



**In re Estate of Joel Mbali Mutie (Deceased) (Succession Cause
226 of 2013) [2023] KEHC 1823 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1823 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 226 OF 2013**

MW MUIGAI, J

MARCH 2, 2023

IN THE MATTER OF

**TIMOTHY MUTUA MBALI 1ST ADMINISTRATOR
REDEMPTA GRACE MBALI 2ND ADMINISTRATOR
ALEX MWAKA MBALI 3RD ADMINISTRATOR**

RULING

1. Joel Mbali Mutie died intestate aged 82 years on December 6, 1998 vide Death Certificate serial No. 488808.
2. Ngonyo Mbali and Timothy Mutua Mbali petitioned for letters of administration intestate and annexed the following documents:
 - a. The Death Certificate of 488808 Joel Mbali Mutie.
 - b. The Chief's letter dated January 18, 2013 confirming the list of beneficiaries left behind by the deceased as follows:
 - 1st Hse
 1. Ngonyo Mbali – wife
 2. Francis Musyimi – son – (dcd)
 3. Munini Mbali - daughter
 4. Patrick Mbali – son - (dcd)
 5. Grace Mbali – daughter
 6. Serah Mbali – daughter



7. Muia Mbali - son – (dcd)
8. Margaret Mbali – daughter
9. Mueni Mbali – son
10. Flora Mbali – daughter
11. Nduku Mbali – daughter (dcd)

2nd Hse

1. Phyllis Mutindi Mbali – wife - (dcd)
2. Boniface Luka Mbali – son
3. Julius Mbali –son - (dcd)
4. Timothy Mutua - son
5. Mbithe Mbali – daughter
6. Mary Mbali – daughter
7. Mutie Mbali – son
8. Mumbua Mbali – daughter
9. Monthe Mbali – daughter – (dcd)

3rd wife

1. Syevuo Mbali – wife
2. Joyce Mbali – daughter
3. Mutile Mbali – daughter
4. Muli Mbali – son
5. Nzioka Mbali – son
6. Mwaka Mbali – son
7. Wayua Mbali – daughter – (dcd)

c. Assets and Liabilities as follows;

1. Machakos/Mua Hills/279
2. Mitaboni/
Mutituni/1057,No.1182,No.822,No.1203,No.1146,
No.1097,No.862,No.980,No.1284,No.863,No.1755.
3. Plot No.30 Mutituni
4. Shares at Kyanzavi Farmers Co. Ltd



3. The Grant of Letters of Administration was issued to Ngonyo Mbali and Timothy Mutua Mbali on August 13, 2013.
4. On January 28, 2016 Summons for Revocation of Grant dated January 26, 2016 was filed by Dorcas Syevuo Mbali the Applicant herein.
5. A fresh grant was issued to Ngonyo Mbali, Timothy Mutua Mbali and Dorcas Syevuo Mbali on 16th day of 2017.
6. A Chamber Summons dated February 20, 2018 was filed seeking to substitute Dorcas Syevuo Mbali (3rd Administrator) – deceased with one Patricia Mutile Munyao.
7. A Rectified grant was issued on July 18, 2018 to Ngonyo Mbali, Timothy Mutua Mbali and Patricia Mutile Munyao.
8. On July 4, 2019 Summons for Rectification and Confirmation of Grant dated July 4, 2019 was filed.
9. Affidavit of Protest sworn on November 6, 2019 by Patricia Mutile Munyao (deceased) was filed.

Chamber Summons

10. The 3rd Administrator/Applicant herein filed a chambers summons dated October 5, 2020 seeking the following orders; -
 - i. That orders do issue to substitute the 3rd Administrator Patricia Mutile Munyao (now deceased) with Alex Mwaka Mbali.
 - ii. That costs of this application be in the cause.
11. The application is supported by the affidavit of the Applicant and on the following grounds:
 - a. That Patricia Mutile Munyao passed on on March 24, 2020.
 - b. That it is in the interest of justice to substitute the 3rd Administrator to pave way for this matter to proceed to confirmation.
 - c. That all the parties in the 3rd administrator's house agree to the substitution.
12. Summons for revocation of grant dated April 14, 2021 was filed seeking to have the grant issued on the July 18, 2018 be revoked and a fresh grant issued to Timothy Mutua Mbali, Redempta Grace Mbali and Alex Mwaka Mbali. The same was accordingly issued on May 19, 2021.

Affidavit Of Protest

13. Affidavit in protest to proposed mode of distribution sworn on 8th July, 2022 by the Alex Mwaka Mbali (3rd administrator) was filed on 12th July, 2022 deposing as follows:-
 - i. That there are two beneficiaries from the 3rd house that were omitted from the petition and they pray that their names be included for purposes of distribution. The two are (i) Costar Mwendu Mbali and (ii) Irene Wayua Mbali (deceased) survived by Angela Mueni (Minor)
 - ii. That the beneficiaries of the 3rd House where the Protestor comes from are opposed to the proposed mode of distribution of some of the properties.



- iii. That after the demise of the deceased herein in 1998 the clan subdivided the deceased properties amongst the 3 families and each family knows their respective properties and have been residing and utilizing their portions for more than 20 years now.
- iv. That the mode of distribution proposed by the 2nd Administrator is highly discriminative as against the 3rd house and also tends to favor the beneficiaries of the 2nd house which he represents.
- v. That the wishes of the 3rd house is that the clan's subdivision is adopted by the court and since the same is in the custody of the 2nd administrator, he should surrender it to the court for adoption.
- vi. They are not opposed to the following proposed mode of distribution as it is in line with the clan's subdivision; -

TABLE

TR

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Name

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Description

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heirs

TR

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Ngonyo Mbali

Timothy Mutua Mbali

Alex Mwaka Mbali

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Mitaboni/Mutituni/822

(0.43 Ha)

Mitaboni/Mutituni/862

(0.21 Ha)

Mitaboni/Mutituni/1146

(0.08 Ha)

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To be distributed to the 3 houses in equal shares

To be distributed amongst the 2nd & 3rd House in equal shares

1st house absolutely



TR

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Ngonyo Mbali

Timothy Mutua Mbali

Alex Mwaka Mbali

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Mitaboni/Mutituni/1182

1. Ha)

Mitaboni/Mutituni/1284

(0.26Ha)

Mitaboni/Mutituni/1755

(0.07Ha)

Mitaboni/Mutituni/2303

0.36Ha)

Plot No.30 Mutituni

Shares in Kyanzavi famers Co. ltd

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Distributed amongst the 3 houses in equal shares

Distributed to 1st and 3rd house in equal shares

2nd house absolutely

3rd house absolutely

Amongst 3 houses in equal shares

Amongst 3 houses in equal shares

- vii. The surviving beneficiaries of the 3rd house are opposed to proposed distribution of the following properties listed here below;-

Mitaboni/Mutituni/863Mitaboni/Mutituni/1057Mitaboni/
Mutituni/1203Mitaboni/Mutituni/2189Mitaboni/
Mutituni/2220Machakos/Mua/279

Further Affidavit Of Protest

14. That there is no evidence that the said parcel of land Mitaboni/Mutituni/1057 belonged to the late Muthoka Mutie and/or he sold it to the 2nd Administrator's brother Boniface Luka Mbali.
15. That the allegations of sale of property Mitaboni/Mutituni/822 are not true and are intended to disinherit the other beneficiaries.
16. That the allegations that the 2nd Administrator sold a portion at Machakos/Mua Hills/279 is also intended to disinherit other members of the family.



17. That the 2nd Administrator did not mention the alleged sales of the above referenced plot No. Mitaboni/Mutituni/1057 and 822 and Machakos Mua Hills/279 in his application for confirmation of grant.
18. That the dam area was equally subdivided between the 3 houses and the three houses use it without interference from each other.
19. That the parcel No. Mitaboni/Mutituni/2189 be given to the purchasers on condition that this sale is proved beyond doubt.

Written Submissions

3rd Administrator/protestor

20. It is submitted that the 1st and 2nd Administrators filed the summons for confirmation of grant and the 3rd Administrator is opposed to the same due to the fact that the same has been unfairly distributed.
21. From the 1st and 2nd Administrators mode of distribution, the 3rd house is highly prejudiced and the 2nd house which is represented by the 2nd Administrator benefits from the lion's share of the deceased's estate.
22. That the subdivision was carried out 20 years ago by the clan but the 2nd respondent's is now alleging that the said subdivision by the clan was without any legal basis and it is not binding under the law.
23. That the agreement on sub-divisions made by the clan is in the custody of 2nd Administrator yet the 2nd Administrator dismisses the said subdivision alleging that it has no legal basis and not binding under the law.
24. That the clan subdivided the property equally among the three houses. No house should have an advantage over the other. All the residual properties of the deceased should be shared equally among the three houses.
25. That the properties the 2nd Administrator alleges were sold by the deceased especially with respect to Mitaboni/Mutituni/1057 & 822 and Machakos/Mua Hills 279, the sales were only introduced to the Court after the Protest was filed hence the 2nd Administrator sought to disinherit other members of the family by this unsubstantiated sales.
26. It is finally submitted that the properties should be distributed equally amongst the three (3) houses.

1st And 2nd Administrators

27. It is submitted that the protest filed herein is based on a document which was not produced before this court. That the distribution by the clan was not based on law and has no legal basis. Section 45 of *Law of Succession Act* cap 160 Laws of Kenya makes it clear that any dealing with property of a deceased person without the authority of the Court is an offence of intermeddling.
28. That the distribution of the estate should be done in a way that is equitable. Reliance is made in the case of *Mary Rono -vs- Jane Rono and another* [2005] eKLR the court stated that equality is not about mathematical equality and the court should consider the circumstances of each case.
29. It is further submitted that the distribution proposed by the 1st Administrator fits into the circumstances of this case. The issues raised in the protest were addressed in the supplementary



affidavit. The Protestor hereon has not placed before this court any material evidence that can make it deviate from the distribution proposed by the 1st administrator.

30. It is finally submitted that the deceased was married to three wives, section 40(1) of the *Law of Succession* cap 160 Law of Kenya comes to play. The net estate should be distributed among the 3 houses considering the number of children in each house as a unit therefore the position by the Protestor that emphasizes on mathematical equality between the 3 houses does not hold.

Determination

31. The court considered the pleadings and submissions by parties' and the issue for determination is the distribution of the deceased's estate amongst the beneficiaries of the estate. In consonance with distribution of the deceased's are issues raised in the Protest of excluded beneficiaries and purported sale of some of the assets that comprise of the deceased's estate.

Beneficiaries

32. Costar Mwendu Mbali and Irene Wayua Mbali (deceased) survived by Angela Mueni (Minor) are alleged to have been left out as beneficiaries of the estate of the deceased. The Law of Succession provides for distribution of the estate of the deceased to the family, spouse(s), children, if predeceased by the immediate family, then parents, siblings grandchildren etc. are beneficiaries of the estate. If the named parties are children of the deceased they are automatic beneficiaries of the deceased's estate. If they are child/children of the deceased's daughter/son of the deceased then as grandchildren they are entitled to their parent's share in the deceased's estate.

In *Christine Wangare Gachigi vs 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.”

Purchase/sale Of Deceased's Property

33. The Protestor took issue with the proposed distribution of the estate of the deceased specifically with the listed properties that were/are alleged to have been sold either by the deceased and/or during administration of the estate.
34. The Court notes with concern that the deceased died in 1998 and the succession proceedings commenced in 2013 and to date almost 10 years on the distribution of the estate remains stillborn. If the deceased sold any portion of land or land parcel and there is tangible and cogent proof presented



then the sold property/portion ought to be hived off as it is not available for distribution. The sold portion or property rightfully belongs to the Creditor of the deceased's estate.

35. If the property or portion was sold during administration of the estate of the deceased before confirmation of grant it was irregular, illegal and unlawful as provided by section 55 LSA as follows;

No distribution of capital before confirmation of grant (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.

36. Therefore, the Protest shall be determined on proof of sale of either of the properties by deceased and therefore belongs to the Creditor or if sold during administration the sale proceeds ought to have been held in trust for beneficiaries and where unavailable shall held to be part of the seller's beneficial portion/interest in the deceased's estate. In the absence of evidence of sale then the suit properties are assets of the deceased available for distribution as follows; Mitaboni/Mutituni/863 Mitaboni/Mutituni/1057 Mitaboni/Mutituni/1203 Mitaboni/Mutituni/2189 Mitaboni/Mutituni/2220 Machakos/Mua/279

Distribution

37. The distribution of deceased 's intestate estate is governed by section 34-42 of LSA. Of relevance are the following provisions;

Section 38 LSA;

Where intestate has left a surviving child or children but no spouse 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.

Section 40 LSA. Where intestate was polygamous

- (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38 Section 71 LSA proviso provides;

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

38. *Mary Rono –vs- Jane Rono and another* [2005] eKLR where Waki J.A stated inter alia that;-

“More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number



of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife and children”

39. The Court in *Re Estate Of John Musambayi Katumanga – Deceased* [2014] Eklr held as follows:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

40. Further, *In the Matter of the Estate of Nelson Kimotho v Mbiti (Deceased)* HCSC No.169 of 2000, M. Koome LJ (as she then was) directed that the estate of a polygamist be divided in accordance with the provisions of Section 40 of the Act. The estate was divided into units according to the number of children in each house with the widows being added as additional units

41. From the legal provisions and case-law outlined above, applied to the instant case, on the one hand, the Protestor contended that distribution of the deceased’s estate was done 20 years ago by the clan between the 3 houses. On the other hand, the 2nd Administrator asserted that the clan’s distribution lacked the force of law and that distribution the estate should not be equal between the 3 houses but equitably between the 3 houses based on certain special circumstances.

42. The law provides for life interest in the estate of the deceased’s estate where the beneficiaries are surviving spouse(s) and children. If there are surviving children of the estate then the estate of the deceased ought to be distributed according to section 38 LSA equally amongst the children of the deceased.

43. Where the deceased was polygamous, the family shall distribute the estate according to the various households, each household represents the wife/widow and children with/from the deceased. Distribution of the estate is as provided by section 40 LSA.

44. At this stage in the absence of proof of the sale of properties that are part of the deceased’s estate, they are available for distribution to the deceased’s family among the 3 houses equally. If and when proof is availed they shall be exempted from distribution.

45. In the absence of special circumstances presented to the court to justify equitable distribution of the estate, the distribution shall be equal distribution of the properties between the 3 houses, without demolishing or removing or evicting any beneficiary from the permanent occupation and/or residence, permanent structures and development.

Disposition

1. The Protest filed on July 12, 2022 in the absence of evidence of sale of the omitted properties will be upheld if no evidence is presented during interpartes hearing on a date to be agreed by parties.
2. If there is no objection or proof to the contrary then Costar Mwendu Mbali and Irene Wayua Mbali shall be considered beneficiaries of the estate of the deceased.



3. The Protest shall be upheld or dismissed subject to viva voce evidence presented in Court.

DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 2ND MARCH, 2023.

M.W.MUIGAI

JUDGE

