



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Anthony Mutonga Ndolo (Deceased) (Succession Cause 683 of 2010) [2025] KEHC 2322 (KLR) (28 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 683 OF 2010**

MW MUIGAI, J

FEBRUARY 28, 2025

**IN THE MATTER OF THE ESTATE OF THE LATE
ANTHONY MUTONGA NDOLO (DECEASED)**

BETWEEN

PIUS MUIINDENDOSI APPLICANT

AND

ZIPORRA NDUK HATCHER 1ST RESPONDENT

RICHARD MUNYAO MUTONGA 2ND RESPONDENT

JOICE MUTONGA NDAVI 3RD RESPONDENT

RULING

Disposition.

1. On the 31st May, 2022 the Hon.Lady Muigai delivered ruling as follows:-
 1. The summons for rectification of confirmed grant filed on 9/9/2021 is dismissed.
 2. The Administrators shall appoint Surveyor to carry out survey in the presence of Administrators, beneficiaries and /or Purchasers and determine each beneficiary's share without demolishing any permanent structures.
 3. Each of the Purchasers to pursue claim from ELC Court by virtue of Section 13 of Environment & *Land Act*.
 4. Each party to cater for own Costs.



Pleadings

Replying Affidavit

2. On 23rd August, 2024, the three administrators Zipporah Nduku Hatcher, Richard Munyao Mutonga and Joyce Mutonga Ndavi filed a replying affidavit and stated as follows:-
 1. That the grant issued to us was confirmed on 28/7/2021 whereof a half share of the estate property Machakos/Mua Hills/116 was to be registered in the names of 1st and 2nd administrators for ourselves and the beneficiaries in that house whereas the other half was to be registered in the names of Joyce Mutonga Ndavi (3rd administrator) for herself and her children.
 2. That by an Inadvertent error and or lack of knowledge on our part we did not instruct our advocate on record that there were purchasers of various portions who had purchased from the deceased.
 3. That after several deliberations as between ourselves and the beneficiaries it was agreed that we invite a surveyor to subdivide the land into two equal portions but also to set aside the portions sold to the various purchasers. We were also in agreement that after the subdivision we would take the matter back to court for redistribution of the estate.
 4. That we sought the services of the surveyor one Titus Kavoi of Kamumu Survey & Mapping who was actually recommended to us by the applicant herein.
 5. That it was only after the Court annexed mediation in August, 2023 that the surveyor, after meeting all family members including the applicant herein, continued with the survey process and the surveyor submitted the first draft survey report on 19/10/2023 as shown by the annexed copy marked "ZNH1".
 6. That the administrators and the beneficiaries had equally agreed that the (two) half shares belonging to the two families be subdivided further into smaller portions with each beneficiary getting his/her portion, instead of us the administrators holding their portions in trust.
 7. That the applicant blatantly lying to this Honourable court when he states that he was not involved in the survey exercise. He was called to all meetings of the family when the survey submitted a progress of his survey work but when his demands for a specific was not met he rushed to the court to attempt to stop the surveyors work. Annexed and marked "ZNH3a" are some minutes of the family where the what was he attendance. Annexure "ZNH3b" are photographs taken during the family meetings with the applicant in attendance.
 8. That during the May 2024 meeting the applicant and his two sons Gregory Mumo Muinde And John Muthini Ndosiwere in attendance but he refused to indicate his acceptance of the plot allocated (plot number 21) saying the same was not suitable for his intended use.
 9. That I, Zipporah Nduku Hatcher, the 1st administrator herein, was allocated the portion of land Identified as portion Number 23 and the same is adjacent to the applicant's children portion of land and I can sincerely and honestly state that the allegations by the applicant that the portion is rocky and uninhabitable is untrue. That section of the land has no rocks and is habitable and suitable for cultivation. Annexed are photos showing vegetation growing on a section of that portion marked "ZNH5".
 10. That the sole intentions of the applicant herein is to derail and trash the survey process which has consumed considerable amount of time and resources just so that he can actualize his selfish



intentions of getting a specific portion of land which we reliably are aware that he want to dispose of.

11. That the applicant is not a beneficiary of the estate of the deceased herein but is a son in-law to the deceased herein.
12. That one Mary Ndosu, the applicant's wife and daughter to deceased, is now deceased having passed on 9th October, 2021.
13. That it is our honest belief that upon her death, her share of the deceased estate devolves to her adult children; Esther Mukenyi Ndosu, Gregory Mumo Muinde and John Muthini Ndosu.

Grounds For The Certificate Of Urgency

3. On 7th July, 2024, the applicant Pius Muide Ndosu filed a certificate of urgency premised on the following reasons:-
 1. That the Applicant is the legal administrator of the Estate of Mary Mukonyo Ndosu(now deceased) vide the grant of letters of administration intestate and certificate of confirmation of grant issued on 4th September, 2023.
 2. That on 5th February, 2020 a Certificate of Confirmation of Grant was issued to the Respondents as administrators.
 3. That under the Certificate of Confirmation of Grant, ½ Share Machakos Mau Hills/116 was registered in the names of the Respondents to distribute equally among all the other beneficiaries of the Estate of the deceased herein including Mary Mukonyo Ndosu(now deceased).
 4. That the Administrators/Respondents went ahead and carried out a sub-division without informing and without the involvement of the beneficiaries of the estate of Mary Mukonyo Ndosu(deceased) where the Applicant is an administrator.
 5. That the Administrators/Respondents have not factored in the developments undertaken by the family of Mary Mukonyo Ndosu(deceased) and have placed the beneficiaries and the Applicant on a rocky, sloppy and inhabitable land owing to an expression of an interest by a third party to purchase the portion occupied by the Applicant and other beneficiaries of the Estate of Mary Mukonyo Ndosu(deceased).
 6. That the orders sought herein are necessary to serve the interests of justice.

Summons

4. On 7th July, 2024, the applicant Pius Muide Ndosu filed summons to attend court by all parties for hearing of an application seeking the following orders:-
 1. That pending hearing and determination of this application this court do issue a temporary injunction restraining, Zipporah Ndosu Hatcher & Richard Munyao Mutongaor their agents from further dealings on the ½ share of Land Parcel No. Machakos Mau Hills/116 forming part of the estate of the late Anthony Mutonga Ndolo(deceased).
 2. That this Honourable Court do order that Zipporah Ndosu Hatcher & Richard Munyao Mutongathe administrators of the deceased's estate herein do produce for good record and account detailed statement of accounts and affairs of the ½ share Land Parcel No. Machakos Mau Hills/116 of the estate up to and until the date of such order.



3. That this Honourable court do order cancellation of any irregular and unlawful sale and or transaction in respect of ½ share of Land Parcel No. Machakos Mua Hills/116.
4. That this Honourable court be pleased to order a re-survey of the ½ share of Land Parcel No. Machakos Mua Hills/116 with all the beneficiaries of the Estate being informed and involved during the re-survey exercise.
5. That the court be pleased to direct that the re-survey/subdivision on the ½ share of Land Parcel No. Machakos Mua Hills/116 to take into account developments, occupation and use by respective beneficiaries in order to preserve them for the benefit of the respective beneficiaries.

Grounds Of Application.

1. That the Applicant is the legal administrator of the Estate of Mary Mukonyo Ndosi(now deceased) vide the grant of letters of administration intestate and certificate of confirmation of grant issued on 4th September, 2023.
 2. That on 5th February, 2020 a Certificate of Confirmation of Grant was issued to the Respondents as administrators representing the two households of the deceased i.e the house of Esther Mutonga & Joice Mutonga.
 3. That under the Certificate of Confirmation of Grant, ½ Share Machakos Mua Hills/116 was registered in the names of the 1st & 2nd Administrators/Respondents to distribute equally among all the other beneficiaries of the Estate of the deceased herein including Mary Mukonyo Ndosi(now deceased) and whom belong to the household of Esther Mutonga.
 4. That the 1st & 2nd Administrators/Respondents went ahead and carried out a subdivision without informing and without the involvement of the beneficiaries of the estate of Mary Mukonyo Ndosi(deceased) where the Applicant is an administrator.
 5. That the 1st and 2nd Administrators/Respondents have not factored in the developments undertaken by the family of Mary Mukonyo Ndosi (deceased) and have placed her beneficiaries and the Applicant on a rocky, sloppy and inhabitable land owing to an expression of an interest by a third party to purchase the portion occupied by the Applicant and other beneficiaries of the Estate of Mary Mukonyo Ndosi (deceased).
 6. That the 2nd Administrator/Respondent Richard Munyao Mutonga,has allocated to himself a bigger share of the property and taken possession of the portion which had been developed by the beneficiaries of the Estate of Mary Mukonyo Ndosi(deceased) who had cleared the bushes, dug trenches and have been cultivating on that portion.
 7. That the Administrators/Respondents will not be prejudiced if the orders sought are granted.
 8. That the orders sought herein are necessary to serve the interest of justice.
5. On 22nd October, 2024 the Applicant submitted as follows:-
1. According to the grant, a share of Land Parcel No.Machakos Mua Hills/116 was to be registered in the names of the 1st and 2nd Administrators to be distributed equally among the beneficiaries listed therein. We submit that there are no purchasers listed in the Certificate of Confirmation of Grant



2. Section 71 (2) of the *Law of Succession Act* provides that the courts shall only confirm grants after they are satisfied as to the entitled share of all beneficiaries. It states that:

“(2)Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled: and when confirmed such grant shall specify all such persons and their respective shares.”

3. We are also of the view that equality not only means size but also value. The Administrators Respondents attempt to allocate one beneficiary an inhabitable, non-arable parcel of land falls short of what the legislators intended by equality.
4. We are of the considered view that the 2nd Administrator/Respondent having admitted that the Applicant and his late wife had been farming on the parcel of land labelled as Plot No.7 in surveyors report, then it would only be fair if the parcel of land is subdivided to the beneficiary who had been utilizing and had developed it to avoid a miscarriage of justice.
5. The court in *Stephen Njoroge & 5 Others v James Gachuhi Kariuki & 2 Others* [2015] eKLR when faced with a similar matter ordered that subdivision be conducted in the presence of all the beneficiaries of the estate and each beneficiary to be allocated the parcel of land they were in occupation of.
6. We are of the considered view that the Administrators/Respondents having been issued with the Confirmed Grant more than four years ago and having failed to complete the administration process within time, ought to be compelled to file an account recounting their dealings with estate up to date.
7. In the foregoing, we submit that the Applicant has proved that there are irregular transactions in respect of a ½ share of Land Parcel No. Machakos Mua Hills/116 which ought to be cancelled and resurvey conducted.”

Analysis & Determination

6. This Court from pleadings cannot resolve emerging disputes on actual distribution of the property to beneficiaries as it is not on the ground. The Court cannot determine the valuable part of land and non valuable. The Surveyor is expected to be fair just and equitable, for example let as many have portions near the main road or river/stream or already cleared land and also some bushy areas.
7. If there is acrimony and unrest then the Court shall employ security by the nearest Police Station to the suit property Land Parcel No. Machakos Mua Hills/116 through Court order to be issued through Deputy Registrar Machakos High Court and also the Court Bailiff Mr Aliwa of Machakos High Court to visit witness and prepare Report and present to Court.
8. This Court has seen annexures of Kamumu Survey & Mapping Services and attached proposed distribution. There is also Minutes of Meeting with Buyers of 28/10/2023 25/11/2023 Balancing of Portions of Buyers and Family Portions of family of Joyce & Family of Esther, Meeting of 18/5/2024 Mutonga’s family with Buyers confirmation of beacons & roads. There are Photographs of meetings with family members including the Applicant and Proposed Acceptance Consent of beneficiaries/ Purchaser names ID and signature or thumb print. Clearly , this is an ongoing process.



9. In compliance with the Court Ruling of 31/5/2022 paragraph 2 that Survey shall be in the presence of All Administrators and Beneficiaries and/or Purchasers (and each may be represented by 3rd Party or nominee)
10. The Surveyor shall file a comprehensive report on the survey in Court No 1 Machakos High Court after subdivision of the suit property Machakos/Mua Hills /116 confirming measurement, acreage, location, survey/subdivision, which beneficiary's share or portion, if agreed by beneficiaries/ Administrators Purchasers/ 3rd parties occupation, access and permanent structures.
11. The Survey Report should confirm that survey was by and in the presence and/or representatives of Administrators/Beneficiaries and/or record of any agreement/grievances raised during the survey by any party.
12. The Ruling of 31/5/2022 clearly stipulated the Court's mandate is to facilitate administration and distribution of deceased's estate, transmit the beneficial interest from deceased to beneficiaries first and foremost; each beneficiary to get their share. Thereafter, the proprietary interest of sale or purchase of land may be considered if agreed within the Succession cause if not the in the appropriate forum ELC.
13. If there are any grievances after the completion of survey and the survey report presented to Court No 1 Machakos High Court, then the matter/dispute shall be canvassed in Court. If All parties agree to mode of distribution as per Surveyor's sketch plan without demolishing permanent structures, hindering access or destroying crops or livestock then ALL beneficiaries shall sign consent name ID number and signature of thumbprint for approval by the Court under Section 71 LSA.
14. The Court allows completion of survey of Machakos/Mua Hills /116 and filing of Reports and/or written Consents by beneficiaries if agreed Purchasers.
15. Further Mention for Direction in Court No 1 on 27/3/2025.

RULING DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS HIGH COURT VIRTUALLY/PHYSICALLY ON 28/2/2025.

M.W.MUIGAI

JUDGE

