



REPUBLIC OF KENYA



In re Estate of Thomas Mutuambugu M'mugaine alias Mutuambugu Mugaine alias Mutuambugu Mugaine (Deceased) (Succession Cause 30 of 2008) [2023] KEHC 24504 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24504 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 30 OF 2008
TW CHERERE, J
OCTOBER 26, 2023**

**IN THE MATTER OF THE ESTATE OF THOMAS MUTUAMBUGU M'MUGAINE
ALIAS MUTUAMBUGU MUGAINE ALIAS MUTUAMBUGU MUGAINE (DECEASED)**

BETWEEN

JOSEPH GITONGA MUTUAMBUGU OBJECTOR

AND

CELIA KAREA KIOME 1ST RESPONDENT

JOSES MURIUNGI MUTUAMBUGU 2ND RESPONDENT

CHARLES MUNENE M'ATUGI 3RD RESPONDENT

JUSTA KAGURE MUGAMBI 4TH RESPONDENT

RULING

Background

1. Thomas Mutuambugu M'mugaine Alias Mutuambugu Mugaine alias Mutuambugu Mugaine (Deceased) died sometimes on 05th January, 1994. His estate comprised of LR. Abogeta/L.Kiongone/382.
2. Letters of Administration were issued on 23rd April, 2008 to Celia Karea Kiome (Petitioner/1st Respondent) in her capacity as widow of the deceased. Subsequently, by a Certificate of Confirmation of Grant dated 05th June, 2008, the estate was distributed to Charles Munene M'Atugi (½ Acre) and Joses Muriungi Mutuambugu (Balance).
3. Subsequently, LR. Abogeta/L.Kiongone/382 was partitioned into two parts and Charles Munene M'Atugi was issued with title number LR. Abogeta/L.Kiongone/1127 and Joses Muriungi



Mutuambugu title number LR. Abogeta/L.Kiongone/1128 which he subsequently sold to Justa Kagure Mugambi (4th Respondent).

4. Following the death of Celia Karea Kiome (Petitioner/1st Respondent), this court on 15th December, 2022 appointed Joseph Gitonga Mutuambugu (Objector/Applicant) and Joses Muriungi Mutuambugu (2nd Respondent) as joint administrators of the estate.
5. By chamber summons dated 09th June, 2009 amended on 05th May, 2010, Joseph Gitonga Mutuambugu (Objector/Applicant) who claims to be a son of the deceased prays that the Certificate of Confirmation of Grant dated 05th June, 2008 that distributed the estate to Charles Munene M'Atugi (3rd Respondent) (½ Acre) and Joses Muriungi Mutuambugu (Balance) be revoked for disinheriting him.

2nd Respondent's case

6. Joses Muriungi Mutuambugu (2nd Respondent) by his statement dated 01st November, 2021, stated that Joseph Gitonga Mutuambugu (Objector/Applicant) was his step-brother and lived on deceased's estate as at the time of distribution of the estate in 2008 but did not benefit from the estate. He conceded that the estate comprised in LR. Abogeta/L.Kiongone/382 had since been partitioned into two parts and LR. Abogeta/L.Kiongone/1127 sold to Charles Munene M'Atugi (3rd Respondent) and LR. Abogeta/L.Kiongone/1128 sold to Justa Kagure Mugambi (4th Respondent). He similarly conceded that he was aware of the Objector/Applicant's claim as at 2009 when he sold LR. Abogeta/L.Kiongone/1128 to Justa Kagure Mugambi (4th Respondent). He explained that Charles Munene M'Atugi (3rd Respondent) was given ½ of deceased's estate after he assisted deceased's widow to file this cause.

3rd Respondent's case

7. Charles Munene M'Atugi (3rd Respondent) stated he assisted the widow of the deceased to file this cause and was given LR. Abogeta/L.Kiongone/1127 which was a subdivision of deceased's estate. He equally conceded that Joseph Gitonga Mutuambugu (Objector/Applicant) has lived on deceased's land since 2008.

4th Respondent's case

8. Justa Kagure Mugambi (4th Respondent) stated she bought LR. Abogeta/L.Kiongone/1128 which was a subdivision of deceased's estate from Joses Muriungi Mutuambugu (2nd Respondent) by a sale agreement dated 25th July, 2009 and was issued with a title deed on 13th November, 2009. He conceded that she has not taken possession of the land for the reason that it is occupied by Joseph Gitonga Mutuambugu (Objector/Applicant).

Objector's case

9. Joseph Gitonga Mutuambugu (Objector/Applicant) stated that he is son of the deceased and has been in occupation of his estate. He faulted the Joses Muriungi Mutuambugu (2nd Respondent) and his deceased mother Celia Karea Kiome (Petitioner/1st Respondent) for disinheriting him. He conceded he built a house on deceased's land in 2008 and occupied it in 2009 and that's when he became aware of this cause.
10. Objector/Applicant's witness Charity Kaira who is deceased's sister stated that Objector/Applicant was the only son of deceased but confirmed that Joses Muriungi Mutuambugu (2nd Respondent) and



his deceased mother Celia Karea Kiome (Petitioner/1st Respondent) lived with deceased on his land until he died.

Analysis and determination

11. I have considered the application in the light of the evidence on record and the parties' submissions.
12. Objector/Applicant's evidence that he is son of deceased has been conceded by Joses Muriungi Mutuambugu (2nd Respondent) who pleaded that Objector/Applicant is his step-brother. That Objector/Applicant has been in occupation of deceased's land since 2008 and more particularly the sub-division known as LR. Abogeta/L.Kiongone/1128 has similarly been conceded by Joses Muriungi Mutuambugu (2nd Respondent) who stated that Objector/Applicant was still in occupation of the said land even as at 2009 when he sold the portion to Justa Kagure Mugambi (4th Respondent). It has also been conceded by Justa Kagure Mugambi (4th Respondent) that she has since 2009 not taken possession of the land for the reason that it is occupied by Joseph Gitonga Mutuambugu (Objector/Applicant).
13. It is to be remembered that no party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit. This procedural imperative was discussed by the Court of Appeal in *Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others* [2014] eKLR, in which the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC 91/2002* was quoted with approval thus:

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

14. Flowing from the above, I find that 2nd Respondent who has all along pleaded the fact that Objector/Applicant is step-brother cannot be allowed to depart from that pleading only for the reason that he did not occupy deceased's estate during deceased's life-time. 2nd Respondent's evidence that Objector/Applicant was not entitled to a share of deceased's estate is hence rejected.
15. The Court in *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR reiterated circumstances that may lead to revocation of a grant as follows:

“The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”



16. In *Musa Nyaribari Gekone & 2 Others v Peter Miyianda & another* [2015] eKLR, the court of Appeal held that:
- “The expression “any interested party” as used in the foregoing provision, in its plain and ordinary meaning, is in my view wide enough to accommodate any person with a right or expectancy in the estate.”
17. The expression “any interested party” as used in the foregoing provision, in its plain and ordinary meaning, is in my view wide enough to accommodate any person with a right or expectancy in the estate such as the Applicants herein. The Applicant who is a son of the deceased is by law beneficially entitled to the estate of deceased and on that basis, has *locus standi* to present the application for revocation of the grant.
18. 2nd Respondent has conceded that him and his late mother did not notify the Objector/Applicant of the filing of this succession cause nor distribute any share to him and this leads to the conclusion that the grant was obtained by the making of a false statement and by concealment from the court of material particulars concerning disclosure of the Objector/Applicant’s right over the estate.
19. Section 38 of the *Law of Succession Act* the Act provides that:
- “Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Section 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”
20. In the case of *Stephen Gitonga M’Murithi v Faith Ngira Murithi* [2015] eKLR, the Court of Appeal noted that Section 38 of the Act 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. Also see *Rono v Rono & another* [2008] 1 KLR).
21. Now that deceased’s widow Celia Kareia Kiome is deceased, the persons entitled to deceased’s estate are his sons Joseph Gitonga Mutuambugu (Objector/Applicant) and Joses Muriungi Mutuambugu (2nd Respondent). The widow of the deceased already transferred the portion that she and her son were entitled to Charles Munene M’Atugi (3rd Respondent) thereby extinguishing 2nd respondent’s right over the estate. The sale by 2nd Respondent to the 4th Respondent of the remaining portion known as LR. Abogeta/L.Kiongone/1128 which the Applicant occupies was fraudulent and it is declared null and void.
22. Consequently, it is hereby ordered:
1. Title number LR. Abogeta/L.Kiongone/1128 in the name of Justa Kagure Mugambi (4th Respondent) is hereby cancelled
 2. The Land Registrar Meru is directed to transfer LR. Abogeta/L.Kiongone/1128 to Joseph Gitonga Mutuambugu
 3. 4th Respondent’s claim lies not against the estate of the deceased but against the 2nd Respondent
 4. Applicant’s costs shall be borne by the 2nd Respondent
 5. Mention on 14th December, 2023 to confirm compliance with these orders

DATED AT MERU THIS 26TH DAY OF OCTOBER, 2023.

WAMAE. T. W. CHERERE



JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Applicant/Objector - Mr. Kaimenyi for Kaimenyi Kithinji & Co. Advocates

For Petitioner - N/A

For 1st, 2, 3rd Respondents - Ms. Mukaburu for Kiogora Arithi & Associates Advocates

For 4th Respondent - Ms. Kiyuki for Kiyuki & Kayika Advocates

