



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 151 OF 2006

IN THE MATTER OF THE ESTATE OF JONATHAN MUIA MUMO (DECEASED)

PIUS KATEETI MUIA.....PETITIONER/RESPONDENT

VERSUS

DAVID MUTUKU MUIA

PAULINE MUMBUA.....APPLICANTS

RULING

1. This matter relates to the estate of **Jonathan Muia Mumo** (deceased) who died intestate on 23.11.1993. The Petitioner applied for letters of administration intestate in the estate of the deceased. A grant was issued on 13.7.2006.
2. On 26.6.2008, an application was made for confirmation of grant. In the application for confirmation of grant the proposed mode of distribution was as follows:

PROPERTIES	BENEFICIARY	SHARES
Machakos/ Matuu/656	Pius Kateeti Muia	Absolutely
Machakos/ Matuu/472	Pius Kateeti Muia	Absolutely
Machakos/ Matuu/491	Pius Kateeti Muia	Absolutely
Machakos/ Matuu/3523	Pius Kateeti Muia	Absolutely
Machakos/ Matuu/3520	Pius Kateeti Muia	Absolutely
Machakos/ Matuu/3524	Pius Kateeti Muia	Absolutely
Machakos/ Matuu/1103	Pius Kateeti Muia	Absolutely

3. Searches attached to the affidavit indicated that Machakos/ Matuu/3524, 3520, 3523, 491,472, 656 and 1103 were registered in the names of the deceased.
4. Before the grant was confirmed, an application dated 7th June, 2011 was filed for revocation of grant which was dismissed.
5. In response to the summons for confirmation, the objectors proposed a mode of distribution vide affidavit filed on 5th June, 2013 as follows:

PROPERTIES	BENEFICIARY	SHARES
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Machakos/ Matuu/656	Muasa Muia Richard Mumo Mui David Mutuku Muia Pauline Wambua Muia Elizabeth Muthoki Muia	In equal shares
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Machakos/ Matuu/472	Pius Muia Muasa Muia Pauline Wambua Muia Rose Mwanzia Muia Richard Mumo Muia David Mutuku Muia	In equal shares
Machakos/ Matuu/491	Not indicated	Not indicated
Machakos/ Matuu/3523	Not indicated	Not indicated
Machakos/ Matuu/3520	Not indicated	Not indicated
Machakos/ Matuu/3524	Not indicated	Not indicated
Machakos/ Matuu/1103	Pius Muia Muasa Muia Pauline Wambua Muia Rose Mwanzia Muia Richard Mumo Muia David Mutuku Muia Elizabeth Muthoki Mui	In equal shares

6. Pius Muia did not consent to the mode of distribution.

7. The petitioner opposed the distribution vide summons dated 3rd October, 2013 and filed on 10th June 2014 and proposed as follows;

PROPERTIES	BENEFICIARY	SHARES
Machakos/ Matuu/656 1.9 Ha	Muasa Muia Richard Mumo Muia Mutuku Muia Pauline Wambua Muia Elizabeth Muthoki Muia	In equal shares
Machakos/ Matuu/472 1.4 ha	Pius Muia Muasa Muia Elizabeth Muthoki Rose Mwanzia Muia	In equal shares
Machakos/ Matuu/491	Pauline Wambua Muia	In equal shares

0.6 ha	Richard Mumo Muia David Mutuku Muia	
Machakos/ Matuu/3523	Abdinego Kyalo	Absolutely
Machakos/ Matuu/3520 0.04 ha	Pius Muia	Absolutely
Machakos/ Matuu/3524 0.11 ha	Abdinego Kyalo	Absolutely
Machakos/ Matuu/1103	Pius Muia Muasa Muia Pauline Wambua Muia Rose Mwanzia Muia Richard Mumo Muia David Mutuku Muia Elizabeth Muthoki Mui ACK Church	As per survey map
Machakos/ Matuu/786 1.8 ha	Dorothy Ndinda Kyove	Absolutely

8. Muasa Muia, Richard Mumo and Mutuku Muia did not consent to the proposed mode of distribution.

9. David Mutuku Muia proposed the following mode of distribution vide affidavit filed on 15th April, 2015.

PROPERTIES	BENEFICIARY	SHARES
Machakos/ Matuu/656 1.9 Ha	Muasa Muia Richard Mumo Muia Mutuku Muia Pauline Wambua Muia	In equal shares
Machakos/ Matuu/472 1.4 ha	Pius Muia Muasa Muia Pauline Wambua Muia Richard Mumo Muia Rose Mwanzia Muia David Mutuku Muia	In equal shares
Machakos/ Matuu/491	Not available for distribution	

0.6 ha		
Machakos/ Matuu/3523	Abednego Kyalo	Absolutely
Machakos/ Matuu/3520 0.04 ha	Pius Muia	Absolutely
Machakos/ Matuu/3524 0.11 ha	Abednego Kyalo	Absolutely
Machakos/ Matuu/1103	Pius Muia Muasa Muia Pauline Wambua Muia Rose Mwanzia Muia Richard Mumo Muia David Mutuku Muia Elizabeth Muthoki Mui ACK Church	As per attached surveyors map
Machakos/ Matuu/786 1.8 ha	Dorothy Ndinda Kyove	Absolutely

10. A search annexed to the affidavit of the Petitioner indicated that Machakos/ Matuu/1103 is registered in his names.

11. The objection proceeded via oral evidence and OB Pw1 was David Mutuku Muia who testified that the land was surveyed and the family members sat and agreed but however the petitioner was absent during the exercise. He told the court that the petitioner is not agreeable to the mode of distribution and he likewise is not agreeable to the petitioner's mode of distribution. He urged the court to agree with his mode of distribution as per the map marked MFI 2. On cross examination, it was his testimony that there were six children of the deceased, namely Job Muia(deceased), Josephine Mwikali(married), Pius Kateeti Muia(administrator), Muasya Muia(died in 2016), Mumo Muia, Syokau Muia (married), Kalondu Muia (married), Mbula Muia (married), David Mutuku, Elizabeth Muthoki. He told the court that they were 13 children and 6 are now alive and that he resided on parcel 1103 and has built his home there and further that the deceased did not allocate land to the children to build houses. It was his testimony that parcels 656, 472, 3520, 786, 3524, 3523 and 491 belonged to the deceased and 786 had been sold and is awaiting transfer to the buyer. It was his testimony that he did not object to the distribution on parcel 472, 656, 3520, 3524, 3523 but wanted parcel 491 to include Muasa Muia and Rose Mwanzia. He stated that parcel 1103 was subdivided and parts were sold by different family members.

12. Ob Pw2 was David Mutuku Muia who testified that it is only the administrator who is opposed to the distribution and he objected to the map that was prepared by the surveyor. The map was admitted in evidence by consent and marked OB Exh 2. On cross examination, he testified that he wanted the parcel 1103 shared equally. The objectors closed their case and the petitioner tendered his testimony.

13. The petitioner testified that parcel 1103 was subdivided as per agreement by the family and that all the family members had their share however his married sisters had no interest on the land. He requested that the distribution be allowed as per his proposal. On cross examination, he told the court that he had no problem with parcel 1103 being shared equally so that everybody got 1.73ha and on re-examination, he indicated that he was agreeable to a resurvey of plot B2.

14. The court directed that the parties file submissions and only the objectors submissions are on record. The objector submitted that the deceased had seven beneficiaries, to wit; Pius Kateeti Muia, David Mutuku Muia, Pauline Wambua, Muasa Muia, Richard Mumo Muia, Rose Mwanzia Muia and Elizabeth Muthoki Muia. It was counsel's submission that the dispute is on plot 1103 and in that regard framed two issues for determination being what the applicable law is and how should the property be distributed. On the first issue, reliance was placed on Section 2(1), 34 and 38 of the Law of Succession Act as well as the case of **Matter of the Estate of Elizabeth Wanjiku Munge (Deceased) 2015 eKLR**. On the 2nd issue, a mode of distribution was proposed that departed from what was averred in the affidavit and supplementary affidavit in that Elizabeth Muthoki was included as a beneficiary to plot 656 and 472 and plot 491 that he indicated in his affidavit as not being available for distribution was stated as to be divided equally between Pauline, Richard and David.

15. The parties adduced evidence in court vide their affidavits that were filed. I have considered all the evidence adduced. There are two issues which arise for determination:

- Who are the beneficiaries entitled to the estate of the deceased"
- How should the estate be distributed"

8. **Who are the beneficiaries"**

The deceased was survived by the following children

- Pius Kateeti Muia,
- David Mutuku Muia,
- Pauline Wambua,
- Muasa Muia,
- Richard Mumo Muia,
- Rose Mwanzia Muia and
- Elizabeth Muthoki Muia

Section 29 of the **Law of Succession Act** provides:

“For the purposes of this Part, “dependant” means –

(a) The 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;

Thus, the children of the deceased are dependants of the deceased whether or not they were maintained by the deceased prior to his death and they are entitled to the estate of the deceased.

16. This brings me to the 2nd issue which is the **distribution of the Estate**. I have looked at the modes of distribution of the objector and the petitioner and note that they do not indicate that all the dependants have been given a share of the estate. The proposal also seemed to include persons who are not named dependants to the deceased. As pointed out by the objector vide his submissions, distribution must be under intestate succession. **Section 34** of the **Law of Succession Act** provides:

“A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”

17. The deceased was indicated as being monogamous meaning the law relating to distribution would be under section 38 of the Law of Succession Act. I am of the view that the estate of the deceased should devolve as provided under **Section 38** of the **Law of Succession Act**.

18. **Section 38** of the **Law of Succession Act** provides:

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

19. In **Christine Wangari Gichigi v Elizabeth Wanjira Evans & 11 Others (2014) eKLR** the Court held that:

“Under Section 38 of the Act all that one needed to establish in this cause was to show that they were either children or grandchildren of the deceased. Matters of failure to participate actively in the litigation proceedings should not have dissenting consideration in respect of 2, 3 and 4 cross appellants in the absence of renunciation of respective claims to the estate.”

20. Having established the law relating to the distribution of the estate of the deceased, and having established who the beneficiaries of the estate of the deceased are, because the deceased had one house, **Section 3** of the **Law of Succession Act**, defines the **“house”** as a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife. There is no permission for discrimination of the children on grounds of their sex. All the deceased’s wife’s children are therefore entitled to a share of his net intestate estate equally as provided for by **section 38** of the **Law of Succession Act**.

21. After evaluating the entire evidence I find that the proposed mode of distribution by the objectors appears to be equitable and in tandem with the provisions of section 38 of the Law of Succession Act as all beneficiaries will get an equal share unlike that of the petitioner. In fact the objectors' proposal seems to be acceptable by a majority of the beneficiaries. Consequently the estate shall be distributed as proposed by the objectors as follows :

(a) Land Number MACHAKOS/MATUU/1103

- A. 1.73 HaRose Mwanzia
- B. 1.73 Ha..... Pius Kateeti Muia
- C. 1.73 HaMuasa Muia
- E1 -0.90 HaDavid Mutuku 1.73 Ha
- E.2.083 HaDavid Mutuku
- H1 – 1.04 HaMumo Muia 1.73 Ha
- H2 -0.69 Ha Mumo Muia
- M-0.10 HaTo church

That from the above proposal everyone gets 1.73 hectares

(b) Machakos/Matuu/656 (1.9 Ha)

- Mutuku Muia
- Richard Mumo Muia
- Pauline Wambua Muia equally
- Muasa Muia
- Elizabeth Muthoki

(c) Machakos/Matuu/472 (1.4 Ha)

- Pius Muia
- Muasa Muia
- Pauline Wambua Muia
- Rose Mwanzia Muia equally
- Richard Mumo Muia
- David Mutuku Muia
- Elizabeth Muthoki

(d) Machakos/Matuu/3520

- Pius Kateeti Muia, the Petitioner

(e) Machakos Matuu/786

Be transferred to Dorothy Ndinda Kyove

(f) Machakos/Matuu/3524

Be transferred to Abednego Kyalo

(g) Machakos/Matuu/3523

Be transferred to Abednego Kyalo

(h) Machakos/Matuu/491 (0.6 Ha)

Pauline Wambua

Richard Mumo equally

David Mutuku

22. I order that the estate of the deceased be distributed and divided equally among the surviving children. It transpired that the deceased did not make a will as none was proved and hence the distribution must be conducted in accordance with section 38 of the Law of Succession Act. However the respective shares ought to take into account where the developments by respective family members have been made. In light of the foregoing authority, I caution against excluding the dependents of the deceased who have not participated in the litigation. However if the dependants are not interested in the estate then they ought to move the court by filing the requisite papers upon which their shares shall be reallocated.

23. In the result, I find that the objectors' protest has merit and is allowed. The estate shall be distributed as proposed by the objectors. As parties are members of one family, each party shall meet their own costs.

Orders accordingly.

Dated and delivered at Machakos this 6th day of November, 2019.

D. K. Kemei

Judge