



**In re Estate of Kamau Muthumbi (Deceased) (Succession Cause
249 of 2010) [2023] KEHC 505 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 249 OF 2010
TM MATHEKA, J
FEBRUARY 2, 2023**

N THE MATTER OF THE ESTATE OF KAMAU MUTHUMBI (DECEASED)

BETWEEN

SAMMY KARIUKI KAMAU 1ST PETITIONER

ALICE HAKI KAMAU 2ND PETITIONER

AND

NAOMI WAIRIMU KAMAU 1ST OBJECTOR

JAMES MUNGAI KAMAU 2ND OBJECTOR

PETER MAINA KAMAU 3RD OBJECTOR

JOHN MUHORO KAMAU 4TH OBJECTOR

THOMAS MUTHAMA KAMAU 5TH OBJECTOR

RULING

1. Kamau Muthumbi died on the 6th of May 1996 aged 80 years. He was a polygamist married to two wives. Namely; Alice Haki Kamau (1st wife) and Serah Mukuhi Kamau (2nd wife). His second wife predeceased him and at the time of his demise he was survived by his first wife and children. Namely;

1. Philomena Njeri Kamau,
2. Sammy Kariuki Kamau,
3. Muhoro Kamau,
4. Simon Nderitu,
5. Maria Wambui,



6. Muthama Kamau,
 7. James Mungai,
 8. Peter Maina and
 9. Wanjiku Kamau.
2. All his children were adults at the time of his death.
 3. The first wife Alice Haki Kamau filed a succession cause in Senior Resident Magistrate Court in Molo, ie, Succession Cause No 4 of 1997 petitioning for letters of Administration Intestate on February 25, 1996. The same were issued to her on May 16, 1997 and confirmed on August 31, 1999.
 4. In the Supporting Affidavit to the petition, sworn by Alice Haki Kamau on 31.8.1999 the following were listed as estate's properties:-
 1. Molo South/Ikumbi Block 3/73 (Moto) – Alice Haki Kamau holding it in trust for James Mungai, Muthama Kamau, Peter Maina & Simon Nderitu
 2. Mau Summit/Molo Block 5/181 (Moto)- Philomena Njeri Kamau
 3. Mau Summit/Molo Block 5/182 (Moto)- Alice Haki Kamau
 4. Mau Summit/Molo Block 5/6 (Moto)- Alice Haki Kamau
 2. The 1st Petitioner, Sammy Kariuki Kamau filed this cause on May 18, 2020. Vide Summons dated May 18, 2010 he sought to have the grant issued and confirmed to his late Mother Alice Haki Kamau revoked on grounds that it excluded him as one of the beneficiaries and that it was obtained fraudulently. The record does not reflect the ruling of this Application.
 3. On August 14, 2013, the Petitioners herein vide an Application dated August 13, 2013 sought to have the grant of letters of administration issued jointly to them confirmed, transfers that may have taken place in LR Molo South Ikumbi/73, Mau Summit Block 5/181 & Mau Summit Block 5/182 canceled and the costs of the Application. The Application was supported by their joint affidavit sworn on the 13.8.2013. In that affidavit the petitioners herein described themselves as Administrators. However, the record does not show when the two were appointed as such.
 4. Before the hearing and determination of the application, the objectors Naomi Wairimu Kamau, Muthumbi Kamau, Peter Mungai Kamau & Muhoro Kamau on June 12, 2014 lodged an objection to making of a grant to the Applicants/petitioners brought under Section 68 of the *Law of Succession Act* cap 160 and rule 17(1) of the *Probate and Administration Rules*. The grounds for objections were that the petitioners fraudulently filed petition for grant of letters of Administration Intestate by making false statement and concealment of the true facts from this honorable court, failed to disclose to the court that the deceased Kamau Muthumbi had two wives/houses namely Alice Kamau 1st wife & Selah Mukuhi 2nd wife deceased and excluded them from the list of beneficiaries of the deceased's estate and the proceedings herein.
 5. The objection is supported by an Affidavit of the 1st Objector James Mungai Kamau sworn on the same date of June 12, 2014 reiterating the above grounds.
 6. Philomena Njeri Kamau daughter of the deceased also filed an Affidavit of Protest against the Confirmation of grant to the petitioners on June 12, 2014, sworn on June 10, 2014. She accused the 2nd petitioner for filing another succession cause in respect to the same estate of the deceased and contended



that she wants to fraudulently obtain the grant as she has failed to obtain consent from all beneficiaries and furnish this Honourable Court with full inventory of the assets of the deceased's estate.

7. She averred that she is one of the beneficiaries of the deceased's estate having been given 0.51 acres of the estate's land known as Mau Summit/Molo Block 5/181 (Motto) and issued with a title deed of the said portion of land since the year 2009, has substantially developed the said parcel and therefore entitled to the same.
8. The 2nd petitioner swore a Replying Affidavit in opposition to the Objection on July 8, 2014. She deposed that the deceased during his lifetime gave the applicants a land known as Molo/Ikumbi Plot No 73 – Mawingo measuring 6 acres and which land they have already sold.
9. She deposed that the objectors are children of her late co-wife Serah Mukuhi and that the deceased had informed the 1st objector to build a house for them at Molo/Ikumbi Plot No 73 –Mawingo.
10. She averred that the objectors knew the deceased had shared his property between the two families in his lifetime and that Mau Summit Plot No 181 had been left to her while Molo Mau Summit Plot No 182 had been given to the 1st Petitioner. She prayed the grant be confirmed.

The Evidence

Petitioner's Case

11. The 2nd petitioner Alice Haki Kamau confirmed that the deceased was married to her and Serah Mukuhi and that the Parcels of Land in question belonged to the deceased. She said the objectors and the protestor Philomena Kamau are children of her co-wife and that they were given a parcel of land by the deceased in Mawingo Molo which they have since sold. She said her co wife during her lifetime never stepped into the land where she lived and that none of her children were allocated the Land there. She was unaware that the 1st petitioner was given land by the deceased and had no problem with the 1st petitioner being given her land. She believed that only her children are entitled to inherit the estate's property.
12. The 1st Petitioner testified that when his step Mother Serah Mukuhi passed on, he went to Nairobi at Kangemi and took her children Muthama, Mwangi and Simon Wairimu to live with him and his mother Alice Haki Kamau on plot No 181 which belonged to the deceased. He testified in support of the evidence of the 2nd petitioner that the deceased had left land to the objectors at Ikumbi Mawingo which has since been sold. He said that land measured approximately 4.6 acres.
13. It was his testimony that in their house they were 5 children two are dead and the remaining ones are him, Philomena Njeri and Wanjiru Kihuyu. That Wanjiru Kihuyu is married and does not wish to inherit while Philomena Njeri was given Land in Kiambaa which is registered in the 2nd Petitioner's name. He stated that he is in possession of Plot No 182 while his mother lived on Plot 181 and that prior to staying on plot No 182 he lived in Molo Moto farm which is 5 acres and registered in the 2nd petitioner's name.
14. He said the protestor illegally registered plot number 181 in her name and asked this court to cancel it. That plot number 181 is an acre while plot 182 measures 1 ¼ acres. He proposed plot number 181 to go to the 2nd Petitioner while 182 be given to him.

Objectors' Case

15. OW1, James Mungai Kamau testified that he was a son of the deceased's second wife. That the first wife Alice Kamau had three children. Namely; the 1st petitioner, Philomena Njeri (protestor herein)



and Wanjiru Kihuyu While their mother had 8 children i.e Muhoro Kamau, Simon Nderitu, Maria Wambui, James Mungai, Muthama Kamau, Peter Maina, Jane Wanjiku & Wairimu. He stated that only five (5) of his siblings are alive.

16. It was his testimony that the deceased had the following parcels of land:-
 1. Molo South/Ikumbi Block 3/73
 2. Mau Summit/Molo Block 5/6 (Moto)
 3. Mau Summit/Molo Block 5/181 Moto
 4. Mau Summit/Molo Block 5/182 Moto
17. He said the first plot measured 5 ½ acres and it was given to their house. That the deceased had constructed a house for their mother thereon. He confirmed they sold it in 2010 and bought another land in Naivasha before the distribution of the estate.
18. Regarding the second plot, he stated that it measures approximately 5 ½ acres and that the 1st petitioner lives there. That third parcel is 1¼ acres and it was subdivided by the deceased. He said the deceased sold ¼ acre to Daniel Gitahi out of this plot and the rest was occupied by the 2nd Petitioner. It was his evidence that the deceased during his lifetime had told each one of them that they should have a plot in Mau Summit/Molo Block 5/181 Moto. He stated that he; Muthama Kamau and Peter Maina each have titles of the plots excised from Mau Summit/Molo Block 5/181 Moto. He did not have evidence of transfer of these plots to them and confirmed that they obtained the titles in the year 2007 before the grant was confirmed.
19. With respect to plot 5/182, he said it was given to the protestor by the deceased in presence of the 2nd Petitioner and prayed that the same goes to her. He prayed that he should be given a share in plot number 181.
20. OW2- Peter Maina Kamau testified in support of the testimony of OW1 that the 1st Petitioner was given land at Kadenyi by the deceased. He supported the proposal that plot 182 should be given to the protestor and similarly prayed to be given his share of land in in Mau Summit/Molo Block 5/181 Moto
21. OW3 – Philomena Kamau Muthini testified that the 1st petitioner was given 6 acres of land in Molo by the deceased before his demise. She said that land is still there. It was her testimony that she was given Plot No 182 and that the 1st Petitioner in 2007, during post-election violence requested her to stay on her plot in Mau Summit/Molo Block 5/182 Moto and was to leave afterwards but declined to do so to date. She stated that she has constructed a house on her plot and prayed she be given the same. She testified that her mother lived on plot 181 and was buried there. It was her testimony that the 1st petitioner should go and stay on his plot and that the objectors herein be given a share in plot no. 181. She confirmed the objectors had been given a land by the deceased and they sold the same in 2010.

Submissions

Objectors' Submissions

22. The objectors urged the court to invoke the provisions of section 40 of the [Law of Succession Act](#) and equally distribute the remainder of the estate.



Petitioners' Submissions

23. The petitioners submitted that the objection is frivolous and should be dismissed since all the objectors were given their inheritance by the deceased before his demise but they sold them and shared proceeds amongst themselves.
24. The 1st petitioner submissions on whether plot No 181 was a gift is immaterial as the evidence on record does not show that he was gifted the same.
25. The 1st petitioner prayed that he be granted the remaining parcels of land.

Analysis & Determination

26. Having considered the pleadings, entire evidence and the submissions of both counsel, I am of the considered view that the following issues crystalize for determination: -
 1. What properties did the deceased leave behind?
 2. Whether the deceased established his wishes on how his two parcels of land were to be subdivided.
 3. How should the estate be distributed?

Issue No 1

27. The objectors averred that the Deceased had the following parcels of land;
 1. Molo South/Ikumbi Block 3/73
 2. Mau Summit/Molo Block 5/6 (Moto)
 3. Mau Summit/Molo Block 5/181 Moto
 4. Mau Summit/Molo Block 5/182 Moto
28. It was agreed by all parties herein that the first property was given to the second house and the same was sold in the year 2010..
29. Regarding the second property, the objectors contended that it was given to the 1st petitioner by the deceased during his lifetime and that it is registered in the deceased's name. This Position was disputed by the petitioners.
30. The onus of proving the alleged parcel exists and it belonged to the deceased entirely lie on the objectors as is set out under section 107 (1) of the *Evidence Act*:

“Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.”
31. The objectors herein did not adduce any evidence to prove that this land belonged to the deceased and that it was given to the 1st petitioner. It is my opinion therefore that this land does not exist and is not available for distribution.
33. Regarding the third and fourth parcels of land, the evidence on record show that they belonged to the deceased.



Issue No 2

34. It is not in dispute that the 1st petitioner and the objectors are beneficiaries of the estate of the deceased in terms of section 29 (a) of the *Law of Succession Act*, which provides that:
- “for the purposes of this part, ‘dependent’ means the wife, or wives, or former wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”
35. Section 42 (a) of the *Law of Succession Act*, states that:
- “where an intestate has, during his lifetime by will, paid, given or settled any property to or for the benefit of a child, grandchild or house, that property will be taken into account in determining the share of the net intestate estate finally accruing to the child or grandchild or house.”
36. Based on the foregoing provision of the law and the evidence on record, it’s clear the deceased during his life time allocated land parcel No Molo South/Ikumbi Block 3/73 to the second house & Mau Summit/Molo Block 5/181 Moto & Mau Summit/Molo Block 5/182 Moto to the first house.
37. In the circumstances therefore it is my opinion that deceased established his wishes on how his aforesated parcels of land were to be distributed during his lifetime.

Issue No.3

38. The evidence of the 1st petitioner is that he has been in occupation of Plot No 181 while he cultivates on plot No 182. He stated that they were three remaining children from the first house. That Wanjiru is not laying any stake on the estate. He contended that the protestor who is his biological sister was given a land in Kiambaa which is registered in his late mother’s name. The protestor on her part contended that she was given plot No 182 a fact which has been supported by the objectors. The evidence of the 1st petitioner shows that the protestor was not given any land by the deceased. It would be unfair to give the 1st petitioner both plots No 181 and 182. He has been in occupation of Plot No 181 and it is only fair that he continues occupying it while the protestor is given plot No 182.
39. The Objectors concede that they were given their inheritance by the deceased before his demise and they sold it and bought some other land.
40. Going by section 42 of the *Law of Succession Act* which states: Previous benefits to be brought into account where-
- “(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”
41. Taking into account the fact that they objectors had their own share, Summary Kariuki Kamau and Philomena Njeri were not given anything it is only fair that the inherit the remnant of their father’s estate.
42. In the end the following orders issue;



- i. The objection vide the application dated June 12, 2014 is dismissed.
- ii. Sammy Kariuki Kamau to inherit the parcel No Mau Summit Block 5/182.
- iii. Philomena Njeri Kamau & Sarah Wanjiru to inherit Mau Summit Block 5/181 in equal shares.
- iv. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 2ND DAY OF FEBRUARY, 2023.

MUMBUA T MATHEKA

JUDGE

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