



REPUBLIC OF KENYA



**In re Estate of M’rutere M’kiambati (Deceased) (Succession Cause
35 of 1986) [2023] KEHC 26250 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 35 OF 1986
TW CHERERE, J
NOVEMBER 23, 2023**

BETWEEN

JOSEPH KAURO KAAI PETITIONER

AND

KENNEDY MURIITHI APPLICANT

RULING

1. The record does not demonstrate when M’Rutere M’Kiambati (Deceased) died but his estate comprised of LR. Nyaki/mulathankari/744.
2. This cause was filed by one M’Munyua M’Rutere who described himself as the only son of the deceased and Letters of Administration were issued to him on 22nd June, 1987
3. By summons dated 28th May, 1996, Jennifer Kathure Kathurima in her capacity as wife to deceased’s son who was himself deceased applied that M’Munyua M’Rutere who had since died by substituted with his son Joseph Kauro Kaai. The application appears to have been granted for Letters of Administration were subsequently issued to Joseph Kauro Kaai on 12th June, 1996.
4. By summons dated 28th January, 1997, Joseph Kauro Kaai applied for confirmation of the grant by a Certificate of Confirmation of Grant dated 19th February, 1997, the estate was distributed equally to Joseph Kauro Kaai and Jennifer Kathure Kathurima.
5. Subsequently, Jennifer Kathure Kathurima died and by Certificate of Confirmation rectified on 02nd July, 2013, the estate was distributed equally to Joseph Kauro Kaai and Jennifer Kathure Kathurima’s son Fredrick Kigunda Kahurima.
6. Consequently, LR. Nyaki/mulathankari/744 was subdivided into two parts i.e LR. Nyaki/mulathankari/3856 which was registered in the name of Joseph Kauro Kaai and LR. Nyaki/mulathankari/3856 in the name of Fredrick Kigunda Kathurima.



7. Successively, Joseph Kauro Kaai caused LR. Nyaki/mulathankari/3856 to be portioned into eight (8) portions name LR. Nyaki/mulathankari/4479- 4486 all registered in his name whereas LR. Nyaki/mulathankari/3856 was portioned into three (3) portions LR. Nyaki/mulathankari/3351 registered in the name of Fredrick Kigunda Kathurima which was subsequently registered in his name as LR. Nyaki/mulathankari/4252.
8. LR. Nyaki/mulathankari/3352 was registered in the name of Simon Kiige Karimi and Phineas Murerwa M’Mutungi and LR. Nyaki/mulathankari/3353 was registered in the name of Phineas Murerwa M’Mutungi and Caroline Karwitha Gitonga.
9. It has now been revealed that Joseph Kauro Kaai’s siblings included the following:
 1. Julius Mutethia Kaai (deceased)
 2. Beatrice Mutindi Kaai (deceased)
 3. Josphat Kithure Kaai
10. By summons dated 01st March, 2022, Kennedy Muriithi, son of Beatrice Mutindi Kaai (deceased) faults the Petitioner for not providing for his siblings including his mother Beatrice Mutindi Kaai (deceased) and I directed that the summons be heard by way of viva voce evidence

Petitioner’s case

11. Joseph Kauro Kaai stated that he did not provide for his siblings conceded that his siblings Julius Mutethia Kaai (deceased), Beatrice Mutindi Kaai (deceased) and Josphat Kithure Kaai for the reason that the deceased who is his grandfather had expresses his wish to have him inherit half share of his estate. Maritha Gacheri, Petitioner’s father stated that the deceased had disinherited her husband after he sold a cow belonging to his sister Kinaitore but could not remember when the event occurred. Josphat Kithure a brother to the Petitioner stated that his mother Maritha Gacheri informed him that the deceased had given half share of his land to the Petitioner but that Petitioner had offered to give him $\frac{3}{4}$ of an acre.

Applicant’s case

12. Kennedy Muriithi, (Applicant) son of Beatrice Mutindi Kaai (deceased) who is daughter of deceased stated that he was born and bred on his grandfather’s land and that faults failure by the Petitioner to provide for his mother’s estate had disinherited him and his siblings Peter Munene and Maureen Kendi.

Analysis and determination

13. I have considered the application in the light of the evidence on record and the parties’ submissions and I have deduced the issues for determination as follows:
 1. Whether deceased bequeathed disputed $\frac{1}{2}$ share of LR. Nyaki/mulathankari/744 to Protestor as a gift inter vivos
 2. Who is entitled to the disputed $\frac{1}{2}$ share of LR. Nyaki/mulathankari/744
14. Applicant’s evidence that he is son of deceased’s daughter Beatrice Mutindi Kaai (deceased) and has settled on deceased’s land is conceded by Petitioner and his witnesses. It has also been conceded by the Petitioner that he caused half share of deceased’s estate to be distributed exclusively to him out of which it has been partitioned into eight (8) portions name LR. Nyaki/mulathankari/4479-4486 all registered in his name.



15. In response to the application for revocation of grant dated 01st March, 2022, Petitioner filed two replying affidavits. In the affidavit sworn and filed on 25th April, 2022, Petitioner averred as follows:

Paragraph 4: That the late M'Rutere M'Kiambati had two sons M'Munyua M'Kiambati and Josphat Kathurima M' Rutere

Paragraph 8: That my siblings as well as all beneficiaries of the Estate of Josphat Kathurima M' Rutere were aware of the proceedings and consented to the estate being distributed equally between the two sons

Paragraph 9: That I and Jennifer Kathure were to hold the shares of the estate in trust for ourselves and other beneficiaries. I was to hold in trust for the children of the late M'Munyua M'Kiambati and Jennifer Kathure held in trust for the children of the late Josphat Kathurima M' Rutere

16. In the second affidavit sworn and filed on 02nd November, 2022, Petitioner averred as follows:

Paragraph 7: That during his lifetime, the late M'Rutere M'Kiambati expressed his wishes of how he wanted his land LR. Nyaki/mulathankari/744 distributed

Paragraph 8: That the wishes of the late M'Rutere M'Kiambati were that his land LR. Nyaki/mulathankari/744 be shared out between his son Josphat Kathurima M' Rutere and the Petitioner (deceased's grandson)

17. Petitioner therefore justifies his action of distributing the disputed ½ share of LR. Nyaki/mulathankari/744 on the ground that it was bequeathed to him by his grandfather, the deceased herein.

18. 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 v. Stephen Mutinda Mule & 3 Others* [2014] eKLR, in which the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v. 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.”

19. Flowing from the above, I find that Petitioner who in his first affidavit sworn and filed on 25th April, 2022 pleaded that he was holding the disputed ½ share of LR. Nyaki/mulathankari/744 in trust for the children of the late M'Munyua M'Kiambati is estopped from departing from that pleading and his claim that the said share was bequeathed to him by the deceased is thus rejected.

20. In any event, the issue of when a gift (*inter vivos*) becomes complete was discussed in the case of *re Estate of the Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR where the court held that:

For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way



of resulting trusts or the presumption. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. (Emphasis added).

21. From the foregoing, it is the finding of this court that the alleged gift to the Petitioner was incomplete and hence the disputed ½ share of LR. Nyaki/mulathankari/744 of the estate of the deceased person remains for distribution in accordance with the provisions of the Law of Succession Act.
22. 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.”
23. In Musa Nyaribari Gekone & 2 Others v Peter Mijenda & 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.”
24. 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.
25. Petitioner has conceded that he did not provide for his siblings who include the mother of the Applicant herein 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 other beneficiaries to the estate.
26. The question therefore is; what formula is applicable in the distribution of ½ share of LR. Nyaki/mulathankari/744.
27. In the Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR, the Court expressed itself on the distribution of the property of a grandparent to grandchildren as follows:

“The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”
28. Maritha Gacheri, the widow of the late M’Munyua M’Kiambati to whom the disputed ½ share of LR. Nyaki/mulathankari/744 is alive.



29. 35 (1) of the *Law of Succession Act* provides for the mode of distribution on an intestate estate where the deceased is survived by a spouse and child or children as follows:

“Subject to the provisions of section 40, where an intestate has left a surviving spouse and child or children, the surviving spouse shall be entitled to: the personal and household effects of the deceased absolutely; and a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon remarriage.”

30. In interpreting this section, Musyoka (J) in the case of *Tau Katungi -v- Margrethe Katungi & Another* (2014) eKLR stated that: -

“The effect of section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated.”

31. Accordingly, since the widow is still alive and has not remarried, her life interest in the property applies.

32. From the foregoing, it is hereby ordered as follows:

1. Letters of Administration issued to Joseph Kauro Kaai on 12th June, 1996 are hereby revoked and Joseph Kauro Kaai and Kennedy Muriithi are appointed joint administrators with an order that Letters of Administration be issued in their joint names
2. The Land Registrar Meru is directed to call the eight portions namely LR. Nyaki/mulathankari/4479 to LR. Nyaki/mulathankari/4486 which are subdivisions of LR. Nyaki/mulathankari/3856 and revert them to title No. LR. Nyaki/mulathankari/3856
3. The Land Registrar Meru is further directed to register LR. Nyaki/mulathankari/3856 in the joint names of Joseph Kauro Kaai and Kennedy Muriithi for purposes of distribution
4. Thereafter, LR. Nyaki/mulathankari/3856 shall be distributed in equal shares as follows:
 - a. ¼ share to Joseph Kauro Kaai
 - b. ¼ share to the estate of Julius Mutethia Kaai (deceased)
 - c. ¼ share in equal share to the children of Beatrice Mutindi Kaai (deceased) namely Kennedy Muriithi, Peter Munene and Maureen Kendi.
 - d. ¼ share to Josphat Kithure Kaai
 - e. Maritha Gacheri shall have a life interest in each of the shares
5. Applicant’s costs shall be borne by the Petitioner
6. Mention on 08th February, 2024 to confirm compliance and for further orders/directions

DATED AT MERU THIS 23RD DAY OF NOVEMBER 2023

WAMAE. T. W. CHERERE

JUDGE



Appearances

Court Assistants - Kinoti/Munene

For Applicant - Mrs. Mutegi for Mutegi Mugambi & Co. Advocates

For Petitioner -Mr. Wamache for B.G.Kariuki & Co. Advocates

