



REPUBLIC OF KENYA



**In re Estate of Sicily Muthoni Gachoki (Succession Cause 201 of 2013)  
[2023] KEHC 25811 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25811 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
SUCCESSION CAUSE 201 OF 2013  
RM MWONGO, J  
NOVEMBER 23, 2023  
IN THE MATTER OF THE ESTATE OF SICILY MUTHONI GACHOKI**

**BETWEEN**

**SELINA WAGATWE MWATHI ..... PETITIONER**

**AND**

**BONFACE SP KARANJA ..... PROTESTOR**

**RULING**

1. The deceased died aged 80 years, on 24/11/2007. Letters of administration were issued to her daughter, the Petitioner, Selina Wagatwe Mwathi, on 25<sup>th</sup> September 2008. The property of the deceased was land parcel No Ngariama/ Kabare/953 measuring one (1) acre.
2. That parcel of land was a subdivision emanating from Ngariama /Kabare/32 which had belonged to the deceased's husband Gachoki Kigo. The title was issued to the deceased after sub-division on 16/11/2000
3. The protestor is the petitioner's brother. He filed an affidavit of protest dated 21<sup>st</sup> April, 2022 stating as follows:
  1. That my siblings include the petitioner herein, one Julius Muriuki P.Gachoki who passed on in the year 2000, Patrick Karanja Ndambiri who passed on in 1995 and Ernest Muchira Karanja who passed on in 2006.
  2. That our father the late Gachoki Kigo alias Karanja Kigo passed on in the year 1970 leaving behind land parcel number Ngariama/Kabare/32 measuring approximately 8.8 acres.
  3. That we did succession proceedings with regards to our father's estate in the year 1995 and the said estate was subdivided as follows:



Julius Muriuki (Son) 2.5 Acres

Patrick Ndambiri (Son) 2.5 Acres

Boniface S.P Karanja (Son) 2.5 Acres

Sicily Muthonigachoki(Wife) the balance, 1.29acres

4. That a portion of 0.3 acres was hived from the share of our deceased mother herein for the purposes of an access road, leaving a balance of 1 acre.
  5. That the one-acre portion held by our deceased mother herein was subsequently registered as land parcel number Ngariama/Kabare/953.
  6. That the petitioner herein was married and during the meeting held in 1992, she declined to take up any share of land parcel number Ngariama/ Kabare/32 as she had shares of and at her husband's home in Thirikwa.
  7. That in the year 2008 the petitioner went before the Land Disputes Tribunal vide Land Disputes Tribunal Case No.41 of 2008 where the Tribunal made a ruling that our mother's estate be shared equally between myself and the petitioner
  8. That thereafter the petitioner instituted succession proceedings for my mother's estate without my knowledge and consent and in the petition she included names of strangers who are not our siblings as dependants of my mother. That Julius Njeru and Silas Ndambiri who are included in the said petition are total strangers.
  9. That I have extensively developed land parcel number Ngariama/ Kabare/953 owned by our mother from way back in the year 2000, by planting 5000 tea bushes among other developments, on the understanding that it would be transferred to me.
  10. That the grant issued to the petitioner herein ought to be revoked/annulled.
  11. That in the interests of justice I propose to share the estate with myself inheriting  $\frac{3}{4}$  acres of the said parcel number Ngariama/Kabare/953 and the petitioner inheriting  $\frac{1}{4}$  acres.
4. The respondent deposed a replying affidavit with the following major averments:
- i. That it is not true that a family meeting was held, which appointed the protestor as sole beneficiary of our late mother's estate.
  - ii. That it is true that I was married in the early 50'S and my advocate on record advises me, which advice I verily believe to be true and correct that marriage does not bar and/or disqualify me from inheriting and/or benefiting from the estate of our mother.
  - iii. That before my mother passed, I left my matrimonial home and went to stay with her, till her demise.
  - iv. That as a daughter of the deceased, I am entitled to a share out of her estate.
  - v. That the protestor has already benefited from our parents' estate and is only looking to benefit twice and unfairly.
5. An oral hearing of the protest was conducted. The protestor availed two witnesses, Gabriel Gachoki Nyaga and Linus Muchira Karanja to give evidence. For the respondents, the petitioner and her witness Kamau Muchira gave evidence.



- Parties thereafter filed written submissions as directed by the court.

### **Protestor's Submissions**

- The protest is made on grounds that there was a memorandum of understanding adopted in 1992 in the presence of family members, including the Petitioner and the deceased herein who was alive then. In the meeting the family members agreed on the mode of distribution of their father's estate. The Petitioner herein expressly stated that she had no interest in inheriting her father's estate.
- At the meeting it was also agreed that the one acre portion that the deceased herein was to inherit, which became known as land parcel number Ngariama/Kabare/953 was to be inherited by the person who took care of the deceased herein during her lifetime. The said parcel would also be inherited by the person who catered for: the succession proceedings of their father, Gacoki Kigo's, estate; survey fees for their father's land parcel number Ngariama/Kabare/32; and who carried out the developments on land parcel number Ngariama/Kabare/953.
- In the meeting, the protestor, whose middle name is Ndiga agreed to take up all the above said responsibilities. It is the protestor's case that he took care of their mother the deceased herein until her death in 2007. The protestor also extensively developed land parcel number Ngariama/Kabare/953 by planting over 5000 tea bushes among other developments, on the understanding that the same would be transferred to him.
- The protestor produced the Growers Registration Confirmation in evidence. The protestor also catered for the expenses for the succession of their father's estate, subdivision expenses for land parcel number Ngariama/Kabare/32 and funeral expenses for his parents. The protestor produced the receipts in evidence. The petitioner did not tender any evidence of having refunded the protestor the expenses the protestor incurred, which was a condition for any person who wanted a share of Ngariama/Kabare/953 in accordance with the memorandum of understanding.
- The protestor cited the case of *In re Estate of Cypriano Imanyara Imiru* (Deceased)(Civil Appeal 78 of 2016)[2022]KECA 1176(KLR)(21 October 2022)(Judgment) where the Court of Appeal in giving effect to the wishes of the deceased where the children had expressed no dissatisfaction with the said wishes during the life time of the deceased, stated that the wishes of the deceased must be respected and proceeded to confirm the mode of distribution that gave effect to the wishes of the deceased.

### **Petitioner's submissions**

- The petitioner submitted that Land Parcel Ngariama/Kabare/953 is registered in the names of Sicily Muthoni Gachoki, the deceased herein, and who is the mother to both the protestor and the petitioner.
- The said Land Parcel was carved out of the original land parcel Ngariama/Kabare/32 in the names of Gachoki Kigo. His succession resulted into four (4) portions, namely Ngariama/Kabare/953, Ngariama/Kabare/954, Ngariama/Kabare/955 and Ngariama/Kabare/956.
- Land parcel Ngariama/Kabare/954 devolved to the protestor herein, while Ngariama/Kabare/953 devolved to the mother.
- Ngariama/Kabare/955 and Ngariama/Kabare/956 devolved to the other siblings who have since passed on.
- The protest is on Land Parcel Ngariama/Kabare/953 on which the parties herein disagree as to the mode of distribution. The protestor proposes to get a portion measuring 0.30 acres leaving only 0.10 acres to the petitioner.



17. The protestor herein objects to the petitioner inheriting from their parents on the ground that she is married.
18. The petitioner led evidence that during her mother's lifetime, she built her a house and took care of her. That she literally lived with her mother as her home was near her parents' home. After her mother's death the protestor demolished the house leaving the petitioner with no place to stay at her parents' home
19. The petitioner relies on Section 38 *Law of Succession Act*, which enshrines the principle of equal distribution of the net intestate's estate to the surviving children of the deceased.
20. She also relies on the case of *Stephen Gitonga M'Murithi v Faith Ngira Murithi* (2015)eKLR

“The court noted that Section 38 *Law of Succession Act* requires distribution of the estate equally irrespective of gender and whether married and comfortable in their marriage or unmarried”

### **Issues for Determination**

21. The only issue for determination is whether the protest should be allowed and the mode of distribution

### **Analysis and Determination**

#### **Summons for confirmation of grant**

22. The petitioner was issued with a grant on 25<sup>th</sup> September, 2008 and the same is sought to be confirmed vide summons for confirmation of grant dated 21<sup>st</sup> April 2009. The protestor objects to this mode of distribution.
23. The petitioner in the said summons proposes that the entire land parcel number Ngariama/Kabare/953 that belonged to the deceased herein, be allocated to her. The protestor on the other hand proposes that she be allocated 3/4 acres out of land parcel number Ngariama/Kabare/953 and the petitioner 1/4 acre.

#### **Distribution of land parcel number Ngariama/Kabare/953**

24. The protestor supports his mode of distribution based on purported minutes of a meeting held by villagers. It is clear that the minutes relate to land parcel No Ngariama/Kabare/32, the mother title, and not to Ngariama/Kabare/953, the sub-division, although the linkage is clear.
25. The protestor herein objects to the petitioner inheriting from their parents on the ground that she is married.
26. The protestor testified that petitioner had been married and had benefitted through her husband's clan land. Consequently, the family had agreed that land parcel number Ngariama/Kabare/953 was to be inherited by the protestor.
27. In the case of *In re Estate of Cypriano Imanyara Imiru (Deceased)*(Civil Appeal 78 of 2016)[2022] KECA 1176(KLR)(21 October 2022)(Judgment) the Court of Appeal gave effect to the wishes of the deceased where the children had expressed no dissatisfaction with the said wishes during the life time of the deceased, stated that the wishes of the deceased must be respected and proceeded to confirm the mode of distribution that gave effect to the wishes of the deceased.



28. PW2- Linus Muchiri testified that the family had agreed at the 1992 family meeting that the one-acre portion that the deceased herein was to inherit, which became known as land parcel number Ngariama/Kabare/953 was to be inherited by the person who took care of the deceased herein during her lifetime.
29. Further, the protestor stated that he developed the land while the petitioner went to live with her husband and she has never left her matrimonial home.
30. The petitioner avers that before her mother died, she left her matrimonial home and went to stay with her, until her final demise.
31. The petitioner testified that she lived in her matrimonial home and not on land parcel number Ngariama/Kabare/953. She had lived with her mother for a brief period until her death. Further, she stated that her deceased mother bequeathed the parcel of land to her. Moreover, in the 1992 family meeting, she did not sign in the minutes' memorandum to make a waiver of her rights in the land. She said that indeed she developed the land by building a house for her mother.
32. RW2- Kamau Muchira testified that the petitioner did not get any land from her deceased father and hence should inherit land parcel number Ngariama/Kabare/953. In its entirety
33. Further, he said she had developed the land by building a house for her deceased mother. Thus, she was entitled to benefit from the deceased's land as a daughter. Having been married did not void her right as a beneficiary of her deceased's mother.
34. In the case of *In re Estate of Francis Andachila Luta (Deceased)* (Succession Cause 875 of 2012) [2022] KEHC 16900 (KLR) (23 December 2022) (Judgment) Musyoka J held that:
- “Customary law discriminates against daughters so that they are not entitled to inherit from their dead parents, more so daughters who are married. That position is inconsistent with Article 27 of the *Constitution* ..... and it is void by virtue of Article 2(4) of the *Constitution*.”
35. The petitioner submits that the protestor has already benefited from his parents, meaning his father's estate, and sharing in the estate of the deceased herein amounts to benefiting twice.
36. Section 38 *law of succession Act*, enshrines the principle of equal distribution of the net intestate's estate to the surviving children of the deceased. The section 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 sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children. (Emphasis supplied).
37. In *Stephen Gitonga M'Murithi v Faith Ngira Murithi* (2015)eKLR
- “The court noted that Section 38 *Law of Succession Act* requires distribution of the estate equally irrespective of gender and whether married and comfortable in their marriage or unmarried”
- That position of the law is clear and also in accordance with Article 27(1)-(4) of the *Constitution* which provide as follows:
- “Every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms. (3) Women and men have the right to equal treatment, including



the right to equal opportunities in political, economic, cultural and social spheres. (4)  
The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

### **Disposition**

38. In the result, the provisions of Article 27 of the *Constitution* read together with section 38 of the *Law of Succession Act* are clear, and I will abide by them.
39. I therefore find and hold that the land parcel number Ngariama/Kabare/953 should be shared equally between the deceased's children who survived her.
40. As it is not in dispute that all the other siblings of the petitioner and protester are deceased, I direct that the deceased's land shall be divided equally between the two of them.
41. Orders accordingly.

**DATED AT KERUGOYA THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023**

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**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mukami for the Applicant/Protestor
2. Mwaura holding brief for Migwi for the Respondent
3. Murage, Court Assistant

