



In re Estate of Jason Munyi Migwi (Deceased) (Miscellaneous Succession Application 80 of 2013) [2023] KEHC 2462 (KLR) (21 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS SUCCESSION APPLICATION 80 OF 2013**

RM MWONGO, J

MARCH 21, 2023

**IN THE MATTER OF THE ESTATE OF JASON
MUNYI MIGWI ALIAS JASON MUNYI DECEASED**

BETWEEN

TABITHA MUTHONI JASON APPLICANT

AND

PATRICK MUNENE MUNYI RESPONDENT

JUDGMENT

1. The applicant's application dated December 16, 2020 seeks:
 - a) That the Honourable Court declare the remaining portion in estate of Jason Munyi Migwi alias Jason Munyi in Land Parcel No. Inoi/Kaitheri/58B be inherited by the Applicant since she was left out of the Will dated 11.7.1990 and as per the High Court order in Embu dated 17.11.2011.
 - b) That costs of this application be provided for.
2. The application is supported by the Affidavit of the applicant of even date. It seeks inter alia, that:
 - a) The will be respected as it is.
 - b) That the portion undistributed be shared by the deceased children equally except for Julius G. Mwai who was given land by his father.
3. The critical aspect contained in the application is that the applicant reiterates that she is a child of the deceased who was left out of the deceased's will, and that she now wants her share.
4. In paragraph 12 of the supporting affidavit, the applicants depones that the deceased left some shops and room which are not shared.



5. The applicant annexed a copy of the Will, the confirmed grant issued on March 22, 1995 and the order of the court made on November 17, 2011.
6. The respondent opposed the application on the grounds that the applicant has previously made several similar applications which were unsuccessful such as that made on 16.1.2015; that the court is now functus officio; and that the applicant is a vexatious litigant.
7. In her reply to the grounds of opposition the applicants reiterated the contents of her application. She added that on 17.1.1990 it was agreed in the presence of the deceased and his sons Justus Gitari, David Muriuki and Patrick Munene as follows:

“We have agreed that this land of Jason (deceased) he will be taken a photograph with our children all administrators of this land (sic). It is we 5 people together with Mwai Jason also Tabitha Muthoni will be given each person a place to build also to cultivate each person their side.

The people who will share this land of Jason are these:

1. Justus Gitari
2. David Muriuki
3. Patrick Muenne
4. Tabitha Muthoni
5. Mwai Jason

The order of the High Court at Embu is attached hereto”.

8. The applicant finally states on the strength of an annexed Sketch Plan, that there are portions of land which were not shared out. No evidence was adduced of these facts.
9. The applicant in her submissions states that it is not in dispute that the applicant is a child of the deceased, that she is not married and that she was not provided for. The applicant seeks that the court, guided by article 159 (2) (d) of *the Constitution* to determine matters without undue regard to technicalities to declare a reasonable provision for the applicant.
10. The applicant invokes section 26, 27 and 28 of the *Law of Succession* that on dependants, and asserts that the court has unfettered discretion to make reasonable provision for a dependant of the deceased.
11. Counsel cites *James Maina Anyangu v Lorna Yimsiba & 4 Others* [2014] eKLR where Emukele J made provisions for children left out in a will.
12. The respondent submits that the applicant filed an application on 12.1.2020 seeking revocation and annulment of the grant. The court issued an order on 17.11.2011 which has not been varied set aside or appealed against, directing that the Will be respected as it is.
13. The respondent argues that the Administrator distributed all the deceased’s estate in accordance with the deceased’s Will, and nothing remains undistributed.

Indeed, argues the respondent, the portion the applicant considers as not having been distributed is the portion where she has built her house which is her son’s land.



Analysis and Determination

14. The applicant's application accepts the Will as it is, but does not specify in respect of which aspect the land or property in the Will is undistributed. The Will at Paragraph 3 indicates the properties of the deceased as:
 - a. Land Parcel Inoi/Kaitheri/58, which is bequeathed to the deceased's grandson:

"According to the current occupation and unsafe pf the land by the following sons and daughters: Jason Gitari Munyi, Patrick Munene Munyi: Tabitha Muthoni Munyi Justus Munyi and David Muriuki Munyi".
 - b. Commercial premises with 3 shops and 6 rooms and 8 residential rooms.
15. The respondent exhibited an official search for Inoi/Kaitheri/58 which shows that the land was sub-divided and distributed on March 4, 2022, and the sub-divided properties thereof are indicated.
16. With regard to the commercial premises in the Will Clause 3 (b) there is no indication of whether the property was titled and whether it was subdivided.
17. In any event, it was for the applicant to prove that there is undistributed property of the deceased's estate, which the administrators deny is the case. On that basis alone, the applicant's application is bound to fail.
18. The applicants seeks that the court exercise its discretion to make provision for the applicant under the provision for dependants in Part III of the *Law of Succession Act*.
19. Section 26 entitles the court to make provision for dependants not adequately provided for by a will or on intestacy. The court must come to the opinion that reasonable provision for that dependant was not made.
20. However, section 30 *Law of Succession Act* provides:

"No application under this Act shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71".
(Emphasis supplied)
21. In the present case the applicant exhibited the certificate of Confirmation of Grant of the deceased's estate issued by the court, way back on March 22, 1995. Accordingly, applying the provisions of section 30 Law of Succession, the applicant was barred from invoking the dependency provisions from March 22, 1995.
22. Ultimately, the court has no choice but to come to the conclusion, which it hereby does, that the applicant's application is unsuccessful and it is hereby dismissed.
23. Order accordingly.

DATED AT KERUGOYA THIS 21ST DAY OF MARCH, 2023

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R. MWONGO

JUDGE

In the presence of:



1. Githinji - holding brief for A.P Kariithi for Applicant
2. Kahiga G - for Respondent
3. Court Assistant, Murage,

