



**In re Estate of Kituku Mbio (Deceased) (Succession Cause
718 of 2010) [2024] KEHC 9618 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 718 OF 2010**

MW MUIGAI, J

JULY 25, 2024

IN THE MATTER OF THE ESTATE OF KITUKU KYEVA MBIO (DECEASED)

BETWEEN

DENNIS WAMBUA KITHUKU 1ST ADMINISTRATOR

BENSON MWEU KITHUKU 2ND ADMINISTRATOR

AND

ERASTUS JOHN KITHUKU OBJECTOR

JUDGMENT

Court Record

1. Kithuku Kyeka Mbio died intestate on 12th January 1995 *vide* Death Certificate serial No. 35877.
2. Benson Mweu Kithuku and Erastus John Kithuku petitioned for letters of administration *vide* Petition of 14/10/2010 and after gazettelement in November 2010 a grant was issued to the Petitioners on 11/4/2011.
3. The Deceased left the following heirs/beneficiaries surviving him:
 - i. Erastus John Kithuku – son
 - ii. Benson Mweu Kithuku– son
 - iii. Philis Wanziku Kithuku- daughter
 - iv. Winfred Kanini Kithuku- daughter
 - v. Veronica Mbulwa Kithuku- daughterThe Deceased left behind properties known as follows;



- a. Kathonzweni/Muusini Plot No.16
 - b. Konza share certificate No. 1322
 - c. Machakos/Konza North Block1/757
 - d. Konza /Malili Plot No 453
 - e. Konza kwa Mutio plot No.694
 - f. Ukia/Utaati/1002
4. The Summons for Conformation was filed on 26/10/2011 and Certificate of Confirmation of grant issued on 16/3/2012.
 5. Summons for Revocation of Grant was filed on 9/10/2012 by Dennis Wambua Kithuku s/o Veronica Mbulwa Kithuku (deceased) d/o Kithuku Kyeka Mbio (deceased) maternal grandfather to the Applicant. He was left with siblings; brother Francis Katua Kithiku & sisters Eunice Ndanu Kithuku & Sharon Mueni Kithuku residing on suit property Kathonzweni/Muusini Plot 16 where the Administrator Erastus John Kithuku threatened to evict them. They were left on the property by their late mother and have nowhere else to go to.
 6. By order of this Court on 16/2/2022 under Section 66 LSA the grant was amended to include the Applicant who filed Summons for Revocation as Co Administrator.
 7. The Grant of letters of Administration was issued to Erastus John Kithuku, Benson Mweu Kithuku and Dennis Wambua Kithuku on 15th March 2022.

Summons For Confirmation Of Grant

8. The Petitioners/Administrators filed Summons for Confirmation of Grant on 21/4/2022 dated 19/4/2022 seeking the following prayers:
 - a. That the grant of letters of Administration intestate be made to the said Dennis Wambua Kithuku, Benson Mweu Kithuku and Erastus John Kithuku be confirmed and the estate be divided in terms of the annexed proposed mode of distribution.
9. Erastus John Kithuku the Objector herein filed his affidavit of protest sworn on 18th May 2022 deposing that he is the son of thre late Kithuku Kyeka and that the court directed that the beneficiaries to the estate of the deceased agree on a mode of distribution, that draft summons for confirmation together with the proposed mode of distribution were shared for his approval.
10. He avvered that having perused the draft summon for confirmation and the proposed mode of distribution he communicated his dissatisfaction / disapproval of the proposed mode of distribution.
11. That despite his communication for disapproval, the co- administrators filed the summons for confirmation and proposed mode of distribution without any further consultations from the other beneficiaries.
12. That the properties that were previously registered in his name with the consent of the rest of the beneficiaries were removed from him without any alternative adequate provision for him and that the administrators have purported to give equal shares of the estate to the grandchildren yet they can only inherit the share of their late mother.



13. Reply to Protest by the co administrators was filed on 13th July 2022 and indicated that the proposed mode of distribution was fair just and equitable while the 3rd Administrator's proposed mode of distribution was to fulfil selfish interests towards unjust enrichment.

Evidence

Protestor's Case

14. Pw.1- Erastus John Kithuku told the Court that he is the son to the deceased. he was dissatisfied with the the proposed mode of distribution, particularly over Konza shares certificate No 1322 consisting of South Block 5, Konza/2406 and Konza South Block 5 konza 1758 which were registered in his name by virtue of a consent dated 20/5/2010. That being the owner of the said properties it was fair that the same be allocated to him. He further testified that the consent was given by all the children of the deceased except Veronica Mbulwa who was survived by her son. That attempts to have the 1st administrator attend meeting that culminated in the consent was futile.
15. That the said properties were transferred in to his name and there has never been any objection from his siblings.
16. On cross examination he stated that the transfer of the two properties was not to be done in trust of the beneficiaries but in his own interest. He also asserted that he had sold South Block (5) Konza/2406 subject of being the owner. That he is not aware of any caution placed over South Block(5) Konza/1758
17. 1st administrator Dennis Wambua Kithuku, adopted his witness statement dated 13/07/2022. He asserted that they placed caution over South Block(5) Konza/1758. That he was not involved in the sale of plot no. Konza/ Malili/453. The deceased was his grandfather; father to his late mother. Erastus is his Uncle. The properties already sold were; Konza/Malili Plot 453 Konza South block 5 Block /2406 & Machakos Konza 2406 was sold while case went on. He placed caution on South Block (5) Konza/1758. The Children of deceased gave one of them the 3rd Administrator/Protestor the right to have properties of their father in Konza held by him in trust for them together but not for his sole ownership.
18. On cross examination he stated that there was a grant in place at the time of the purported sale. That it was sold in the year 2021 but there was no sale agreement to support the same. There has been no objection to the registration and subsequent transfer of the two properties namely South Block (5) Konza/2406 and Konza South Block (5) Konza/1758. That he was not present when the consent dated 20/5/2010 was being given. That there was no explanation why the 2nd administrator who was present when the consent was given did not testify.

Written Submissions

Objector's Submissions Dated 7th January, 2024

19. The Objector raised one issue for determination;-
 - i. The manner in which the deceased estate ought to be distributed.
20. Reliance was placed in the case of *Re Estate of Julius Ndubi Javan (deceased)* [2018] eKLR to buttress the point of the primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries.



21. The Objectors submitted that there was no evidence called to demonstrate that consent was obtained fraudulently and that it was not in doubt that the administrators were reneging on their consent which if allowed will highly prejudices the objector who has already disposed off some of the properties.
22. The court was urged to seek reliance on the consent earlier given and hold that the properties South Block 5, Konza/2406 and Konza South Block 5, Konza/1758 be bequeathed to the objector.
23. It is submitted that acts of transferring and subsequent registration of the two properties in favour of the objector is well within the confines of law and does not amount to intermeddling in the deceased property and same ought not to be interrupted at this stage. The proposed mode of distribution by the petitioner.
24. It was the objector's final submission that the objector has made his claim against the estate of the deceased and prayed that the court rejects

Petitioner's Submissions

25. It was submitted that the issue for determination is whether this honourable court should be pleased to confirm the grant as per the amended schedule for distribution dated September 21, 2022.
26. It is submitted that the properties under contention are Konza Malili plot No. 453 and Konza Shares Certificate No.1322 consisting of two parcels namely Konza South Block (5) Konza/2406 and Konza South Block(5) Konza/1758.
27. It is submitted that the objector confirmed during hearing that he had disposed off by way of sale property Konza Malili Plot No 453 together with the other beneficiaries.
28. Reliance was made to section 3 of the [Law of Contract Act](#), Cap 23 Laws of Kenya and Section 107(1) of the [Evidence Act](#) on he who alleges must prove.
29. It is submitted that at the time when the objector disposed off by way of sale of the property with no letters of administration and that conduct amounts to intermeddling prohibited under Section 45 (1) of the [Law of Succession Act](#).
30. Reliance was made to the case of [Re Estate of Barasa Kanenje Manyu\(deceased\)](#).
31. It is submitted that the affidavit of protest is one founded on blatant falsehoods and misrepresentation of facts and that this court has a primary duty of ensuring assets of the deceased are distributed to the rightful beneficiaries in a just manner as held in the case of Succession Cause 720 of 2013, [Re Estate of Julius Ndubi Javan \(deceased\)](#)[2018]
32. The Petitioner finally submitted that the court be pleased to confirm the grant as per the amended schedule for distribution dated 21st September 2022.

Determination

33. I have considered the pleadings oral testimony and submissions herein and the issue that arises for determination is the mode of distribution for the properties of the deceased.
34. Erastus John Kithuku the Objector herein filed his affidavit of protest sworn on 18th May 2022 deposing that he is the son of the late Kithuku Kyeka and that the court directed that the beneficiaries to the estate of the deceased agree on a mode of distribution, that draft summons for confirmation together with the proposed mode of distribution were shared for his approval.



35. That the properties that were previously registered in his name with the consent of the rest of the beneficiaries were removed from him without any alternative adequate provision for him and that the administrators have purported to give equal shares of the estate to the grandchildren yet they can only inherit the share of their late mother.
36. This is an intestate estate and therefore, distribution is subject to Section 38 of the [Law of Succession Act](#); as follows;
- “Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”
37. The plots in contention are Konza Share Certificate No1322 consisting of the two parcels of land: Konza South Block 5 Konza/2406 and Konza/1758 where the protester is alleged to have sold and during the hearing he stated that he had sold with the consent of the other beneficiaries and with a grant confirmed at the time.
38. From the available evidence, the protester seems to have intermeddled with the properties according to section 45 of the [Law of Succession Act](#) although he did not produce evidence of the sale of the property and the alleged consent by the beneficiaries seem to be disputed.

Beneficiaries of the Estate

39. The Protestor/3rd Administrator’s Protest, is that he was not consulted on the proposed mode of distribution by the 1st & 2nd Administrators. Secondly, that he took issue with equal distribution of the estate of the deceased with grandchildren that 1st Administrator s/o daughter of deceased with 3 other siblings with the children of the deceased. Thirdly, he therefore opposes the mode of distribution by the Summons and makes proposes mode of distribution in the Protest. The law provides for grandchildren to inherit from grandparent fro their deceased parent’s share. The 1st administrator is rightfully pursuing and is entitled to his late mother’s share of the deceased’s estate and it is not contested she was daughter of the deceased.
40. In [re Estate of Imoli Lubatse Paul \(Deceased\)](#) [2021] eKLR, the Trial Court; Hon W.Musyoka J stated of right of grandchild/ren;

“In the instant case, the applicant, in the summons for revocation of grant, is a child of a dead son of the deceased herein. The applicant is claiming directly by dint of *In re Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR (Musyoka J) and *In re Estate of Florence Mukami Kinyua (Deceased)* [2018] eKLR (T. Matheka J), and does not require to take out letters of administration to intervene in the estate of her late grandfather, where her own parents are dead. Secondly, apart from case law, the provisions of the [Law of Succession Act](#) cover these situations. Section 39 of the [Law of Succession Act](#) makes grandchildren heirs in intestacy, where their own parents, who are biological children of the deceased, are dead. Section 41 of the [Law of Succession Act](#) is the provision that enables grandchildren to step into the shoes, of their own parents, and to step into those shoes they need not take out letters of administration.”

I believe that there is a misconception. Grandchildren are not in the same footing with the daughters-in-law or children-in-law of the deceased. Grandchildren would be blood relatives of the deceased. They would be entitled automatically, as blood kin of their grandparent, to take the share due to their own parents, the biological children of the deceased, where



such biological children are dead. A surviving spouse of a dead child of the deceased is not a biological kin of the deceased parent-in-law. Such a child-in-law would have no automatic right or entitlement to a share in the estate of her parent-in-law. Whereas statute is clear that grandchildren have a right under sections 39 and 41 of the *Law of Succession Act*, there is not a single provision in the *Law of Succession Act*, or any other statute for that matter, which makes provision for any in-law.

Distribution of Deceased's Estate

41. Section 38 of *Law of Succession Act* that requires where the deceased died intestate and has left surviving children and there is no spouse, the estate of the deceased to be distributed equally amongst the children.
42. In *Re Estate of John Musambayi Katumanga – (deceased)* [2014]eKLR Hon. W. Musyoka J stated as follows;

"[27] The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is "equally" as opposed to "equitably". This is the plain language of the provisions. The provisions are in mandatory terms – the property "shall ... be equally divided among the surviving children." Equal distribution is envisaged regardless of the ages, gender and financial status of the children."
43. The Law prescribes equal distribution of the deceased's estate amongst children of the deceased in the absence of surviving spouse(s). As illustrated by the case of Katumanga supra;

Disposition

44. That the estate of the deceased shall be distributed equally amongst all the beneficiaries. In accordance with Section 71 *LSA*;

The following properties are available for distribution as outlined in the Petition for letters of administration;

1. Kathonzweni/Mussoni Plot No 16 – Veronica Mbulwa Kithuku (daughter of deceased & mother to 1st Administrator Dennis Wambua Kithuku to hold in trust for siblings Francis Katua Kithuku, Eunice Ndanu Kithuku & Sharon Mueni Kithuku jointly & severally).
2. Konza Share Certificate No 1322; that consists of
Konza South Block (5) Konza /2406- Erastus John Kithuku (sold)
Konza South Block (5) Konza /1758- Erastus John Kithuku Benson Mweu Kithuku & Veronica Mbulwa Kithuku
3. Machakos/Konza North block 1/757-
Winfred Kanini Muasya
Pheres Wanziku Nzuki
4. Konza /Malili Plot 453- equally amongst siblings (sold)



5. Konza Kwa Mutio Plot No 694 -equally amongst siblings
6. Ukia /Utaati/1002- Nicholas Mutunga Kanyeke (creditor)
7. Therefore, the protest lacks merit and it is hereby dismissed.
8. A certificate of confirmation of grant to be issued distributing the estate of the deceased according to the mode provided hereinabove.
9. Any aggrieved Party is at liberty to apply.
10. Family matter no order as to Costs.

**JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS HIGH COURT
ON 25/7/2024 (VIRTUAL/ PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

In the presence of:

Ms Mbulu for 1st & 2nd Administrators- Present

Geoffrey/Patrick – Court Assistant(s)

