidavit evidence on record. I have also considered the government surveyor's report dated 11th October, 2023 and a proposed subdivision plan filed by the Applicant.
6. In his report, the surveyor states in that in preparing the proposed subdivision plan, he had taken into consideration the ground permanent developments and equality and fairness for all the beneficiaries. He also stated that each house was to get an equal share of 1.17 Ha which is approximately 2.9 acres.
7. It is trite law that "whoever alleges must prove." This is contained in Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which states as follows:
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
8. The *Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes the burden of proof thus:

"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case....."
9. The court of appeal in the case *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR discussed the burden of proof and stated thus:

"(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced."
10. In *Hellen Wangari Wangechi v Carumera Muthini Gathua* [2005] eKLR, Mativo J (as he then was) quoted with approval Lord Brandon in *Rheir Shipping Co. SA. v Edmunds* [1955] IWL 948 at 955 where the court rendered itself as follows:

"No Judge likes to decide case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take."
11. The burden to prove that the proposed subdivision plan does not comply with the equal distribution order lies with the Applicants. Applicants did not tender any evidence to counter the surveyor's report and proposed distribution plan.



12. From the foregoing, I do not find it difficult to agree with the Respondents that Applicants have by their actions used every trick in the books to avoid and or delay the distribution of the estate. Their actions are not only an affront to the authority of the court but are also prejudicial to the beneficiaries at large.
13. But the court cannot allow the beneficiaries to suffer without a remedy for it has the jurisdiction to revoke the grant issued to the Applicants for their failure to implement the grant.
14. Section 76 of the *Law of Succession Act* provides that:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- a. that the proceedings to obtain the grant were defective in substance;
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
 - ii. to proceed diligently with the administration of the estate; or
 - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. that the grant has become useless and inoperative through subsequent circumstances.”

15. From the foregoing analysis, it is hereby ordered as follows:
 1. The chamber summons dated 24th October, 2023 is without merit and it is dismissed
 2. Notice is issued to the Administrator/Applicants that this court will not hesitate to revoke their appointment if they do not diligently discharge their duties as provided under Section 83 of the *Law of Succession Act* Cap 63 Laws of Kenya.
 3. Mention on 13th June, 2024 to receive a progress report concerning subdivision of the estate

DATED AT MERU THIS 23RD DAY OF MAY 2024

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Kinoti/Munene



For Administrators/Applicants - Mrs. Kaume for M.G.Kaume & Co. Advocates

For Protestors/Respondents - Ms. Atieno for J.K.Ntarangwi & Co. Advocates

