



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Mackenzie Majanja Shivachi (Deceased) (Succession Cause
375 of 2006) [2024] KEHC 5272 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 375 OF 2006
PJO OTIENO, J
APRIL 30, 2024**

BETWEEN

EDWIN NGAIRA MACKENZIE PETITIONER

AND

MONICAH K MACKENZIE OBJECTOR

RULING

1. Mackenzie Majanja Shivachi (“Deceased”) died on 1st February, 1997 and was survived by one widow, three sons and eight daughters named: -
 - a. Rebecca Inyanya Ngaira- Widow (Deceased)
 - b. Henry Shivachi-Son (Deceased)-Survived by Betty Njambi Gitau- Wife and 5 children
 - c. Phylis Munai Odengo-Daughter
 - d. Pamela Adema Ang’alika-Daughter
 - e. Isabella Khavwajila Majanja-Daughter
 - f. Christine Mmbone Majanja-Daughter
 - g. Edwin Ngaira Mackenzie-Son
 - h. Hilda Makhungu Mackenzie-Daughter
 - i. Monicah Khalahi Mackenzie-Daughter
 - j. Basil Majanja Mackenzie-Son (Deceased)-Survived by Hellen Gatabi-Wife and 3 children
 - k. Joyna Shivachi Mackenzie-Daughter
 - l. Abigael Mmbaya Mackenzie-Daughter



2. At the time of his death, the deceased owned LR No. Kakamega/iguhu/1077-6.8 Ha LR No. Kakamega/iguhu/1693-0.06Ha and LR No. Kakamega/iguhu/982-3.4Ha
3. Rebecca Inyanya Mackenzie and Edwin Ngaira Mackenzie petitioned the court for the grant of letters of administration intestate which grant was issued on 29th November, 2007.
4. Following the death of Rebecca Inyanya Mackenzie, an amended grant of letters of administration was sought and issued on 17th October, 2019 appointing Edwin Ngaira Mackenzie, Hilda Makhungu Mackenzi and Beth Njambi Gitau as administrators of the estate of the deceased.
5. Summons for confirmation of grant was then filed on 24/9/2019 and supported by the affidavit of Edwin Ngaira Mackenzie sworn on 24th September, 2019 in which he proposed the mode of distribution to be that LR No. Kakamega/iguhu/1693 measuring 0.6Ha be shared between Phyllis Odendo, Pamela Angalika, Isabella Majanja, Christine Mbone Mackenzie, Monica K. Mackenzie, Hilda Mackenzie, Abigail Mackenzie and Joyna S. Mackenzie; for LR No. Kakamega/iguhu/1077 he proposed that himself and Basil Mackenzie Majanja do receive 7.1 acres each and the remaining 2.2 acres to be shared jointly amongst Phyllis Odendo, Pamela Angalika, Isabella Majanja, Christine Mbone Mackenzie, Monica K. Mackenzie, Hilda Mackenzie, Abigail Mackenzie and Joyna S. Mackenzie; and for LR No. Kakamega/iguhu/982, he proposed that 1 acre be shared jointly among the daughters and the remaining balance be given to Beth Njambi Shivachi to hold in trust for Shadrack Mathai, Robai Lusanji, Samuel Nderitu and Kefa Amalemba.
6. By that proposal the surviving sons would each get approximately 2.873ha, the widow of the deceased son would end up with 3.0 ha while the ... daughter would jointly get 1.295ha.
7. That proposal found support in the affidavit of Basil Mackenzie sworn on 5/2/2020, in which he agrees with the mode of distribution proposed by Edwin Ngaira Mackenzie and avers that the mode was agreed at a family meeting held on 28th February, 2009 and that all beneficiaries of the deceased had agreed to the said mode save for Beth Njambi. The averments of Basil Mackenzie are echoed by Beth Njambi, Edwin Ngaira, and Joyna Shijehi in affidavits filed on 6th February, 2020. The gist of the affidavits is that the family met and agreed on the administrators' proposals by attending court and swearing affidavits. Edwin Ngaira in particular exhibited proceedings of the court and affidavits sworn by Abigael and Christine by which they agreed to the mode of distribution. Beth Njambi on her part, stated that the family indeed met and agreed as shown in the exhibited minutes and that even though she had objected to the proposed distribution of Parcel No, 982, her concerns had now been addressed.
8. The application was however resisted by an affidavit of protest and proposal on the mode of distribution of the estate of the deceased sworn by Hilda Makhungu Mackenzie on 29th November, 2019, on behalf of her six other sisters in which she disputes the mode of distribution proposed by Edwin and contends that the same is discriminatory, unequitable and unjustified. She proposes that LR No. Kakamega/iguhu/1077 and LR No. Kakamega/iguhu/982 whose combined total is 25 acres be equally distributed among the children of the deceased with each child getting 2.2 acres. She adds that the share of the daughters be curved out to include the homestead of the parents while the homesteads of the three sons also be taken into account on curving out their shares. She further proposes that the whole of LR No. Kakamega/iguhu/1693 and all the developments thereon be given to Isabella Khavwajila Majanja in consideration of the fact that she quit her job to take care of their ailing mother until her demise. The six daughters also executed and filed an authority to Hilda to appear, plead or act on their behalf. The second objector equally filed a witness statement which reiterated the contents of the Affidavit of protest, almost verbatim/



9. Pursuant to the directions by the court given on the 24.06.2019, the protest was disposed by way of viva voce evidence. By the same directions, the grant then in force was by consent amended by removing the name of Rebecca Inganya Mackenzie and adding the names of Hilda Makhungu Mackenzie and Beth Njambi Gitau. It was on that day additionally agreed that Hilda Makhungu would file and serve an application for confirmation of grant within 15 days but was never so filed till the 24.09.2019 when the first administrator filed the same.
10. For the protester, Hilda Makhungu gave evidence as the sole witness by adopting her witness statement as evidence in chief and was put to cross examination. Her evidence was that even though the children and daughter in law to the deceased had agreed on the mode of distribution proposed by the 1st administrator but the 7 girls had revoked the agreement and now want the estate distributed equally among the 11 children of the deceased with the widow to the first son getting the son's share to hold in trust for her children with the deceased son. She stressed the fact that no reason had been proffered to merit the unequal share between the sons and daughters.
11. For the petitioners, Edwin Ngaira Mackenzie, gave evidence as the petitioner's first witness (PW1), adopted his affidavit sworn on 24/9/2019 and further stated that the proposed mode of distribution was agreed at a family meeting held on 28/2/2009 which meeting was attended by himself, Rebecca Inyanya Ngaira, Phylis Munai Odendo, Monica Mackenzie, his uncle Jeremy Shivachi, Pamela Adema, Isabela Majanja, Christine Mackenzie, Hilda, Monica Mackenzie, Basil Mackenzie, Anne Mackenzie, Joyner Mackenzie, Abigael Mackenzie and Beth Njambi.
12. On cross examination, he refuted claims that he had constructed commercial properties on LR No. KAKAMEGA/IGUHU/982. He stated that he only has an office in a building on the parcel which office he was given by his late mother. He indicated that parcel LR No. Kakamega/iguhu/1077 has tea which the sisters benefit from and further put it that the basis of him getting a bigger share than his sisters was the agreement they had which agreement he asserts has never been rejected by the sisters.
13. PW2, Jeremy Shivachi, a retired civil servant, testified that the land in dispute was ancestral land given to the deceased which he left for his children and widow. He stated that he attended the meeting on the mode of distribution and the court appearance when all agreed on how to share the estate.
14. On cross examination he pointed out that he was not aware that the daughters disputed the proposed mode of distribution.
15. PW3, Joyna Mackenzie, testified that she was a daughter to the deceased and adopted her affidavit sworn on 6/2/2020 by reiterating that all the beneficiaries sat and agreed on the mode of distribution and later attended court to confirm the agreement when the mode was not contested by any of the children to the deceased save for the daughter in law. On cross examination she stated that she was in agreement with the mode of distribution agreed at the meeting held on 28/2/2009.
16. On being questioned by the court she stated that it was her sister Isabela Majanja who harvests the tea leaves and that LR No. Kakamega/iguhu/982 was given to Beth's husband by the deceased.
17. PW4, Beth Njambi testified that she was the wife to Henry Sivachi, the first son to the deceased who died in the year 2008. She adopted her affidavit sworn on 2/2/2021 agreeing with the proposal by the administrators and adding that her discomfort had been addressed and she was keen to have the grant confirmed as proposed by the administrators.
18. On cross examination she stated that LR No. Kakamega/iguhu/982 was given to her husband in the presence of elders in year 1987 and that the deceased gave each son 7 acres. She said she was not aware of what the deceased said about the daughters getting land.



19. In re-examination, she indicated that she was married in 1980 and had lived in LR No. Kakamega/iguhu/982 since 1987 adding that she objected to the proposal on distribution in court on 29.04.2009 because her husband had just died and she was still grieving.
20. On being questioned by the court she stated that she no longer has a problem with the daughters getting a share of LR No. Kakamega/iguhu/982 and that she does not have any rental premises on the estate property.
21. Parties have filed their respective submissions on the mode of distribution of the deceased's estate. For the Objectors, the plain position taken, and without a mention on the status of the family agreement the objector had conceded having participated in making, is that the principle of equality in sharing between siblings be applied and seeks reliance on section 38 of the Law of Succession Act. She adds that on account and in consideration of Isabella having resigned from employment to be with their mother.
22. For the petitioners the submission offered was that in a family meeting held on 28/2/2009, his proposed mode of distribution was agreed by all the beneficiaries. He avers that upon the demise of their mother, the daughters took over 2.2 acres of a tea plantation farm which they have been benefiting from to date. He states that the daughters are in occupation of their parent's house to which the sons have no objection and argues that the mode of distribution proposed by the daughters is not equitable and will cause great hardship to the sons. He contends that the allegations by Isabella Khavwajila Majanja that she quit her job to take care of their mother is not substantiated and maintains that his mode of distribution had earlier been agreed by the daughters in court and by way of affidavits and since they did not challenge the proceedings, the same should be left undisturbed.

Issue, Analysis and determination

23. After reading the petition, the summons for confirmation of grant, the Affidavit of protest and other subsequent the affidavits and the written submissions, the court identifies the sole issue for determination to be; how should the estate of the deceased be distributed. In answering that question the court takes the view that parties are always bound by their bargain entered into voluntarily unless there be demonstrated a vitiating factor that would suffice setting aside a contract. The principle of party autonomy, in all spheres of life, is respected by courts because courts exist for the purposes of resolving disputes and thus have no mandate where parties have an agreement, however reached; in or out of court. The court equally reminds itself of the doctrine of estoppel by which the law precludes a person from asserting something contrary to what is implied by a previous action or statement to another¹. In this case parties sat and agreed at home and nine of them, including six daughters who how want to resile from the agreement, two of whom swore and filed affidavits, attended court and confirmed the agreement. With those facts, the court finds that the objectors in agreeing to the terms of the agreement of 28.2.2009 and attending court on the 24.9.04.2009 led the petitioners and other beneficiaries to rely and act on the representations and are thus estopped from resiling therefrom. See [*First Assurance Company Limited v Seascapes Limited* \(2008\) eKLR](#).
24. From the court record, there is consensus that the sons lay no claim to the commercial property, the homestead and the tea plantation. For lack of a disagreement, the court finds that parcel number Iguhu/1692, portions of the parcel number Iguhu/1077 on which the deceased's homestead stands and that other part on which there grows tea plantation is distributed and shared out to all the eight (8) daughters to inherit and hold in equal shares.

¹ See [*Serah Njeri Mwobi v John Kimani Njoroge* \(2013\) eKLR](#),



25. The foregoing determination leaves the court with the next determination on what to take of the agreement of the parties dated the 28.2.2009. Having found that the objectors are estopped from contending contrary to the agreement of 28.2.2009, the court find that the proposal by the 1st administrator presents the unanimous agreement of the parties and directs that the remainder of the estate be shared out in terms of that agreement. In that scheme, the two surviving sons, Edwin Ngaira Mackenzie and Basin Mackenzie Majanga, shall equally share what remains of Iguhu/1077 after the ladies get their share. On the same note, Beth Njambi Gitau gets 3.0 hectares of Iguhu/982. The remainder of Iguhu/982 goes to all the daughters to share equally.
26. In summary, the grant is hereby confirmed and the estate distributed as proposed in the summons for confirmation of grant save that the exact acreage of parcel number Iguhu/1077 be established by survey to confirm what area constitutes the homestead and the tea plantation. On the same vein, parcel number IGUHU/982 shall also be surveyed to establish what remains after one (1) acre is hived off for the benefit of the daughters.
27. The survey be done within 60 days from today and a report filed in court to enable the certificate of confirmation be issued.
28. Matter shall be mentioned on 4.7.2024 to confirm compliance.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF APRIL, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for Mr. Munyendo for the Petitioner

Mr. Amasakha for the Objectors

Court Assistant: Polycap

