



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 1783 OF 2013**

**IN THE MATTER OF THE ESTATE OF NELSON NDARA KOIBITA (DECEASED)**

**MARY NJERI KAMWENA.....APPLICANT/ADMINISTRATIX**

**VERSUS**

**EDITH WANJIRU MAGONDU.....1<sup>ST</sup> RESPONDENT/ADMINISTRATIX**

**NANCY WAIRIMU NDARA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The deceased herein died on 25<sup>th</sup> April, 2013. Since then, there has been protracted litigation regarding his estate and the beneficiaries which culminated in the decision of Musyoka J on 5<sup>th</sup> October, 2018. In the said decision, the Judge made a determination that the deceased was survived by Cynthia Koibita, Nancy Wairimu Ndara, Edith Wanjiru Magondu, all wives of the deceased and their children namely; Erika Wanoii Koibita, Jason Mongae Koibita, Faith Ann Muthoni, AMN and MMN. Further, Edith Wanjiru Magondu, Mary Njeri Kamenwa and Manase Maina Kiritu were appointed as administrators of his estate and directed to file the present application for confirmation of grant.

2. By way of summons for confirmation of grant dated 11<sup>th</sup> September, 2019 the Applicant/Administrator sought confirmation of grant and distribution of the estate in the terms proposed in her supporting affidavit of similar date. She averred that Nancy Wairimu Ndara has been collecting rent of the deceased's properties since his demise and utilizing it for her own benefit to the exclusion of other beneficiaries.

3. The applicant contended that pursuant to the Court order of Musyoka J, a bank account was opened at Equity Bank, Four Ways Branch, Account Number 002xxxxxxx to receive the deposit of all the rental income of the estate of the deceased. That to date, only the rental income for L.R No. Kiambaa/Karura/T.199 has been harnessed and is deposited by the tenants into the bank accounts opened.

4. She also accused the 2<sup>nd</sup> respondent of non-payment of the electricity bill on L.R No. Kiambaa/Karura/T.199 amounting to Kshs. 361,172.49/=, land rates on L.R No. Nairobi Block 82/1569(Tena) – Kshs. 107, 414/=, L.R No. Nairobi Block 82/1251(Greenfields) – Kshs. 82,6725/= and L.R No. Nairobi Block 82/2395 – Kshs. 99,329/=. The applicant sought to have all monies deemed to have been due as rental income from the deceased's properties and not deposited to the said account nor accounted for by Nancy Wairimu Ndara, to be assessed and discounted with interest from any benefit she is entitled to as a beneficiary of the estate of the deceased. She urged the Court to confirm the grant in terms proposed in her affidavit.

5. In support of the summons for confirmation of grant, Edith Wanjiru Magondu the 1<sup>st</sup> respondent herein filed an affidavit dated 7<sup>th</sup> October, 2019. She reiterated the sentiments by the applicant that the Rental Income and Expenses Audit prepared by Edward Dancan & Associates indicated that Nancy Wairimu received rental income amounting to Kshs. 5 million which she solely benefited from to the exclusion of other beneficiaries. She also filed her proposal on the mode of distribution of the estate of the deceased.

6. In her affidavit on the mode of distribution dated 30<sup>th</sup> September 2019, Nancy Wairimu Ndara the 2<sup>nd</sup> respondent herein stated that the proposed mode of distribution by the applicant was unfair, unjust and was calculated to benefit some beneficiaries. She denied claims that she had solely benefited from rental income collected from estate properties. She asserted that she was neither an administratix nor an agent of the estate and that it was the administrators who ought to be responsible for rental income.

7. She averred that she had given an account of the income generated from the estate of the deceased from the year 2013 to 2017 through the Audit report dated 2<sup>nd</sup> May, 2019. She urged the Court to adopt her proposed mode of distribution as it was fair and just.

8. In sum, the parties herein made the following proposals on the distribution of the estate of the deceased.

<b>DESCRIPTION OF PROPERTY</b>	<b>APPLICANT'S PROPOSED BENEFICIARIES</b>	<b>EDITH WANJIRU'S PROPOSED BENEFICIARIES</b>	<b>NANCY WAIRIMU'S PROPOSED BENEFICIARIES</b>
<b>L.R No. Nairobi Block 82/1569 (Tena)</b> 2 Blocks of 3 floors of 3 and 6 units	Edith Wanjiru Magondu  MMN	Edith Wanjiru  MMN	Edith Wanjiru Magondu  (Absolute)

respectively	(Equal Share)	(Equal Shares)	
<b>L.R No. Nairobi Block 82/1251 (Greenfields)</b>  3-bedroom main house and 2 floors of residential units	Erika Wanoii Koibita  Jason Mongae Koibita  (Equal Shares)	Cynthia Koibita  Erika Wanoii Koibita  Jason Mongae Koibita  (Equal Shares)	Cynthia Koibita  (Absolute)
<b>L.R No. Nairobi Block 82/2395</b>  4-bedroom main house and 2 floors of residential units.	Nancy Wairimu Ndara  Faith Ann Muthoni  AMN  (Equal shares)	Nancy Wairimu Ndara  Faith Ann Muthoni  AMN  (Equal Shares)	Nancy Wairimu Ndara (Absolute)
<b>L.R No. Kiambaa/Karura/T.199</b>  9 commercial units and 18 residential units	Cynthia Koibita  (Absolute)	Cynthia Koibita  Nancy Wairimu Ndara  Edith Wanjiru Magundu  (Equal Shares)	To be shared equally among all the beneficiaries of the estate of the deceased.
<b>Account No. 002xxxxxxxxxx Equity Bank, Fourways Branch</b>	Edith Wanjiru Magundu  Cynthia Koibita  (Equal shares)	Edith Wanjiru Magundu  Cynthia Koibita  (Equally)	To be shared equally among all the beneficiaries of the estate of the deceased.
<b>Cooperative Bank Account and Equity Bank Account No. 012xxxxxxxxxx</b>		Edith Wanjiru Magundu  Cynthia Koibita  (Equally)	

9. The summons was canvassed by way of written submissions. The Applicant submitted that all the parties were in agreement on the distribution of the estate save for the property known as L.R Kiambaa/Karura T.199 and monies in the bank. She stated that her proposal should be adopted as it was based on the findings of Musyoka J in his ruling dated 14<sup>th</sup> December, 2017. That in the said decision the Court had determined that Nancy Wairimu Ndara had been unlawfully administering the estate of the deceased. She claimed that the said unlawful actions still persist as evinced from the bank statements attached.

10. It was the Applicant's submissions that due to the neglect occasioned by the 2<sup>nd</sup> Respondent, L.R Kiambaa/Karura T.199 had electricity bill arrears resulting in the rental units being unoccupied. Further, that a portion of the property has been earmarked for demolition for the construction of the Southern Bypass. The applicant further submitted that the 2<sup>nd</sup> Respondent had illegally appropriated upwards of Kshs. 4,934,000/= over the period of 2013 to 2017. That although she claimed to have applied Kshs. 3,846,750/= for expenses, she retained the surplus of Kshs. 1,087,249/= for herself and her children. It was her case that the 2<sup>nd</sup> Respondent was therefore indebted to the estate and should therefore not benefit from the distribution of L.R Kiambaa/Karura T.199 or the funds held at Equity bank.

11. The 1<sup>st</sup> respondent submitted that the mode of distribution per house should apply across the board. She proposed that in the event of any conflict in the distribution of L.R No. Kiambaa/Karura/T.199, the property should be sold and proceeds shared among the beneficiaries, per house and equally.

12. The 1<sup>st</sup> respondent further submitted that the money in the bank should be divided between Cynthia Koibita and Edith Wanjiru Magundu.

She was of the view that Nancy Wairimu Ndara had collected and spent rental income for her own benefit and to the exclusion of other beneficiaries. That she was therefore not entitled to further benefit from any cash arising therefrom. Further, that the 2<sup>nd</sup> respondent should also bear the burden of all the liabilities of the estate of the deceased since she assigned herself the duty to clear all pending bills pending the transmission to the beneficiaries.

13. In her written submissions, the 2<sup>nd</sup> respondent denied claims that she had used rental income for her own benefit. She averred that she had accounted for all rental proceeds collected between 2013 and 2017 through the audit report produced in Court. She urged the Court to compel the current administrators to also account for the rental income they had been collecting to date and produce bank statements in order to ascertain the funds available in the bank accounts.

14. On the issue of liabilities of the estate, the 2<sup>nd</sup> respondent submitted that the same should be borne by the estate itself but not from a beneficiary's share as proposed by the applicant and the 1<sup>st</sup> respondent. She asserted that she had filed proper books of account and urged the Court to adopt her proposed mode of distribution.

15. Manase Maina Kiritu who is the 3<sup>rd</sup> administrator in the estate of the deceased submitted on his proposed mode of distribution. He proposed that L.R Nairobi Block 82/1569, L.R No. Nairobi Block 82/1251 and L.R No. Nairobi Block 82/2395 to be shared equally to the three widows and their children. He further proposed that L.R No. Kiambaa/Karura/T.199 and funds in Account No. 002xxxxxxxxxxx at Equity Bank Fourways Branch to be shared equally among all the beneficiaries of the deceased.

16. Having considered all the material canvassed, the Court will proceed to make a determination based on the evidence placed before it. The issue for determination is which of the proposals is fair, reasonable and equitable for and in accordance with the provisions of the law of Succession Act.

17. Distribution of the estate of a deceased person is hardly an exercise in clear-cut precision due to several factors. However, the court has the duty when distributing estate property to ensure that there is as far as is practicable equal and equitable distribution to all beneficiaries.

18. The deceased was survived by the following beneficiaries: -

i. 1<sup>st</sup> House - Cynthia Koibita (widow)

Erika Wanoii Koibita - daughter

Jason Mongae Koibita – son

ii. 2<sup>nd</sup> House - Nancy Wairimu Ndara (widow)

Faith Ann Muthoni - daughter

AMN – Son (minor)

iii. 3<sup>rd</sup> House - Edith Wairimu Magondu (widow)

MMN – son (minor)

19. The law relating to the distribution of the intestate estate of a polygamous man is found in **Section 40** of the Law of Succession Act which provides:

#### **40. Where an intestate was polygamous**

**(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.**

**(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.**

20. In the case of **Mary Rono v Jane Rono & another [2005] eKLR**, an interpretation of Omollo, JA under **Section 40** of the Law of Succession Act is as follows:

*“My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.”*

21. From the foregoing, it is evident that the estate of the deceased should be divided into houses based on the number of children in each,

with any surviving widows being counted as a separate unit from the number of children. This is, without a doubt, the most equitable distribution method.

22. From the proposals put forth by the parties on the mode of distribution, it is important to state that for as long as the beneficiaries of the deceased are not in agreement it is left to the court to apply the laid down law and principles to arrive at what the court would consider to be fair and just in the circumstances of each case. The aim of the Court is not to achieve mathematical equality between the beneficiaries but to factor in each case.

23. There are children of the deceased who can be defined as minors. AMN was born on 12<sup>th</sup> December, 2005 and is now 15 years old while MM was born on 4<sup>th</sup> November, 2007 and is now 13 years old as evinced from their birth certificates on record. The other children are all adults. Any distribution of the estate of the deceased ought to take this into account.

24. From the proposals put forth by the parties herein, there is a consensus from all the parties on the distribution of L.R No. Nairobi Block 82/1569 (Tena), L.R No. Nairobi Block 82/2395 and L.R No. Nairobi Block 82/1251 (Greenfields) which are to be distributed to the houses of Edith Wanjiru Magondu, Nancy Wairimu Ndara and Cynthia Koibita respectively. Parties could however not agree on the distribution of L.R No. Kiambaa/Karura/T.199, monies in the Equity Bank Account Number 002xxxxxxxxxxx Fourways Branch, an undisclosed Account at Cooperative Bank Account and funds at Equity Bank Account No. 012xxxxxxxxxxx.

25. The applicant proposed that L.R No. Kiambaa/Karura/T.199 be distributed to Cynthia Koibita absolutely while the 1<sup>st</sup> respondent proposed that the property be distributed equally among the deceased's three wives. Conversely, the 2<sup>nd</sup> respondent proposed that the property be shared equally among all beneficiaries of the estate of the deceased. It was the 3<sup>rd</sup> administrator's view that the property be sold and the proceeds thereof be distributed equally amongst all beneficiaries of the estate.

26. A report by the Deputy Registrar of the family division 20<sup>th</sup> November, 2017 which was filed pursuant to a site visit stated that this is a commercial property with 38 units in total. In this case the deceased is survived by three wives and five children. The wives of the deceased are considered additional units to the number of children.

27. Taking into account that the property is commercial in nature, the proposal for equal distribution among all the beneficiaries of the deceased is reasonable but is not mathematically viable to distribute 38 units among 8 beneficiaries. That being said, there has been great animosity between the beneficiaries of the estate of the deceased since his demise.

28. In 2017, Musyoka J ordered the parties to open a joint bank account for collection of rental income from estate property. Account No. 002xxxxxxxxxxx Equity Bank at Fourways Branch is the resultant account where rental income has been deposited since. Prior to this, Nancy Wairimu Ndara had been illegally collecting rent from estate property. On the direction of the Court, she filed audited account of the rental income from 2013 to 2017.

29. A perusal of the audited accounts indicate that she collected Kshs. 4,934,000/= in rental income. During this period, she spent Kshs. 3,846,751/= on school fees for her children, food, transport and medication. All these expenses were not approved by the Court. In convicting her for contempt of Court, Musyoka J stated that she was defiant in refusing to deposit rental income as directed and spent the money contrary to the decision of the Court. The Court also found her guilty of intermeddling as defined under **Section 45** of the Law of Succession.

30. With this in mind, the 2<sup>nd</sup> respondent and her children benefited from rental income collected between 2013 to 2017 to the exclusion of other beneficiaries, and this should therefore be considered before they receive any further financial benefit. Further, considering that the estate of the deceased has liabilities as asserted by the applicant, this ought to be settled before any distribution can take place.

31. The 1<sup>st</sup> respondent also proposed that monies in Cooperative Bank Account and Equity Bank Account No. 012xxxxxxxxxxx be distributed to Edith Wanjiru Magondu and Cynthia Koibita. Although these accounts are mentioned among the assets of the deceased in the Petition for letters of administration intestate, no further evidence was presented as to their existence and whether they have any funds for distribution to the beneficiaries. The other parties did not even mention the two accounts in their proposals. This Court therefore directs that the administrators provide bank statements to confirm the existence and the status of the bank accounts.

32. The upshot of the above analysis is that the estate of the deceased shall be distributed as follows:

1. As agreed by the parties in their proposal:

- i) L.R No. Nairobi Block 82/1569 (Tena) be distributed to the house of Edith Wanjiru Magondu;
- ii) L.R No. Nairobi Block 82/1251 (Greenfields) be distributed to the House of Cynthia Koibita;
- iii) L.R No. Nairobi Block 82/2395 be distributed to the House of Nancy Wairimu Ndara.

2. L.R No. Kiambaa/Karura/T199 shall be sold and the proceeds therefrom in addition to the funds in Equity Bank Account No. 002xxxxxxxxxxx Fourways Branch, Equity Bank Account No. 012xxxxxxxxxxx and funds in deceased's Co-operative Bank Account be applied as follows:

- i. Payment of all utility bills, rates and all liabilities outstanding on all estate properties.

ii. Kshs. 3,846,751/= being the equivalent of what Nancy Wairimu Ndara utilised for her benefit to the exclusion of other beneficiaries in the estate be set-aside and distributed equally between the houses of Cynthia Koibita and Edith Wanjiru Magondu.

iii. The balance to be distributed equally to all beneficiaries in accordance with Section 40 of the Law of Succession Act.

3. No orders as to costs.

**DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2021**

.....

**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Advocate for the Applicant/Administratrix**

**In the presence of.....Advocate for the 1<sup>st</sup> Respondent/Administratrix**

**In the presence of.....Advocate for the 2<sup>nd</sup> Respondent**