

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 219 OF 2014

IN THE MATTER OF THE ESTATE OF PHOEBE NZISA KIKUMU (DECEASED)

NAHUM NDANU)

BENJAMIN KASYOKA KIKUMU)

MARY MBESA KIKUMU).....PETITIONERS

VERSUS

PHIBIAN KAMENE MUNYAO.....PROTESTOR

RULING

1. This matter relates to the estate of **Phoebe Nzisa Kikumi** the deceased who died intestate on 4.2.2013. The Petitioners applied for Letters of Administration intestate in the estate of the deceased. A grant was issued on 6.6.2014 albeit in the names of two of the three petitioners and thus Mary Mbesa Kikumu was excluded from the grant.

2. On 23.7.2014, an application was made for confirmation of grant. Vide further affidavit deponed on 23.7.2014 in support of the application for confirmation of grant. The proposed mode of distribution was made by Benjamin Kasyoki Kikumu as follows:

PROPERTIES	BENEFICIARY	SHARES
LR KANGUNDO SHOP PLOT 262	Benjamin Kasyoka Kikumu Mary Mbesa Kikumu Jonathan Kiva Kikumu	
LR KANGUNDO/ISINGA/169	Benjamin Kasyoka Kikumu Jonathan Kiva Kikumu	
LR KANGUNDO/ISINGA 91	Jonathan Kiva Kikumu	
LR MATUNGULU/NGULUNI/799	Benjamin Kasyoka Kikumu	
LR MATUNGULU/KAMBUSU/421(MWATATI)	Benjamin Kasyoka Kikumu	
EXPRESS KENYA LIMITED	Benjamin Kasyoka Kikumu	
BRITISH AMERICAN TOBACCO	Jonathan Kiva Kikumu	
BARCLAYS BANK	Jonathan Kiva Kikumu	
CENTUM CDC	Jonathan Kiva Kikumu	
TALA HOUSING CO-OPERATIVE SOCIETY LIMITED MEMBER NO 08-587	Jonathan Kiva Kikumu	

MATUNGULU/KAMBUSU PLOT NO 420	Jonathan Kiva Kikumu	
NAIROBI HOUSE MARINGO G-1472	Jonathan Kiva Kikumu	
MATUNGULU/NDUNDUNI PLOT 27	Jonathan Kiva Kikumu	
MATUNGULU/KAMBUSU/393	Esther Mueni Wambua Isabellah Mwangeli Kamene Munyao Mary Mbesa Kikumu Naum Ndanu Kikumu	
HOUSING FINANCE AC 300-0003581 EQUITY AC 0900193696827 POST BANK AC KKANBSA 003426	All beneficiaries	

3. In response to the summons for confirmation, Phibian Kamene Munyao vide affidavit deposed on 15.10.2014 proposed that the assets of the deceased be shared equally amongst the beneficiaries. Vide affidavit deposed on 7th March, 2018 the protestor alluded to a schedule of distribution marked PKM but however the same is not annexed to the affidavit.

4. The court directed that the parties file submissions. Learned counsel for the petitioners submitted on the issue of whether the grant should be confirmed as filed. It was counsel's argument that the affidavit filed on 11th May, 2018 factored in the protestor in the distribution of the estate hence her protest lacks merit. Reliance was placed on the case of **Re Estate of Damaris Njeri Kimani (Deceased) (2015) eKLR**.

5. Learned counsel for the protestor submitted that the deceased was survived by seven beneficiaries being Nahum Ndanu, Benjamin Kasyoka Kikumu, Mary Mbesa Kikumu, Phibian Kamene Munyao, Esther Mueni Wambua, Isabellah Mwangeli Kikumi and Jonathan Kiva Kikumu. Counsel listed a number of properties that he submitted belonged to the deceased and proposed that the said assets be distributed equally. According to counsel, the proposal by the petitioners fronts unequal distribution of the estate such that the daughters get smaller portions and the same is discriminatory. Counsel placed reliance on the case of **Re Estate of John Musambayi Katumanga (2014) eKLR** and submitted that the objector's mode of distribution be adopted.

6. I have considered all the rival affidavits on record. 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"*
- *What is the effect of a grant that leaves out an administrator"*

8. Who are the beneficiaries"

The deceased was survived by the following children as per the petition filed on 27th March, 2014:

- Nahum Ndanu,
- Benjamin Kasyoka Kikumu,
- Mary Mbesa Kikumu,

- Phibian Kamene Munyao,
- Esther Mueni Wambua,
- Isabellah Mwangeli Kikumi and
- Jonathan Kiva Kikumu

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.

7. 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 petitioners and have noted that the petitioner’s mode does not indicate that all the dependants have been given an equal share of the estate. The proposal also seemed to give some persons more shares than others. 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.”

8. The law relating to distribution would be that the estate of the deceased should devolve as provided under **Section 38** of the **Law of Succession Act**.

9. **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 divided among the surviving children.”

10. 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 as was posited in the case of **Naomi Wangechi Munene & Another v Dorcas Wanjiru Gitonga (2016) eKLR**. I agree with the protestor and find that all the deceased’s children are entitled to a share of his net intestate estate equally as provided for by **section 38** of the **Law of Succession Act**.

11. In the premises i order that the estate of the deceased be distributed and divided equally among the surviving children. However since one of the administrators had been omitted in the grant issued it is necessary that a fresh one be issued and a fresh summons for confirmation be filed and that the estate will be distributed in line with the provisions of section 38 of the Law of Succession Act.

12. As indicated earlier, the grant was issued in the names of two of the three petitioners and this calls for Rectification of grant. Section 74 of the Law of Succession Act provides:

Errors in names and descriptions, or in setting out the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court.

13. In the matter of the **estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR** the court stated;

“The law on rectification or alteration of grants is Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules..... What these provisions mean is that errors may be rectified by the court where they relate to names or descriptions, or setting out of the time or place of the deceased’s death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the court by these provisions is not general.....”

As the name of one of the administrators Mary Mbesa Kikumu had been left out in the grant, the other two administrators will be handicapped as all the three have to jointly work and consult each other in the affairs of the estate. The grant therefore has become inoperative and should be revoked and a new one issued.

14. In the result the following orders are hereby issued:

(a) The Grant made to Naum Ndanu & Benjamin Kasyoka Kikumu on 6th June, 2014 is hereby revoked and a fresh one issued in the names of the three administrators Nahum Ndanu, Benjamin Kasyoka Kikumu and Mary Mbesa Kikumu.

(b) A fresh application for confirmation of the grant shall be filed and served upon all the beneficiaries and shall be confirmed as directed in paragraph 11 above.

(c) This being a matter between family members, each party shall bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 3rd day of December, 2019.

D. K. Kemei

Judge