



REPUBLIC OF KENYA



**Samwel & another v Mbogo & another (Miscellaneous Succession Cause
30 of 2017) [2022] KEHC 325 (KLR) (31 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE 30 OF 2017**

**LW GITARI, J
MARCH 31, 2022**

BETWEEN

TARTISIO NGAI SAMWEL 1ST PETITIONER

BEATRICE GAAJI NDERI 2ND PETITIONER

AND

PATRICK RUGENDO MBOGO 1ST PROTESTOR

GENASIA NJOKI NDERI 2ND PROTESTOR

JUDGMENT

Background

1. This matter relates to the estate of Nderi Munyi (deceased) who died intestate on 29th January 2013. A grant of letters of administration was issued to Beatrice Gaaji and Tratisious Ngai Samuel upon being appointed by this court as the administrators of the deceased's estate on 15/10/2018.
2. What is pending before this court therefore is determination of the summons for confirmation of grant dated 3/5/2021.
3. The Petitioners relied on their respective affidavits that are on record and that were both sworn on 30th September 2019.
4. The 1st Objector/protestor Patrick Rugendo Mbogo relied on his respective affidavits as well as his written submissions. The 2nd Objector/Protestor Genasia Njoki Nderi on the other hand relied on her affidavits and also gave viva voce evidence.

The brief facts of this matter are that the Petitioner had filed Succession Cause No.224/2016 in the Senior Resident Magistrate's Court at Chuka. There was no objection to the Petition in the



Magistrate's Court and therefore the grant was issued on 3/7/2017. Among the properties which were distributed was Land Parcel No. Karingani/Muiru/1588.

5. The Protestor Patrick Rugendo Mbogo Munyi moved to this court vide a Misc. Application No.30 2017 by way of summons under Section 76 of the *Law of Succession Act* for revocation of the said grant. The protestor was contending that the grant was obtained through misrepresentation and no provision was made for him and other beneficiaries who were children of his late father Mbogo Munyi who passed away in 1981 and left his estate in the hands of the deceased herein. The protest was contending that they were not involved in the proceedings as the cause was filed in secrecy and through misrepresentation. He further claimed that himself and his family had lived on Land Parcel No. Karingani/Muiru/1975 from time immemorial and they were therefore entitled to that parcel of land and not the petitioners. The summons proceeded before Justice Limo who on 11/10/2018 ordered that the said grant be revoked and any subdivisions or entries made pursuant to the said grant be reversed, the estate to revert back to the name of the deceased if any changes had occurred. The Judge further appointed Tratisios Ngai Samuel as the administrator of the estate who was at liberty to apply for confirmation of grant before the expiry of six (6) months with notice to Patrick Rugendo Mbogo Munyi. Later on 11/6/2019, Beatrice Gaaji Nderi was appointed as a co-administrator of the estate.

The petitioners filed a summons for confirmation of grant dated 1/7/2019. This summons was considered but the grant was not confirmed due to some pertinent issues which had not been ironed out. The court postponed the confirmation of grant and directed the administrators to comply with law with regard to the identification of the children of the deceased and prove that the deceased had disposed off any of his properties by way of sale in his life time.

The administrators filed a summons for confirmation dated 3/5/2021 and swore an affidavit sworn on the same date indicating the mode of distribution. This did not go well with the protestor Patrick Rugendo Mbogo and he filed an affidavit protest claiming entitlement of L and Parcel No. Karingani/Muiru/1975 for his family.

This being a succession matter, the court moved to consider the summons for revocation of grant as litigation must come to an end the court has wide discretion while dealing with matter. I will then move to consider the issue which stand out for determination in this cause.

The duty of this court as donated by the *Law of Succession Act* Cap 160 Laws of Kenya is to determine what constitutes the estate of the deceased, who the rightful beneficiaries are and the distribution of that estate. Bearing this in mind I proceed to identify and determine the issues in dispute.

Issues for determination

6. The main issues for determination are:
 - a. Who are the lawful beneficiaries in this cause?
 - b. What properties are available for distribution in this cause?
 - c. Which mode of distribution should be applied?

Analysis

7. Confirmation of grants in probate causes is provided for under Section 71 of the Act, the relevant portion says as follows:

“71. Confirmation of grants



- (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.”
8. Under Section 71 of the Act, an administrator is enjoined to apply for confirmation of his grant after expiration of six months from the date the grant was made to him. The provision is in mandatory terms. As such, without a grant being confirmed, it would be void to the extent of the confirmation.
9. Upon the application for confirmation being made, this court is empowered to confirm the grant or, if not satisfied that the Applicant will properly administer the estate, issue a confirmed grant to another person or persons or order the postponement of the confirmation. Section 71(2)(a) of the Act and the proviso to subsection (2) state as follows:-
- “
- “(2) The court to which application is made, or to which any dispute in respect thereof is referred, may –
- (a) If it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or...
- Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities of the all persons beneficially entitled: and when confirmed the grant shall specify all such persons and their respective shares.’
10. To put this cause into perspective, this court gave a ruling on 11th February 2021. It was the holding of the court that that the summons for confirmation of grant dated 1st July 2019 was premature at the time because it did not provide a comprehensive list of the children and wives of the deceased as well as proof that the deceased sold portions of his estate during his lifetime.
11. This court postponed the confirmation of the grant and directed the administrators to comply with the law in order for this court to be able to determine the summons. To date, the parties have failed to comply although the petitioners have removed some names which were earlier listed as other dependants.
12. Section 47 of the Act herein after referred to as the “Act”) empowers this court to entertain any application and determine any dispute under the Act, and to pronounce such decrees and make such orders therein as may be expedient and fit in the circumstances.
13. In addition, Rule 73 of the *Probate and Administration Rules* gives the Court power to make orders to meet the end of justice. The said Rule states:
- “Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
14. In the circumstances, this court has a duty to determine the issues highlighted herein above and proceed to confirm the grant.



Who are the lawful beneficiaries?

15. It is not in dispute that the deceased was polygamous and had five (5) wives. From the court record, the beneficiaries of the deceased's estate are as follows:

- a. 1st House
 - i. Severina Kaburu (deceased) - Widow
 - ii. Tratisious Ngai Samwel – Son
- b. 2nd House
 - i. Agnes Ciambura (deceased) – Widow
 - ii. Alibina Kageni Samwel – Daughter
 - iii. Genesis Njoki Samwel – Daughter
 - iv. Joyce Kirimi – Daughter
 - v. Justin Gitari Samwel – Son
 - vi. Wilfred Gitonga Samwel – Son
- c. 3rd House
 - i. Janet Karimi (deceased) – Widow
 - ii. Erastus Mutembei Samwel – Son
 - iii. Dores Wanja Samwel – Daughter
 - iv. Njeru Samwel (deceased) – Son
- d. 4th House
 - i. Winfred Mugere (deceased) – Widow
 - ii. Samson Mwenda – Son
 - iii. Solomon Njue – Son
 - iv. Gervasio Kinyua – Son
 - v. Casty Kathambi – Daughter
 - vi. Moreen Nkatha – Daughter
 - vii. Stella Ireri – Daughter
- e. 5th House
 - i. Beatrice Gaaji - Widow
 - ii. Patrick Mbabu – Son
 - iii. Charles Mbae – Son
 - iv. Fredrick Mugendi – Son



- v. John Kariuki – Son
 - vi. Ephantus Mwiti – Son
 - vii. Kenson Gikundi – Son
 - viii. Nancy Kawira – Daughter
 - ix. Stelaah Gakii – Daughter
 - x. Lucy Mukawanjiru – Daughter
16. There is no dispute as to who the lawful beneficiaries from each of the houses are.
17. The Petitioners however contend that the deceased sold pieces of his estate to third parties including:
- a. Purity Kagendo Kinyua
 - b. Bedorf Mwenda
 - c. Lawrence Kirimi Nyaga
 - d. Patrick Mwiti Nyaga
 - e. Charles Njiru
 - f. Erastus Mbaka Mwiti
 - g. Erastus Kinyua
 - h. Elliton Mwiti
 - i. Kenneth Kinyua
18. There is no evidence on record that was tendered to substantiate the claim that above persons were purchasers of parts of the deceased estate during his lifetime. In addition, a sale of the estate after the death of the deceased and before the confirmation of the grant violates the provisions of the Section 82(b)(ii) of the Act as it amounts to intermeddling, an offence that is provided for under Section 45 of the Act. In the circumstances, the said persons are strangers to this cause as it is trite that a purchaser is not a beneficiary of an estate that is subject to a succession cause. This person have not joined this cause as interest parties and as such their interest if any in the suit cannot be determined.
19. The lawful beneficiaries in this cause include the 2nd Petitioner, who is the only surviving widow of the deceased, as well as the surviving children of the deceased from each of the 5 (five) households as listed above.

Which properties are available for distribution in this cause?

20. The assets listed under this cause are:
- a. Muthambi/Lower Karimba/134
 - b. Muthambi/Lower Karimba/1528
 - c. Muthambi/Lower Karimba/1028
 - d. Karingani/Muiru/1975
 - e. Karingani/Mariani/3639



- f. Karingani/Mariani/3822
 - g. Karingani/Mariani/2012
 - h. Karingani/Mariani/3443
 - i. Karingani/Mariani/3123
21. In dispute here is whether land parcel no. Karingani/Muiru/1975 forms part of the deceased's estate. The distribution of the said Karingani/Muiru/1975 has been contested by the 1st Protestor.
22. According to the 1st Protestor, parcel no. Karingani/Muiru/1975 was registered in the name of the deceased to hold it as a trustee for the deceased's late brother, Mbogo Munyi. The late Mbogo Munyi was the father to the 1st Protestor and was survived by:
- a. Phrisila Cianjeu Mbogo Munyi - wife
 - b. Patrick Rugendo Mbogo Munyi - son
 - c. Peter Gitari Mbogo Munyi - son
 - d. George Gitonga Mbogo Munyi - son
 - e. Mugo Mbogo Munyi - son
 - f. Tarasila Ciambaka Mbogo Munyi - daughter
 - g. Lucyline Kathure Mbogo Munyi - daughter
 - h. Kawira Mbogo Munyi - daughter
 - i. Gatwiri Mbogo Munyi - daughter
23. The 1st Protestor further contends that he does not have any claim over any other parcel of land listed for distribution in this cause save for parcel no. Karingani/Muiru/1975.
24. It is therefore the 1st Protestor's proposal that the said land parcel no. Karingani/Muiru/1975 should be distributed as follows:
- a. Phrisila Cianjeu Mbogo Munyi – 0.3 Acres
 - b. Patrick Rugendo Mbogo Munyi – 4.0 Acres
 - c. Peter Gitari Mbogo Munyi – 1.0 Acres
 - d. Ephantus Mugo Mbogo - 1.0 Acres
 - e. Lucyline Kathure Mbogo Munyi – 0.25 Acres
 - f. Kawira Mbogo Munyi – 0.20 Acres
 - g. Gatwiri Mbogo Munyi – 0.25 Acres
25. In response, the Petitioners contend in their respective affidavits that the 1st Protestor is not an heir of this estate but rather, he is an heir to the estate of his late father, Mbogo Munyi. It is her contention that the 1st Protestor sold the entire land that formed the estate of his late father and is now left with Karingani/Mariani/225 at Kanaituri village.



26. From the evidence on record, land parcel no. Karingani/Muiru/1975 was a sub-division of land parcel no. Karingani/Muiru/1588. According to the 1st Protestor, the applicants initially disguised land parcel no. Karingani/Muiru/1975 as parcel no. Karingani/Muiru/1588 and presented the same for confirmation as part of the deceased's estate. The green card to Karingani/Muiru/1975 was registered in 1998 in the name of Ndri Munyi as absolute proprietor. The documents annexed by Patrick Rugendo demonstrated that his claim was all along a claim to own land dispute, it is not within the perview of the jurisdiction of this court.
27. This is a probate court. A claim of ownership of land should be addressed to the appropriate court. In the circumstance, I opine that it is in the interest of justice that confirmation in respect to land parcel no. Karingani/Muiru/1975 be stayed pending determination of its ownership in the appropriate forum. The court should now consider confirmation of the grant in respect of the other properties

Which mode of distribution should be applied

28. The mode of distribution of the subject estate as proposed by the Applicants is contained in paragraph 4 of the affidavit sworn by them on 3rd May 2021 in support of the instant application.
29. From the affidavit of protest sworn by the 2nd Protestor on 12th June 2021, the 2nd Protestor took issue with the distribution of L.R. Karingani/Mariani/3639. According to her, the distribution of the 0.4 Acres in L.R. Karingani/Mariani/3639 to Beatrice Gaaji Nderi was not in accordance with the family agreement on the mode of distribution. She further contends that the portion awarded to the said Beatrice Gaaji Nderi should have been distributed to her late mother Agnes Ciambura for onward transmission to her beneficiaries.
30. I however note that during her submission in court, she stated that she was in agreement with mode of distribution proposed by her brother, the 1st Petitioner herein.
31. As noted herein above, the deceased was a polygamous man and died intestate. Section 40 of the Act is therefore the governing provision for the distribution of his estate. The Section provides:

“Where the intestate was polygamous

- i. 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.
- ii. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

This forms the mode of distribution of the estate of a man who dies intestate and was polygamous.

32. However, since the beneficiaries are in agreement with the distribution proposed by the Petitioner, I opine that the same should be confirmed save for land parcel no. Karingani/Muiru/1975 as explained above.

Conclusion

33. For the reasons stated the summons has merits and the grant is confirmed as per paragraph 4 of the Petitioners' affidavit sworn on 3rd May 2021 in support of the summons for confirmation save for the



distribution proposed in respect of land parcel no. Karingani/Muiru/1975 as the same should be stayed pending determination of its ownership in the appropriate court.

I therefore order:

1. The grant issued to the petitioners on 15/10/2018 is confirmed.
2. The distribution of the estate shall be as proposed in the petitioner's affidavit sworn on 3/5/2021 at paragraph 4 that is as follows:-

KARINGANI/MARIANI/1589

1. Tratisious Ngai Samwel - 2.00 Acres (whole)

KARINGANI/MARIANI/3639

1. Genesisia Njoki Samwel
2. Alibina Kagendo Samwel - 0.10 points jointly
3. Biwolt Murithi - 0.20 acres
4. Justin Gitari Samwel - 24.5 acres
5. Wilfred Gitonga Samwel - 24.5 acres
6. Beatrice Gaaji Nderi - 0.40 acres

MUTHAMBI/LOWER KARIMBA/134

1. Lucyline Mukwanjiru
2. Nancy Kawira Samwel
3. Stella Gakii Nderi - 0.10 acres jointly
4. Patrick Mbabu Nderi - 0.50 acres
5. Fredrick Mugendi Nderi - 0.10 acres
6. Kenson Gikundi Nderi - 0.10 acres
7. Charles Mbae Nderi - 0.10 acres
8. John Kariuki Nderi - 0.10 acres
9. Erastus Mwititi Nderi - 0.10 acres
10. Beatrice Gaaji Nderi - 0.35 acres

MUTHAMBI/KARIMBA/1528

1. John Kariuki Nderi - 0.95 acres (whole)

MUTHAMBI/KARIMBA/1028

1. Fredrick Mugendi Samwel - 0.95 acres (whole)

KARINGANI/MARIANI/3443

1. Justin Gitari Nderi - 0.50 acres
2. Wilfred Gitonga Nderi - 0.50 acres
3. Beatrice Gaaji Nderi - 1.00 acres



4. Solomon Njue Nderi - 0.34 acres
5. Samson Mwenda Nderi - 0.33 acres
6. Gerevasio Kinyua Nderi - 0.33 acres
7. Tratisious Ngai Samwel - 1.00 acres
8. Tratisious Ngari Samwel - 0.50 acres

KARINGANI/MARIANI/3822

1. Moreen Nkatha Nderi
2. Anstella Njeri Nderi 0.10 acres jointly
3. Casty Kathambi Nderi
4. Samson Mwenda Nderi - 0.10 acres
5. Winfred Mugere Nderi - 0.10 acres

KARINGANI/MARIANI/2012

1. Samson Mwenda Nderi - 0.10 acres
2. Solomon Njue Nderi - 0.15 acres
3. Gerevasio Kinyua Nderi - 0.15 acres
4. Munene Njoka - 0.41 acres

KARINGANI/MARIANI/3122

1. Nchege Murua - 0.95 acres -whole
3. This will exclude the distribution of Land Parcel No. Karingani/Muiru/1975 which will be stayed pending the determination of its ownership in the appropriate court.
4. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 31ST DAY OF MARCH 2022.

L.W. GITARI

JUDGE

