



REPUBLIC OF KENYA



In re Estate of Paul Mwirebua Kaguruko (Deceased) (Succession Cause 88 of 1998) [2023] KEHC 2194 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 88 OF 1998**

EM MURIITHI, J

MARCH 16, 2023

**IN THE MATTER OF THE ESTATE OF PAUL MWIREBUA KAGURUKO
(DECEASED)**

BETWEEN

JENNIFER MUKUBU PETITIONER

AND

ROSE NCURUBI MWOBOWIA ADMINISTRATRIX

AND

SILAS KINUU MWENDA 1ST APPLICANT

ELIUD KIMATHI MWIREBUA 2ND APPLICANT

FLORENCE GACHERI MURITHI 3RD APPLICANT

RULING

1. Paul Mwirebua Kaguruko ('the deceased') died on December 26, 1997 and he was survived by the following beneficiaries:-
 - a) Jennifer Mukubu - widow (now deceased)
 - b) Silas Kinuu Mwenda - son
 - c) Eliud Kimathi Mwirebua - son
 - d) Justus Murithi Ikiugu - son-in-law
 - e) Rose Ncurubi Mwobobia - daughter-in-law
2. The deceased had 2 parcels of land namely Ntima/ntakira/1949 And Ntima/ntakira/1302.



3. The petitioner was issued with Grant of Letters of Administration which was subsequently confirmed on 20/12/2004. Upon the demise of the petitioner on 12/7/2007, an Amended Grant of Letters of Administration was jointly issued to Silas Kinuu Mwenda and Rose Ncurubi Mwobobia on 30/4/2019. On 25/7/2019, Eliud Kimathi Mwirebua and Florence Gacheri Murithi, the 2nd and 3rd applicants herein, applied for revocation of the grant, which was allowed on 28/9/2020.
4. The 1st applicant filed chamber summons October 7, 2020 brought under section 71 of the [Law of Succession Act](#), seeking confirmation of the grant of administration issued to Silas Kinuu Mwenda and Rose Ncurubi Mwobobia.
5. At paragraph 6 of his supporting affidavit, the 1st applicant avers that they have all agreed, save for Rose Ncurubi Mwobobia, that L.R No. Ntima/ntakira/1302 measuring 5.90 acres should be divided equally among Silas Kinuu Mwenda, Rose Ncurubi Mwobobia, Eliud Kimathi Mwirebua and Florence Gacheri Murithi (deceased). He avers that L.R No. Ntima/ntakira/1949 measuring only 0.064 Ha was given to him by the deceased as a gift inter vivos and the same has already been registered in his name with the blessings of the entire family.
6. Rose Ncurubi Mwobobia, the 2nd administrator herein has opposed the application vide her replying affidavit sworn on 3/6/2021. She terms the application as an abuse of the court process, as the matter was fully heard and determined by Justice Sitati and a ruling delivered on 20/12/2004, and no appeal has been preferred. She urges the court to refrain from redistributing the estate by altering the mode of distribution as ordered by the court on 20/12/2004, as that would amount to sitting on appeal on its own ruling.
7. Eliud Kimathi Mwirebua, the 2nd applicant swore a supplementary affidavit on 27/6/2022 in support of the applicant's application.

Submissions

8. The applicants urge that the initial certificate of confirmation of grant was revoked and there is currently no approval on distribution in respect of this estate. They urge there is no dispute that L.R No. Ntima/ntakira/1949 should go wholly to the 1st applicant while L.R No. Ntima/ntakira/1302 should be distributed equally among the 4 beneficiaries. They urge the court to appoint just the 1st applicant to be the only administrator herein to avoid complications and facilitate the administration.
9. The 1st administrator/the protestor herein urges that the court has become functus officio as the matter herein was heard and fully determined by Sitati J. and a ruling delivered on 20/12/2004. She urges that the direction by Mabeya J. was given out of ignorance of the correct position of the matter as it was done in her absence. She, however, urges the court to factor in the 3.10 acres of L.R No. Ntima/Ntakira/1302 bought by her deceased husband from the deceased herein, during distribution of the estate.

Analysis and Determination

10. Before delving into the merits of this case, the court wishes to address the issue whether the court is functus officio by virtue of the decision of Sitati J. of 20/12/2004. It is true that the grant herein had been previously confirmed by Sitati J. on 20/12/2004, and a certificate of confirmation of grant issued.



However, when the court was moved to revoke the grant by the 2nd applicant on 25/7/2019, and the Court (Mabeya J) on 28/9/2020 ruled as follows:

“I have considered the record. The alleged replying affidavit is not on record. The application remains unopposed. The application dated 25/7/2019 is hereby allowed as prayed. Let the parties file an application for fresh distribution within 30 days.”

11. This court finds that the grant of letters of administration confirmed on 20/12/2004 by Sitati J was revoked on 28/9/2020 by Mabeya J. It goes without saying, therefore, that the court is not functus officio, as urged by the 1st administrator.
12. The undisputed facts in this case are that although the deceased was the registered proprietor of L.R No. Ntima/ntakira/1949 And Ntima/ntakira/1302, all the beneficiaries are in agreement that the former parcel ought to solely go to Silas Kinuu Mwenda, the 1st applicant herein. It is, therefore, the distribution of L.R No. Ntima/ntakira/1302 (henceforth called the suit property) measuring 5.90 acres which is contested.
13. The 1st administrator has urged the court to first subtract 3.10 acres from the suit property, allegedly bought by her deceased husband from the deceased herein, and then thereafter distribute the remainder equally among the 4 of them. The applicants have completely avoided the contested issue of the alleged purchase of a portion of the suit property by the 1st administrator’s husband. They instead urge the court to distribute the suit property equally among the 4 of them, since they are all children of the deceased.
14. The court has looked at the speech statement by the deceased which was made on 28/8/1995, which the 2nd applicant refers to as a will. The deceased said as follows:

“This Land of mine, where we are now, which borders M’Kirigia in the West and Jediel Kiogora in the East, is five point nine zero (5.90) acres. The Land which was at Nkairire was bought for Jotham Mwobobia. Sketch should be read to find out how big it was and when found out, it should be given to Jotham Mwobobia. The remainder to be shared among three sons namely Silas Kinuu, Jotham Mwobobia and Eliud Kimathi. When sub-dividing the land, Jotham’s will border M’Kirigia and Eliud’s will border Kiogora. The lands at Kithima belongs to Eliud and Jotham. They are their own lands. The piece of land at Magundu belongs to Silas Kinuu, the whole of it.”

It appears from that statement that a portion of the suit property was indeed bought for the 1st administrator’s husband.

15. The court is certain that the 1st administrator has proved on a balance of probabilities that 3.10 acres of the suit property was purchased by her deceased husband from the deceased herein. After excising the 3.10 acres bought by the 1st administrator’s husband from the suit property, the remainder of the suit property will be distributed as required by the provisions of section 38 of the *Law of Succession Act*, which provides that:

“38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”



ORDERS

16. Accordingly, for the reasons set out above, the 1st applicant's application dated 7/10/2020 is hereby allowed. The grant issued to Silas Kinuu Mwenda, the 1st Applicant herein, and Rose Ncurubi Mwobobia, the 1st administrator herein, is hereby confirmed in the following terms:
- a. L.R No. Ntima/ntakira/1949 wholly goes to Silas Kinuu Mwenda.
 - b. L.R No. Ntima/ntakira/1302 will be distributed as follows:
 - i. Silas Kinuu Mwenda - 0.70 acres
 - ii. Eliud Kimathi Mwirebua - 0.70 acres
 - iii. Rose Ncurubi Mwobobia - 3.80 acres (inclusive of 0.70 acres for Jotham Mwobobia)
 - iv. Justus Murithi Ikiugu (taking the share of Florence Gaceri Murithi) - 0.70 acres
 - c. The request for appointment of the 1st applicant as the only administrator of the deceased is declined.
17. There shall be no order as to costs.
18. Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Gikunda Anampiu & Co. Advocates for the Petitioner

M/S L. Kimathi Kiara & Co. Advocates for the protestors.

