



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 24 OF 2011**

**MARGARET WANGU KAMAU.....(DECEASED)**

**JUDGMENT**

1. Before court is the summons for confirmation of grant dated 8/5/2017 and filed in court on 9/5/2017 in respect of the estate of Margaret Wangu Kamau and filed pursuant to orders of court dated 8/2/2017.
2. The summons is supported by an affidavit by one of the appointed administrator, David Rukungu Kamau (hereinafter the applicant).
3. To the affidavit is annexed exhibit "DRK2", a proposal on the mode of distribution of the estate.
4. Six (6) beneficiaries are listed by the applicant and the available assets of the deceased for distribution are listed as;
  - i) Plot number 15/366 Nakuru Municipality
  - ii) Bahati/Kabatini Block 1/2313
5. The applicant proposes that property plot number 15/366 be sold and the proceeds be shared out equally after clearing the debts incurred by himself (David Rukungu Kamau) Kshs. 1,373,425.69. He proposes that property Bahati/Kabatini Block 1/2313 be shared out equally among all the beneficiaries.
6. The summons is opposed and in an affidavit of protest the joint administrator, Reuben Wachira Kamau (hereinafter the protestor) has given a history of the matter starting with stating that he had applied and been issued with a grant on 3/11/2011.
7. He urges that the applicant misled the court that he was the only beneficiary of the deceased and used letters of administration to transfer the property to himself. He (applicant) enjoys possession of the deceased's estate excluding other beneficiaries.
8. One of the properties does not, according to the protestor, belong to the deceased and the applicant arbitrarily allocated a value to it.
9. The applicant is accused of failing to include Beth Mumbi Wangu as one of the beneficiaries despite the court order that she be included.
10. The applicant is accused of excluding properties such as shares at Akuisi Company Limited and Kangei Co-operative Sacco with an ill intention of retaining them to the exclusion of other beneficiaries.
11. The applicant is further accused of including plot number Nakuru Block 15/366 situated at Kanyi Estate Nakuru in the distribution. Knowing that the property belongs to the protestor and the applicant had approached the protestor with a view to buying the same vide agreement dated 30/8/2010. The said agreement is annexed.
12. The protestor seeks that the applicant accounts for and avails all the deceased's property for equal distribution of Bahati Kabatini Block No. 1/2323, shares in Akuisi Company Limited and Kangei Nyakinywa Co-operative Sacco to all beneficiaries.
13. The parties left it to court to decide the summons on the basis of the material filed.
14. I have had occasion to consider the summons for confirmation of grant, the affidavit in support and the mode of distribution. I have considered the affidavit of protest.
15. Of determination is what constitutes the estate of the deceased, who are the beneficiaries and what should be the mode of distribution.

16. It is instructive to note that the court did issue a fresh grant of letters of administration on 24/1/2017 jointly to the applicant and the protestor.
17. The averments in the affidavit of protest specifically at paragraphs 12 where the protestor stated that the issuing of a joint letters of administration will create a tug of war between him and applicant has no place at this confirmation stage.
18. The court has already issued a joint grant to the protestor and the applicant. They are both mandated to manage the estate including in distribution. Where they do not agree, the protestor, as he has done, is free to put his case across and ventilate his position.
19. Unfortunately, when the protestor states at paragraph 13 of the affidavit of protest that he is able and willing to distribute the estate without bias or coercion without indicating any proposals to achieve that, the protestor is not helpful to the estate and to the court.
20. This matter has had a disturbing history. At one time both the applicant and the protestor each obtained a grant of letters of administration in different proceedings. As of now, the court is proceeding on a skeleton file the original file having disappeared from the registry.
21. Matters are not helped by the fact that the parties herein appeared in person.
22. This has disadvantaged the court to a great proportion. The parties have exhibited serious misapprehensions of the law and procedure and were guilty of (especially the protestor) a mix up of issues and blatant introduction of irrelevancies.
23. Yet, this ought to have been a straight forward matter. Margaret Wangu Kamau died on the 10/6/2010. Details available from record are that at the time of her death she was not married and had no children. She was not survived by her parents. There is evidence which is accepted by both sides that she had taken in BMW into her family as her own.
24. So who should be her beneficiaries? In accordance with **Section 39(b)** of the **Law of Succession Act** her dependants for purposes of succession would be her brothers and sisters.
25. The listed beneficiaries are;
1. David Rukungu Kamau - brother
  2. Reuben Wachira Kamau - brother
  3. Solomon Muriuki - brother
  4. Anne Ngima - sister
  5. Martha Warukira - sister
  6. Susan Mwihaki - sister
26. The protestor asserts that the applicant has left out Beth Mumbi Wangu, a beneficiary and this is contrary to the orders of court of 24/1/2018.
27. I have painstakingly gone through the pleadings and affidavit evidence on record. In a replying affidavit sworn by David Rukungu Kamau, the applicant herein on 13/12/2011 in response to a summons for revocation of grant of letters of administration dated 6/12/2011, he depones as follows;
- “The estate indeed belongs to my late sister MARGARET WANGU KAMAU (deceased) who died and left behind a daughter one BETH WANGU who is currently in Form 2 at KALOU SECONDARY SCHOOL and currently my dependant as I live together with her and pays her school fees as per exhibit marked ‘A’.”**
28. It is clear beyond conjecture that Beth Mumbi Wangu was a child taken in by the deceased as per her own and she is a dependant within the meaning of **Section 29** of the **Laws of Succession Act**.
29. As regards the assets of the deceased, there are discordant voices from both sides. The applicant has been less than candid in the listing of the same. He lists properties Bahati/Kabatini Block 1/2313 and plot number 15/366. He makes a curious and illegal claim in respect of property plot number 15/366 stating that the property should be sold and after clearing debts incurred by himself amounting to KShs. 1,373,425.69, the proceeds be shared out equally.
30. An administrator has no duty to use his/her resources for the benefit of an estate. While these debts are not explained, no person has the duty to settle on behalf of the estate any payments, debts, utilities, improvements or any other expense that the estate owes other than an administrator of such an estate and such payment must be met by the estate for its assets.
31. **Section 83 (b)** of the **Law of Succession** provides;

**“83. Personal representatives shall have the following duties -**

**(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death”**

32. Any purport to have incurred expenses of the estate by any person in thus illegal, null and void and at the peril of such a person if at all. This also applies to any expenses allegedly incurred by the protestor.

33. The applicant has also failed to include in the list of assets of the estate shares whose share certificate was handed over to him in presence of the protestor by one Wilson Wanjohi. A document dated 10/8/2010, and titled “Handing over of land documents belonging to Margaret Wangu Kamau (late)” and duly signed by the said Wanjohi and the applicant and marked as ‘E’ annexed to the affidavit of David Rukungu Kamau sworn on 13/12/2011 shows that the applicant received;

1. Certificate of ordinary shares for Akuisi Farmers Company Limited.

2. Land Certificate number Bahati/Kabatini Block 1/2313.

34. The protestor on his part states that property plot number Nakuru Block 15/366 belongs to him. He provides no evidence of ownership and he states that the applicant has left out shares in Akuisi Company Limited and Kangei Nyakinyua Co-operative Sacco. No evidence of the existence of shares at Kangei Nyakinyua Co-operative Sacco has been adduced by the protestor. This court, therefore, cannot ascertain that the same exist.

35. Tellingly, and in total contradiction of the protestor’s claim to plot number Nakuru Block 15/366, the protestor lists this property in P & A 5 form filed in court on 2/8/2011 as property of the deceased.

36. I have also gathered from the record that in a summons for confirmation dated 28/2/2017, the protestor indicated that Nakuru Municipality Block 15/366 should go to him as all along he was the *late* (sic) payer (rate payer perhaps). Being a rate payer is not conclusive evidence of ownership. In any event he clearly lists this property as an asset of the deceased in form P & A 5 filed in court on 2/8/2011. At what point did ownership transfer to him?

37. As regards the mode of distribution, **Section 39** is crystal clear in the shares by brothers and sisters where a deceased left no child or spouse. The share should be equal among them. **Section 39** of the **Law of Succession Act** states;

**“39. (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority -**

**(a) father; or if dead**

**(b) mother; or if dead**

**(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none**

**(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none**

**(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.**

**(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”**

38. In our case, however, we have another dependant, Beth Mumbi Wangu, and the court has the power under **Section 26** of the **Law of Succession** to make a reasonable provision for her from the estate. In doing so, the court has complete discretion. **Section 27** of the **Law of Succession Act** provides;

**“S. 27. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”**

39. In so doing the court has to have regard to the following as per **Section 28** of the **Law of Succession Act**;

**“28. In considering whether any order should be made under this Part, and if so what order, the court shall have regard to -**

**(a) the nature and amount of the deceased’s property;**

**(b) any past, present or future capital or income from any source of the dependant;**

(c) the existing and future means and needs of the dependant;

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

(e) the conduct of the dependant in relation to the deceased;

(f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

(g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant."

40. The parties herein who appeared in person were unable to articulate the relevant issues properly. For their sake, I need to clarify that when it comes to property forming part of the estate this must be that property defined under **Section 3(1)** of the **Law of Succession Act** in these terms;

**"Free property, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death."**

41. From the foregoing the issues for determination answer as follows;

a) The ascertained assets of the estate of the deceased constitutes;

(i) Plot No. 15/366 Nakuru Municipality

(ii) Bahati Kabatini Block 1/2313

(iii) Shares in Akuisi Farmers Company Limited

b) The ascertained beneficiaries are;

1. David Rukungu Kamau - brother

2. Reuben Wachira Kamau - brother

3. Solomon Muriuki - brother

4. Anne Ngima - sister

5. Martha Warukira - sister

6. Susan Mwhaki - sister

7. Beth Mumbi Wangu - dependant

c) The distribution of the estate shall be governed by **Section 26** and **39** of the **Law of Succession Act** as extrapolated hereunder.

42. As per affidavit evidence of David Rukungu Kamau sworn on 13/12/2011, Beth Mumbi Wangu was in form 2 at that time. Though her age is not given. Though her age is not given, she must now be a young adult.

43. In making a provision for Beth Mumbi Wangu, I am alive to the fact that I have complete discretion to order a specific share of the estate to be given to her within the provisions of **Section 27** of the **Law of Succession Act**.

44. I am bound by **Section 28** of the **Law of Succession Act** to have regard to the nature and amount of the deceased's property, any past, present or future capital or income from any source of the dependant, the existing and future means and needs of the dependant, whether the deceased had made any advancement or other gift to the dependant during his lifetime, the conduct of the dependant in relation to the deceased, the situation and circumstances of the deceased's other dependants and the beneficiaries under any will, the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

45. Mumbi is a young adult. I have no evidence of any past, present or future capital or income from any source of this dependant. Compared to other beneficiaries, her needs and life expectancy are higher. The other beneficiaries are adults who are settled in their own way and whose lives did not depend on the deceased. In these circumstances I am inclined to give her a larger provision than the other beneficiaries.

46. As regards the other beneficiaries, **Section 39** of the **Law of Succession Act** provides that they will get equal shares of the remainder after the share to Beth Mumbi.

47. With the result that I proceed to confirm the grant of letters of administration issued jointly to David Rukungu Kamau and Reuben Wachira Kamau in and set out the distribution of the estate as follows;-

<b>NAME</b>	<b>DESCRIPTION OF PROPERTY</b>	<b>SHARE</b>
	Plot 15/366	To be sold and proceeds be
		shared out as follows;
Beth Mumbi Wangu		½ the proceeds of sale
David Rukungu Kamau	”	Half share of proceeds
Reuben Wachira Kamau		of sale equally
Solomon Muriuki		
Anne Ngima		
Martha Warukira		
Susan Mwihaki		
Beth Mumbi Wangu	Bahati/Kabatini Block 1/2313	½ acre
David Rukungu Kamau	”	1 acre to be shared
Reuben Wachira Kamau		equally
Solomon Muriuk		
Anne Ngima		
Martha Warukira		
Susan Mwihaki		

<b>NAME</b>	<b>DESCRIPTION OF PROPERTY</b>	<b>SHARE</b>
Beth Mumbi Wangu	Shares in Akuisi Farmers Company Ltd.	To be sold and shared
David Rukungu Kamau		out equally among all
Reuben Wachira Kamau		beneficiaries
Solomon Muriuki		
Anne Ngima		
Martha Warukira		
Susan Mwihaki		

**Dated and Delivered at Nakuru this 13<sup>th</sup> day of December, 2018.**

**A. K. NDUNG'U**

**JUDGE**