



In re Estate of Mwangi Mugwe Muriu (Deceased) (Succession Cause 10 of 2018) [2023] KEHC 17503 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17503 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 10 OF 2018
CM KARIUKI, J
MAY 18, 2023
FORMERLY NAKURU SUCCESSION CAUSE NO. 10 OF 2018
IN THE MATTER OF THE ESTATE OF THE LATE MWANGI MUGWE
MURIU (DECEASED)**

BETWEEN

FRANCIS MUGWE MWANGI 1ST ADMINISTRATOR

STEPHEN MUGWE MWANGI 2ND ADMINISTRATOR

AND

PATRICK MUGO MWANGI & OTHERS CO- ADMINISTRATOR

RULING

1. The 1st and 2nd administrator herein filed for the summons of confirmation of grant dated January 6, 2016. The grant herein was issued in respect of the Estate of Mwangi Mugwe Muriu alias Mwangi Mugwe Muriu, the deceased herein, on January 26, 2015 to Francis Mugwe Mwangi, Stephen Mugwe Mwangi, and Patrick Mugo Mwangi. The assets of the deceased include Nyandarua/Nyairoko/17, the suit parcel hereinafter, and money at Barclays Bank of Kenya Limited, account No xxxxx.
2. In rebuttal the protestor filed affidavits of protest against the confirmation of the grant through affidavits dated January 25, 2016 and November 19, 2018, November 21, 2019, and a supplementary affidavit dated February 12, 2019 seeking that the issues outlined therein on the mode of distribution in respect to the estate of the deceased be dealt with before the grant is confirmed.
3. In the affidavit of protest dated January 25, 2016, he laid out his grounds for protest as follows: -
 4. That the beneficiaries and properties described in the application for confirmation of grant dated January 6, 2016 are correct.



5. That the annexed attached plan is contested as the same was procured without an order arising from the existence of these probate proceedings.
 6. that the said document is the cause of the wrangles they experienced, and on numerous instances it created a rift between the houses leading to failure to file joint administration at the inception of these proceedings.
 7. That it would be irregular to rely on such a document whose source is unknown, its probative value is questioned or challenged, and it can only be expunged from the court record.
 8. That in all fairness, distribution has to ensure equitable, justified, and reasonable allocation of an estate's properties, whereas the applicants cannot annex, rely or even use an impugned document annexed as Pmm1.
9. On the other hand, the 1st and 2nd administrator filed a joint replying affidavit dated December 11, 2018. They deponed that: -
10. They were administrators representing the 2nd and 3rd houses, respectively
 11. That their late father had three families all living in one homestead and that there was absolute law and order.
 12. That when their father passed on there was unhealthy competition resulting to constant accusations and therefore a meeting was convened for all family members and a few relatives to sort out the problems. The meeting was conducted in Kikuyu.
 13. Although many items were discussed in the meeting, the separation of the families by subdividing the land took center stage and therefore was the first item to be discussed.
 14. That in the end, it was unanimously agreed that the land be subdivided into three equal portions according to the three houses, namely house no 1 (first wife), house no 2 (second wife), and house no. 3 (third wife).
 15. That in addition, it was unanimously agreed that the first house be accommodated on portion a while second and third house be accommodated on portion b and c, respectively of the land from the main gate. This set up is emphasized on the advisory plan/map.
 16. That from the above details, it can be observed that the advisory plan was generated from the meeting of December 4, 2003.
 17. That there is no doubt that the subdivision of the land has become the cornerstone for peace and harmony within their families and was done in broad daylight as attested and confirmed by the area chief.
 18. The minutes of the meeting as annexed indicated that five persons who attended the meeting were members and representatives of house No 1 contrary to the protestor's claim that there was no meeting or sitting convened to warrant the subdivision of land in 2005 and that he and his siblings were unaware of the arrangement.



19. That the sub-division has never been contested by house No 1 and that they could have complained to the area chief, police or court of law if their claims were genuine.
20. That members of house No 1 continue to live in their respective portion of land, which they have fenced well according to the boundaries specified, and that they were busy tilling the land.
21. That the petitioners request that this honourable court confirm the grant.
22. The 1st and 2nd petitioner also filed further joint replying affidavits dated May 28, 2019 and December 16, 2022.
23. The parties adduced *viva voce* evidence and later filed their submissions in support of their respective arguments.

Protestor's Submissions

24. The protestor submitted that he is protesting against the confirmation of the grant firstly because he has issues with the mode of distribution proposed by his co-administrators in particular the attached plan annexed to the co-administrators' affidavit dated December 11, 2018. He stated that the mode of distribution proposed in respect to the suit parcel was not done in accordance to the law. He further deponed that the signatures appearing there was a forgery and the protestor is not privy to the meeting, any attendance or deliberation that approved the said plan of distribution.
25. The protestor testified that the annexed plan is contested and was the source of wrangles within these probate proceedings. That it would be irregular to rely on a document whose source is unknown and its probative value is expunged and challenged. It was their assertion that distribution has to ensure equitable, justified and reasonable allocation of an estate's property and that the estate should be devolved as per section 40 of the [Law of Succession Act](#) since the deceased was polygamous.
26. It was suggested that the land should be subdivided by a government surveyor and each person's portion clearly mapped out. in so doing the children of the deceased do not need to hold in trust any property for the protestor's co-siblings rather they should be free to deal with their parcels of land as they so desire.
27. On whether or not the protest has merit, the protestor submitted in the affirmative because the protest is based on law and fact because the protestor has an issue with the proposed distribution mode. It was stated that the issue of who the beneficiaries of the estate are is not in dispute. It is not disputed that the deceased had a polygamous family with 3 wives and children. That the major bone of contention relates to the 34 acres of the suit parcel.
28. Reliance was placed on section 2 (1), 28, 29 (a), 40, 72 (a) (2) (d) and 76 (a) (b) (c) of the [Law of Succession Act](#) and rule 40 (6) (8) of [Probate and Administration Rules](#).
29. [Mary Rono v Jane Rono & another](#) [2005] eKLR, [In re Estate of Kimitei Cherop \(deceased\)](#) [2021] eKLR
30. On the issue of costs, the protestor submitted that the costs associated with distribution of the deceased's estate including legal fees, valuation of the assets charges and all activities pertaining to this case, including any travel on related costs to be considerate as costs of administration and to be paid from the estate.



1st and 2nd Administrators' Submissions

On whether the court should adopt the mode of distribution proposed in the administrators' affidavit in support of the summons sworn on January 6, 2012?

31. The 1st and 2nd administrators stated that on October 9, 2018, the administrators filed their summons of confirmation of grant dated January 6, 2018. The affidavit in support of the summons clearly stipulated the administrators' proposal for division of the deceased's property and the same was sworn on January 2016. The schedule indicated two properties: the suit parcel and monies at Barclays Bank of Kenya Limited. That there had been no strife or rather none of the beneficiaries had touched on the monies in the bank account and the administrators have clearly indicated that each representative of each house to hold the monies in trust for self and for the benefit of the rest of the beneficiaries in that specific house.
32. They asserted that the bone of contention arose from the suit parcel measuring 13.26 hectares registered under the deceased's name. They reiterated that all participants in this matter confirmed that there was a meeting held on December 4, 2003 and that there were representatives from all three houses. That fifteen out of nineteen beneficiaries were in attendance and that during the meeting, the protestor testified that he was not present in that meeting and thus he could not state who was present, thereby disregarding any allegation that there wasn't any representation from the 3rd house together with the issue of forged signatures.
33. It was argued that the protestor can only attest to what he knows of his own knowledge and that the protestor did not adduce any evidence on the issue of falsified signatures but just made mere allegations. They did not bother to call any witness that would substantiate their claims of forgery or fraud. It was asserted that the protestors have not presented anything to this court that would warrant a decision that, indeed, there were falsified signatures in documents filed in court, and thus, their position was that the signatures on the documents were proper. Reliance was placed on the *Re Estate of Samuel Ngugi Mbugua (deceased)* [2017] eKLR and section 42 of the *Evidence Act*.
34. The 1st and 2nd administrators averred that their preferred mode of administration is based on equality and equity in the estate. That the scheme was also lifted and inspired by Agikuyu cultural practices and, more specifically, a practice called 'ithaku' meaning that every house gets equal shares.
35. Reliance was placed on article 11 of the *Constitution, Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (suiting division) Limited (now known as King Woollen Mills Limited) & 2 others* [2016] eKLR, *Re Estate of G.K.K (deceased)* [2017] eKLR and section 28 & 29 of the *Law of Succession Act*.
36. It was submitted that the protestor's assertion on paragraphs 12, 13, and 14 of the affidavit of protest sworn on November 19, 2018 stating that the act of the administrators proposing a mode of distribution somehow amounts to intermeddling was just an accusation as the protestor did not adduce any shred of evidence to back this allegation.
37. The 1st and 2nd administrator pointed out that the protestors have not annexed their proposed mode of distribution of the estate leaving the court with an impossible task of deciphering exactly what they want. Reliance was placed on section 27 of the *Law of Succession Act, Re Estate of Marete Mbui alias M'marete M'mbui alias Justus Marete (deceased)* [2017] eKLR, *Re Estate of Morris Kilonzo Musyimi (deceased)* [2019] eKLR.



38. In conclusion, it was stated that the administrators have conducted themselves as transparently in dealing with the deceased's property by considering all the beneficiaries and dependants of the deceased; thus, they prayed that this court upholds the proposed mode of distribution as articulated in the affidavit; in support of the summons sworn on January 6, 2016.

Analysis and Determination

39. Having considered the affidavits of protests herein, the joint replying affidavit, the annexures thereto, parties' written submissions, and the oral submissions, the issues that arise for determination herein are: -

- i. Whether the application for protest herein is meritorious? and;
- ii. Whether the summons for confirmation of grant should be dismissed.

40. The protestor herein opposed the 1st and 2nd administrators' proposed mode of distribution, insisting that it was based on a document that he alleged was the cause of family wrangles. He also stated that he was not aware of any family meeting held and that it would be irregular to rely on such a document whose source is unknown; its probative value is questioned or challenged. He argued that the suit parcel should be distributed to each beneficiary in their own right. He asserted that the land should be divided according to the provisions of section 49 of the *Law of Succession Act* since the deceased was polygamous.

41. PW1 Patrick Mugo Mwangi, the protestor herein, testified that he was not aware of anything that happened on December 4, 2003 and that he has never been invited for a meeting on how distribution should be done. He reiterated that he was not aware of a meeting where it was agreed that the land should be divided into three portions and that each house should get an equal share. He stated that he was not aware if any of his siblings from the 1st house attended.

42. On the other hand, the 1st and 2nd administrator herein asserted that their proposed mode of distribution was informed by the meeting of December 4, 2003 held by the members of the family, i.e, the 1st, 2nd, and 3rd house. They contended that they agreed to share the suit parcel per house.

43. DW1, Francis Mugure Mwangi testified that they met as a family and agreed to have the land equally per house. He stated that Patrick, the protestor herein, was not in the meeting; although he was invited, he never participated. That there were no signatures forged. DW1 averred that there were no problems between the houses before their father died. That sharing the land per child will be contrary to the deceased's wishes as communicated by him to his wife. He also submitted that he was tasked with looking for a surveyor to subdivide the land.

44. DW2, Jecinta Wanjiku Mwangi, the deceased's third wife, testified that the deceased communicated to her his wishes to have the land divided equally per the three houses. She stated that a meeting was held on December 4, 2003 with members of the family, and nobody opposed what was agreed at the meeting. They agreed on the subdivision, and people were to move. She reiterated that the land should be shared equally as per house and not per child.

45. In the instant case, the deceased was a polygamous man who died intestate. The assets of the deceased were available for distribution, and the beneficiaries are not disputed. The deceased was survived by:

46. Jecinta Wanjiku Mwangi – widow/ 3rd house
children from the 1st house



- i. Patrick Mugo Mwangi
- ii. Rose Wambui Mwangi
- iii. Teresiah Wangui Mwangi
- iv. Kuria Mwangi
- v. Agnes Waithira Mwangi
- vi. Beatrice Wairimu Mwangi
- vii. Margaret Nyambura Mwangi
- viii. Christine Mjangili Mugwe

children from the 2nd house

- i. Francis Mugwe Mwangi
- ii. Lucy Wambui Mwangi
- iii. Ann Murugi Mwangi

children from the 3rd house

- i. Stephen Mugwe Mwangi
- ii. Mary Wambui Mwangi
- iii. Peter Gichungu Mwangi
- iv. Ruth Wamaitha Mwangi
- v. Eunice Waithera Mwangi
- vi. Rachael Njeri Mwangi
- vii. James Kuria Mwangi

47. The deceased's assets are: -

- i. Land parcel No Nyandarua/Nyarioko/17 which is 13.3hectares
- ii. Money at Barclays Bank of Kenya Ltd, account No xxxxx

48. The 1st and 2nd administrator asserted that their proposed mode of distribution was informed by decisions arrived at by the family in the meeting held on December 4, 2003. I have examined the minutes of the meeting held on December 4, 2003 annexed as evidence by the administrators.

49. From the minutes, it appears that it was agreed that the suit parcel should be divided into three portions 'ithaku to be divided equally among the three houses. It was also agreed that after the subdivision of the land, the three houses will be given a grace period of one year to move from their former portions to their respective allocated portions i.e. January 2004 to January 2005 and that a surveyor procured by Francis Mugwe in order to subdivide the land.

50. The minutes were signed by Francis Mugwe, Margaret Njeri, Rose Wambui, Jecinta Wanjiku, Charles Mutonya, Kuria Mwangi, James Mwangi, Gichungu Mwangi, Beatrice Wairimu, Lucy Wambui and Margaret Nyambura. However, the names of Njoki Njuguna, Stephen Mugwe, Ruth Wathithi and



Ann Murugi were also included although there were no signatures against their names. Although not all beneficiaries were present, this list includes members of the family from all three houses. The protestor advanced claims that some of these signatures were forged but I find that those allegations were unsubstantiated as the protestor did not produce any evidence whatsoever to support his claims.

51. During oral submissions DW1 stated that the aforementioned division was per the deceased's wishes and that assertion that DW2 corroborated. She stated that the deceased told her he wanted the suit parcel subdivided per house and not per child. However, apart from their testimonies, the administrators did not adduce any documentary evidence to support their claims about the deceased's wishes.

52. The deceased herein died intestate and was a polygamous man survived by one widow and 18 children comprising three houses because the deceased had three wives, 2 of whom were deceased. Section 40 of the [Law of Succession Act](#) provides as follows;

“(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 interest within each house shall then be in accordance with the rules set out in sections 35 to 38”

53. The same was expounded on in [Rono v Rono](#) Civil Appeal No 66 of 2002, where Waki J.A (as he then was) 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 of that wife.”

54. Further, 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.

55. Although I acknowledge that the meeting held on December 4, 2003 did occur contrary to the protestor's assertion, it is my humble opinion that there isn't sufficient evidence to prove that it was in tandem with the deceased's wishes or that the deceased ever communicated that what was agreed upon were his wishes for his estate. the 1st and 2nd administrator also did not convince this court that their mode of distribution was as per the deceased's wishes. Apart from DW2's testimony, there was no



other evidence produced before this court to prove that the deceased's wish was to have the suit parcel subdivided equally amongst the three houses.

56. In the circumstances, as a result of the failure to agree on a mode of distribution by the beneficiaries, I find no need for this court to exercise its discretion to establish a mode of distribution that is contrary to the equal distribution mandated by section 40 of the Law of Succession Act. The deceased died intestate and was a polygamous man survived by one widow and children anchoring the distribution of his estate on section 40, which provides as follows;

“(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 interest within each house shall then be in accordance with the rules set out in sections 35 to 38”

57. I am also guided by the reasoning of the court in the Estate of Ainea Masinde Walubengo(deceased) (2017) eKLR where the court held that: -

“I am of the view that section 40 of the Law of Succession Act will apply to the circumstances of this case. Meaning that the court will distribute the estate of the deceased according to each house, taking into account the number of children in each unit, including the surviving widow.”

58. The same reasoning was applied in the Matter of the Estate of Nelson Kimotho Mbiti(deceased) HCSC No 169 of 2000, where the court directed that the estate of a polygamist be divided according to 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.

59. Accordingly, I find that the deceased's estates shall be distributed according to section 40 of the Law of Succession Act. The deceased's children and surviving spouse shall take the estate's share in equal share.

60. Thus, the court makes the orders;

- i. The estate of the deceased, i.e, the suit parcel, Land parcel No Nyandarua/Nyarioko/17, which is 13.3hectares and monies held at Barclays Bank of Kenya Ltd, account No xxxxx, will be distributed equally among the beneficiaries who comprise 19 units from the first house, second house and the third house. For purposes of clarity, with respect to the 3rd house, Jecinta Wanjiku Mwangi, the widow of the deceased, shall be accounted for as a distinct unit.
- ii. Parties bear their costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 18TH DAY OF MAY 2023.

CHARLES KARIUKI

JUDGE

