



REPUBLIC OF KENYA



In re Estate of the Late Daniel Kairu Kimani (Succession Cause E26 of 2020) [2024] KEHC 13835 (KLR) (5 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE E26 OF 2020
HM NYAGA, J
NOVEMBER 5, 2024**

IN THE MATTER OF THE ESTATE OF THE LATE DANIEL KAIRU KIMANI

BETWEEN

MONICA WANJIKU KAIRU 1ST ADMINISTRATOR

BENSON NJOROGE KAIRU 2ND ADMINISTRATOR

AND

TIMOTHY MWANGI KAIRU 1ST PROTESTOR

FAITH WACUKA KAIRU 2ND PROTESTOR

RULING

1. The deceased herein died on 18th August 2011. He was survived by the following:-
 - i. Faith Wacuka Kairu – Daughter
 - ii. Monicah Wanjiku Kairu – Daughter
 - iii. David Kimani Kairu – Son
 - iv. Benson Njoroge Kairu – Son
 - v. Timothy Mwangi Kairu – Son
 - vi. Edith Wairimu Kairu – Daughter
2. It is also apparent that the widow survived the deceased herein but had also passed away by the time the petition herein was filed.



3. By a petition for Letter of Administration intestate dated 1st December 2020, Monica Wanjiku Kairu and Benson Njoroge Kairu moved the court for the issuance of a grant of letters of administration intestate. On 20th June 2022, a grant of Letter of administration intestate were issued by this court.
4. Subsequently, the Administrators moved this could vide on summons dated 20th July 2023 seeking to have the grant confirmed. Their proposed mode of distribution of the estate was as set out in paragraph 6 of their affidavit in support thereof. I will revisit the details later.
5. In the consent attached to the summons for confirmation of a grant, other beneficiaries signed the said document save for Faith Wacuka Kairu and Timothy Mwangi Kairu. The two mentioned beneficiaries were served with the application and subsequently, they filed their affidavits of protest against the confirmation of the grant. Directions were given that the protests proceeds by way of viva voce evidence.
6. Before I go into the details of the matter before me, it is important to note that previously, the widow of the deceased had filed a petition in Nakuru High Court Succession Cause No. 634 of 2014 and a grant was issued by this court on 8th December 2014.
7. It is common ground that the then Administrator passed away before the grant therein could be confirmed. Subsequently, Benson Njoroge Kairu and Faith Wacuka obtained a limited grant ad litem issued in Nakuru High court Succession Cause No. 247 of 2015, on 10th June 2015. The purpose that was set out was for :-

“ the purpose of prosecuting Nakuru Succession Suit No. 634 of 2014”

8. It is also not in dispute that Timothy Mwangi Kairu did file Probate and Administration case No. E1236 of 2020 at Nairobi. The petition filed as that of Probate with a Written Will or proof of oral Will. In the said petition, Timothy annexed an alleged last will and testament of the Deceased herein, dated 5th June 2007.
9. When the parties came to argue the protest before the court, it did emerge that in the petition filed in Nairobi High Court by Timothy no grant of probate was issued.
10. During the hearing of the protest, Timothy did admit that the said cause was dismissed by the court for want of prosecution on 27th September 2022. Timothy further stated that he was in the process of reinstating the said cause when he learnt of this application for confirmation.
11. As regards succession cause No. 634 of 2014 the Petitioners did inform the court that the grant therein was revoked by the court on 5.12.2018. They annexed a notice of the court issued under section 76 of the *Law of Succession Act*. A perusal of the said court file confirms that indeed that grant was revoked.
12. The protest proceeded by way of viva voce evidence. The Protestors case is summarized as follows.
13. Timothy Kairu stated that to his knowledge, the deceased left a will dated 5th June 2007 in which he was named as one of the executors. That his mother, Mary Kairu, became an administrator in P&A Cause No. 634 of 2014. That to enable their advocate then (M/S Githiru & Co) to file an application for confirmation, his mother instructed the advocate and a note entitled “proposed division as per succession cause No. 634 of 2014 and will” was prepared. That the said note clearly instructed the advocate that the land known as Miti mingi Mbaruk Block 5/1613 was to be divided into 6 equal portions and that the portion on which the deceased’s house stood was to be registered in his name. That his mother then procured the services of Mugendi & Associates, a survey firm, for carrying out the survey. He referred the Court to a draft subdivision which was marked TMK4 in his affidavit.



14. Timothy further state that Benson and Faith obtained a grant Ad Litem to enable them prosecute Succession Cause No. 634 of 2014. That instead of concluding that matter, Benson teamed up with Monicah to file the present cause.
15. Timothy further averred that in compliance with the wish of his late father, he moved into the acre that the deceased's house stood in 2016 and has occupied the house since then.
16. Timothy further averred that he was not served with a citation requiring him to renounce his executorship or to apply for grant of probate of the will. He contends that there was concealment of material facts herein and that he is not agreeable to the proposed mode of distribution.
17. Timothy thus states that there being a will, the grant herein ought to be revoked and that the court issues him with a confirmed grant of Letters under section 71 (2)(b) of the Act. He avers that he intends to distribute the estate in accordance with the wishes of the deceased.
18. In his oral evidence, Timothy stated that after the death of their father, his mother took the will to Ms Githu & Company Advocates with instructions to file for a grant of probate. That instead, the advocate filed a petition for a grant of Letter of Administration Intestate. It was his further evidence, that it was also his mother's wish and directive that the house at Miti mingi Mbaruk was to be left for him which was also in accordance with the wishes of the deceased who had gifted him as the last born.
19. Timothy further testified that upon the death of his mother the house left abandoned and so he undertook renovations and moved in as had been wished by his father and mother.
20. During Cross examination he stated that he had not consented to his mother applying for the grant in Succession Cause No. 634 of 2014 and the signature against his name was not his. He admitted that he did not obtain the consent of his siblings prior to filing the petition No. E1236 of 2020 in Nairobi. He also admitted that the said cause had been dismissed.
21. Timothy denied that Edith Kairu (Edith) was living in the house and that he evicted her as alleged by the Petitioners.
22. When questioned about the grave yard where his parents are buried, Timothy stated that the same is not fenced and every family member is free to access it.
23. As regard the houses at Langalanga, Timothy stated that rent used to be paid to an account he had jointly opened with Edith. He denied the allegations that he had instructed the tenants to pay rent into another account in which he was the sole signatory. He averred that it was M/s Githiru and Co. who notified the tenants to pay the rent to their office.
24. The second protestor, Faith Wacuka Kairu (Faith) also filed an affidavit of protest. Her averments largely mirror those of Timothy. Both Protesters exhibited the proposed survey map by Mugendi & Associates and the fee note, addressed to their late mother.
25. In addition, Faith stated that she and Benson were issued with a grand ad litem in order to prosecute the succession cause No. 634 of 2014. Faith also averred that she was never served with a citation as required, hence the grant issue herein was erroneously issued and should be revoked and confirmation of grant be issued to Timothy under section 71(1)(b) of the Act.
26. In her oral testimony, Faith stated that the deceased left a will, which was disclosed to them by their mother. That the matrimonial home of the deceased was given to Timothy as per the deceased's wishes and in accordance with Kikuyu customs. She thus sided with Timothy stating that the house in question should be given to him. She further stated that a surveyor was called and subdivided the



- land at Mbaruk in accordance with the wishes of the deceased and subsequently she took possession of her portion measuring one (1) acre.
27. As regards Motor vehicle Registration No. KAE 439 X, Faith stated that it is her who had given it to her father and who gave it back to her in 2009 and then she sold it.
 28. Faith further averred that after their mother died, Edith who had been living with voluntarily left their home. Later Timothy did renovations to it and moved in. Faith denied that she had signed the consent for the petition for the grant herein.
 29. On cross examination, Faith admitted that in 2014, the said Motor vehicle Registration No. KAE 439 X was in her father's name but she transferred it to her name in 2017 as she already had the transfer form, duly signed by her later father. She also conceded that she had, with Benson filed for the grant of Letters Ad Litem in Succession Cause No. 247 of 2015.
 30. Joseph Murithi Mugendi a Surveyor came to testify in support of the protestors. It was the surveyor's testimony that Mary, the widow of the deceased had approached him and instructed him to proceed to subdivide the land at Miti mingi. That he then proceeded to sub-divided the said property into 6 portions but no titles could issue since the grant that Mary had had not been confirmed.
 31. I will now turn to the petitioners' case.
 32. In her oral testimony, Monicah Kairu (Monicah) stated that after the death of their father, their mother filed a succession cause, which was consented to by Timothy. That their mother died before the grant had been confirmed. It was her further testimony that before their mother died, Timothy never raised the issue of the will and only came up with it after she died. He then started harassing Edith, who had been living in their family home and eventually evicted her forcefully. That he then took over the house without consent of the other siblings.
 33. Monicah further stated that the graveyard on which their parents and late brother are buried are inaccessible since Timothy had refused to let them in. She denied that their family home was left to Timothy.
 34. As regards the rental income from the Langa Langa property, it was her testimony that Timothy changed the agreed payment method and directed tenants to pay rent to an account that only he is aware of.
 35. It was her proposal that a quarter of an acre that holds the family home be set aside as a trust for the entire family and the rest be shared equally.
 36. The witnesses took issue with the manner in which Faith took Motor vehicle registration No. KAE 439X, terming it irregular.
 37. She questioned the authenticity of the alleged will and pointed out that it referred to their mother as a child of the deceased.
 38. On cross examination, the witnesses denied that Timothy was orally gifted the home by his father. That they have been unable to access the graveside since Timothy has blocked them. She denied ever meeting the surveyor.
 39. Benson Kairu (Benson) also testified in support of the summons for confirmation. He reiterated Monicah's evidence and added that he never sanctioned the purported sub-division of the land at Miti Mingi/Mbaruk.



40. Benson affirmed that Edith was living with their late mother in the family home but she was unceremoniously evicted by Timothy. That Timothy unilaterally changed the accounts where the rent for the Langa Langa a property was to be paid. He urged the court to order that Timothy be made to account for the rent he has collected since the changes he effected.
41. Edith Kairu (Edith) also testified supporting the proposal in the summons for confirmation. She reiterated what Monicah and Benson had testified.
42. She added that she was the one living with their mother after their father died. That after their mother died, Timothy with the help of Faith forcefully evicted her. She reported the incident to the police. Later, she learnt that Timothy had moved into their family home. She denied knowledge of the will that Timothy alluded to.
43. Edith further stated that from September 2020, Timothy directed the tenants at the property at Langa Langa not to pay rent into the Joint account they held together and since then she does not know where the rent was paid. She also demanded that Timothy accounts for the said rent.
44. At the close of the hearing the parties filed their respective submissions which I will not rehash. It suffices to state I will incorporate them in the ruling.

Issues for Determination

45. In my opinion, the issues to be addressed by the court are:-
 - i. Whether the grant herein was properly issued.
 - ii. Whether there was on will drawn by the deceased.
 - iii. How should the estate be distributed?
46. On the first issue it is noted that indeed, there was Succession Cause No. 634 of 2014 which was commenced by the mother to the parties herein.
47. From the material before the court, the grant therein was revoked by the court after giving notice to the petitioner on 5th December 2018.
48. With the said grant revoked and the cause dismissed, the parties had two options, to either apply for the reinstatement of the cause and the seek substitution of the administrator or to make a fresh petition altogether. It is evident that the Petitioners then opted for the latter, hence this cause.
49. The complaint by the Protesters is that they were never served with the citation as they had not consented to the two Petitioners applying for the grant. It is also the Protesters' case that there was a will left by the deceased.
50. For a grant to be revoked, the Applicants needed to have filed summons to that effect. Needless to state, the court can also revoke the grant on its own motion if there are sufficient grounds for doing so.
51. This cause was filed as one which was for intestate estate. The Protesters had a right to seek the grant revoked if there was indeed a will. What they have done was to file a protest as to the proposed mode of distribution and in the same protest orally sought to have the grant revoked.
52. Section 76 of the Act provides as follows:-

Revocation or annulment of grant



A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- a. that the proceedings to obtain the grant were defective in substance;
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

53. Section 66 of the Act gives the order of Priority as administering the estate where it provides as follows:-

- i. Preference to be given to certain persons to administer where deceased died intestate
- ii. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide
- iii. the following order of preference—
 - a. surviving spouse or spouses, with or without association of other beneficiaries;
 - b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
 - d. the Public Trustee; and
 - e. creditors:
 - i. Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

54. The grant of letters of administration herein was issued pursuant to the petition by the current administrators. The requisite consent that was filed then did not contain the signatures of the 2 protestors as required. It was thus necessary that a citation be issued to the 2 beneficiaries in question under Rule 7 of the P & A Rules.

55. It is then clear that no citation was issued as required. So, what is the effect of lack of a citation?

56. A citation serves as a notice to the parties who have not consented that the Petition has been filed or is to be filed. It gives them a chance to either accept the Petitioner's or object to them.

57. Ordinarily, while the failure to issue a citation would constitute a ground to revoke the grant, the court ought to consider whether the lack of the consent has prejudiced any party.

58. In the instant case, Timothy and Faith are not really prejudiced since the estate has not been distributed. The petition was presented by persons who rank equally to them. In any case, they eventually became aware of the grant, hence their protest. I am therefore of the view that a revocation of the grant at this stage would do more harm than good to the parties.

59. In any case, the court can invoke section 71 (2)(b) of the Act as submitted by counsel for the protestors, and confirm the grant to them alongside the Petitioners.



60. As to whether the protesters ought to be added to the confirmed grant, I find that this would also just lead to more delays. Even with the current administrators having failed to notify the protesters correctly as per the law, it is not shown that they have benefitted in any way, to the detriment of the protesters. Thus, I am reluctant to revoke the grant issued herein, or add the protesters as sought.
61. It was the Protesters' case that the deceased left a will. Now, the cause herein is for intestate estate. The Protesters have not sought to revoke the grant upon discovering of a will, so it is difficult to uphold the purported will.
62. Matters are made worse by the fact that Timothy used the alleged Will to file Succession Cause No. E1236 of 2020 in Nairobi, without the knowledge of any other beneficiary.
63. Much has been said about this Will. Reference was made to the Letter of Instruction to Ms Githiru & Co. Advocates which mentions a will. So why did the parties, including the protesters, consent to a petition by their mother filed for an intestate estate if they knew that there was a will? These are some reasons to doubt if a valid will existed. As I have stated, these are proceedings in an intestate estate, without the proper introduction of the said will, this court cannot make reference to it. The matter is treated as an intestate one.
64. If I got the 1st Protester (Timothy) correctly, the house in question was said to have been gifted to him during the lifetime of the deceased as a wedding gift. Thus, apart from laying claim through the will which I have dealt with, he has stated that the house was a gift *inter vivos*. This particular argument was not supported by any evidence. None of the other siblings, save for Faith corroborated this averment. In fact there is no evidence to show that the deceased made any steps to make his intention to make the gift to Timothy. The nature of a gift *inter vivos* was discussed in *Re: Estate of the Gideon Manthu Nyioka (2015) eKLR* in which the court referred to the Court of Appeal case of *Rapal Shah & Another vs Sejah Shah Appeal No. 268 of 2019 (2024) KECA 76(KLR)*. It was held that:-
- a. -
 - i. "In law, gifts are of two types. There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortis causa*). Section 31 of the *Law of Succession Act* provides as follows with respect to gifts made in contemplation of death:
 - ii. ...For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid."
65. Halsbury's Laws of England 4th Edition Volume 20 (1) at paragraph 67 also discusses such gifts and states as follows:-
- i. -"Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in



the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

66. From the evidence, the alleged gift inter vivos to Timothy was not manifested in any way. His claim that it was gifted to him as a wedding present was vehemently opposed by his other siblings who attended the same wedding. At the time of the filing of the initial cause by his mother, there was nothing stated to that effect. Therefore, it is difficult to agree with him that the house gifted as alleged.
67. Timothy has also invoked Kikuyu customs, which are said to state that the last born’s the one entitled to inherit the parents house. He cited LM ‘s vs JWC and Another (2005) eKLR. In that particular matter, the court allowed that to happen because there was no objection to it. It was upon concurrence by all the parties and the court did not restate that to be the custom.
68. It was incumbent upon the Protester (Timothy) to provide proof of such custom by way of expert evidence. That he has failed to do.
69. Even if the custom was to be restated, I doubt if this court can uphold it in light of the provisions of Articles 27(3) of *the constitution* which expressing bars any form of discrimination. The Article provides the following:-
- i. ‘women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres’?.
70. Further Section 3 (2) of the *Judicature Act* provides that:-
- i. (2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is 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.
71. In my view, the claim by Timothy over the house, in the face of the objection raised, would be contrary to the law. If the parties had been in agreement to that effect then the court would really have had no issue and would have been able to uphold their wishes.
72. For the foregoing reasons, I find that the claim by Timothy is untenable.
73. The general Principle when it comes to distribution of an estate is that the beneficiaries ought to get equal shares. This principle has been reiterated in many cases. 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.”



74. In *Eliseus Mbura M'thara V Harriet Ciambaka & Another* [2012] eKLR the court reiterated the principle of non-discrimination that is required in the distribution of a deceased person's estate as follows:

‘The *law of Succession Act* does not discriminate between gender in matters of succession or inheritance. Under the *law of Succession Act* and indeed under *the Constitution* a child is a child and every person has equal rights under the law irrespective of gender. The *Law of succession Act* does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person’.

75. I have considered the proposal by the Petitioner vis-à-vis the protest. I am in agreement with the proposal by the Petitioners as it gives all the beneficiaries equal rights to the estate. The parties' home is of sentimental, personal and cultural value. This is where they grew up, their roots. It would not be in order to drive all of them away and leave just one person to live in it. From the evidence, the other siblings are unable to access their parent's graveside. That will be worse if the same place is now left to one beneficiary.

76. Accordingly, I agree with the Petitioners that a portion of land that has the parent's house and the graveside should be set aside and held in trust for the entire family.

77. Therefore, in respect to the property at Miti Mingi/Mbaruk, I direct that a reasonable portion of land be set aside for the above purpose. The Petitioner's shall hold it in trust for the entire family, with equal and unhindered access to all of them. The Petitioners/Administrators shall be responsible for the maintenance of the house and graveside. The remainder of the land shall be divided equally amongst the beneficiaries.

78. As for the other property the parties were all in agreement that the same be sold and the proceeds be shared equally. I uphold the same.

79. On the issue of rent for the property at Langa Langa, it is evident that the letter to the tenants came from Timothy. It was also evident that Edith, who was a co-signatory to the account that was previously used to hold the rent, has not received any funds from December 2023.

80. That being the case, it follows that Timothy has to account for all the rent that he has collected from that date. In the event he fails to do so, then the same is to be deducted from his share of the proceeds of the sale and be distributed among the beneficiaries equally.

81. As for the Motor vehicle KAE 439 X, it is not in dispute that it was sold. Faith claims that the vehicle was hers. If this really was the case, then why was the vehicle included in the 'will' that she and Timothy were keen to exhibit to the court? Why was the vehicle transferred after the death of their father?

82. These are questions that trigger suspicion over the manner in which the vehicle was transferred from the deceased's name so that of Faith and then sold.

83. For the foregoing reasons, I find that the proceeds of the sale of that vehicle ought to be available for distribution amongst all the beneficiaries. Failure to do so will result in Faith's share of proceeds from the sale being reduced by the value of the vehicle as stated in the Petition. The same shall be shared among the beneficiaries.

84. In conclusion, the court makes the following orders:-

- i. The estate is to be distributed as an intestate estate with all beneficiaries entitled to equal shares.



- ii. Faith Kairu to account for the sale of motor vehicle KAE 439 X and in default Ksh 100,000/- being the stated approximate value of the vehicle to be deducted from her share of proceeds from the sale and be distributed among all the beneficiaries.
- iii. Timothy Kairu is to account for all the rent collected from December 2023 and in default the same to be deducted from his share of sale of the proceeds of sale of the estate and be distributed equally among all beneficiaries.
- iv. The property known as Muguga/Jet & Chore 2381 and Nakuru Langa Langa /130 to be sold and proceeds shared, subject to the deductions set out hereinabove.
- v. A reasonable portion to be hived off Miti Mingi /Mbaruk Block 5/1613 to hold the family house and the parents' graveside and the same to be held in trust by the Administrators, for themselves and other beneficiaries.
- vi. Each beneficiary shall have equal access to the house and graveside.
- vii. The Administrators are given 180 days to complete the transmissions process, failing which, by their own acts or omissions, any beneficiary may apply for their removal.

85. This being a family matter, there shall be no orders to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MERU THIS 5TH DAY OF NOV 2024.

H.M. NYAGA

JUDGE

