



REPUBLIC OF KENYA



**In re Estate of Kamau Gichuhi (Deceased) (Succession Cause
10 of 1985) [2023] KEHC 17494 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17494 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 10 OF 1985
RN NYAKUNDI, J
MAY 17, 2023
IN THE MATTER OF THE ESTATE OF KAMAU GICHUHI (DECEASED)**

BETWEEN

DANIEL MWANIKI KAMAU APPLICANT

AND

MONICAH WAMBUI KAMAU RESPONDENT

RULING

1. The Applicant, Daniel Mwaniki Kamau, filed Chamber Summons dated October 26, 2021, seeking orders that:
 1. Spent.
 2. An order do issue that the Applicant is allowed to be receiving equal share of the income that the 2nd house is controlling from Eldoret Municipality LR NO. 10492 and Eldoret Municipality Block 6/95 estate of the (Deceased) pending the hearing and determination of the application dated August 17, 2020 and July 17, 2020.
 3. An order do issue that the Respondent to render account of he income every month from Eldoret Municipality Lr No 10492 and Eldoret Municipality Block 6/95 pending the hearing and determination of the application dated August 17, 2020 and application dated July 17, 2020.
 4. Cost be paid by the Respondent.
2. The application is premised on the grounds therein and is further supported by the affidavit of Daniel Mwaniki Kamau, sworn on October 26, 2021.



The Applicant's Case

3. The Applicant deposed that he is the biological son of the Respondent and the deceased herein. the Applicant maintains that he is a dependant of the estate of the late Kamau Gichuhi (Deceased).
4. The Applicant contends that the Respondent has since kicked him out of his father's estate together with his family and has cut links with him while the rest of the dependants are enjoying and benefiting from the monthly income derived from parcel of land known as Eldoret Municipality Lr No. 10492 and Eldoret Municipality Block 6/95 that the 2nd house is controlling.
5. The Applicant deposed that he has three ongoing school children and has no income and thus paying their school fees has become a problem. Further that he is renting a house which has also become a problem to pay.
6. The Applicant maintains that he is unemployed and is living in poverty whilst the administrator herein is collecting a good amount of income every month from parcel of land known as Eldoret Municipality Lr No 10492 and Eldoret Municipality Block 6/95 that the 2nd house is controlling.
7. The Applicant urged the Court to make a finding that he supposed to get an equal share of the income that is generated from parcel of land known as Eldoret Municipality Lr No 10492 and Eldoret Municipality Block 6/95 that the 2nd house is controlling.

The Respondent's Case

8. The application is opposed by the Respondent, Monica Wambui Kamau, vide her replying affidavit dated September 14, 2022.
9. In a nutshell, the Respondent maintains that she has not chased any of her children and that the Applicant herein is the one who left on his own free will. The Respondent further maintains that she treats all her children equally and has not discriminated against any of them.
10. According to the to the Respondent, the Applicant is a very lazy man who wants her to work while he roams up and about without bothering to look or work to do. The Respondent further alleges that the Applicant is a violent man whom when prevented from abusing the facilities on the suit premises claims that the same are his late father's property.
11. The Respondent further that she has seven children namely; Ngugi Kamau, Jane Muthoni, Waweru Kamau (Deceased), Daniel Mwaniki Kamau, Njenga Kamau (Deceased), George Maina Kamau and Esther Wanjiro Kamau.
12. The Respondent contends that none of her children stress her out like the Applicant herein.
13. The Respondent maintains that the Applicant's children are his responsibility and therefore he ought to take responsibility of them using his own funds.
14. The application was canvassed vide written submissions. The Respondent through her Advocates, M/ s C F Otieno & Co filed submissions dated April 12, 2023 whereas Applicant filed submissions dated May 4, 2023.

Determination

15. I have carefully considered the pleadings and the submissions on record. The only issue for determination is whether the order sought can be issued.



16. The matter before court involves the widow of the deceased and the son of the deceased herein. It is not disputed that the deceased herein was a polygamous man and upon his demise the Respondent and one Leah Mukami Gichuhi (Deceased) were appointed administrators of the estate herein.
17. The Applicant contends that the Respondent being one of the administrators of the estate herein and the representative of the 2nd Household has neglected and or refused to give a share of the estate of the deceased herein. The Applicant maintains that the Respondent herein has continued to benefit from the proceedings obtained from parcel of land known as Eldoret Municipality Lr No 10492 and Eldoret Municipality Block 6/95 that the 2nd house is controlling to his exclusion.
18. The Respondent on the other has levelled counter accusations against the Applicant herein suggesting that he is lazy and has refused to take care of his own responsibilities and only wants benefit from the deceased's estate without seeking employment.
19. In the present case, there is no dispute that the Applicant is a son to the deceased and the Respondent herein. It further not in doubt that the Applicant by virtue of section 29 of the Law of Succession Act is dependant and or beneficiary of the deceased. Counsel for the Respondent, Mr Otieno, in submission contends that no application for dependency can be made after a grant of representation has since been confirmed. He further argues that from the consent that was recorded on September 30, 1985 a Trust was never created as the consent in question was guided by the Kikuyu Customary law at and the time and the understanding was that the children in each household would inherit from their respective mothers. Counsel contends that currently there is no parcel of land that is registered in the name of the deceased herein and that LR No 10492 now has a new number being LR No Plot 21/3733.

From the record is not disputed that the Certificate of Confirmation of Grant that issued on July 26, 2012 that was issued by Hon. Justice F. Azangalala, was given to one Leah Mukami Kamau (Deceased) and Monicah Wambui Kamau. There is not dispute that a trust was never created from the wording of the grant. However, in situations where by the deceased was polygamous the law that guides this Court in such matters is Section 40 of the Law of Succession Act* which primarily 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”

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.”

20. Further, In the Matter of the Estate of Nelson Kimotho Mbiti (Deceased) HCSC No 169 of 2000, Koome J, 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. The same reasoning was also applied by Judge



Ali Roni in the Estate of Ainea Masinde Walubengo (Deceased) (2017) eKLR stating 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.”

21. At this juncture it worth pointing out that Article 27 of the Constitution 2010 provides that every person is equal in the eyes of the law and before the law; and the Article goes further to state that there should be no discrimination on any ground including gender which encompasses marital status; the Constitution does not allow discriminatory rules and customs in matters of personal law, including inheritance.
22. There ought to be no classification into categories of male, female, married or unmarried; there ought to be no discrimination against the male or female children of a deceased person; nor discrimination between the married daughters and unmarried daughters of a deceased person.
23. Counsel for the Respondent contends that consent that forms the basis of the grant dated July 26, 2012 was guided by the Kikuyu Customary Law at the time. I must remind Counsel any law that is repugnant to justice cannot stand and thus the Applicant herein ought to have benefitted from the share that was bestowed upon the 2nd household. Further under Section 3 (2) of the Judicature Act Cap 8, it states;

The High Court, Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more parties are subject to it, or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

24. In my view the Applicant cannot be simply denied his share of inheritance in view of a consent that that seemingly is repugnant to justice.
25. Be as it may, there seems to be an error apparent on the face of the grant and certificate of confirmation of grant on record creating an illegality in terms of how the estate of the deceased ought to have been distributed. Each beneficiary of the deceased represents a share of each unit in the respective households and therefore ought to have benefited as per their share unit.
26. The Respondent herein cannot therefore enjoy monopoly of the estate of the deceased herein without equitably sharing the share that was bestowed upon the 2nd house to the rest of the beneficiaries therein including the Applicant herein. I must emphasize that the Applicant’s share of inheritance is not dependent on whether he is lazy or not, working or other irresponsible. He is entitled to inherit and ought to be given his fair share for that matter. I am alive to provisions of Rule 73 of the Probate and Administration Rules which provides that:
 73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
27. The Respondent being the representative of the second household ought to have ensure that each of the beneficiaries therein received their equitable share of the said estate. It must be noted that the object of the Court is uphold substantive justice. It is my considered view that substantive justice will be done by ensuring that the Applicant gets what he rightfully deserves.
28. It is for that reason, that I invoke the inherent powers of this Court granted under Rule 73 (1) of the Probate and Administration Rules to make the following orders:



1. That application be and is hereby allowed in terms of prayer (1).
2. That the Respondent herein shall within (21) days of this ruling prepare a proposal on how she intends to distribute the share of the estate of the deceased herein that was given to each of the beneficiaries in the 2nd household herein.
3. This being a matter involving members of the same family there shall be no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF MAY, 2023.

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R NYAKUNDI

JUDGE

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in the presence:

