



In re Estate of Gakuha S/O Ruoro alias Gerald Gakuha S/O Ruoro (Deceased) (Succession Cause 123 of 2005) [2023] KEHC 25802 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 123 OF 2005
FN MUCHEMI, J
NOVEMBER 29, 2023**

BETWEEN

GERALD GAKUHA MAKURI ADMINISTRATOR

AND

PETER MUCHIRI NDEGWA 1ST PROTESTOR

PATRICK WAGURA GITAHU 2ND PROTESTOR

JUDGMENT

Brief Facts

1. The matter is coming up for the determination of the protest dated May 7, 2019 in opposition to the summons for confirmation of grant dated March 27, 2019.

Background

2. The petitioner one Peter Muchiri Ndegwa filed this petition on March 2, 2005 in his capacity as the grandson of the deceased. The deceased was said to have no wife or children during his lifetime. The grant of letters of administration intestate was issued to the petitioner on July 29, 2005. However, the said grant was revoked by Matheka J on intervention by the applicant herein Gerald Gakuha Makuri who claimed that he was a nephew of the deceased. The applicant was then appointed the administrator of the estate.
3. The Confirmation of grant of Summons dated May 27, 2019 was filed by the applicant on the same date the protestors herein Peter Muchiri Ndegwa and Patrick Wagura Gitahi filed this protest dated May 7, 2019 opposing the mode of distribution. Parties were heard by way of viva voce evidence.



The 2nd Protestors' Case

4. PW1, Patrick Wagura Ndegwa stated that the deceased is his grandfather, and uncle to his father, Sila Gitahi. The 2nd protestor further testified that the deceased had no wife or children. Further, that he used to look after the deceased in his old age and cultivate his land LR. No. Tetu/Ihururu/158 and that he did not know the administrator/petitioner until he went to the deceased's land in 2019 and ordered the protestors to vacate the premises. The witness stated that he did not know how the administrator and the deceased were related.
5. PW1 stated that the deceased sold his parcel of land to his father vide a verbal agreement. The witness further testified that they used to cultivate the land during and after the death of the deceased.
6. On cross examination, PW1 stated that the deceased and his father were step brothers. The witness further stated that the 1st protestor is his father's cousin. PW1 further testified that he did not file his protest until the time the administrator went to claim the suit premises.
7. PW2, David Muteru Merebu testified that he was employed by Sila Gitahi, the father of the 2nd protestor as a herdsman in the year 1970 and that the said Sila Gitahi told him that the deceased had sold LR No. Tetu/Ihururu/158 to him.
8. The witness further stated that the said Sila Gitahi was a nephew to the applicant herein. He further testified that the said parcel of land has all through been utilized exclusively by the family of Silas Gitahi and that the 2nd protestor is a son to the late Gitahi.

The Administrator's Case

9. DW1, Gerald Gakuha Makuri testified that the deceased was his uncle as his mother was a sister to the deceased. He testified that he took care of the deceased from 1972 until 1979 and while he was employed in Nakuru, he used to send financial assistance to the deceased through commuter buses and the post office to the deceased.
10. DW1 testified that the deceased told his parents that he had reserved his parcel of land for him as he was named after the deceased and that the 2nd protestor is a neighbour to the deceased and a first cousin to the 1st protestor. It was further stated that the father of the 2nd protestor was a step brother to the father of the 1st protestor.
11. The administrator stated that the 2nd protestor's father did not purchase any land from the deceased as he claims.

Issue for determination

12. The main issue for determination is whether the protest has merit.

The Law

Whether the protestor has merit

13. The deceased herein died on October 12, 1993. He was not married and had no children surviving him. It is not contested that the applicant is a nephew of the deceased, for his mother Regina Wanjiku Ruoro and the deceased were siblings.
14. The 2nd protestor said that he is a grandchild of the deceased as the deceased was an uncle to his father. The applicant testified that the 2nd protestor was a neighbour of the deceased and a first cousin to the



1st protestor in that his father, Silas Gitahi is a step brother to the father of the 1st protestor. It is thus clear on the evidence that the 2nd protestor is not a grandson of the deceased as he claims. The only relation that could be deciphered from the evidence is that the 1st and 2nd protesters are cousins, which fact has been confirmed by the applicant. Although the 2nd protestor denied knowing the 1st protestor on cross examination, on cross-examination, he said that the two were cousins. Furthermore, the 2nd protestor testified that he did not know the administrator as he never saw him go visit the deceased and that he did not know the sister to the deceased who was the mother of the applicant. Thus it is evident that the 2nd protestor is not related to the deceased.

15. The 2nd protestor further claims that the deceased sold LR No Tetu/Ihururu/158 to his father vide a verbal agreement. It is trite law that he who alleges must prove. This degree of prove is well enunciated in the case of *Miller v Minister of Pensions* [1947] cited with approval in *D.T. Dobie Company (K) Limited v Wanyonyi Wafula Chabukati* [2014] eKLR. The court stated:-

“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’, thus proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

16. Further, section 107 of the *Evidence Act* cap 80 places the burden of proof on the party who wants the court to rely on the existence of any set of facts to make a finding in his favour, to prove those facts. The 2nd protestor did not produce any documentary evidence to show that the deceased had sold the suit premises to his late father. The 2nd protestor only called PW2 as a witness to support his allegation that his father purchased the land from the deceased. The said witness testified that he did not witness the sale agreement but instead it was the 2nd protestor’s father who told him that the deceased had sold the land to him. Such evidence is hearsay evidence which is not admissible. Therefore, it is my considered view that the 2nd protestor did not prove that the said land was sold to his father.
17. I find that the applicant herein is the closest surviving relative of the deceased in degree of consanguinity and is therefore entitled to inherit from the deceased who was his uncle.
18. Having found no merit in the protest, it is hereby dismissed with no order as to costs.
19. The grant issued to the applicant on November 16, 2018 is hereby confirmed. The applicant Gerald Gakuha Makuri shall be the sole heir of the deceased’s estate comprising of L.R. Tetu/Ihuru/158.
20. The certificate of grant to issue in the foregoing terms.
21. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY AT THIKA THIS 29TH DAY OF NOVEMBER, 2023.

F. MUCHEMI

JUDGE

