



REPUBLIC OF KENYA



In re Estate of Dishon Muchene Muthiora alias Dishon M Muthiora (Deceased) (Succession Cause 3435 of 2014) [2024] KEHC 13012 (KLR) (Family) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13012 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 3435 OF 2014
PM NYAUNDI, J
OCTOBER 18, 2024
IN THE MATTER OF THE ESTATE OF DISHON MUCHENE
MUTHIORA ALIAS DISHON M. MUTHIORA (DECEASED)

JUDGMENT

1. Before this Court is for summons for Annulment of Grant and Issuance of a fresh Grant of Letters of Administration with terms of Oral Will annexed. The Application is presented under Sections 76, 51, 5, 8 and 9 of the [Law of Succession Act](#); Rules 44, 13, 7 and 16(1) of the [Probate and Administration Rules](#).
2. In that Application the Applicant seeks that the Grant issued to her and Lucy Wanjira Muchene on 22nd April 2015 and amended on 13th March 2018 be annulled and that the Estate be administered in the terms of the Oral will of the deceased herein, Dishon Muchene Muthiora who died on 21st September 2014. Both James Muthiora Muchene and Lucy Wanjira Muchene have sworn affidavits in opposition to this summons.
3. This summons was filed as an objection to the Summons for Confirmation of Grant dated 13th September 2018 in which the 1st Administrator sought the following orders:
 1. That the Grant of Probate (or Letters of Administration (Intestate) issued to the Petitioner by this Honourable Court in this cause on the 22nd of April 2015 be confirmed.
 2. That the costs of this application be in the cause.
4. The summons was supported by the Affidavit of even date sworn by the Applicant/Co-Administrator, Lucy Wanjira Muchene.
5. The Summons for annulment proceeded by way of viva voce evidence.



Summary of the Objector's Evidence

6. OW1, Jane Wanjiku Muchene. She stated that she was the 2nd wife of the deceased. Her testimony is that she and Lucy agreed on how the deceased's estate would be distributed. The agreement was that the deceased's estate be distributed according to the deceased's wishes in the oral will uttered the night before he died.
7. She testified further that the 1st administrator, Lucy Wanjira Muchene's actions are an attempt to deny or defraud the 2nd family their rightful share allocated to them by the deceased. The 1st administrator deserted her home in 1980 and only came back after the deceased's death. She left her children who she cared for. That it would be unfair for the 1st administrator to claim an equal share of the estate. According to her the deceased's estate should be distributed according to the wishes of the deceased. She urged the court to revoke the grant.
8. In her Further Affidavit sworn on 11th March 2023, the Objector averred that the signatures on the consent for confirmation of grant are forged and do not belong to the members of her household.
9. During cross examination, she stated that the deceased left behind a farm in Riruta and plots in Ruai. Part of Dagoretti/Riruta/1836 has been leased out and part of it has been built. She constructed units after the deceased's death. She collects Kshs. 88,000 from that property. Lucy has constructed a house on her portion. There is no dispute on the Ruai properties. The Dagoretti property has never been subdivided according to the deceased's will. She and Lucy met on 28th September 2014 to agree on how the land should be shared. They engaged a surveyor who placed beacons. They sold the parcel of land and the proceeds were used to pay for the subdivision. She paid the surveyor in cash. She denied converting the proceeds from the sale to her personal use. According to her the property should not be divided into two; she has four children whereas Lucy has three children.
10. OW 2, Grace Wanjiru stated that the Deceased was her brother. She adopted her written statement dated 9th March 2019 as her evidence in chief. Her evidence was that she was present when the deceased made the oral will on 20th September 2014. According to her, the deceased was very ill. The deceased was in the company of his children, James Muthiora and Rose Kanyi. His wife, Jane Wanjiku, Njuguna (surveyor) and his two brothers in law were present. The deceased informed them that he wished to distribute his property. He distributed the property between his seven children and two wives. The deceased asked them if they were satisfied with the mode of distribution which they all agreed. Lucy was not present in the meeting as she had separated with the deceased from 1980.
11. During cross-examination, she stated that she did not record the deceased's oral will. The deceased gave each wife an equal portion. Each child got a portion. The first wife, Lucy has built on her portion. The deceased died the next day.
12. In re-examination, she stated that the property was not divided into equal shares; each plot has a different size. She contends that four of the deceased's plots devolved to the respective beneficiaries as per the deceased's wishes. One plot was sold and proceeds used to facilitate the survey, subdivision, transfer and issuance of new titles in the name of the respective beneficiaries. That the original petition was procured and instituted through undue influence and/or without her full knowledge and consent.

Summary of the 1st Administrator's Case

13. PW1 Lucy Wanjira Muchene filed a Replying Affidavit dated 16th May 2019. She denied the existence of the oral will. It was her evidence that the allegation of the existence of the oral will is an afterthought because the applicant participated in the succession process by signing the application and supporting



affidavit. That the mode of distribution by the 2nd administrator is not fair. She urged the court to dismiss the summons.

14. She stated that she got married to the deceased in 1974 under Kikuyu Customary Law. She had three children with the deceased. She was living with the deceased at the time of his death. According to her, the deceased's mother gave them Dagoretti/Riruta/1836 in 1990. They put up rental houses in 1992. At the time of the deceased's death there were 40 units and the rental income was Kshs. 235,000 per month. After the deceased's death, Jane Wanjiku has been collecting rent and utilizing it alone. Jane did not share the proceeds of the property sold in Ruai. According to her, the deceased did not leave a will distributing his property. After the deceased's death she met with Jane and agreed on how the property should be distributed. Her proposal was that the property and accounts for rent collected since 2014 be shared equally.
15. Pursuant to the courts directions parties filed written submissions, the Applicants filed written submissions. The Administrator's submissions dated 22nd July 2024 are a summary of her evidence and do not cite any law or judicial precedent. There is therefore no need to restate them here.

Summary of the objector's submissions.

16. The Objector submitted that the terms of the oral will were documented in the notes of the meeting of 28th September 2014 and thus, the deceased died testate. That the surveyor drafted a petition and presented before court and the objector was led to believe that signing and filing the petition was necessary for the property to be subdivided. Also, that the consent was obtained under the mistaken belief that it was solely for the division of Dagoretti/Riruta/1836 thus failed to disclose all the deceased's assets. According to her, she had established the grounds of fraud and concealment of material facts. She sought to rely on the following decisions; *In re Estate of Joseph Kilonzo Musyoka (Deceased)* [2018] eKLR and *In re Estate Prisca Ong'ayo (Deceased)* [2020]eKLR.
17. She further submitted that the will left by the deceased was a valid will as stipulated under Section 9 (1) and 10 of the *Law of Succession Act*. She also sought to rely on the decision of *In re Estate of Kevin John Ombajo (Deceased)* [2021] eKLR on what constitutes a valid oral will. She submitted that the applicant did not prove to the court that she was collecting rent of Kshs. 235,000 from the property in Dagoretti. She urged the court to find that the proceedings leading to the issuance of letters of administration were fundamentally flawed.

Analysis and determination

18. I have carefully considered the oral evidence, submissions by the Objector and the proposed modes of distribution by the parties. I have also considered the authorities relied on, and the relevant provisions of the law cited. In my view, three main issues arise for determination:
 - i. Whether the deceased made an oral will.
 - ii. What assets comprise the estate of the deceased available for distribution.
 - iii. How the estate should be distributed.

On the 1st issue: Whether the deceased made an Oral Will.

19. In determining this issue, the facts preceding the summons for the annulment of grant are material. The Objector herein was a co Petitioner in the Petition for grant of letters of Administration intestate lodged in Court on 28th December 2014 and supported by joint affidavit sworn by her and James



- Muthiora Muchene on 15th December 2014. She categorically stated in that affidavit that the deceased died intestate.
20. That subsequent to the Petition grant issued to the Objector and James Muthiora Muchene. The 1st Administrator challenged this grant vide her application dated 20th July 2017. That Application was not opposed by the objector and consequently the Court rectified the grant to include the 1st Administrator as Co Administrator with the Objector herein on the 13th March 2018. At this point the Objector did not raise the issue of the Oral will.
 21. The existence of the Oral will is introduced by the objector in response to the Summons for Confirmation. The evidence relating to the proclamation of the oral will is captured in the notes of the meeting held on 28th September 2014. I observe that those notes make no mention of the oral will purportedly proclaimed on 20th September 2014.
 22. The Objector and her witness contradicted each other on a material fact as to the pronouncement of the will. The Objector states that he pronounced the will at home while the witness Grace Wanjiru states that he pronounced the will on his hospital bed. This is a material contradiction and goes to the crux of the matter.
 23. The *Law of Succession Act* provides for the making of the Oral Will which would be enforced in the distribution of the estate of a deceased person. Section 9 of the *Law of Succession Act* provides;
No Oral Will shall be valid unless—
 - a) it is made before two or more competent witnesses; and
 - b) the testator dies within a period of three months from the date of making the Will:
 24. Section 10 of the *Law of Succession Act* provides;
If there is any conflict in evidence of witnesses as to what was said by the deceased in making an Oral Will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.
 25. The key elements of an oral will therefore are that;
 - (1) It must be made in the presence of two competent witnesses;
 - (2) The testator must die within three months of making of the will.
 26. The document through which the deceased was said to have had expressed his wishes or desires on distribution was put in evidence and marked as an exhibit. It is dated 28th September 2014. The document is definitely not a will for it was not executed in conformity with section 11 of the *Law of Succession Act*. Further none of the witness were able to recount to the Court the exact words of the deceased.
 27. I find that this contradiction of where the pronouncement was made, coupled with the failure to restate the pronouncement by the deceased in his own words and finally the delay in raising the existence of the Oral will make it impossible for this court to find that the deceased died testate. I therefore decline the 1st prayer of the Summons dated 9th April 2019.
On the 2nd Issue; What assets comprise the estate of the deceased.
 28. Whereas it is alleged by the Objector and conceded by 1st Administrator that the Deceased also owned properties in Ruai, those properties have not been sufficiently described neither is there proof of



ownership so as to confirm that they are in existence and available for distribution of the estate. Accordingly, I find that the sole asset available for distribution is Dagoretti/Riruta/1836.

The 3rd issue is how the Estate of Deceased should be distributed?

29. It is not disputed that the deceased was a polygamous man with two wives. In the circumstances, the applicable law is Section 40 of the Act and distribution shall be subjected to the said provisions; the section provides as follows;

Section 40

“Where an interstate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate 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.”

30. This court is also guided by the Court of Appeal decision of *Rono vs Rono and Anor* (2005) 1 EA 363; where it was held that the estate of a polygamous deceased should be distributed according to the number of children and not the number of houses.
31. The 1st house is found to comprise of four family members’ which translates to four units made up of;
- (i) Lucy Wanjira Muchene- wife.
 - ii) Anne Njeri Muchene
 - iii) James Muthiora Muchene.
 - iv) Rose Kanyi Muchene.
32. The 2nd house comprises of five members which translates to five units made up of;
- (i) Jane Wanjiku Muchene –widow
 - (ii) Grace Njeri Muchene
 - (iii) Martin Muthiora Muchene
 - (iv) Nancy Nyambura Muchene
 - (v) Antony Wangunyu Muchene
33. In the end, I find that fair distribution will be achieved by sharing the assets in the ratio 4:5; (45% to 55%) as the 1st house had 4 units and the 2nd house has 5 units. The parcel of land is Dagoretti/Riruta/1836. The portion devolved to each house shall, thereafter, be shared equally between the children in each house in accordance with section 38 of the *Law of Succession Act*, with each widow holding a life interest of her share.
34. The Objector raised the issue that members of the family have proceeded to allocate themselves shares of the estate and constructed thereon. The law of succession is clear that these actions amount to intermeddling with the estate of the deceased and the Court will not sanction unlawful actions. It follows that any transmission that has been effected without the sanction of the court is void.
35. The final orders shall be as follows;
- i. That the deceased died intestate



- ii. Property of the Estate available for distribution is Dagoretti/Riruta/1836
- iii. That the said assets shall be distributed in the ratio of 4:5 (45% to 55%) to the 1st and 2nd House respectively. That the Administrators shall hold the respective shares in trust for their Children in equal shares.
- iv. Accordingly, the Grant as rectified on 18th March 2018 is confirmed and the mode of Distribution shall be as paragraph (iii)} above.
- v. That the Administrators shall finalise transmission of the Estate within 120 days. In the event that either Administrator fails or declines to execute any documents so as to facilitate the transmission within 21 days of delivery, the Deputy Registrar, Family Division Milimani High Court Nairobi is authorized to execute the said documentation.
- vi. This being a family matter there shall be no order as to costs
- vii. Mention on February 25, 2025 to confirm compliance

DELIVERED ON THE VIRTUAL PLATFORM, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2024.

PATRICIA NYAUNDI

JUDGE

In the presence of:

Court Assistant Fardosa

