



**REPUBLIC OF KENYA**

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

**SUCCESSION CASE NO. 91 OF 2016**

**IN THE MATTER OF THE ESTATE OF ELIUD KANG'ETHE alias ELIUD KANG'ETHE KAHARA (DECEASED)**

**JUDGMENT**

1. Before me is Summons filed on 27<sup>th</sup> February, 2017, seeking confirmation of grant of letters of administration intestate to the estate of **Eliud Kang'ethe** alias **Eliud Kang'ethe Kahara** (Deceased). The grant to be confirmed was made to **TKK, SKK** and **MWK** the administrators herein on 28<sup>th</sup> August, 2014.
2. The Summons is supported by the affidavit of **TKK**. He identified eleven dependants namely:- **TKK, SKK, MWK, WGK, JNK, DNK, DGK, RWK, ENK, JWK** and **GNW**. He also identified the shares of all persons beneficially entitled to the estate in his proposed mode of distribution in respect of the sole asset of the estate, namely, LR. NO. KIAMBAA/THIMBIGUA/[...].
3. He proposed that **TKK, SKK, MWK, WGK, JNK, DNK** and **DGK** each get 0.4455HA and that the sisters **RWK, ENK, JWK** and **GNW** each receive 0.0465 HA of said land parcel.
4. On 29<sup>th</sup> March, 2017. **SKK** filed an affidavit protesting against the above mode of distribution He objected to the above mode of distribution claiming that it ignores the wishes of his late father, the deceased herein in regard to distribution of the land. He contended that the Applicant's proposed mode of distribution will result in fragmentation of the land and is only concerned with the land near the tarmac road. He proposed an alternative mode of distribution.
5. **MWK** filed her affidavit of Protest on 19<sup>th</sup> April, 2017. She deposed that the Applicant's proposed mode of distribution does not comply with the wishes of her late father-in-law that the whole family should have direct access to the main road from their allocated portions of land. She contended that the proposed mode of distribution in the application only addresses the plots next to the main road and ignores the rest of the land. The court was urged to consider the deceased's wishes and avoid fragmentation of the land. She also provided her proposed mode of distribution.
6. The four daughters of the deceased **JWK, GNW, RWK** and **ENK** filed their affidavit of Protest in opposition to the application for Confirmation of Grant and the proposed mode of distribution. They deposed that they should each receive a quarter of an acre plot next to the main road.
7. **DGK** filed his affidavit of protest to the Administrators' proposed mode of distribution on his behalf and on behalf of his brother **DNK** and in support of his four sisters. He proposed that all beneficiaries get a commercial plot bordering the Banana-Limuru highway in addition to a second parcel away from the main road.
8. The summons for Confirmation of Grant was disposed of by way of oral submissions. Before that, the parties had agreed by consent that the District Surveyor, Kiambu does survey the land parcel concerned and file into court a professional proposal on how best to distribute the deceased's parcel of land. This was done.
9. During submissions counsel for **TKK** submitted that each beneficiary should get a plot on the road and also in the interior. The proposal was said to be consistent with the wishes of the deceased.
10. On behalf of **SKK**, counsel submitted that the deceased had before his death expressed his desired mode of distribution of his estate, pointing out the locations of the beneficiaries' parcels. He submitted that beneficiaries had developed their respective parcels of land and that the sisters have also been provided for. In regard to the mode of distribution by **TKK**, it was submitted that the same fragments the land rendering it economically unviable. He contended that each of the daughters of the deceased was willing to take a quarter acre of the land abutting the main road while leaving the balance to be shared by their brothers. He urged the court to uphold the surveyor's report in regard to the mode of distribution.
11. On behalf of **MWK** it was submitted that the deceased had during his life time distributed his land among his sons and had beacons placed, subsequent to which the respective heirs developed their respective portions. It was contended that the Applicant's mode of distribution is wasteful as it creates numerous small slices of land; that there is a conspiracy to disinherit **MWK** by excising and giving parts

of her portion to the daughters of the deceased. Counsel urged that the wishes of the deceased be respected and that the daughters be provided for. In regard to the mentally ill beneficiary, DNK, counsel submitted that his share should be held in trust by the administrators. He disagreed with the surveyor's report

12. The court has considered the rival submissions of the parties in addition to their respective affidavits and sketches in respect of their preferred modes of distribution. The chief difficulty presented by this case is that the terrain of the sole asset of the deceased is not uniform. Some parts abut a highway hence carry a higher value, and others do not. Moreover, a portion measuring about 0.42 ha of the suit land is said to be a slopy land that none of the beneficiaries are keen to inherit as their sole portion. The second problem is that some of the beneficiaries herein have already developed homes or other developments on certain parts of the land which they assert were given to them or shown to them by the deceased during his lifetime, as their inheritance. The exact wishes of the deceased cannot be established as the beneficiaries appear to give different versions thereof. In any event, the deceased died intestate.

13. It appeared initially from the consent filed with the application to confirm grant that the Applicants **TKK** and his brother **DGK** and their sisters had agreed on the distribution mode contained in the sketch attached to the application. However, **DGK** later filed a protest suggesting that the portions of the land abutting the highway which cuts through the parcel, should be divided in a manner that ensures that each beneficiary gets a plot abutting the said road to achieve equity in terms of value and that the Applicant ought to get an extra portion.

14. This latter assertion is disputed by the administrator **SKK** who notably did not sign the consent in the application. He asserts that he, like the Applicant and other sons had been allocated land by the deceased which they have respectively developed. He annexed a series of photographs marked annexure **S.K. E K 1 – 4** which appear to support his depositions. His depositions, including those related to location of graves on the land parcel are in part confirmed by the surveyor's report, and sketches marked **A** and **B**. While keen to retain his alleged allocation abutting the highway this administrator takes issue with the mode of distribution proposed by the Applicant asserting, like his sister-in-law **MWK** that the proposed distribution will lead to fragmentation of the land into many parts which are not economically viable. Despite signing the consent accompanying the application, the four daughters of the deceased were later to file a proposal that they desired to be assigned a quarter acre each of the part of land abutting the main road and that the balance of the land be shared by the brothers.

15. The beneficiaries of the deceased are not in dispute. It is also not in dispute that the deceased died possessed of only one landed asset, namely **LR KIAMBAA/THIMBIGUA/[...]** which measures about 3.76 Ha. or 9.29 acres as per the search certificate copy marked annexure **DGK** dated 7.3.2003 and attached to the affidavit of **DGK** in support of the application for revocation dated October 2014.

16. In distributing this asset, the court is alive to the fact that land abutting the highway may have a higher value than parcels in the hinterland. At the same time, the court's desire is to attain equity and fairness and not necessarily equality. See **Rono v Rono [2005] e KLR**. In that case, the Court of Appeal reiterated that female and male beneficiaries of an intestate are to be treated as equals. The applicable law in this instance is found in Section 38 of the Law of Succession Act which provides that:

**“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”**

17. The Act does not distinguish between male and female children of an intestate. In this regard, the court notes that the four female children of the deceased are content to receive smaller portions than their male siblings – quarter acre each abutting the main road. In principle, the male siblings do not oppose the distribution in favour of their sisters though the Applicant, **MWK** and **SKK** propose smaller parcels – about an eighth of an acre for each sister. Protestations by **MWK** that such portions should not be parceled out of her land have no basis as the court has never formally assigned any part of the land to any beneficiary. Nonetheless the court will consider among other factors the portions on which each beneficiary has invested or developed.

18. The court having considered all these facts and the surveyor's proposals is of the view that in order to achieve equity, the court will distribute the suit land in the manner set out in the surveyor's sketch marked **“C”** but subject to the following variations as to share size. Parcels **A, B, C, H, J, K, and L** in the said sketch are to be reduced or varied to 0.40 ha each or thereabout. This reduction will create an extra 0.14 ha which will be added to plots **D, E, F & G** in sketch **C** to increase their individual size to about 0.085 ha.

19. This mode of distribution obviates wastage and unnecessary and uneconomical fragmentation of the more useable portion of the land asset while achieving equity for the female siblings especially. This principle also applies with regard to the portion measuring about 0.42 ha which is said to have poor topography and is less accessible or usable.

20. Rather than fragment this piece into thin strips in the manner proposed by the parties and the surveyor, the court will direct that the said parcel be split lengthwise into two equal halves measuring about 0.21 ha each as follows. The first half of the land indicated to be on a slope in sketch **C** will comprise of parcels marked **“M, N, P”** and half of **“Q”** and the second half to combine the remaining half of parcel **“Q”** together with the proposed parcels **R, S & T**. The first half above will devolve upon the female siblings jointly and in equal shares, while the second half will devolve upon the remainder of the beneficiaries. Thus, the estate of the deceased will be distributed among the beneficiaries as follows, based on the outlay in the sketch **“C”** of the surveyor's report.

<u>Portion in sketch C</u>	<u>Beneficiary</u>	<u>Size</u>
1. “A”	TKK	0.40 ha or thereabout
2. “B”	DGK	0.40 ha or thereabout
3. “C”	SKK	0.40 ha or thereabout

- |         |     |          |
|---------|-----|----------|
| 4. "D"  | JWK | 0.085 ha |
| 5. "E"  | GNW | 0.085 ha |
| 6. "F"  | RWK | 0.085 ha |
| 7. "G"  | ENK | 0.085 ha |
| 8. "H"  | MWK | 0.40 ha  |
| 9. "J"  | WGK | 0.40 ha  |
| 10. "K" | JNK | 0.40 ha  |
| 11. "L" | DNK | 0.40 ha  |

12. "M, N,P & half of "Q"

Jointly in equal shares by

the female beneficiaries in items 4 – 7 above. 0.21 ha

13. Half of "Q" &"R,S,T" Jointly in equal

shares by the beneficiaries in 1, 2, 3, 8, 10

and 11above 0.21 ha

21. It has been established that the beneficiary **DNK** is suffering from a chronic mental illness and as at April 2016 was confined in the Western State Hospital in the USA. Pending any application that may be brought under the Mental Health Act, or further orders of the court, I direct that the shares due to DNK will be held in trust, for him by his four female blood siblings herein who appear to retain some sort familial attachment or rapport among them. These are **JWK, GNW, RWK** and **ENK**. For the avoidance of doubt, this order does not confer on these persons any power of appointment or dealing in respect of the said shares and is only made to facilitate transmission, and as a temporary safeguard of the shares due to the said indisposed beneficiary.

Parties will bear own costs.

**DELIVERED AND SIGNED AT KIAMBU THIS 6<sup>TH</sup> DAY OF FEBRUARY 2020.**

.....

**C. MEOLI**

**JUDGE**

**In the presence of:**

Ms. Wamaitha holding brief for Mr. Gachoka for the Respondent – MWK Mr. Njehu holding brief for Mr. Gatitu for Applicant

Mr. Kinyanjui for Respondent E.K. Kangethe