



REPUBLIC OF KENYA



**In re Estate of M'Ikenda Kathumbi (Deceased) (Succession Cause  
688 of 2015) [2023] KEHC 884 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 884 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
SUCCESSION CAUSE 688 OF 2015**

**LW GITARI, J**

**JANUARY 24, 2023**

**IN THE MATTER OF THE ESTATE OF M'IKENDA  
KATHUMBI ALIAS IKENDA BURURIA  
(DECEASED)**

**BETWEEN**

**ALBERT MBAKA IRAMBU ..... PETITIONER**

**AND**

**JULIET KAGENDO MATI ..... 1<sup>ST</sup> PROTESTOR**

**ALEX GITONGA KATHUMBI ..... 2<sup>ND</sup> PROTESTOR**

**NJAGI MAGITI ..... 3<sup>RD</sup> PROTESTOR**

**ALBINA KAARI MAGITI ..... 4<sup>TH</sup> PROTESTOR**

***(Formerly Meru HC SUCC NO 460 OF 2013)***

**JUDGMENT**

1. This matter relates to the estate of M'Ikenda Kathumbi alias Ikenda Bururia (deceased) who died intestate on April 1, 1984.
2. The deceased had only one property that comprised his estate, that is, Karingani/Muiru/638 that measures 1.10 Hectares.
3. A grant of letters of administration of the subject estate was made to the Petitioner on February 6, 2019. He proceeded to file a summons for confirmation of grant dated 19/7/2019 and proposed a mode of distribution of the estate to the beneficiaries. This was met with protests by the protestors who filed affidavits of protests. The court directed that the protests be heard by way of 'viva voce' evidence.



## The Protestors' Case

4. PW1 was Juliet Kagendo, the 1<sup>st</sup> Protestor in this case. She adopted her evidence of protest and statement dated July 16, 2020 as her evidence. PW1 stated that she is the first born to the deceased and is followed by the late Buba, Albina Kaari, Njagi, Gitonga, and Keren Muthoni. According to her, the Petitioner is her cousin and not a son of the deceased. That deceased owned land parcel no. Karingani/Muiru/638 where they live. She produced a copy of the certificate of official search as Exhibit 1.
5. It was her testimony that the Petition was filed by Buba who is now deceased. She maintained that Albert Mbaka is not a dependant of the deceased as the deceased only had six (6) children. That the said Albert Mbaka owns the land parcel known as Karingani/Muiru/1165, she produced the copy of the search as Exhibit 2. That the father of Albert is Irambu Magiti was the father to the deceased. It was thus her case that Albert should inherit from his father and not the deceased. On cross-examination, PW1 stated that the deceased was never given the land by the clan but rather, he bought the said land. That there are people who were buried in the subject land including Albert's mother, one Kenda Mbururia, one Mbirunda, and Albert's late sister, one Esther. According to PW1, the family objected the burials on the land but the said people were interred while the family was pursuing a case in court.
6. PW2 was Alex Gitonga Jathumbi, the 2<sup>nd</sup> Protestor herein. He relied on his affidavit of protest dated November 15, 2019 and adopted together with his statement filed on July 16, 2020 as his evidence. It was his testimony that the deceased is his biological father and that his siblings included Juliet Kagendo, Albina Kaari, Njagi, Karen Muthoni, and Mbuba. He corroborated PW1's testimony that the Petitioner herein is their cousin and refuted the allegation that the deceased did not have children. That the deceased was married to their mother, one Charity Ciakanguru and that the subject land parcel belonged to the deceased. He further stated that Albert's brothers, one Patrick Nyamu and Erastus Mutegi forced their way onto the subject land after the demise of the deceased, which was before demarcation of the land. He thus prayed for the said land to be given to the 1<sup>st</sup> Protestor, who is their eldest sister, for purposes of distributing the same to his other rightful siblings.
7. PW3 was Mbiuki Murang'a alias Tarasius Nduru. He stated that both names referred to him and adopted his statement as his evidence. He further stated that he knew the deceased was married to Charity Ciakathiunguru and that the two had six children in total including Juliet, the late Mbuba, Kaari, Njagi, Kaagura and Gitonga. It was his evidence that he knew the deceased very well and knows that the Petitioner is the son of Irambu Magiti and not the son of the deceased. He also testified that the subject land belonged to the deceased and should therefore be distributed among the children of the deceased.
8. PW4 was Albina Kaari Magiti, the 4<sup>th</sup> Protestor herein, and one of the children of the deceased. He adopted his statement as his evidence and corroborated the testimonies of his co-protestors that the Petitioner is his cousin and not a son of the deceased.
9. PW5 was Augustine Njagi Magiti, the 3<sup>rd</sup> Respondent herein. He adopted his affidavit of protest sworn on November 17, 2019 as well as his statement dated July 15, 2021 as his evidence. It was his testimony that he is among the children of the deceased. He equally corroborated the testimonies of his co-protestors that only the children of the deceased should get a share of the estate he left behind.

## The Defendants' Case

10. The Petitioner testified as DW1. He maintained that the protestors are his siblings and that their parents were Esther Keru, Charity Ciakarunguru, and that their father was Irambu Mwiria. He stated the deceased is his uncle and is the one that brought them up. He conceded that the said Irambu



Mwiria was his biological father and stated that his father had two (2) wives and twelve (12) children. According to him, the deceased did not have children and took care of them because their father was a drunkard. That the area Chief subdivided the land into various parcels and each of them were shown where they were to live. He further stated that land parcel number Karingani/Mwiru/1155 was his own land having purchased the same with his own money.

11. DW2 was Jerevasio Ndeke, the assistant chief of Karongoni sub-location. She recalled that sometime in 2013, two brothers, Benard Bumba and Alex Gitonga went to her office. They wanted an introductory letter to enable them file a succession cause. Since DW2 alleged to know the family members in their family, she told them to go and call all the beneficiaries. DW2 alleges that the two brothers offered to give her Kshs 10,000/= but she declined their offer. It was also her evidence that the said brothers never came back but she was later called to the office of the DDC regarding a complainant that she had written an introductory letter and issued the same to some family members while leaving others. DW2 denied the allegation contending that the signature of the letter she was shown was not hers. She stated that she then recorded a statement but did not know what transpired consequently until she was summoned to appear before this Court.

### **The Submissions**

12. The Protestors filed their submissions on May 11, 2022. They submitted that the Petitioner is a nephew of the deceased and therefore has no right over the subject estate. According to the Protestors, they are the true and only children of the deceased and that as such, they should be the only ones inheriting the estate. The Protestors maintained that the Petitioner did have a different parcel of land elsewhere where he lives with his family and ekes a living and could therefore not purport that he was being maintained by the deceased prior to his demise. He therefore urged this court to allow the protest and that fresh letters of administration be issued to Juliet Kagendo Mati, who they allege is a daughter/child to the deceased.
13. The Petitioner, on the other hand, filed his written submissions on October 7, 2022. It was his submission that the protesters herein are the children of the deceased from the second house while the petitioner herein and other beneficiaries are children of Irambu Bururia from the first house. It was thus his case that while the Petitioner is a nephew of the deceased, the protesters are also nieces and nephews to the deceased. He relied on the provisions of Section 29 and 66 of the *Law of Succession Act* to argue the order of priority did not exist in this case. He further relied on the case of *re Estate of the late M'thigai Muchangi (Deceased)* [2020] eKLR and urged this court to dismiss the protest on a finding that the protesters have failed to prove their case.

### **Analysis**

14. I have considered the protest, evidence adduced before this Court and the respective submissions by the parties. The issues that arise for determination are:
  - a. Whether Petitioner and the Protestors are dependants of the deceased;
  - b. What mode of distribution of the deceased's estate should be applied in the circumstances?

#### **a. Whether the Petitioner and the Protestors are dependants of the deceased**

15. Section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides that:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration



shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;...”

16. The Petitioner claims that the deceased did not have a wife or children. That in accordance with Sections 29 and 66 of the Law of Succession Act, the person or persons in order of priority to petition for a grant of representation of the deceased’s estate was his wife and children. In the absence of a spouse and children, the Petitioner claims that the persons with priority would have been the parents of the deceased, and in their absence, the next in line would have been his brother but he claims that he too is deceased. As such, the Petitioner claims that the only logical beneficiaries to the estate of the deceased are the children of Irambu Bururia, the deceased’s brother.
17. The current assistant chief Karangoni sub-location helped shed some light in the matter. According to her, she know all the parties on this matter as the children of the late Irambu Bururia, the brother to the deceased herein. According to the Petitioner, the late Irambu Bururia had two wives and twelve children namely:
  - a. Patrick Nyamu
  - b. Benard Mbuva
  - c. Eustace Mutegi
  - d. Njagi Maguti
  - e. Albina Kaari Magiti
  - f. Alex Gitonga
  - g. Karen Kaguze Muthoni
  - h. Juliet Kagendo
  - i. Remty Kanini
  - j. Rosemary Kagendo
  - k. Ciathuni Maguti
  - l. Alex Mbaka Irambu
18. The Petitioner’s testimony that the late Irambu Bururia had two households was corroborated by the evidence of the assistant chief (DW2). In contrast, the Protestors contend that the rightful beneficiaries of the deceased were those listed in the assistant chief’s letter drawn by the then area chief, Elisia Kawira Kanga. These are:
  - a. Benard Mbuba Kathumbi
  - b. Njagi Magiti
  - c. Juliet Kagendo
  - d. Alex Gitonga Kathumbi



- e. Alibina Kaari
- f. Kellen Kaguna

19. The said Elisia Kawira Kanga is since deceased and DW2 testified before this court that the letter relied upon by the Protestor as having been authored at the chief's office was never verified. In the circumstances of this case, it is my view that some of the beneficiaries of the deceased indeed hatched a plan to have the succession proceedings commence at the exclusion of others. This unlike the petitioner who has listed all the beneficiaries. Section 29 of the Law of Succession Act provides:

“

- “(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.”

The protestors have not come to court in good faith. They did not come to equity with clean hands. They did not prove with evidence. They did not prove with evidence that they are children of the deceased. Indeed none bore the name of the deceased. I find they are not the only dependants of the deceased. They qualify as dependants just like the petitioner. The court has the sole discretion to determine the question as to who between the parties in the dispute is closest and affinity, Section 66 (supra) refers. Section 39 of the Law of Succession Act on the other hand provides:

- “1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-(a)father; or if dead(b) other; or if dead.”

I should therefore base the determination on the evidence tendered by the parties. To this and I find that the petitioners evidence is credible. The petitioner and the protestors are closest relatives of the deceased and therefore dependants.

#### **b. Distribution of the Estate**

20. The Petitioner, at paragraph 4, of his affidavit in support of summons for confirmation of grant proposes that the estate of the deceased, the same being LR No Karingani/Muiru/638 (measuring approximately 1.10 Ha) be distributed as follows:

- a. Albert Mbaka Irambu – 0.38 Acres
- b. Eustace Mutegi – 0.38 Acres
- c. Patrick Njagi Magitibu – 0.38 Acres
- d. Benard Mbuba Kathumbi – 0.38 Acres
- e. Alex Gitonga Kathumbi – 0.38 Acres
- f. Njagi Magiti - 0.38 Acres



- g. Lenity Kanini Mbaka
- h. Rosemary Kagendo Jediel - 0.22 Acres
- i. Grace Cianthuni
- j. Juliet Kagendo Mati
- k. Alibina Kaari Magiti - 0.22 Acres
- l. Karen Muthoni

21. I find that based on the evidence tendered by the petitioner and the chief, the above proposed mode of distribution is equitable in the circumstance of this case. The upshot of this, therefore is that the protests by the protestors must fail and the summons for confirmation of grant be confirmed as prayed.

**In conclusion:**

I find that the protests have no merits and are therefore dismissed

The summons for confirmation of grant is allowed. The estate be distributed as proposed by the petitioner at paragraph 21 above.

I make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 24<sup>TH</sup> DAY OF JANUARY, 2023.**

**L.W. GITARI**

**JUDGE**

**24/1/2023**

The Judgment has been read out in open court.

**L.W.GITARI**

**JUDGE**

**24/1/2023**

