



In re Estate of M’ragwa Iburu alias Ragwa Kiburu (Deceased) (Succession Cause 150 of 2015) [2023] KEHC 737 (KLR) (24 January 2023) (Judgment)

Neutral citation: [2023] KEHC 737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
SUCCESSION CAUSE 150 OF 2015**

LW GITARI, J

JANUARY 24, 2023

**N THE MATTER OF THE ESTATE OF M’RAGWA
IBURU ALIAS RAGWA KIBURU (DECEASED)**

BETWEEN

ELIPHAS KAMUNDI M’ARAGWA PETITIONER

AND

JOHN GITONGA MURUNGI PROTESTOR

(FORMERLY CHUKA S.P.M. SUCCESSION CAUSE NO. 68 OF 2008)

JUDGMENT

1. This is a very old matter which was first filed in court in 2008. It is therefore important to give a brief background of the matter upto the point where the applicant has brought the present application.
2. Upon the death of the deceased, John Gitonga Murungi, now the protestor herein, petitioned the court in Succession Cause No 68/2008 in the Principal Magistrate’s Court at Chuka for the grant of letters of administration intestate. The protestor stated that he presented the petition as a son of the deceased.
3. The present petitioner Eliphas Kamundi M’Ragwa objected and filed a petition by way of cross-application for grant. His contention was that he was the only surviving son of the deceased who ranked in priority as opposed to the petitioner who is a grandson. He also filed a caveat dated 26/6/2008 and an objection of even date together with an answer to the petition. He contended that he was not consulted and did not sign a consent when the petition was filed and as a son he should be the one to administer the Estate.
4. *Vide* a consent filed in court on 25/3/2010 and dated October 24, 2010, the grant of letters of Administration was issued jointly to John Gitonga Murungi and Eliphas Kamundi M’Ragwa. The parties were to agree on the mode of distribution but if they failed to agree, each party was to file its



proposed mode of distribution for the court to make a determination. The grant was however revoked on 10/5/2017 and Eliphas Kamundi was appointed administrator and a fresh grant was issued.

5. On December 14, 2010 the Administrator, Eliphas Kamundi M'Ragwa, filed a summons for confirmation of grant and proposed a mode of distribution whereby he was to get a portion of 9.3 acres out of Land Parcel No Mwimbi/Kiogora/5XX while John Gitonga Muriungi would get 0.98 acres.
6. On the other hand, the protestor filed an affidavit in support of the summons for confirmation of grant and proposed that the said land parcel be distributed as follows: John Gitonga - 1.0 Acres Eliphas Kamundi M'Ragwa - 6.33 Acres Nicholas Kinyua M'Ragwa - 3.0 Acres
7. Affidavits of protests were filed by Nicholas Kinyua M'Ragwa, claiming a grandson; Dores Nyawira Murungi, with eight others claiming that the deceased is their grandfather and further that they had lived on the said land parcel. They further claimed that the deceased had made a will giving the petitioner one acre and Harriet Mukwanyaga M'Ragwa three acres out of the remaining 10.33 acres. They therefore opposed the mode of distribution proposed by the petitioner. The interested parties claimed that they were entitled to 3.16 Acres out of Mwimbi/Chogoria/5XX.
8. This claim by the interested parties was opposed by the petitioner who claimed that they are children of his late brother Kanampiu M' Aragwa who owned. Land Parcel Number Mwimbi/Chogoria/3XX which was distributed to his beneficiaries. His contention is that the interested parties have no claim in the estate of the deceased.
9. Eventually, on 10/5/2017 by consent of all the parties, the grant issued to the petitioners on 25/3/2010 was revoked by the order of this court, Justice Limo. The Judge then appointed Eliphas Kamundi the administrator of the estate of the deceased. The said administrator was ordered to apply for confirmation of the grant before the expiry of six months with notice to all the parties.
10. The petitioner filed a summons for confirmation of grant dated 27/9/2018. On 1/11/2018, Mr IC Mugo, counsel for the interested parties informed the court that they had no objection for the proposed mode of distribution of the estate by the administrator in the application dated 27/9/2018.
11. The proposed mode of distribution was however not acceptable to the protestor and he filed an affidavit of protest dated October 17, 2018. The court gave directions that the protest be heard by way of viva voce evidence. The protest is therefore the subject of this Judgment

The Application

12. By an application dated September 27, 2018, the Petitioner sought confirmation of the letters of administration intestate made to him on May 10, 2017 in respect of the estate of the deceased in this matter, the late M'Ragwa Iburu alias Ragwa Kiburu (deceased) who died on March 26, 1987.
13. At paragraph 9 of the affidavit in support of the subject summons for confirmation of grant, the Petitioner proposed the following mode of distribution of the deceased's estate:
 - i. Dores Kanyua – 1 ½ Acres
 - ii. Bridget Karimi Dishoni – 1 ½ Acres
 - iii. Esther Ruguru Kiburi – 1 ½ Acres
 - iv. Eliphas Kamundi M' Aragwa – 1 ½ Acres
 - v. Lilian Igoki Njagi – 1 ½ Acres
 - vi. Nicholas Kinyua – 1 ½ Acres



- vii. John Gitonga Murungi
Dores Kawira Murungi
Mercy Kagendo Murungi
Jackline Gatakaa Murungi
Stella Mukwaiti Murungi 1 ½ Acres registered in
Lenah Kathambi Murungi their joint names
Mary Kananu Murungi
Erick Mutura Murunga
Martin Mwenda Murungi
- 14. In response to the said Application for confirmation of grant, John Gitonga Murungi, a grandson of the deceased, filed an affidavit of protest sworn by himself on October 17, 2018.
- 15. In the aforesaid affidavit of protest against confirmation of grant by the Protestor, he lists the following people as beneficiaries of the deceased's estate:
 - i. Jesca Nau M'Ragwa – Widow (Deceased)
 - ii. Dores Kanyua Julius – Daughter
 - iii. Kanampu M'Ragwa - Son (Deceased)
 - iv. Bridgit Karimi Juma – Daughter
 - v. Esther Ruguru Kiburi – Daughter
 - vi. Harriet Mukwanyaga M'Ragwa – Daughter
 - vii. Eliphas Kamundi M'Ragwa – Son
 - viii. Lilian Igoki Nkagi – Daughter
 - ix. John Gitonga Murungi – Grandson
 - a. Dores Kanyua - 1.36 Acres
 - b. Bridget Karimi Dishoni - 1.36 Acres
 - c. Esther Ruguru Kiburi - 1.36 Acres
 - d. Eliphas Kamundi M'Ragwa - 1.36 Acres
 - e. Lilian Igoki Njagi - 1.36 Acres
 - f. Nicholas Kinyua - 1.36 Acres
 - g. John Gitonga Murungi - 1.00 Acres
 - h. Dorris Kawira Murungi
Jackline Gatakaa Murungi
Stella Mukwaiti Murungi
Lenah Kathambi Murungi 1.36 Acres jointly



Mary Kinaru Murungi
Erick Mutura Murungi
Martin Mwenda Murungi
Total- 10.5 Acres

Petitioner's Case

16. PW1 was the Petitioner herein, Eliphas Kamundi M'Aragwa. He stated that the Protestor is a son of his late brother. He relied on his affidavit sworn on September 27, 2018 as his evidence in chief. He testified that the estate of the deceased comprised of LR Mwimbi/Chogoria/5XX (the "suit land") and denied the allegation that his father gave the Protestor any land. He stated that the Protestor, his mother and his siblings live on LR Mwimbi/Chogoria/3XX which formed part of the estate and which the deceased had given to the Protestor's father.
17. On cross examination, PW1 testified that the Protestor's mother did put up a home in parcel LR Mwimbi/Chogoria/5XX which is the only land that comprised the estate of the deceased. He stated that the Protestor's mother lived there temporarily before moving to LR Mwimbi/Chogoria/3XX. He acknowledged that he had previously filed another succession cause, the same being, Chuka SPM Succession Cause No 68 of 2008 and that in paragraph 5 of his affidavit in support of the summons of confirmation of grant dated December 14, 2010, he had stated that the estate should be distributed between himself and the Protestor in the proportion of 9.35 acres and 0.98 acres respectively. According to PW1, the children of his late brother Kanampiu were not entitled to the estate. He acknowledged that he had sworn an affidavit on September 27, 2018 in support of the summons of confirmation of grant herein. He also acknowledged that in paragraph 9 (vii) of the said affidavit, he included children of his late brother Kanampiu. He stated, however, that he had now changed his mind and that the said children are not entitled to the estate of the deceased while the children of his late sister, on the other hand, are entitled to a share.
18. PW2 was Esther Ruguru, a daughter to the deceased. She adopted as evidence her affidavit which she swore on October 31, 2018. She stated that the deceased lived on LR Mwimbi/Chogoria/5XX and bought Parcel No 3XX which he gave to the late Kanampiu. She deposes the affidavit of protest is founded on lies and mirepresentation only meant to mislead the court. She deposes that the protestor is the son of Kanampiu M' Aragwa who was a son of the deceased. The protestor filed Succession Cause No169/2009 in the Estate of his late father and he currently lives on his father's land. She however deviated from this averment and said that the deceased had marked the boundary of the 1 acre that the Protestor was to receive. She further stated that the deceased wanted that the daughters of the late Kanampiu to stay in 1 acre of LR Mwimbi/Chogoria/5XX. In cross-examination she stated that the deceased was clear that the protestor was to reside on land parcel Number 3XX where his father lived.
19. PW3 was Doris Kanyua, another daughter of the deceased. It was her testimony that the deceased used to tell them how his land would be inherited. She corroborated PW2's testimony that the deceased gave the late Kanampiu land parcel No LR Mwimbi/Chogoria/3XX. She also stated that the Protestor lives in LR Mwimbi/Chogoria/3XX and that the other children of the late Kanampiu live on the land of the deceased. She further stated that the son of the Protestor, who is namesake of the deceased, was the one given one acre by the deceased and that the Protestor built a house on his father's land. On cross examination, she acknowledged signing an affidavit in which she deposed that the Protestor was given land by the deceased. She testified that the late Kanampiu was the only child of the deceased who was given land by the deceased as he was the eldest and that after he died, the Protestor started utilizing that land. She also stated that the other children of the deceased utilize the land of the deceased.



20. PW4 was Bridget Karimi, a daughter of the deceased. She stated that she was in agreement with the proposed mode of distribution by the Petitioner as the Protestor utilizes his father's land and has built there. On cross examination, she stated that she attended the meeting held on May 11, 1985 which was called by the deceased. She denied that the deceased stated in that meeting that one acre of his land be given to the Protestor.

Protestor's Case

21. The Protestor testified as DW1. He stated that the deceased was his grandfather. He relied as his evidence his affidavit which he swore on October 17, 2018 as his evidence. He stated that the estate of the deceased measures 11 acres and that his claim is one acre. It was his testimony that the one acre which he is claiming was given to him by the deceased in 1985. That he fenced the said land and planted coffee. He thus stated that he was not agreeable with the mode of distribution proposed by the Petitioner. On cross examination, the Protestor stated that LR Mwimbi/Chogoria/3XX was owned by his father and not the deceased. That he filed a succession cause in respect of his father land and a grant was issued to him. He alleged that he was holding the land in trust for his siblings but admitted that the grant he obtained did not indicate so. He also admitted that he has built on LR Mwimbi/Chogoria/3XX but stated that he has also built on the land of the deceased.
22. DW2 was M'Basiti Mwirichia. He adopted as his evidence his affidavit which he swore on October 17, 2018. He corroborated the Protestor's evidence by stating that on May 11, 1985, the deceased called the family members and indicated that he wanted to give land to the Protestor. He further stated that he gave the Protestor a portion of land and also gave land to a child of one of his daughters. According to him, surveyors were called and they placed beacons on the portion of land given to the Protestor. On cross examination, DW2 stated that women were not allowed in the meeting that the deceased called for and that in the meeting, there was no one who was writing the minutes.
23. DW3 was Julius Njeru Bauni, a nephew of the deceased. He relied as his evidence his affidavit which he swore on October 17, 2018. It was his testimony that in 1985, the deceased called for a meeting stating that he wanted to give land to his grandchildren. He stated that after the meeting, he went to the land together with DW2 and one Obed Bauni and subdivided the portion near the road which was to be given to the Protestor. He stated that he is the one who wrote the wishes of the deceased in a document which was produced before court. He further stated that the rest of the land was left for the deceased and that the Protestor constructed a stone walled house for his mother in the portion of land which he was given. That the Protestor then built his house in his father's land. It was DW3's testimony that although one Kinyua Maragua Koome was a young child at the time the minutes of the meeting were reduced into writing, he signed his part. He also stated that although children never used to attend meetings under Meru customs, they were present but stayed aside and did not participate in the meeting.
24. Directions were then given by this court on the filing and service of the parties' respective submission. However, none of them complied. This court thus ordered on October 4, 2022 that it would proceed to give the judgment without the said submissions.

Issues for Determination

25. From the pleadings and evidence on record, the following issues arise for determination by this court:
- i. Who are the beneficiaries of the deceased?



- ii. Whether the protestor is entitled to one acre of the deceased's parcel of land, the same being LR Mwimbi/Chogoria/5XX.
- iii. How should the estate of the deceased be distributed?

Analysis

a. Who are the beneficiaries of the deceased?

26. Section 29 of the [Law of Succession Act](#) sets out the meaning of the term 'dependant' as follows:

“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, grandparents, 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.”
27. On the other hand, the Petitioner listed the same persons save for Jesca Nau M'Ragwa (deceased) and John Gitonga Murungi.
28. In the Petition for a grant of letters of administration, the Petitioner listed all the beneficiaries listed by the Protestor in paragraph 15 above and added the following persons:
- i. Nicholas Kinyua M'Ragwa
 - ii. Erick Mutura Murungi
 - iii. Martin Mwenda Murungi
29. The Protestor, is the son of Kanampiu M'Ragwa (deceased) who is a son of the deceased in this cause, and hence the grandson of the deceased. He built on the suit land during the lifetime of the deceased. Going by the definition of a dependant, he qualifies to be a beneficiary who must prove that he was being maintained by the deceased as provided under Section 29(b) (*supra*).

b. Whether the protestor is entitled to one acre of LR Mwimbi/Chogoria/5XX

30. From the evidence adduced by the parties, it is evident that LR Mwimbi/Chogoria/5XX (the “suit land”) is the only property that constitutes the estate of the deceased. The copy of search in respect of the same clearly indicates that the suit land measures approximately 11 Acres and was registered in the name of the deceased, Ragwa Kiburu, on December 9, 1967.
31. It is the Protestor's contention that on May 11, 1985, the deceased herein bequeathed to him a portion of land measuring one (1) acre during a family gathering he had convened. He deposed that the wishes of the deceased were reduced into writing by one Julius Njeru Bauni in a document which he produced before this court as his evidence.



32. The document referring to the minutes of the alleged meeting that was held on May 11, 1985 was translated from Mwimbi to English by Basilio Gitonga on February 3, 2022. The contents of the translated version read as follows:

Bequethal of My Land

Date– 11TH -5-1985

Today, me M'Ragwa Kiburu I bequeath Mukwanyaga a piece of land and I again bequeath John Gitonga a piece of land to build for his mother.

I sub-divide in favour of Gitonga bordering the road and Mukwanyaga on the lower side bordering Pharis. And I further provide an access road bearing a width of ten feet to allow Mukwanyaga reach the main road.

The rest of the land remains mine, me M'Ragwa.

This action I have undertaken in the presence of the following family members.

1. Josiah M'Mantu
2. Obed Bainsi
3. Basti Mwirichia
4. Asaph Marangu
5. Julius Njeru
6. Mrs Joyce Murngi
7. Kinyua M'Ragwa
8. Koome Juma.

Me, M'ragwa s/o Kibiru, I have done this in the presence of all those people without any single objection.

I have done this today 11-5-1985 and nobody should alter it.

Signature

Thump print

33. The Protestor stated that in the month of December 1985, he took possession of the said portion of land and fenced it and that presently, he has developed land. He produced photographs of the developments on the land as evidence of the same. The Protestor thus stated that he was not agreeable to mode of distribution proposed by the petitioner as the same would result in his displacement.
34. My view is that this document is not authentic for the following reasons. It should not escape the mind of this court that the protestor is the one who filed succession in the estate of the deceased Ragwa Kiburu alias M'Aragwa Kibiru way back in 2008. At paragraph 4 of the affidavit in support of the Petition; he listed twelve dependants him being one of the dependants. In the petition for letters of administration, he stated he was presenting the petition in his capacity as a son of the deceased. It is worthy noting that the protestor did not attach any consent from other beneficiaries allowing him to file the Petition of Letters of Administration of the estate of the deceased. After the objection was filed, the protestor in an affidavit sworn on 27/1/2011 in support of summons for confirmation of grant, claimed from the estate of the deceased without any indication that he was given the land by



the deceased in his lifetime. He also proposed to give Nicholas Kinyua M'Ragwa 3.0 acres another grandson of the deceased. It is my finding that the protestor is not truthful. He lied that he was a son of the deceased. He never relied on the said agreement when filing the petition. Upto this stage he has not proved dependency on the deceased during his lifetime. It therefore leaves this court in the darkness as to why the deceased would wake up one morning and decide to give him land. It should also not escape the mind of this court that the original of this documents was not produced in court as exhibit for the court to assess it and confirm that indeed it is a document which was made in 1985. The Law on documentary evidence is well settled. It is that contents of a documents must be proved with primary Evidence. Primary Evidence means the documents produced for inspection by the court, see Section 65 (1) of the *Evidence Act*, cap 80 Laws of Kenya. The law requires that documents must be proved by primary evidence. Section 67 of the *Evidence Act* (supra) provides-

“Documents must be proved by primary evidence except in the cases herein after mention.”

The conditions of proof of documents by secondary evidence were not established. The law requires that he who alleges must proof. see Section 107 & 108, &109 of the *evidence Act*, supra.

“Burden of proof

- 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.Incidence of burden

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.Proof of particular fact.

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.”

This is the burden of proof. The onus of proof was on the protestor to proof that indeed the deceased bequeathed one acre parcel of land under the said document by producing the primary document. The protestor was required to adduce cogent and credible evidence. This is the incidence of legal burden of proof. The evidential burden on the other hand is on the party who may loose if no sufficient evidence is adduced to the required standard in support of the allegation. The legal burden in a case is always on the claimant and rests with him throughout the trial, that is to say the claimant who alleges must proof. The protestor has not adduced sufficient evidence to proof the authenticity of the said document which he purports that it bequeathed one acre of piece of land from the deceased's estate. The evidence in support of the allegation is contradictory. If the said document was bequeathing one acre to the protestor, he would have relied on it when filing the petition and claim one acre as a grandson and not as a son. This document was introduced only after the protestor's petition was challenged and he was eventually removed as an administrator.



I find that the document JGM1 annexed to affidavit of Nicholus Kanyua M'Aragwa in support of the protest is a fabrication which is not admissible.

35. The Petitioner adduce evidence that the protestor had filed succession in the estate of his deceased father, Kanampiu M'Ragwa was given Land Parcel Number Mwimbi/Chogoria/3XX during the lifetime of the deceased. This is supported by the green card ERK1 and a certificate of official search. Grandchildren are blood relatives to the deceased who would be automatically entitled to take a share which is due to their own parents, the biological children of the deceased where such biological children are dead. Grand children have a right under Section 39 & 41 of the Law of Succession Act.

I note that the Petitioner has proposed to give the protestor and his siblings 1½ (one and half acres). These are the children of Kanampiu Murungi a son of the deceased who pre-deceased the deceased herein. He has also proposed that each child of the deceased gets one and half acre (1½). The mode of distribution constitutes the equal distribution of the estate of the deceased to all the beneficiaries.

How should the estate be divided?

36. The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. Grandchildren are entitled to share equally the portion which their parent would have received. In my view, the estate of the deceased should be distributed as proposed by the Petitioner.

That is to say:

Land Parcel LR No Mwimbi/Chogoria/5XX

1. Dores Kanyua - 1 ½
 2. Bridget Karimi Dishoni - 1 ½
 3. Esther Ruguru Kiburi - 1 ½
 4. Eliphas Kamundi M'Aragwa - 1 ½
 5. Lilian Igoki Njagi - 1 ½
 6. Nicholas Kinyua - 1 ½
 7. John Gitonga Murungi
 8. Dores Kawira Murungi
 9. Mercy Kagendo Murungi
 10. Stella Mukwaiti Murungi 1½Acres registered
 11. Lenah Kathambi Murungi into their joint names
 12. Mary Kananu Murungi
 13. Martin Mwenda Murungi
37. The upshot is that the protest is without merits and is dismissed. The summons for confirmation of grant is allowed and distribution of the estate be as per paragraph 25 above.

Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 24TH DAY OF JANUARY 2023.



L.W GITARI

JUDGE

24/1/2023

Judgment has been read out in open court.

L.W. GITARI

JUDGE

24/1/2023

