



**In re Estate of the Late Gasper Walele Mwanguwa (Deceased) (Succession Cause 355 of 2012) [2021] KEHC 9782 (KLR) (3 May 2021) (Judgment)**

Neutral citation: [2021] KEHC 9782 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 355 OF 2012**

**JO NYARANGI, J**

**MAY 3, 2021**

**N THE MATTER OF THE ESTATE OF THE LATE  
GASPER WALELE MWANGUWA (DECEASED)**

**BETWEEN**

**JULIUS MNDWARIGHA WALELE ..... 1<sup>ST</sup> APPLICANT**

**JOHN IGHACHOWALALE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KATHARINA WAMBUGHA WALALE ..... OBJECTOR**

**JUDGMENT**

1. Gasper Walele Mwanguwa the deceased herein died at coast General Hospital in Mombasa on February 20, 2012. According to the court record, he was survived by 8 children among them the petitioners and the widow by the name of Katharina Wambugha Walele the objector herein. Besides, the deceased had taken two other biological children but born out of wedlock as part of his family.
2. Through a Miscellaneous Application No 154/2012, dated July 19, 2012 the objector (widow) sought a number of orders inter alia; preservation of the estate, production of accounts and disclosure of dealings with the estate by the petitioners herein. She also appeared to challenge the validity of a will allegedly written by the deceased and produced during a family meeting by one of her sons one Focus Mwanguwa Walele.
3. During the pendency of the said application, the petitioners in their capacity as executors filed a petition dated August 28, 2012 seeking a grant of probate of written will. Upon hearing the Miscellaneous Application, Odero J delivered her ruling on March 28, 2013 directing consolidation of the two files. The Honourable Judge also directed the objector to file objection proceedings.
4. Consequently, on December 11, 2013 the objector filed her petition by way of cross petition for a grant.



5. According to the deceased's alleged will dated May 27, 2011, he appointed Veronica Kalamba Walele, Julius Mndwarigha Walele and John Ighacho Walele as joint executors and trustees. He bequeathed his estate as follows; Executors to pay;
  - a. Kshs 10,000 per month for the upkeep of my wife Katharina Wambughu Walele
  - b. The balance upon payment of maintenance expenses if any for the house shall be used for the construction of my house at Bura Kwa Wene Mwangi where I will be buried.
  - c. Payment of school fees and upkeep for Mary Mwai Walele until she completes her education. The period she will stay with Mary Mwai Walele upon my death shall be paid 5000 for her upkeep.
6. He further bequeathed his male children Focus Mwanguwa Walele , John Wanguwa Walele and Julius Mwndwarigha Walele the following properties;
  - a. L.R Plot IX/2XX
  - b. House at Kwa Hola Portreiz
  - c. House at Majengo
  - d. House on Mbs/Block XII/1XX to get one floor each as follows;
    - i. 1<sup>st</sup> floor Focus Mwanguwa Walele
    - ii. 2<sup>nd</sup> floor John Ighacho Walele
    - iii. 3<sup>rd</sup> floor Julius Mndwarigha walele
7. To the female children, namely;
  - (a) veronica Kalamba
  - (b) Getrude Mwanake Walele
  - (c) Hortensia Mkamburi Walele
  - (d) Elinora Dali Walele
  - (e) Annaciata Marura Walele
  - (f) Mary Mwai Walele

He bequeathed L.R plot No Mombasa/IX/XXX Tudor and flat No. D 8-35 at Nyayo Highrise Nairobi. To his wife, he bequeathed a house at Makande and upon her death, it be inherited by all his female children including Mary Mwai Walele.

7. He however made a condition that proceeds from all his properties be shared out 10 years after his death.
8. Dissatisfied with the existence of the said will, the objector questioned its validity and content. Upon hearing the objection proceedings challenging the validity of the will, the court delivered its ruling on December 15, 2017 dismissing the objection. The court found that the only recourse the objector had was to ask for reasonable provision as a dependant to the deceased.
9. Consequently, the Executors minus veronica who had refused to sign a petition application for a grant of probate filed summons for confirmation of grant dated August 9, 2019. On August 22, 2019, the



- objector (widow) and her daughters i.e deceased's female children filed summons dated August 19, 2019 seeking adequate/reasonable provision be made for them.
10. In the said application which was supported by an affidavit sworn by the widow/ objector, they argued that; the will was discriminatory as it recognized sons more than daughters; the widow was entitled to a bigger share having acquired all the properties together with the deceased; some assets were left out; that the deceased had distributed his property to his family members before he died and, that the court to find out that the share given to her and the female children was inadequate.
  11. In response, John Ighacho Walele filed a replying affidavit sworn on August 17, 2019 opposing the application arguing that all beneficiaries were provided for. That the issue being raised has already been determined by the court in its ruling of December 15, 2017 and that the summons was filed in bad faith.
  12. On September 17, 2020, the court allowed the applicant to file an affidavit of protest. Subsequently, Katharina Wambughu Walele filed an affidavit of protest dated September 18, 2020 against the summons for confirmation of grant. She averred that her husband did not make reasonable provision for her as she was only awarded 10,000 per month out of rental proceeds generated from their commercial properties. That the only house in Makonde which was allocated to her is a rental house with rent payable to National housing corporation.
  13. She claimed that she had already filed originating summons in Mombasa HCC No. 4/2020 in which she is claiming her share of the assets acquired jointly as matrimonial property with the deceased during the subsistence of their marriage. It was her contention that having been married by the deceased in 1957, they jointly acquired several properties some of which are not disclosed in the will.
  14. She claimed that some properties are not free for distribution inter alia; house in Kwa hola which was booked by the deceased but not paid for. That the purchase price was later paid by her daughter Honorata Chari Walele. She further stated that, she was residing in Mombasa/Block XII/XXX ground floor as her matrimonial home and that due to her medical condition, she cannot live on the upper floors.
  15. Further, it was argued that plot No D8-35 Nyayo High rise fetching Ksh 20,000 rent per month was the only property left for the 7 daughters. In conclusion, she claimed that she was entitled to 50% of the property as the same was jointly acquired with the deceased husband during the subsistence of their marriage and that the court is enjoined to distribute 50% of the deceased's share.
  16. In their response to the affidavit of protest, the petitioners reiterated their averments in the replying affidavit to the summons for reasonable provision aforesaid. They stated that; the affidavit of protest is an attempt to appeal through the back door against the ruling of December 15, 2017; the affidavit of protest amounts to *res judicata*; it is intended to delay confirmation of the grant; division of matrimonial property cannot apply in a probate case; protestor is a vexatious litigant; the protestor has been collecting rent from rental properties and cash from the bank and that, any property not listed shall be subjected to the relevant provisions of the law for distribution as an intestacy estate.
  17. Parties agreed to dispose of the protest and application for reasonable provision by way of written submissions.

### **Protestor's submissions**

18. Through the firm of Wanjiku Mohamed advocates LLP the protestor filed her submissions on October 9, 2020. She basically anchored her submissions on what constitutes matrimonial property under Section 6 and 14 of the *matrimonial property Act*.



19. Counsel submitted that a widow can lay claim on property acquired together with the deceased husband in probate proceedings. In support of this proposition reliance was placed in the case of *Esther Wanjiru Gitbatu V Mary Wanjiru Gitbatu* (2019) e KLR and *In the estate of MAA (deceased)* 2020) e KLR where both courts recognized a widow's interest in the property jointly acquired with her deceased husband.
20. Challenging the aspect that the protestor was to hold life interests only in the property bequeathed to her, counsel submitted that the provision for life interest over property without assuming ownership is discriminatory and untenable and that a widow can sue a legal representative for recovery of her 50% share and then claim a share from the deceased's husband's 50% share. To buttress this submission, counsel relied on the wisdom of the holding in the case of *re estate of Peter Kinyua Ethangania (deceased)* (2020) e KLR and in *re estate of Daniel Kago Wachira (deceased)* (2020) e KLR.
21. Concerning the unlisted properties, counsel submitted that, in the absence of a residuary bequest, the intended property shall fall under the intestate estate. According to learned counsel, the application for confirmation of grant is not sustainable in its current form.
22. It was further argued that the grant sought to be confirmed i.e "grant of probate of written will" does not exist in law as it should have been grant of probate with will annexed.
23. Regarding lack of consent, the protestor denied ever consenting to the application for confirmation of grant contrary to Veronica's assertion in her unsigned affidavit. Touching on the aspect of submission of accurate estate accounts within six months, counsel opined that the petitioners are in breach of section 83 of the law of succession.

#### **Petitioner's submissions.**

24. The petitioners filed their submissions on October 13, 2020 through the firm of Omondi Waweru and Co Advocates. According to the petitioners, this court has jurisdiction to determine the application for distribution of the estate of a deceased person as was held in the case of *re estate of Kiiti Mulinge Ngao (deceased)* 2019) e KLR. They further contended that the issues being raised are *res judicata* as the court has already determined the same. To fortify this argument reliance was placed on the holding in the case of *E.T.V Attorney General & another* (2012) e KLR where the court held that courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new cause of action so as to seek the same remedy before the court.

#### **Rejoinder by the protestor by way of supplementary submissions.**

25. The reply to the affidavit of protest having been filed after the protestor had filed his submissions, counsel sought leave to file supplementary affidavit which she did on November 23, 2020. Basically, counsel submitted that the suit was not *res judicata* as the court has never determined the issue of reasonable provision.
26. He also filed supplementary submissions stating that the issue at hand has not been canvassed fully to justify a declaration of *res judicata* as stated in the case of *Margaret Mumbi Kagiri V Kago Wamairwe* (2012) e KLR.

#### **Determination**

27. I have considered the objection herein by way of a protest challenging summons for confirmation of grant. I have also considered the petitioner's response. Further, I have taken into consideration



counsel's submissions and case law in support. Basically, the objector protestor is opposing the confirmation of the grant on various grounds;

28. Firstly, the objector is contending that as a wife to the deceased, she is entitled not only to reasonable provision as a dependant but 50% of the entire estate having jointly acquired the property in issue during the subsistence of her marriage with the deceased. She therefore argued that her 50% share recognized under *matrimonial property Act* Sections 6,7 and 14 was not free property available for distribution and that had the deceased survived he had no powers to dispose of the same.
29. Secondly, that the will executed by the deceased was discriminatory to her and her daughters who were entitled to equal share like the sons to the deceased.
30. Thirdly, that there are several unlisted properties belonging to the estate among them landed properties and shares in various institutions.
31. Fourthly, that the grant sought to be confirmed is non-existent as it is titled "Grant of probate of written will" contrary to section 53 (a) (i) of the law of succession.
32. On their part, the applicants responded by stating that, the issues raised are *resjudicata* as the same have been canvassed by a competent court. Further, that the grant of probate of written will was legally issued hence due for confirmation. As to division of matrimonial property, they argued that this court is bound to exercise jurisdiction over probate issues and not matrimonial property dispute. As to properties not listed, they argued that there are sufficient legal provisions to deal with the same as an intestate estate.
33. Having summarized, the issues in controversy, I will consider the same as follows;
  1. Whether the issues raised in the affidavit of protest amount to *res judicata*;
  2. Whether the grant of probate of written will is capable of confirmation;
  3. Whether failure to list all known assets of the deceased in the will renders the application for confirmation incompetent;
  4. Whether the protestor is entitled to reasonable provision of the estate as a dependant;
  5. Whether she is entitled to 50% of the estate as being her contribution towards acquisition of the estate during the subsistence of her marriage with the deceased.Whether the issues raised in the affidavit of protest amount to *resjudicata*.
34. The protestor is claiming what she refers to as her fair share of the estate either as a dependant or 50% of the estate being her 50% equal contribution towards acquisition of the property in issue by virtue of being a widow of the deceased. The petitioners argued that in its ruling dated December 15, 2017, the court determined the issue revolving around validity of the will and therefore the grant should be confirmed and estate shared out in accordance to the will.
35. When is a matter deemed to be *resjudicata*?. Under Section 7 of the *Civil Procedure Act*, no court shall try any suit or issue in which the matter directly or indirectly in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
36. According to that provision, a matter in controversy becomes *resjudicata* if the matter between the same parties must have previously been heard and determined on merit by a competent court. See



*Margaret Mumbi Kagiri V Kagiri Wamairwe* (supra). The issue seeking determination herein is the objector's petition and cross petition for a grant of representation which is also challenging indirectly the validity of the will executed by the deceased. On December 15, 2017 the court declared the will valid. The court advised the objector to pursue a claim for reasonable provision separately. Issue regarding the validity of the will is spent.

37. At page 13 and 14 of its ruling the court stated as follows;

“However, failure to make provision for a dependant by a deceased person in his will does not invalidate the will. The remedy for the objector and her dependants lies not in objection proceedings but in an application for reasonable provision under section 26 of the Law of Succession Act.”

38. What is the implication of the ruling dated December 15, 2017? Does it resolve the issue of reasonable provision which is the subject of the protest herein? In the case of *Michael Bett Sirov V Jackson Koech* (2019) e KLR the court of appeal had this to say regarding resjudicata;

“The doctrine of *resjudicata* bars the bringing another suit where there has been a previous suit between the same parties but has been heard and finally determined by a competent court. The rationale is that it would be pointless and a waste of judicial time, to litigate issues that have already been determined by the court.”

39. Ideally, the objective of the doctrine of *resjudicata* is to disabuse the process of litigation via the court from vexatious litigants; uphold the dignity of courts' authority; avoid likelihood of issuing contradictory decisions by different courts on the same matter; save on judicial time and unnecessary legal expenses and most importantly, bring litigation to an end”

40. In the instant case, the protest has raised weight and substantive issues that were not the subject of litigation or determination in the ruling of J Thande delivered on December 15, 2017. That is why the court advised the objector on considering the alternative of seeking for reasonable provision. Accordingly, it is my finding that the issues in controversy are not *resjudicata*.

Whether the grant of probate of written will is capable of confirmation.

41. There is no doubt that there is a grant of probate of written will issued on January 18, 2019 to the petitioners jointly. According to the petitioner, such a grant does not exist. I have looked at section 53 of the law of succession. It provides that;

“Forms of grant- a court may –

(a) Where a deceased person is proved (by production of a will or an authenticated copy thereof or oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either (i) probate of the will or more of the executors named therein; or (ii) If there is no proving executor, letters of administration with the will annexed...”

42. The spirit of the grant issued herein is clear. The grant is that of a testate estate which requires issuance of a grant of probate of the will since there are executors who have proved the existence of a will. I do not find any prejudice in wording the grant as “grant of probate with will annexed or grant of probate of written will”. The use of the two-wordings interchangeably does not defeat the intention and purpose of the grant. That is a curable technicality under Article 159 (2) (d) of the Constitution.

Whether failure to list some of the properties comprising the estate renders the application for confirmation incompetent.



43. It is the protestor's contention that several properties were not listed. she went ahead to list them. However, I did not see much documentary evidence to support the existence of some of those asset's e.g shares. The petitioners are of the view that, if any property was omitted in the will, it can be dealt with as an intestate estate. Indeed, under section 66 of the *law of succession*, where there is partial intestate, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.
44. With section 66 in place, it therefore follows that any unlisted property in a will can separately be dealt with as an intestate estate and be treated as if the deceased had not left a will. I do agree with the petitioners that the properties omitted in the will are not lost. They will be listed separately be dealt with as an intestate estate hence separately distributed amongst all beneficiaries who are legally entitled the objector and her daughters inclusive. To that extent, omission of those properties if proved does not make the application for confirmation of the grant under the will incompetent. Therefore, I do not find that ground sustainable.

Whether the protestor is entitled to reasonable provision as a dependant.

45. The protestor/objector claims that the deceased husband did not make reasonable provision for her being one of the dependants. The petitioners do not deny that their mother (protestor) was a wife to the deceased immediately preceding his death. Who is a dependant? Section 29 of the *law of succession* defines a dependant as;
- a. Wife, or wives, or former wives, and the children of the deceased whether or not maintained by the deceased immediately or prior to his death;
  - b. Such of the deceased's parents, step parents, grandparents, grandchildren, step grandchildren, children who the deceased had taken into his family as his own, brothers and sisters, and half brothers and half-sisters, as were being maintained by the decease immediately prior to his death and
  - c. Where the deceased was, her husband if he was being maintained by her immediately prior to the date of her death.
46. From the above provision, there are three categories of dependants. The first category which is automatic and not qualified is that of wife, or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.
47. To that extent, the protestor being a widow of the deceased is automatically qualified to be a dependant to the deceased and she and or her daughters need not prove that they were being maintained by the deceased immediately preceding his death. See *In re estate of the late Annelies Anna Graff* (2019) e KLR where the court stated that;

“Section 29 (a) creates a special category of dependants who are dependants due to their relationship to the deceased. Here the wife, wives, former wife or wives and the children of the deceased are automatic dependants and it is immaterial whether or not they were being maintained by the deceased immediately prior to his death.

48. Having held that the protestor was a dependant to the deceased, the question will be, whether she is entitled to reasonable provision? Section 26 of the *law of succession* creates room for the court to apply its discretion in making reasonable provision for dependants not provided for in a will by the testator.
49. Section 27 of the *law of succession* goes further to bestow more discretionary powers on the court in determining on what provision to make for a dependant by directing a specific share of the estate to



be given to the dependant, or by way of periodical payments or lumpsum and impose conditions as it thinks just.

50. It is incumbent upon this court to make a finding whether the protestor deserves any reasonable provision or not. It is admitted that she was not completely left out. She was provided for by an award of Ksh10,000 monthly from income generated from commercial properties. She was also given a house in Makonde. She now feels that this was not reasonable.

51. It is trite that a will is a testamentary expression of a deceased's wishes on how he prefers his assets or property distributed after his death. However, this testamentary will is not without conditions. It is not absolute. It is subject to attainment of certain parameters or conditions. A will therefore is not a sacred document that is indispensable. Where necessary, a court can apply its discretion to vary and make reasonable provision to people who may reasonably suffer or be hurt by the making of such will. See *Elizabeth Kamene Ndolo Vs George Matata Ndolo* (1996) e KLR where the court of appeal stated as follows;

“This court must, however, recognize and accept the position that under the provision of section 5 of the Act every Adult Kenyan has unfettered testamentary freedoms to dispose of his or her property by will in any manner he or she wishes. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised responsibly and a testator exercising that freedom must bear in mind that the engagement of the freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is especially recognized by section 26 of the Act which provides as follows ...”

52. The court went further to state;

“So that if a man by his will disinherits his wife who was dependant on him during his life time, the court will interfere with his intention to dispose of his property by making reasonable provision for he disinherited wife”

53. According to the advocate, the house in Makande is attached to a loan by the NHC to which rent collected therefrom is used to offset the loan. This fact was not controverted implying that the protestor is not benefiting. Equally, the ksh 10,000 per month out of rental income from commercial buildings may not be reasonable.

54. The protestor was a wife to the deceased since 1957. Undoubtedly, the properties acquired during the subsistence of the marriage does comprise the estate's assets. It would be unfair to bequeath the protestor by giving her Kshs10,000 per month out of a vast estate. The protestor having stayed with the deceased as husband and wife since 1957 till his death deserves better treatment. Whereas children have a right to inherit their father's estate under the will, this court is under duty to protect those unfairly or unnecessarily stripped of their entitlement by executors who do not even state reasons for such action excluding some automatic dependants.

55. In the circumstances of this case, it is my finding that the protestor will be entitled to reasonable provision. However, this can only be done after valuing the properties listed in the will See *Brioan Kadima V Jackson William Musera & another* (2017) e KLR where the court held that;

“Accordingly, for the court to determine the adequate provision of the estate that should go to the applicant as reasonable provision an accurate inventory to the estate and the respective



value of the estate assets is crucial so as to establish the nature and amount of the deceased's property.”

Whether the protestor is entitled to 50% of the estate being her contribution towards the acquisition of the entire estate during the subsistence of their marriage.

56. It was the protestor's contention that having been married to the deceased in 1957, they jointly acquired their properties now comprising the estate. That she is entitled to 50% share first and the balance of 50% will be shared amongst the beneficiaries.
57. I am alive to the fact a will of deceased person must at all times be honoured as long as it is not unreasonable. See in the estate of the *estate of the late Sospeter Kimani Waitbaka* Successions Cause 341/1998 where the court held that;
- “The will of the deceased must be honoured as much as it is reasonably possible. Readjustments of the wishes of the dead by the living must be spared for only accentric and for only unreasonably harmful testators and weird wishes. But in matters of normal preferences for certain beneficiaries or dependants, may be for their social goodness to the testator, the court should not freely intervene to alter them.”
58. This court is seized of this matter as a probate court dealing with the property of a deceased person. The protestor has brought in the argument based on Division of matrimonial property under *matrimonial property Act*. In my opinion, this court is not properly seized of the jurisdiction to handle matrimonial properties dispute between children and a widow to the deceased.
59. To do so will render superfluous the provisions under section 35 and 40 of the *law of succession* which provides guidance on how a deceased person's property shall be dealt with when the deceased has left one spouse with children or in case of a polygamous family in accordance with section 40.
60. The issue of matrimonial property would have been applicable if it was a dispute between spouses fighting over the estate of their late husband. In such a scenario, the court would be enjoined by the court of appeal finding in the case of *Esther Wanjiru Githatu Vs Mary Wanjiru Githatu* (Supra). Githatu case is in my view distinguishable from the instant case in which it is mother fighting with the children. In my opinion, the only recourse she has is to seek for reasonable provision which I have already allowed subject to valuation of the estate. I therefore hold that division of matrimonial property is not applicable in the circumstances to this case.
61. Having found as above, it is my holding that the grant is ripe for confirmation which I hereby do confirm but suspend the distribution aspect until the valuation report is submitted. Accordingly, the objection /protest partially succeeds and partially fails with orders that;
- a. The protestor/objector is entitled to reasonable provision out of the deceased's estate upon submission of a valuation report of all the deceased's assets listed in the will dated May 27, 2011
  - b. The grant herein is confirmed but the distribution of the estate is held in abeyance pending submission of the valuation report
  - c. That the objector/protestor and the petitioners to engage a mutually agreed valuer to value the property and submit the report within 45 days.
  - d. Mention for determination of Reasonable provision of the objector on June 2, 2021
  - e. Costs in the cause.



**DATED, SINGED AND DELIVERED VIRTUALLY AT MOMBASA THIS 3<sup>RD</sup> DAY OF MAY, 2021.**

**J. N. ONYIEGO**

**JUDGE**

