



REPUBLIC OF KENYA



In re Estate of the Late Waronja Gachunga Kihiu (Deceased) (Succession Cause 3111 of 2015) [2023] KEHC 18705 (KLR) (Family) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 18705 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 3111 OF 2015

PM NYAUNDI, J

APRIL 28, 2023

**IN THE MATTER OF THE ESTATE OF THE LATE
WARONJA GACHUNGA KIHU (DECEASED)**

BETWEEN

MOSES WARONJA KINYA 1ST APPLICANT

SAMWEL KAMWE KINYA 2ND APPLICANT

AND

JOSEPH GACHUNGA WARONJA 1ST ADMINISTRATOR

GODFFREY KAMATU WARONJA 2ND ADMINISTRATOR

JUDGMENT

1. The genesis of this Succession Cause is the Petition for grant of letters of administration in respect to the estate of Waronja Gachunga Kihiu (deceased). The Respondent Joseph Gachunga Waronja And Godfrey Kamatu Waronja filed the Petition and listed the beneficiaries as;
 - i. Joseph Gachunga Waronja
 - ii. Godfrey Kamatu Waronja
 - iii. Salome Wambui Gichura
2. This sparked an objection by the Protestors who filed Summons for revocation of grant aggrieved that they had been excluded and yet they were beneficiaries of the estate of the deceased estate. The parties thereafter on 10th July 2018 recorded a consent before the Hon Onyiego J. where it was agreed that the Applicants, Moses Waronja Kinya, Hannah Waringa Maina and Naomi Njeri Kinya be included



as beneficiaries and that the Respondents as administrators proceed to file summons for confirmation with proposed mode of distribution.

3. Pursuant to the order of the Court the Administrators filed summons for confirmation of grant dated 23rd July 2018 and filed on 14th September 2018. The Applicants being aggrieved filed an affidavit of Protest dated 21st September 2018.
4. Subsequently the Administrators filed joint Witness Statement for Affidavit of Protest sworn on 17th April 2019 and filed in court on 30th May 2019. Naomi Njeri Kinya, Hannah Waringa Maina and Moses Waronja Kinya swore separate affidavits of protest on 22nd November and filed them in Court on 28th November 2019.
5. The Administrators also filed a joint Witness Statement on 10th December 2019 and Witness statements by Rev. William Waronja Karanja (Warui) and Joseph Gakinya Warui both dated 9th December 2019 and filed in court on 10th December 2019.
6. The Administrators/ Respondents are the sons of the deceased. The Applicants are the grandchildren (Moses Waronja and Naomi Njeri Kinya) and wife to deceased grandson (Hannah Waringa Maina).
7. The Matter proceeded by way of *viva voce* evidence.

Protestors' Case

8. Moses Waronja testified as the sole witness for the Protestors. He adopted both his statement and affidavit of protest files in Court. Along with the other Applicants they are not agreeable to the proposed mode for distribution in the summons for confirmation as set out in Paragraph 7 of the Affidavit;
 - a. Muguga/ Jet Scheme /277
To be registered as follows;
 $\frac{1}{2}$ Acre- Moses Waronja Kinya, Hannah Waringa Maina, Naomi Njeri Kinya (Jointly in equal shares)
4 $\frac{1}{2}$ Acres- Joseph Gachunga Waronja, Godffrey Kamatu Waronja (Jointly in equal shares)
 - b. Molo South/ Langwenda Block 7/31 (nguirubi)
To be registered in the names of Joseph Gachunga Waronja and Godffrey Kamatu Waronja (in equal shares).
9. The distribution ought to be equal amongst all the beneficiaries. The Administrators are unreasonable in allocating themselves 4 acres.
10. The Applicants deny that the deceased allocated their mother a gift *inter vivos* of a parcel of land in Molo. The Applicants aver that attempts to resolve the matter amicably have not borne fruit.
11. In cross examination the Applicant insisted that the land should be shared among the 5 beneficiaries, who are identified as Joseph Gachunga Waronja, Godfrey Kamatu Waronja, Moses Waronja Kinya, Hannah Waringa Maina and Naomi Njeri Kinya.
12. The deceased had 2 wives. The administrators are step uncles to the Protestors/ Applicants. The mother to Applicants is Miriam Wanjiku Waronja who is daughter of the deceased and step sister to the Administrators.



13. The Applicant stated that the property that is in Molo is registered in his late mother's name and was not a gift from the deceased.
14. It is the case of the Applicants that the mother was given an acre to share with Peter Kimuhu Waronja her brother and Peter having died that share should now come to them as he was from their house.
15. In his estimation both parcels of land measure about 5 acres. They would like a share of the land that the grandfather had left to himself and the ½ acre allocated to Peter as per the will of the deceased dated 10th October 1995. The protestors dispute the subsequent will dated 21st January 1996 as it is not signed by the Deceased.
16. The Applicant did not inherit land from his father and his sister Hannah (stays at Muguga parcel of land. No one stays on the parcel of land in Molo.

Respondent's Case

17. RW1- Godfrey Kamatu Waronja. He is a co administrator of the estate of the deceased and the youngest son of the deceased. The 1st Respondent is his elder brother. Peter and Miriam who were his siblings have since died. The other child of the deceased Salome Wambui Gichura has waived her right to inheritance from the estate of the deceased. The protestors are children to Miriam. The Deceased left two properties as identified in para 7 of the affidavit in support of the summons for confirmation.
18. The property in Molo should be assigned to the 1st Administrator according to the wishes of the deceased. It was his evidence that the deceased divided the property at least 2 years before he died.
19. Earlier the deceased expressed his intention in signed will dated 10th October 1995. He later revised this as per unsigned will dated 21st January 1996.
20. He confirmed that the mother of the Protestors is buried at the Muguga parcel of land. It was on the date of her burial that the deceased summoned his children and expressed his wish to amend the will dated 10th October 1995.
21. Their brother Peter Kimuhu had mental illness he died at age 67 and was never married.
22. He testified that the deceased had gifted Miriam land in Molo where she had lived from 1971 until when she came home on account of the clashes in Molo. He was adamant that the share for Miriam at Muguga was ½ an acre.
23. On cross examination he reiterated that the proposal presented was in accordance with the wishes of the deceased.
24. On re-examination he reasserted that the deceased was the author of both documents. He opposes any additional allocation to the Petitioners.
25. RW2 William Waronja Karanja is a nephew to the deceased. He was present when the deceased prepared the will dated 10th October 1995 and when he revised it in 1996. After the death of Miriam, he called some of the clan members and recalled the parcel he had given to Kimuhu. He drafted the document dated 8th January 2017. The protestors are demanding the share that was originally given to Kimuhu this was against the wishes of the deceased.
26. On cross examination he confirmed that his name does not appear among those present at the meetings on 10th October 1995 and 21st January 1996. He confirmed that the latter document does not have a signature. Miriam was the eldest daughter of the deceased.



27. On re-examination he asserted that he was present at both meetings. He confirmed that one of the children of Miriam was staying at the land in Muguga. Miriam was buried on Geoffrey's share.
28. At the close of the hearing both parties filed submissions.

Protestors Submissions

29. The protestor invites the court to administer the estate as being intestate as the wills purportedly prepared by the deceased are disputed. It is the proposal of the Protestors that the land be shared equally among the 5 listed beneficiaries.

Administrator/ Respondents' Submissions

30. The administrator invites the Court to adopt the distribution as proposed in affidavit in support for the summons for confirmation. They argue further that this is in accordance with the will of the deceased as expressed in both wills. Further the Court should factor in that the deceased gifted the mother of the Protestors a parcel of land in Molo where Naomi currently resides.
31. The mother of the Protestors was married, and her husband was not buried on the Molo plot as this was not matrimonial land but land she had inherited. They contended that the protestors had failed to show that their mother actually bought the land.
32. The Administrators aver that they rank in priority to the share that was bequeathed to their deceased brother as against the protestors.
33. The Administrators rely on the following authorities.
 - a. Succession Case 555 of 2018 *Estate of Kelvin John Ombajo*
 - b. *Re Rufus Ngethe Munyue (Deceased Public Trustee v Wambui)* (1977)

Analysis and Determination

34. Upon reviewing the evidence adduced, documents, witness statements and submissions of the parties I identify the following as the issue for determination.
 - a. How should the estate of the Deceased be distributed?
 - b. Who should pay costs?
35. It is common ground that the deceased's estate comprises of 2 assets;
 - a. Muguga/ Jet Scheme/ 277 Measuring 1.9 Hectares (4.695 acres)
 - B. Molo South/ Langwenda Block 7/31 (Ngwirubi) measuring 1.609 hectares (3.975 acres)
36. By consent recorded on 10th July 2018 it was agreed that the 3 protestors be included as beneficiaries of the Estate. The 3 lay a claim to the estate by virtue of being the children and daughter in law of Miriam Wanjiku Waronja who was a daughter of the deceased.
37. In *Re Estate of Imoli Luhtase Paul (Deceased)* 2021 eKLR, the court clarified that grandchildren are not on the same footing with daughters-in-law or children-in-law of the deceased. Observing that grandchildren as blood relatives of the deceased are entitled automatically to take the share of their parents. The Court stated that since in-laws have no automatic right of inheritance, they can only approach the court upon obtaining representation of the persons on whose account they claim.



Hannah Waringa Maina, one of the Protestors herein has escaped this requirement by virtue of the consent recorded.

38. On the basis of the consent, I will treat all 3 beneficiaries as grandchildren of the deceased. By virtue of Section 39 and 41 they can stake a claim on the share that was due to their mother, Miriam Wanjiku. On this I am guided by the decision of Musyoka J in [Re Estate of Wahome Njoki Wakagoto](#) (2013) eKLR where it was held;

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

39. This was restated in [Re Estate of Florence Mukami Kinyua \(Deceased\)](#) (2018) eKLR in which Matheka J held that a grandchild is a direct heir to the intestate estate of their grandparent, where his or her own parents have predeceased the grandparent, or, where the parent dies before the estate is distributed. The court asserted that such a grandchild steps into the shoes of the deceased parent so as to take the share that such parent would have taken from the estate of the grandparent’s estate.

40. Based on the foregoing decisions therefore the 3 protestors will be entitled to the share that falls due to their mother/ mother-in-law and not separate shares as has been suggested.

41. It has been suggested that in considering the share due to the protestors, the court should factor in that the deceased gifted Miriam Wanjiku land in Molo measuring approximately 5 acres. This was vehemently opposed by the Protestors who were categorical that the late Miriam had purchased this property on her own. It was further contended that the protestors should inherit from their father.

42. Section 28 of the [Law of Succession Act](#) provides that

“In considering whether any order should be made under this part, and if so what order, the court shall have regard to.....

- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime.”

43. Having said that, it is trite law that gift *inter vivos* must be established by evidence. It was so held in [Re Estate of the Late Gedion Manthi Nzioka \(Deceased\)](#) [2015] eKLR where it was held that: -

“For gifts *inter vivos*.... gifts of land must be by way of registered transfer or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid.”

44. In the instant no evidence was adduced by the Administrators to show that the land in Molo was gifted to Miriam by the deceased. The land was not described with sufficient detail to identify it or associate it with the deceased. On this claim, the Administrators didn’t get off the starting blocks and I therefore have no hesitation in holding that it has not been established that the deceased gifted Miriam the land in Molo and that, the court should factor that in determining Miriam’s share in the estate of the deceased.



45. The law is now well settled that for purposes of the law of succession, the children of a deceased are equal irrespective of gender or marital status. In *Stephen Gitonga M'Murithi v Faith Ngira Murithi* [2015] eKLR the Court of Appeal held
- “...Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children irrespective of gender and whether married and comfortable in their marriage or unmarried. ...”
46. In *Re Estate of Kimitei Cherop (Deceased)* [2021] eKLR where the facts were similar to the instant case, the court found that a grandson of the deceased was entitled to the share of his deceased mother alongside his uncles and aunts, notwithstanding that his mother was married, not as a dependant or beneficiary but based on the principle of representation aforementioned.
47. The administrators submit that their proposal is aligned with the wishes of the Deceased person and rely on proclamations by the deceased person in a will dated 10th October 1995 which according to them was revised in the will dated 21st January 1996. This relates to the parcel of land referred to as Muguga Jet Scheme/ 277. The Protestors contest the validity of the document dated 21st January 1996 as it is not signed by the deceased.
48. The formal requirements for validity of a written will are enumerated in Section 11 of the *Law of Succession Act*, which states: -
- “No written will shall be valid unless-
- a. The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator...’
49. It is not in dispute that the document dated 21st January 1996 was not signed by the deceased person. For this reason, I hold that it is not a valid written will for purposes of distributing the estate of the deceased.
50. The Administrators submitted that it should be considered as an oral will. The relevant section for determining the validity of an oral will in Section 9 of the *Law of succession Act* which is framed in mandatory terms as follows-
- a. No oral will shall be valid unless
- a. It is made before two or more competent witnesses and
- b. The testator dies within a period of three months from the date of making the will.
51. In this case the deceased made this proclamation on the 21st January 1996 and died on the 10th November 1997 almost 21 months later. In the circumstances the will does not qualify as a valid oral will. I am persuaded by the decision of Achode J (as she then was) in *Re Estate of Kevin John Ombajo (Deceased)* (Succession Cause of 555 of 2018 [2021] eKLR where in circumstances similar to the current one the court found the intentions of a deceased person on the distribution of their estate can only be derived from a valid will be it oral or written.
52. In any event even if I were to find that ‘will’ dated, 21st January 1996 were a valid oral will, Section 18(2) of the *Law of Succession Act* is categorical that a written will shall not be revoked by an oral will.
53. The next issue is whether the Court should factor in the wishes of the deceased as expressed in the will dated 10th October 1995. Both the administrators accept the validity of the document and infact



- there is evidence that the daughter in law to Miriam lives on the ½ acre assigned to Miriam. The 1st and 2nd Administrators are also in possession of the parcels assigned to them vide the will dated 10th October 1995.
54. The point of departure is what happens to the ½ acre that was intended for Peter Kimuhu Waronja (Deceased). The Court is obligated to give effect to the discernible wish of the deceased person when it is cogent. In the will of 10th October 1995, the deceased gave to Miriam Wanjiku Waronja and Peter Kimuhu Waronja 1 acre jointly. This is distinguishable from the allocation to the 1st and 2nd Administrator which were separate shares of 1 and ½ acres each.
55. That being the case I find that the deceased intended that Miriam Wanjiku Waronja and Peter Kimuhu Waronja hold the 1 acre jointly. Section 91(4) of the [Land Registration Act](#) provides: -
- If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently-
- a. Dispositions may be made only by all the joint tenants;
 - b. On the death of a joint tenant, that tenants interest shall vest in the surviving tenant or tenants jointly; and
 - c. Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.
56. This leaves the 1 acre that the deceased allotted to himself. Since he was silent on it. The [Law of Succession Act](#) as relates to intestate succession shall apply. The title deed indicates that the land measures 1.9 hectares or 4.695 acres. After allocating the shares as above it is only .695 acres that is available for distribution. Guided by Section 40 (1) of the [Law of Succession Act](#), the portion shall be divided equally between, the Godfrey Kamatu Gachunga, Joseph Gachunga Waronja and the beneficiaries of Miriam Wanjiku Waronja. The remaining portion of 0.695 acres will therefore be divided in 3 equal shares.
57. Moving to the other parcel of land Molo South/ Langwenda Block 7/319nguirubi) I find that the same falls for distribution under the laws governing intestate succession under the [Law of Succession Act](#) Cap 160 Laws of Kenya. I concur with the decision of Ogola J. in [Re Estate of Kimitei Cherop \(Deceased\)](#) 2021 eKLR where he cited the decisions in [Stephen Gitonga M'Murithi v Faith Ngira Murithi \(supra\)](#); [Eliseus Mbura M'Thara v Harriet Ciambaka and Another](#) [2012] eKLR and [Peter Karumbi Kengati & 4 Others v Ann Nyokabi Nguithi](#) [2014] eKLR that emphasise the equal right of children to the estate of their parents regardless of gender and marital status. In the current case this means that Miriam Wanjiku and her estate are entitled to an equal share of the subject parcel of land.
58. In light of the above and I make the following orders.
- a. THAT the Estate of Waronja Gachunga Kihiu be distribute as follows
 - a. MUGUGA/ JET SCHEME/277 measuring 4.695 acres to be divided and shared out as follows
 - a. Joseph Gachunga Waronja 1 ½ acres plus 1/3 share of the balance of 0.695 acres
 - b. Godffrey Kamatu Waronja 1 ½ acres plus 1/3 share of the balance of 0.695 acres



- c. Moses Waronja Kinya, Hannah Wairinga Maina and Naomi Njeri Kinya (as grandchildren and daughter in law of Miriam Wanjiku Waronja -deceased) 1 acre plus 1/3 share of the balance of 0.695 acres, to be held jointly
 - d. Molo South/ Langwenda Block 7/31 (Nguirubi) measuring 1.609 hectares (3.975 acres) to be divided equally between the surviving children of the deceased and the share of Miriam Wanjiku Waronja be transmitted to her survivors namely Moses Waronja Kinya, Hannah Waringa Maina and Naomi Njeri Kinya.
- b. The Administrators herein are hereby ordered to distribute the estate of the deceased and to complete the administration of the deceased's estate within 120 days from the date hereof.
 - c. The matter to be mentioned before the Deputy Registrar on 13th September 2023 to confirm compliance.
 - d. Parties to bear their own costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2023

P M NYAUNDI

JUDGE

In the presence of:

.....Advocates for the Applicant

.....Advocates for the Respondent

Karani Court Assistant

