



REPUBLIC OF KENYA



**In re Estate of Mbaya Mbiriri (Deceased) (Succession Cause 2095 of 1994)
[2024] KEHC 7497 (KLR) (Family) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2095 OF 1994
HK CHEMITEI, J
JUNE 20, 2024
IN THE MATTER OF THE ESTATE OF MBAYA MBIRIRI (DECEASED)**

BETWEEN

GICHOBI NJAGI 1ST APPLICANT

SIMON GITARI 2ND APPLICANT

AND

MARIAMU KAGONDU NJAGI & 7 OTHERS RESPONDENT

RULING

1. This ruling relates to the following applications filed by different beneficiaries of the deceased's estate:
 - a) Application dated 31st August, 2022.
 - b) Application dated 6th June, 2022.
 - c) Application dated 13th January, 2023.
 - d) Protest dated 13th March, 2023.
 - e) Protest dated 26th February, 2024.
2. The application dated 31st August, 2022 filed by Gichobi Njagi seeks for Orders that:
 - (a) Spent.
 - (b) This honorable court be pleased to order the OCS, Kutus Police Station, to supervise and provide security during sub-division of land parcel number Kabare/Njuku/34.



- (c) The Deputy Registrar of this court be directed to sign all documents to effect the transfer of L.R. No. Kabare/Njuku/34 or its sub-division into the names of the beneficiaries in place of the administrator herein.
- (d) The Land Registrar be directed to dispense with the production of the original title deeds for L.R. No. Kabare/Njuku/34.
- (e) Costs of this application and the surveyors' expenses be jointly borne by the two houses.
3. The application is supported by affidavit sworn by Gichobi Njagi on 31st August, 2022. He avers that he is a grandson of the late Njagi Murugu and thus a beneficiary of the estate of the late Mbaya Mbiriri. The deceased died intestate on 25th February, 1986 and was survived by two houses. His father belonged to the second house.
4. That on 22nd February, 1990, the council of elders ruled that one house be awarded 8 acres and his father (deceased) be awarded 6 acres. The first house/unit Jane Mbaya Mbarire has unsuccessfully on various occasions misled the court in an attempt to apportion itself all the parcel of land belonging to Mbaya Mbarire.
5. On 15th October, 2018 Hon. Lady Justice Kalpana Rawal upheld the decision of the arbitrators and directed that the suit land be sub-divided into two parts of 8 acres and 6 acres and be distributed to the 1st and 2nd house respectively. On 10th January, 2021, the Respondents filed summons seeking to have the letters of administration and confirmed grant issued by the court revoked. On 1st April, 2022, Hon. Lady Justice Odero delivered a ruling and dismissed the application for being res judicata.
6. The Respondents advocates wrote to his advocates requesting that they reach out to them for the purpose of surveying and sub-dividing the suit land. An agreement on the date for sub - dividing the land could not be agreed upon by him and the Respondents.
7. He went on to state that in June, 2022 he contracted the services of a surveyor and when they went to the suit land, they were received with hostility and chased out of the farm. He has tried severally to approach the first house so as to survey the land and proceed to distribute it but they have been hostile and uncooperative.
8. He deponed that the first house has become uncooperative declaring unwillingness to sign the transmission documents while the children of the first house have vowed to resist the sub - division of the property.
9. On the basis of such resistance and the need to effect sub - division it is desirable to get assistance of the police to provide security when the surveyor visits to survey the land for purposes of sub - division.
10. The application is opposed vide replying affidavit sworn by Simon Karinga Njagi on 6th November, 2022. He states that he is one of the beneficiaries of the deceased's estate. He swore the affidavit on his behalf and on behalf of the other 6 Respondents.
11. He denied that the beneficiaries of the first house have refused to participate in the process of sub-division but that the applicants have refused to extract and/or amend the grant to reflect the correct beneficiaries for the purposes of sub-division.
12. That the orders by Hon. Lady Justice Kalpana Rawal do not name the beneficiaries of either the first house and therefore incapable of being enforced. He prays that the honorable court amends/rectifies the grant as per the respondents' application dated 6th June, 2022 showing the proposed mode of distribution.



13. The proposed mode of distribution in the application dated 6th June, 2022 and signed by Gichobi Njagi, Simon Gitari, Mariamu Kagondu Njagi and Grace Warui Muriuki is as follows:

Beneficiaries:	Description of the property:	Share:
Simon Gitari. Gichobu Njagi.	6 acres to be curved out of L.R. No. Kabare/ Njuku/ 34	To be shared in equal shares.
Mariamamu Kagondu Njagi. Grace Warui Muriuki. Charity Ruguru Kariuki. Susan Wanjoka Mucira. Peter Mwai Mbaya. David Muriithi Gatimu. Josphat Simon Karinga Njagi.	8 acres to be curved out of L.R. No. Kabare/Njuku/ 34.	To be registered in the names of Josphat Simon Karinga Njagi and on behalf of the 7 beneficiaries.

14. The application is opposed vide replying affidavit sworn by Peter Mwai Mbaya on 25th January, 2024 who states that he has never opposed the sub – division of the estate into two portions of 8 acres and 6 acres respectively.
15. He states that the application dated 31st August, 2022 portrays an image of animosity between the beneficiaries which is far from the truth. He states that he has no problem in the land being divided into these portions and the Applicants should feel free to go and proceed with the sub – division.
16. The application dated 13th January, 2023 filed by Peter Mwai Mbaya seeking for orders that:
- Peter Mwai Mbaya be allowed to join as one of the administrators of the estate of Mbaya Mbiriri.
 - Upon prayer 1 being allowed, a confirmed grant be issued on the basis of the ruling of honorable Lady Justice Kalpana Rawal issued on 15th October, 2008.
 - The administrators do execute all the necessary documents to enable transmission and on failure of either party to do so, the Deputy Registrar do execute the necessary documents on their behalf.
 - Costs be provided for.
17. The application is supported by affidavit sworn by Peter Mwai Mbaya on 13th January, 2023. He states that he is a beneficiary of the estate of the late Mbaya Mbiriri. This succession was concluded way back in 2018 but the estate has not been distributed accordingly.
18. The current administrators he deponed have failed to move the court and get the confirmed grant issued as per the ruling of Hon. Lady Justice Kalpana Rawal issued on 15th October, 2008.
19. The application is opposed by replying affidavit sworn by Josphat Simon Karinga Njagi on 25th May, 2023 in response to the application dated 13th January, 2023. He states that he is the 7th Respondent. The 1st, 2nd, 3rd, 4th and 6th Respondents object to the application dated 13th January, 2023. All the



- beneficiaries including the Applicant and the Respondents had consented to the mode of distribution on 6th June, 2022. All the beneficiaries including the Applicant have been involved in these succession process. All the parties had consented to Josphat Simon Karinga being the administrator of the first house and Simon Gitari to be the administrator of the second house as per the consent to the mode of distribution dated 6th June, 2022.
20. The ruling by Justice Rawal dated 15th October, 2008 ordered 8 acres to be given to the first family and to be shared equally. The application dated 13th January, 2023 is in bad faith and meant to delay the court process because the Applicant has been enjoying, most of the property throughout the years to the detriment of other beneficiaries. He prayed that the court issues a confirmed grant to the administrators Josphat Simon Karinga and Simon Gitari who should proceed and share the property and bring this matter to conclusion and therefore the summons for rectification of grant dated 6th June, 2022 be allowed in the first instance.
 21. Alvan Kathuri Gachuki has filed an affidavit of protest sworn on 26th February, 2024. He states that he is one of the deceased's grand sons from his second wife Charity Wakame who sired the following children with the deceased: Njagi Mbaya, Grace Wathuiya Mbaya, Tabitha Njeri Mbaya and Esther Kariuko Mbaya (all of whom have been left out of the instant proceedings as the deceased's beneficiaries).
 22. That Njagi Mbaya was the father to Gichobi Njagi, one of the administrators herein. He substituted his late father, Njagi Mbaya who passed away before this succession was concluded. When Gichobi Njagi substituted his late father, he failed to inform his aunties, the sisters to his late father.
 23. According to him it will be fair that all the beneficiaries be brought on board and then have the estate distributed in a fair manner and all be considered. Allowing the confirmation of this succession in its present form as per the ruling of Kalpana Rawal of 2008 shall be discriminative. The law of succession is very clear at Section 38 on how the estate of an intestate shall be distributed. It is in the interest of justice that all beneficiaries be involved and the issue of unfair distribution be addressed.
 24. Mariamu Kagonda Njagi, Grace Warui Muriuki, Charity Ruguru Kariuki, Susan Wanjoka, Peter Mwai Mbaya and David Muriithi Gatimu have filed submissions dated 15th February, 2024 opposing the application dated 13th January, 2023, affidavit of protest dated 13th March, 2023 and in support of the application dated 31st August, 2022. Reliance has been placed on Sections 35 and 38 of the [Law of Succession Act](#). They pray that the 8 acres due to the first house be shared equally among the 6 children or their heirs since the widow of the first house is since deceased as per the consent to the mode of distribution of the deceased's estate dated 16th January, 2024.
 25. Alvan Kathuri Gachoki has filed submissions dated 23rd February, 2024 praying that he and his siblings get 3 out of the 8 acres and the rest of the beneficiaries share the remaining 5 acres. His justification for this proposal is that they developed the said 3 acres and have lived there all their lives.
 26. Peter Mwai Mbaya has filed submissions dated 23rd February, 2024.

Background

27. This matter emanates from the ruling delivered by Hon. Lady Justice Kalpana Rawal on 15th October, 2008.
28. Save for Alvan Kathuri Gachoki, all the parties on record are in agreement that land parcel number Kabare/ Njuku/ 34 be divided into two portions to be shared between the first (8 acres) and the second (6 acres) house.



29. The subsisting wrangles are between the beneficiaries in the respective two houses on how to share their respective shares after the sub-division of the land.

Analysis and Determination

30. I have carefully considered the applications, the responses, the protests as well as the written submissions filed by the parties. This court does not see the need at this juncture to reproduce the submissions again as they all gravitate around the straight issues raised in the respective rival affidavits. They all agree that the substratum of this case is the ruling by Hon Lady Justice Rawal (as she then was.)
31. The learned judge directed that the suit parcel of land be split into two. The portions are 6 and 8 acres respectively. All the applications and counter applications have basically gravitated around the said ruling. None of the parties appealed against the same.
32. The myriad of applications have succeeded in one thing, namely, stalling the execution of Justice Rawals ruling. It is immaterial for me to consider how the parties will share out their respective house portions. This court cannot superintend them. They know each other better than the courts. They know which house they come from, whether they are the deceased children or grandchildren.
33. All that the court is driving at is simply to have the parcel divided into two. Whichever formula each house will further sub divide their respective portions into the resultant beneficiaries shall be determined by each household and in the event of any disagreement they may be at liberty to apply to the court without dragging the rest of the beneficiaries.
34. I think the court has summarized the spirit and the letter of the applications and the objections herein. The invitation by the other beneficiaries for this court to begin sharing out the portions due to members of each household is akin to reviewing the ruling of Rawal J.
35. In the premises the court directs as hereunder:-
- (a) Land parcel number Kabare /Njuku /34 be subdivided into two portions of 6 and 8 acres respectively as per the ruling of this court dated 15th October 2008.
 - (b) The respective beneficiaries of the two houses after the above exercise shall be at liberty to subdivide their respective portions in the manner they deem appropriate among themselves.
 - (c) For avoidance of doubt the exercise in (b) above shall only be done after the administrators namely Josphat Simon Karinga and Simon Gitari shall have complied with (a) above.
 - (d) The officer in charge of Kutus police station shall supervise and provide security for the above exercise.
 - (e) The administrators shall procure the services of a Government Surveyor so as to ensure the smooth subdivision exercise and the costs shall be met equally between the two houses.
 - (f) The administrators shall sign the conveyancing instruments so as to ensure smooth transfer to the two respective houses.
 - (g) In the event that the administrators fail or disagree to execute the transfer documents then the Deputy Registrar of this court shall within 14 days of being notified of the said failure proceed to execute the conveyancing instruments.



- (h) The administrators shall immediately after the subdivision have the grant confirmed and the two parcels of land each transferred in their joint names pending a formal transfer to the respective beneficiaries from the two houses.
- (i) In view of the duplicity of the applications herein and the age of this cause none of the parties or their surrogates shall file any other application without the leave of this court being first obtained.
- (j) Being a family matter each party shall bear their respective costs.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 20TH DAY OF JUNE 2024.

H K CHEMITEI

JUDGE

