



REPUBLIC OF KENYA



In re Estate of Samuel Mbatia Kamau alias Mbatia Kamau (Deceased) (Succession Cause 443 of 2015) [2024] KEHC 380 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 380 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 443 OF 2015
HM NYAGA, J
JANUARY 24, 2024
IN THE MATTER OF THE ESTATE OF SAMUEL
MBATIA KAMAU ALIAS MBATIA KAMAU (DECEASED)**

BETWEEN

LUDIA WATETU MBATIA ADMINISTRATOR

AND

JAMES WAMBUGU MBATIA 1ST PROTESTOR

JOSEPH GICHEHA MBATIA 2ND PROTESTOR

DAVID WACHIRA MBATIA 3RD PROTESTOR

RULING

1. The deceased herein Samuel Mbatia Kamau died intestate at the age of 81.
2. According to the Affidavit in support of petition for letters of Administration intestate, he was survived by the following dependants: -
 - i. Ludiah Watetu Mbatia- Widow- 75 years' old
 - ii. David Wachira- Son- 56 years' old
 - iii. Peter Ndiritu Mbatia- Son- 52 years' old
 - iv. James Wambugu Mbatia- Son- 50 years' old
 - v. Joseph Gicheha Mbatia- So- 48 years' old
 - vi. Paul Murima Mbatia- Son- 46 years' old
 - vii. Beatrice Gathoni Mbatia- Daughter- 40 years' old



- viii. Pauline Wambui Mbatia- Daughter- 37 years' old
 - ix. Milka Wangui Mbatia- Daughter- 37 years' old
 - x. Priscilla Wanjiku Mbatia- 32 years' old
3. As per the same affidavit, the estate of deceased comprised of only one asset. Namely; Plot No.39 Bahati Settlement Scheme valued at Ksh. 3,000,000/=
 4. Following the deceased's demise, a grant of letters of administration intestate was issued on 20th April, 2016 to Ludia Watetu Mbatia in her capacity as the widow and confirmed on 13th December, 2018.
 5. Subsequently, the Protestors herein filed summons seeking revocation of grant on grounds that the same was obtained without their consent and through concealment of material facts. The court upon considering the summons, annulled the certificate of confirmation of grant dated 13th December,2016, rectified the grant of representation by adding the name of one of the Applicants to be selected by consensus amongst themselves and directed either of the administrators to file summons for confirmation of grant of letters of administration on 12th November,2020.
 6. A rectified grant of letters of Administration intestate was thereafter granted to Ludia Watetu Mbatia and David Wachira Mbatia. On 28th June,2022, Ludia Watetu Mbatia, the 1st Administrator, filed summons for confirmation of grant and in her affidavit in support, proposed the deceased estate to be distributed in the following manner;

PROPERTY	NAME	SHARE
Othaya/kiahagu/868	Ludia Watetu Mbatia	To Hold In Trust For All The Beneficiaries
Plot No 39 Bahati Settlement Scheme	Ludiah Watetu Mbatia	0.5 Acres
	David Wachira Mbatia	0.876 Acres
	Estate Of Peter Ndiritu Mbatia	0.876 Acres
	James Wambugu Mbatia	0.876 Acres
	Joseph Gicheha Mbatia	0.876 Acres
	Paul Murima Mbatia	0.876 Acres
	Beatrice Gathoni Mbatia	0.876 Acres
	Pauline Wambui Mbatia	0.876 Acres
	Milka Wangui Mbatia	0.876 Acres
	Priscilla Wanjiku Mbatia	0.876 Acres



7. The 1st Administrator swore a further affidavit on 15th May, 2023 wherein she averred that at the time of filing of the same and the proposal, she had discussed with her daughters and they were agreeable to her proposed mode of distribution but her sons declined and insisted that they ought to inherit a bigger share because they are men.
8. She attached consent for distribution of the estate. As per the said consent, Rachael Wangui Ndiritu, who is the wife and representative of the estate of Peter Ndiritu Mbatia, Beatrice Gathoni and Milka Wangui Mbatia are the only beneficiaries who appended their signatures to the 1st Administrator's schedule of the proposed distribution.
9. Milka Wangui Mbatia, a beneficiary of the deceased estate swore a supplementary affidavit deponing that the proposal by the 1st administrator was accepted by all her sisters. She proposed that Priscilla Wanjiku's portion to be where the residential house is constructed since she was the one who constructed it.
10. She averred that measurement of the land ought to be in acres and not in hectares and that correction should be noted at the point of distribution of the land so that the area given to each of the beneficiaries does not exceed the actual acreage of the land.
11. David Wachira Mbatia, the 2nd Administrator swore an affidavit of protest on 21st June, 2023 wherein he averred that he was not consulted when the counsel for the 1st Administrator drew and filed the summons for confirmation but was only served with an already filed summons for confirmation of grant.
12. He proposed the deceased's estate to be shared as hereunder: -



PROPERTY	BENEFICIARY	SHARE
Othaya/Kiahagu/868	Ludia Watetu Mbatia Beatrice Gathoni Mbatia Pauline Wambui Mbatia Milka Wangui Mbatia Priscilla Wanjiku Mbatia	0.125 Acres
Plot No. 39 Bahati Settlement	David Wachira Mbatia Estate of Peter Ndiritu Mbatia James Wambugu Mbatia Joseph Gicheha Mbatia Paul Murima Mbatia Ludia Watetu Mbatia Beatrice Gathoni Mbatia Pauline Wambui Mbatia Milka Wangui Mbatia Priscilla Wanjiku Mbatia	0.875 Acres 1 Acre
	David Wachira Mbatia Estate of Peter Ndiritu Mbatia James Wambugu Mbatia Joseph Gicheha Mbatia Paul Murima Mbatia	8 Acres

13. He averred that the above schedule is according to the wishes of the deceased and whereby the appropriate specific allocations had already been done, and the beneficiaries have already proceeded to occupy their specific allocated properties.
14. The summons was canvassed through written submissions.

1st Administrator's submissions

15. The 1st administrator submitted that the net intestate herein consists of two parcels of land and that her proposal is to have her life interest over the parcel of land known as Othaya Kiahagu/868 subject to the provisions of Section 37 of the *Law of Succession Act*.
16. She argued that the proposal by the protestors regarding distribution of the above property is not only inequitable but contrary to the provisions of Section 35 of the *Law of Succession Act*.
17. She posited that the rights of the protestors only crystalize upon the death or remarriage of the surviving spouse.



18. Regarding property known as Plot Number 39 Bahati Settlement Scheme, she submitted that being the surviving spouse of the deceased, she exercised powers under Section 35(2) of the [Law of Succession Act](#) and appointed the entire property and proposed to vest the same immediately on all the children of the deceased in equal shares of 0.876 acres and left 0.5 acres for herself. She argued that the proposal by the protestors regarding this property is equally contrary to the provisions of Section 35 of the [Law of Succession Act](#).
19. She contended that the recourse the protestors have is under Section 35(3) of the [Act](#) and none of the protestors have made an application under the said section and as such the protest filed has no basis in law but it exposes deep seated greed by the protestors.
20. In buttressing her submissions, the 1st Administrator relied on the cases of [In re Estate of Walter Kiplangat Arap Chamdany \(Deceased\)](#) [2021] eKLR which cited with approval the case of [Tau Katungi v Margrethe Katungi & Another](#) (2014) eKLR where Musyoka J. interpreted Section 35 in respect of life interest and [Eddah Wangu & another v Sacilia Magwi Kivuti \(Deceased\) Substituted with Ribereta Ngai](#) [2021] eKLR for the proposition that interest bequeathed by the law is not available for distribution unless the surviving spouse bequeaths the same as provided under the law.

Protestors' Submissions

21. The protestors submitted that not all the beneficiaries are aware of the existence of the instant application yet their views are a mandatory requirement.
22. The protestors argued that once there is a protest to confirmation of grant, the matter becomes contentious and it should be served on all parties who would be affected by the court's decision on the confirmation and distribution. That notwithstanding, the protestors urged this court to adopt their mode of distribution and take into account where each beneficiary has settled on and developed as initially allocated by their late father.
23. They contended that it would be harsh, unconsumable and unfair to displace and migrate forcibly the beneficiaries from their old homesteads and long settlements.

Analysis and Determination

24. I have carefully considered the Application, affidavits on record and the submissions by each party. The issues for determination are: -
 - i. Whether all the beneficiaries of the deceased's estate were served with the instant application and the proposed mode of distribution.
 - ii. If the answer to the above is in the affirmative, what is the most equitable mode of distribution of the estate of the deceased?

Issue No 1 - Whether all the beneficiaries of the deceased's estate were served with the instant application

25. In the instant case the Protestors submitted that not all the beneficiaries are aware of the existence of this Application and the proposed mode of distribution.
26. According to the 1st Administrator, all her daughters are amenable to her proposed mode of distribution. However, a perusal of the annexed consent for distribution of the deceased estate shows that only three of the aforementioned beneficiaries signed the same.



27. It is not clear why her other daughters i.e. Pauline Wambui Mbatia and Priscilla Wanjiku Mbatia failed to sign the aforesaid consent if indeed they are agreeable to the 1st Administrator's mode of distribution.
28. It is also uncertain whether Paul Murimi Mbatia who is listed as one of the beneficiaries of the deceased's estate was served with the instant application.
29. It is imperative that the court ascertains that all beneficiaries were duly served with the summons for confirmation of grant and the proposed mode of distribution before determining the same. This is because a grant obtained without knowledge of all beneficiaries is liable for revocation. All family members of the deceased therefore must be consulted and they should give written consents to the summons of confirmation proceedings and Proposed mode of distribution. *In the matter of estate of Isaac Kireru Njuguna (Deceased)* Nairobi In Succession Cause No. 1046 of 1994 the court found out that:

“ a grant is liable for revocation where all the heirs have not consented to the mode of distribution ... ”

30. In *Al-Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & Another* [2013] eKLR the court held that;

“The Law of Succession by virtue of Rule 26 requires that any petition for issue of a Grant must be accompanied by a consent duly signed by all persons entitled in the share of the same estate”

31. *In the matter of estate of Isaac Kireru Njuguna (deceased)* Nairobi in Succession Cause No.1046 of 1994 the court found out that a grant is liable for revocation where all the heirs have not consented to the mode of distribution.

32. In the instant matter, it appears the protestors came up with their own mode of distribution and the 1st administrator with three beneficiaries came up with theirs. Both modes of distribution appear to have been made without proper and/or adequate input from the other beneficiaries' i.e. Pauline Wambui Mbatia, Priscilla Wanjiku Mbatia and Paul Murimi Mbatia. The mere presence of two proposals, on the mode of distribution was sufficient evidence to show that these beneficiaries did not agree on the proposal made by the protestors or that made by the 1st Administrator. This fact on its own confirms that the grant herein is not ripe for confirmation.

33. *In re Estate of Edward Omusinde Otong'o (Deceased)* [2020] eKLR Musyoka J held as follows:-

“Rule 40(8) of the *Probate and Administration Rules* is also relevant. It requires administrators, when applying for confirmation of their grants, to file consent in Form 17, contemporaneously with the application, signed by all dependants and other persons who may be beneficially entitled. It says as follows:

“Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 17 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for



directions un chambers on notice if Form 74 to the applicant, the protestor and such other person as the court thinks fit.”

Rule 40(8) of the *Probate and Administration Rules*, does not declare so in loud language, but it quietly requires administrators, when applying for confirmation of their grants to file a consent in Form 17, contemporaneously with the application, signed by all dependants and other persons who may be beneficially entitled. Under that provision, a confirmation application may be disposed of by the court without hearing any party so long as no affidavit of protest has been filed and all the persons beneficially entitled have executed consents in Form 17. However, where there is an affidavit of protest on record or where any person who is beneficially interested in the estate has not signed the consent in Form 17, then the court should not proceed to give orders on distribution before it has heard such persons. That is the purport of Rule 40(8).”

34. In my opinion and given the history of the matter, it would be equitable, just and fair that all the beneficiaries are heard on the distribution of the assets of their late father.
35. In the circumstances therefore, I direct the 1st Administrator and the 2nd administrator herein serve all the beneficiaries with the instant application and the affidavit of protest respectively, accompanied by their filed proposed modes of distribution within 21 days from the date hereof.
36. Given the nature of the dispute, I am in doubt whether it will be possible to get consents from all beneficiaries. It would be preferable to have them individually state their respective views.
37. I therefore direct that all the beneficiaries shall attend court on the date that I shall give so that their individual views are recorded by the court. Hopefully, this will bring an end to this long running matter.
38. I will not give any orders as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY OF JANUARY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Mr. Machoka for Githui for 1st administrator

Mr. Kariuki for K. Mbugua for 2nd administrator

