



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Paul Muthiani Musau (Deceased) (Probate & Administration
51 of 2017) [2023] KEHC 1239 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PROBATE & ADMINISTRATION 51 OF 2017
MW MUIGAI, J
FEBRUARY 16, 2023**

BETWEEN

PETER MWAKA MUTHIANI ADMINISTRATOR

AND

BENJAMIN WAMBUA JAMES 1ST ADMINISTRATOR

JOSEPH KAWINZI MUTHIANI 2ND ADMINISTRATOR

ANTHONY MUSAU MUTHUSI 3RD ADMINISTRATOR

RULING

1. The 4th Administrator/Applicant herein, Peter Mwaka Muthiani filed an application dated 26th August, 2022 pursuant to Order 50 Rule (1) of the *Civil Procedure Rules 2010*, Section 1A, 1B, 3A of the *Civil Procedure Act* and all enabling provisions of the Law seeking the following reliefs: -
 - (a) (spent)
 - (b) That this Court do enforce Order 23 of Hon. Lady Justice R. N. Nambuye dated, read and delivered by Hon. Justice Majanja on the 21st day of September, 2012.
 - (c) That this Court directs the Deputy Registrar to sign the requisite consents on behalf of the 1st, 2nd and 3rd Administrators to facilitate the distribution of the deceased's estate to individual beneficiaries.
 - (d) That the Surveyor's distribution of Share Schedule report to each beneficiary be filed in Court.
 - (e) That parties be directed to file an amended confirmation of grant within 390 days of the said distribution to each beneficiary being concluded.
 - (f) That the County Commander Machakos be ordered to ensure that the OCPD Matungulu enforces compliance and keeps the peace during the said exercise.



- (g) The costs of this application be provided for.
2. The Application is supported by the grounds set out on the face thereof as well as the affidavit of the 4th Administrator/Applicant sworn on even date.
 3. The 4th Administrator/Applicant's case is that on 20th July, 2022 this Court directed that the remaining three (3) Administrators after the demise of the 2nd Administrator proceed and distribute the deceased estate to each beneficiary; that the 4th Administrator obtained and executed mutation forms to enable them proceed with the distribution of the deceased's estate and forwarded the same to the 1st and 3rd Administrators through their Advocates for purposes of getting them executed to move forward the process of distribution.
 4. The 1st and 3rd Administrators indicated and confirmed that they would not execute and distribute the deceased's estate to the beneficiaries unless the name of the 2nd deceased Administrator is removed from the grant. The said proposal would delay further the distribution of the estate, in the 37 years old suit which is still pending in Court since Succession Cause started way back at Mililani Law Courts in Nairobi, where it was located HCC P&A No 667 of 1984 and thereafter transferred to Machakos where it was allocated the current case number. The distribution has/had already been done to each house and the said report filed in Court. The distribution exercise was/is at its tail end of the distribution of the said estate. The reason why 4th Administrator requests the Court to direct that the Deputy Registrar execute the requisite mutation forms and consents on behalf of those Administrators who have refused and neglected to discharge their duties is to ensure it is in consonance with the judgment of LJ Nambuye Order 23.
 5. The Applicant vide the Supporting Affidavit deposed that he obtained mutation forms to facilitate the distribution of the deceased's estate and forwarded the same through his advocate to the Co Administrators vide letter dated 4/8/2022.
 6. The 1st & 3rd Administrators declined to execute the mutation forms until the 2nd Administrator who is deceased is replaced and/or removed as per the letter of 5//8/2022.
 7. The Applicant annexed the judgment by Hon LJ R. Nambuye (as she then was) of 21/9/2012 that determined administration and distribution of the estate of the deceased.

Replying Affidavit

8. The 1st Administrator/Respondent, Benjamin Wambua James swore an Affidavit on his own behalf and on behalf of 3rd Administrator, Anthony Musau Muthusi and deposed as follows:-

Joseph Kawinzi Muthiani (2nd Administrator) passed on 28/06/2022 leaving Peter Mwaka Muthiani as the only administrator representing the house of Esther Mutindi Muthiani. Joseph Kawinzi Muthiani (2nd Administrator) had/has children of age of majority who intimated that they wanted to replace their late father in the administration of the estate.
9. When the 4th Administrator/Applicant, Peter Mwaka Muthiani through his advocates sent Mutation Forms for Joseph Kawinzi Muthiani, Anthony Musau Muthusi, Benjamin Wambua James and the 4th Administrator to sign, Joseph Kawinzi had already passed on hence they instructed their advocates to reply to Peter Mwaka Muthiani's Advocate; that the said mutation forms sent for the three administrators to sign were blank and unfilled thus creating suspicion as to why they should sign incomplete forms.



10. The Respondents asserted that the said Mutation Forms had been prepared by a Surveyor in Nairobi who never participated in the sub-division claiming to certify that all the work performed in the field had been carried out under his personal supervision which is not true, yet they had instructed the Government Surveyor Mr. Wambua who did the sub-divisions of the land parcels in issue to prepare Mutation Forms accordingly.
11. On 17/05/2021 the Ruling was delivered which dictated the sub-divisions of the assets of the estate herein thus the Ruling of 21/09/2012 is overtaken by events.
12. In execution of the Ruling dated 17th May, 2021 on 2nd September, 2021 Land Parcel No Machakos/ Nguluni/774 was subdivided into 6 portions; three equal portions on the red soil each measuring approximately 15 acres and three equal portions on the black soil each measuring approximately 94 acres; that the 3 houses ie; the house of Katile Muthiani, the house of Mutindi Muthiani and Syokwia Muthiani got one portion of 15 acres on the red soil and another portion measuring 94 acres on the black soil respectively.
13. In Land Parcel No Matungulu/Sengani/1158 it was also divided into 3 equal portions each measuring 7.13 acres. The 3 respectively houses got each 7.13 acres; that he, (the 1st Administrator) and the 3rd Administrator have already done distribution of assets/ shares to all the beneficiaries in their respective households.
14. Therefore, the 4th Administrator should likewise distribute the assets /shares to the beneficiaries of the household of Esther Mutindi Muthiani without any further delay; that the 4th Administrator/ Applicant is looking for a way to ignore and circumvent the Court's ruling of 17/05/2021 which is not possible for the same has fully been implemented; that it cannot be ignored that the 2nd administrator– Joseph Kawinzi Muthiani passed on and he left behind living children whose interest cannot be overlooked for that would seriously prejudice the estate of the late Joseph Kawinzi Muthiani.

Written Submissions

4th Administrator/Applicant Written Submissions

15. It is submitted that there is no mode of distribution of the estate of the deceased to each beneficiary filed in this Court by the Respondents herein or a draft of the same served upon the 4th Administrator/ Applicant for consideration hence the averments of the 1st Administrator/Respondent Replying Affidavit on distribution are false.
16. That the Respondents in this succession cause are not candid to make the substitution of the 2nd Administrator as they vehemently purport. The same has been demonstrated of them failing to sign the mutation forms. The 4th administrator/Applicant invites this Court to read keenly the Ruling of D. K. Kemei, J as stated in par.18 as from line 7 – 18 and 19 as follows:-

“.....I must quickly add that if a co-administrator, has refused to sign documents to effect the distribution of the estate, there are proper provisions in the Act under which one can bring an application for handling such a situation generally.

..... the Registrar of this Court or his deputy or any other officer of the court would only come in after the Court is satisfied that there has been a refusal by the co-administrators. In any case vide the judgement dated 21.9.2012 the Deputy Registrar had been mandated to step in and carry out the exercise of distribution in the event of failure by the administrators to do so.



17. It is finally submitted that the Respondent's averments in their Replying affidavit is misleading and cannot be true or legally sound as they state that the judgment dated 21/09/2012 has been overtaken by events.

1st & 3rd Administrator /Respondent's Submissions

18. It is submitted that 1st administrator/respondent – Benjamin Wambua James has been representing the house of Katile Muthiani, the 3rd Administrator/Respondent – Anthony Musau Muthusi has been representing the house of Syokwia Muthiani while the 4th Administrator/Applicant – Peter Mwaka Muthiani and the late 2nd Administrator/Respondent; Joseph Kawinzi Muthiani have been representing the house of Esther Mutindi Muthiani.
19. That on 20/07/2022 the Administrators/Respondents were present in Court and the Court never directed the three remaining administrators to proceed and distribute the estate herein to each beneficiary but instead it is the 4th Administrator/Applicant counsel who sought time for the distribution of the estate to each beneficiary.
20. That the 4th Administrator/Applicant should follow suit and distribute the assets shares of the house of Esther Mutindi Muthiani to its beneficiaries instead of blaming the 1st and 3rd administrators over nothing and painting them as non-law abiding citizens which is not the case. It is after all the beneficiaries have shared the household share assets only then a list for each household can be brought before the Court for a certificate of confirmation of a grant accordingly.
21. That the 2nd administrator Joseph Kawinzi Muthiani herein passed on and left behind living children whose interest cannot be overlooked for that would seriously prejudice his estate.

Determination

22. This Court read and considered the instant application responses and written submissions on record and the issue for determination is that the Court should grant the order for the Deputy Registrar to execute the requisite Forms and/or Documents to facilitate distribution of the estate of the deceased in line with the judgment and Rulings of this Court.
23. For the Court to grant final orders, it is incumbent that the Court familiarizes itself with the chronology of events that culminated to the seeming stalemate /deadlock that requires Court intervention.

Court Record

24. The proceedings commenced in 1984 in High Court Nairobi HCC P& A 667 of 1984 with filing of Petition with Will annexed for the estate of Paul Muthiani who died on 18/9/1982.
25. This Court gleaned through the detailed and comprehensive Judgment of LJ Hon Nambuye (as she then was) to derive the genesis and process of succession proceedings culminating to/with the judgment, as the pleadings and court recorded proceedings are voluminous and some/most missing due to time span and protracted litigation by the parties.
26. According to the judgment, The Petition was filed in 1984 by Jonathan Nyumu Muthiani, Samwel Musyoki Muthiani, James Maingi Muthiani and John Muthusi Muthiani and contesting parties filed Objection and Cross Petition.



27. In 2004, the Certificate of Confirmation of Grant was to the effect that Plot 774 Komarock, Plot 15 A & B Tala Market, LR Matungulu/Sengani/1158 and Plot Katine Section, Tala were to be shared in 3 equal portions.
28. The proceedings before LJ R. Nambuye were pursuant to an application lodged for revocation of grant of 18/11/2004 filed on 19/12/2004 seeking to revoke the grant then issued to Benjamin Wambua James Joseph Kawinzi & Anthony Musau Muthusi.
29. In a nutshell, from the said Judgment, Pg 6, the alleged Will was not proved to be a valid will as required by Section 11 of *LSA*. On 9/11/2004, before Hon. LJ Koome (as she then was) granted the confirmation of the grant dated 19/8/2004 and the estate was to be administered and distributed as an intestate estate.
30. From the same judgment at Pg 30 & 51, the contention that 2nd Administrator, Joseph Kawinzi Muthiani was not a son to/of the deceased was refuted and he was confirmed as one of the deceased's sons as detailed from the deceased's own Note Books and he gave him land to build on and settle on where he has been all along.
31. It was also noted from the said judgment, that it was undisputed the deceased was polygamous. At Pg 35 the family of the deceased/beneficiaries of the estate were listed in detail but summarized herein as follows;
 - a) 1st Wife Syokwia Muthiani – 3 sons namely; John Muthusi- 7 sons (grandchildren of the deceased) Samuel Musyoki-6 sons (grandchildren of the deceased) David Kavatu Mutisya-4 sons (grandchildren of the deceased)
 - b) 2nd Wife Katile Muthiani - 2 sons namely; Jimmy Nyumu-11 sons (grandchildren of the deceased) James Maingi- 5 sons (grandchildren of the deceased)
 - c) 3rd Wife Esther Muthiani- 2 biological daughters no son(s)

‘iweto’ unions under Kamba Customary law implemented as follows;
 Mary Katoko (Kadogo) no biological children Mukii- 2 sons (Applicant, Peter Mwaka & Kiio Muthiani)(grandchildren of the deceased) Kaluku Munyanze- (there was contest that she was not a wife under iweto but an employee but was confirmed to be part of iweto) Joseph Kawinzi Muthiani, Wambua Muthiani & Muema Muthiani (grandchildren of the deceased)
32. It is instructive to note from the said judgment; useful information is that the deceased decided that subdivision of the portions of land into 3 parcels and shared to the 3 wives. The 2 wives who were then deceased the land was registered in their children's names leaving parcel number 570 which was the share for Esther Mutindi, one of the deceased's wives.
33. Esther Mutindi Muthiani had no children but married 3 wives under Kamba Customary law, iweto namely; Mary Kadogo, Mukii & Katuku Mary. Mukii had 2 children Peter Mwaka & Anthony Kiio, Katuku had 3 children Kawinzi, Wambua & Muema. Joseph Kawinzi wanted Land Parcel 570 that had been allocated to the house of Esther Mutindi; who had married his mother, Katuku as she also married Mukii, mother to Peter Mwaka and Kiio to also have it shared amongst the 3 wives homes/children.
34. From the above events it is clear that the Applicant, Peter Mwaka who was alleged to have sold ½ of Plot 570 & Land Parcel 1158 and Joseph Kawinza 2nd Administrator, (now deceased) who was said not to be son of the deceased, both are from the house of Esther Mutindi. Therefore, with the above background and history of altercation, distribution of the deceased's estate that belongs to the house of



Esther Mutindi cannot possibly be fairly distributed without the representation of Joseph Kawinza's family in the administration and distribution of the estate's process.

35. The dispute between the Applicant and the 2nd Administrator now(deceased) is amplified from the said judgment, at Pg 37 that the Applicant was sued by the 2nd Administrator in Machakos Land Disputes Tribunal Case Number 211 of 2003 and the decision was in the Applicant's favour, that whereas Plot 570 was for the House of Esther Mutindi, the land Parcel was for the Applicant.

Appointment of Administrators

36. From these facts, the Trial Judge stated as follows at pg. 67 of the judgment;

“There was consensus by members of the 1st & 2nd Household Units with regard to appointment of Benjamin Wambua James & Anthony Musau Muthusi as personal representatives of 1st & 2nd Households of the deceased. (Syokwia & Katile). There is also no dispute with Joseph Kawinzi Muthiani representing the house of Katuku. There is objection with Peter Mwaka Muthiani representing the house of Mukii because there appears bad blood between Joseph Kawinzi and Peter Mwaka. There also appears a dispute with regard to Peter Mwaka representing interests of the house of Kaluku for the same reason..... It therefore, follows the following are appointed as Administrators of the estate of the deceased. Benjamin Wambua James; Anthony Musau Muthusi; Joseph Kawinzi Muthiani & Peter Mwaka Muthiani.”

Distribution of the deceased's estate.

37. The mode of distribution was enumerated at Pg 64 & 65 of Paragraph 10,11 & 12 of the judgment of 21/9/2012 that the properties comprised of LR Plot 774 Komarock; LR Plot 1158 Katunduni Kwa Kaluku; Plot No 15 at Tala Market & Plot No Katine Section behind Plot No 15 Tala Market; to be distributed amongst the 3 households /wives/widows of the deceased.
38. Simultaneously, the grant and Confirmation of Grant both of 21/8/2012 were issued encompassing the above terms and orders.
39. The Consents /Court orders of 3/04/2014 by Hon L Kimaru J (as he then was) granted orders to have parties/Counsel meet the Government Surveyor at Machakos. After the Survey, the Survey Plan was to be presented to Court for the Court's Approval and incase of any objections the Court was to consider the same. On 13/11/2017, Hon. W. Musyoka J by Consent of the parties/Counsel agreed and ordered the matter be transferred to Machakos High Court where the subject-matter / properties that comprise of the deceased's estate were/are situate.
40. On 25 /9 2017, the Applicant filed application and sought that in compliance with the judgment by Hon LJ R. Nambuye (as she then was) of 21/9/2012, that the Court grants the estate be wound up and each beneficiary to get their share within 60 days, the administrators to issue quarterly reports, the Court Registrar to execute and issue a decree of the judgment of 21/9/2012 and County Police Commander to ensure OCPD Matungulu complies with Court Orders.
41. The Respondents objected to the Application on grounds that the Applicant sold portion of the land subject of ELC 222 of 2017; the Surveyor did not consider permanent buildings and developments; the applicant brought the Surveyor without involving the other Administrators; the subdivision was not in terms of the Court's judgment; divide 3 parts each one for 3 households instead subdivision was for subdivision was of 9 portions.



42. Hon D.K. Kemei J by Ruling of 5/11/2019 maintained status quo on the suit properties; a fresh grant was issued to the same Administrators, the Administrators were to agree on the mode of distribution within 60 days in line with judgment of 21/9/2012 and avail a Report to the Court.
43. By an Application dated 22/9/2020, the Applicant sought review of the Ruling of 5/11/2019. The Court by Ruling of 17/12/2020 found that reports were filed in compliance with the Judgment and Consents/Orders thereafter. The Counsel filed skeletal submissions and the matter was at the tail end of being finalized.
44. On 11/1/2021, the Applicant filed Certificate of Urgency seeking a mention date to be issued for purposes of issuing Ruling date on distribution of the estate based on submissions filed and reports presented in Court. The Court considered the issues raised by parties; 1st 2nd & 3rd Administrators were apprehensive of the apportionment of LR Matungulu /Sengani/1158 due to the fact that beneficiaries and 3rd Parties' [Purchasers] had/have carried out developments and [permanent structures] on the land that were not factored in the survey. On the other hand, the Trial Court considered the subdivision of 9 portions instead of 3 was untenable and contrary to the judgment of 21/9/2012 and consents of all Administrators of 3/4/2014.
45. By Ruling of 17/5/2021 the Court held; Parcel Number Machakos /Nguluni/774 & Parcel Number Matungulu/Sengani/1158 shall be shared equally between 3 households of the deceased. The Administrators shall ensure that each household is allocated portions containing rocky, sandy and cotton soils so as to bring semblance of equity and fairness. Plots 15A & 15B Tala Market & Plot at Katine Section shall be sold and proceeds shared equally amongst 3 households. In order to fast track the process, the Administrators to use the previous surveyors and have mutation forms of Mutation Forms amended to reflect subdivision into 3 portions as opposed to 9 portions or in the alternative have a new Surveyor carry out the exercise and file the Report within 60 days. In the event of lack of cooperation among Administrators, the Deputy Registrar of this Court is hereby authorized to sign all the necessary documents to fast track the subdivision exercise.
46. On 26/10/2021, this Court took over the proceedings and the parties through Counsel informed the Court that the Government Surveyor's report of 26/9/2021 was filed with the Court. Mr. Ayora informed the Court that one of the families during demarcation were pushed to another party's land and this was/is a problem and he proposed that the Surveyor's report to be discussed before it is adopted as Consent by parties in Court.
47. On 23/11/2021, Ms Nzau informed the Court that they filed 1st ,2nd & 3rd Administrators Report on implementation of the Courts Rulings. Mr. Ayora informed the Court that the 4th Administrator had not complied with Courts Rulings and sought meetings with the other Administrators.
48. On 16/2/2022, Mr Ayora informed the Court that, the Surveyor went on the ground and conducted survey and Report was filed on 6/10/2021. Counsel reiterated that 1 family had taken up most of the land and constructed permanent structures and other parties seek compensation if these structures are not demolished.
49. Ms Nzau on the other hand stated the Surveyor complied with Court's Rulings and the Report ought to be adopted. The Court took the view due to diverse views on the Government Surveyor's Report, the best avenue was to call the Government Surveyor to shed light on what informed his decision and who belongs where on the land and whether there were any challenges objections etc or not and if not if all beneficiaries/Administrators consented. The proposal was rejected. This Court adopted the Government Surveyor's Report of 6/10/2021 as part of the Court Record.



49. On 20/7/2022, Mr. Ayora informed the Court of the pending instant application and Ms Nzau indicated to the Court they had not filed Response as the 2nd Administrator Joseph Kawinza died on 28/6/2022 and they needed 2 months to have the deceased substituted.
50. Mr. Ayora opposed the application for adjournment as causing delay and proposed the Surveyor to confirm each household's portion of land of the 2 properties and then have consents and confirm or amend confirmed grant. Mr Ayora proposed that the Surveyor goes back to the land parcels and apportions to each beneficiary their entitlement and then confirm consents in Court. Mr. Mulei filed notice of Change of advocates for 2nd Administrator. This Court deemed the Report accepted by parties and in case of any problem or challenge to approach the Court. Hence the instant Application.

Issues

Substitution of 2nd Administrator

51. It was indicated to the Court that 2nd Administrator Joseph Kawinzi Muthiani had not filed Response to the instant Application due to his demise on 28/6/2022 and they needed 2 months to have the deceased substituted. The Applicant opposed the application for adjournment as causing delay.
52. Section 81 of *LSA* provides for powers and duties of personal representatives to vest in survivor on death of one of them;

Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.

Rule 14 of the 5th Schedule of the *Probate and Administration Rules* provides:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letter of administration may be granted to the nominee of a party in such suit, limited for purpose if representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties or any other parties touching the matters at issue in the cause of the suit, and until a final decree shall be made therein and carried into complete execution.”

The Court of Appeal in *Florence Okutu Nandwa & another v John Atemba Kojwa*, Kisumu Civil Appeal No 306 of 1998, stated that:

“A grant of representation is made in personam. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another. The issue of substitution of an administrator with another person should not arise. Where the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under section 76 of the *Law of Succession Act*. Upon its revocation, a fresh application for grant



should be made in the usual way, following procedures laid down in the Law of Succession Act and the Probate and Administration (Rules)...”

Hon. LJ Angawa in *Peris Wanjiku Nduati (deceased)* Nairobi High Court Succession Cause No 2349/2001 held that:

“where an administrator dies before completion of administration, the right course of action should be to seek his replacement through an application for grant of administration de bonis non”

53. This Court from the above outlined procedural and evidential record confirms a long-protracted litigation between parties in administration and distribution of the estate of the deceased. The Court record particularizes the circumstances leading to the stalemate/deadlock amongst beneficiaries and/or among Administrators.
54. The house of Esther Mutindi Muthiani consists of 3 households under Kamba Customary law, iweto marriage and includes the Applicant from his mother Mukii, Kawinzi 2nd Administrator (deceased) from his mother Katuku and the house of Mary Kadogo. Trial Judge in the judgment of 21/9/2012 found the Applicant and 2nd Administrator as members of the deceased’s family but each was to be Administrator of the respective house only. Therefore, the disclosed fact of the 2nd Administrator’s death, cannot be glossed over at the expense of expediency and that his estate ought to be represented by the Applicant and/or remaining Administrators. The law requires and provides for 2nd Administrator to be replaced by issuance of a limited granted ad litem and/or full grant of his estate and Administrator(s) therein to take up the 2nd Administrator’s interest in these proceedings.

Distribution of Deceased’s estate in compliance with Order 23 of Judgment of 21/9/2023

55. The Applicant sought expedition of distribution of the estate subdivision of the suit properties, consents by beneficiaries filed with Deputy Registrar who will also sign execution documents and winding up of the estate. At the same time the Parties/Counsel raised various issues regarding the process.
56. The parties, Administrators have not agreed to subdivision of the properties by 1 surveyor and survey/subdivision was alleged not to have been conducted in the presence of All Administrators/Beneficiaries/representatives. Beneficiaries are not agreed and/or have not consented to the subdivision. There are 3rd Parties (Purchasers) included and the issues is not agreed on yet. There are permanent structures and developments not considered yet.
57. The Consent /Court orders of 3/04/2014 by Hon L Kimaru J (as he then was) to have parties/Counsel meet the Government Surveyor at Machakos for survey of the properties and after the Survey, the Survey Plan was to be presented to Court for the Court’s Approval and in case of any objections the Court was to consider the same has not been completed/complied with.

Beneficiaries

58. Beneficiaries comprise of the children of the deceased as outlined in the judgment of 21/9/2012. If the children are deceased the grandchildren are entitled only to the share of their parent in the deceased’s estate.



59. In *Christine Wangare Gachigi v Elizabeth Wanjira Evans & 11 Others* NKU Civil Appeal 221 of 2007[2014] eKLR where the Court held;

“Although Sections 35 and 38 of the *Laws of Succession Act* is silent on the fate of surviving grandchildren whose parents’ pre-deceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child’s issue alive or en ventre sa mere or that date of the intestate’s death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate’s death.....

We affirm the learned trial Judge’s decision that the beneficiaries of the estate of the deceased herein comprised all the deceased’s children surviving as at the time of distribution and the grandchildren of the deceased children of the deceased who had either predeceased her or died shortly after presentation of the Succession Proceedings to court.”

60. The 4th Administrator’s Further List of Documents has annexed Beneficiaries Affidavit of 24/9/2022 that lists parties ID numbers signatures and some are blank and they have not consented/filed protests. The Court has to be satisfied that the beneficiaries have obtained their rightful share and beneficial interest from the deceased’s estate by the Administrator (s) filing amended Summons for Confirmation of Grant reflecting actual property or interest as envisaged in the judgment of 21/9/2012 with their written consents and/or signatures and identification in person by correspondence or representation.

61. Section 71 *LSA* proviso reads;

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

62. See also; *In the matter of the Estate of Solomon Odwar Anyango (deceased)* Succession Cause No 142 of 2015 eKLR The Court held relying on Section 71 *LSA*, in distribution of deceased’s estate, the Court confirming the grant is obliged to identify each beneficiary and their share before confirming the grant.

63. The Parties have through Counsel filed the Government Surveyor’s Report of 6/10/2021 and the Report by the 1st 2nd & 3rd Administrators Report on Execution of the Ruling dated 17/5/2021. They sought adoption of the Surveyor’s Report of 6/10/2021 and title deeds issued in the names of the Administrators who will distribute to their respective households. The Administrators undertake to resolve any issue arising among the estate’s beneficiaries on the already done sub divisions and proposed that valuation to be conducted on the 2 properties Plot No 15 A & 15 B before sale and proceeds distributed amongst the beneficiaries.

Survey

64. The Surveyor’s Report filed on 6/10/2021 has annexed an aerial view of the properties and ground measurements of Matungulu/Sengani/1158 7.1.acres each A,B,&C, Machakos/Ngulumuni/774 15 acres 3 parcels & 94 acres 3 Parcels.
65. This Court finds the Survey report inconclusive because, from the naked eye the portions are not equal as alleged. Secondly, the survey does not show which household is allocated which parcel, and



whether there will be access from each parcel. Thirdly, where permanent structures and developments are is not indicated and which household resides where on the land. Fourthly, the 3rd parties and where they occupy is not indicated. Fifthly, were the administrators and/or beneficiaries and/or their representatives present during the survey. Sixthly, what did the parties state during the survey were they all in agreement or they differed and what are the challenges with regard to survey/subdivision according to the judgment of 21/9/2012?

The Surveyor is the Expert witness that visits and surveys the suit-properties and informs the Court the true position on the ground to aid resolution of any dispute arising/pending distribution of the estate. The Consent by parties before Hon. L. Kimaru is not fully complied with.

3rd Parties/Purchasers

66. Parties have made allegations and counter allegations of who sold part of the land parcels that comprise of the deceased's estate. The fact of sale of part of the deceased's estate is fortified by various copies of agreements for sale in the Court record.

The Survey ought to identify contested areas of the estate. However, this Court has the requisite jurisdiction to adjudicate over the administration and distribution of the deceased's estates by conferring beneficial interest and not proprietary interest. The forum to determine legal sale, use, occupation and ownership of land is with the Environment & Land Court.

Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR where the court observed as follows:

“.....The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the *Probate and Administration Rules* are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependents. However, claims by and against third parties, meaning persons who a neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the *Probate and Administration Rules*. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.....

67. Suffice is that any Beneficiary / Administrator who sold any part of the deceased's estate shall be deemed to hold the proceeds of the sale in trust for the beneficiaries or the sold portion is to be apportioned as part of the beneficiary/administrator/household of the vendor's portion.

Order 23 of the Judgment of 21/9/2012 reads;

68. ‘In the alternative to number 22 above, the remaining 3 Cooperating Administrators are at liberty to seek the assistance of the Deputy Registrar of the Family Division to execute the necessary paperwork for any transaction that needs to be executed in furtherance of the smooth administration of the estate in the event of default on the part of any administrator to play his role in the administration of the estate.’



69. The Order 23 will be applicable after the survey is confirmed in terms of the Judgment of 21/9/2012 which is not suspended or overtaken by events. The judgment remains a valid, regular and legal judgment of the Court until successfully reviewed or appealed against. This Court takes the view the subsequent consents/Court orders and Rulings are to resolve arising challenges in the course of compliance of the said judgment and aid the conclusion of administration and distribution of the estate of the deceased. From the highlighted issues, the Order 23 of the Judgment will apply once parties resolve the pending issues.

Disposition

1. The Application filed on 26/8/2022 is partly upheld and partly withheld as it is premature as follows;
2. Order 23 of Hon. Lady Justice R. N. Nambuye dated, read and delivered by Hon. Justice Majanja on the 21st day of September, 2012 shall be effected after the pending matters are resolved.
3. The 2nd Administrator's family Joseph Kimanzi Muthiani shall commence the process to obtain limited grant ad litem for a member of 2nd Administrator's family to step in as Co Administrator's in estate of the Deceased herein.
4. The Court notes in the Court file correspondence suggesting that 3rd Administrator Anthony Musau Muthusi passed on. If so similar order pertains to his estate and /or family to obtain limited grant to step in as Co -Administrator in the deceased's estate.
5. The Surveyor shall file a comprehensive Report on the survey and subdivision of the suit properties Machakos/Nguluni/774 & Matungulu/Sengani/1158 confirming measurement, acreage, location, survey/subdivision, which household is on which portion, 3rd parties' occupation, access and permanent structures. The Report should confirm that survey was by and in the presence and/or representatives of Administrators/
Beneficiaries and/or any agreement/ grievances raised during the survey.
6. If or when the survey/subdivision is conducted again, if security and safety required the OCS Machakos to oversee the process in Machakos/Nguluni/774 and OCS Matungulu to oversee the process in Matungulu/Sengani/1158.
7. The Administrator (s) to file Amendment of Summons for Confirmation on record listing the beneficiaries of the 3 households with ID numbers and written Consents to be approved by the Court under Section 71 *LSA*.
8. If any of the Administrators fails to comply with the above conditions then Order 23 shall be invoked by the Court by mention of the matter before Court for Interpartes proceedings.
9. The matter is family matter and therefore no orders as to Costs.
10. Further Mention for Compliance/Directions on 23/2/2023.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 16/2/2023
(PHYSICAL/VIRTUAL CONFERENCE).**

M.W.MUIGAI

JUDGE

In the presence of

Mr. Ayora - for the applicant



Mrs Nzau - for the 3rd administrator/respondent

Geoffrey/Patrick - court assistant(s)

16/02/2023

Mr. Ayora:

1. Joseph Kawinzi Muthiani 2nd Administrator passed on last year
2. Benjamin Wambua James 1st Administrator passed on during the pendency of this application and is due for burial next week.
3. Anthony Musau Muthusi 3rd Administrator is alive and the application was made in error.

COURT: The family of the 1st Administrator to pursue limited grant. Further mention on 20/04/2023

Serve the other party.

M.W.MUIGAI

JUDGE

Mr. Ayora: There is massive development of permanent structures since this application was filed and this will cause a problem.

Court: The matter shall be resolved by the Surveyor's meeting/report that shall inform the beneficial interest to beneficiaries and thereafter proprietary interest to the purchasers by the Beneficiaries

Further mention for directions on 20/04/2023.

M.W.MUIGAI

JUDGE

16/02/2023

