



REPUBLIC OF KENYA



**In re Estate of Kanambiu Kaburi alias Silas Muriithi (Deceased) (Civil Appeal 029 of 2022) [2024] KEHC 8693 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8693 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL 029 OF 2022**

**LM NJUGUNA, J**

**JULY 18, 2024**

**IN THE MATTER OF THE ESTATE OF KANAMBIU  
KABURI ALIAS SILAS MURIITHI (DECEASED)**

**BETWEEN**

**EDITH GATURI KANAMBIU ..... APPELLANT**

**AND**

**FAITH WANJIRA K. KABURI ..... 1<sup>ST</sup> RESPONDENT**

**KAREN WAWIRA MURIITHI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**DOROTHY KARIMIH KANAMBIU ..... INTERESTED PARTY**

*(Being an appeal from the Ruling of Hon. M.N. Gicheru CM delivered in Embu CM Succession Cause No. 301 of 2017 on 25th January 2021)*

**RULING**

1. The appellant herein filed the memorandum of appeal dated 26<sup>th</sup> May 2022. Through it, she seeks for the following orders:
  1. That the ruling delivered on the 25<sup>th</sup> January, 2021 in CM Succession Cause Number 301/2017 and all consequential orders be set aside and the appeal be allowed; and
  2. That the grant be revoked and the beneficiaries be allowed to redistribute the estate in accordance with the law on intestate succession in polygamous setting.
2. The appeal is premised on the grounds that the learned trial magistrate:



1. Failed to determine that the appellant was not served with the summons for confirmation of grant, neither did she sign the requisite consent forms yet the grant was still confirmed;
  2. Failed to consider that the appellant and other beneficiaries save for the respondents herein did not attend court for confirmation of the grant'
  3. Misdirected himself into ordering that the estate of the deceased be shared out equally between the respondents herein absolutely without including the children of the deceased yet the family had not agreed on a mode of distribution;
  4. Erred in law and fact by failing to adhere to the provisions of sections 40, 35, 36, 37 and 38 of the *Law of Succession Act* and determined that the properties devolve to the respondents without adhering to the law of intestate succession;
  5. Erred in law and fact by ruling that the grant as issued by the court adhered to the rules of succession yet no beneficiaries executed any consent nor presented themselves to court during confirmation of the grant;
  6. Erred in law and fact by mistaking that the appellant herein is the daughter of the 1<sup>st</sup> respondent and she is represented by Ms. Fatuma, Advocate, which was not the case;
  7. Misdirected himself and erred in law by mistaking that the 1<sup>st</sup> respondent's siblings were her immediate sisters and brothers yet that was not the case;
  8. Erred in law by mistaking that the affidavit dated 04<sup>th</sup> June 2019 was filed by the appellant's siblings yet the appellant belongs to the 2<sup>nd</sup> respondent's house;
  9. Misdirected himself by relying on the proposal of the 1<sup>st</sup> respondent, on the mistaken assumption that the appellant belonged to the 1<sup>st</sup> respondent's family;
  10. Misdirected himself in determining that Title no. Gature/Weru/3502 had been sold by the respondent, which is not true;
  11. Misdirected himself in allowing the consent without the presence of all beneficiaries to the estate of the deceased; and
  12. Misdirected himself in law and facts by stating that the other siblings of the respondents herein have no complaint yet they were disinherited upon confirmation of the grant.
3. The respondents, being the widows of the deceased, petitioned for and were issued with a grant of letters of administration intestate in the estate of the deceased on 08<sup>th</sup> December 2008. Soon afterwards, they filed summons for confirmation of grant together with a supporting affidavit, in which they named 10 beneficiaries including themselves. The proposed mode of distribution in the said affidavit bequeathed the estate of the deceased only between the respondents as follows:
1. Karen Wawira Muriithi
    - i. Bus park No. BSP 1
    - ii. Motor vehicle registration no. KSL 570
    - iii. Land Parcel Ngandori/Kiriari/1574- to get ½ acres
    - iv. Land parcel Ngandori/Kiriari/3523- to get ½ acres
    - v. Embu/Municipality/1492



- vi. Kiosk no. 24 Mbuvari Market
2. Faith Wanjira K. Kaburi
  - i. Bus park No. BSP 8
  - ii. Bus park No. BSP 68
  - iii. Bus park No. BSP 71
  - iv. Motor vehicle registration number KVL 874 Isuzu Canter
  - v. Land Parcel Ngandori/Kiriari/1574- 1 acre
  - vi. UNS Plot No. B Embu
  - vii. UNS BCR No. 1 Embu
  - viii. Semi-permanent stall Dallas
3. Land parcel no. Gaturi/Weru/3502- to be held jointly between Karen Wawira Muriithi and Faith Wanjira K. Kaburi
4. Land parcel no. Ngandori Karau/T.1 to be held jointly between Karen Wawira Muriithi and Faith Wanjira K. Kaburi
4. A certificate of confirmation of grant was issued in line with the proposed mode of distribution on 20<sup>th</sup> January 2019. Subsequently, the appellant moved the court through 2 applications; one seeking revocation of the grant on the grounds that the beneficiaries were not present during confirmation proceedings and that she did not execute the relevant consents. The second application sought to inhibit any dealings by the respondents on the deceased's properties. In their replying affidavit to the applications, the respondents stated that some of the properties of the deceased are incapable of being subdivided since they are stalls in a storey building in a Bus park.
5. The children of the deceased from the 1<sup>st</sup> respondent's house suggested that the properties be held jointly. The respondents urged the court to retain land parcel numbers Gaturi/Weru/3502 and Ngandori Karau/T.1 jointly in their names to enable them transfer them to the purchasers who had bought them. The court held that indeed Rule 41(1) of the *Probate and Administration Rules* was not complied with. That the interests of the appellant were well represented by the 1<sup>st</sup> respondent, whom the court erroneously stated, was the appellant's mother who was represented by Ms. Fatuma, Advocate.
6. The court proceeded to order that another certificate of confirmation be issued including the names of the children in each house in the portions given to their mothers as per the certificate of confirmation of grant issued on 20<sup>th</sup> January 2019. A certificate of confirmation of grant was issued on 25<sup>th</sup> January 2021 capturing this position. In the said certificate of confirmation, the appellant is named as a child of the 2<sup>nd</sup> respondent.
7. The court directed that the appeal be canvassed by way of written submissions but none of the parties complied.
8. The issues for determination are:
  1. Whether the grant should be revoked;



2. Whether non-compliance with Rule 41(1) of the [Probate and Administration Rules](#) impaired fair distribution of the estate of the deceased; and
  3. Whether the distribution of the estate is fair and just.
9. The appellant has raised a series of issues in the memorandum of appeal. However, through perusal of the proceedings and pleadings, I have found that they were resolved at different stages. As stated earlier, there was a certificate of confirmation of grant issued on 20<sup>th</sup> January 2019 in which the estate was distributed solely to the respondents excluding their children. Through its impugned ruling, the court stated that the children of the various houses should be included in the distribution to hold their mothers' shares with them jointly. Following this ruling, another certificate of confirmation of grant was issued on 25<sup>th</sup> January 2021.
10. As to whether the grant should be revoked, the appellant submitted before the trial court that the respondents concealed from the court material information as the grant was confirmed under unclear circumstances. Her issue in that regard, was touching on the distribution of the estate. She did not raise any issue on the procedure for obtaining the grant of letters of administration itself, but rather, its confirmation. That being said, the trial court addressed itself on the issue of distribution and gave its orders as it deemed fit. I am persuaded that the trial did not err. In this appeal, the appellant decries the issue of distribution of the estate and the procedure thereof. Therefore, there is no basis for the grant to be revoked, as the appellant has not challenged the process of obtaining the grant but rather the issue of distribution of the estate.
11. The trial magistrate conceded that indeed Rule 41(1) of the [Probate and Administration Rules](#) was not complied with but, in any event, the appellant's interests in the estate were catered for. I agree with the appellant when she states that the trial magistrate erred in stating that the 1<sup>st</sup> respondent was her mother. This was an error on his part, however, the error does not appear on the certificate of confirmation of grant but only in the ruling. In my view, this may be overlooked. Rule 41(1) of the [Probate and Administration Rules](#) states that:
- “(1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.”
12. Distribution of the estate of the deceased who was polygamous and who died intestate is guided by Section 40 of the [Law of Succession Act](#). The wives and children of the deceased were all included in the distribution of the estate, noting that the 2 houses have an equal number of beneficiaries. In determining the 2<sup>nd</sup> and 3<sup>rd</sup> issues herein, it is my view that whether or not Rule 41(1) of the [Probate and Administration Rules](#) was complied with, the end result is a fair distribution of the estate in accordance with the certificate of confirmation of grant issued on 25<sup>th</sup> January 2021.
13. It would be unjust to unsettle a distribution that is based on the substantive law which is the [Law of Succession Act](#) on the basis that there is a flaw of a simple procedure as described in the subsidiary legislation which is the [Probate and Administration Rules](#). In my view, the failure by the trial Court to adhere to Rule 41 (1) did not cause any injustice to the appellant. Article 159(2)(d) of the [Constitution](#) provides that justice should be served without undue regard to procedural technicalities. It is on this basis that the oversight in procedure by the trial court shall be overlooked since the end-result of the matter is compliant with the law.



14. Finally, there is the glaring issue of 2 certificates of confirmation of grant. In the impugned ruling, the certificate of confirmation of grant issued on 20<sup>th</sup> February 2019 was not set aside. For uniformity, it is appropriate that the same be set aside through this appeal.
15. In the end, I find that the appeal lacks merit and the same is hereby dismissed with orders as follows:
  1. The certificate of confirmation of grant issued on 20<sup>th</sup> February 2019 is hereby set aside; and
  2. The certificate of confirmation of grant issued on 25<sup>th</sup> January 2021 is hereby upheld.
  3. Each party to bear its own costs of the appeal.
16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 18<sup>TH</sup> DAY OF JULY, 2024.**

**L. NJUGUNA**

**JUDGE**

