



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 850 OF 2014
IN THE MATTER OF THE ESTATE OF BENSON
MATHENGE MUCHEMI (DECEASED)

JUDGMENT

1. Vide summons for Confirmation of Grant dated **24th January 2023**, **BRIAN MUCHEMI MATHENGE**, an administrator seeks the following orders:
 - 1) **The grant of letters administration intestate issued to ANASTACIA WAMBUI MATHENGE, ANDREW GITUKU and BRIAN MUCHEMI MATHENGE on the 18th day of December 2017 and rectified on the 30th day of November 2021 be confirmed.**
 - 2) **The costs of this application be provided for.**
2. The summons was supported by the Affidavit of even date sworn by the applicant, a replying affidavit dated 24th April 2023 and a further affidavit sworn on 26th April 2023.
3. **LEONARD THOMPSON** filed an affidavit of protest dated 6th April 2023. He opposes the proposed mode of distribution presented by Brian Muchemi Mathenge.

4. **CATHERINE ALUVISIA OCHOKI**, a creditor of the estate filed a Replying Affidavit dated 24th March 2023. She argues that the deceased was her tenant. After he died, the deceased's wife Anastacia Wambui Mathenge continued living in her house. She is claiming Kshs. 3,884,160 from Anastacia's share.
5. **ANASTACIA WAMBUI MATHENGE** also opposes the proposed mode of distribution by Brian Muchemi Mathenge. She avers that she is the wife of the deceased. They were directors of Forward Mobiles Limited. She owned 40 % shares whereas the deceased held 60% of the shares. The proposed mode of distribution includes properties and money which belong to the company. She urged the court to issue an order that they be removed from the proposed mode of distribution.
6. The summons was canvassed by way of *viva voce* evidence.

EVIDENCE

7. **PW1, Brian Muchemi**. He proposes that the estate be shared equally between the beneficiaries of the estate. He disagrees with the proposal of Andrew Gituku especially on the garage. He argues that the garage has not been beneficial

to any of the beneficiaries. He has never received any income from the garage. The deceased had 60% shares in Forward Mobiles Limited. He proposes that the shares be distributed equally among the beneficiaries. He states that the company was mismanaged and is seeking an audit of the same. The share belonging to his brother who is 13 years old should be registered in his mother's name.

8. During **cross -examination by Ms. Njoroge** , he stated that the log books are in the name of the deceased . They are in possession of the deceased's lawyer. He did not include Anastacia in the mode of distribution because she has restricted access to the company. The company has been shut down. The company used to make Kshs. 2.4 million per month.

9. During **cross-examination by Ms. Kihima**, he stated that the garage is run by two of his uncles. The garage cannot be subdivided; it should be liquidated.

10. In re-examination, he stated that he has never been given a list of liabilities since he became an administrator.

11. At the hearing Leonard Thompson withdrew his protest dated 6th April 2023. He proposed that LR. NO. 37/191 be divided into equal shares. He submits that the property be shared equally.

12. **RW1, Anastacia Wambui Mathenge.** She does not agree with the proposed mode of distribution. She is a director and shareholder of Forward Mobiles Limited. She objects to the inclusion of Forward Mobile assets and bank accounts which include: (i) LR No. 37/91 which was registered in the name of the company on 13th May 2008; (ii) computerized steel fabricating machine which was financed by Equity Bank on 18th December 2012; (iii) bank account at Equity Bank; and (iv) escrow account at NCBA Bank. The account at Equity Bank was opened by the advocates and they deposited money from sale of dealership of Forward Mobiles Limited. Her vehicles have also been listed in the proposed mode of distribution. The log books are in possession of Jamleck Maina Muchemi and Fredrick Karoka Muchemi. She is not opposed to the mode of distribution of the other vehicles. She proposes that: LR No.

Mweiga/Kamatungu Block 1 and the property in Embu be shared equally after confirmation of ownership; 80% shares in Kenya Racing Team be shared equally; and shares in companies be shared upon confirming shares belonging to the deceased.

13. During **cross-examination by Mr. Juma**, she stated that she owns 40% shares in Forward Mobiles while the deceased holds 60%. After his death, she assumed 100% of the shareholding. According to her, a company is a separate entity and has an independent identity separate from the deceased. Forward Mobiles is no longer doing business. She will discharge her obligation of running the company. Forward Mobiles used to receive monthly payments from Safaricom. Some money was received after the deceased's death. She utilized the money for her daughter's school fees. The deceased had made arrangements for payment of school fees for the other children. After the deceased's death she entered into an agreement with James Ochoki on payment of rent. The lease agreement was between Forward Mobiles and the landlord. She does not have

logbooks showing that the properties are registered in her name. The estate has no claim to the companies.

14. During **cross-examination by Mr. Odongo**, she stated that the children do not have a share in Forward Mobiles Ltd. she has not withdrawn money from Equity Bank after the deceased's death.

15. In **re-examination**, she stated that the escrow account holds Kshs. 22 million The property in Embu should be shared equally.

APPLICANT'S SUBMISSIONS.

16. The applicant formulated the following three issues to be considered by this court;

- i. What assets constitute the Estate of the Deceased?**
- ii. Whether the Estate should be distributed equally among all beneficiaries in the mode and manner proposed by the Applicant, Brian Mathenge Muchemi?**
- iii. Whether the shares of Forward mobiles and or other companies belong to the Estate of the Deceased and how they should be dealt with?**

17. On the first issue, it was his submission that the following properties form part of the deceased's estate;

- i. all the 40 vehicles listed in the petition for letters of administration by Anastacia Wambui Mathenge form part of the deceased's estate. He argued that she has not produced any evidence showing that some of the vehicles belong to her.
- ii. Land L.R No. Mweiga/Kamatongu Block 1 Samaki/284 is registered in the deceased's name.
- iii. Land in Embu- Anastacia included it in her schedule of assets and is in agreement that it forms part of the deceased's estate.
- iv. Land L.R No.37/191 (I.R No.17354)- Anastacia listed it as a property of the estate.
- v. 60 out of the 100 shares in Forward Mobiles Limited.
- vi. 80% stake in Kenya Racing Team.
- vii. 20 out of the 50 shares in space makers Ltd.
- viii. 400 out of the 1000 shares in superb safaris Company Limited.
- ix. Computerized steel fabricating machine- was purchased and owned by the deceased. Although Anastacia stated that it was bought on loan by Forward Mobiles, she has no evidence of the same.
- x. Account No.0010201200912 domiciled at Equity Bank Limited- He stated that Anastacia in her supporting affidavit in support of the petition of letters administration intestate stated that they sold their matrimonial home to offset a loan at Equity Bank. The amount was deposited in Equity Bank account. School fees and upkeep were withdrawn from this account on consent.
- xi. Account Number 7995340016 domiciled at NCBA bank- Anastacia did not indicate that the money belongs to her alone or the company. Advocates representing parties in this suit were paid from this account and Anastacia did not object to that.

18. On the second issue whether the properties should be distributed equally, it was the applicant's submission that the deceased left one wife and seven children and therefore, the estate should be distributed under Section 35 of the Law of Succession Act. According to him the estate should be shared equally among all the beneficiaries of the deceased's estate. He sought to rely on the decisions of **In Re Estate of Solomon Ngatia Kariuki (Deceased) (2008) eKLR, FAAF v RFM & 2 others (Petition E035 of 2023) [2025]** and **NSA & another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another [2019] eKLR** which all held that property should be distributed equally among beneficiaries without any form of discrimination.

19. On the third issue, relying on the decisions in **the matter of the Estate of Charles Karuga Koinange [2017] eKLR, Re Estate of Boniface Mutinda Kabaka (Deceased) (Succession Cause E185 of 2021)**, it

was the applicant's submission that shares owned by the deceased in the companies are available for distribution.

RESPONDENT'S SUBMISSIONS

20. She framed the following three issues to be determined by this court;

- i. Whether the assets owned by Forward Mobiles Ltd constitutes the Estate of the Deceased?**
- ii. Whether assets owned by Forward Mobiles Limited should be subjected to equal distribution as per the proposed mode of distribution?**
- iii. Whether the proposed mode of distribution is fair and just to all beneficiaries?**

21. On the first issue, relying on the decisions in **Salomon v.**

A. Salomon & Co. Ltd [1897] AC 22 (House of Lords)

and **Victor Mabachi & Anor & Nurtun Bates Limited**

[2013] eKLR, it was her submission that Forward Mobiles

Limited is a limited company which is separate from the

owners. It was her submission that the properties registered

in the company belong to the company even where there are

shareholders. Reference is made to the cases of **Metchem**

East Africa Limited & ano v Joseph Karuga Koinange &

ano. 2019 KEHC5954(KLR) and Omondi v National

Bank of Kenya Ltd & others (2001) 1 EA 177.

22. She avers that Land Reference No. 37/191 (I.R NO 17354), Monies in Bank account number 0010201200912 held at Equity Bank, Monies in Account Number 7995340016 held at NCBA Bank, Computerized steel fabricating machine are in the name of the company and therefore, they do not form part of the deceased's estate. Reference is made to the cases of **Kenya Breweries Limited & 3 others v Symon Wairobi Gatuma [2017] KECA 417 (KLR)**, **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] KECA 816 (KLR)** and **In re Estate of Boniface Mutinda Kabaka (Deceased) (Succession Cause E185 of 2021) [2022] KEHC 12031 (KLR) (Family Division), Ruling**. She further submitted that the beneficiaries of the estate are only entitled to the shares the deceased owns and not the properties. Reference is made to the decisions of **In re Estate of Timothy Mwandu Muumbo (Deceased) (Succession Cause 1673 of 2015) [2024] KEHC 14610 (KLR) (Family) (21 November 2024)**, **Pacific Frontier Seas Ltd v Kyengo & Ano. [2022] KECA**

396 (KLR) and Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR)

23. On the second issue, it is her submission that the beneficiaries are only entitled to the 60 % shares owned by the deceased in the company and not the properties registered in the name of the company. She avers that where there is a dispute about ownership of the shares, the probate court lacks jurisdiction to distribute them. This should be determined by a court that has jurisdiction to deal with companies. Reference is made to the case of **Rosemary B. Koinange & 6 others v Isabella Wanjiku Karanja & another [2021] KECA 717 (KLR) and Pacific Frontier Seas Ltd v Kyengo & ano. [2022] eKLR.**

24. On the third issue, it was her submission that the estate should be distributed in accordance to Section 35(1) of the Law of Succession Act provides that where an intestate is survived by a spouse and children, the surviving spouse shall be entitled to the personal and household effects of the deceased absolutely and a life interest in the whole residue of the net intestate estate. It further states that upon the

termination of that life interest, the estate shall be divided equally among the surviving children. reference is made to the case of **In Re Estate of John Musambayi Katumanga (Deceased) (2014) eKLR.**

ANALYSIS AND DETERMINATION

25. The Court has considered the Summons for Confirmation dated 24th January 2023, the Replying affidavits, the oral evidence and submissions filed by the parties and finds that the issues for determination are;

- a) What forms part of the estate of the deceased.**
- b) Whether Catherine Aluvisia Ochoki is a creditor of the estate.**
- c) How the estate property should be distributed.**

What forms part of the estate of the deceased.

26. It is not in dispute that the following properties belong to the deceased;

- i. Motor Vehicles listed in the schedule for distribution.
- ii. Land in Embu.
- iii. Mweiga Kamatongu Block 1/ Samaki 284.

27. However, there is no proof of ownership of the motor vehicles and the land in Embu. None

of the parties have placed evidence to show that they were registered in the deceased's name. This court cannot distribute such properties. In the event that they find proof of ownership, they can always come to court and have the same shared.

28. The following properties are disputed;

- i. LR No. 37/191 (IR No. 17354) which is registered in the name of Forward Mobiles Ltd.
- ii. Computerized steel machine.
- iii. Account No. 0010201200912, Equity Bank.
- iv. Account No. 7995340018 NCBA Bank.

29. There deceased is said to own the following shares in the following companies;

- i. 60% shares in Forward Mobile Ltd.
- ii. 20% shares in Space Makers Ltd.
- iii. 400 shares in Superb Safaris Company.
- iv. 80% in Kenya Racing Team.

30. In law there exists a distinction between shares held by a shareholder and the assets (including Bank Accounts) and property of said company. In the celebrated case of ***Salmon vs Salmon & Co Limited [1897] ACC*** it was held that:

“a limited company enjoys a separate legal existence apart from its shareholders. It can own property. It can sue and be sued, and it has perpetual existence, which means it can continue to exist despite the demise of its owners, the shareholders”. (own emphasis)

31. In ***Victor Mabachi & Another vs Nurtun Bates Limited [2013] eKLR*** the court held that -

“This being the case Mediacom as a body corporate is a person *jurisica*’ with separate independent identity in law; distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil”.

32. The company therefore in law is an entity separate and distinct from the Deceased.

33. **In the matter of the Estate of Gitere Kahura & another (both Deceased) [2018] eKLR** the court stated that:-

The relationship between the deceased persons and the company was that they were shareholders in the company by virtue of the two shares they held. The fact of being shareholders did not constitute them owners of the property of the company. That remained property of the company, for their sole interest in the company were the shares. It is the said shares that are available for distribution herein amongst the survivors of the deceased. Should the survivors have no interest in continuing to have the company exist, then it is up to them to wind it up or to liquid it, so as to have access to its assets. However, that cannot happen until after the shares in the company have been distributed to the beneficiaries. The jurisdiction of the probate court lies with distribution of the shares, but not the liquidation of the company or the distribution of its assets.

34. In **Re the matter of the Estate of Charles Karuga Koinange [2017] eKLR**, court held that:-

shares held in a limited liability company by the deceased person are assets which the deceased's family has power to distribute in the succession cause relating to such deceased's estate.

35. From the above, it is clear that it is only the shares held by the Deceased that form part of the estate.

36. LR No. 37/191 (IR No. 17354) which is registered in the name of Forward Mobiles Ltd therefore does not form part of the estate of the deceased. It was registered in the company's name on 17th January 2017. Computerized steel machine was bought by Forward Mobiles Ltd. Equity Bank facilitated the purchase of that machine. Account No. 0010201200912, Equity Bank is in the name of Forward Mobiles Limited and is also not available for distribution.

37. Anastacia told the court that the Money in NCBA Bank is from the sale of Forward Mobiles Ltd. This therefore, does not form part of the estate of the deceased. The contentious issue is whether she had the capacity to Sale the Company, but that is a matter for another forum.

38. The following properties therefore, form part of the estate of the deceased;

- 1) Mweiga Kamatongu Block 1/ Samaki 284.
- 2) 60% shares in Forward Mobile Ltd.
- 3) 400 shares in Superb Safaris Company.
- 4) 20% in space makers.
- 5) 80% Kenya Racing Team.

Whether Catherine Aluvisia Ochoki is a creditor of the estate

39. Catherine Aluvisia Ochoki stated that Anastacia owes her Kshs. 3,750,000 which is rent arrears. She argued that the deceased and Anastacia were her late husband's tenants. She averred that her late husband entered into an agreement with Anastacia that once the estate is subdivided, she will pay the amount owed to him. Anastacia in her oral evidence stated that she entered into a deed settlement. I have seen the deed settlement agreement which is dated 1st November 2017. The agreement is between Anastacia Wambui Mathenge for and on behalf of Forward Mobiles Ltd and James Ondimu Ochoki (Catherine's husband). The deceased did not enter into an agreement with James Ondimu Ochoki and therefore, Catherine Aluvisia Ochoki is not a creditor of the estate. Having held that a company is a

separate entity and can sue or be sued, she should pursue her claim against Anastacia Wambui Mathenge and Forward Mobiles Ltd.

How the estate property should be distributed?

40. **Section 35** of the Law of Succession

Act caters for a situation where the deceased is survived by a spouse and children. The surviving spouse is entitled to the deceased's chattels and a life interest on the residue. The deceased in this case was survived by a spouse and children. One of the Beneficiaries contends that in distributing the estate the Court should be mindful not to divide the estate in a manner that is not viable. I have taken this into consideration.

41. The deceased's estate should be distributed equally amongst all the beneficiaries;

42. In the end, the deceased's estate is distributed as follows;

- 1) Mweiga Kamatongu Block 1/ Samaki 284.- To be registered in the joint names of the Administrators to hold in trust for all the beneficiaries of the Estate namely; Anastacia Wambui Mathenge; Leonard Thompson, Andrew Gituku, Brian Muchemi Mathenge, Wattson Weru

- Mathenge, Lucy Wanjiru Mathenge, Grace Wanjiku Mathenge and Joy Waceke Mathenge
- 2) 60% shares in Forward Mobile Ltd- To be held jointly by the administrators in trust for all the beneficiaries in equal shares; Anastacia Wambui Mathenge, Leonard Thompson, Andrew Gituku, Brian Muchemi Mathenge, Wattson Weru, Lucy Wanjiru Mathenge, Grace Wanjiku Mathenge and Joy Waceke Mathenge.
 - 3) 400 shares in Superb Safaris Company- To be held jointly by the administrators in trust for all the beneficiaries in equal shares; Anastacia Wambui Mathenge, Leonard Thompson, Andrew Gituku, Brian Muchemi Mathenge, Wattson Weru, Lucy Wanjiru Mathenge, Grace Wanjiku Mathenge and Joy Waceke Mathenge.
 - 4) 20% in space makers- To be held jointly by the administrators in trust for all the beneficiaries in equal shares; Anastacia Wambui Mathenge, Leonard Thompson, Andrew Gituku, Brian Muchemi Mathenge, Wattson Weru, Lucy Wanjiru Mathenge, Grace Wanjiku Mathenge and Joy Waceke Mathenge.
 - 5) 80% Kenya Racing Team- To be held jointly by the administrators in trust for all the beneficiaries in equal shares; Anastacia Wambui Mathenge, Leonard Thompson, Andrew Gituku, Brian Muchemi Mathenge, Wattson Weru, Lucy Wanjiru Mathenge, Grace Wanjiku Mathenge and Joy Waceke Mathenge.
 - 6) That there shall be no order as to costs.
 - 7) Leave granted to appeal, any party exercising their right of appeal at liberty to exercise their right of appeal within 30 days

It is so ordered.

DATED and DELIVERED at NAIROBI this 27th Day of NOVEMBER 2025.

**P. M NYAUNDI
JUDGE**

In the presence of:

Fardosa Court Assistant

Nyamache holding brief for Osoro for Administrator (Anastasia Wambui)

Irungu holding brief Murage for 1st Interested Party (Margins Weru)

Mrs. Odongo for Co-Administrator & Beneficiary - Andrew Gituku & Leonard Muchemi

ORIGINAL