



In re Estate of Abraham Gitahi Gateru (Deceased) (Succession Cause 560 of 2004) [2023] KEHC 312 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEHC 312 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 560 OF 2004
FN MUCHEMI, J
JANUARY 26, 2023**

BETWEEN

CYRUS KING'ORI GITAHI APPLICANT

AND

ALICE WANGARI NDUMO 1ST PROTESTOR

MICHAELINA WAIRIMU NDUMO 2ND PROTESTOR

MARTIN NDERITU MUTERU 3RD PROTESTOR

JUDGMENT

1. This is a judgement on the protest dated 4th March 2021 against the Summons for confirmation of grant dated 23rd November 2020 that sought for distribution of the estate of the deceased in a manner detailed in the supporting affidavit. The three protestors filed an affidavit of protest and presented their preferred mode of distribution. The said protest was heard by way of viva voce evidence according to the directions given on 18/12/2017.

The Protestors' Case

2. PW1, Olive Charity Wambui Mbuthia, a niece to the deceased testified that her father, Jacob Nderitu Muturi and the deceased were brothers and did business together and L.R. Mahiga/Munyange/238 is ancestral land which was registered in the name of the deceased to hold in trust for his siblings. PW1 further testified that one of her uncles, Kingori Gateru, died in 1972 leaving his widow Esther Mirigo Mahinda as a beneficiary to the land. Before Esther died she denounced her rights of inheritance in respect of the land.
3. The witness testified that the deceased bequeathed some parcels of his land to his sons, Nehemiah Ndumo and the applicant. She further testified that she only has an interest in the ancestral land which she proposed to be distributed in equal shares between her father's family and the deceased's family.



4. On cross examination, the witness testified that the deceased settled his sons on other parcels of land during family meetings which she attended and that the deceased's wishes were never put in writing the witness further testified that the deceased and her father were buried on the ancestral land but the deceased had earlier told his children to move to one side of the land so as to vacate the portion belonging to the witness father.
5. PW2, Alice Wangari Ndumo, a daughter in law to the deceased, testified that she was married to Nehemiah Ndungu, a son to the deceased and that the deceased had land in Mahiga which was ancestral and he held it in trust for his siblings. The witness further testified that the deceased had six (6) children but only two are alive, the applicant and Charity Wanjiru Wahugu.
6. PW2 further testified that the deceased had settled her and her husband on land at Gatarakwa and Mweiga Ikumari before his death and that they developed the said properties and built their matrimonial home on the land parcel in Mweiga. The witness further testified that they held a family meeting where the deceased distributed the ancestral land into two equal shares with one share being apportioned to his family and the other to the family of the 3rd protestor. PW2 stated that the land parcels in Mweiga and Gatarakwa were to remain with them and the applicant was given land in Nanyuki. PW2 further added that Esther Mirigo Mahinda, the wife of Komu Kingori, relinquished her rights in regard to the property after the death of her husband.
7. On cross-examination, the witness stated that the beneficiaries of the estate of the deceased are his children as follows:-
 - a. 3 children of Geoffrey Muteru
 - b. Cyrus Kingori
 - c. Charity Wambugu
 - d. Herself as the widow of Nehemiah Ndumo
 - e. Wambui Kihohia
8. She further testified that dividing the properties equally would go against the wishes of the deceased. She later stated that she did not attend the meeting but was informed of its contents by her husband. She further stated that the land parcels though given to the sons of the deceased were never transferred.
9. The witness testified that the applicant moved to the left side of the ancestral land after the deceased told him to move from the right side which belonged to Jacob Nderitu. She further testified that the applicant found tea bushes planted by the deceased on the ancestral land and thus the applicant did not make any developments on the said property. She stated that the applicant has sold part of the Nanyuki land to his wife's nephew although no transfer has been effected.
10. PW3, Martin Muteru Nderitu, a nephew to the deceased testified that land parcel Mahiga/Munyange/238 belonged to his grandfather, Gateru Gitahi Wanjeru who gave it to his sons, the deceased and Jacob Nderitu. He proposes that the land parcel be shared out equally into two between the two families. He further testified that like his sister, PW1, he only had an interest in the ancestral land. He stated that the deceased told the applicant to shift to one side of the ancestral land to create space for Jacob's family.

The Applicant's Case

11. The applicant testified that he is a son of the deceased and he proposes that the estate be distributed as per his affidavit in support for the confirmation of grant. He states that the deceased gave his brother



land in Mweiga and Gatarakwa to use but he did not transfer ownership to him. He states that PW2 moved to the Mweiga land after her husband's death. He further stated that Nehemiah build houses on the Mweiga land. The witness further testified that he was given land in Laikipia to use and take care of it and that is where his family resides. He proposes that the land parcels in Gatarakwa, Mweiga and Laikipia be shared equally between the three beneficiaries of the deceased.

12. The applicant stated that he used to stay with Kingori Komu, his uncle in Nyeri for 8 years and he used to take care of him. He further testified that his uncle gave him a portion of his share on the ancestral land to build his home, which he did. He stated that the deceased knew of his uncle's wishes. The applicant states that he is entitled to his share and his uncle's share on the ancestral land.
13. On cross-examination, he testified that he allocated himself a bigger share of the ancestral land to compensate himself for the development he made on the said land. He admitted that he had no proof of any of the developments. The applicant did not provide any proof of an adoption order to show that his uncle Kingori Komu had adopted him as his child.
14. The applicant testified that the ancestral land belonged to the deceased and not his grandfather. He further testified that the deceased was the eldest son and the registered owner of the land. He proposed that the land be divided into equal shares to be shared amongst his brothers. That the land ought to be divided amongst the three brothers with each getting 2.7 acres for each house and that the extra one acre portion goes to him to compensate for his development of the land.
15. On re-examination, the applicant stated that he was adopted by his uncle under Kikuyu Customary law at the age of five (5) years and that he became his child for all intents and purposes.
16. Parties hereby disposed of the summons for confirmation by way of written submissions. The applicant however did not file any submissions despite being given 14 days to do so.

The Protestors' Submissions

17. The protestors reiterated the contents of their affidavits and further submitted they are aggrieved by the applicant being appointed as the sole administrator and that the applicant did not consult any of the beneficiaries before applying for letters of administration intestate. Neither did he seek their consent on distribution of the estate. The protestors propose that the court do appoint the 1st and 3rd protestors as co administrators to safeguard the protestors' interests and entitlements in the estate. The protestors oppose the distribution as proposed by the applicant for he has apportioned himself a bigger share of the ancestral land without any reasonable justification.
18. The protestors submit that the family of Jacob Nderitu Gateru agreed that half the share of the ancestral land be registered in the name of the 3rd protestor.
19. The protestors contend that the deceased had distributed his estate to his children before his demise and some of the beneficiaries have developed their respective parcels. It is important therefore that the mode of allocation be maintained. The court was urged to distribute the estate as per the protestors affidavit of protest dated 5th May 2021.
20. The protestors further contend that where the beneficiaries cannot agree on the distribution of the property, the same ought to be distributed in accordance with section 38 of the *Law of Succession Act*. The protestors rely on the cases of *Re Estate of Godana Songoro Guyo (Deceased)* [2020] eKLR, *Dan Ouya Kodwar vs Samuel Otieno Odwar & Another* [2016] eKLR and *Re Estate of Festo Lugadiru Abukira (Deceased)* [2019] eKLR and submit that the estate ought to be distributed equally if the beneficiaries cannot agree on the mode of distribution and on the properties that were never distributed.



21. The protestors further submit that the court has a discretion in ensuring fair distribution of the deceased's estate but the discretion must be exercised judicially on sound legal and factual basis. As such, the protestors argue that the estate ought to be distributed in line with the deceased's wishes.
22. The protestors rely on rule 18 of the Probate and Administration Rules and submit that once a beneficiary has renounced her rights the same cannot be retracted. Thus, the protestors argue that one of the beneficiaries renounced her right in the estate and pray that the court respects her intention.
23. The protestors rely on section 66 of the Law of Succession Act and Rule 26 of the Probate and Administration Rules and submits that the applicant did not seek any consent from the beneficiaries before applying for the letters of administration. The protestors argue that failure to seek consent of relevant persons is an integral principle as enunciated in the case of Al-Amin Hatimy vs Mohammed Abdulrehman Mohamed & Another [2013] eKLR. The protestors submit that the applicant in his applications dated 6th September 2019 and 23rd November 2020 did not seek consent of the other beneficiaries except one, Charity Wanjiru Wambugu and thus the applications do not meet the legal requirement for confirmation.
24. Relying on the case of Re Estate of John Musambayi Katumanga (Deceased) [2014] eKLR it was submitted that the applicant is not entitled to a bigger share in the estate as he did not prove that he was adopted by his uncle nor did he prove any developments as alleged.

Issues for determination

25. The main issues for determination are as follows:-
 - a. The identification of the beneficiaries.
 - b. The shares for each of the beneficiaries.

The Law

The mode of distribution of the deceased's estate

26. Upon perusal of the pleadings by both parties the following properties have been proven to belong to the deceased's estate and are available for distribution as per the attached certificates of official search and the title certificates:-
 - a. Nyandarua/Aberdare Forest North Block 1/351 – 4.75 ha
 - b. Laikipia/Nanyuki/Marura/Block III/ 482 (Sweetwaters) – 4.212 ha
 - c. Euaso Nyiro/Suguroi Block 1/874 – 1.54 ha
 - d. Ngobit/Supuko Block III/536 – 0.60 ha
 - e. Mweiga Block 2 Ikumari/334 – 0.3602 ha
 - f. Gema Holding Ltd – 3 shares converted to a parcel Kikohey Ranch Gilgil Plot No. B146 – 2 acres
 - g. Kenya Airways Shares Ltd – 1000 shares
 - h. ICDC Investment Co. Ltd. – 334 shares
 - i. Kenya Commercial Bank Ltd – 33 shares



- j. Kenya Commercial Bank Ltd Account No. 11212219701
 - k. Old enclosed Market Nyeri Municipality Council General Kiosk Business in Stall No. 12
 - l. Old enclosed Market Nyeri Municipality Council one of four shares in tea kiosk business in stall No. 17
27. The law applicable in the distribution of the estate of the deceased is section 38 of the [Law of Succession Act](#) which provides:-
- Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.
28. From the evidence of the parties, the beneficiaries have been identified as follows:-
- i. Alice Wangare Ndumo
 - ii. Cyrus Kingori Gitahi
 - iii. Esther Wanjiru Wambugu
 - iv. Michaelina Wairimu Muteru
 - v. Martin Muteru Nderitu
 - vi. Olive Charity Wambui Mbuthia
29. The applicant claims to have been adopted by his late uncle King'ori Komu and in that capacity he claims an extra one acre from the land as his inheritance from his uncle who had no wife or child. This is denied by his siblings and his cousins. He did not call any witness to support his claim. Except his word of mouth, the applicant did not adduce any evidence to demonstrate that he was an adopted son of his late uncle. Had he been adopted as he claimed, his own siblings and his cousins would have known this and testified to it. In my considered view, the claim of adoption has not been established. This evidence was supported by that of PW1 and PW3. The applicant admitted in cross-examination that PW2 and her late husband have lived and utilized the land for about 18 years. The applicant said that PW2 moved to Mweiga land after the death of her husband. Her husband died in 2018. I am convinced that L.R Mweiga/Block II Ikumari/334 forms a part of the deceased's assets.
30. The applicant further contradicted himself as he sought one extra acre to be added to his share in the estate for the reason that he developed the entire land L.R. Mahiga/Munyange/238. During cross-examination, the applicant failed to demonstrate that he carried out any developments on the said land. Even assuming that he did, that does not entitle him to get an extra share over and above the shares of his siblings. As such, the applicant being a beneficiary is entitled to equal share in the estate alongside his siblings.
31. The applicant testified that L.R Mweiga/Block II Ikumari/334 ought to be shared equally between the beneficiaries of the estate. PW2 a daughter in law of the deceased told the court that the land was allocated to her and her husband during the deceased's lifetime. The couple moved to settle on the land where they build their home. The evidence of the 1st protestor was corroborated by that of PW1, a daughter of the deceased and that of PW3 who is her own brother. The applicant in cross-examination told the court that PW2 moved to the Mweiga land three years after the death of her late husband Nehemiah. The record shows that Nehemiah who was then the administrator of the estate died in 2018. This evidence was disapproved by that of the protestors witnesses. The applicant later admitted



that PW2 and her late husband have been on the land for about eighteen years. PW2's husband died in 2018 which is only three 3) years before this case was heard the protests having been filed in 2021.

32. The issue that arises herein is whether the 1st protestor is entitled to the Mweiga land where she lives and has developed. The applicant said that the deceased gave PW2 and her husband the land to use and not to own. The evidence of all the other beneficiaries including PW1 and PW3 a cousin to the applicant is that the deceased gave the land to his son Nehemiah absolutely to settle there where he built a home. The applicant did not call any witness to support his contention. Due to the contradictions in his evidence in chief and cross-examination, I found him an unreliable witness.
33. It is trite law that where the wishes of the deceased can be established, it is in the interests of justice to respect them. It was held in the case of *Joseph Wairuga Migwi Vs Mikielina Ngina Munga* (2016) eKLR by Mativo J that a deceased person has the power to give gifts *inter vivos* during his life time. The law recognises such gifts under section 42 of the *Law of Succession Act* which provides that such gifts shall be taken into consideration in distribution of the estate. Mativo J cited the case of *Matha Wanjiku Waweru Vs Mary Wambui Waweru* where Onyancha J held:-

“In this case the deceased had in his lifetime distributed his estate as he wished. He had power to do so. His family members did not protest or change his mode of distribution which they had opportunity to do during his lifetime. He fixed clear physical boundaries which no one interfered with at any stage even after his death. In my view his wishes should have been respected.....”

A similar holding was made by Makhadia J, as he then was, in the case of *Paul Kirubi Nyingi & Another Vs. Francis Wanjobi Nyingi*

34. It was also the wish of the deceased that the Gatarakwa land L.R. Nyandarua/Aberdare Forest Block 1/351 was given to the late Nehemiah and his wife PW2 and that they said they have developed it by planting trees. Esther Wanjiru Wambugu was also given land Ngobit/Supuko/Block III (Sweetwaters) by the deceased during his lifetime. The applicant was given land L.R. Laikipia/Nanyuki/Marura Block III/482 where his family lives to date. In my considered view the court ought to uphold the wishes of the deceased since none of the beneficiaries disputed his decision during his lifetime nor interfered with the use of the land given to their siblings.
35. The protestors argued that their consent was not sought by the applicant when he applied for revocation of the grant issued in favour of his late brother Nehemiah. The applicant admitted this fact in his evidence stating that the protestors were not interested in pursuing the succession cause. Section 26 requires that any person applying for letters of administration shall seek consent of all the persons in priority or equality under Section 66 of the Land of Succession Act. The prosecutors have established that their consent was not sought by the applicant. The land L.R Mahiga/Munyange/238 is claimed by two families that of the deceased and that of Jacob Nderitu Gateru the deceased's brother. It is important that the interests of both families be represented in the administration of the estate. As such, this court ought to make orders to that effect to ensure smooth transmission.
36. The evidence of the protestors which was admitted by the Applicant in the course of the hearing is that L.R. Mahiga Munyange/238 is ancestral land and that although it was registered in the name of the deceased, it was to be shared by the deceased and his late brother Jacob Nderitu Gateru since their other brother Komu died without having a family. I am convinced that the parties were in agreement that the land should be divided into two equal shares between the two families.
37. I find merit in the protestors' case and allow it in the following terms:-



- i. That Martin Muteru Nderitu is hereby appointed a co-administrator of the deceased's estate to join the applicant and to represent his late father's family.
- ii. That the estate of the deceased shall be distributed as follows:-
 - A.L.R. Mahiga/Munyange/238(3.28 ha)
 - a. Deceased Ibrahim Gitahi Gateru family ½ share to be shared equally among:-
 - i. Alice Wangari Ndumo
 - ii. Cyrus Kingori Gitahi
 - iii. Michaeline Wairimu Muteru
 - iv. Esther Wanjiru Wambugu
 - b. Jacob Nderitu's family ½ share to be registered in the name of Martin Muteru Nderitu
 - B. L.R. Laikipia/Nanyuki /Marura Block III/482 - Cyrus Kingori Gitahi (4.212ha)
 - C.Nyandarua Aberdare Forest - Alice Wangari Ndumo North Block 1/351 (4.57ha)
 - D. L.R. Mweiga Block 2/Ikumari/334 - Alice Wangari Ndumo (0.3602ha)
 - E. Euaso nyiro/Suguroi Block 1/874 - Michaelina Wairimu Wambugu (1.54ha)
 - F. L.R. Ngobit/Supuko Block III/536 - Esther Wanjiru Wambugu (0.60ha)
 - G.Old Market Nyeri Municipality - Cyrus Kingori Gitahi General Kiosk Stall No. 12 - Michaelina Wairimu in equal shares
 - H. Old enclosed Market Nyeri -Esther Wanjiru Wambugu ¼ share tea Kiosk No. 17 - Alice Wangare Ndumo in equal shares
 - I.Gema Holdings Ltd Shares - Cyrus Kingori Gitahi Kikopey/Gilgil Plot No. B146
 - J.Kenya Airways shares Ltd. -Alice Wangare Ndumo -Cyrus Kingori Gitahi -Michaeline Wairimu in equal shares
 - K. ICDC Investment Co. Ltd. -Esther Wanjiru Wambugu
 - L.Kenya Commercial Bank Ltd Shares -Michaelina Wairimu Muteru



M.Kongasis Farmers Ltd. –Alice Wangare Ndumo
N.Kenya Commercial Bank Ltd. Alice Wangari Ndumo
A/c 112xxxx Cyrus Kingori
Wanjiru Wambugu Michaelina Wairimu Muteru
in equal shares
O.Kenya Commercial Bank Ltd. Alice Wangari Ndumo
A/c 11212xxx Cyrus Kingori
Esther Wanjiru Wambugu Michaelina Wairimu Muteru
in equal shares
A certificate of confirmation to issue.

38. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF JANUARY, 2023.

F. MUCHEMI

JUDGE

JUDGEMENT DELIVERED THROUGH VIDEOLINK THIS 26TH DAY OF JANUARY, 2023

