



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 664 OF 2015**

**IN THE MATTER OF THE ESTATE OF MUTUAMWARI MUGA**

**BERNARD RAIBU EPANTUS.....1<sup>ST</sup> PETITIONER**

**MECY UKIMA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**WENDY KARWITHA.....PROTESTER**

**RULING**

***The Application***

1. Before the Court is an application dated 21<sup>st</sup> December 2020 seeking an order that the undistributed 0.71 acres is the Protestor's share of the estate. It also seeks that the Protestor be appointed the administrator of the estate.

***The Protestor's/Applicant's Case***

2. The Protestor/Applicant urges that in the lower Court, the Court found in her favour and her protest was allowed in the Judgment delivered on 10<sup>th</sup> December 2020; That she was excluded as a beneficiary of the estate and that the undistributed 0.71 acres is, therefore, her share.

3. The Protestor filed written submissions dated 14<sup>th</sup> September 2021. In her submissions, she reiterates that the Court found in her favour and her protest was allowed in the Judgment of 10<sup>th</sup> December 2020 but she was excluded as a beneficiary and that the undistributed 0.71 acres is her share so that the total acreage will be 2.30 Ha (5.68 acres).

***Petitioners'/Respondents' Case***

4. The Petitioners/Respondents opposed the application by their grounds of opposition dated 11<sup>th</sup> May 2021. They urge that the Applicant's summons violate the provisions of Section 76 of the Law of Succession Act and that the application is bad in law and is fatally and incurably defective. They also filed submissions dated 19<sup>th</sup> July 2021. They urge that prior to the confirmation of grant, the family proposed the mode of distribution and that the grant was subsequently confirmed and distribution was done. The Petitioner cites the case of *In Re Estate of G K K (Deceased)* (2017) eKLR for the proposition that the primary function of a probate court is distribution of the estate of a deceased person and once an order for distribution is made, the Administrators must comply or the Court would be compelled to remove them as administrators. They urge that there is no basis to include the Applicant in the list of distribution unless the Court sanctions her request.

5. On whether the Court can appoint the Applicant as an administrator, they urge that one has to be eligible to apply for grant as stipulated under Section 66 of the Law of Succession Act, which sets out the order of priority. That if many of them qualify, any of them can apply but this is set to a maximum of 4 as prescribed in Section 56 (1) (b) of the Act. That the administrators appointed were jointly nominated by the family of the late MUTUAMWARI MUGA. They urge that there has not been any challenge to the procedure leading to the confirmation of grant and that the Applicant has not established any ground that would warrant the substitution, replacement or addition of another administrator. They cite *In Re Estate of Tuaruchiu Marete (Deceased)* (2019) eKLR and Succession Cause No. 1086 of 1995 *In the Matter of the Estate of Ndungu Kariuki* (unreported).

***Determination***

6. The Court has perused the Judgment of the Court of 10<sup>th</sup> December 2020. In the said decision, the Court considered the Protestor's objections and found that she was the sole heir of Jeremy Mutembei, a deceased beneficiary. The Court allowed her protest and deemed her a beneficiary of the estate of the said Jeremy Mutembei. This Court has considered that there was no other person who claimed to be a child or

dependant of the deceased beneficiary, Jeremy Mutembei.

7. The Court has also observed that the mode of distribution did not tally with the total acreage which is up for distribution. The entire Land Parcel Number Igoji/Mweru I/ 158 measures 2.30 Ha which is the equivalent of 5.68 acres. The Court allocated to the beneficiaries 7 portions of 0.71 acres each. This adds up to 4.97 acres in total and there is therefore 0.71 acres that was left undistributed. This was an error on the face of the record within the meaning of Order 45 of the Civil Procedure Rules providing for review. This Court agrees with the Protestor that the undistributed 0.71 acres of land is to be apportioned to her.

8. As to her request to have her appointed as administrator, this Court considers that Section 76 (d) of the Law of Succession Act provides for the instances when a grant may be revoked owing to inaction on the part of the administrator. It provides as follows: -

**76. 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 an interested party or of its own motion—***

***a) ...***

***b) ...***

***c) ...***

***d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either—***

***i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or***

***ii) to proceed diligently with the administration of the estate; or***

***iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular.***

9. In the instant case, the Protestor has not claimed that the Administrators initially appointed by the Court have failed to perform their duties. In fact, this Court considers that by reason of the error pointed out above, the Protestor was not included as a beneficiary and as such, she would have had no opportunity to observe the diligence or otherwise of the Administrators. This Court does not, therefore, find that there is reason to substitute the Administrators of the estate with the Protestor.

**Conclusion**

10. The Court in its Judgment of 10<sup>th</sup> December 2020 allowed the Protestor's objection. It found that she was the only heir to the estate of a deceased beneficiary namely Jeremy Mutembei. The Court made a similar finding for two other deceased beneficiaries whose children were allocated their respective portions. The Court however omitted to include either the Protestor or her deceased father in the grant. The mode of distribution of the estate reveals that a total of 0.71 acres was left undistributed. This Court has considered that this was an error on the face of the record, within the meaning of Order 45 of the Civil Procedure Rules and that this undistributed 0.71 acres should be allocated to the Protestor.

11. The Court rejects the prayer to substitute the Administrators of the estate with the Protestor as it has not been demonstrated that the current Administrators have failed in their duties as per Section 76 (d) of the Law of Succession Act.

**ORDERS**

12. Accordingly, for the reasons set out above, the Court makes the following orders: -

***i) The grant issued on 10<sup>th</sup> December 2020 is hereby rectified to include Wendy Karwitha as a beneficiary of the estate of the Mutumwari Muga in addition to the other beneficiaries in the grant.***

***ii) The prayer to have the Protestor be appointed as Administrator in place of the current Administrators is declined.***

***iii) The said Wendy Karwitha is hereby allocated 0.71 acres of Land Parcel No. Igoji/Mweru I/158.***

***iv) The shares of the other beneficiaries remain unaffected.***

***v) There shall be no order as to costs.***

Order accordingly

DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF OCTOBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Nyaga Mutuamwari & Co. Advocates for the Protestor

M/S Mutembei & Kimathi Advocates for the Petitioners