



REPUBLIC OF KENYA



In re Estate of Francis Mburu Macharia (Deceased) (Succession Cause 811 of 2015) [2024] KEHC 16106 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 811 OF 2015
EM MURIITHI, J
DECEMBER 19, 2024**

BETWEEN

JOHN MACHARIA MBURU PROTESTOR

AND

LYDIA GAITIABI PAULINO APPLICANT

JUDGMENT

1. The deceased herein, Francis Mburu Macharia died on 19th August, 2010, survived by only John Macharia Mburu as shown in the chief's introductory letter dated 6/5/2015. The estate comprises of Kiirua/Kiirua/968, Kibirichia/Ntumburi/1374 and Kibirichia/Ntumburi/1371.
2. John Macharia Mburu was issued with a Grant of Letters of Administration intestate on 16/3/2016 which was confirmed on 28/6/2017. Lydia Gaitiabi Paulino, an alleged wife to the deceased, successfully applied for the revocation of the grant and a fresh one was jointly issued to her and John Macharia Mburu on 29/1/2020.
3. The Applicant filed summons for confirmation of grant dated 5/2/2020 and proposed at paragraph 6 of the affidavit in support thereof how the estate properties ought to be distributed.
4. The Applicant swore a further supporting affidavit on 21/11/2020 in support of the summons for confirmation of grant.
5. The Protestor filed his affidavit of protest on 22/10/2020 insisting that he was the only lawful beneficiary of the deceased, and the Applicant, Nancy Mwendwa and Samuel Mwenda were strangers to him.

The Statements

6. Luke Mutunga, a pastor filed his statement dated 21/11/2020 urging that the deceased and the Applicant were husband and wife. The deceased gave his son Macharia 2 acres at Ntumburi, he gave



- Sammy 1 acre of the land at Ntumburi and the balance of the land at Kibirichia/Ntumburi was given to his wife. The Applicant signed for the release of the body of the deceased as his wife and he conducted the church burial rites.
7. Those sentiments were echoed by Charles Mbaya and Fredrick Kaburu Mwangera, the brother-in-law to the deceased and the area manager of Njotene Kiirua, respectively in their statements dated 21/12/2020.
 8. Nancy Mwendwa Mainge, a beneficiary, swore an affidavit on 8/3/2022 in support of the Applicant's mode of distribution. She avers that she is a daughter of the deceased, the Protestor is her step brother while the Applicant is her step mother. The deceased sired 3 children with 3 different women namely the Protestor, Muthoni (deceased), survived by Sammy Mwenda and her. Upon the demise of her mother in 1998, Monica took care of them at Ntumburi until she separated with the deceased. She and the Applicant took care of the deceased when he was sick until his demise and therefore the Protestor is not the only dependant of the deceased. The Applicant also took care of her son Wallace Mwirigi, who is now 23 years old. The Applicant is entitled to LR No. Kiirua/Kiirua/968 which she jointly bought with the deceased in 2005.
 9. Sabella Kanyua filed her statement on 24/11/2020 in support of the protest. She contends that the deceased was married to her aunt Monica Mcheeche Mbutura, and she lived with them in Kiirua market for over 30 years. In 2008, Monica separated with the deceased and Gaitiabi started visiting the deceased as a friend, before his death in 2010. The houses in Kiirua were built with the joint efforts of the deceased and Monica and the latter tried to chase Gaitiabi out of the houses before her unfortunate death in 2015. Gaitiabi was never introduced to the family as the wife to the deceased, neither did she have any children with him and thus she is not entitled to any of his properties.
 10. Her sentiments were echoed by Joseph Mwathimbu in his statement dated 24/11/2020.

Oral Evidence

11. PW1 John Macharia Mburu testified that, "I come from Murangi. I currently reside at Kirua-Meru. I work as butchery operator. I am the petitioner. I know the deceased. He is my father. Lydia Gaitiabi. I have been seeing her. I knew Nancy Mwendwa she died five years ago. She was my step-sister from Muranga. She was married at Muranga. My father hailed from Muranga. My father had a home at Muranga Kigumo. Margaret Muthoni from Muranga was my Step-mother. She died almost 7 years ago. When my father came from Muranga in the 1980s he came with his children including the step sister. Margaret Muthuri was married here at Meru. She died and she had a child named Samwel Mwenda. He resides at Kiirua at his father's home. Samuel Mwenda was not mentioned by our father. He was provided for by his father. He only came visiting. The deceased and Nancy Mwendwa did not provide for Stanley Mwenda. Nancy and Margaret my said step sister and I were adults when we came to Meru. We depended on our father until my sisters we married Nancy did not have children Margaret had 2 children one Kithikina who died about 5 years ago and Samwel Mwenda who living. When we came from Muranga our father rented a house for himself and our for u children. When our father came from Muranga he left my mother at Muranga. He had divorced her. My mother is alive. When father came to Meru he did not marry. My father had property 3 plots 968/Kibirichia 7371 and 1374. I am not aware of any other parcel of land. Kiirua 968 is about 20X80 feet. Kibirichia 1371 is about 2 acres. Kibirichia 1374 is about 3 ½ acres. Lydia Gaitiati claims property. I do not agree. Parcel No. 1371 belongs to me. I had been given by father and I later bought it was about 15 years ago. My father sold it to me. I have a witness. He is the one who bought 1370 plot. The plots 1370 and 1371 are adjacent. It was my father who subdivided the land. My father sold parcel Nos. 1370-1373. It remained only 1374. When my father sold 1370-1373, we got titles for the purchases. I also got a title for my parcel 1371.



The titles were taken out in 1985. The purchasers from 1370 one Joseph Mwalinge is my witnesses in this case. The purchaser for 1370 one Joseph Mwalinge is my witness in this case. The purchases stated using the parcel. I also use my portions. Only parcel 1374 remained. Our father used to lease the parcel 1374. Currently, I am the one who was taking charge of the parcel of land. Claim by Lydia to parcel 1314. I do not agree. Lydia was never a wife to my father. Nancy Mwendwa is deceased. Samwel Mwenda should not inherit as he lives with his father. Mwenda has never claimed an interest in my father's land. I did not include the said Nancy and Samwel Mwenda as heirs. I do not consider that they should inherit I got a later of 29/8/2014. From the chief. The letter did not indicate anybody as heirs as I was the only living survivor. I had old the chief that the parcel No 1371 had already been sold to me and registered in my name. Parcel No. 1371 is not subject to this succession as it is already registered in my name. I filed an affidavit of protest to the application by Lydia. I oppose this application by Lydia. Affidavit in protest to confirmation of Grant sworn on 16/10/2020 and filed on 22/10/2020. Affidavit of 21/12/20 by Lydia further supporting affidavit. It is not true that my mother was never married to the deceased. My mother has not come to claim the estate as they were divorced and she has other property at Muranga. When my father bought the property in Meru 1980 we were together. Muthomi and Nancy were brought up by Monica Cheche. Monica lived with our father. Cheche died recently about 2 years she is the one who brought us up. My father was a person who lived with "uncountable" women. He had loose relationship with several women. He did not marry any of them. My father is Kikuyu. If married he would have used Kikuyu customary. I am not aware of any Kikuyu customary marriage with any person. It is not true that Lydia was married in 2003. Lydia lived with my father as a friend from 2008. I used to her from 2008. I used to see Lydia for 2008. I slept at my father's home but I knew she was a friend. I did not get to know where she came from. She has never come from home at Muranga. She has never been brought home at Muranga and introduced. She has adult children but not with my father. I have seen the children after my father died. I do not know about my father and respondent attending church together. My father never had a prolonged ailment. He had only a sudden illness from which people from Muranga and I attended to him and they came to bury him. My mother also came to burry my father as his mother. My father was buried by my mother and together with people from Muranga. I was one of the people who arranged for the funeral. I saw Lydia at that funeral arrangement but I did not know her as a wife. Lydia was not introduced as wife of the deceased. She was only present among other mourners. During this sudden illness, I took care of my father. I used to see Lydia. She is not the only one who took care of my father, I saw her when I visited my father. My father lived on plot 968. Meeting of 2008 in the presence of pastor. I never got a notice of any meeting in 2008. It is that time that I was invited to such a meeting. It is true that I broke the house but I did not take any property. I had gone to look for water during campaign exercise. When they saw me, they started screaming and beating me. They accused be of breaking. I broke but I did not take anything from the house. I broke the house because of my anger when they beat me up. They beat me up with her children. I had only gone there to seek water and they refused me. I was chased after we failed to reconcile at the police station. I accepted the charge and I was fined. I did not steal any title from the house. I know how my father got the plot at Kiirua. The plot No. 371 and 1374 were originally plot Kibirichia 385. My father brought the land in 1981. Plot 968 Kiirua was brought recently. He had another plot at Kiirua which he sold and bought 968. It was about 2000. At this time, my father lived with Monica Cheche. Lydia was not living with my father. I never knew my father as business partner of the Applicant Lydia. My father operated a shop. He worked as cattle dealer I operated the butchery. My father also had a bar. I did not know Lydia as a partner. My father bought plot 968 from one Fredrick. The purchase price of 40,000/= paid at once before an advocate. There was a sale agreement. I did not at the agreement no lady claiming to be a wife at the transaction. At the Land Board, the purchaser and the vendor were present. It was not there. The house on the plot was constructed on 2004. It is a timber house, three roomed. He lived there until he died. I am the one who supervised the construction with



one fundi Gitonga. The materials were brought by our father. He would then give me materials for us to construct. I lived at the house for sometime. My father came to live in the house alone when the rest of us left. I used to see Lydia for about 2 years. Monica Cheche lived at her own place when they parted with my father. Presently it is the Applicant who stays on the plot. She refused to vacate after the death of my father. I did not report her to police. I decided to follow up through this proceedings. I pray that the land be left with me as the others have no right to the property.”

12. On cross examination, he stated that, “Francis the deceased had 3 children, Nancy Mwendwa, Magaret Muthoni and I. We were all born in Muranga and when my father came to Meru, he came with the children and left the wife at Muranga. Monica has no child. She met our father at Meru in 1980. They lived together for 20 years. In 2000, they had separated with my father. When we came from Muranga, I was 22 years. I was born in 1960. Muriithi and Nancy were my followers. Muriithi was about 12 years at the time we came to Meru. Nancy was younger than Muriithi but I do not recall her age. Muthoni and Nancy were small children not adults at the time we came from Muranga. We were not able to provide for ourselves. Monica and my sisters lived in one house. We had rented two houses at Kiirua. [witness dodges question as to the residence of the family when they came to Meru] I lived at a separate house a little father off from my father as I was adult. It was not very far. I used to go for meals at the family home. After meals I went to my own room. It is not true that I was trouble-some. I stayed at the house rented for by my father until I got married. I rented at the plot after marriage. Even when I got my first child in 1984. We used to work together with father but we lived separately. I moved from the plot and went to stay at Kiirua and at a rented place. I am the one who pays for rental. My house is not near the subject plot 968. We used to work with my father but I did not get involved in his personal life. I never interfered with his personal life. I was only involved in work. Muthomi was married in 1981. She got pregnant after school she is only 12 years. Nancy left our home. Muthomi got married at Kiirua. She had two children. The first child was born in 1984 as with my child. Muthomi’s 2nd child was born in 1988, They had their own father. Muthomi died in 1993 and was buried by my husband. I have not produced a death certificate. Nancy died. I do not have a certificate of death. Chief’s letter. I told the chief that I was the only one who survived as the others had died. The chief also testified before the court. The chief did not record who had died on the dates. Plot 1371. I bought from my father in 1992. I have not produced any documents of purchase from my father. I am the one who filed the succession proceedings. I did not include plot 1371 in the petition. The parcel of the land was not in the estate.

[witness is referred to official search of plot 1371 indicating owner is deceased]

[Court – notes Affidavit of Support of Petition of 20/12/2015 indicating one of the assets as 1371.]

Parcel No. 1371 was transferred to me by my father. It is not true that plot 1371 is part of the estate. It is true that the property was registered in the name of my father to hold for me. Plot 1371 belonged to my father. I was given by my father. My father lived at Kiirua market on plot No. 968. It was far for where I had rented. He was buried on plot No. 968. He lived on the plot 968 with Lydia the Applicant. I do not know for how long they lived together with Lydia. My father was a businessman. He dealt with livestock buying and slaughtering. He also bought and sold cereals. I did not know with whom he sold the cereals, I did not live with my father. I had my own work. I only saw him sometimes when I visited him. I do not agree that he worked with Lydia in the cereals. I do not know what Lydia did. I cannot tell whether by father worked with Lydia. My father had many “wives” with whom he lived for short period of time. I knew about 10 of such “wives”. My mother Jane Njeri had divorced my father. Before we came to Meru, my father had divorced my mother. My mother only came to burry my father. My mother is still unmarried but she has other children with person other than my father.



Plot 968. It is the plot where my father lived. He lived on the plot for 4 years. He went to live on the plot in 2007. The house was constructed in 2006. I was one of the persons who constructed the house. It is not true that the house was constructed in 2003. It is not true the Lydia was married by father in 2003. I started seeing Lydia in 2008. It is not true that they are married.

[Witness is referred to photographs on Applicant's documents]

I see my father in photographs. I also see photographs of the church. My father was in the church. I also see Lydia with my father in the church. In the group picture, I have seen some of my friends who attend the Baptist Church. When my father was unwell, I used to visit him every morning and evening. I used to visit him when I came from work. He died at home. I found him at home when was called that he had died. We went to report to the police. The burial was on plot 968 where my father lived with Lydia. Samwel Mwenda is the living child of Muthomi. I do not oppose this sharing of the estate. Nancy had no children and she is deceased. Lydia had no children with the deceased. I do not agree that she should inherit. She has her own home. At the time of death of the deceased, Lydia was only coming as a visitor. Breaking of the house. I had gone to ask for water. I found them there. She was with others. I did not know who was living in the house. I found the Applicant on the plot. I was charged in court. I cannot remember the year. I found other neighbours within where she lived. I had gone to seek water at the place where Lydia was living with other. My son came to find out why I had been arrested by police. It is not true that I took anything from the house I was charged with malicious damage and I accepted the charge and was fined.

Plot 968 Kiirua was bought by my father in 2000's. I do not recall the date.

[Witness is referred to this documents of search] It is 2004. At this time, I did not see the Applicant with my father. My father sold another plot to buy plot 968. I do not recall the number. I know the person who sold the first plot as Mukari and the search as Fredrick. I was present when the 1st plot was bought. I have not produced the agreement of sale. Plot 968 was bought by proceeds of the first plot. I was present when plot 968 when was produced. I did not sign the sale agreement. The purchase price for 968 came for the sale of the 1st plot. It is not true that the purchase price for the plot 968 came from the proceeds of sale of cereals. My father moved for business of selling clothes, took up cereals business and later operated a bar. I do not know the plot initially bought by my father and I have not produced any agreement. At the funeral, my people from Muranga came, Lydia was also there. Lydia did not come as a member of family. Mwenda was present. They were with my son. Photographs may have been taken. I was confused. I cannot confirm there were pictures. There was no committee from arrangement of the funeral. The persons who had come from Muranga were received as visitors. It was by the people at Meru of the Mwenda's family I did not see Lydia. I was involved with the burial.

[Witness is referred to his affidavit] Lydia came after the death of the deceased. She used to visit a friend. She came to stay in the deceased's home in 2012. I did not report to the police. According to Kikuyu customs we do not take up such matters. It is not true that I did receive her because she was the wife of my father.

[Paragraph 14 of Petitioners' affidavit] I know Mwenda. They did not depend on my father; Nancy is a child of the deceased. I did not depend on my father. Nancy did not have a child. I do not oppose Mwenda sharing. I only oppose Lydia's claim."



13. In re-examination, he stated that, “[Photographs in statement of the Applicants dated 21/12/2020] I recognize my father Lydia. I do not.....Lydia is not the only women in the picture. I do not know the other pictures. The picture does not show the date. Lydia came into plot 968 in 2012. Before that I only saw her visit but I do not know whether she lived there. There were many women who visited. Lydia was never introduced to our family as a wife of the deceased. Purchase of plot 968. The money came from the sale of the first plot and from proceeds of business. My father did not indicate that he had any person contribute to the purchaser. Plot 1371 was sold to me I got a title for the plot. When I filed the case it was erroneously indicated as plot of the estate. I only agree that Samuel Mwenda should get a share but he is not entitled in equal share. Nancy died without a child. Mwenda’s mother is also deceased. The deceased have not claimed the estate. They were married and when they died, they were buried at their matrimonial home. We do not have a good relations with Lydia. She has included my step sisters in claim. I know Lydia has her own home and children. I know that my father had about 10 women with whom he associated. I do not know the nature of their relationship, whether it was business or friendship. I was charged after I broke the house. We never reconciled. I decided to file a succession proceedings from the court. I decided petition the court to reconcile the issue. The chief knows about our family and that is why he wrote the letter before the filing of succession. At the time of the chief’s letter the other beneficiaries had died. That is all.”
14. PW2 Joseph Murethimba Manyara adopted his statement as his evidence in chief. He testified that, “I came from Kiirua. I am a business. I know John Macharia Mburu, I also know Francis Mburu Macharia. I made a statement dated 15/12/2020. I pray that my statement be adapted as my statement. I knew Francis Mburu Macharia. I knew the children of Mr. Francis Mburu Macharia. I know the children of Mr. Francis Mburu. I knew two female children as Muthoni and Nancy and a son John. I knew the wife to Francis they stayed at the shop at center. This was Monica Sese. His wife was Monica Sese. Monica is also deceased. I think Francis died before Monica. I know their plot at Kiirua Market. It was constructed with a timber house. They had leased the house at and they were staying at this house at the shop. Lydia Gaitiagi – I do not know her. I have been seeing her at Kiirua. I do not know whether she was his wife. I could not have known whether she was his wife.”
15. On cross examination, he stated that, “I got to know Francis Mburu in 1985. I came to Kiirua. I used to sell clothes at Kiirua that time. Francis Mburu used to sell clothes. When I got to know him he was selling clothes second-hand clothes. They are children I know Nancy Muthuri and Macharia. Nancy was a child of Mburu, together with Muthoni. I know Muthoni is deceased. I know Samuel Mwenda who is a child of Muthomi. Nancy also died. They used to live in Kiirua and they would go to Kikuyu land. I heard that she died while at Kikuyu.

Had Mburu married the mother of these children? Francis Mburu had married the lady in Kikuyu land. He never told me that he had married the mother. He later married Monica Sese. They had business together I know they had bought a plot at Kiirua market. Monica and Mburu had plot at Kiirua Market. I also know that they had bought a shamba. I do not know that Mburu separated with Monica and Monica started living at Kiirua. I do not know when Monica died. When did Monica and Mburu separate? I do not know when they separated. I know that Monica continued to live on the plot with another man. Plot next Kiirua Primary School. I know they bought a plot near Kiirua Primary School near Kiirua Market. I cannot tell whether Mburu had married the mother of John. I do not know when Mburu died. I did not go to his funeral.



Monica Chacha. Did you know her relatives? I knew one relative of Monica called Musa. The others I did not get to know. Charles brother to Chache I have seen him but I do not know him well.”

16. In re-examination, he stated that, “I do not know whether Lydia was Mburu’s wife. I did not hear Mburu talk of his wife Lydia.”
17. AW1 Lydia Gaitiabi Mburu testified that, “I am a Co-administrator in the estate of my husband. I filed an affidavit in support of application for confirmation dated 5/2/2020. I pray that the distribution of the estate be in accordance with my affidavit. I filed statement as a further affidavit of 21/12/2020. I wish to adopt the affidavit of support and further affidavit. Francis Mburu is my husband. John Macharia is a son of the deceased. Johh Macharia may not know me because I was the one who was taking care of Mburu. Macharia was not coming to the father. It is not true that I went that place after my husband died. We bought the parcel of land with my husband. I stayed with the deceased for 3 years when he was unwell. Nancy Mwenda. She is daughter of my husband with who he left me. The other who died was in the deceased home at Kikuyu.

Photographs in list of photographs. The 1st photographs show myself and Mburu at our home. The 2nd shows Mburu and I outside our home where I live today. The group photograph shows members of our church, Mburu is 2nd on the left. I am in the photograph. They were taken by John Macharia when they broke into my house in 2013. They broke into the house with his son and took away weighing scale, sufurias and plates. They also cut padlock. They took away mattresses, blankets and the carpet was destroyed. I reported to the police and they were arrested. They were charged and fined I have title parcel Kibirichia/Ntumburi/968 measuring 0.019 ha. I lived there with the deceased and he is buried on the parcel of land 968. I went to the burial committee. I was participating. I was even the Treasurer of the Church Committee. The burial permit was taken by the persons who broke into my house. I confirm that I am a widow of the late. We used to live together. We started living together in 2003 until 2010 when he passed on. I was not a mistress. I did not know when John Macharia when he filed succession proceedings. He only come with court documents saying that he had filed succession proceedings and the plot belonged to him and wishes to remove me. I made an application to join the proceedings. He started bring people to see the plot for purpose of selling. There are two shambas at Kibirichia 1371. I consider that the two acres in 1371 should go to Macharia. I agree that he is a child to the deceased. I recall the shamba was one before it was subdivided into three. Macharia was not given two acres; Maina got two acres and Kione two acres. Kione and Maina are deceased. I do not know whether they had family. I wish that Macharia gets two acres and the balance I shall distribute to my other children Sammy son of Muthomi a daughter to the deceased. The child is Nancy Mwendwa who is my child. I pray that court approves the proposed distribution.”

18. On cross examination by counsel for the Interested Party, she stated that, “Nancy Mwenda is my child as she was the daughter of my husband. I came to know her in 2003. She was an adult at the time, I got to know her. We lived with her together with Mburu. She had a child who used to go to school at Kiirua at a Primary School called Kieni Kia Ndege. The child was called Mwirigi. Mwirigi is still living. I say that Nancy should do get a share of the land. She should get her share for Kibirichia/Ntuburi/1374? I cannot recall the correct number. It is now being used by person given by Macharia. I used to use the land until Macharia took it. Parcel No. 1371 which I propose should go to Macharia. Macharia has already sold the two acres to one of his witness. The witness testified in court. He is called Kamande. I



- do not recall the other name he used in court. He is the only witness who testified for the Applicant. I did not see any documents of sale of the shamba. John Macharia also did not purchase any documents of sale of the land by his father. I am the one who lives on my plot Macharia does not live on any of the shambas subject of this proceedings.”
19. On cross examination by the Petitioner, she stated that, “I was not married in church but he loved me and I loved him. I was the one who was taking care of him. We did not have any children with the deceased. We only loved each other. When John and his father came to Meru I was not with them. When the shamba and the plot were purchased it was Mburu and Chacha Monica his wife, with deceased. I do not know whether John Macharia’s mother is alive. When was plot at Kiirua bought? We bought the plot for John Gatini in 2006. Where is the title for the plot? The title was taken by John Macharia. I know about the shamba which was owed by the deceased was given out to John Macharia two acres and he sold to Kamande. The shamba was 12 acres in whole. After giving to John, Maina, Kiome and he sold two acres to Kamande leaving four acres. Due erosion taking away part of the four acre piece, three acres remain for distribution. John Macharia has sold his share to Kamande. 1374 and plot 968. The deceased left the two parcels of land to me. I do not care where you take your children take your children. It is not true that you called people from Muranga after Mburu died. It was Nancy Mwenda who called people from Muranga. Where in Muranga? We met at the mortuary with family of the deceased.”
 20. AW2 Kaburu M’wongela adopted his statement of 21/12/2020 as his evidence in chief. He testified that, “I am area manager of Kiirua sub-unit Jotene. I know one Francis Mburu. I refer a statement of 21/12/2020. I pray that the statement of 21/12/2020 be adapted as my evidence.”
 21. On cross examination by counsel for the Petitioner, he stated that, “Statement of 21/12/2020. I am the area manager. I had to know what was happening to my area’s residents. I had reported to Macharia son to Mburu and the Lydia the Applicant. Do you know how much Lydia paid of the plot? I do not know how much was paid of the plot. Do you know how John Mburu and Macharia had agreed about the plot Ntumburi. I know that Mburu and his wife Lydia Gatiabi had bought a plot at Kiirua and a shamba at Ntumburi. The Ntumburi land was almost 2 acres as I heard from John Mburu. It was given to Macharia. I do not recall when the shamba was given to Macharia. I do not know whether John was using the shamba. I do not know whether we had given the title to the shamba. He given 2 acres to Macharia and the rest he kept for himself. I was told by Mburu. The shamba was bought during the time of Lydia. Mburu had just married Gatiati. I remember that Macharia died in 2010. Lydia Gatiati’s marriage. I know them for 8 years during which time they bought the plot at Kiirua. I do not know when the shamba was bought but it was after Mburu separated with Chacha. Do you know the contribution of John Mburu and Lydia Gatiabi to the acquisition of the plot? I do not know. Did you attend to any marriage ceremony? Between Lydia and Mburu. I did not go for any wedding but we could see the two were married even if there was no ceremony. I know Mburu children from his original home were Macharia, Muthuri and another child whose name. I did not recall. Lydia and Mburu had no children. Only Mburu and Gatiati lived on the plot which was a house made up of 3 rooms. How much did John receive for Lydia to buy the plot? I do not know.”
 22. In re-examination, he stated that, “Lydia and Mburu lived for 8 years from the time we bought as plot at Kirima where we were neighbours. Before buying the plot they had rented a house at Taari’s plot. Muthuri is deceased. She had 2 children, one of whom is also deceased leaving Sammy who lives at Kiirua. The other children of John Mburu lives to Nairobi I do not recall her name.”
 23. AW3 Luke Muthinja Mutunga adopted his statement of 21/12/20 as his evidence in chief.



24. On cross examination by counsel for the Petitioner, he stated that, “I am a pastor. I have not carried anything to show that I was a pastor. Do you know how long John Mburu and Lydia lived together? I got to know the family in 2005. Mburu got sick in 2008. He died in 2010. I do not know anything about the family before 2005. I find when they had rented somewhere. They had a shop. I know they bought a plot in Kiirua. Mburu told me he had given a piece of shamba for Macharia. It appeared that Macharia delayed in getting for the shamba. When did they construct the building in Kiirua. They bought the plot after 2000 and built the plot. Mburu used to get sick many times. It appears when the proceed for the shop brought the plot. Macharia did contribute as John Mburu told me. Did you witness any wedding? They were not officially married in church. I said they lived together as husband and wife. It happened to be a customary marriage.”
25. In re-examination, he stated that, “Lydia and Mburu were man and wife. The first time I went to see them I found him lying on bed and she told me that I should go the next day, as the husband was not feeling well. They deal with church matters together. Lydia was assisting Mburu when the was cooperation before the children on Lydia towards the late Mburu.”
26. AW4 Charles Mbaya testified that, “I have filed a witness statement of 21/12/2020. I come from Kirua. I knew Francis Mburu. He had married my sister. My sister was called Monica Cheche. When they married they lived together for a long time and Francis Mburu had other 5 children 3 boys and 2 girls with a previous marriage. The first was John Macharia, 2nd Kiumbe, 3rd Maina; Njeri who died and left one child. Sammy Mwenda was left by 5th child of the deceased. I do not know any other child of the deceased. I know the 3 boys and 2 girls. The children were brought up by my sister Monica Nchekei. When the children were fully grown. Macharia married and Mburu separated from my sister Monica Cheche because Nchacha had another husband who had married her before Mburu. He and called Jakubu Merethia. Cheche and Mburi lived at Kiirua Market. They had plots at Kiirua market and they had built a shop and were running a shop on the plot. They also had a shamba at Nthumburi Kibirichia. They were operating on the shamba with assets. When Cheche left Mburu because of Mwiethia, we had a meeting and helped them divided the property they had. It was the plot and the 10 acres shamba at Ntumburi. We give the shop to Cheche and Mburu said he rented at Ntumburi land. We agreed as a family. Lydia was the wife of Mburu after Cheche left Mburu. Mburu said he wanted a lady from Meru and he married Lydia Gaitiati. They lived as husband and wife as he had lived with Cheche. He lived with, Lydia at a rented plot at Kiirua and later bought a plot near Kiirua Primary School from one John Gatimi. They lived there with Lydia doing their business. In the land, we continued to live together and Mburu became sick after about 2 years. Lydia is the one who was looking after him. Mburu called us and told us his land at Ntumburi was distributed to Macharia 2 acres; Kiumbe 2 acres and Maina 2 acres. It was 6 acres from the children. Macharia sold his 2 acres to one villager called Manyara, also known as Kamunde. I attended Mburu’s funeral. We had no problem with Lydia. We had done the marriage from Lydia in accordance with Kimeru Customary Law. On the burial date, Lydia was there and she is the one who was directing and leading the burial as a wife of the deceased. I recorded a statement and filed it in court. I wish to adopt the statements as my evidence. The court should consider the two children who were the children of Mburu. I am referring to Njeri and Mwenda as they were left with Lydia to take care of them and Lydia is the one who lives with them. The meeting with Mburu involved village elders. Mburu’s will wish were recorded but it was not brought to the elders. It was Koome and Macharia as Macharia was the first-born, who were given the recording.”
27. On cross examination by counsel for the Petitioner, he stated that, “Lydia and Mburu were married. They had married according to Kimeru customary law. We went for Lydia from her home at Chugu. I did not record this in the statement but I told the advocate. Cheche only lived with Mburu. He had not paid dowry. Lydia had been married and there were witness like Murungi and other, who are alive.



I do not know whereby they have testified. I visited Macharia and Lydia several times because they were our neighbours and we had no grudge between Mburu and Cheche and we could visit any time.

Do you know what assistance that Machiria gave to Mburu? He did not help the father because he even caused a dispute between the elders. I was informed of any help. Mburu would have told us as village elders of any assistance we got from Macharia. I could see Mburu all the time. If one visited another, he could tell of any help. We used to assist each other with Mburu after Macharia and Koome refused with the documents. We visited and got to know about the offers of the family.

Did Lydia ever go to Ntumburi? [Lydia was never given Kiirua plot] It is false. I have told the truth.”

28. On cross examination by counsel for the Interested Party, he stated that, “I know Nancy Mwendwa. She is a daughter of Mburu. She is alive.”
29. RW1 Beneficiary Nancy Mwendwa adopted her affidavit of 8/3/2022 as her evidence in chief. She testified that, “Francis Mburu, the deceased was my father. John Macharia is my brother. Lydia Gaitibi is my step-mother.”

Submissions

30. The Applicant urges that she, the Protestor, Nancy Mwendwa Maingi and Samuel Mwenda are the beneficiaries of the estate and the same should be distributed as she has proposed at paragraph 6 of her affidavit in support of the summons for confirmation of grant.
31. The Protestor did not file any submissions.

Analysis and Determination

32. The singular issue for determination is how the assets of the deceased ought to be distributed.
33. Whereas the Protestor insists that he is the only beneficiary of the deceased, the Applicant maintains that she was the wife to the deceased and he had 2 other children with other women.
34. The Protestor testified that, “I know the deceased. He is my father. Lydia Gaitiabi. I have been seeing her. I knew Nancy Mwendwa she died five years ago. She was my step-sister from Muranga. When my father came from Muranga in the 1980s he came with his children including the step sister. Margaret Muthuri was married here at Meru. She died and she had a child named Samwel Mwenda. He resides at Kiirua at his father’s home. We depended on our father until my sisters we married Nancy did not have children Margaret had 2 children one Kithikina who died about 5 years ago and Samwel Mwenda who living. My father had property 3 plots 968, Kibirichia 1371 and 1374. Kiirua 968 is about 20X80 feet. Kibirichia 1371 is about 2 acres. Kibirichia 1374 is about 3 ½ acres. Lydia Gaitiati claims property. I do not agree. Parcel No. 1371 belongs to me. I had been given by father and I later bought it was about 15 years ago. My father sold it to me. I have a witness. I also got a title for my parcel 1371. Claim by Lydia to parcel 1374. I do not agree. Lydia was never a wife to my father. Nancy Mwendwa is deceased. Samwel Mwenda should not inherit as he lives with his father. Mwenda has never claimed an interest in my father’s land. I did not include the said Nancy and Samwel Mwenda as heirs. I had told the chief that the parcel No 1371 had already been sold to me and registered in my name. Parcel No. 1371 is not subject to this succession as it is already registered in my name. My father was a person who lived with “uncountable” women. He had loose relationship with several women. He did not marry any of them. My father is Kikuyu. If married he would have used Kikuyu customary. I am not aware of any Kikuyu customary marriage with any person. It is not true that Lydia was married in 2003. Lydia lived with



my father as a friend from 2008. I used to see Lydia for 2008. My father was buried by my mother and together with people from Muranga. I was one of the people who arranged for the funeral. I saw Lydia at that funeral arrangement but I did not know her as a wife. Lydia was not introduced as wife of the deceased. She was only present among other mourners. During this sudden illness, I took care of my father. I used to see Lydia. She is not the only one who took care of my father, I saw her when I visited my father. My father lived on plot 968. Plot 968 Kiirua was bought recently. I never knew my father as business partner of the Applicant Lydia. My father bought plot 968 from one Fredrick. The house on the plot was constructed on 2004. It is a timber house, three roomed. He lived there until he died. I am the one who supervised the construction with one fundi Gitonga. The materials were brought by our father. He would then give me materials for us to construct. My father came to live in the house alone when the rest of us left. I used to see Lydia for about 2 years. Presently it is the Applicant who stays on the plot. She refused to vacate after the death of my father. I did not report her to police. I pray that the land be left with me as the others have no right to the property.”

35. On cross examination, he conceded that, “Francis the deceased had 3 children, Nancy Mwendwa, Magaret Muthoni and I. Nancy left our home. Nancy died. I do not have a certificate of death. I told the chief that I was the only one who survived as the others had died. Plot 1371. I bought from my father in 1992. I have not produced any documents of purchase from my father. I did not include plot 1371 in the petition. Parcel No. 1371 was transferred to me by my father. It is true that the property was registered in the name of my father to hold for me. Plot 1371 belonged to my father. I was given by my father. My father lived at Kiirua market on plot No. 968. He was buried on plot No. 968. He lived on the plot 968 with Lydia the Applicant. My father had many “wives” with whom he lived for short period of time. My mother Jane Njeri had divorced my father. I see my father in photographs. I also see photographs of the church. My father was in the church. I also see Lydia with my father in the church. In the group picture, I have seen some of my friends who attend the Baptist Church. Samwel Mwenda is the living child of Muthomi. I do not oppose this sharing of the estate. Nancy had no children and she is deceased. Lydia had no children with the deceased. I do not agree that she should inherit. She has her own home. At the time of death of the deceased, Lydia was only coming as a visitor. The purchase price for 968 came from the sale of the 1st plot. It is not true that the purchase price for the plot 968 came from the proceeds of sale of cereals. My father moved from business of selling clothes, took up cereals business and later operated a bar. At the funeral, my people from Murang’a came, Lydia was also there. Lydia did not come as a member of family. Mwenda was present. They were with my son. Photographs may have been taken. I know Mwenda. Nancy is a child of the deceased. Nancy did not have a child. I do not oppose Mwenda sharing. I only oppose Lydia’s claim.”
36. In re-examination, he stated that, “I only agree that Samuel Mwenda should get a share but he is not entitled in equal share. Nancy died without a child.”
37. PW2 testified that, “I know John Macharia Mburu. I knew Francis Mburu Macharia. I know the children of Mr. Francis Mburu. I knew two female children as Muthoni and Nancy and a son John. I knew the wife to Francis they stayed at the shop at center. His wife was Monica Sese. I know their plot at Kiirua Market. It was constructed with a timber house. They had leased the house at and they were staying at this house at the shop. Lydia Gaitiagi – I do not know her. I have been seeing her at Kiirua.”
38. On cross examination, he stated that, “I got to know Francis Mburu in 1985. I used to sell clothes at Kiirua that time. Francis Mburu used to sell clothes. They are children I know Nancy Muthuri and Macharia. Nancy was a child of Mburu, together with Muthoni. I know Muthoni is deceased. I know Samuel Mwenda who is a child of Muthomi.”
39. In re-examination, he stated that, “I do not know whether Lydia was Mburu’s wife. I did not hear Mburu talk of his wife Lydia.”



40. The Applicant testified that, “Francis Mburu is my husband. John Macharia is a son of the deceased. Johh Macharia may not know me because I was the one who was taking care of Mburu. Macharia was not coming to the father. We bought the parcel of land with my husband. I stayed with the deceased for 3 years when he was unwell. Nancy Mwenda. She is daughter of my husband with who he left me. The 1st photographs show myself and Mburu at our home. The 2nd shows Mburu and I outside our home where I live today. The group photograph shows members of our church, Mburu is 2nd on the left. I am in the photograph. I have title parcel Kibirichia/Ntumburi/968 measuring 0.019 ha. I lived there with the deceased and he is buried on the parcel of land 968. I went to the burial committee. I was participating. I was even the Treasurer of the Church Committee. The burial permit was taken by the persons who broke into my house. I consider that the two acres in 1371 should go to Macharia. I agree that he is a child to the deceased. Macharia was given two acres; Maina got two acres and Kione two acres. Kione and Maina are deceased. I do not know whether they had family. I wish that Macharia gets two acres and the balance I shall distribute to my other children Sammy son of Muthomi a daughter to the deceased. The child is Nancy Mwendwa who is my child. I pray that court approves the proposed distribution.”
41. On cross examination by the Protestor, she stated that, “When was plot at Kiirua bought? We bought the plot for John Gatini in 2006. Where is the title for the plot? The title was taken by John Macharia. I know about the shamba which was owed by the deceased was given out to John Macharia two acres and he sold to Kamande. The shamba was 12 acres in whole. After giving to John, Maina, Kiome and he sold two acres to Kamande leaving four acres. Due erosion taking away part of the four acre piece, three acres remain for distribution. John Macharia has sold his share to Kamande.”
42. Her testimony was corroborated by the area manager, the pastor and the brother-in-law to the deceased, AW2, AW3 and AW4 respectively. AW2 testified on cross examination that, “I know that Mburu and his wife Lydia Gatiabi had bought a plot at Kiirua and a shamba at Ntumburi. The Ntumburi land was almost 2 acres as I heard from John Mburu. It was given to Macharia. He given 2 acres to Macharia and the rest he kept for himself. I was told by Mburu. Only Mburu and Gatiati lived on the plot which was a house made up of 3 rooms.”
43. In re-examination, he stated that, “Lydia and Mburu lived for 8 years from the time we bought as plot at Kirima where we were neighbours. She had 2 children, one of whom is also deceased leaving Sammy who lives at Kiirua.”
44. AW3 testified that, “I got to know the family in 2005. I know they bought a plot in Kiirua. Mburu told me he had given a piece of shamba for Macharia. I said they lived together as husband and wife. It happened to be a customary marriage.”
45. AW4 testified that, “I knew Francis Mburu. He had married my sister. My sister was called Monica Cheche. When they married they lived together for a long time and Francis Mburu had other 5 children 3 boys and 2 girls with a previous marriage. The first was John Macharia, 2nd Kiumbe, 3rd Maina; Njeri who died and left one child. Sammy Mwenda was left by 5th child of the deceased. Lydia was the wife of Mburu after Cheche left Mburu. Mburu said he wanted a lady from Meru and he married Lydia Gatiati. They lived as husband and wife as he had lived with Cheche. He lived with, Lydia at a rented plot at Kiirua and later bought a plot near Kiirua Primary School from one John Gatimi. They lived there with Lydia doing their business. In the land, we continued to live together and Mburu became sick after about 2 years. Lydia is the one who was looking after him. Mburu called us and told us his land at Ntumburi was distributed to Macharia 2 acres; Kiumbe 2 acres and Maina 2 acres. It was 6 acres from the children. Macharia sold his 2 acres to one villager called Manyara, also known as Kamunde. I attended Mburu’s funeral. We had no problem with Lydia. We had done the marriage from Lydia in



- accordance with Kimeru Customary Law. On the burial date, Lydia was there and she is the one who was directing and leading the burial as a wife of the deceased.”
46. On cross examination by counsel for the Protestor, he stated that, “Lydia and Mburu were married. They had married according to Kimeru customary law. We went for Lydia from her home at Chugu. Lydia had been married and there were witness like Murungi and other, who are alive. I visited Macharia and Lydia several times because they were our neighbours and we had no grudge between Mburu and Cheche and we could visit any time.”
 47. On cross examination by counsel for the Interested Party, he stated that, “I know Nancy Mwendwa. She is a daughter of Mburu. She is alive.”
 48. In her uncontroverted testimony which was corroborated by the Applicant, the Protestor, PW2 and AW4, RW1 Nancy Mwendwa affirmed that, “Francis Mburu, the deceased was my father. John Macharia is my brother. Lydia Gaitibi is my step-mother.”
 49. From the totality of the evidence of the Applicant as juxtaposed with that of the Protestor/Petitioner, it is crystal clear that the deceased, who died intestate was survived by the Applicant, the Protestor, Nancy Mwendwa and Samuel Mwenda. Samuel Mwenda is the son to a daughter of the deceased namely Margaret Muthoni, who is also deceased. Samuel Mwenda therefore rightfully steps into the shoes of his deceased mother, Margaret Muthoni, to take her share, in accordance with section 41 of the *Law of Succession Act*, which provides as follows:

“Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”
 50. While the Protestor urges that LR No. Kibirichia/Ntumburi/1371 is registered in his name having been given to him by the deceased, the court finds that the same forms part of the estate of the deceased, as vividly shown by certificate of official search dated 22/8/2015. The parties concede that the Protestor was bequeathed 2 acres of LR No. Kibirichiaantumburi/1371 by the deceased.
 51. The Applicant has magnanimously proposed that the said parcel of land devolves wholly to the Protestor, his prior sale of 2 acres thereof to Manyara Alias Kamande notwithstanding.
 52. The record shows that the deceased herein was survived by a wife, 2 children and a grandson. Nancy Mwendwa and Margaret Muthoni (now represented by her son Samuel Mwenda) are on par with the Protestor as children of the deceased irrespective of their gender and/or marital status and they are entitled to an equal share of their deceased father’s properties.
 53. The court undoubtedly finds that the mode of distribution proposed by the Applicant at paragraph 6 of the affidavit in support of the summons for confirmation of grant is more equitable and just. The Protestor’s mode of distribution is inequitable, self-serving and skewed towards disinheriting the other rightful beneficiaries of the deceased.
 54. The Protestor’s protest dated 16/10/2020 lacks merit and it is hereby struck out.



Orders

55. Accordingly, for the reasons set out above, the Grant of Letters of Administration jointly issued to Applicant and the Protestor on 29/1/2020 is hereby confirmed for the distribution of the Deceased's estate as follows:

1. LR No. Kiirua/Kiirua/968 measuring 0.019 Ha to go wholly to Lydia Gaitiabi Paulino.
2. LR No. Kibirichia/Ntumburi/1371 measuring 0.80 Ha to go wholly to John Macharia Mburu.
3. LR No. Kibirichia/Ntumburi/1374 measuring 1.48 Ha to be shared between Nancy Mwendwa and Samuel Mwenda in equal shares.

56. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 19TH DAY OF DECEMBER 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Mrs. Ntarangwi for the Applicant.

Mrs. Kaume for the Petitioner.

Ms. Nelima for Nancy Mwendwa Interested Party.

