



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei – J

**SUCCESSION CAUSE NO. 51 OF 2017**

**(FORMERLY NAIROBI SUCCESSION CAUSE 667 OF 1984)**

**IN THE MATTER OF THE ESTATE OF PAUL MUTHIANI MUSAU (DECEASED)**

**PETER MWAKA MUTHIANI.....4<sup>TH</sup> ADMINISTRATOR/APPLICANT**

**VERSUS**

**BENJAMIN WAMBUA JAMES.....1<sup>ST</sup> ADMINISTRATOR/RESPONDENT**

**JOSEPH KAWINZI MUTHIANI.....2<sup>ND</sup> ADMINISTRATOR/RESPONDENT**

**ANTHONY MUSAU MUTHUSI.....3<sup>RD</sup> ADMINISTRATOR/RESPONDENT**

**RULING**

1. The 4<sup>th</sup> Administrator/applicant's counsel approached the court vide certificate of urgency as well as notice of motion dated 11.1.2021 seeking that a mention date in the month of January 2021 be issued for purposes of taking a ruling date on distribution based on the submissions and reports filed in this honourable court.

2. The grounds of the application are that this is a 35-year-old matter that should be dispensed within the shortest time possible. Counsel stated that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Administrators will not be prejudiced if the orders sought are granted.

3. In support of the application was an affidavit deponed by Samuel Ayora Magati who is the counsel for the 4<sup>th</sup> Administrator wherein he averred that it would be in the interest of justice that an early mention date in January 2021 be issued because the court diary is in July 2021.

4. When the advocates appeared before me on 28.1.2021, Mr Ayora counsel for the applicant demanded that the court give a ruling on the two reports and as submitted by the parties. Mrs Nzau counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> administrators equally sought a ruling on the reports and submissions of the parties.

5. In retrospect, in my ruling rendered on 5.11.2019, I made the following orders that I shall reproduce in material part;

***“2. The administrators do agree on a mode of distribution of the remaining unutilized land and file an application in that regard detailing the mode of distribution within 60 days from the date hereof failing which the court shall adopt the mode in the judgement issued on 21st September, 2012.***

***3. The administrators are ordered to avail to court a report and inventory of their activities as per the provisions of section 83 of the Law of Succession Act within sixty (60) days from the date hereof....”***

6. It is not in dispute that the properties of the deceased are ***L. R No.774 Komarock, L.R No.1158 Katunguni Kwa Katuku, Plot No.15A and 15B at Tala Market, Plot No. Katine section behind plot No.15 Tala Market***. This court is cognizant that the parties were to agree on the remaining unutilized portion of the land. It is not in dispute that indeed the parties have agreed to a mode of distribution of the estate of the deceased save for one plot and to this end have filed reports in court. For the avoidance of doubt, the reports filed by the 4<sup>th</sup> Administrator as well as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> administrators are dated 17.1.2020 and 28.7.2020 respectively.

7. What then do the reports state in this regard? In the report filed on 17.1.2020 filed by the 4<sup>th</sup> Administrator, the following can be elicited as regards each of the properties of the deceased;

**a) L.R No.774 Komarock.**

That the same consists of the sandy area, the rocky area, the arable part and the small portion on the right. It was agreed that the 4 portions be subdivided into 3 portions each on the sandy area, the rocky area, the arable part and the small portion on the right so that each house gets a piece on the sandy area, the rocky area, the arable part and the small portion on the right. - See item **1A** and **1B** on page 1 and 2 (annexure PMM-1).

**b) L.R No.1158 Katunguni Kwa Katuku.**

That the same has been subdivided into 3 equal portions, one for each of the 3 houses- See item 2 page 2 of PMM1.

**c) Plot No.15 (a) and (b) at Tala Market.**

That the same be sold and the proceeds distributed equally to the 3 houses- See item 3 page 2 of PMM1.

**d) Plot No. Katine section behind plot No.15 Tala Market**

That the same be sold and the proceeds distributed equally to the 3 houses- See item 3 page 2 of PMM1.

8. In the report filed on 28.7.2020 by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> administrators, the following can be elicited as regards each of the properties of the deceased;

**a) L.R No.774 Komarock,**

That the same consists of an area with sandy and black cotton soil so the same has been subdivided equally into 6 portions among the 3 houses with each house getting 2 portions. – (See page **1** item **3e**).

Further that the survey and subdivision was done without considering the developments on the land and therefore the subdivision be revoked and have the Registry Index Map (R.I.M) amended as per the ruling dated 5.11.2019 upon submissions to be made on what had been done previously- See item 4.

**b) L.R No.1158 Katunguni Kwa Katuku.**

That the same has been subdivided equally that is into 3 equal portions, one for each of the 3 houses- See item 1 page 1.

**c) Plot No.15 A and 15B at Tala Market.**

That the same be sold and the proceeds distributed equally to the 3 houses- See item 3d page 1.

**d) Plot No. Katine section behind plot No.15 Tala Market.**

That the same be sold and the proceeds distributed equally to the 3 houses- See item 3d page 1.

9. I have also considered the submissions of each of the learned counsels that I shall not reproduce not out of disrespect for their industry but for purposes of brevity. I have also considered the two reports on the proposed subdivision of the properties.

10. After considering the reports and submissions of counsel, it is clear to me that there is agreement that firstly, **L.R No.1158 Katunguni Kwa Katuku**, be subdivided equally that is into 3 equal portions, one for each of the 3 houses; Secondly, that **Plot No.15 A and 15B at Tala Market**, be sold and the proceeds distributed equally between the 3 houses; Thirdly, that **Plot No. Katine section** behind **plot No.15 Tala Market** be sold and the proceeds distributed equally between the 3 houses.

11. It is also clear that **L.R No.774 Komarock** had been subdivided into 9 plots as per the mutation forms but the exercise was not concluded due to hostilities on the ground and whereas the 4<sup>th</sup> administrator wants this subdivision to remain and to be concluded, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> administrators want the subdivision to be revoked so that the subdivision will take into account the developments on the land. I am at cross roads on whether to hear the parties on their contentions in respect of this specific plot and therefore grant a partial confirmation or grant confirmation on what had already been achieved by the surveyor. It is noted from the record of 3. 4. 2014 learned counsels for the 4<sup>th</sup> administrator as well as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> administrators entered into a consent before Justice Kimaru as follows:

**“The properties to be subdivided are:**

**i) L.R No. Matungulu/Sengani/1158**

ii) Plot Numbers 15A and 15B Tala Market

iii) L.R No. Katine Section Tala

iv) L.R No. Machakos/Nguluni/774

**Each of the parcels shall be divided into three (3) equal portions. The two advocates and the administrators to meet at the offices of the surveyor in Machakos on 22/4/2014. The surveyor shall present to the court survey plans on 5/5/2014 for the court's approval. In case of any objections the court considers the same."**

Pursuant to the said consent, the parties through their counsels appeared before Kimaru J on 5/5/2014 and agreed by consent that the subdivision plans had been approved by the court. They agreed that the survey to commence from 12/5/2014. However, it seems the 4<sup>th</sup> administrator carried out the survey in the absence of his co-administrators which brought about the stalemate wherein the 4<sup>th</sup> administrator filed an application dated 25.9.2017 seeking for an order for the Deputy Registrar to sign the necessary documents. Apparently the point of departure seems to be the survey exercise done by the 4<sup>th</sup> administrator that sought to subdivide parcel number Machakos/Nguluni/774 into nine portions contrary to the earlier consent to have all the assets shared equally between the three houses. It is this disagreement that has led to the myriads of applications by the parties herein. Even with these disagreements, the bottom line remains that vide the judgement of Nambuye J (as she then was) dated 21.9.2012 and the consent by the parties entered before Kimaru J on 3.4.2014 all the four assets belonging to the deceased were to be divided into three (3) equal portions as per the three households. Suffice to add that the said consent has not been set aside to date. From the said consent and the two reports it is clear that parties are in agreement that the assets be divided into three equal parts as per the three households. The two reports have left no doubt that the other three assets be sold and the proceeds shared equally between the three households while two of the assets be divided equally into three portions between the three houses.

12. Having considered that this court on 5.11.2019 had pointed out that if there was no agreement then there would be adoption of the mode in the judgement issued on 21.9.2012. I would now add that the consent entered into by the parties on 3.4.2014 wherein the assets were to be shared equally between the three households is still binding. In order to bring this old matter to an end, in respect of plot **L.R No.774 Komarock**, I direct that the same be subdivided into 3 equal parts as per the three houses; the specificities as to who gets what portion or how many subplots will come out of the 3 main parts according to who wishes to get which plot that is facing where, can always be handled by the beneficiaries once each household has obtained their respective shares. **L.R No. Matungulu/Sengani/1158** shall also be shared equally between the three households. The other two properties namely **Plot Numbers 15A and 15B at Tala Market** and plot at **Katine section within Tala** be sold and the proceeds shared equally between the three households. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> administrators in their report appear to have misgivings about a resurvey of plot Machakos/Nguluni/774 due to the fact that beneficiaries and third parties have carried out developments on their portions. However, that should not worry them as the judgement of Nambuye J (as she then was) at page 67 had foreseen such an eventuality when she stated as follows:

**"The administrators are however at liberty to validate any sale transaction done without authority but falling within the share entitlement of the party who has purported to dispose of the said property without being holder of a grant of representation to the estate of the deceased."**

The parties' concerns if any would be taken care of by the said direction. Suffice to add that the grant having been revoked and the present administrators appointed made it necessary for a fresh distribution of the assets. Hence, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> administrators' suggestion that the earlier subdivision of plot No. Machakos/Nguluni/774 by them be retained is not convincing as there is need to carry out fresh distribution of that particular property in view of the appointment of the 4<sup>th</sup> administrator. Again, the 4<sup>th</sup> administrator's suggestion that the subdivision of that particular portion into nine portions as partly carried out by him is not tenable as the same went against the judgement dated 21.9.2012 and the consent entered on 3.4.2014. It is expected that all the administrators will work together and bring this old matter to a close for the benefit of the beneficiaries. The report by the 4<sup>th</sup> administrator is not workable as the same is inconsistent with the mode of distribution as ordered by the court in the judgement dated 21.9.2012 and by the consent of all administrators dated 3.4.2014.

13. In the result it is my finding that the report dated 17.1.2020 by the 4<sup>th</sup> administrator is not suitable/workable. I find the report by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> administrators dated 28.7.2020 regarding the distribution of the estate of the deceased is acceptable and the same is allowed to the extent as follows:

**a). Parcel number Machakos/Nguluni/774 and parcel number Matungulu/Sengani/1158 shall be shared equally between the three households of the deceased. The administrators shall ensure that each household is allocated portions containing rocky, sandy and cotton soils so as to bring semblance of equity and fairness.**

**b). Plot Numbers 15A and 15B Tala Market and plot at Katine Section shall be sold and the proceeds shared equally between the three households.**

**c). The administrators are directed to work together and conclude the process of distributing the estate so that the beneficiaries get their rightful entitlements.**

**d). In order to fast-track the process, the administrators may use the previous surveyors and have the mutation forms regarding parcel Machakos/Nguluni/774 amended so as to reflect subdivision into three portions as opposed to nine portions while the other properties will be dealt with as ordered in (b) above and in the alternative the administrators can engage a new surveyor to carry out the exercise and to file the report before the court within sixty (60) days upon commencing the exercise.**

**e). In the event of lack of cooperation among the administrators, the Deputy Registrar of this court is hereby authorized to sign**

*all the necessary documents so as to fast-track the subdivision exercise.*

*f). Matter is fixed for mention on the 19.7.2021 to confirm progress.*

*g). There will be liberty to parties to apply if need be.*

*h). As parties are members of one family, there will be no order as to costs.*

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 17TH DAY OF MAY, 2021.**

**D. K. Kemei**

**Judge**