



REPUBLIC OF KENYA



In re Estate of Ezekiel Waweru Muiruri (Deceased) (Succession Cause 2708 of 2012) [2024] KEHC 4843 (KLR) (Family) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4843 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2708 OF 2012
HK CHEMITEI, J
APRIL 25, 2024**

BETWEEN

MARGARET MUGURE WAWERU APPLICANT

AND

ANNA WANGARI WAWERU PROTESTOR

RULING

1. This ruling relates emanates from the judgment of this court by Hon. Aroni J delivered on 31st October, 2019 to wit:

“26. It is notable that some properties were acquired before the 2nd wife came into the picture such as:

Plot No 8 Ithang’arari

Plot No 47 Section SSS/ 4 Thika

Stall No 375 Garissa market – Thika.

27. In my view the three named properties rightly belong to the 1st widow and her family. The 2nd widow ought not to reap where she did not sow.

28. As for the rest of the properties for the court to equitably distribute the same. It is ordered that parties do jointly agree on a valuation of all assets save the three above. Proceeds from the rent being collected by the 1st widow do cater for the cost of valuation. Valuation to be done within 45 days of the date hereof.”



2. In compliance with the orders of the court of 31st October, 2019, Anne Wangari Waweru (2nd widow) engaged Legit Valuers Limited who filed a valuation report dated 28th September, 2020 which valued the deceased's estate at Kshs 47, 975, 000/= . It, however, included Plot No 8 – Ithang'arari Market and Stall No 375 – Madaraka Market which are amongst the three that the court ordered not to be part of the valuation exercise.
3. Aggrieved by the decision above, Ann Wangari Waweru (1st widow), filed an application dated 17th November, 2021, "...seeking review of the judgment and exclusion of Plot No SSS. 6/ 68 from what the two houses should share equally. This is because, she said, this property was acquired long before the respondent was married in 1984. She stated that at the time of the hearing of the evidence leading to the judgment she had unsuccessfully tried to get the Agreement for Sale and Transfer Form for this property to be able to adduce it in evidence She has since obtained the same. The respondent (Margaret Mugure Waweru – 2nd widow) opposed the application. Her case was that the application was not merited as the evidence regarding the acquisition of the property was always within the applicant's knowledge. This was property the applicant always collected rent from and therefore she knew when it was acquired, the respondent stated. Secondly, she opposed the application because it had been brought following inordinate delay."
4. On 16th may, 2022, Hon. Judge Muchelule delivered a ruling on the application dated 17th November, 2021 to wit:
 - “ 8. In the instant application, the hearing leading to the judgment that is sought to be reviewed was through viva voce evidence. Even without the Agreement for Sale and Transfer Form that the applicant states she subsequently obtained, she knew or ought to have known when the property was bought and developed. She knew whether this happened on or before the respondent was married to the deceased. She did not tender that evidence.
 9. Secondly, the affidavit does not indicate when she obtained the Agreement for Sale and Transfer Form. How long did it take her to bring this application after she obtained the new evidence? She was silent on these matters. The matters are important for review under Order 45 Rule 1 of the Civil Procedure Rules has to be made without unreasonable delay. In this case, the judgment was delivered on 31st October, 2019 and the application for its review was brought on 17th November, 2021. This was two years later. There was no explanation for the delay, and the court cannot exercise its discretion to allow the application.
 10. In all, I find the application nit merited and dismiss it with costs.”
5. The matter was subsequently referred to court annexed mediation after which the partial mediation settlement agreement dated 20th June, 2023 was adopted by Hon. Judge Odera on the same date. A partial certificate of confirmation of grant was then issued on 20th June, 2023 and rectified on 4th August, 2023, by Hon. Judge Nyaundi.
6. The partial mediation settlement agreement dated 20th June, 2023 and the partial certificate of confirmation of grant rectified issued on 20th June, 2023 and rectified on 4th August, 2023 distributed the deceased's estate amongst his beneficiaries save for two properties – matrimonial property Mugumoini Loc 253 and Plot No SSS 6/ 68 Makongeni Phase 6 – whose distribution was to be determined by this court.



7. On 24th October, 2023, this court directed that the parties file submissions on the distribution of the two contested properties - matrimonial property Mugumoini Loc 253 and Plot No SSS 6/ 68 Makongeni Phase 6. On 30th January, 2024, Margaret Mugure Waweru had filed her submissions and Anne Wangari Waweru had not yet filed.
8. There is no evidence however that Anne Waweru filed any submissions as directed by the court.
9. Margaret Mugure Waweru's proposal on the distribution of the two contested properties - matrimonial property Mugumoini Loc 253 and Plot No SSS 6/ 68 Makongeni Phase 6 is as follows:

Mugumoini Loc 253 of Approximate Area 2.83 Ha:

 - (a) "The compound area where the matrimonial home has been constructed and where both wives reside to date, be sub – divided among the two wives to give space for the 2nd wife to construct her own home. The two wives have been residing on the same land and in the same house and she proposes that the existing farm house that is valued at Kshs 2.5 million be left to the 1st wife and the 2nd wife relocate to the sub – divided area within the compound. There, she will occupy the southern side of the compound from the main road.
 - (b) Boreholes: The northern side of the compound has a borehole next to the current matrimonial home and the southern side also has a borehole in which she proposes that she relocates to and constructs her home so that each house will benefit from the boreholes.
 - (c) Graveyard: The deceased, his mother and Margaret's daughter are buried here. She proposes that this be left as a grave yard. The existing farm entrance road that gives access to the grave yard, compound area and farming area be reinstated as the official access path by both parties. She proposes that the small portion on the northern side of the grave yard be divided equally between her and Anne Wangari Waweru since it is next to the main road.
 - (d) Farming area: She proposes that it be divided equally with her getting the western side and Anne Wangari Waweru getting the eastern side as per their consent before the deceased died. The same land where farming takes place has coffee and macadamia growing. There are also bananas in the middle to act as a boundary and up to date both of them have been cultivating on their respective sides.

Makongeni Phase 6 Plot No SSS/ 68:

 - (e) Rental proceeds: plot has an accrued rental income of approximately Kshs 6, 580, 000/= which Anne Wangari Waweru has been collecting since the deceased's death. Margaret proposes that the said rental proceeds be used to cater for the construction of her new house and the rest of the money be used for the sub – division of the land and any other costs that may be incurred during the said process.
 - (f) If the proposal above is accepted by Anne, Margaret further proposes that Anne Wangari Waweru gets the property absolutely including all the rental proceeds that shall be collected thereafter."
10. In light of the foregoing, and keeping in mind that Anne Wangari Waweru has not complied with the court's direction to file submissions on the distribution of the two properties – matrimonial property Mugumoini Loc 253 and Plot No SSS 6/ 68 Makongeni Phase 6 I find the proposal above reasonable in the circumstances.



11. Consequently, the court directs that the two properties be shared out as proposed by Margaret Mugure Waweru including the release of the sum of Kshs 6,580,000 in the account.
12. The above exercise shall be undertaken and completed within 90 days from the date herein and the grant be rectified to that effect.
13. Each party to bear its own costs.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 25TH DAY OF APRIL 2024.

H K CHEMITEI

JUDGE

