



REPUBLIC OF KENYA



**In re Estate of AMN (Deceased) (Succession Cause 566 of 2012)
[2024] KEHC 5143 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 566 OF 2012**

MW MUIGAI, J

MAY 16, 2024

IN THE MATTER OF THE ESTATE OF THE LATE AMN (DECEASED)

IN THE MATTER OF

GSM 1ST CO- ADMINISTRATOR

PSM 2ND CO- ADMINISTRATOR

RULING

1. Vide a petition received on 22nd June,2012 by this court wherein the petitioners GSM and PSM petitioned this Honorable Court for a grant of Letters of Administration intestate of the estate of AMN (deceased) who died on 5th May,2011 as per death certificate and domiciled in Kenya.
2. As per the Affidavit in support of Petition for Letters of Administration Intestate, the deceased died intestate and left the following surviving him; -
 - a. JMM- Daughter 32 Years
 - b. PMM-son 26 Years
 - c. JMM- Son 24 Years
 - d. SNM-son 13 Years
 - e. DNM- Son-deceased
 - f. LKM – Daughter-42 Years
 - g. JMM- Daughter- 37 Years
 - h. PSM- Son-37 Years
 - i. GSM- Wife-adult



3. The Affidavit in Support of Petition for Letters of Administration Intestate mentioned properties left by the deceased at the date of his death as follows:
 - a. Athi River/Athi River Block 1/855.
 - b. Iveti/misakwani/1006,1420,983,840,659,670,275,759,1059.
 - c. Syokimau/Mavoko/157
 - d. Nairobi Block/122
 - e. Iveti/Misakwani/159
 - f. Iveti/Misakwani/984
 - g. UNS.Industrial Plot No. 115
 - h. Athi River/Athi River Block 1/1308
 - i. Athi River/Athi River Block 1/2486
 - j. Shares With City Chicken & Eggs- 73000 Shares
 - k. Nairobi Consumer Co-op Ltd Shares
Shares with Aimi Mak Kilungu Ltd No. 00XXXX4-25 Shares
Shares with Kyanzavi Farmers Co. Ltd No. 1XX6-5 Shares
Nairobi/Mombasa LR 44336, L.R. 12715/42
4. The estimated value of the properties Kshs. 800,000.
5. Vide the Chief's letter dated 13th June,2012 confirmed that the Deceased hailed from his location.
6. Vide the Gazette notice dated 31st May, 2013, GS and PSM both of P.O Box 40633 Nairobi in Kenya the deceased's widow and Administrator respectively were gazetted for grant of Letters of Administration intestate to the estate of AMN late of Misakwani Location, who died at Miskwani, Machakos on 5th May,2011.
7. Grant for Letters of Administration made and issued on 17th July, 2013 by this Honorable Court to GS and PSM as personal representatives of the deceased's estate to render a just and true account thereof as required by law.
8. Application for Summons for Confirmation of Grant filed on 7th October,2015 wherein the Applicants sought orders for the grant of letters of administration made and issued on 17th July,2013 to GS and PSM be confirmed.

Supplementary Affidavit in support of Petition for Letters of Administration Intestate

9. In the supplementary affidavit filed in court on 7th June 2017, sworn by GS and PSM, the Administrators herein, wherein they deposed that they filed a petition for Letters of Administration Intestate in the High Court of Kenya at Machakos on 22nd June,2012. That the said Petition failed to highlight the full inventory of all the assets owned by the deceased. Lamenting that the Petition is necessary to ensure that the full inventory of all the assets of the deceased is recorded in court. deposing that the following is a list of the missing inventory as compared to the Petition, of the deceased's assets as known since the date of demise.



- a. Iveti/Misakwani/659, 670,275,759,1059.
 - b. Nairobi Block 122/2
 - c. Athiriver/Athiriver Block 1/1308
 - d. Athiriver/athiriver Block/2486
 - e. Shares with City Chiken & Eggs-7300 shares
 - f. Shares with Kyanzavi Farmers Co. Limited,1XX6- 5 shares.
 - g. Shares with Muvuti Athiani Co-op Society- 1 Share.
 - h. Nairobi Mombasa L.R No. 44336, L.R No. 12715/42
 - i. Aimi Ma Kilungu Comm. Plot No. 690
 - j. Aimi Ma Kilungu Agri. Plot No.1298
 - k. Kyanzavi Block No.15 Plot No. 1421.
10. This matter was placed for Court annexed mediation for parties/Counsel to discuss intricate issues privately and come up with proposed mode of distribution for the Court to adopt as an order of the Court.
 11. On 2/11/2022 the parties filed a Certificate of non compliance by Mediator of 9/6/2022.
 12. The Summons for Confirmation filed in 2015 was to be served to the Co Administrator and members of the 2nd House to file consents or Protests to the Summons.
 13. On various dates different parties/members of the family of the deceased appeared in Court addressed the Court but refused Court annexed mediation, Clan meetings at home and despite orders for Witness Statements filed and viva voce hearing to proceed the parties declined and instead each wrote handwritten Note to this Court detailing what they told the Court orally.
 14. In summary, on different occasions the parties stated as follows;
 - a. RNK (N) intimated and wrote through Deputy Registrar on 8/11/2023 that she is sister to the deceased and lives on property that belonged to their late parents and therefore since she was not married she is entitled to a share of the said properties;
Iveti Misakwani shares of Kyanzavi 1XX6 & Block 15 (Katelembo Aihani Makuti Coop Society-not listed as property of deceased)
By Letter of 8/5/2023 and 2/5/2023, she informed the Court that the deceased's wife evicted her and her 6 children and damaged the door of her house as she settled on her parents land which the deceased her late brother was administrator.
 - b. Michael Muthama s/o RNK sister to the deceased by letter of 2/5/2023 stated he was born and brought up in Iveti Misakwani by her mother as 4th born child and was raised by his late grandmother mother to his mother and the deceased and they lived on the ancestral land as was told by his late Uncle the deceased after their grand mother died. He urged the distribution of ancestral land that the deceased held on behalf of his mother and Uncle ought to be distributed separately and not as part of deceased's estate.



- c. PSM by letter filed on 10/1/2023, Co Administrator representing 3 other children of 1st wife FNM married in 1963 and she built on 659 the house in 1994 at Misakwani 5 acres with 18 rental rooms and 2nd wife was married in 1986. Each house has 4 children, when the deceased died all documents were in possession of the 2nd widow and Co administrator GS. She begun to withdraw funds from the account and collected rent from rentals without sharing and took most of the prime land.
 - d. JMM by letter of 18/1/2023 stated she is daughter of the deceased by 1st wife and that after his death the family sat and discussed the matter with the 2nd widow and agreed to equal/equitable sharing of the property of the deceased between the 2 houses. Thereafter, 2nd widow took up all properties and sold plots and collected rent from rental plots and has not shared any property or proceeds with the 1st House.
 - e. GS Co Administrator and widow of the deceased filed letter on 30/12/2022 indicated she was married in 1980 but in 1986 was shown land Iveti Misakwani Plot 659 in the presence of Clan leaders. The land was a bush she cleared with her children and they built their home and she lives with her children is 2 1/2 acres. She stated she sold ¼ acre to educate her children in Technical School & University. The Co Administrator also received Ksh 60,000/- twice I to buy a vehicle and the other to have insurance. She explained that she withdrew money from accounts to settle the late husband's medical bill and other debts. She proposed that each house remains on the portion and home and the rest be divided equally.
 - f. PM & JM both children of 2nd widow of the deceased and JMM echoed their mother's sentiments that they should be asked to share their mother's homestead with the 1st family as they deserted home during the deceased's life and were given the land to build on and have settled there with their mother and own families
15. Parties did not file their submissions neither did they file their consent from the court annexed mediation within two months as was per the court directions on 6th December,2023.

Determination

16. I shall now dwell on distribution of the intestate estate of the deceased. It is not in question that the deceased had 2 wives each with 4 children. This created 2 houses according to Section 3(1) of the [Law of succession Act](#) which states that "House" means a family unit comprising a wife, whether alive or dead at the date of the death of the husband and the children of that wife.
17. The discretion to confirm grants is provided for under section 71 of the [Law of Succession Act](#). The court upon filing of petition for grant of letters of administration, issuance of the grant and subsequent filing of summons for Confirmation of grant; The Court shall apply [Law of Succession Act](#) and confirms the proper appointment administrators of the estate, the beneficiaries of the estate, the properties that comprise of the estate of the deceased and available for distribution and confirms the proposed mode of distribution with written consents of beneficiaries or orders distribution in accordance with the law. On this basis, I must use section 40 of the [Act](#) as my focal point for this polygamous scenario. It provides:
- “ 40. Where an intestate was polygamous;
 - 1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first



instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children;

2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

18. Section 35 LSA; Where intestate has left one surviving spouse and child or children; the law provides;

- (3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.
- (4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—
 - (a) the nature and amount of the deceased’s property;
 - (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;
 - (c) the existing and future means and needs of the applicant and the surviving spouse;
 - (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
 - (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;
 - (f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
 - (g) the general circumstances of the case including the surviving spouse’s reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

19. The issue that arises for determination is whether the sister to the deceased RNK is entitled to the Estate of the deceased and secondly whether all the beneficiaries should get an equal share of the properties of the deceased.

20. The sister and her son protested that they are entitled to Iveti/Misakwani 1420 which she claimed belonged to her late mother.

21. The Protestor claims dependency. The meaning of dependancy is defined under Section 29 of the Act.



It provides:-

- “(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, grand-parents, 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.”
22. There is a condition precedent which a person claiming dependency has to establish. It requires that the person claiming dependency must prove that he/she was being maintained by the deceased immediately prior to his demise.
23. I find that the sister to the deceased Rose Nthenya has proved that she lives and has lived in the parcel of land for a longer period and is therefore entitled to a portion where she lives.
24. The case of *Rono v. Rono* (*supra*), the Court applied section 40 of the *Law of Succession Act* and stated;
- “...More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children...”
25. I am inclined to find that the beneficiaries in the estate of the deceased be distributed in equal shares In the case of *In re Estate of Waweru Mwaniki Gatuha (Deceased)* [2020] eKLR where the court was guide by the decision in *Scolastica Ndululu Suva v Agnes Nthenya Suva* [2019] eKLR where it was held:
- It is therefore evident that although Section 40 of the *Law of Succession Act* provides a general provision for distribution of the estate of a polygamous deceased person, the court has the discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”

Disposition

26

- a. That the estate of the deceased shall be distributed equally amongst all the beneficiaries.
- b. In accordance with Section 71 *LSA* ;
- c. The following properties are available for distribution as outlined in the Petition for letters of administration;
- d. Iveti/Misakwani/659, the home of 1st wife and later settled on by the 2nd widow shall be shared equally by both houses.
- e. Iveti/Misakwani/,275,759,1059.
- f. Nairobi Block 122/2
- g. Athiriver/Athiriver Block 1/1308



- h. Athiriver/Athiriver Block/2486
 - i. Shares with City Chicken & Eggs-7300 shares
 - ii. Shares with Kyanzavi Farmers Co. Limited,1XX6- 5 shares.
 - iii. Shares with Muvuti Athiani Co-op Society- 1 Share.
 - iv. Nairobi Mombasa L.R No. 44336, L.R No. 12715/42
- i. Aimi Ma Kilungu Comm. Plot No. 690
- j. Aimi Ma Kilungu Agri. Plot No.1298
- k. Kyanzavi Block No.15 Plot No. 1421.
- l. The property Kyanzavi Block No 15 No 1421, Kyanzavi Farmers Shares 1XX6-5 shares shall be shared by the sister to deceased, and both houses of the deceased to share the deceased share and any other ancestral property be similarly shared; Plot 983 as per the Clan meeting Report filed on 25/4/2023, shall remain with deceased's sister RNN.

RULING DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS HIGH COURT ON 16TH MAY, 2024 (VIRTUAL/PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE - FOR THE 1ST ADMINISTRATOR

NO APPEARANCE - FOR THE 2ND ADMINISTRATOR

PATRICK - COURT ASSISTANT

