



**In re Estate of M’Elongi Itiame alias Erongi Itiame (Deceased) (Succession Cause 224 of 2010) [2023] KEHC 24506 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24506 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 224 OF 2010  
TW CHERERE, J  
OCTOBER 26, 2023  
IN THE MATTER OF THE ESTATE OF M’ELONGI  
ITIAME ALIAS ERONGI ITIAME (DECEASED)**

**BETWEEN**

**MIRITI ROBERT ELONGI ..... PETITIONER**

**AND**

**BENJAMIN NTONGAI KABIRA ..... ADMINISTRATOR**

**RULING**

**Background**

1. M’Elongi Itiame alias Erongi Itiame (Deceased) died sometimes on 25<sup>th</sup> July, 1984. Deceased’s estate comprises of LR. Amwathi/Maua/2610, LR. Amwathi/Maua/3378 and LR. Amwathi/Maua/9526.
2. The chief’s letter dated 29<sup>th</sup> April, 2010 filed together with this cause discloses that deceased was survived by the following dependents:

Widows

1. Ciondia M’Itiame
2. Nyoroka M’itiame

Children

1. Robert Miriti M’Elongi
2. Richard Murungi M’Elongi
3. Cornelius Mutuma Kabira
4. Peter Kaberia Kabira



5. Fredrick Kirimi Julius
  6. Henry Nkunja Kabira
  7. Jacob Itiame
  8. Benjamin Ntongai Kabira
  9. Lucy Kathure
  10. Gladys Mwendu
3. By an order dated 20<sup>th</sup> February, 2019, this court appointed Miriti Robert Elongi and Benjamin Ntongai Kabira as joint administrators of the estate and directed Miriti Robert Elongi, the Petitioner/1<sup>st</sup> Administrator to apply for confirmation of the grant within 30 days.
4. Subsequently by an affidavit dated 04<sup>th</sup> March, 2019, the Petitioner/1<sup>st</sup> Administrator proposed to distribute the estate as follows:
- LR. Amwathi/Maua/2610 (1.63 acres)
1. Peter Kaberia Kabira 1 acre
  2. Cornelius Mutuma Kabira 0.63 acres
- LR. Amwathi/Maua/3378 (6.95 acres)
1. Nyoroka M’itiame 0.6 acres
  2. Benjamin Ntongai Kabira 1.25 acres
  3. Margaret Muiti w/o Jacob Itiame 1.00 acre
  4. Henry Nkunja Kabira 1.00 acre
  5. Richard Murungi M’Elongi 1 acre
  6. Miriti Robert M’Elongi 1.20 acres
  7. Lucy Kathure 0.10 acres
  8. Gladys Mwendu 0.10 acres
- LR. Amwathi/Maua/9523(0.50 acres)
- Ciondia M’Itiame
5. Petitioner/1<sup>st</sup> Administrator proposal was supported by all the beneficiaries except Benjamin Ntongai Kabira the 2<sup>nd</sup> Administrator who made the following proposal:
- LR. Amwathi/Maua/2610 (0.50 acres)
1. Miriti Robert M’Elongi 0.30 acre
  2. Gladys Kathuure 0.10 acre
  3. Ciondia M’Itiame 0.10 acres
- LR. Amwathi/Maua/3378 (7.45 acres)
1. Benjamin Ntongai Kabira 5.45 acres



2. Henry Nkunja Kabira 1.00 acre
  3. Jacob Itiame (deceased) 1.00 acre  
LR. Amwathi/Maua/9526(1.65 acres)
  1. Cornelius Mutuma Kabira 0.50 acres
  2. Peter Kaberia Kabira 0.50 acres
  3. Richard Murungi M'Elongi 0.50 acres
  4. Fredrick Mitu M'Elongi 0.30 acres
  5. Lucy Kathure 0.05 acres
  6. Nyoroka M'Itiame 0.10 acres
6. After it became apparent that the parties could not agree on the mode of distribution, the court directed that the matter be heard on merit.

#### **Petitioner's case**

7. Miriti Robert Elongi, the Petitioner/1<sup>st</sup> Administrator opposed distribution of LR. Amwathi/Maua/3378 as proposed by the 2<sup>nd</sup> Administrator on the ground that his proposal that the same be distributed to Benjamin Ntongai Kabira, Henry Nkunja Kabira and the family of Jacob Itiame(deceased) who are in occupation is reasonable. It was also his evidence that the proposal that LR. Amwathi/Maua/9526 be distributed to Ciondia M'Itiame is also based on the same ground that she is in occupation of that land.

#### **2<sup>nd</sup> Administrator's case**

8. Benjamin Ntongai Kabira the 2<sup>nd</sup> Administrator- stated that he had used his resources to recover LR. Amwathi/Maua/3378 and was therefore entitled to a bigger share of the estate but in cross-examination conceded that he did not have any proceedings to support his claim. He however supported the 1<sup>st</sup> Administrator's proposal to distribute LR. Amwathi/Maua/9523 to deceased's surviving widow Ciondia M'Itiame.
9. Julius Mbaabu conceded that deceased did not make any expression concerning how he wanted his estate distributed and that it was the 2<sup>nd</sup> Administrator who informed him that his father wished that he gets a bigger share of LR. Amwathi/Maua/3378.

#### **Analysis and determination**

10. I have considered the proposed modes of application for revocation in the light of the affidavits and annexures thereto, the oral evidence and submissions of the parties and I have deduced the following issues for determination:
  1. Whether deceased made a wish concerning distribution of his estate
  2. How ought the estate be distributed?

#### **Whether deceased made a wish concerning distribution of his estate**

11. The case by the Applicant is that deceased wished that he gets a bigger share of LR. Amwathi/Maua/3378 which he had allegedly recovered from one M' Mauta M' Mithiaru.



12. Section 109 of the *Evidence Act*, Cap 80 places the burden of proof on him who alleges and states as follows: -

‘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 in a particular person.’

13. The foregoing section was reiterated in *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR where it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence.....”

14. The question of burden of proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place..  
.....”

15. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the Court of Appeal held that:

“Denning J. in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

16. In support of his claim, the 2<sup>nd</sup> Administrator annexed summons for Objection No. 134 of 1997 but there is nothing on that summons to demonstrate any nexus with LR. Amwathi/Maua/3378. From the evidence on record, the 2<sup>nd</sup> Administrator failed to place before the court any material to support his case that he had reclaimed LR. Amwathi/Maua/3378 from one M’ Mauta M’ Mithiaru or that deceased had wished that he gets a bigger share of that land. His witness did not make it any better for the reason that his evidence was hearsay based on what he was informed by the 2<sup>nd</sup> Administrator concerning the alleged wishes of the deceased.

17. It should be remembered that no beneficiary has a better right to a deceased’s estate than the other. From the foregoing, I find that the 2<sup>nd</sup> Administrator has not demonstrated that he has a better title to deceased’s estate as compared to all the other beneficiaries and his claim for a bigger share of LR. Amwathi/Maua/3378 is therefore rejected.



## How ought the estate be distributed?

18. In a case of this nature where the deceased died intestate and was a polygamous man survived by one widow and children, the anchor on distribution of his estate is Section 40 of the *Law of Succession Act* which primarily provides that;

“ 40.

- (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”.

19. The mode of distribution proposed by the Petitioner/1<sup>st</sup> Administrator is supported by all the beneficiaries except the 2<sup>nd</sup> Administrator. I also notice that the Petitioner/1<sup>st</sup> Administrator has proposed to give the 2<sup>nd</sup> Administrator a slightly bigger share which the other beneficiaries are comfortable with.

20. In my considered view, the proposal that was made by the Petitioner/1<sup>st</sup> Administrator is reasonable and objective and there would be no reasonable cause to for the court to depart from the will of the majority of the beneficiaries.

21. Consequently, the orders that commend to me and which I hereby issue that

1. Deceased’s estate shall be distributed as follows:
  - a. LR. Amwathi/Maua/2610
    1. Peter Kaberia Kabira 1 acre
    2. Cornelius Mutuma Kabira 0.63 acres
  - b. LR. Amwathi/Maua/3378
    1. Nyoroka M’itiame 0.6 acres
    2. Benjamin Ntongai Kabira 1.25 acres
    3. Margaret Muiti w/o Jacob Itiame 1.00 acre
    4. Henry Nkunja Kabira 1.00 acre
    5. Richard Murungi M’Elongi 1 acre
    6. Miriti Robert M’Elongi 1.20 acres
    7. Lucy Kathure 0.10 acres
    8. Gladys Mwendu 0.10 acres
  - (c) LR. Amwathi/Maua/9523  
Ciondia M’Itiame



1. Mention on 14<sup>th</sup> December, 2023 to confirm compliance with these orders and for further orders and/or directions
2. Each party shall bear its own costs

**DATED AT MERU THIS 26<sup>TH</sup> DAY OF OCTOBER 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances

Court Assistants - Kinoti/Munene

For Petitioner/1<sup>st</sup> Admin-Mr. Gitonga for Basilio Gitonga, Muriithi & Associates

For 2<sup>nd</sup> Administrator -Mr. Asuma for Mutembei & Kimathi & Co. Advocate

