



REPUBLIC OF KENYA



**In re Estate of Mzee Ismail (Deceased) (Succession Cause 1043 of 1992)
[2024] KEHC 7988 (KLR) (Family) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7988 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1043 OF 1992
PM NYAUNDI, J
JUNE 28, 2024
IN THE MATTER OF THE ESTATE OF MZEE ISMAIL (DECEASED)**

RULING

1. Mzee Ismail (the Deceased) died on 6th February 1992. Ismail Mzee Ismail and Twalib Mzee Ismail Ngigi, the deceased's sons petitioned this court for grant of letters of administration intestate. The said grant was issued on 12th November 1992.
2. The Deceased is said to be survived by the following;
 - a. Fatuma Mzee Ismail – wife.
 - b. Fatuma Ali- wife.
 - c. Ismail Mzee Ismail- son (deceased).
 - d. Twalib Mzee Ismail- son deceased.
 - e. Musa Mzee Ismail - son.
 - f. Kibibi Mzee Ismail- daughter.
 - g. Khadija Mzee Ismail- daughter.
 - h. Fatuma Juma Ali-daughter.

Assets

 - a. Plot No. 909/213 Machakos
 - b. Plot No. 909/104 Machakos
 - c. Plot No. 909/55 Machakos.
 - d. Plot No.909/594.



- e. Plot No. 909/573.
 - f. Plot No. 36/1/2 Nairobi.
 - g. Plot No. 4069/96 Kitui.
 - h. Nzambani Farm Kitui.
 - i. Katalambo Farm Kitui.
- Liabilities
- a. Waki & Company Advocates, Kshs. 25,000/=.
 - b. Mohamed Ali Motha, A Debt Of Kshs. 15,000/=.
 - c. Medical Bill- Dr. Warshaw, Kshs. 3,000/=.
3. Kibibi Wanjiku Mzee and Fathiya Awadh Abdul filed summons for revocation or annulment of grant dated 4th July 2022 seeking the following orders;
- a. That the grant of letters of administration issued on 12th November 1992 to Twalib Mzee Ismail and Ismail Mzee Ismail be revoked on the ground that the grant has become useless and inoperative through subsequent circumstances occasioned by the death of both administrators.
 - b. That a grant of letters of administration intestate be issued to Kibibi Wanjiku Mzee and Fathiya Awadh Abdul.
 - c. That the grant issued on 12/11/1992 be confirmed.
 - d. That costs of this application be provided for.
4. The Summons is brought pursuant to Section 76 of the [Law of Succession Act](#) and Rule 44 of the [Probate and Administration Rules](#) and all enabling provisions of the law is supported by the Applicants sworn affidavit of even date.
5. Musa Mzee Ismail filed an affidavit of protest dated 21st October 2022. He averred that a new grant of representation should be issued to him, Kibibi Wanjiku Mzee and Fathiya Awadh Abdul. He seeks to represent the interests as a son of the deceased. That the mode of distribution presented by the applicants contains falsehoods and is not fair as it does not represent an equal and just mode of sharing. That the deceased bought property in Bondeni and the same was never transferred to him. Instead, the property was transferred to Fathiya Awadh who has been receiving rent for over two decades. His proposed mode of distribution is fair and should be adopted by the court.
6. The summons for revocation and the protest was disposed by way of viva voce evidence.

Evidence

7. PW 1, Fathiya Abdul Awadh gave oral evidence on 14/12/2023. She adopted her supplementary affidavit as her evidence in chief. She told the court that the deceased was her father in law. He had three wives and seven children. Musa Ismail is her brother in law. All the beneficiaries of the estate consented to the mode of distribution except Musa Mzee Ismail who refused to attend a family meeting. The mode of distribution attached is the same one proposed in 1992, most of the beneficiaries have been living in their portions for the past 30 years. She stated that property known as Bondeni Asset does not form part of the deceased's estate. Musa Mzee Ismail was allocated land in Machakos but he sold



- it. The deceased allocated two parcels of land in Kitui to all his children. Plot No. 69 belonged to her mother in law. Musa Ismail proposes the property in Kitui and Plot 69 be distributed to him solely.
8. During cross examination, she stated that the will dated 13/2/1992 was read by the Imam on 13/2/1992. The will has no witnesses. The deceased died on 8/2/2011. The mother of the protestor and the deceased were divorced. She does not agree with the mode of distribution of the protestor which seeks to exclude a property in Machakos and 2 properties exclusively given to him. They were blessed with four children. She stated that she had been excluded from her husband's estate.
 9. In re-examination, she stated that the deceased signed the will.
 10. DW1 was the protestor, Musa Mzee Ismail. He adopted his affidavit dated 21/10/2023 and supplementary affidavit dated 20/7/2023 as his evidence in chief. He told the court that the deceased was his father. He denied the existence of a will which is dated after the deceased's death. He does not agree to the mode of distribution presented by the applicants. His mother was buried in Kitui.
 11. During cross examination, he stated that the proposed mode of distribution is the same as the one in the alleged will. He contributed towards the construction of the plots in Kitui. Most of the beneficiaries have settled in the deceased's estate. The deceased did not distribute any asset before he died. The proposal by the applicants does not provide for his mother's house. He does not agree to the proposal that the land in Kitui be distributed according to Islamic law.

Applicants Submissions

12. The Applicants submissions are dated 13th May 2024. They identified the following as issues for determination;
 - a. Does this Honourable Court have jurisdiction to determine this matter and/or the application before this court?
 - b. With the beneficiaries of the Estate hereof having held the estate properties for over 32 years as per the wishes of the deceased and consented by all heirs made improvements thereon and even some assets disposed, should they be re-distributed now? Is the Islamic principle of Maslaha al-Mursalab and the principle of estoppel applicable in this cause?
 - c. Should the Honourable Court confirm the distribution of the assets forming this estate pursuant to the mode of distribution as consented in the application for confirmation of grant which in extenso re-produced the declaration/will of the deceased being opposed by the protestor?
 - d. Should the Honourable court revoke the grant issued in this matter and who should be appointed as administrators?
13. On the first issue, the applicants submit that the wishes of the deceased on how the estate should be distributed must be upheld. That the wishes of the deceased constitute a formal/ written will in Islam. Reliance was placed in the decision in *Re Estate OSS (deceased)* [2015]eKLR. It was submitted that this court has the jurisdiction to dispose this matter.
14. On the second issue, it was submitted that in Islam, the protestor is estopped from bringing a claim 32 years later after all the beneficiaries have settled on their respective portions. That re-distribution of the property is against the laws of Islam which protects lineage and property. It was further submitted that the deceased's wishes should be respected as he had settled all the beneficiaries before he died. Reliance was placed in the decision of *Jacinta Nduku Maasai v Leonida Mueni & 4 others* [2018] eKLR.



15. On the third issue, it was submitted that the distribution of the estate of the deceased should be in accordance to the wishes of the deceased.
16. On whether the grant should be revoked and who should appointed as administrators, it was submitted that the power to revoke a grant is discretionary. That there is need to revoke the grant issued in order to complete the administration of the estate of the deceased.

Protestor's Submissions.

17. The Protestor filed written submissions dated 17th February 2024. He identified the following three issues for determination;
 - a. Whether the purported will should be considered in intestate proceedings?
 - b. If (a) is in the affirmative, is the purported will valid?
 - c. If (a) or (b) are in negation, which is the most appropriate mode of distribution?
18. The protestor challenged the validity of the purported will attached in the applicants' application for revocation. That the will does not meet the requirements of a valid will in accordance to Section 11 of the [Law of Succession Act](#).
19. According to him, the mode of distribution should be in accordance with Section 40 of the [Law of Succession Act](#) which provides that;
 - “ 1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”.
20. He submitted that the estate should be divided into 4 equal units as the deceased only had 4 children. He relied on the decision in [re Estate of Kimitei Cherop \(deceased\)](#) [2021] eKLR where the court held that the estate of the deceased should be distributed in equal shares.

Analysis and Determination

21. I have carefully considered this summons for revocation of Grant, the protest, Reply filed thereto as well as the written submissions filed. The issues which arise for determination are as follows:-
 - i. Whether there exist sufficient Grounds to revoke the Grant issued on 12th November 1992.
 - ii. If yes, who should be appointed as administrators of the estate of the deceased?
 - iii. How should the estate of the deceased be distributed then?

Whether there exist sufficient Grounds to revoke the Grant issued on 12th November 1992.
22. A Grant may be revoked as set out in section 76 of the [Law of Succession Act](#) which provides as follows:-
 - “ 76. Revocation or annulment of grant
A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—



- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

23. Where there is more than one executor or administrator, section 81 of the [Law of Succession Act](#) significantly provides that;

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them....”

24. Naturally, upon the death of a single/ more administrators, the duties of the legal representative have no owner and the Grant to the deceased executor/administrator must be taken to have expired and become inoperative, in the language of section 76 (e) of the [Act](#). It is incontestable that a grant in the name of a deceased person cannot be implemented and a fresh grant must upon such death be issued to a living person.

25. I respectfully agree with the Court in [re Estate of Ngaigwo M'Shomba \(Deceased\)](#) [2019] eKLR, where F. Muchemi J held that;

“Where a single administrator or executor dies, before completion of the succession proceedings, the appropriate direction to take is for the applicant to apply for a grant of letters of administration *de bonis non*. This can only be done by revoking the grant under Section 76 (e) and rule 44 of the [Probate and Administration rules](#) and paragraph 16 of the 5th schedule. Technically or legally, the grant has become useless and inoperative.”



26. Similarly, in *Julia Mutune M'mboroki v John Mugambi M'mboroki & 3 others* [2016] eKLR, the court (F. Gikonyo J.) held that;

“...In my view, therefore, where the sole administrator is a natural person, and he or she dies, the grant becomes useless or inoperative by reason of subsequent event of his demise. I am aware that the *Law of Succession Act* does not define or say what constitutes “the grant has become useless and inoperative through subsequent circumstances”. But, in my opinion, death of an Administrator would be a sufficient reason to revoke a Grant for having become useless and inoperative due to subsequent demise of its holder. Accordingly, in such case, the proper procedure is to apply for revocation of grant of letters of administration under section 76(e) of the *Law of Succession Act* on the reason that the grant has become useless and inoperative through subsequent circumstances and a grant to be made to another person named in the application.”

27. This court finds that the death of the administrators, Ismail Mzee Ismail and Twalib Mzee Ismail rendered the grant issued to them on 12/11/1992 inoperative, within the meaning of Section 76 of the *Law of Succession Act*, and it is up for revocation.

Who should be appointed as administrators of the estate of the deceased?

28. In determining who should be appointed administrators to replace the dead ones, I should be guided by section 66 of the *Law of Succession Act*, which provides as follows –

‘When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference –

- a. Surviving spouse or spouses, with or without association of other beneficiaries;
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided in Part V;
- c. The Public Trustee; and
- d. Creditors.’

29. The order of preference set out in section 66 of the *Law of Succession Act* is not binding to the court. It is discretionary. Section 66 refers to it as ‘a general guide.’ Priority is given to surviving spouses, followed by the other beneficiaries entitled in intestacy as set out in Part V of the *Act*, then the Public Trustee and creditors. The persons entitled in intestacy according to Part V, in their order of preference, include children (and grandchildren where their own parents are dead), parents, siblings, half-siblings and other relatives who are in the nearest degree of consanguinity up to and including the sixth degree. The court can appoint administrators without following the order of preference

30. The surviving spouse of the deceased rank in priority followed by the children. In this instant cause, one of the widows is said to be dead. The status of the other widow is unknown. The surviving members of the family of the deceased are Fathiya Awadh Abdul, Mzee juma Ali, Musa Mzee Ismail, Halma Ismail and Kibibi Wanjiku Mzee



31. The Protestor argues that the issuance of a fresh grant to the applicants only will occasion great injustice to him as there is no representation in his mother's house. He told the court that one of the applicants is his step sister while the other one is a wife of his late brother.
32. The estate of a deceased person must have an administrator/administratrix. The law permits the appointment of upto 4 legal representatives administrators (see section 58 of the [Law of Succession Act.](#))
33. The protestor ranks higher than Fathiya Abdul Awadh who is the wife of his late brother. In view of the foregoing, the court hereby appoints Kibibi Wanjiku Mzee, Musa Mzee Ismail and Fathiya Abdul Awadh as administrators of the estate of the deceased. At paragraph 3 of the Affidavit of Protest, the protestor makes this proposal.

How should the estate of the deceased be distributed?

34. The applicants in this case proposed that the deceased's estate be distributed as per the Islamic laws since the deceased was a Muslim. The protestor on the other hand, stated that the deceased was polygamous and the estate should be distributed according to Section 40 of the [Law of Succession Act.](#)
35. Section 2 (3) of the [Laws of Succession Act](#), Cap 160 provide:

'Subject to subsection (4), the provision of this [Act](#) shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law'.
36. Section 48 (2) of the [Laws of Succession Act](#), Cap 160 puts further emphasis on this issue. It provides:

'For the avoidance of doubt, it is hereby declared that the Kadhi's court shall continue to have and exercise jurisdiction in relation to the estates of a deceased Muslim for the determination of inheritance in accordance with Muslim law and any other question arising under this [Act](#) in relation to such estates.'
37. Case law has now settled the applicable law in disputes involving estates of deceased Muslims. The high court in the cases of [Eryang J in Chelanga v Juma KLR](#) (2002) volume 2 and the case of the matter of the estate of [Ali Shitiale Ibrahim](#), P & A 151 of 94 eKLR [1994] M K Ibrahim J as he was then, held:

'The [law of succession Act](#) does not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim. In view of those statutory provisions, the devolution of the estate of any such person has to be governed by Muslim law.'
38. The Court of Appeal, by Githinji JA in *Re Estate of Ismail Osman Adam (Deceased), Noorbanu Abdul Razak v Abdulkader Ismail Osman*, Mombasa Civil Appeal No 285 of 2009, pronounced himself as follows:

“There should not be any confusion between the jurisdiction of the High Court to entertain a dispute relating to testamentary or intestate succession to estates of Muslims and the substantive law applicable in the High Court in such disputes...however if the High Court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of section 2(3) of the [Law of Succession Act](#), the law applicable in the High Court as to the devolution of the estate is the Muslim law and not the law of succession law. As an example, disputes relating to the



validity of a will made by a Muslim and ascertainment of heirs and shares of each will be determined in accordance with Muslim law...”

39. It is evident that this Petition was presented with respect to a deceased who died intestate. It is therefore not possible at this stage of the proceedings to introduce a will in the manner proposed by the Applicants. The Court will always in distributing the estate have regard to and respect the discernible wishes of the deceased and apart from a will, these can be discernible from for instance the actions of the deceased prior to his death.
40. This is not the first time that the Distribution of the Estate in coming up for confirmation. The previous administrators filed Summons for confirmation dated 19th February 1998, as amended on 19th October 1999. That Application was supported by affidavit dated 22nd July 1999, which set out the mode of distribution in paragraph 4. All the surviving beneficiaries of the deceased at the time namely
- a. Fatuma Mzee Ismail
 - b. Fatuma Ali
 - c. Fatuma Juma Ali
 - d. Kibibi Mzee Ismail
 - e. Ismail Mzee Ismail
 - f. Twalib Mzee Ismail
 - g. Musa Mzee Ismail
- Gave their consent to the proposed mode of distribution as per joint affidavit sworn on 15th January 2001.
41. The proposal on distribution made by the Applicants mirrors that made in the earlier summons for confirmation of grant made. The proposal by the Protestor to a large extent aligns with that of the Applicants except with regard to the handling of the 3 properties in Ukambani
- a. Plot No. 69
 - b. LR No. 4096/297
 - c. Shamba in Kitui (Nzambani/Kyanika/628 and Nzambani/ Kyanika/629
42. The Protestor proposes to have the entire parcels Plot No. 69 and the Shamba in Kitui allocated to him, whereas the Applicants propose they be shared between him and Fatuma Mzee Ismail and with regard to the Shamba in Kitui in accordance with Islamic law as per paragraph 12 (e) and (g) of the Supporting Affidavit sworn on 4th July 2022.
43. I am inclined to adopt the proposal made by the Applicants as it mirrors that made by the previous administrators and to which the beneficiaries had consented.
44. Documents presented show that plot No. 4096/ 297 is not registered in the name of the deceased and therefore is not available for distribution in his estate.
45. In the Final analysis these are the orders; that will issue
- a. The grant of letters of administration issued on 12th November 1992 to Twalib Mzee Ismail and Ismail Mzee Ismail is revoked



- b. Grant of Letters of Administration intestate will issue to Kibibi Wanjiku Mzee, Fathiya Awadh Abdul and Musa Mzee Ismail.
- c. The Grant is confirmed and mode of distribution is as per paragraph 12 of the Affidavit sworn on 4th July 2022
- d. The Administrators to complete administration within 120 days
- e. In the event any administrator fails to sign any document necessary for transmission of the assets of the estate within 21 days of delivery of the same, the Deputy Registrar Family Division to sign the same on their behalf
- f. Mention on 24th October 2024 to confirm compliance

It is so ordered

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 28th DAY OF JUNE, 2024.

P. NYAUNDI

JUDGE

In presence of: -

Fardosa Court Assistant

Mr. Okoth Advocate for the Applicant

