



**In re Estate of Moses Gakuru Thuo (Deceased) (Succession Cause
20 of 2022) [2024] KEHC 14773 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 20 OF 2022
G MUTAI, J
NOVEMBER 20, 2024
IN THE MATTER OF THE ESTATE OF THE
LATE DR MOSES GAKURU THUO (DECEASED)**

BETWEEN

PETER EDWIN THUO GAKURU 1ST APPLICANT

MARGARET NJERI THUO 2ND APPLICANT

AND

PETER THUO GAKUO 1ST RESPONDENT

BEATRICE NJERI THUO-OSEBOR 2ND RESPONDENT

SAIDA NJERI THUO 3RD RESPONDENT

RULING

1. The deceased whose estate is the subject of these proceedings is Dr Moses Gakuru Thuo. Dr Thuo, a prominent medical practitioner, died in Mombasa Hospital on 23rd December 2020 at the age of 70 years. According to what is stated in his death certificate, the deceased, who is said to have resided in Nyali, Mombasa County, died from “pulmonary oedema, due to ischaemic heart disease, due to Type 2 Diabetes mellitus, due to systemic hypertension hypothyroidism.”
2. It is common ground that the deceased was polygamous. This is evidenced by the letter dated 18th June 2021 written by the Chief of Frere Town Location, Talib Abbas Dola, in which the deceased is identified as having three wives whose names are given as:-
 - a. Margaret Njeri Thuo, then aged 74 years;
 - b. Elizabeth Nankinyi Babu, then aged 70 years;
 - c. Fursiyah Abdullah Mohamed, who was deceased at the time the letter was written.



3. Dr Thuo had the following issues:-
 - a. Peter Thuo Gakuru (ID No. 11060332), then 49 years old, the 1st Objector/Applicant herein;
 - b. Beatrice Njeri Thuo (ID/PP No 6013342), then 44 years old;
 - c. Sarah Njoki Thuo (ID/PP No 2478052), then 40 years old;
 - d. Beatrice Njeri Thuo Gakuo (PP NO A2146648), then 44 years old;
 - e. Saida Njeri Thuo (ID No 30693199), then 27 years old; and
 - f. Mahmoud Abbas Thuo (ID No 35153679), then 24 years old.
4. A joint Petition for Letters of Administration Intestate was filed on 15th March 2022 by Peter Thuo Gakuru (the 1st Protestor), Beatrice Njeri Thuo-Osebor and Saida Njeri Thuo, representing each of the three houses.
5. The dependents/heirs of the deceased were identified in paragraph 4 of the Affidavit in Support of the Petition for Letters of Administration Intestate sworn by the 3rd Administrator/Respondent on 28th February 2022. The estate of the deceased was stated as being worth Kes 45,000,000 in paragraph 7 of the said affidavit. Although the affidavit was solely signed by Ms Saida Njeri Thuo, and not by all the Administrators, no objection was taken as to the validity of the Petition. Mahmoud Abbas Thuo, Elizabeth Nankinyi Babu, Sarah Njoki Thuo, Beatrice Njeri Thuo and Margaret Njeri Thuo signed consents to the Grant of Letters of Administration Intestate.
6. The consent of Sarah Njoki Thuo (with proposed amendments) is dated 13th June 2022, Beatrice Njeri Thuo (also with proposed amendments) is dated 14th July 2022, while that of Margaret Njeri Thuo (with proposed amendments) is dated 13th July 2022.
7. The following beneficiaries gave unconditional consents
 - a. Mahmoud Abbas Thuo on 28th February 2022; and
 - b. Elizabeth Nankinyi Thuo on 28th February 2022.
8. Two applications were filed, the first dated 26th September 2022. The said application sought leave to amend the Petition on the ground that the 1st family was not involved in the filing of the Petition. The same was withdrawn on 15th February 2023. The second application, filed by Peter Edwin Thuo Gakuru, was dated 17th August 2023. In the said application, the Applicant sought to be included in the list of beneficiaries on the ground that he was the son of the deceased. This latter application was withdrawn on 2nd November 2023.
9. The grant of representation with respect to this estate was issued to Peter Thuo Gakuru, Beatrice Njeri Thuo-Osebor and Saida Njeri Thuo. The same is dated 22nd September 2022.
10. Although the parties initially indicated that they would file joint Summons for Confirmation of the Grant of Letters of Administration Intestate, their discussions failed. On 6th May 2024, leave was granted to the 2nd and 3rd Administrators to file the Summons for Confirmation of Grant. The 1st Administrator was granted the leave to respond if need be.
11. The Summons for Confirmation of grant was filed by the counsel for the 2nd and 3rd Administrators on 18th June 2024. The proposed mode of distribution was set out in paragraph 7 of the Supporting Affidavit sworn on 18th June 2024 by Saida Njeri Thuo. The deponent averred that the proposed mode



of distribution had the support of the 2nd, 3rd and 4th houses. She annexed to her affidavit the consents by:-

- a. Elizabeth Nankinyi Babu, dated 18th June 2024;
 - b. Mahmoud Thuo, dated 18th June 2024;
 - c. Beatrice Njeri Thuo-Osebor, dated 18th June 2024; and
 - d. Peter Edwin Gakuru Thuo dated 18th June 2024.
12. Before the grant could be confirmed, the 1st and 2nd Protestors filed an Affidavit of Protest sworn on the 16th day of July 2024. The Affidavit of Protest is dated 16th July 2024. The protest is limited to the devolution of Title No Kiambaa/Thimbigua/2033 and the house erected on it, which, according to the Summons for Confirmation of Grant, is to devolve to Elizabeth Nankinyi Babu and her children, Beatrice Njeri Thuo-Osebor and Peter Gakuru Thuo, to be shared equally by them.
 13. The Protestors averred that the said parcel of land, and the house thereon, should exclusively devolve to the 1st house, as they are entitled to it, on the ground that the 2nd Protestor celebrated her marriage to the deceased on the said property and that she exclusively occupied it for most of her life, with her children, to the exclusion of the other dependants of the deceased. It was averred that the 1st house was not interested in any other property save for Title No Kiambaa/Thimbigua/2033 and that the Protestors' names, as well as that of Beatrice Njeri Thuo, should be removed from the schedule of distribution of the deceased's other properties.
 14. The 2nd and 3rd Administrators, on the other hand, urged that the proposed mode of distribution was reasonable, fair and just.
 15. The Protest was heard by way of viva voce evidence. The 2nd Protestor testified in support of the protest on 22nd July 2024.
 16. Ms Margaret Njeri Thuo testified that she is an evangelist residing in Nairobi. It was her evidence that the deceased was her husband, having got married to him in 1971 in a Christian wedding. She testified that their marriage was never dissolved. Their marriage was blessed with four issues: Peter Thuo Gakuo, Beatrice Njeri Thuo, Sarah Njoki Thuo and Judith Wanjiku Thuo. She stated that her protest was about Title No Kiambaa /Thimbigua /2033, which she stated was given to her and the deceased by the father-in-law in his written will. She testified that the land, which measures 3 acres, has a house she and the deceased built and that they occupied the house on 31st July 1986 once it was completed.
 17. The 2nd Protestor denied knowing Ms Elizabeth Nankinyi Babu and stated that the first time she saw her was during the burial of the deceased. She said that she moved out of the Kiambaa house due to security issues with the intention of moving back once it became safe to do so. Upon getting a job in Ethiopia, which she took up with her husband's blessing, she sent him the keys to the house by courier.
 18. Margaret denied knowledge of the properties situated in the Coastal region and averred that the other beneficiaries could take these as she and her house had no interest in them. Her only interest was with the Thimbigua property where her last-born daughter and her husband are buried.
 19. When cross-examined by Ms Rutvi Shah, she stated that she hadn't slept in the Thimbigua property since 1996. She denied having separated from the deceased and averred that they were on talking terms right up to the moment he died. Although she stated that she was entitled to the house, she admitted during the cross-examination that she did not enter it during the burial of her husband or that of her daughter. She stated that she didn't do so as she did not want to cause a scene as Elizabeth Nankinyi Babu was already in occupation.



20. During re-examination, she stated that she and the deceased never separated. She testified that the title was in the name of the deceased because under the Gikuyu customs, only the name of the husband may be included and that upon the husband's demise, the property became hers. She reiterated that she and her deceased husband got married in church.
21. The 2nd and 3rd Administrators called only one witness, Ms Saida Njeri Thuo. Ms Saida Thuo is an advocate and legal consultant in Nairobi. She testified that she was the daughter of the deceased. The 1st Protestor is her half-brother. It was her evidence that the 2nd Protestor was unknown to her and that she first met Margaret during her father's funeral.
22. Saida testified that she and the 3rd Administrator divided the deceased's property after they could not progress with the 1st house despite the fact that all the houses had been together at first.
23. She stated that the Thimbigua house belonged to Ms Elizabeth Nankinyi Babu and her children Peter Gakuru Thuo and Beatrice Njeri Thuo-Osebor. Saida averred that it would be unfair to move Ms Elizabeth Nankinyi Babu from the house she had occupied for a long time as she is presently blind and suffers from mild dementia. She testified that Margaret Thuo and her father lived more time apart than they did together.
24. When cross-examined by Mr Kirimi, Ms Saida Thuo stated that the marriage between Margaret and her father was tumultuous. She said the deceased married Ms Elizabeth Nankinyi Babu in 1973 and her mother in 1993.
25. Saida admitted that Margaret lived in the Thimbigua property for a period between 10 and 20 years. She stated that Margaret was recognized in the succession proceedings and got a share of the estate, which Saida thought was adequate as she had another home and didn't need anything else from the estate. All children, on the other hand, got immovable properties.
26. Upon the close of the hearing, the parties were directed to file written submissions.
27. The Protestor submissions are dated 11th August 2024. The Protestors' advocates, WAKlaw Advocates submitted that the most critical matter in the cause was the position of the 2nd Protestor. It was urged that the 3rd Administrator had excluded her from the estate and denied her a tangible share of the estate. It was urged that there was no list of properties nor a definite or clear list of beneficiaries and that the whole process was exposed to possibilities of arbitrariness and abuse due to deliberate non-disclosures of the 3rd Respondent.
28. Counsel submitted that Margaret had a life interest in the deceased's properties under Section 82 of the *Law of Succession Act*. Thus, the 2nd Protestor and her children, Peter Thuo Gakuru and Beatrice Njeri Thuo should get Title No Kiambaa/Thimbigua/2033 for themselves exclusively.
29. The submissions of the 2nd and 3rd administrators are dated 9th September 2024. Counsel for the 2nd and 3rd Administrators, ADRA Advocates LLP, submitted that the only disputed property was Title No. Kiambaa/Thimbigua /2033.
30. Counsel for the 2nd and 3rd Administrators submitted that there were only two issues for determination to wit:-
 - a. Whether the current status quo on the ground should be disrupted as proposed in the protest; and
 - b. Should the new issues raised in the Protestors' written submissions dated 11th August 2024 be considered?



31. It was submitted that the 1st and 2nd houses had settled into their various properties and that each of them should be deemed to have accepted their positions since then.
32. Counsel submitted that the proposed mode of distribution was fair, just and equitable and that the same had been agreed upon by the 2nd and 3rd houses.
33. Regarding what was stated as new issues introduced at the submissions stage, it was urged that these should be ignored. Reliance was placed in the case of *Thome Dynamics Ltd & Another vs Nzioka & 12 others; County Government of Nairobi & Another (Interested Parties) (Environment & Land Case 21 of 2012) [2024] KEELC 3258 (KLR) (9 April 2024) (Judgment)* as the reading of the Affidavit of Protest shows that the same was strictly in relation to the distribution of the Kiambaa property and that what the submissions of the Protestors had attempted to do was to introduce new issues. It was urged that none of the four new issues was raised in the Affidavit of Protest or during the hearing.
34. Counsel submitted that the Protest was in regard to the Kiambaa property only. It was urged that parties be bound by their pleadings and that “the new arguments ought to be ignored when a decision on the protest is rendered.”
35. It was denied that the 3rd Administrator had taken sole charge of the administration. In support of this, reference was made to the consents which had been filed. Counsel submitted that all the properties of the deceased were disclosed. There was a schedule of distribution and that it was clear that the 2nd Protester got a share of the estate.
36. I must now consider the Affidavit of Protest, the response thereto and also the Summons for Confirmation of Grant and determine whether or not it has merit. As the primary role of the Probate and Administration Court is to distribute the estate I must also decide if to confirm the Grant of Representation issued herein.
37. From the evidence adduced, it is evident that the 2nd Protestor and the deceased were estranged and hadn't lived together for a long time before his demise. During her testimony, Ms Margaret Njeri Thuo stated that immediately prior to his death, the primary caregiver of the deceased was Ms Elizabeth Nankinyi Thuo. Margaret Thuo didn't contest that the deceased was polygamous and that he married two other women apart from her.
38. During cross-examination, the 2nd Protestor admitted that she had ceased to reside in the disputed property in 1996. Even after she came back to Kenya in 2009 upon retirement, she didn't attempt to reclaim the Thimbigua house, which then was, and still is, occupied by Ms Babu.
39. Although she claimed to be a co-owner of the property, that is not borne out by the title. The title has the name of the deceased as the sole proprietor. Margaret attempted to explain this as something which was done in accordance with the customary practices of the Agikuyu. This explanation fails as she did not provide evidence that would lead this court to conclude that such a practice exists among the Agikuyu.
40. In my view Margaret had the burden of proof under the *Evidence Act* to show that indeed such custom exists.
41. Sections 107 and 109 of the *Evidence Act* provides as follows:-
 1. Sections 107
 - “1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
2. Section 109:
“The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
- 42 I agree with what M Thande, J held In re Estate of Fares Michael Kuindwa (Deceased) [2019] KEHC 11254 (KLR) where she stated that:-
- 23 A person who seeks to propound customary law must call evidence to prove that customary law. In Sakina Sote Kaittany & another v Mary Wamaitha [1995]eKLR, Gicheru, J.A. (as he then was had this to say concerning proof of customary law and practices:
...the onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case. call evidence to prove that customary law, as would prove the relevant facts of his case.
43. Ms Margaret Thuo did not produce her father-in-law's will, which she claimed bequeathed her and the deceased the Thimbigua property. She also failed to procure corroborating evidence. In the circumstances, I am unable to agree with her.
44. The 2nd Protestor testified that even after she became aware of the fact that Ms Babu was in occupation of the Thimbigua property, she took no step to reclaim it. Given her conduct during the two funerals she attended in situ, she appears to have given up on any claim she may have had. She didn't enter the house nor even made any attempt to do so. Her reason was that she didn't want to create a scene. Whereas that could be so, why didn't she attempt recovery action thereafter? In my view, the 2nd Protestor had, for all intentions and purposes, given up any claim she had to the said property. It would appear to me that whatever claims the 2nd protestor had for the Kiambaa property were lost by the effluxion of time. Ms Elizabeth Nankinyi Babu, an old infirm lady, now occupies the said home. It would be most unfair to disturb her at this point of life in favour of what is, in all fairness, an old stale claim.
45. Further to the foregoing, this court is persuaded that the deceased settled his spouses as he wished and that the settlement was accepted. I am persuaded by the holding of H. M Nyaga, J in re Estate of the Late Joseph Muhika Irungu (Deceased) [2024] KEHC 2316 (KLR) where he held as follows:-
- “ 53. It is thus my finding that both houses were settled on their respective parcels of land, equal in size. It is thus a sign of avarice for the protestor to now stake a claim in the land where the deceased had settled the 2nd wife and her children. She already had her own land and if she chose to dispose of it, she cannot now move to demand a share of the land that the 2nd house was settled. These are occurrences that took place over forty (40) years ago and each house is deemed to have accepted their respective properties.
54. Thus, and in answer to the last question, I find that the 1st house is not entitled to any part of the net estate that the 2nd house settled on. That property is only available for the 2nd house. 55. Accordingly, I dismiss the protest with costs to the Petitioner.”



46. The Protestor is in relation to the Kiambaa property only. The Protestors haven't indicated that the proposed mode of distribution, save for the claim with respect to the Kiambaa property, is unfair. Most beneficiaries are happy with what they got. There is no claim that the mode of distribution does not accord with Section 40 of the Law of Successions Act.
47. I agree with the 2nd and 3rd Administrators/Respondents contention that parties must be bound by their pleadings. Whatever issues the Protestors have with the 3rd Administrator ought to have been raised in the Protest and not in the Written Submissions, as they did. It is trite that submissions aren't pleadings.
48. In the circumstances, I see no reason to interfere with the proposed mode of distribution.
49. The protest does not have merit the same is dismissed.
50. Having dismissed the protest, what happens next? WN Musyoka, J, In his book Law of Succession, 2nd Edition, states in page 335 as follows:-
- “the so-called protest hearings are nothing more than a hearing of the confirmation application, and the same ought to be determined in the manner envisaged in section 71 (2) of the Law of Succession Act and Rule 41 (2) of the Probate and Administration Rules, where the court may confirm the grant if satisfied that the personal representatives had been properly appointed, had administered the estate in accordance with the law and were poised to continue to do so to completion, and the proposed distribution confirmed with the relevant law”.
51. There is no question that the personal representatives were properly appointed. Each of the three houses has an administrator. Parties filed consents which this court has perused.
52. Although the extent of the estate was initially questioned, the application for amendment of the Petition to include more particulars was withdrawn. There is no claim that the administrators have not properly administered the estate. I do not, therefore, have any reason to think that the estate is not well administered or that the good administration presumably existing would cease.
53. The proposed mod of distribution save for the Kiambaa property wasnt challenged. The Protestors have not indicated that their shares were less than what the law entitles them. In the circumstances, I see no reason to interfere with the proposed mode of distribution in the Summons for Confirmation of Grant.
54. I must state that the purpose of the administration process is to
- a. Identify;
 - b. Collect;
 - c. Preserve; and
 - d. Distribute the estate of a deceased person
- I am satisfied that the administrators identified, collected and preserved the estate.
55. In the circumstances, having dismissed the Protest and in accordance with the discretion of this court under section 47 of the Act and Rule 73 of the Probate and Administration Rules, I confirm the grant the court issued on 22nd September 2022 and allow the Summons for Confirmation dated 18th June



2024. I order that the deceased's estate be distributed according to the Schedule in Paragraph 7 of the affidavit sworn by Ms Saida Njeri Thuo on 18th June 2024.

56. This being a family matter parties shall bear their own costs.

57. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF NOVEMBER 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Rutvi Shah, for the 2nd and 3rd Administrators/Respondent;

Mr Kirimi for the 1st and 2nd Protestors; and

Arthur - Court Assistant.

