



In re Estate of M’ndatho Nciuru M’inturu (deceased) (Probate & Administration 46 of 2016) [2023] KEHC 22 (KLR) (10 January 2023) (Ruling)

Neutral citation: [2023] KEHC 22 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PROBATE & ADMINISTRATION 46 OF 2016
EM MURIITHI, J
JANUARY 10, 2023**

BETWEEN

JACOB NKUBANIA M’NDATHO PETITIONER

AND

GERALD KATHURIMA NDATHO APPLICANT

RULING

1. By a notice of motion dated October 26, 2022, [which should have been a summons] for revocation of confirmed grant and issue of confirmed grant for distribution of the estate as prayed therein, the applicant sought specific orders as follows:
 - “ 1. That the honourable court be pleased to certify this application urgent and to hear it *ex-parte* and to dispense with service
 2. That the honourable court be pleased to annul/revoke the grant of letters of administration and certificate of confirmation of grant issued to Jacob Nkubania Ndatho and issue them to Gerald Kathurima Ndatho.
 3. That the honourable court be pleased issue an order for confirmation of grant in terms of paragraph 8 of the supporting affidavit herein.
 4. That costs of the application be provided for.”
2. The grounds for the application are set out in application as follows:
 - “ 1. That the administration /petitioner has failed to complete administration of the estate as per the law.



2. That the administrator /petitioner has greatly intermeddled with the estate of the deceased by among others leasing out part of the estate which is to be given to other beneficiaries) to strangers”
3. The supporting affidavit sworn by the applicant on October 26, 2022 set out the facts as follows:
 - “1. That I am the applicant herein and a son to the late M’ndatho Nciuri M’inturu the deceased herein.
 2. That the grant of letters of administration intestate was issued to Jacob Kubania Ndatho.
 3. That the administrator/petitioner has failed to complete administration of the estate as per the law.
 4. That the administrator/petitioner has greatly intermeddled with the estate of deceased by among other leasing out part of the estate (which was meant for other beneficiaries) to strangers.
 5. That the administrator has refused to cooperate with other family members.
 6. That before our late father died he had sold land to and the purchaser is likely to sue the family since the petitioner has failed to give her out her share.
 7. That we have been unable to complete the administration of the estate since the petitioner died.”
4. The application was opposed by a replying affidavit sworn by one Jacob Ndatho on December 8, 2022 as follows:
 - “1. That I am the petitioner herein and the applicant is my elder brother.
 2. That the applicant has not been helping in prosecuting this cause until recently when he filed this application.
 3. That I have been defending the family’s land (estate) even during the - deceased lifetime todate.
 4. That the applicant has not spent a cent-in this cause.
 5. That there has been protests by my nephews namely- Elvis Bundi and Moses Mutethia whom the applicant have not mentioned in his application.
 6. That the applicant has left out some beneficiaries in his application (proposal) for distribution.
 7. That I want to state that I cultivate a portion of Four (4.00) Acres in the estate and I’ve not let any portion to anybody as the applicant states.
 8. That this applicant is occupying a land comprising Four (4.00) Acres.
 9. That he/applicant has also left out our mother -Mwariumwe (widow) to the deceased’s in his proposal.
 10. That I have no problem with the purchaser taking her share of land which she bought from the deceased and actually she is in occupation of the said land.



11. That I wish to state that I've not delayed the distribution! administration only that there are pending matters/protests.
 12. That since I've spend a lot of time and money in this cause I am entitled to a bigger share and costs
 13. That earlier, the family had agreed to sell a portion of land to one Moses Mutethia to cater for the expenses but he/purchaser declined to buy forcing me to use all my resources.”
5. The applicant filed a supplementary affidavit sworn on December 17, 2022 in reply to the replying affidavit in terms as follows:
- “ 1. That I am the applicant herein hence competent to swear this affidavit.
 2. That the petitioner herein has failed to cooperate with other beneficiaries and distribute as per our late father's wish.
 3. That the petitioner is greed and has personal interest and wants a larger share.
 4. That every beneficiary has been contributing money to pursue this matter.
 5. That I have not left out any beneficiary from my proposal the said Mwariumwa is our mother and she was not interested with any parcel of land.
 6. That we agreed that all the pending protest be withdrawn and the estate be distributed as per the application of confirmation which has been signed by all the beneficiaries.
 7. That our late father had distributed, demarcated what was remaining was only the transfer.”
6. Despite filing a replying affidavit sworn on December 8, 2022 and having been present on December 14, 2022 when the hearing date was set the petitioner did not attend the hearing on December 20, 2022 and the matter proceeded to hearing with the applicant principally urging that “the court directs the distribution of the estate in accordance with the affidavit in support of the application paragraph 4.”
7. The court noted that the beneficiaries before the court on the hearing date and listed herein below supported the application and distribution of the estate property as filed by the applicant Gerald Kathurima:
- i. Jane Kathure Mugambi;
 - ii. Mary Naitore Ndatho;
 - iii. Gerald Kathurima Ndatho;
 - iv. Dancan Kinyua;
 - v. Stephen Munene;
 - vi. Mutethia Moss Nchiuri;
 - vii. Elvis Bundi;
 - viii. Jecinta Karimi Mugambi; and



ix. Salome Mwariume.

The court particularly notes that the persons whose interests the petitioner purported to pursue, namely, nephews Elvis Bundi and Moses Mutethia and mother -Mwariumwe (widow), all support the distribution of the estate as proposed by the applicant!

8. It is clear that the petitioner seeks more share of the estate on account a sense of entitlement allegedly “defending the family’s land (estate) even during the deceased lifetime to date.” If such expenditure was made during the lifetime of the deceased he could have obtained a gift in the life of the deceased which the distribution court could have taken into account in terms of section 42 of the *Law of Succession Act*. There is no evidence of such expenditure before the court and it is not possible to factor such claim in the distribution of the estate. The replying affidavit of Jacob Kubania Ndatho merely alleges that the applicant to have “spend a lot of time and money in this cause [and therefore claim to be] entitled to a bigger share and costs.”
9. Such expenditure has not been quantified or claimed from the estate of the deceased. It should be used as an excuse to delaying distribution of the estate in accordance with confirmed grant. The beneficiaries now agree that the estate be distributed in accordance with paragraphs 4 of the affidavit in support of the application for distribution. Only the petitioner opposes the application because of his claim to a bigger share based on his alleged expenditure on the estate. As shown in the affidavit of the applicant in reply, other beneficiaries also allege to have used their monies for purposes of pursuing the assets of the estate. The costs claimed by the petitioner are in the discretion of the court!
10. As this expenditure claim by the petitioner has not been quantified and established, is should be made against the estate and, when proved, the beneficiaries will meet the cost in equal shares in payment in money. The distribution of the estate shall not be obstructed on account of an unproved claim of expenditure for the estate. The petitioner may, if so advised, file a suit for recovery form the estate of any monies that he considers he spent on account of the administration of the estate, and the same shall be recovered from the beneficiaries of the estate.

Orders

11. Accordingly, the court finds merit in the applicant for revocation of the grant on the ground of failure to diligently distribute the estate in accordance with the confirmed grant, making it necessary the revocation of the grant.
12. The court makes an order for the appointment of new administrators being the petitioner himself Jacob Nkubania Ndatho and the applicant herein Gerald Kathurima Ndtho, and distribution of the estate as agreed between the beneficiaries and set out in paragraph 4 of the supporting affidavit sworn by the applicant on October 26, 2022.
13. For clarity, estate shall now be distributed as agreed by the beneficiaries as follows:
 1. Land Parcel No Kiirua/Ruiri/3452 measuring 1.21ha. is distributed to Jacob Kubania Ndatho.
 2. Land Parcel No Kiirua/Ruiri/ 3453 measuring 1.62ha. is distributed to Gerald Kathurima Ndatho.
 3. Land Parcel No Kiirua/Ruiri/3454 to be distributed to Stephen Munene and Duncan Kinyua in equal shares.



4. Land Parcel No Kiirua/ Ruiru/3455 is distributed to Jane Kathure Ndatho $\frac{1}{4}$ acre; Mary Naitore Ndatho $\frac{1}{4}$ acre; Maricella Karwirwa Ndatho 1.25 acres; and Jacinta Muriuki 2.5 acres.
14. If any administrator fails to execute any documents necessary for the transmission and distribution of the estate assets to the beneficiaries, the Deputy Registrar of the court shall execute the said documents as necessary.
15. There shall be no order as to costs.
16. Order accordingly.

DATED AND DELIVERED ON THIS 10TH DAY OF JANUARY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances

Parties in Person

