



**In re Estate of Kibara Njagi (Deceased) (Succession Cause
964 of 2013) [2024] KEHC 9981 (KLR) (9 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 964 OF 2013
RM MWONGO, J
AUGUST 9, 2024**

BETWEEN

PETER MURIITHI KIBARA APPLICANT

AND

STANLEY MARINGA KIBARA RESPONDENT

RULING

1. The deceased died on 4th February, 1978. Thereafter a litany of proceedings engulfed the deceased's succession.
2. It is not disputed that the deceased had four wives as follows:
Wambeti Kibara (House 1) - Children: Bernard Muthuku and David Warui
Waruguru Kibara (House 2) - Children: Margaret Kanini, Eliud Gachoki, Samuel Migwi, John Karunji, Joseph Nyangi, Hellen Wanjiru and Peter Muriithi
Mary Wanjiku (House 3) - Children: Margaret Wangungi, Susan Wamutira and Wambia Kibara
Lydia Gakunju (House 4) - Children: David Gachoki, Wakarii, Wakaria, Mugweru, Wamutira, Wachira Maringa and Dionisio Kithaka.
3. Following various proceedings Letters of Administration were issued to Stanley Maringa Kibara and one Eliud Gachoki, his stepbrother, on 8th April 2021.
4. The, Respondent/Administrator filed a Summons for Confirmation of Grant dated 23rd November 2021. According to the Affidavit in support of the summons, of the twenty (20) children of deceased, the ones surviving are:
 - 1) David Warui, 2) Peter Muriithi, 3) Wambia Wachu, 4. Julia Wakarii 5) Gabriel Mugweru, 6) James Wachira and then applicant, 7) Stanley Maringa.



5. According to the summons, the deceased's sole property was LR No Inoi/Ndimi/276 measuring about 7.1 acres (2.87 Ha). The applicant seeks distribution in paragraph 6 of his affidavit as follows:

1. Cecily Wanjiru Kithaka 0.25 Ha
2. Stanley Maringa Kibara 0.79 Ha
3. Gabriel Mugweru Kibara 0.79 Ha
4. Monicah Wambui Gachoki 0.25 Ha
5. James Wachira Kibara 0.79 Ha
6. The summons was opposed by Peter Muriithi Kibara, also the deceased's son. He claims in his Protest dated 21st March 2022 that the deceased also owned a 1/4 share in Plot No 24 Kiamuthambi. Further he deponed that:
 1. The main contention in this case arises from the fact that there were 2 sons of the deceased who were given clan land namely Bernard Muthuku s/o Wambeti given Inoi/Ndimi/101, and Eliud Gachoki s/o Waruguru given Inoi/Ndimi/274; but these properties are not the subject of this succession.
 2. That he protests the mode of distribution proposed by the applicant as he has left out the other 15 children of the deceased.
 3. That he urges this court to distribute the estate Land Parcel No Inoi/Ndimi/276 as follows in equal shares:
 - A. Land Parcel No Inoi/Ndimi/276
 - a. Share of Bernard Muthuku deceased to be inherited by Peter Muriithi Kibara.
 - b. Share of Margaret Kanini deceased to be inherited by Peter Muriithi Kibara.
 - c. Share of Eliud Gachoki deceased to be inherited by Peter Muriithi Kibara.
 - d. Samuel Migwi deceased to be inherited by his wife Susan Micere.
 - e. John Karunji deceased to be inherited by Peter Muriithi Kibara.
 - f. Joseph Nyangi deceased to be inherited by Mwangi Nyangi.
 - g. Share of Hellen Wanjiru deceased to be inherited by Peter Muriithi Kibara.
 - h. Share of Susan Wamutira deceased to be inherited by Peter Muriithi Kibara.
 - i. Share of Margaret Wangungi deceased to be inherited by Peter Muriithi Kibara.
 - j. Share of Wambia Kibara to be inherited by Peter Muriithi Kibara.
 - k. David Gachoki deceased to be inherited by Monica Mweru his wife.
 - l. Wakaria deceased to be inherited by Peter Kibara son of Wakaria Mugweru.
 - m. Jacinta Wamutira deceased to be inherited by Wanjiku son of Wamutira.
 - n. Dionisio Kithaka deceased to be inherited by Cecily Wanjiru Kithaka his wife in equal shares.



B ¼ Share in Plot No 24 Kiamuthambi

To be distributed to Peter Muriithi Kibara in trust for himself and the other 19 children of the deceased.

7. In his response statement, the administrator/respondent states that:
1. His deceased father had the following properties:
 - (i) LR No Inoi/Ndimi/101
 - (ii) LR No Inoi/Ndimi/274
 - (iii) Village Plot No 42 - Kaitheri
 - (iv) Plot No 24 - Kiamuthambi
 - (v) LR No Inoi/Ndimi/276
 - (vi) LR No Mwea/Settlement/Scheme/3365
 2. During the time of land consolidation and demarcation, a man could not get from our clan more than one parcel of land in his name. My father managed to get three parcel of land which were registered as follows:
 - (i) LR No Inoi/Ndimi/101 measuring about 5 acres (2.0 hectares) which was registered in the name of Bernard Muthuku Kibara, the first-born son from the house of Wambeti.
 - (ii) LR No Inoi/Ndimi/274 measuring about 4.35 acres (1.74 hectares) which was registered in the name of Eliud Gachoki Kibara the first-born son from the house of Waruguru Kibara.
 - (iii) LR No Inoi/Ndimi/276 measuring about 2.37 hectares (5.9 acres) was registered in the name of my father.
 3. My father's intention was that the first house (Wambeti's) own land parcel Inoi/Ndimi/101, the second house (Waruguru's) to own land parcel number Inoi/Ndimi/274 while the fourth house (Lydia Gakunju's) to own land parcel number Inoi/Ndimi/276, since all the 3 daughters of the 3rd house (Mary Wanjiku's) were married.
 4. Each of the three houses occupy the parcel of land meant for that house, since the time my father was alive. No member of one house has ever cultivated or occupied the parcel of meant for another house. This informs my proposal in the application for confirmation of grant. My father gave me the original title deed for land parcel number Inoi/Ndimi/276. He also gave the coffee shares of his land to my mother, Lydia Gakunju.
 5. As concerns plot number 24 Kiamuthambi, the same should be inherited by all the family members. The same to be registered in the name of Stanley Maringa Kibara to be sold and the proceeds be shared equally by the four houses, equally.
8. The court held a *viva voce* hearing of the Protest. The Protestor testified on his behalf against the summons. The Administrator/Respondent and John Muriithi Njogu testified in support of the summons of confirmation.



Protestor's Case

9. PW1 Peter Kibara testified that he was the son of the deceased with the 2nd wife Waruguru. In essence his evidence, was that the deceased's 1st wife lived on Bernard Muthuku's Land Parcel Inoi 101, but was buried on parcel 276. That the 2nd family was settled on Parcel Inoi 274 where he moved to in 1976 when his father was still alive. The deceased's 3rd wife went to a Plot in Mukinduri; and the deceased's 4th wife with her children lived in Parcel 276 which is the suit land.
10. His proposal is that the deceased land parcel 276 be distributed in equal shares amongst all the deceased's children without discrimination as to gender or the house one is from. The main contention arises from the fact that there were 2 sons of the deceased who received clan land namely Bernard Muthuku son of Wambeti and Eliud Gachoki son of Waruguru.
11. The protestor testified that in 1960 he was a grown up and his father was in detention when the land was allocated. There was no evidence to controvert the 1st petitioner's evidence that Bernard Muthuku got land parcel No Inoi/Ndimi/101 and Kibara Njagi got Land Parcel No Inoi/Ndimi/276 through Eliud Gachoki who made contributions to the clan; and that the deceased is the one who directed the clan how to allocate the lands. Bernard Muthuku and Kibara Njagi were in detention during land adjudication in 1960.

Respondent/Administrator's case

12. On the other hand, the petitioner's contention is that those parcels belonged to his deceased father and that it is his father who gave his sons the land parcels or directed they be given by the clan, but we submit that this is not true and it was not proved through evidence.
13. The basis of the petitioner's contention was that his mother Lydia Gakunju lived on the Land Parcel No Inoi/Ndimi/276 and that since Bernard Muthuku s/o Wambeti had been allocated land by the clan being Land Parcel No Inoi/Ndimi/101 his brother/sibling from his mother's house should inherit part of that land, and that since Eliud Gachoki was given Land Parcel No Inoi/Ndimi/274 by the clan his siblings from his mother's house (Waruguru) should inherit that land.
14. The petitioner and his witness testified that 15 children of the deceased should not inherit the estate for reasons that there are children from the other houses who were given clan land. It was submitted that the proposal does not hold water and is discriminative and unconstitutional.
15. The Administrator submits that the land parcels the clan gave to Benard Muthuku and Eliud Gachoki do not from part of the deceased's estate. The law provides only that the gift intervivos should be taken into account during the distribution. The 15 children of the deceased never received any land from the deceased in his lifetime. Kibara Njagi never distributed land to any of his children during his lifetime.
16. The petitioner produced in court an affidavit which had been sworn on 27th April, 1984 by the said first wife. Wambeti Kibara and filed in court at Nyeri Resident Magistrate's succession cause number 166 of 1982.
17. In paragraph 2 of that affidavit, the first wife deponed:

“ That my husband Kibara Niagi when he was alive gave to me and my children
Muthuku and Warui a piece of land registered in the name of Muthuku Kibara and
I live with my said sons in the land at Gatitu-Ndimi.”



18. She further deponed in paragraph 3 of that affidavit thus: -

“That my husband also gave a piece of land to Lydia Gikunju and her children, at Inoi/Kiringa”.

19. At paragraph 4 of that affidavit, she stated:

“That my husband also gave a piece of land to Peter Muriithi’s mother Waruguru and Peter Muriithi and his brothers live in the land given to Waruguru by Kibara Njagi”.

Issues for Determination

20. There are two issues for this court’s determination:

- i. Whether Land parcel number Inoi/Ndimi/101 registered in the name of Bernard), Muthuku (deceased) and parcel number Inoi/Ndimi/274 registered in the name of Eliud Gachoki (deceased) were obtained by the deceased herein and therefore ought to be considered as gift inter vivos.
- ii. How the deceased’s estate should be distributed.

Analysis and Determination

21. The Green Cards exhibited for the various land parcels indicate the parcels were registered as follows: Inoi/Ndimi/101 to Bernard Muthuku Kibara; Land Parcel No Inoi/Ndimi/274 to Njagi Kibara and corrected to read Eliud Gachoki; and Land Parcel No Inoi/Ndimi/276 of Kibara Njagi (deceased). These were given by the clan to the said persons and title registered in 1960. The same was a first registration. The land registered to Bernard Muthuku and Eliud Gachoki is not indicated to have originated from the deceased and he is not recorded to have given the land to his sons.
22. . *In Re Estate of Solomon Mwangi Waweru (Deceased)* (2018) eKLR A.K.Ndungu J found that a succession court has no jurisdiction to hear and determine issues related to trust in land as that is the jurisdiction of the Environment and Land Court. The court was of the view that the parties relying on trust ought to file separate proceedings to articulate their claim or right in the correct forum.
23. The protestors urge the court to distribute the estate of the deceased as per the 1st protestor’s proposal. In this regard there are only 2 properties available for distribution namely; Village Plot No 42 Kiamuthambi and Land Parcel No Inoi/Ndimi/276. The deceased beneficiaries are 20 in total.
24. John Muriithi Njogu, the petitioner’s witness testified that though he didn’t attend the clan meetings, he would be told about what was deliberated in those meetings. He confirmed that parcel number Inoi/Ndimi/274 is for the second house of Waruguru, where the protestor is a member. Further, that parcel number Inoi/Ndimi/101 is for first house of Wambeti while parcel number Inoi/Ndimi/276 is for the house of the fourth wife, Lydiah. The petitioner belongs to this house. The 3 daughters of the third house were married by 1960, a fact contained in paragraph 5 of the Applicant’s written statement (Stanley Maringa Kibara) dated 12th September, 2022, and which fact was not denied by the protestor.
25. It was agreed that the deceased, having died in 1978, prior to 1981 when the *Law of Succession Act* was enacted, Kikuyu customs would apply as far as daughters are concerned, that they could not inherit their parents’ properties. This is in consonance with the provisions of Section 2 (1) and (2) of the *Law of Succession Act*.



26. The Petitioner/Respondent submits that though the two parcels, numbers Inoi/Ndimi/101 and 274 were not registered in the name of the deceased but in his sons' names, it is clear that the evidence is overwhelming that those two parcels of land were obtained through the efforts of the deceased. It is clear that the first house together with the second house received those parcels of land as gift inter vivos.
27. In the Kerugoya HCCA No 285 of 2013, *Lucia Wamutira Munyiri v Jemimah Wanjiru Gatbiaka & 3 others* [2016] eKLR at paragraph 15, the court stated:
- “I am also persuaded by the Respondents' submissions that this court should take judicial notice of the fact that during pre-independence demarcations of land, it was usual for fathers to influence their first-born son who were of age to be considered for allotment and indeed were considered and given land on the strength of intervention by their fathers. That benefit (getting land) can be considered rightfully to be a gift from the father depending on the circumstances. A gift inter vivos is normally taken into account when distributing an estate of a deceased person to the beneficiaries under section 42 of the Act”.
28. The Petitioner/Respondent submitted that the first house and the second house obtained land through the deceased. As such he submits that the suit land Inoi/Ndimi/274 is meant for the 4th house of Lydiah Gakunju. Nobody from that 4th house ever asserted nor was it testified that he/she is opposed to the mode of distribution proposed by the petitioner. Any earlier proposal by the petitioner was abandoned, and the petitioner explained that he was only attempting to extend an olive branch to the step-siblings, but his gesture was not appreciated.
29. In the specific circumstances of this case the court is satisfied, that based on the settlement and long-term occupancy of the lands, the role played by the deceased in settling each house, that each house was entitled to the parcel settled on.

How should the estate be distributed

30. At the time of his death, the deceased had two properties registered in his name being:
- a. Land parcel number Inoi/Ndimi/276 measuring about 2.37 hectares (approximately 5.9 acres).
 - b. Plot number 24 Kiamuthambi.
31. Whilst the petitioner submits that the suit land is meant for the 4th house of Lydiah Gakunju, with no objection to the 4th house the protestors submit that the two properties should be distributed under section 40 of the *Law of Succession Act*.
32. The *Law of Succession Act* (Sections 35 and 40) provides that distribution of an estate of a deceased person applies to surviving spouses and children.
33. From the evidence and the submission of the parties, it is clear that 4th house was not gifted any land or through by the deceased efforts during his lifetime. A gift inter vivos is required to be taken into account when distributing the estate of a deceased person to the beneficiaries under Section 42 of the Act.

Disposition

34. In light of the foregoing, the deceased's free property at the time of his death, should be distributed to the 4th house of Lydia Wanjiku, taking into account the gifts inter vivos to the other houses.



35. Accordingly, the protest is dismissed and the mode of distribution proposed by the Petitioner/ Respondent is hereby allowed.

36. In the end, the application for confirmation of grant is allowed, and the protest is hereby dismissed.

DATED AT KERUGOYA ON THIS 9TH DAY OF AUGUST, 2024

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R. MWONGO

JUDGE

Delivered in the presence of:

- 1. Muchomba - holding brief for Thungu for Protestor
- 2. Mwangi - holding brief for Kagio for Petitioner
- 3. Murage, Court Assistant

