



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Ng'onde Ngiri (Deceased) (Succession Cause
380 of 2012) [2023] KEHC 17677 (KLR) (24 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 380 OF 2012**

RM MWONGO, J

MAY 24, 2023

IN THE MATTER OF THE ESTATE OF NG'ONDU NGIRI - DECEASED

BETWEEN

JOSEPH NYAMU NGIRI PETITIONER

AND

MARGARET MUTHONI NJIRU PROTESTOR

RULING

1. The deceased died intestate on January 16, 1996, leaving three sons and one daughter surviving him. Her son, Joseph Nyamu Ngiri, the petitioner, took out letters of administration for the estate, which were issued on June 19, 2012.
2. By a summons for confirmation of grant dated September 13, 2012, the petitioner applied for distribution of the estate. The affidavit in support of the petition in paragraph 5 proposed the mode of distribution of the deceased land parcel number Kabare/Kiritine/1088 measuring 2.5 acres as follows:

Joseph Nyamu Ngiri - 0.75 acres
Michael Ngari Ngiri - 0.75 acres
Peter Gachoki Ngiri - 0.75 acres
Margaret Muthoni Njiru - 0.25 acres
3. The petitioner's sister, Margaret Muthoni filed an affidavit of protest dated March 17, 2015 and making, inter alia, the following averments:
 1. That I'm opposed to his proposed mode of distribution whereby he proposes that him, my other brothers Michael Ngari Ngiri and Peter Gachoki Ngiri do get a portion of 0.75 acre each while I get a portion of 0.25 acre.



2. That as per the search certificate, the parcel of land number Kabare/Kiritine/1088 measures 1.12 hectares, is about 2.8 acres and not 2.5 acres as indicated by the administrator.
 3. That my father Ngiri Marigu had 2 wives, the 1st wife being Janet Wambere Ngiri and the second, Ngondu Ngiri.
 4. That the first wife Janet Wambere who is still alive has 5 children being Silas Kangangi, Sebastian Kiura, Evanson Muchiri, Agnes Wambui and Beatrice Wangeci.
 5. That the 2nd house of Ngondu Ngiri, now deceased, has four children being Joseph Nyamu, Michael Ngari, Peterson Gachoki and Margaret Muthoni (me).
 6. That my father died around 1987 or thereabouts. He left behind several properties among them land parcel numbers: Gichugu/Settlement/Scheme/ 438, Kabare/Kiritine/1088, a plot at Magandini Mombasa, a parcel of land at Kakotoni Mombasa, plot number 22 Kiamiciri and a plot at Rukenya.
 7. That from land parcel number Gichugu/Settlement /Scheme/438, my three brothers Joseph Nyamu Ngiri, Michael Ngari Ngiri and Peterson Gachoki Ngiri each got a portion of 2.566 acres. Annexed and marked MMN-1 is a copy of green card for parcel number G/S/S/438.
 8. That upon partition, my brothers got parcel numbers G/S/S/1482, 1483 and 1484. Annexed and marked MMN-2A, 2B and 2C are copies of green cards for the parcels of land.
4. That my brothers from my house are the ones collecting the rent proceeds from the Magandini plot. I receive nothing.
 5. That the plot at Kiamiciri and the plot at Rukenya was sold by my brothers. I received nothing.
 6. That again, the parcel of land at Kakotoni in Mombasa was sold by my brothers and I received nothing.
 7. That the parcel of land which is the subject matter in this suit being Kabare/Kiritine/1088 was meant to be for me and my mother, and that's why my mother was registered as the owner upon my father's death. The other house received an equal share being parcel number Kabare/Kiritine/1087.
 8. That I therefore propose that I get the whole of Kabare/Kiritine/1088 measuring 1.12 hectares, as my brothers have in any event benefited more than me from my father's properties, yet we are all equal before the eyes of the law.
 9. The petitioner filed a reply to the protest as follows:
 1. That we are seeking to inherit Ngondu Ngiri as her children, the four of us listed in the affidavit of support of application for confirmation of grant and the only property in her name is the land parcel No. Kabare/Kiritine/1088.
 2. That parcel of land No Gichugu Settlement Scheme/1482,1483 & 1484 have never belonged to Ngondu Ngiri (deceased) herein and we owned the same when our late father and mother were still alive hence not subject of succession.
 3. That there is no evidence to prove ownership of purported plots at Kiamiciri, Rukenya, Kakotono, Mombasa and Magandini Mombasa by the late Ngondu Ngiri or Ngiri Marigu as alleged and or any prove that the same ought to be subject of succession herein or that they benefit the other three beneficiaries only or any one of the succession cause herein or they benefited the other three beneficiaries only or any one of them.



4. That it is not true that the brothers to the protestor herein sold parcel of land in Mombasa Kakotoni as alleged and ate not aware of such land.
5. That it is not true that land Parcel No. Kabare/Kiritine/1088 was meant and or is meant to be for the protestor herein and our late mother only had it been the case then it ought to have been registered in the joint names.
6. That the protestor is already married and with a lot of property where she got married leaving us squeezed at the parcel of land which was left by our mother the deceased herein hence the need to have slightly bigger parcels as brothers but she also gets a share as proposed in the affidavit in support of application for confirmation of grant herein.
7. That all the three brothers, the other beneficiaries herein have in the lifetime together with their families lived and built permanent and semi-permanent houses on the said parcels of land. That the protest herein lacks merit is misguided in that it seeks to disinherit the three other beneficiaries in the said parcel of land.
8. That the protest herein therefore lacks merit is misguided in that it seeks to disinherit the three other beneficiaries and ought to be dismissed with costs.
9. That the protestor herein demolished her mother's house after her demise and sold all that was therein including materials at an estimated cost of Ksh 350,000 and never shared the proceeds with any of the other with any of the other beneficiaries of the deceased estate hence has an advantage over them hence the need to have a slightly smaller parcel of land that is the subject matter of this succession cause.
10. That my father died in 1989. After the death of my father, we field a succession cause of his estate. My father had 2 houses. His wives were Ngondu Ngiri & Jennet Wambere. The house of Jennet Wambere distributed their portion of land between herself and her son Evanson Muchiri. The land of my father was 5 acres so each house got two and a half acres. Instead of dividing the two and a half acres amongst ourselves we got it registered in our mothers name to hold in trust for us her 3 sons which is parcel No Kabare/Kiritine/1088 which is the subject matter of this succession cause. However, on the ground we subdivided the land among ourselves and each son occupies and cultivates three quarter acres and my mother got nothing after we subdivided the ground as we were supporting her.
10. That after our mother died, we gave the protestor one quarter acre.
11. That we have developed our portions and we all built in the middle of the shamba where our mother had built.
12. I have set out, above, the assertions of the parties extensively.
13. A hearing was held at which both the protestor and the petitioner testified. In addition, the petitioner's availed one witness, Evanson Muchiri, a step son of the protestor.
14. Parties were directed to file written submissions. Highlights were heard on March 14, 2023.

Petitioner's Submissions

15. The petitioner notes that there is no dispute that the late Ngo'ndu Ngiri was the mother of the petitioner, the protestor and 2 other sons namely Michael Ngari and Peter Gachoki Ngiri.



16. That there is also no dispute that the late Ngo'ndu Ngiri left behind only one property namely land parcel No Kabare/Kiritine/1088 measuring 2.5 acres. There is also no dispute that during her life time Ngo'ndu Ngiri lived on the suit land Kabare/Kiritine/1088 and she allowed her 3 sons to build on her land together with their children and the whole family resides there.
17. Further, there is also no dispute that the suit land Kabare/Kiritine/1088 is the property that Ngo'ndu Ngiri inherited from her husband who was polygamous. It came out in evidence that the husband of Ngo'ndu Ngiri was polygamous and he died before his 2 wives. The two wives filed a succession cause for his estate, and they then distributed it a long time ago.
18. There was also evidence from both the petitioner and the protestor that the protestor had gone to live with a man elsewhere and got 7 children and is now living with another man in Kutus where she has another child. The petitioner has taken this into account in his proposed mode of distribution as he has proposed to distribute 1/4 acres to the protestor.
19. The petitioner's proposal and reason for the proposal were as follows: that the protestor gets ¼ acre of the land and he and his 2 brothers get ¾ acre each as the protestor sold the mother's house and used the money on herself. The petitioner also urged the court to take into account the fact that he and his brothers and children have built permanent houses on the land and the unoccupied part is available for their sister as it will avoid displacement and demolition of permanent houses on the land which were all built with the permission of the registered owner of the land.
20. The petitioner also took issue with the fact that he and his brothers and clan elders had called the protestor on several occasions to discuss distribution of their mother's estate and she refused. The petitioner stated that he wished the court to follow the award of the clan elders who had also found it fit that the protestor gets ¼ acres of the land though she disrespected them by failing to appear in their meetings after being invited.
21. The petitioner said the protestor had no evidence to prove her allegations. The petitioner put the record straight by shedding light on the matter that all the plots the protestor alleged were sold by the petitioner were actually owned by their father and other partners and after the succession of their father, the petitioner's mother and step-mother are the ones who sold those shares and used the money as spouses. The petitioner and his brothers have not benefited from such plots which in any event belong to another person's estate.
22. Finally, the petitioner also asks the court to take into account the that the protestor has 12 acres of land in Meru county where her 6 children and husband live.

Protestors' Submissions

23. In her submissions, the protestor proposed that the whole of her mother's estate be distributed to her since her brothers had other parcels of land which they inherited from their father.
24. The protestor added that the land is registered in the name of the biological mother of the petitioner, his brothers and herself. She argued that the petitioner and his brothers had been allocated land, namely Gichugu/Settlement Scheme/438 which had been sub-divided to them by their father. Each plot was 2.56 acres. The land was passed on from their father to their mother, and was left for their mother and herself.
25. The protestor had annexed copies of the green card for the whole land which shows the sub-divisions of 2.56 acres each, whilst the protestor did not get any land. As such, she submitted, the land should devolve to only her.



Issue For Determination

26. The singular issue for determination here is: Whether the protestor is entitled to land parcel Kabare/Kiritine/1088 as the sole beneficiary.

Analysis and Determination

27. Section 2 of the *Law of Succession Act* defines “estate” as “the free property of a deceased person”. Since there is clearly no dispute that the only property which is the subject of the deceased’s estate is LR No Kabare/Kiritine/1088, it is the only property in respect of which any discussion of distribution is possible in this case.
28. The petitioner filed summons for confirmation of grant dated September 13, 2012 for land parcel Kabare/Kiritine/1088. The protestor is opposed to the proposed mode of distribution whereby the petitioner proposes that he and his brothers Michael Ngari Ngiri and Peter Gachoki Ngiri do get a portion of 0.75 acre each; while she gets a portion of 0.25 acre of the property.
29. The protestor argues that her siblings had already received property from their late father, thus the share remaining with her mother should be given to her. That argument is an attempt by the protestor to invoke the principles under section 42 of the LSA by which where an intestate has distributed property for the benefit of any child that property shall be taken into account.
30. Section 42 provides:
- “Where—
- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”
31. It is clear that none of the titles exhibited belonged to the deceased. There was no evidence that the deceased, Ngondi Ngiri, had settled or awarded any of her property to any of her siblings, namely, the petitioner or his brothers. Accordingly, the principle of taking into account lifetime gifts under section 42 is not applicable in this case.
32. The titles which were exhibited LR No Gichugu/Settlement /Scheme/438; and land No Gichugu Settlement Scheme/1482,1483 & 1484 never belonged to Ngondi Ngiri (deceased). According to the petitioner these were owned by them when their late father and mother were still alive hence not subject of succession.
33. The petitioner submitted that this court should take into account the fact that he and his brothers and children have built permanent houses on the land and the unoccupied part is available for their sister as it will avoid displacement and demolition of permanent houses on the land which were all built with the permission of the registered owner of the land.
34. The petitioners also pray this court to take into account the that the protestors has 12 acres of land in Meru County where her 6 children and husband live.



35. As to the mode of distribution, section 29 (a) of the of the *Law of Succession Act* in recognizes 'children' of the deceased as dependants. The law does not classify those children as sons, daughters, married or unmarried.

36. Further, section 38 of the *Law of Succession Act*, cap 160 provides:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children”.

37. The law is clear that distribution benefits all the deceased's children equally. The word used is equally and not equitably. In simple terms, each male and female child are entitled to receive equal shares of the deceased's estate. No discrimination is permissible on this.

38. In *Re Estate of Solomon Ngatia Kariuki (deceased)* (2008) eKLR at page 8 the court stated that:

'The *Law of Succession Act* does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country, they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.'

39. Similarly, the Court of Appeal in the case of *Peter Karumbi Keingati & 4 others v Dr Ann Nyokabi Nguthi & 3 others* [2014] eKLR I was stated as follows:

“As we understand it, the provisions of the *Constitution* on non-discrimination and equality are meant to address, not abstract and theoretical postulates, but very real problems of discrimination, exclusion and marginalization rooted in and perpetuated by the realities of our society, including our cultures and customary laws and practices. The applicants will be contending that customary law excludes married daughters from inheriting their father's estate because such daughters will inherit from the families where they are married. Hence, they should not inherit twice. On the other hand, the *Law of Succession Act* makes no distinction between sons and daughters. So, the Act puts sons at a disadvantage, as the daughters will inherit twice while the sons only inherit once. Accordingly, it is submitted, the *Law of Succession Act* is contrary to the *Constitution* in that it discriminates against sons. Customary law must, in the circumstances, be given primacy over the *Law of Succession Act* because under it both sons and daughters inherit only once.

The arguments are based on many assumptions that are, in our opinion, *prima facie* questionable. Why is there an underlying and unstated assumption that in this day and age in Kenya, Kikuyu daughters will only marry in Kikuyu families from which they will inherit? Suppose they chose to get married into a community, any community in the world, where the rules of succession are completely the reverse of Kikuyu customary practices? Suppose they married, as happens every day, into families that have absolutely nothing to be inherited? Does a son inherit twice when he inherits from his father and his wife inherits



from her family? Somehow the applicants have adeptly, if dubiously, framed customary practices as the paragons of equality and equity.”

40. In the case of *Stephen Gitonga M'murithi v Faith Ngira Murithi* [2015] eKLR the Court of Appeal stated:

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried”.

Conclusion

41. In this regard, therefore, the petitioner, the protestor and all the other surviving siblings have a right to inherit the deceased's land parcel Kabare/Kiritine/1088 in equal shares.

42. That is the order of the court.

43. Orders accordingly.

DATED AT KERUGOYA THIS 24TH DAY OF MAY, 2023

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Otuke - for Beneficiary Margaret Muthoni Njiru
2. Makazi - holding brief for Thungu for Petitioner
3. Murage, Court Assistant

