



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Estate of Timothy Kanyua Mugambi (Deceased) (Succession Cause
168 of 2011) [2023] KEHC 18047 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 168 OF 2011**

LM NJUGUNA, J

MAY 31, 2023

**IN THE MATTER OF THE ESTATE OF TIMOTHY KANYUA
MUGAMBI (DECEASED)**

BETWEEN

CATHERINE N. MUGAMBI PETITIONER

AND

JESSE N.K. MUGAMBI 1ST OBJECTOR

DAVID MURIUKI MUGAMBI 2ND OBJECTOR

RULING

1. The matters for determination before the court are two protests one dated October 8, 2018 and the other dated September 25, 2018 by David Muriuki Mugambi and by Jesse N.K. Mugambi respectively.
2. Both protests are in relation to the estate of the deceased herein. The estate of the deceased previously had two administrators to wit Jesse N.K. Mugambi and Catherine Mugambi but via an application by the 2nd protestor seeking for revocation of grant of letters of administration issued to the then administrators, the court via a ruling delivered on November 16, 2015 revoked the said grant. The petitioner thus filed summons for confirmation of grant wherein she provided her proposed mode of distribution in regards to the estate of the deceased. The same provoked the filing of the two protests.
3. The court gave directions that the matter be canvassed by way of viva voce and thereafter parties filed their written submissions.
4. The petitioner on behalf of Gladys Gichuku Kanyua, Mercy Violet Wanjira Wanduara, Lucy Njeru Mugambi, the beneficiaries of Eunice Marigu Nyaga (deceased) and of Kellen Wambugi Mugambi (deceased) submitted that she had made clear proposal on how the estate of the deceased herein ought to be distributed. It was her case that it is incumbent that the mode of distribution that should be



adopted by the court should be one that ensures that all the properties of the deceased is shared equally amongst the beneficiaries. She therefore listed the whole estate of the deceased and stated that the same be shared equally amongst the beneficiaries so as to bring an end to the matter herein. It was submitted that for the beneficiaries who are deceased, their shares should be inherited by their children. In the same breadth, it was her evidence that given that one Rosemary Wandiri is mentally ill, her share should be apportioned in accordance to the law that apply to such kind of persons. It was therefore her case that given that most of the beneficiaries are people who are well educated, it will not be a problem to work out the basic formula of sharing the various properties as long as the constant factor being equality is applied. This court was therefore urged to adopt her mode of distribution.

5. The 1st protestor filed his submissions dated February 7, 2023 wherein he submitted that he was opposed to the petitioner's mode of distribution for reasons that the same ought to be equitable. It was his submission that the children of his deceased siblings and the mentally challenged sister should also be considered as beneficiaries in place of their respective parents. That the mode of distribution proposed by the 1st protestor is in line with the desires of the deceased especially in respect to Land Parcel No. Ngandori/Kirigi/716 wherein the graveside and homestead lies. It was his evidence that the deceased's desire was to have the said land set aside as a retreat center for agricultural activities, research and demonstrations and therefore a perpetual trust should thus be created. That Land Parcel No. Gaturi/Weru/66 had been given to the 2nd protestor and Titus and the same should be shared equally and therefore, it is only fair that the 2nd protestor be apportioned seven and a half acres and the rest be shared as proposed in paragraph 9(b). He submitted that he was opposed to the petitioner's proposal in reference to Land Parcel No. Gaturi/Matakari/T. 70 as the same does not form part of the estate herein. It was his submission that the said land is under the name of Titus Njeru Kanyua while Land Parcels No. Gaturi/Githimu/1080 and Gaturi/Githimu/1943 referred to by the 2nd protestor in his statement don't exist as the same were closed upon subdivision. Further, that the deceased's estate is quite vast and therefore would require funds to be set aside to finance the distribution to the ultimate beneficiaries. That the properties proposed to be sold by the 2nd protestor should be inherited by the two administrators to dispose and cater for expenses including legal fees. That any amount that may remain after catering for distribution and all other expenses including rates, service bills, surveying fees, legal fees amongst others, should be equally shared amongst the beneficiaries. In the end, this court was urged to allow the protest as the same ensures just distribution of the estate herein.
6. I have considered and analyzed the evidence, and the submissions by the parties herein and I find that the only issue for determination is the appropriate mode of distribution of the estate herein.
7. The procedure for determination of an application for confirmation in the Probate and Administration (P & A) Rules requires hearing of the application for confirmation of grant as set out in Rule 41 of the Probate and Administration Rules, 1980:
 41. Hearing of application for confirmation
 - a.
 - b. The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.



8. On the part of the 2nd protestor, no submissions were filed but his case is that he seeks to have a bigger chunk of the estate of the deceased herein. He argued that his sisters are married and as such, they do not deserve a bigger share of the estate. That the 1st protestor being the eldest son, was given land by Muthanga clan while (the 2nd protestor) and his brother, Titus (deceased) their share was held in trust by the deceased herein. He stated that he claims 6 and 7 ½ acres out of Gaturi/Githimu/1943 and Gaturi/Weru/66 respectively. It was his case that the same should thus not form part of the estate herein. He conceded that he did not have any evidence to support the same but contended that his proposal is based on the fact that the land was given by the clan. He also conceded that all the beneficiaries are entitled to share in the estate.
9. It is trite that the Law of Succession does not discriminate between gender in matters of succession or inheritance. Under the *Law of Succession Act* and indeed under the *Constitution*, a child is a child and every person has equal rights under the law irrespective of gender. The *Law of Succession Act*, does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person. [See *Eliseus Mbura M'Thara Vs Harriet Ciambaka & Another* [2012] eKLR].
10. Further, the court in *Re Estate of John Musambayi Katumanga – Deceased* [2014] eKLR held as follows:

“The spirit of Part V, especially sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”
11. In the same breadth, in the case of Re estate of Lerionka Ole Ntutu, where there was conflict based on whether girls should inherit property from their deceased father, the court decided that girls whether married or unmarried, were entitled to get a share of inheritance from their father. [See *Re estate of Lerionka Ole Ntutu (Deceased)* High Court of Kenya at Nairobi Family Division Succession Case No. 1263 of 2000].
12. From the mode of distribution proposed by the 1st protestor, I note that the extent of the estate of the deceased herein has not been stated and further, creation of a trust as proposed by the 1st respondent would need some form of evidence that the deceased desired the same. Further, in reference to Land Parcel No. Gaturi/Weru/66 and the proposal by the 2nd protestor for him to get 7 ½ acres and the rest be shared as proposed in paragraph 9(b) of the petitioner’s mode of distribution that; in my view is selfish and unfair as compared to what the other beneficiaries stands to acquire; and therefore, I find that the same is not tenable for adoption.
13. In regards to the 2nd protestor’s mode of distribution, it was his case that he should be given 6 (acres) from the original Gaturi/Githimu/1080 and 7 ½ acres from Gaturi/Weru/66 as the clan and their father had intended making a total of 13 ½ acres.
14. It is trite that the primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries and which jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime.



15. To reaffirm this legal position, I again take refuge in the decision in H.C. Succession Cause No.864 of 1996 [2015]eKLR where the court held that:

“ Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ... declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.

In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”

The upshot is that this court lacks jurisdiction to resolve the proprietary interest on land based on the alleged trust. The available option was for the objectors to articulate their claim by instituting proceedings against the estate of the deceased suing the administrators to obtain orders on declaration of a trust leading to enforcement of their proprietary interests on the land.” Also see *in Re Estate Of Njuguna Igwima* [2017] eKLR, in which it was held inter alia, that a brother of the deceased is not a beneficiary of his estate, unless he can show that he was a dependant of the deceased.

16. Further, this court vide section 47 and Rule 73 of the Probate and Administration Rules makes provision that nothing shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of this court. Having regard to the above modes of distribution as provided for by the parties herein, it is my humble view that the best route for this court to ensure that equality and fairness is achieved, is by adopting the mode of distribution as proposed by the petitioner herein.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST OF MAY, 2023.

L. NJUGUNA

JUDGE

..... for the Applicant

..... for the Respondents

