



REPUBLIC OF KENYA



In re Estate of Margarita Mwita Machera (Deceased) (Succession Cause 595 of 2014) [2022] KEHC 10482 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE 595 OF 2014
RPV WENDOH, J
MAY 26, 2022**

BETWEEN

GATI MAROA WANGERA 1ST OBJECTOR

ESTHER MBONE 2ND OBJECTOR

AND

LUCAS MWITA MACHERA 1ST PETITIONER

NYANSWI MWITA HABABU 2ND PETITIONER

JUDGMENT

1. This cause relates to the estate of Margarita Mwita Machera (Deceased) who died intestate on August 5, 2004. This judgement is in respect to the summons for confirmation of grant dated March 30, 2017 to confirm the grant issued on March 31, 2016 and the protestor proceedings.
2. The grant was issued in the names of Nyanswi Mwita Habuba, Lucas Mwita Machera and Gati Maroa Wagera.
3. At the heart of the dispute in the deceased's estate is land parcel number LR Bukira/buhiringera/101 (suit land) measuring approximately 24.5 Ha.
4. The succession cause proceeded by way of viva voce evidence. Catherine Waisiko Nyangombe, Gati Maroa Wagera and Paul Kibisoi Absalom testified in favour of the objectors' case. Lucas Mwita Machera and Samson Maribo Makubo testified in favour of the petitioners' case. The court summoned Jones Nyaboa Marua and Zedekiah Habuba.
5. Catherine Waisiko Nyangombe testified as PW1. She adopted in evidence her statement dated July 27, 2020. She testified that she is the sister of the deceased; that the deceased was the 2nd wife to Festos Mwita Machera who is also deceased; that the deceased herein was survived by one son; that she also had two co-wives. She denied knowing Lucas but she knows Mwita Machera.



6. On cross examination, she testified that the deceased married two wives. The first one being Nyanswi Mwita Habuba and a Maragoli woman who did not stay for long; that she also did not know who is on the suit land. She reiterated that she does not know who Lucas Mwita Machera is. The deceased's child is Gati Maroa Machera. On re-examination, she confirmed that the deceased is one and the same person as Nyamohange.
7. Gati Maroa Wangera is PW2. She adopted in evidence her statement dated July 27, 2020. She is the daughter of the deceased. She stated that Lucas Mwita is a grandchild to her deceased mother; that Nyanswi Mwita Habuba and Esther Mbone are the wives of the deceased married through the woman - woman marriage; that Lucas and Nyanswi are not heirs of her mother; that her late father had three wives and each wife was given a portion of land; that before her mother died, she distributed her parcel of land between three people being herself and the other two wives and her share of the land was 2 ½ acres.
8. Paul Kibisoi Absalom is PW3. He adopted his statement dated July 27, 2020. He stated that he is the brother to Esther Mbone who was married to the deceased and they had 5 children; that she was living on the suit land but she left after a dispute with Mwita in 1997; that the deceased had one daughter by the name Gati.
9. Lucas Mwita Machera is DW1. He adopted his statement dated February 18, 2020 as his evidence in chief. He stated that Gati Maroa is his aunty; that he does not know Esther Mbone; that his grandfather had three wives and Gati Maroa is the daughter of Sarah Waiseri and not a beneficiary of the deceased; that the deceased herein had no children; that the deceased married two women one of them being his mother Nyanswi. He further stated that Gati was with her brothers Zedekiah whom they filed the first succession cause but the grant was revoked upon his application and a fresh grant was issued to him and his mother; that the land of the deceased was registered in the names of 5 people who are all deceased except Zedekiah who is the son of the 1st wife of his grandfather.
10. Samson Maribo Makubo is DW2. He adopted his statement dated 20/2/2020. He stated that he is the brother of Festus Mwita and Lucas Mwita is his grandson; that his brother had three wives one of them being Sarah who had 5 children one of them being Gati Mwita. The deceased married Nyanswi who has 2 sons and they are the heirs of the deceased since she did not have any children; that the deceased married Nyanswi who gave her children; that the land in question is land parcel no. 101 registered in 5 names; that Gati Maroa should inherit from land no. 105 which is Sarah's portion.
11. ones Nyambona Marwa is DW3. He is the chief of Bukira North location. He testified that he wrote the letter dated August 21, 2012 and produced it as evidence being 'PEXH1'. It was his testimony that Nyanswi Mwita and Esther Mbone are daughters in law of the deceased; that he had written the two letters one dated August 21, 2012 and the second letter dated Septmber 11, 2015; that in the first letter, there were more beneficiaries than in the second letter. He stated that he did not know the beneficiaries well. He testified that the first letter was not used but the second one.
12. Zedekiah Habuba is DW4. He testified that the deceased was the younger wife of his father; that his father had three wives Sarah Boke, the deceased herein and Robi Mwita. Of the three, the only one surviving is Robi Mwita. He stated that Gati Maroa is the only child to the deceased and not the daughter to Sarah; that the deceased married two wives that is Esther Mbone and Nyanswi Mwita; that Lucas Mwita is a grandchild to the deceased. He stated that in the Kehancha Succession case, the land was given to Gati but Lucas and Nyanswi opposed and the grant was cancelled by the court in Kisii in Misc. Application No. 278 of 2013 (DEXW2). He testified that the land had 5 people with equal shares who are all deceased except him; that the 1st petitioner is the son to the 2nd petitioner.



13. On cross examination by court, DW4 stated that Robi had a child by the name Gati but it is not the Gati who is before this court; that Sarah also had a child by the name Gati but she died.
14. Both parties filed submissions. In support of their case, the objectors submitted that Festo Mwita Machera (deceased) had three wives. He also had three parcels of land which he gave to the three wives. One of the wives, the deceased in this case, was blessed with one child, the 1st objector but for purposes of continuity of her generation, she married two women under the Kuria Customary Marriage one of them being Nyanswi Mwita Habuba who had one son, Lucas Mwita Machera. It was submitted that the aforementioned was the grandson to the deceased herein.
15. Further, it was stated that the deceased was allocated 1/5 share of the suit parcel of land; that in the ruling of 17/3/2016, this court determined who were the beneficiaries of the deceased's estate. Lucas Mwita Machera is the grandson of the deceased and can only inherit the estate through his mother upon her demise. The objectors proposed that 1/5 of the deceased's estate be shared among Nyanswi Mwita Habuba, Gati Maroa Wangera and Esther Mbone.
16. The petitioners submitted that the 2nd respondent is not entitled to any share, since she did not come to court to testify; that the 1st respondent is also not a child to the deceased. The only heirs should be the applicants.
17. I have carefully considered and understood the arguments of both parties. The main issues for determination is the identify the heirs of the Estate of Margarita Mwita Machera and their respective shares.
18. The undisputed fact is that Festo Mwita Machera the Patriarch who is also deceased, had three wives namely Sarah Waiseri, Margarita Mwita Machera and Robi Mwita Machera all of whom are deceased apart from Robi Mwita Machera. The Patriarch also apportioned his parcel of land to the three wives as follows: -
 - a) Sarah Waiseri - L.R. Bukira/buhiringera/221
 - b) Magarita Mwita Machera - 1/5 share of L.R. Bukira/buhiringera/101
 - c) Robi Mwita Machera - L.R. No. Bukira/buhiringera/191.
19. It is also undisputed that Margarita Mwita Machera (Deceased) whose estate is the subject of consideration herein, married two women under the Kuria Customary Law. That is Nyanswi Mwita Habuba and Esther Mbone.
20. The disputed beneficiary in the estate of the deceased is one Gati Maroa Wangera (1st objector). PW1 and PW3 took the position that the 1st objector is the daughter of the deceased. These sentiments were also echoed by DW4 who clarified that the 1st objector is not his sister. He stated that all the three wives of the deceased had daughters by the name Gati. The daughter of Sarah named Gati is deceased. She is not the Gati who is before this court.
21. On the other hand, DW1 and DW2 testified that the 1st objector is the daughter of Sarah Waiseri, the 1st wife of the deceased hence she should inherit from her portion. It was their testimony that the deceased did not have any children.
22. The succession cause in this estate was first filed in the SRM's Court in Kehancha being Succession Case No. 44 of 2012. The grant of letters of administration was issued to Zedekiah Habuba Mwita and Mathias Mwita Habuba which was later revoked vide Kisii Misc. Application No. 278 of 2013.



23. In his application before the Kisii Court, the 1st petitioner based his arguments on the fact that the true beneficiaries of the deceased, Christine Nyanswi and Gati Maroa had been left out. The 1st petitioner in his supporting affidavit of May 3, 2013, described himself as the grandson of the deceased and the son of the 2nd petitioner herein. He also stated that the deceased left one biological daughter by the name of Gati Maroa (the 1st objector). It was also his averment that the estate of the deceased comprised of 1/5 share in the suit parcel of land. On this basis, the Kisii court annulled the letters of administration issued in the Kehancha court on January 28, 2013.
24. Subsequently, fresh letters of administration were issued in the names of the petitioners on July 20, 2015. The petitioners filed an application for confirmation of grant on August 8, 2015. In their application, the 1st petitioner (Lucas Mwita) stated that the beneficiaries of the estate of the deceased are himself, Nyanswi Mwita Habuba (his mother and daughter in law of the deceased) and John Wambura Mwita (his brother and grandson of the deceased). It is this application which triggered the objectors to file an application dated September 26, 2015 for annulment of the grant issued to the petitioners. The main ground raised by the objectors was that the petitioners had not disclosed the true beneficiaries of the estate of the deceased. It was their contention that they are the daughter and daughter in law of the deceased respectively, hence entitled to the estate.
25. The resultant ruling was delivered by this court on March 17, 2016. In his ruling, Mrima J observed in paragraph 6 that the 1st petitioner herein, surprisingly denied that the 1st objector has any interest in the estate of the deceased. The court therefore revoked the grant issued to the petitioners on July 20, 2015 and issued another one dated March 31, 2016 in the names of Nyanswi Mwita Habuba, Lucas Mwita Machera and Gati Maroa Wagera. The petitioners filed an appeal against that decision at the Court of Appeal but it was later withdrawn.
26. I also do echo the sentiments of Mrima J in his ruling of 17/3/2016. It is quite surprising that the applicants now want to deny that the 1st objector is a beneficiary to the estate of the deceased, on the basis that she was not a child to the deceased but a child to the 1st wife of the Patriarch Festo Mwita Machera. The only evidence that the 1st petitioner has preferred to this court to justify his allegations is oral evidence. The letters from the chief produced by DW3 have not been controverted. In all the letters, the 1st objector is named as the daughter of the deceased.
27. It is not lost to this court that in many Kenyan Communities, especially in a polygamous set ups, one name may be found in each of the houses. I take the position that the name Gati could have been a name used to name the female children in the lineage of the Patriarch for all his three wives. The petitioners are using this loophole to allege that the Gati, 1st objector in this case belonged to a different wife and not the deceased.
28. I am of the view that the petitioners are not truthful because of their shifty testimonies. Earlier, they said on Oath that the 1st objector was a biological daughter to the deceased only to take a different position and intentionally leave out the 1st objector as a beneficiary once a fresh grant was issued to them. In his ruling dated May 17, 2016, J Mrima observed that Lucas Mwita, the 1st Petitioner has sought the revocation of grant on the basis that the grant had been obtained by fraud and that the beneficiaries of the deceased are Christine Nyanswi and Gati Maroa. Further in the Chief's letter of introduction dated August 21, 2012 Kehancha RMC 44/2012 the Chief identified Gati Moroa Wagera as a daughter to the deceased. In his affidavit dated May 3, 2013 and filed in MISC Application 44/ 2021, in support of a summons for revocation of grant at paragraph 6 thereof, Lucas Mwita (1st petitioner) deponed that Gati Maroa is the biological daughter of the deceased Lucas Mwita (1st petitioner) cannot run away from his pleadings even in the cases that had been determined earlier regarding this same matter. He



is bound by those pleadings. The change in his testimony, to deny that Gati is not a daughter of the deceased is driven by greed, and meant to deny Gati her inheritance. He is a grandchild of the deceased and he can only inherit through his mother, Nyanswi, 2nd Petitioner. This court is satisfied that the 1st objector is a daughter to the deceased and therefore a beneficiary of the deceased's estate.

29. The 2nd objector Esther Mmbone is also named as a wife to the deceased. Unfortunately, she has been a silent participant in these proceedings. PW3 her bother, testified that Mmbone was married to the deceased in 1985 and had 5 children but she left for Nairobi in the year 1997. It is not clear whether her children live on the land. She has not expressed any interest in the estate. The court cannot make a finding on her behalf.
30. The court finds that the beneficiaries of the estate of the deceased are: -
 - a) Gati Maroa Wangera - daughter.
 - b) Nyanswi Mwita Habuba - daughter in law.
21. The deceased had 1/5 share in the suit parcel of land Lr Bukira / Bwisaboka / 221. This is not disputed and is evidenced by the search dated December 1, 2009. The search indicates that the land is co-owned by 5 people and each has 1/5 share. The land is about 24.5 Ha. It therefore follows that each of the five persons had 4.9 Ha. The 1st objector testified that before the deceased died, she bequeathed the parcel of land to her and the other 2 wives and that her share is 2 ½ acres.
22. The deceased died in the year 2004. The 2nd objector as it was stated, left in the year 1997. Hence, it could not be that she was allocated a parcel of land since she left even before the deceased died. I shall proceed and allocate the 1/5 share of the deceased's land being 4.9 Ha equally between the 1st objector and the 2nd petitioner who are the beneficiaries of the estate of the deceased. Each party is therefore allocated 2.45 Ha.
23. The 1st objector in her statement, stated that the petitioners sold their parcel to third parties. However, no evidence was tendered to confirm these allegations. Out of abundance of caution, if there were already well-established demarcations, in accordance with the deceased's wishes, they shall remain as so. If at all any of the beneficiaries sold their entitlement, they cannot therefore interfere with the portions of land belonging to the beneficiaries. In other words, the boundaries as set, should not be moved.
24. To this end, the following orders do issue: -
 - i. The surviving dependants of the Magarita Mwita Machera are Gati Maroa Wangera and Nyanswi Mwita Habuba.
 - ii. The grant issued on March 31, 2016 is hereby revoked and a fresh grant issued in the names of Gati Maroa Wangera and Nyanswi Mwita Habuba.
 - iii. The surviving dependants+ of the deceased shall share the suit land in equal shares of 2.45 Ha each.
 - iv. The County Surveyor to visit the land and subdivide it as much as possible according to how the two beneficiaries have settled on the land. The beneficiaries will share the surveyor's costs.
 - v. Each party to bear their own costs.
 - vi. Mention on September 28, 2022 to confirm compliance.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 26TH DAY OF MAY, 2022

R. WENDOH



JUDGE

Judgment delivered in the presence of

Gati Maroa the Objectors.

No appearance for the Petitioners.

Evelyn Nyauke Court Assistant.

