



In re Estate of the Late Pauline Muthoni Gatu (Deceased) (Succession Cause 8 of 2019) [2023] KEHC 1069 (KLR) (20 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 8 OF 2019
CM KARIUKI, J
FEBRUARY 20, 2023**

IN THE MATTER OF THE ESTATE OF THE LATE PAULINE MUTHONI GATU (DECEASED)

BETWEEN

FRANCIS PAUL KERRE PETITIONER

AND

CECILIAN NYAMBURA GICHIA 1ST PROTESTOR

PATRICK WAMBUGU GICHIA 2ND PROTESTOR

LUCY NJAMBI GICHIA 3RD PROTESTOR

ANDREW GATU GICHIA 4TH PROTESTOR

JUDGMENT

1. Dr Francis Paul Kerre, the petitioner herein filed a summons dated December 2, 2020 for the confirmation of grant issued to him on August 11, 2019 in respect to the estate of Pauline Muthoni Gatu, the deceased herein who died testate. Upon filing of summons for the confirmation of the grant, Cecilian Nyambura Gichia, Patrick Wambugu Gichia, Lucy Njambi Gichia and Andrew Gatu Gichia, the protestors herein filed an affidavit against the confirmation of grant dated January 25, 2021.
2. The affidavit of protest against the confirmation of grant is predicated on the grounds on the face of the affidavit which are: -
 - I. That the deceased left a valid will dated June 9, 2016 which she had partly or had commenced the process of executing it while alive by obtaining a letter of consent and mutations were drawn and the process completed on the ground although she died prior to completing execution of the will.



- II. That among the beneficiaries who were put into possession of the entitlements such as Patrick Wambugu Wachira and Andrew Gatu Gichia took possession of their portions and developed them.
 - III. That the petitioner was shown his portion with beacons and was put in possession and he is aware of the fact.
 - IV. That the protestors together with the children of their late brother Charles Kariuki Gichia agreed that the status quo on the ground pertaining to title no Laikipia/Nyahururu/159 be maintained and the remaining work be completed leading to the registration and issuance of title deed by the same surveyor Mwaura who was paid Kshs 125,000/- for the purpose.
 - V. That the will is very clear that Andrew Gatu and Patrick Wambugu were to remain on the portions where they have built.
 - VI. That the deceased caused a 7th portion to be demarcated measuring 0.8ha out of the said parcel of the land which was to be hers and before her death she stated that the same be gifted to Charles Wambugu Gatu who is her grandson.
 - VII. That the protestors together with the deceased's brother children agreed that the portion of 0.8ha be registered in the name of Charles Wambugu Gatu as per the deceased's wishes although it is not reflected in the will.
 - VIII. That as per the mutations the total area subdivided in 19.72ha leaving a portion of 2.2ha which is marshy and joins to and forms part of a separate 5 acres dam which belongs to the government and the same was not bequeathed to any of them but the deceased wished all of her children to benefit from it as a grazing field.
 - IX. That the monies at Equity Bank account No xxxx ought to be shared equally among the children with Charles Kariuki's portion being shared amongst his three children.
 - X. That they take great exception in the manner in which the petitioner changed the name of the deceased in relation to Telekom Mobile Company into his own name and started receiving proceeds solely in his name yet it is contrary to the will and that he must render a true account of the proceeds.
 - XI. That in view of the fact that Andrew Gatu Gichia is a resident of the United Kingdom, his unavailability and costly air ticket in coming to Kenya and the untrustworthy manner, lone ranger and secretive manner in which the petitioner filed the citation, the instant succession cause, the application for injunction, the changing of Telekom Ltd names as well as filing of summons for confirmation of grant without their consent, the protestors are of the considered view that the grant should not be confirmed in his name only but it should be confirmed to the petitioner, Patrick Wambui Gichia and Lucy Njambi Gichia.
 - XII. That the portion of 50 by 100 ft out of the said parcel of land housing the Safaricom and Telekom mobile companies, the Equity Bank Account as well as the undistributed portion of 2.28 acres all be registered in the three names to hold in trust for the other beneficiaries.
3. On the other hand, the petitioner filed a supplementary affidavit dated February 26, 2022. He deponed that: -
- I. The deceased had not commenced the process of executing her will by allocating portions of land to her children and engaging a surveyor to subdivide the land.



- II. That he was aware of the fact that the surveyor referred to by the protestors was engaged by the 1st protestor to prepare the mutation form dated May 5, 2016 and no actual subdivision took place on the ground and there are no beacons confirming the subdivision proposed in the mutation form. He also denied that the surveyor was paid Kshs 125,000/- by the deceased.
 - III. That the deceased did not attend the land control board for the consent letter dated April 20, 2016 as at the time she was seriously ailing and confined in the house. If anything, the consent dated April 20, 2018 is not signed by the author and it only bears a stamp whose genuineness is challenged as it could have been prepared anywhere.
 - IV. That the mutation form dated May 5, 2016 is full of glaring irregularities and although it bears the stamp of the district surveyor on the 1st page the same was not registered at the lands registry to give it a legal effect and is not signed by the district surveyor on the last page as per the law required.
 - V. He denied being shown his portion of land and that he is possession of the said part of the parcel of land.
 - VI. That Andrew Gatu and Patrick Wambugu were shown the portions that they were to occupy by the deceased before her demise but Andrew Gatu has not developed his portion as it holds the matrimonial house which the petitioner personally assisted his mother to construct.
 - VII. That it is not true that the deceased caused a 7th portion of 0.8ha to be demarcated from the estate and that this would go against the will and that it is false that Charles Wambugu Gatu is entitled to the said portion.
 - VIII. That although the marshy area of approximately 2.28ha is to benefit all the beneficiaries the said mutation form has allocated the area to individual beneficiaries
 - IX. That it is not true that he beneficiaries are settled on the ground as per the mutation form and he prayed for the mutation form to be dismissed and disregarded and for the grant to be confirmed as per the petitioner's proposal and for a government surveyor to be authorized to subdivide the land on the ground as per the deceased will.
 - X. That save for Andrew and Patrick, the other beneficiaries should ballot for their portions upon subdivision by a government surveyor
 - XI. That the sum of Kshs 256,000/- paid by Telkom Ltd was shared equally among the beneficiaries including the protestors herein a fact they have concealed from the court.
 - XII. That he is opposed to Patrick Wambugu and Lucy Njeri being enjoined as administrators as that would go against the deceased's will and make it difficult for him to administer the estate and distribute the same as per the deceased's will due to lack of cooperation and antagonism by them.
 - XIII. That the grant be confirmed as prayed and the monies collected from the students occupying the main house from the date of the deceased's death be shared equally among the beneficiaries upon a full account being provided by the 4th protestor.
4. The 4th protestor also filed a replying affidavit dated January 21, 2021.
 5. Additionally, parties adduced viva voce evidence and later filed their submissions in support of their respective arguments.



6. Petitioner's submissions

7. The petitioner submitted that the will dated April 9, 2016 had not been challenged by the protestors but the objection raised to distribution as per the will was that the deceased has changed the mode of distribution in the will during her lifetime by sub-dividing the land as per the consent dated April 20, 2016 and a mutation form dated May 5, 2016.
8. It was argued that one of the protestors had engaged a scrupulous surveyor who subdivided the land contrary to the deceased wishes and that the deceased protested the same during her lifetime. That the deceased did not sign transfer forms transferring any of the subdivisions created in the mutation form to the beneficiaries and the land is still intact.
9. The petitioner asserted that the distribution in the mutation form is different from the one in the will and the protestors stand to benefit from the mutation by getting bigger shares of the estate than the petitioner whereas a person not provided for in the will i.e Charles Wambugu Gatu s/o of the 4th protestor is getting 2 acres in the mutation.
10. The petitioner pointed out that the suit land was to be subdivided into 7 equal portions after excision of a 50 by 100 ft plot covering the area occupied by mobile provider companies. Each of the deceased 6 children was to get a portion each whereas the 7th portion was to be distributed at a later stage and in default be treated as the undistributed part of the estate yet the mutation form had portions varying in sizes ranging from 3.34ha, 2.95ha and 3.15 ha.
11. The petitioner stated that no appeal was preferred against the ruling delivered on January 24, 2020, where this honourable court pronounced itself as follows: -
 - a. 'The alleged subdivision of the suit land on the ground unless implemented by the deceased and transfer effected on specific shares to the heirs cannot overtake a will.
 - b. If the said subdivision is not in accordance with the will of April 9, 2016 same can only be validated by the heirs by consent
 - c. In absence of that the assets have to be shared in accordance with the will annexed.'
12. It was proposed that the land be distributed as per the will save for Andrew Gatu and Patrick Wambugu who were to inherit the portions they have built as per the will; the other beneficiaries should ballot on their respective portions as per the subdivision scheme to be prepare by a government surveyor in line with the will. That the 7th portion should be shared out equally among the 6 beneficiaries.
13. In conclusion, the petitioner asserted that as for the monies payable by the mobile providers the beneficiaries proceed to supply payment account details to the mobile providers for payment to be made directly to them in equal shares.

14. Respondents/ protestors' submissions

15. The respondents/protestors asserted that they do not have trust in the manner in which the petitioner has been administering the estate and that the 4th protestor appoints the 2nd and 3rd protestor to replace him as he is out of the country most times.
16. It was contended that the mutation form dated May 5, 2016 does not deviate from the deceased' will. That after the making of the will the deceased called or a meeting where she expressed how the 7th portion was to be distributed and that the petitioner is the only one who didn't attend the meeting even after it was postponed for 6moth to accommodate him.



17. The respondents stated that from the 7th portion, 2 acres was to go to Charles Wambugu Gatu and the rest was to be shared equally among the children. That the deceased appointed the 3rd respondent to get her a surveyor and she brought Mr Mwaura who embarked on the subdivision process but the deceased passed away before the process was complete. That at the time of her demise, every beneficiary was aware and in possession of their portions as they had been shown by the deceased.
18. The respondents stated that the children of the deceased got an equal share save for the 3rd and 4th respondents and Charles Wambugu who was given two acres by the deceased during the family meeting. That the 3rd respondent gave a share of her portion to Andrew Gatu.
19. Further, they submitted that in the event that this court is inclined to order that the 2 acres be shared equally among the deceased's children, their share should be given to Charles Wambugu as per the deceased's will.

20. Analysis and determination

21. I have considered evidence adduced and submissions filed by parties herein and the main issue for determination is on the mode of distribution to be adopted by this court.
22. I am faced with two competing modes of distribution namely that of the protestors and that of the petitioner. The protestors' mode of distribution is per the mutation form dated September 1, 2016 following the subdivision by Mr Mwaura, the surveyor they state the deceased engaged before her demise. The protestors submitted that the deceased had commenced the process of executing it while alive by obtaining a letter of consent and mutations were drawn and the process completed on the ground although she died prior to completing execution of the will. They also stated that the deceased had distributed 2 acres of the undistributed portion of the suit land to one Charles Wambugu Gatu.
23. Contrarily, the petitioner's mode of distribution is primarily as per the will dated April 9, 2016.
24. The deceased's will dated April 9, 2016, the will herein is uncontested. The will declared the deceased intention of the parcel No Laikipia/Nyahururu/159, the suit land herein and stipulated that: -
 - a. A parcel of land measuring approximately 50 × 100 ft to be excised to cover the area occupied by mobile provider companies must to be registered in the names of the administrators in trust for all beneficiaries. Proceeds from the mobile phone companies to be shared equally among all my children. The share for my deceased son Charles Kariuki to be shared equally by all his children.
 - b. The remainder of the land to be divided into 7 (seven) equal portions. My children to inherit one portion each. The 3 children of my deceased son Charles Kariuki to inherit one portion in equal shares. My sons Andrew Gatu and Patrick Wambugu to remain on the portions where they have built. I will express my intention for the 7th portion at a later date in default in which it shall be treated as an undistributed part of my estate.

My children

I. Francis Kerre

II. Andrew Gatu

III. Cecilia Nyambura

IV. Patrick Wambugu

V. Lucy Njambi



The children of deceased son Charles Kariuki

I. George Kamau

II. Pauline Muthoni

III. Florence Wanjiku

25. Looking at the mode of distribution which the protestors assert is based on the wishes of the deceased, number of observations can be made: -
26. Firstly, the mutation form does not represent the deceased wishes that 6 equal portions be subdivided amongst the children including the children of her deceased son. The subdivision in the mutation are not equal.
27. PW1, PW2 and PW3 testified that the deceased had shown each of the siblings their portion and had procured the services of Mr Mwaura to subdivide the suit land on the ground according to the allocated portions. However, the mutation form that was produced is contradictory to the deceased's wishes as per the will and more so I am not convinced on the balance of probabilities that the land control board consent to subdivide the land was pursued by the deceased and was regularly issued and/or registered. The same was not even signed by the deceased and PW1 testified that she was not sure if the deceased attended the board meeting physically yet the protestors were adamant that she was the one who was pursuing the subdivisions.
28. Further, PW1 stated that it was the deceased who paid the surveyor yet she was not in control of her accounts because she was sick and she had not receipt to show the said payments. It is also clear that it was PW1 who allegedly introduced the surveyor to her mother. No satisfactory explanation was given as to why there was no receipt for the Kshs 100,000/- paid to the surveyor.
29. Furthermore, the protestors testified that the deceased had bequeathed Charles Wambugu Gatu 2 acres although it was not in the will. However, he who alleges must prove that indeed the deceased gave out the property or gift during his/her lifetime the protestors did not produce evidence of the same in form of statements from the alleged witnesses who were mentioned in their testimonies as having knowledge of the deceased's wish to bequeath Charles Wambugu or minutes of the meeting where the deceased allegedly bequeathed the said Charles Wambugu. There is also no codicil to the will. All there exists is the protestor's word of mouth which is not sufficient evidence to support such a claim.
30. It is imperative to note that there was no dispute as to the allocation given to Andrew Gatu and Patrick Wambugu. The same was also made clear in the will. However, contrary to the unsubstantiated claims by the protestors, it seems that the deceased did not specify which portions her remaining children would occupy.
31. It is worth noting that the protestors acknowledge that validity of the deceased's will in its contents and form however they are also in support of the mutation form which appears to be in contradiction of the same. Further the said mutation form was not registered in lands registry neither was it signed by the district surveyor although it bears his stamp. Accordingly, I find that the subdivision as per the mutation form cannot stand. I reiterate that any subdivision of the suit land must be as per the deceased's wishes stipulated in the will.
32. The probate jurisdiction of this court is to ensure due and proper administration of a particular deceased estate, having regard to any duly express testamentary intentions of the deceased and the respective interest of the beneficiaries entitled to a share to the estate.



33. I find it peculiar that the deceased would make a will in respect to the suit land then go ahead and begin subdividing the suit land in contradiction to the said will. The protestor has not led any evidence to show that the intentions of the deceased during the making of the will were not crystal clear for this court to interfere or vary the will. In absence of any such evidence, I hold that the deceased's will is to be followed to the letter.
34. Taking into account the protestors' mistrust in the petitioner's administration of the estate I find that it is necessary to appoint co-administrators in the estate. The deceased left the petitioner and Andrew Gatu as executors of the estate. Through his testimony Andrew Gatu recommended that Patrick Wambugu and Lucy Njeri be appointed as administrators due to the fact that he does not reside in Kenya; a recommendation that was supported by the other protestors who form majority of the beneficiaries. I hereby appoint the said Patrick Wambugu and Lucy Njeri as co-administrators alongside the petitioner.
35. I order that 50 × 100 ft covering the area occupied by mobile provider companies mast shall be excised and registered in the names of the administrators in trust for all beneficiaries.
36. I also order that the remaining part of the suit land should be subdivided afresh in 7 equal portions as per the will and a new subdivision scheme shall be prepared by a government surveyor. The beneficiaries including the children of the late Charles Kariuki will cast ballots on which respective portion of land they will occupy save for Andrew Gatu and Patrick Wambugu who will occupy the portions they have built on as per the will.
37. Moreover, as for the 7th portion of land, I find that the allegation that Charles Wambugu Gatu was bequeathed 2 acres from it was not proved. I will therefore treat the same as undistributed I also order that the remaining part of the suit land should be subdivided afresh in 7 equal portions as per the will and a new subdivision scheme shall be prepared by a government surveyor. The beneficiaries including the children of the late Charles Kariuki will cast ballots on which respective portion of land they will occupy save for Andrew Gatu and Patrick Wambugu who will occupy the portions they have built on as per the will.
38. The protestors alleged that they had not received any share from proceeds from the mobile serve providers but the same is untrue. However, in view of the need for transparency the petitioner is ordered to file a true and audited account of the proceeds from the Safaricom and Telcom Limited from the date of the deceased demise till date within forty-five (45) days from the date of delivery of this judgement after which the court shall determine how the same shall be distributed. Thus, the final orders are;
 - i. An order be and is hereby issued directing that, the deceased's will is to be followed to the letter in distribution of instant estate.
 - ii. An order be and is hereby issued appointing the Patrick Wambugu and Lucy Njambi as co-administrators alongside with the petitioner.
 - iii. An order be and is hereby issued directing that, a portion of suit land by dimensions of 50 × 100 ft. covering the area occupied by mobile provider companies mast shall be excised and registered in the names of the administrators in trust for all beneficiaries.
 - iv. An order be and is hereby issued directing that the remaining part of the suit land to be subdivided afresh in 7 equal portions as per the will and a new subdivision scheme shall be prepared by a government surveyor. The beneficiaries including the children of the late Charles



Kariuki will cast ballots on which respective portion of land they will occupy save for Andrew Gatu and Patrick Wambugu who Will occupy the portions they have built on as per the will.

- v. An order do and is hereby issued directing the petitioner to file a true and audited account of the proceeds from the Safaricom and Telkom Limited from the date of the deceased demise to date within forty-five (45) days from the date of delivery of this judgement after which the court shall determine how the same shall be distributed.
- vi. There be liberty to apply.
- vii. No orders as to costs

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 20TH DAY OF FEBRUARY, 2023.

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CHARLES KARIUKI
JUDGE

