



REPUBLIC OF KENYA



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**In re Estate of Zakayo Nyaga Mburugo (Deceased) (Succession Cause
787A of 2002) [2023] KEHC 1447 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 787A OF 2002
LM NJUGUNA, J
MARCH 1, 2023**

BETWEEN

PETER NJERU ZAKAYO 1ST PROTESTOR

ANN YEMBU 2ND PROTESTOR

AND

JAMLICK KIURA ZAKAYO ADMINISTRATOR

RULING

1. The matters for determination before the court are two protests filed on January 28, 2021 and on 3/2/2022 by Peter Njeru Zakayo and by Ann Yembu Nyaga respectively.
2. The court gave directions that the protests be canvassed orally and wherein the 1st protestor submitted that his complaint is in relation to land parcel number Evurore/Kathera/963 which the administrator apportioned to Delvin Mugendi and Patrick Njeru Nyaga yet they are not beneficiaries to the estate of the deceased. It was his case that the rightful beneficiaries ought to be Sera Weru Nyaga, Julia Warue Ileri, Ann Yembu Nyaga and Peter Zakayo. That Delvin Mugendi Kiura is the son to the administrator whilst Patrick Njeru Nyaga is a person unknown to him. The 2nd protestor's case equally revolved around the same parcel number wherein she alleged that the administrator had apportioned the land to Delvin Mugendi and Patrick Njeru yet they are not beneficiaries to the estate herein. The 2nd protestor stated that Delvin Mugendi is a son to the administrator while Patrick Njeru Nyaga is a stranger to her and to the estate. She denied that her late mother had directed that the duo be apportioned land parcel number Evurore/Kathera/963.
3. The respondent/administrator on the other hand submitted that the only land in dispute is Evurore/Kathera/963. That in a meeting held on 02.09.2018, it was agreed that the suit land be divided into two portions between Patrick Njeru Nyaga who is the son to the late Jackson Mugo Zakayo, who was the deceased's son and Delvin Mugendi Kiura, his son. He offered to relinquish Delvin Mugendi's



share and suggested that the same be shared amongst the five children of the deceased herein while the portion for Patrick Njeru Nyaga should remain given that he is a son of their brother. It was his case that the deceased herein was blessed with six children and that five are still alive while one, Jackson Mugo Zakayo is deceased.

4. Sera Weru, Juliah Warue Ireri and Patrick Njeru Nyaga all supported the respondent's case.
5. I have considered and analyzed the pleadings and the evidence by the parties herein and I find that the issue for determination is whether Patrick Njeru Nyaga should benefit from the estate herein.
6. The procedure for determination of an application for confirmation in the *Probate and Administration (P & A) Rules* requires hearing of the application for confirmation of grant as set out in Rule 41 of the Probate and Administration Rules, 1980:

“ 41. Hearing of application for confirmation

(1)

(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.

7. The two protestors generally testified that they are opposed to the parcel of land known as Evurore/ Kathera/963 being apportioned between Delvin Mugendi and Patrick Njeru Nyaga as they are not beneficiaries to the estate herein. The respondents on the other hand, submitted that Patrick should inherit a portion of the suitland given that he is a son to Jackson Mugo Zakayo (deceased). Of importance to note is the fact that the deceased herein had the following children as noted from the chief's letter: Jamlick Kiura, Ann Yembu, Sera Weru, Julia Muthoni and Peter Njeru. After a lengthy consideration and further weighing of the evidence adduced before me by the parties herein, and having in mind that one Jackson Mugo Zakayo (deceased) was also a son to the deceased herein; I find that the respondents narrative is more convincing than the protestors'. I say so for the reason that the parties herein have not denied that one Jackson Mugo Zakayo (deceased) was a son to the deceased herein and further, that the said Patrick Njeru Nyaga was born sometime in the year 1980 and it is the same year that the said Jackson Mugo Zakayo allegedly died; the 2nd protestor stated that she was only 10 years old then and therefore, the same could be true that when Jackson Mugo Zakayo (deceased) bore Patrick Njeru Nyaga, Ann Yembu was too young to appreciate the same. Another possibility is the fact that the protestors herein have deliberately chosen to deny the said Patrick Njeru Nyaga an opportunity to inherit his father's inheritance for their own selfish gain. Further, the evidence of Sera Weru, Julia Warue, Patrick Njeru and Administrator bear semblance as opposed to that of the protestors.
8. *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR the court stated as follows;

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule



41(3) of the *Probate and Administration Rules* was enacted so that claims which prima facie valid should be determined before confirmation.“

9. It therefore follows that a grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent's share in the estate of the grandparents. This was stated *In Re Estate of Wabome Njoki Wakagoto* (2013) eKLR where it was held:-

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

10. In view of the above, I find and hold that the mode of distribution by the administrator is the most appropriate one save for the fact that Delvin Kiura's share which is 0.55ha should be shared amongst Serah Weru Nyaga, Jamlick Kiura Zakayo, Peter Njeru Zakayo, Ann Yembu Nyaga and Julia Warue Ileri in equal shares. Patrick Njeru Nyaga should get his share out of Evurore/Kathera/963 being 0.55HA.
11. This changed mode of distribution is informed by the fact that during the hearing, the administrator Jamlick Kiura Zakayo offered to relinquish Delvin Mugendi Kiura's share being 0.55Ha.
12. Each party to bear its own costs.
13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF MARCH, 2023.

L. NJUGUNA
JUDGE

