



**In re Estate of Githinji Mwaura (Deceased) (Succession Cause
16 of 2017) [2024] KEHC 10755 (KLR) (29 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10755 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
SUCCESSION CAUSE 16 OF 2017**

LW GITARI, J

AUGUST 29, 2024

IN THE MATTER OF THE ESTATE OF THE LATE GITHINJI MWAURA (DECEASED)

BETWEEN

JOSHUA KITHINJI ADMINISTRATOR

AND

ZIPPORAH NYAMBURA GIDEON 1ST PROTESTOR

EVAN NJERU MUNYI 2ND PROTESTOR

JUDGMENT

1. The Judgment relates to the Estate of Githinji Mwaura, deceased who died intestate on 25/2/1991. A grant of letters of administration was issued to Joshua Githinji on 13/11/1995.
2. The grant was however revoked on 10/7/2015 as the administrator had failed to take out summons for confirmation of grant. The administrator had been served with a notice under Section 73 of the [Law of Succession Act](#) as the parties had failed to take steps to further prosecute the matter. The grant was revoked under Section 76(d) (i) of the [Law of Succession Act](#).
 1. The administrator did not take action to reinstate the cause or file a fresh succession Cause. This order was issued in the High Court at Meru. The cause was then transferred to this court as Land Parcel No. Tharaka/Tunyai/A427 which formed the estate of the deceased was within Tharaka Nithi which falls under the jurisdiction of Chuka High Court.
 2. Despite the grant having been revoked, the administrator had the estate of the deceased, that is, Land Parcel No. South Tharaka/Tunyai/A427 to be sub-divided into Parcel No.3666-3679 & 3680 without a certificate of confirmation of grant, transmission documents or consent of the Land Control Board.



3. The Applicant Evan Njeru Munyi moved this court vide a summons dated 17/10/2016 which was filed under a certificate of urgency. His claim was that he had bought fifteen (15) acres piece of land forming the Estate of the deceased which was sold to him by the deceased, he paid the entire purchase price and a consent of the Land Control Board was granted and he took possession. However, before he could transfer the land to himself the deceased died on 25/2/1991. The applicant stated that the administrator had acknowledged that he was entitled to fifteen acres and he agreed to finance him to file succession. That after that the administrator did not adhere to his promise and he later learnt that the land had been sub-divided and was being disposed off.

The administrator claimed that the applicant had bought five acres. An order dated 8/11/2016 was issued and directed that an order of inhibition be issued restraining any dealings on Land Parcel No. South Tharaka/Tunyai/A 427, 36663-3679 and 3680 pending the hearing and determination of the said application.

4. When the summons came up for hearing, the Land Registrar Tharaka Nithi County was summoned by the Judge 'Suo Moto' and he gave evidence in court on 6/6/2018 and informed the court that the subdivisions were done unprocedurally as there was no certificate of confirmation of grant, transmission documents or consent of the Land Control Board. He could therefore not vouch for the legitimacy of the transaction. The Land Registrar Winfred Muguro informed the court that the transfer was irregular. The Judge, Limo J, based on that evidence, ordered the entries to be nullified and reversed. The Land reverted back to the deceased. The Judge directed the applicant to take out a fresh grant. He filed a citation on 2/5/2019. The Judge revoked the grant issued on 13/11/1995 which had earlier been revoked on 10/7/2015. A fresh grant was issued to the applicant after he filed a citation and was confirmed on 14/7/2020. The estate was distributed with the applicant getting fifteen (15) acres out of Land Parcel No.LR. South Tharaka/Tunyai A/427 and the balance to be distributed equally among the beneficiaries. These orders were reviewed and set aside on 28/7/2022, the grant was annulled and fresh grant issued to the present Administrator. The administrator Joshua Kithinji has filed a summons for confirmation of grant and has proposed a mode of distribution of the estate to various persons whose relationship to the deceased has not been stated and giving the protestor Evan Munyi 5.00 Acres. This mode of distribution has elicited affidavits of protest against the confirmation of grant. Affidavit of protest by Evan Njeru Munyi. His contention is that he is entitled to fifteen (15) Acres which he had purchased from the deceased. He has annexed the agreement dated 28/12/1976 and bundles of documents acknowledging receipt issued by Mr. Kioga Advocate (deceased) towards purchase of the said land. He avers that the deceased gave him vacant possession and has been living on the land todate since 1976. In 1989 the deceased obtained the consent of the Land Control Board but he died before the land was transferred to him. He contends that the administrator has no basis for reducing his interest to five (5) acres. He further depones that the mode of distribution is unlawful and some lawful beneficiaries shall be disinherited. HE prays that the court declines to confirm the grant, consider his claim as a liability to the estate and/or in the alternative the estate properly be set aside, to help him persue his rightful share of fifteen (15) acres.
5. Protest by the 1st protestor. She claims to be the daughter of the deceased. Her protest is that the proposed mode of distribution is not equitable and she had proposed to distribute the estate to persons who are total strangers to the deceased. He confirms that the 2nd protestor is entitled



to fifteen acres out of Estate which was sold to him by the deceased. The rest be distributed to the children of the deceased equally.

3. The administrator filed response to the protest which is a mere denial to the averments by the protestors.
4. The matter was heard by way of viva voce evidence. The parties also filed submissions. I have considered the evidence adduced, the affidavits and submissions.

The issues which arise for determination are:

- a. Whether the 1st Protestor is a beneficiary of the deceased entitled to equal share of the estate as the administrator of the estate.
- b. Whether the 2nd Protestor is entitled to fifteen (15) acres out of the estate of the deceased.
- c. Who are the beneficiaries entitled to the estate Section 29 of the *Law of Succession Act* defines dependants.

It provides:-

“29. Meaning of dependant For the purposes of this Part, “dependant” means—

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

5. The 1st protestor testified that she is the daughter of the deceased who is entitled to the estate of the deceased. This is confirmed by PW2 Susan Mumbi Githinji who is a daughter of the deceased. This is not in dispute as the administrator at paragraph 2 of his supporting affidavit in support of the summons for confirmation of grant and has proposed to distribute a share of the estate to her. It is an afterthought for the administrator to aver that she is not a child of the deceased. Section 29 of the Law of Succession Act provides that step-children are recognized as children of the deceased. The 1st protestor being a child of the deceased is a dependant who is entitled to the estate of the deceased.
6. The deceased is survived by children only. Section 38 of the *Law of Succession Act* is applicable. The Section provides: -

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”



7. The Act does not discriminate sons and daughters are entitled to equal shares. constitution prohibits discrimination under Article 27(4) & (5) of constitution.

It is provided:

- “4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”

The first protestor has objected to the mode of distribution as it is not equitable nor is it fair. The 1st protestor is entitled to an equal share as the administrator is getting as well as other beneficiaries.

7. The 2nd protestor maintains that the deceased sold land to him. I have considered the sale agreement, the acknowledgement receipts and that the deceased obtained consent of the Land Control Board to transfer the land to him. I find that he has discharged the burden to prove that the deceased sold land measuring fifteen (15) acres in his lifetime. This has been corroborated by the testimonies of PW1 & 2. The contention that the 2nd respondent was sold five (5) acres was not substantiated. The allegation of forgery is just that a mere allegation. The administrator had the legal and evidential burden to prove the allegations. Section 107, 108 & 109 provides as follows:-

“107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The administrator was required to avail expert evidence to prove forgery by calling a finger prints expert or a document examiner. In the absence of such evidence, the contentions are insufficient to prove that the thumbprint does not belong to the deceased. Paragraph 7 of the reply to the protest is hearsy and is inadmissible.

8. The administrator contends that the 2nd protestor is a stranger to the estate. The Law of Succession Act recognizes a creditor as a person to whom a grant of letters of administration may be issued. In this case the 2nd protestor proved that he had entered into a sale agreement with the deceased during his lifetime. The agreement was sanctioned by the Land Control Board as required by Section 6(1) of the Land Control Act which provides:

- “(1) Each of the following transactions that is to say—



- (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
- (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;
- (c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

9. The administrator has stated that the consent was not obtained as provided under Section 6(1) supra. The operative date is the date when the agreement was concluded. In his affidavits the administrator has not challenged the Land Control Board Consent. He submits that what the protestor bought was five acres not fifteen. The issue as to whether the consent was obtained within six months is not in dispute. The authority cited *Isaac Ngatia Kibagi -v- Paul Kaiga Githui* (2017) eKLR is not relevant as the consent of the Land Control Board had not been obtained.

10. In this matter with regard to the claim by the 2nd protestor is a claim to land forming the estate of the deceased. This is not a claim within the jurisdiction of this court. I should therefore invoke Rule 41 (3) of the Probate and Administration Rules which provides that the court may set apart the share claimed by a party claiming to be beneficiary entitled to a share of the estate. The rule provides:-

“41(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the *Civil Procedure Rules* and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

11. The 1st protestor has proved that she is a daughter of the deceased who is beneficiary entitled to the estate.

12. The applicant has sought to deny the 2nd protestor her claim to the estate. The administrator is trying to steal a match. He was removed as the administrator of the estate by this court (Justice Limo) after it was confirmed that he had illegally sub-divided the estate without a grant. He is again before this court trying to distribute the estate to person’s who are not entitled to the estate while seeking to disinherit the 2nd protestor. Section 47 of the *Law of Succession Act* provides as follows:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as



may be expedient: Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

13. On the other hand Section 70 of the [Law of Succession Act](#) gives the court the sole power to determine the person to whom a grant of representation should be issued. On noting that the administrator of the estate was removed as the administrator and for good reason he cannot be trusted with the administration of the estate of the deceased.

Conclusion:

14. For the reasons stated, I find that the protests have merits. I find that-
The 1st protestor Zipporah Nyambura Gideon is a beneficiary entitled to the estate of the deceased.
The 2nd protestor has a claim over the estate.
The administrator is not suitable to be the administrator of the estate.

Orders:-

1. The grant issued to the administrator Joshua Githinji is revoked.
2. A fresh grant to issue to the first Protestor Zipporah Nyambura Githinji who should move the court to have the grant confirmed.
3. A portion of fifteen (15) acres of the estate of the deceased shall be set apart and not to be distributed until the claim by 2nd protestor is heard and determined in the appropriate court with jurisdiction.

I make no orders as to costs, each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH DAY OF AUGUST 2024.

L.W. GITARI

JUDGE

