



**REPUBLIC OF KENYA**  
**IN THE HIGH OF KENYA AT NAKURU**  
**SUCCESSION CAUSE 709 Of 2007**

**IN THE MATTER OF THE ESTATE OF HETA KONDO (DECEASED)**

**ELVINAH MNYAZI KAHUGU ..... PETITIONER**

**VERSUS**

**JOHN DZUYA SIMEON ..... 1<sup>ST</sup> PROTESTER**

**PHILIP MKUZI JOHA ..... 2ND PROTESTER**

**JUDGMENT**

The petitioner **ELVINAH MNYAZ KAHUGU** petitioned for grant of letters of administration intestation which were issued to her on **19/2/2007**. She later filed summons for confirmation of the said grant, and proposed that distribution be in relation to the estate of **SALOME HETA KONDO** be as follows:

- (1) LR Nyahururu/Passenga 76 – 5.00 Ha to Elvinah Mnyazi Kahugu
- (2) LR Nyahururu/Passenga 76 – 3.55 Ha to John Dzuya Simeon
- (3) LR Nyahururu/Passenga 76 – 3.55 Ha to Philip Mkuzi Joha
- (4) LR Nyahururu/Passenga 76 – 0.9 Ha and LR Nyahururu/Passenga 77 – 2.65 Ha to Joyce Wanjiru Kondo.
- (5) LR Nyahururu/Passenga 77 – 3.55 Ha to Joseph Simeon Kondo
- (6) LR Nyahururu/Passenga 77 – 3.55 Ha to Monica Wangui Kondo
- (7) LR Nyahururu/Passenga 77 – 3.55 Ha to Rahab Muthoni Kondo.

The persons listed as heirs to the estate were the deceased's children – their ages range between 60-45 years. When the petitioner filed for letters of administration she annexed minutes of a family meeting attended by all the heirs, in which the family members resolved that in order to reduce travelling costs and other expenses, the petitioner was nominated to be the administrator of the estate.

According to the petitioner, the beneficiaries of the estate met and agreed on 6/10/2008, that parcel

No.Nyandarua/Passenga/76 and Nyandarua/Passenga/ 77 were to be consolidated and divided among 7(seven) surviving children of the deceased, and a portion of land equivalent to the value of Kshs.700,000/ was to be allocated to the petitioner to defray the survey fees, administration costs and any other expenses.

This mode of distribution is opposed by the protestors John Nzuya Simeon and Philip Mkuzi Joha who state that the parcel of land **Nyandarua/Passenga 76 and 77** measures **69.6 acres** and each beneficiary ought to be allocated **4 hectares**. They point out that the petitioner has proposed to get a larger share than all the others and the portion she is allocating to herself is the land where the protestors have built and developed their residential houses in which they have lived for the last 18 years. Further that the petitioner has failed to take into account the expenses of hiring a surveyor and the expenses incurred since filing of this cause. They state that the petitioner prepared the petition and confirmation without their consent, and that portion proposed to be allocated to Monica Wangui Kondo and Rahab Muthoni Kondo does not even take into account that they do not reside on the said portions and they together with the petitioner have disposed off all the trees worth Kshs.4.2 million on plots No.76 and 77 without the consent of the other siblings.

In their further affidavit, they state that the family had agreed to have the land sub-divided equally among the beneficiaries with the two protestors retaining the parcels around their homesteads. The court is also asked to consider the trees the petitioner is alleged to have cut down and transported to various destinations, and that the timber which still remains should be shared equally among the beneficiaries. They allege that the petitioner misled them into signing a document which stated that she had spent Kshs.700,000/= in the administration, so she should be provided with an extra portion of land, when in reality she spent much less.

The protestors proposal is contested and in the affidavit sworn by the petitioner, she draws the court's attention to a letter written to the D.O Ol-Kalou by the beneficiaries – it is dated **6<sup>th</sup> October 2008**. In that letter, all the beneficiaries resolved that the two parcels in issue were to be consolidated and divided equally among the seven surviving children of the late Salome Heta Kondo.

In addition, a parcel of land equivalent to 700,000/= was to be added to Elvinah (the petitioner) to defray her expenses for filing the Succession Cause and other expenses. A registered surveyor had been authorised to carry out the work so that the actual acreage due to each individual would be communicated to the High Court for determination of the cause.

She explains that the reason why she and her two sisters have not been on the suit property is because of the violence meted on her by the 1<sup>st</sup> protester John Dzuya Simeon on 28/10/2011, where he assaulted Monica Wangui (a copy of her P3 form is annexed). She further deposes that, the protestor has never constructed any house on the plot, and the house he lives in was constructed by her for their late mother.

The petitioner is also accused of maliciously liaising with her two sisters to humiliate their brothers (the 2 protestors) including unfairly accusing one of them of assault – so she has come to court with unclean hands. In fact according to the protestors, what the petitioners did is tantamount to intermeddling with the deceased's property and in their view, expenses incurred towards obtaining grant could not have exceeded Kshs.100,000/=. The court is urged to consider the provisions of **section 41 and 42** of the **Law of Succession** in distributing the deceased's property among her surviving children and the protestor's counsel relies on the case of **Re: Estate of Priscilla Wairimu Kamau** (2005) eKLR where the court stated:

**“..... The deceased's estate falls within the provisions of Cap 160 and in particular section 38 which provides how intestates estate of the deceased who left a surviving child or children, but no spouse, should be administered. The estate should devolve upon the surviving children equally, their marital status or gender notwithstanding.”**

The proposal by the petitioner is termed as not being equitable and the court is asked to consider the decision in **Estate of Nyanjui Thitu Kiarie Succession Cause No.48 of 1993**.

In response, the petitioner's counsel submits that the petitioner's actions including proposed distribution were guided by the consent which all the beneficiaries signed so the question of intermeddling does not arise. The disproportionate proposed distribution is explained and justified on the basis that the petitioner constructed their late mother's house and paid debts to the Settlement Fund Trustee so as to secure the estate.

The protestor's proposed distribution of trees/timber is opposed on grounds that their value has not been stated, so the court would not know how to distribute them.

It is a common ground that the beneficiaries had met and agreed on equal distribution on recognition of **Section 38** of the **Law of Succession**. Indeed the petitioner's concedes that the estate should be divided equally but take into account the cost of administration, survey fees and all other expenses which had been agreed upon at Kshs.700,000/=. There is no dispute that the total acreage of the parcel belonging to the estate measures 69.6 acres – which if it was to be equally shared between the seven beneficiaries would give a total of 9.94 acres each. The Title documents annexed shows that parcel No.77 measures 13.8 Hectares, while No.76 also measures 13.8 Hectares. That gives a total of 27.6 Ha to the nearest round figure is 28 Hectares – which is why the protesters suggest 4 Hectares for each beneficiary. The document signed by the beneficiaries is now contested as a fraud on grounds that the petitioner did not spend Kshs.700,000/= on processing letters of administration and getting the property surveyed. The issues which emerge here:

- (a) The Protestors have not offered any evidence to justify their claim that she did not spend Kshs.700,000/= in filing the Succession Cause, survey and other expenses. In the absence of evidence by the contrary, that figure in the consent remains as valid
- (b) However it is not clear how the petitioner determined that the equivalent of Kshs.700,000/= was 1.45 Ha. – Which is the acreage she got above that of the other beneficiaries. No valuation report has been annexed to support this apportionment and the acreage seems to have been arrived at arbitrary.
- (c) If the petitioner had constructed the house of her mother, that home forms part of the mother's estate, it does not automatically devolve to her and her argument regarding special claims to that house cannot hold. I concur with the protestor's counsel that the house became available for distribution as part of the deceased estate.
- (d) The timber/trees proposed to be disinherited do not seem to have a value to them. It is even not clear whether the trees are concentrated on one portion of the land or whether they are evenly distributed so that once each beneficiary get a piece of the land, they benefit from the trees on that portion.

Taking into consideration the provisions of **Section 38** of the **Law of Succession Act**, I am of the view that the estate must be distributed equally among the beneficiaries to reflect equity. In that regard then the reasonable and equitable distribution is the one offered by the protestors at 4 Hectares for each beneficiary. Then I must consider the second issue to take into account which is whether the portions proposed to be allocated to the beneficiaries have failed to take into consideration developments made by the protestors. There is no tangible evidence whatsoever to demonstrate that the protestors have undertaken certain developments or even settled on the portion which they prefer. I therefore confirm the portions proposed by petitioner to each beneficiary but with an increase in the size so as to reflect equitable distribution.

The third issue, which cannot be ignored, is the consent signed by the beneficiaries acknowledging that the petitioner went the extra mile in following up letters of administration and survey. The protestors do not deny that the petitioner indeed incurred expenses in that regard, only that she seems to have exaggerated the sum. There is nothing presented to this court to suggest that the petitioners used duress on the other beneficiaries to sign the consent, or misrepresented to them the amount she used when they agreed on the figure of Kshs.700,000/=. I think it was up to the protestors who were alleging fraud and misrepresentation, to prove that – they have not. I also recognise that in the absence of a valuation report it is not easy to determine what acreage would be equal or worth Kshs.700,000/=. The protestors are not

making any monetary offer on how to defray the petitioner's expenditure so as to leave everyone with the intact 4 Hectares. So I must fall back on the principle of determinables, which works out as follows – remove the petitioner's 4 Hectares, each of the seven siblings would then be expected to give up a portion of their share to meet in kind the expenses drawn, so that is  $24/7 = 3.42$  Hectares, to the nearest decimal is 3.5 Hectares. This would then mean that each beneficiary would give up 0.05 Hectares of their share so in total it would be a total of 1.00 Hectares which entitles the petitioner to 5 Hectares.

I am therefore satisfied that the proposed distribution not only reflects what the family members had earlier agreed on, but is a fair and equitable means of distributing the estate and does justify a departure from what is contemplated by section 38 of the Law of Succession Act.

Consequently I uphold the proposed schedule of distribution in support of the application for confirmation. The grant is confirmed and mode of distribution is as proposed by the petitioner.

**Delivered and dated this 11th day of September, 2012 at Nakuru.**

**H.A. OMONDI  
JUDGE**