



REPUBLIC OF KENYA



**In re Estate of Mutheki Muchonjoru (Deceased) (Succession Cause
23 of 2020) [2025] KEHC 15937 (KLR) (6 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 15937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 23 OF 2020
HI ONG'UDI, J
NOVEMBER 6, 2025**

BETWEEN

ESTHER NJUHI MUTHEKI PETITIONER

AND

PETER GACHATHI MAINA 1ST OBJECTOR

PAUL KIBUGI MUTHEKI 2ND OBJECTOR

GIDEON MUNGAI MUTHEKI 3RD OBJECTOR

JOSEPH NJOROGE MUTHEKI 4TH OBJECTOR

ESTHER WAMBUI WAWERU 5TH OBJECTOR

RULING

1. The petitioner filed summons for confirmation of grant dated 28th March 2022 together with the annexures therein. The same is supported by an affidavit by the petitioner sworn on even date.
2. The objectors filed an affidavit of objection sworn by the 1st objector on 23rd November 2023 opposing the said summons. He proposed the addition of two administrators to represent the two families in the estate of the deceased. He stated that the deceased sold some portion of land reference number Bahati Engorusha Block 1/124 and at the time of his demise Gabriel Kanyi Njoroge had taken possession and built his house on the said parcel of land. Further, that in the said property the 1st family had their sisters' permanent house and marked grave of the deceased's daughter while Joseph Muturi Gachoki had purchased the said property and taken possession with a permanent structure.
3. He further averred that in land reference number Bahati Engorusha Block 1/80 the 1st family have their permanent house. That in Bahati Engorusha Block 1/447 was a grave site where the deceased's daughter (Catherine Njeri Mutheki) was buried and had a house. Also, in the said land is a permanent house for the 2nd wife and a house built by 2nd Objector



4. He stated that on Bahati Engorusha Block 1/109 are rental units and a refilling station while in Bahati Engorusha 114 are rental units. He added that on Bahati Engorusha Block 1/60 is a permanent structure and grave site for the 1st wife and 2nd wife and the deceased herein. They gave their proposed distribution schedule under paragraph 7 of the affidavit of objection.
5. The petitioner filed a replying affidavit sworn on 25th October 2024 where she averred that during her attempts to execute the certificate of confirmation of grant, she realized that L.R No. Kwale/Mwanyamala/606 was sold by the deceased to a third party and it was only awaiting transfer. Thus, the said property was not available for distribution. She further averred that the 1st family occupies L.R No. Bahati /Engorusha Block 1/80 and not L.R No. Bahati/Enyorusha Block 1/124 and as such they were at liberty to share L.R No. Bahati/Engorusha Block 1/80 as they had proposed.
6. She asserted that Stanley Kaae Mutheki should be the sole beneficiary of L.R No. Bahati/Engorusha Block 1/124 since he did not receive any share from the deceased during his lifetime unlike all the other sons. She stated that all the objectors and their children had been allocated enough land during the lifetime of the deceased, save for Stanley who lived abroad. She further stated that it was prudent that LR. No. Bahati/Engorusha Block 1/60 which has a church and the family grave site be registered jointly in her name and that of the church so that she can take care of the family interests. She urged the court to adopt the proposal made in the summons for confirmation.
7. The parties agreed to proceed by way of viva voce evidence in determining the mode of distribution/ disposal of the properties.

Petitioner's case

8. The administrator called two witnesses and the petitioner testified as PW1. She adopted as her evidence the replying affidavit together with other documents dated 25th October 2024, witness statement together with the bundle of documents all dated 9th December 2024 and summons for confirmation and the affidavit in support where she had listed the proposed distribution.
9. In cross-examination, she stated that she attended court on 28th March 2022 together with the other beneficiaries who consented to her filing this suit. She stated that the deceased had a will and her lawyer had it. She added that the subject property was developed with two houses, a temporary one and a permanent one from which she collected rent.
10. PW2 Thuku Mutheki a son of the deceased adopted as his evidence his witness statement dated 9th December 2024.

Objector's case

11. The objectors called four witnesses, RW1 the 4th objector (1st house) adopted his witness statement and testified that the deceased gave him the subject land and the same had been written down. He stated that they had lived in the subject land together with his mum and the deceased. He denied having signed any consent or appointing the petitioner as the administrator. He further stated that the suit property had rental houses and that the other family took everything. He urged the court to allow them to have a meeting as family and agree on the way forward.
12. In cross-examination, he confirmed that he started living on the deceased's land in 2012 and the deceased gave the land to him as a gift in 2014, though he does not have a title deed to the said land. He added that Gachagi's land (PEXB2) was given to him by the deceased and the land in Bahati was given to Paul Mutheki (2nd objector). He further stated that his step- brother Stanley Kaae Mutheki was also given land and the deceased sold it and sent the money (kshs. 600,000/=) to him since lived abroad.



- He confirmed that the deceased gave him block 1/80 only and that he was not in agreement with the petitioner's proposed distribution. He denied being aware of block 1/124.
13. In re-examination, he stated that the deceased distributed land to all his children in the petitioner's absence. He added that they had never sat down as a family to distribute or discuss about the land and he did not know who appointed the petitioner as administrator.
 14. RW2 Joseph Muturi Gachoki testified that the deceased sold land to him in 2011 and he had built a rental house and his own house on it. He stated that his land is known as Block1/124 (50 x 100 plot) and the agreement for the same was done by an advocate. He added that he was not aware if the said land had been distributed to other people.
 15. In cross-examination, he confirmed that the agreement was done in 2001 as indicated on the agreement. He stated that at the time he bought the said land it had no title and the deceased was sickly. He admitted that he did not know the size of Block/124 but him together with the chief and the deceased obtained consent from the Land board. The said consent was retained by the chief and no sub-division was done.
 16. In re-examination, he stated that he moved into the land when he bought it but he has never been given the title for the same and he was not involved in any subdivision.
 17. RW3 Gabriel Kanyi Njoroge testified that he bought a 50x100 plot from the deceased, paid the first deposit of kshs. 50,000/= and then entered and started building. He stated that after the deceased died his family promised to give them title but five years later they were told that there was a suit in court.
 18. In cross -examination, he confirmed that he bought land from the deceased at kshs. 120,000/= and he paid for it in 2003. He stated that the plot number was block 124 and he lived on it. He further confirmed that he did not know the administrator (PW1).
 19. RW4 Peter Kachagi Mutheki a son to the deceased from the 1st house, testified that he lived in Bahati and its the deceased who gave them that land. He stated that they had never talked about distribution and that the deceased had left no will. He further stated that when they appeared in court they were told on how the land had been distributed and the land in question was never distributed. However, the land in question was never distributed same to those that have buildings on them. The same include; Block 1/124(PGM IV) for Gabriel who bought it from the deceased and he lived there, and for Muturi (PG V). He added that 1st and 2nd house had agreed that priority be given to those living on the land and the 3rd house had been informed of the same.
 20. In cross-examination, he stated that Stanley was also a son to the deceased but he did not know whether the deceased sold his share. He denied having been invited to court by advocate Githui or being served with citation documents. That the documents they received were from court. He confirmed that only the 1st and 2nd family agreed in the meeting which was held. In the said meeting they were not informed that Block 1/80 was to go to RW1.
 21. He further stated that they had a meeting with their advocate, although their sister Mary Muthoni Githagia did not sign the minutes. He confirmed that Block 1/124 belonged to the deceased and that there was a house built by the deceased on Block 1/80. He asserted that it was the deceased's wish that those called by his name be given the borehole. He stated that Block 1/447 has a house built on it by the deceased; Bahati/Engorusha/Block 1/109 also has a house and the 3rd house collects rent from it. Additionally, that Bahati/Engorusha/Block 1/114 has a house with tenants and the 1st house collects the rent. He added that Bahati/Engorusha/Block 1/60 has a church and a burial site for the family and the title deed (PEXB4) should be given to the church.



22. He proposed that Block 1/114 and 109 be sold and its proceeds be shared by the family. He stated that the 1st and 3rd family had not received anything but PW1 who has 6-7 children had her own land. He further stated that each family had been given property.
23. In re-examination, he stated that in the 3rd house's proposal there was no mention of rent or commercial property. His witness statement was adopted as evidence by consent.
24. Parties filed their written submissions after close of the objectors' case.

Petitioner's submissions

25. These were filed by the firm of Wachira Maina & Company Advocates and are dated 1st July 2025. Counsel gave a brief background of the case and submitted that the affidavit of objection as filed is materially defective and liable to striking as it offended section 67 of the Succession Act and rule 17(1) of the Probate and Administration Rules. He placed reliance on the decision in *Re Estate of Stephen Taraiya Kapande (deceased)* [2021] eKLR where the court while determining a similar matter held as follows;

“As argued by Mr. Wanyingi, the petition in this matter was published on 16th August, 2019 since the grant was issued on 28th October, 2019. There is no indication of an objection to the making of the grant and that is the reason the court issued the same. The Objector herein filed her Objection on 25th January, 2021, almost two years after the grant had been issued to the Administratrixes. It is obvious to me that these are two years too late for the Objector. She has filed wrong proceedings.”

26. Counsel further submitted that the mode of distribution as appearing at paragraph 9 of the affidavit in support of the summons together with the necessary modifications as exhibited in her witness statements, was fair and proportionate. In addition, the said proposal brought proportionality and it does not disadvantage any beneficiary unlike the proposal by the objectors which was skewed. The court's attention was drawn to the decision *In re Estate of Wachira Waithaka (deceased)* (Succession Cause 156 of 2000) [2025] KEHC 9244 (KLR) (27 June 2025) (Ruling).
27. In conclusion, he urged the court to allow the summons for confirmation of grant dated 28th March 2022.

Objectors' submissions

28. These were filed by the firm of Chepchieng & Company Advocates and are dated 22nd October 2025. Counsel gave a brief background of the case and submitted that the proposed distribution contained in the summons dated 28th April 2022 and the subsequent proposal by the petitioner contained in the petitioner's statement dated 9th December 2024, supported by Ian Thuku Mutheki lacked the inclusion of the creditors and failed to acknowledge the properties that have commercial units and permanent structures that existed before the succession proceedings.
29. Counsel further submitted that the objectors had demonstrated through credible evidence and witness statements, that the petitioner concealed material facts, including the existence of the interests of creditors and commercial assets. He urged the court to uphold substantive justice under Article 159(2) of *the Constitution* by ensuring that the distribution of the estate is done fairly, transparently and in full compliance with the law. That the same would protect rightful beneficiaries and creditors against procedural irregularities and concealment by the petitioner.



Analysis and Determination

30. I have considered the summons for confirmation, the affidavits and submissions by both counsel for the parties. I find the main issue for determination to be distribution of the deceased's estate.
31. The duty of a probate court was elaborated In Re Estate of Alice Mumbua Mutua (deceased) [2017] eKLR where court held as follows:
- “.....The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”
32. It is not disputed that both the petitioner and the objectors are beneficiaries to the estate of the deceased. They all called evidence and filed their proposed mode of distribution of the estate of their deceased father. It is also not disputed that the deceased was polygamous and had three wives who also bore him children. From the evidence adduced before this court there is no doubt that the deceased died intestate since the claim that he left behind a will was unsubstantiated.
33. In a case of this nature where the deceased was a polygamous man with three wives but survived by one (1) widow and children and died intestate the anchor on distribution of his estate is Section 40 of the Law of Succession Act which primarily provides as follows;
- “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate, shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net interest within each house shall then be in accordance with the rules set out in sections 35 to 38”
34. Further, these principles were expounded in the case of Rono v Rono Civil Appeal NO. 66 of 2002, where Waki J.A (Rtd) stated inter alia that; -
- “More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife and children of that wife.”
35. Additionally, In the Matter of the Estate of Nelson Kimotho Mbiti(deceased) HCSC NO.169 of 2000, Koome J (as she was then) directed that the estate of a polygamist be divided in accordance with the provisions of Section 40 of the Act. The estate was divided into units according to the number of children in each house with the widows being added as additional units. The same reasoning was also



applied in the Estate of Ainea Masinde Walubengo (deceased) [2017] eKLR where the court held as follows;

“I am of the view that Section 40 of the Law of Succession Act will apply to the circumstances of this case. Meaning that the Court will distribute the estate of the deceased according to each house taking into account the number of children in each unit including the surviving widow.”

36. The 1st house is constituted as follows:

- i. Joseph Njoroge Mutheki
- ii. Mary Wanjiru Mutheki (deceased)
- iii. Esther Wambui Waweru
- iv. Peter Gachagi Mutheki
- v. Gideon Mungai Mutheki
- vi. Francis Mburu Mutheki
- vii. John Njuguna Mutheki (deceased)
- viii. Joseph Gitagia Mutheki

37. The 2nd house is constituted as follows:

- i. Paul Kibugi Mutheki
- ii. Mary Wanjiku Mutheki
- iii. Catherine Njeri Mutheki

38. The 3rd house is constituted as follows;

- i. Esther Njuhi Mutheki
- ii. Margaret Wanjiru Mutheki
- iii. Joseph Njoroge Mutheki
- iv. Stanley Kaae Mutheki
- v. Agnes Wanjiku Mutheki
- vi. Peter Gitagia Mutheki
- vii. Mary Thara Mburu
- viii. Ian Thuku Mutheki
- ix. Peris Wanjiru Mutheki

39. The properties vested in the estate of the deceased for distribution are as follows;

- i. Land Reference No. Kwale/Mwanyamala/606.
- ii. Land Reference No. Kwale/Mwanyamala/71.
- iii. Land Reference No. Bahati/Engoshura Block 1/124 (1.8 acres)



- iv. Land Reference No. Bahati/Engoshura Block 1/80 (0.84 acres)
 - v. Land Reference No. Bahati/Engoshura Block 1/447 (0.16 acres)
 - vi. Land Reference No. Bahati/Engoshura Block 1/109 (0.16 acres)
 - vii. Land Reference No. Bahati/Engoshura Block 1/114.
 - viii. Land Reference No. Bahati/Engoshura Block 1/60.
40. The total number of units that the deceased left behind is 20 and these are entitled to inherit from his estate. The Court in *Re Estate of John Musambayi Katumanga (deceased)* [2014] eKLR held as follows:
- “The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”
41. I have considered the law on the matter, the evidence by both parties and the proposals on the distribution of the estate that have been placed before this court. My humble view is that the said proposed modes of distribution do not make a conclusive or fair mode of distribution. I therefore undertake the following distribution of the estate of the deceased as follows:
- i. Land Reference No. Bahati/Engoshura Block 1/124 (1.8 acres) Gabriel Njoroge Kanyi and Joseph Muturi Gachoki – 50 X 100 plot each. The remaining acreage to be shared equally between the 3 houses.
 - ii. Land Reference No. Bahati/Engoshura Block 1/80 (0.84 acres) 1st House
 - iii. Land Reference No. Bahati/Engoshura Block 1/447 (0.16 acres) 2nd House
 - iv. Land Reference No. Bahati/Engoshura Block 1/109 (0.16 acres) 3rd House
42. For the properties Land Reference No. Kwale /Mwanyamala/606, Land Reference No. Kwale/ Mwanyamala/71, Bahati/Engoshura Block 1/114 and Land Reference No. Bahati/Engoshura Block 1/60 no title deeds and search certificates in respect of the same were presented before this court to prove they formed part of the deceased’s estate for purposes of distribution. The court would therefore not risk distributing them. In the event the same are availed then this court shall do a further distribution and ensure that the houses which were allocated less acreage in the distribution herein above (see paragraph 41) are compensated accordingly.
43. A certificate of confirmation of grant to issue as per the distribution above.
44. Costs shall be paid from the estate
45. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 6TH NOVEMBER, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI



JUDGE

