



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Mwau Mathi (Probate & Administration
193 of 2017) [2024] KEHC 17192 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 17192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
PROBATE & ADMINISTRATION 193 OF 2017**

TM MATHEKA, J

JUNE 28, 2024

JUDGMENT

1. Mwau Manthi died on 25/9/1984 at the age of 77 years – the certificate of death says he suffered a stroke and death was sudden.
2. According to the form P&A 5 dated 22/10/2015, he left behind property NZAUI/NZIU/418 and 426 and he was survived by 5 sons, 4 nephews and a person named as purchaser.
3. On 15/3/2016, Mathi Mwau Yuva was issued with grant of letters of administration intestate in Machakos High Court Succession Cause no. 656/2015.
4. Summons for Confirmation of Grant dated 12/8/2017 was filed where he sought distribution of the estate in the following manner: that NZAUI/NZIU/814 (sic) be granted to the alleged buyer and NZAUI/NZUI/426 in trust for himself, the other 4 sons and nephews of the deceased.
5. The matter was in the meantime transferred to Makueni and became Makueni High Court Succession Cause no. 193 of 2017. A Certificate of confirmation of grant was issued as prayed and the estate distributed as per the requested and exhibited in the certificate made on 4/12/2017.
6. On 2/3/2018 Mbonoka Muteti Manthi, Muteti Mathuva and Peter Manthi Muteti filed Summons for Revocation of Grant dated 17/12/2017 – on the grounds that the deceased had 2 sons only– the administrator and one Muteti Manthi (deceased) and that the deceased’s estate ought to have been divided between the two sons; That it was the administrator who sold the land to the purchaser; and That there was no consent for the administrator to obtain the grant in the first place.
7. The administrator responded vide replying affidavit filed on 12/4/2018 to the effect that the parcel 814 was sold by the deceased; That the deceased had two wives namely Mutanga and Mumbua and that Mutanga was the mother of his deceased father; That the applicant had refused to participate in the cause despite being served; That the solution was to divide the property of the deceased into three equal shares – his father’s, father of the objector and the children of one Mwau.



8. In the file is a letter from the chief Nziu location dated 7/1/2019 stating that the deceased had 4 parcels of land in his name: - NZAUI/NZIU/425,814,524 and 514.
9. The letter says that the three parcels of land other than 814 are to be shared equally among Mwau Manthi, Mukuku Mwau, Muteti Manthi and that NZAUI/NZIU/814 will bear the cost of surveying the rest of the land.
10. According to the letter, deceased had two wives.

Mutanga and Mumbua

That Mutanga had a concubine(sic) by name Syukwia who is mother of Mathi Mwau and others.

Mumbua had 2 sons – Mwau and Muteti That the other party is Muteti Manthi.
11. The matter was heard by way of viva voce evidence before Hon. Dulu J.
12. When I took over the matter, the petitioner was remaining with one witness who was not called to testify.
13. The parties had filed written statements which they adopted as their evidence in chief and upon which they were cross examined.
14. Thereafter counsel filed written submissions which I have considered.
15. The issue for determination is whether the application for revocation has met threshold set out under section 76 of the *Law of Succession Act*.
16. From the evidence – the deceased had two wives; one Mutanga, did not have male children and married an Iweto who bore sons – the petitioner, Munyao, Kiiio and Mutuse and two, Mumbua, who bore two sons – Mwau and Muteti. Muteti is the father of the objectors – Mbonoka, Peter, Mathuva and the late Thomas, and Mwau has one son – Mukuku Mwau.
17. It is evident that the deceased was polygamous. He had two houses – one had no child, the other had two children. It is conceded by both the objectors and the administrator that the beneficiaries of the estate are those children of the deceased through their mothers – they were the direct beneficiaries.
18. The issue then is whether these beneficiaries were involved in the petition for grant.
19. The letter of the chief dated 21/9/2015 – identified Mathi Mwau, Munyao Mwau, Kiiio Mwau, Mutuse Mwau, Mukuku Mathi as the sons of the deceased – and it is these who gave consent for the said Mathi to obtain letters of administration.
20. It is clear from the evidence that the deceased had only two sons by his wife Mumbua – Muteti and Mwau. It is therefore not true, as the petitioner describes in the petition that he and others are the sons of the deceased. The deceased had only two sons and the petitioner is not a son of the deceased. The petitioner and the others he names as sons of the deceased were not sons of the deceased – their mother – Syukwia was the Iweto wife of Mutanga, the 1st wife of the deceased who had no male child. They are not direct beneficiaries of the estate of the deceased – they can only inherit that which would have been the share of Mutanga from her husband. This is because their mother was not the wife of the deceased – but the customary Iweto wife of the deceased's wife. Clearly therefore the petitioner could not have priority over the direct beneficiaries of the deceased – the children of his own children and those would be the children of the children of Mumbua.



21. The children of Mumbua are survived by their children – these are Mukuku, Muteti (deceased) Mbonoka, Peter and Mathuva. It is these grandchildren of the deceased who have priority over the petitioner as they are the immediate blood relatives of the deceased – and their fathers survived their grandfather. They are not nephews of the deceased but the grandchildren of the deceased.
22. Hence the answer to the question whether or not the grant was obtained in the manner described by section 76 of the LOSA –

The proceedings were defective in that the applicant did not have the priority to do so, and did not obtain the consent of those other beneficiaries or the persons who did. The petitioner made false statement and made untrue allegations with respect to his relationship with the deceased.
23. On the basis of section 76(a), (b) and (c) it is my view that the grant begs to be revoked.
24. What is the effect of that revocation? It is my view that it is in the interest of justice that the grant is revoked and a fresh one to issue to the three grand children of the deceased – the objectors and the applicant to represent Mutanga’s house.
25. The petitioner’s position is that the deceased sold one of his property No. 814 before his demise yet produced not a single piece of evidence to prove that. The title deed remains in the name of the deceased and therefore there is nothing before the court to support that allegation if he sold the parcel of land to anyone.
26. If he the petitioner sold it, he had no right to do so and such and sale would be null and void.
27. The submissions that the distribution of no. 814 should be held in abeyance pending the filing of a case in the ELC court is untenable as nothing has been placed before me to support that position. In addition, the letter from the chief indicated that the land had been sold to support the costs of the survey of the land – who sold it? That is the question – the petitioner is presenting contradictory evidence – with respect to the parcel of land – and it is my considered view that the deceased did not sell the land, and any other sale contra the LOSA is null and void, and may amount to intermeddling with the estate of the decease.
28. In the circumstances the only other issue is what orders should this court issue?
29. The beneficiaries of the estate are known.
30. The estate is also known – it comprises of 4 parcels of land.
31. Section 40 of the LOSA applies.
32. The deceased left two houses one had the wife, the other had the wife and two sons – those are 4 units. Hence the estate would be divided into four equal units.
33. Three units will go to the house of Mumbua and one unit to the house of Mutanga – her unit would be inherited by her Iweto and the Iweto’s children while that of Mumbua would be inherited by the children of Mumbua, and in their absence their children (her grandchildren) in equal shares.
34. In the end the Final orders:
 - a. The grant issued to Mathi Mwau Yuva be and is hereby revoked. A fresh grant to issue to the three objectors: Mbonoka Muteti, Muteti Mathuva, Peter Manthi Muteti and the Mwathi Mwau.



- b. The entire estate of the deceased: NZAUI/NZIU/425,814,524 and 514 be divided into four equal units: Mutanga to get one unit – Mumbua to get 3.
 - c. Mutanga’s share to be inherited by her Iweto – Syukwia and her children. Mumbua’s share to be inherited by her two sons and in their absence their children (to be named in the grant) in equal shares.
 - d. A certificate of confirmation of grant to issue accordingly
35. Orders accordingly
36. Each party to bear its own costs.

DATED SIGNED AND DELIVERED VIRTUALLY ON 28TH JUNE 2024

MUMBUA T. MATHEKA JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-06-28 23:12:30

