



**In re Estate of Sylvester Njoyi Muchinyi (Deceased) (Succession Cause 771 of 2011) [2024] KEHC 346 (KLR) (Family) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 346 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 771 OF 2011  
HK CHEMITEI, J  
JANUARY 25, 2024**

**BETWEEN**

**GILPHINE KALEJI MUCHINYI ..... 1<sup>ST</sup> APPLICANT  
JULIANA NAFULA MUCHINYI ..... 2<sup>ND</sup> APPLICANT  
STEPHEN MURONO MUCHINYI ..... 3<sup>RD</sup> APPLICANT  
ALFRED MBATI MUCHINYI ..... 4<sup>TH</sup> APPLICANT**

**AND**

**PETER SHIKUKU MUCHINYI ..... 1<sup>ST</sup> RESPONDENT  
BEATRICE MUKWANA LUTTA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. There are two sets of applications herein namely the application dated 24<sup>th</sup> March 2022 in which the 1<sup>st</sup> Respondent, the executor of the deceased will herein pray for the grant to be confirmed. The second application is by the applicants dated 20<sup>th</sup> October 2022 seeking several orders as shall be stated below.
2. When the matter came up for directions the court ordered that both applications be determined in one bullet. This court directed that the second application be heard first since its outcome shall give directions on the second application.
3. The application dated 20<sup>th</sup> October 2022 by the Applicants pray for the following orders:
  - (a) That no grant of representation to the estate of the above named Sylvester Njoyi Muchinyi (deceased) who died on the 11<sup>th</sup> March 2011 having been confirmed, such reasonable provisions be made for the applicants as dependants of the deceased out of his net estate as the court thinks fit.



- (b) That this court be pleased to order that the property known as Nairobi Block 97/567 described in the Will as LR NO 97/567 Tassia Embakasi is deemed and be withdrawn from operation of the will.
  - (c) That in the alternative this court be pleased to declare that the 1<sup>st</sup> applicant Gilphine Kaleji Muchinyi who is jointly registered as proprietor together with the deceased in respect of Nairobi Block 97 /567 became sole owner of the property upon the death of the deceased.
  - (d) That this court be pleased to order that the valuation of the estate be undertaken by independent valuer so as to determine its net worth.
  - (e) costs be provided for.
4. The application is supported by the grounds on the face of the application and the affidavits of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants sworn on the same date and the annexures thereto.
  5. The application has been opposed by the respondents vide their replying affidavits sworn 31<sup>st</sup> October 2022, 7<sup>th</sup> November 2022 and 24<sup>th</sup> February 2023.
  6. The applicants have further filed their further affidavits in response dated 22<sup>nd</sup> November 2022 and 19<sup>th</sup> May 2023.
  7. The issues between the parties herein in a nutshell can be summarised as hereunder. The deceased herein was married to the 1<sup>st</sup> Applicant and they were blessed with the children who are indicated above as applicants. In the course of time the applicants migrated to America leaving the deceased in Kenya although it appears at some point he also joined them in America. Later the deceased divorced the 1<sup>st</sup> Applicant and married the 2<sup>nd</sup> Respondent herein.
  8. In his marriage with the 2<sup>nd</sup> respondent they were blessed with three children.
  9. The deceased and the 1<sup>st</sup> Applicant acquired two properties during the subsistence of their marriage, namely LR NO 97/567 Tassia Embakasi and LR NO 2259/214 KAREN. The Tassia property was registered in the deceased name and the 1<sup>st</sup> Applicant. The Karen land was registered in his own name.
  10. The deceased before he died made a written will dated 15<sup>th</sup> October 2009 nominating the 1<sup>st</sup> respondent Peter Shikuku Muchinyi as his executor. The 1<sup>st</sup> respondent proceeded to apply for grant which he was granted on 8<sup>th</sup> February 2022.
  11. The applicants meanwhile when they learned of this cause filed numerous applications which have essentially been determined save the current application.
  12. The substance of the application therefore is that the court invokes the provision of Section 26 of the Succession Act and tamper with the will to the extent that the deceased ought to have provided reasonable provisions for the applicants and more importantly that the Tassia property could not be willed away by the deceased for it was co-owned with the 1<sup>st</sup> applicant and that the doctrine of “survivorship” squarely applied.
  13. It was the 1<sup>st</sup> Applicants case that the said Tassia property ought to have automatically reverted to her upon deceased death and that the deceased should not have included it in the will.
  14. As regards the Karen property the applicants deponed that the same was purchased jointly and developed using resources contributed by the 1<sup>st</sup> Applicant. Consequently, her input ought to have been taken into consideration by the deceased. In any case she averred that the same was purchased



- during the subsistence of her marriage with the deceased and that the 2<sup>nd</sup> Respondent came late in the day.
15. The Respondents on their part have opposed the application vehemently. The 2<sup>nd</sup> Respondent in particular states that the Karen property is her matrimonial home and that she developed with the deceased. She denied that the 1<sup>st</sup> Applicant had any input at all as she parted with the deceased many years and she has never at all stepped into the country as she alleges.
  16. She went on to state that the applicant has her matrimonial home in America, a property the deceased did not bother to contest.
  17. As regards the Tassia property they said that the deceased had all the rights of bequeathing his interest in the estate as he deemed fit and in any case he had given the applicants who are his sons. It was therefore not true that because he was joint owners with the 1<sup>st</sup> Applicant he could not deal with his interest as he deemed fit.
  18. The Respondents accused the 1<sup>st</sup> Applicant in particular of abandoning the deceased and only came back after his death. They denied that there was anything wrong in the will since in any case it provided for the 1<sup>st</sup> Applicants children.
  19. The Respondents therefore prayed for the application to be disallowed and the grant be confirmed as prayed in the second application.
  20. The court directed the parties to file written submissions which they have complied.

#### **Applicants written submissions**

21. The applicants identified three issues for determination. The first issue is whether the Tassia property forms part of the deceased estate.
22. The Applicants submitted that under the provisions of Section 2 and 49 of the *Land Act* the same do not form part of the estate herein. That the same was separate and distinct. They relied on Isabel Chelangat v. Samuel Tiro Rotich & 5 Others (2012) eKLR among other authorities.
23. The second issue was whether in light of Section 26 of the *Law of Succession Act* the applicants qualified for reasonable provisions from the estate. They submitted that the 1<sup>st</sup> Applicant as a wife did qualify for the same as provided under Section 29 of the *Law of Succession Act*
24. They submitted that taking the totality of the will the same did not provide for the 1<sup>st</sup> Applicant despite providing for the rest of the applicants who are her children.
25. That the properties were acquired during the subsistence of the marriage between the 1<sup>st</sup> Applicant and the deceased and that she had clearly exhibited evidence of money she wired when the Karen property was being developed. They relied on Re Estate of DKB (deceased) (2020) eKLR among other authorities.
26. The 1<sup>st</sup> Applicant added that the Karen property was not the 2<sup>nd</sup> respondents matrimonial home but she only moved there after the death of the deceased. She said that the 1<sup>st</sup> Respondent had her matrimonial home at South B within Nairobi city and that is where the deceased burial arrangements were done. She should therefore not claim that it was her matrimonial home.
27. The last issue was whether in light of the above the estate ought to be valued before the grant is confirmed. It was the applicants case that this was necessary and nothing inhibits the court from carrying out the same. They relied on Re Estate of Harun Gachiengo Kamau (deceased) (2006) eKLR.



### **Respondents submissions.**

28. The Respondents on their part identified the first issue of whether the deceased had the capacity to bequeath the assets as he did in his will. The respondents while in relying on Section 5(1) of the Succession Act submitted that nothing impeded the deceased from doing so.
29. The Applicants also relied on the case of Estate of Wilfred Koinange Gathiomi (deceased) (2020) eKLR among others.
30. On the second issue on adequate provisions they submitted that the deceased adequately provided for the beneficiaries who included the applicants, his children with the 1<sup>st</sup> Applicant, as provided under Section 26 of the Succession Act.
31. The Respondents relied on the case among others of Re Estate of Gurdip Kaur Sagoo (2021) eKLR.
32. In essence therefore it was the respondents case that the decision of the deceased was made conscientiously as provided under Section 28 of the Succession Act and this court cannot be asked to substitute what the deceased failed to do.
33. As regards that Tassia property they accused the applicant of failing to provide the original lease certificate so as to enable the court make informed decision and that the court cannot rely on the photocopied documents. They went further to submit that the deceased in any case had bequeathed his interest therein to the children he bore with the 1<sup>st</sup> Applicant.
34. The same goes with the Karen property in which the respondents have submitted that there is nothing to show the 1<sup>st</sup> Applicants hand in its development. The 2<sup>nd</sup> respondent submitted that she took part in overseeing the construction thereon and part of the deceased benefits as per the will were used to complete some of the constructions. It was not therefore true that the 1<sup>st</sup> Applicant assisted in its development.
35. The Respondents submitted that the intention of the applicants was to negate the testamentary wishes of the deceased and this court should reject it in toto and that the application for confirmation of grant dated 8<sup>th</sup> February 2022 ought to be allowed.

### **Analysis and determination.**

36. It is not in dispute that the 1<sup>st</sup> Applicant was all along the wife to the deceased having married sometimes in 1982 and later solemnised it formally. It is also undisputed that they later divorced as per the decree absolute on record. It is undisputed that the applicants and the deceased had strings of litigations all to do with their marriage and properties and the maintenance of the issue of their marriage.
37. It is also evident that some of the cases except the divorce were not concluded successfully before he passed on. These include the case of the children as well as the matrimonial properties.
38. At the same time, it is undisputed that the applicants and her children later relocated to United States of America during the subsistence of the marriage and have stayed there ever since. The children who are now adults have schooled in the United States and are working and or undertaking their activities in the said country.
39. It is undisputed too that the deceased married the 2<sup>nd</sup> Respondent and together they had two issues the third one it seems the 2<sup>nd</sup> Respondent came with and was accepted by the deceased. The deceased wrote his will which was later presented to this court and the same though challenged by the respondent was found to be valid.



40. The properties which are in contention are basically known to all the parties. The two that the parties have zeroed in are the Tassia and the Karen.
41. There is no doubt and as submitted by the parties that the Tassia property is jointly registered in the names of the deceased and the 1<sup>st</sup> Applicant. Although it was argued by the respondents that the applicants exhibited a copy of the search and not the original lease or search for that matter this court is satisfied that the same is undisputedly in their joint names.
42. The property from the evidence on record is fully developed and it appears that the said development was undertaken during the subsistence of the marriage between the 1<sup>st</sup> Applicant and the deceased.
43. If that is the case what are the legal implications? In my view the perspective taken by the applicants is the law. Section 2 of the [Land Act](#) defines joint tenancy as hereunder;
- “co-tenancy” means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common;”
44. At the same time Section 49 of the same Act states that;
- “Transmission on death of joint proprietor
- If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate.”
45. The deceased did not have a separate share so as to bequeath to any other person as submitted by the Respondents.
46. This brings me to the doctrine of survivorship which I think is squarely applicable in this matter. I wish to adopt the findings of the court in *Mwangi Gakuri v. Bernard Kigotho Maina & Another* (2016) eKLR in which it cited Musyoka J in his book. The court went on to state that;
- “W. M. Musyoka in his book *Laws of Succession* at page 3 states as follows:
- “Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship.... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants.”
47. The Court of Appeal when the matter went on appeal under *Mwangi Gakuri v. Bernard Kigotho & Another* (2018) eKLR agreed with the learned judge when it stated that,
- “The fact that the appellant and the deceased were registered as joint proprietors of the property is not controverted and is indeed supported by the conveyance dated 7th November 1967. The learned Judge appreciated the law on joint tenancy – the principle of right of survivorship that upon the death of a joint tenant, the property passes by operation of the law to the surviving joint tenant and that a joint tenancy cannot pass under the will



or intestacy of a joint tenant as joint tenants are considered in law as single owner (See also *Echaria v Echaria* [2007] 2 EA 139.”

48. If, in my view, the deceased had transferred his interest formally while he was alive I think this court would have thought otherwise. In this case however and as stated in the above authorities he was joined in the hip with the 1<sup>st</sup> Applicant as far as the rights in the property were concerned.
49. In the premises and however difficult it is for the respondents the Tassia property did not form part of the deceased free estate to distribute as he willed. The law caught up with him and this court has no option but to declare that it ought to be retired and or expunged from the will and the same ought to be registered automatically and by operation of law in the name of the 1<sup>st</sup> Applicants alone upon prove to the Registrar of Lands that the co-owner is deceased.
50. It appears to me that in case of joint tenancy as is the case herein, the best route one can take is to formally and actively transfer his interest while still alive, otherwise the law precludes any action after death and thus the surviving joint owner takes over subsequently and the only condition is to prove the death of a joint co-owner.
51. The next pertinent issue is whether the applicant contributed in the acquisition of the Karen property. It is evident that the same was acquired during the subsistence of the marriage between her and the deceased. Evidence although scanty was led to show that she contributed to the partial development of the same. The same was contained in the matrimonial property case which was apparently not concluded.
52. The deceased will as rightly have submitted by the respondents showed that part of the proceeds from the sale of shares were to be used in construction of the house at Karen. Paragraph 14 (a) states that;

“I authorise the following shares in my CDS Account Number 26743/LI-O to be dealt with as follows;

  - (a) Kenya Commercial Bank shares to be sold immediately and the proceeds therefrom to be employed in the construction of the house on the parcel of land known as LR number 2259/214 Karen Nairobi hereinabove mentioned.:

“
53. Apparently she never made to stay in the said house but on the other hand the 2<sup>nd</sup> Respondent has been occupying it.
54. In my considered view therefore the 1<sup>st</sup> Applicant has a legitimate claim however the size over the Karen property for the reason that it was acquired during the subsistence of her marriage with the deceased and made some financial contribution. It is now trite law that a former wife under Section 7 of the *Matrimonial Property Act* can claim a share of the property acquired during their marriage as is the case herein.
55. Turning now to whether the applicants have a stake in the estate pursuant to the provisions of Section 26 of the Succession Act, the same states as follows;

“Provision for dependants not adequately provided for by will or on intestacy Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination



of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”

56. In view of the above portions of the law I find that the deceased regardless of the divorce proceedings he had undergone with the 1<sup>st</sup> Applicant ought to have made reasonable provisions for her. It was not enough to bequeath his estate to the children he had with the applicant. In any case the said children are independent unit just like their mother
57. So as to provide for the 1<sup>st</sup> Applicant and seeing her contribution in the Karen property I find that she ought to get a third of the same. The rest of the property shall go to the 2<sup>nd</sup> applicant and of course later to her children.
58. To this end the same shall be valued including the developments thereon and the 1<sup>st</sup> Respondent shall be at liberty to settle to the 1<sup>st</sup> applicant a third of the value thereof. In the event that the respondents are unable to compensate then the 1<sup>st</sup> applicant shall be at liberty of paying off the 1<sup>st</sup> Respondents three quarters portion as directed above.
59. Further and alternatively and depending on the rights governing the land tenure and usage therein the parties shall be at liberty to hive off a third of the empty land to the 1<sup>st</sup> Applicant.
60. The rest of the will shall remain as wished by the deceased.
61. In view of the above findings the application for confirmation of grant dated 8<sup>th</sup> March 2022 shall be determined taking into considerations the above alteration in the will

#### **Conclusion.**

- (a) Land parcel number 97/567 Tassia Embakasi is hereby retired from the Will and the same be and is hereby registered in the name of the first applicant Gilphine Kaleji Muchinyi exclusively.
- (b) The 1<sup>st</sup> Applicant shall get a third (1/3) of Karen Land Parcel Number 2259/214 and the remaining two thirds (2/3) to the 2<sup>nd</sup> applicant.
- (c) The parties shall undertake a valuation whose costs shall be met equally by the 1<sup>st</sup> Applicant and the 2<sup>nd</sup> Respondent so as to comply with order (b) above.
- (d) The application for confirmation of grant dated 8<sup>th</sup> March 2022 be prosecuted forthwith taking into consideration the ruling and directions herein.
- (e) The rest of the will shall remain as per the deceased wishes.
- (f) Being a family matter each party shall meet its own costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2024**

**H K CHEMITEI.**

**JUDGE**

