



**In re Estate of Solomon M’kachuki alias M’achiuki Iyongo Alias M’kachiuki Igongo (Deceased)
(Succession Cause 288 of 2004) [2022] KEHC 10808 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10808 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 288 OF 2004**

PJO OTIENO, J

MAY 25, 2022

**IN THE MATTER OF THE ESTATE OF SOLOMON M’KACHUKI ALIAS
M’ACHIUKI IYONGO ALIAS M’KACHIUKI IGONGO (DECEASED)**

BETWEEN

ELIZABETH MUKOMBIRO PETITIONER

AND

LAWRENCE MUKARIA OBJECTOR

AND

CHARLES NTONGAI 1ST APPLICANT

PAUL MEME 2ND APPLICANT

JUDGMENT

1. Solomon M’kachuki (‘the deceased’) died on 5th September, 1990 and was survived by the following beneficiaries from two family units:-

1st House

- a) Mworochiaka M’Achuki - widow (deceased)
- b) Lawrence Mukaria - son
- c) Charles Ntongai - son
- d) Julia Ciakauna - daughter
- e) Susan Karambu - daughter

2nd House



- a) Elizabeth Mukombiro - widow (deceased)
 - b) Severina Kathure - daughter
 - c) Lucy Kainda - daughter
 - e) Margaret Ncororo - daughter
2. The only asset for distribution as agreed by all is Ithima/antuambui/20 (hereinafter referred to as the suit asset).
 3. After the demise of the petitioner, an amended grant of letters of administration was jointly issued to Lawrence Mukaria and Amos Karani M'Achiuki on 31/7/2018. On 13/9/2019, Amos Karani M'Achiuki (hereinafter referred to as the petitioner) applied for confirmation of the grant and listed himself, Margaret Ncororo, Sebastian Murungi M'Enambe, Purity Gakii and Christopher Mbero as the beneficiaries. A protest was lodged by Charles Ntongai (hereinafter referred to as the protestor) on 26/11/2019, in which he contends that the suit property should be distributed equally only to him and his brother Lawrence Mukaria, because the other beneficiaries got their bequests during the lifetime of the deceased. He terms all the people listed by the petitioner in the summons for confirmation as strangers, save for Margaret Ncororo. He further refers to the petitioner as a stranger to the estate who lacks *locus standi* to inherit from the deceased. The affidavit of protest exhibited certificate of official search and adjudication records to show the acreage of the estate land and that some property was gifted to members of the family during the lifetime of the deceased
 4. The protest was directed to be canvassed by way of written submissions, which both sides filed as ordered. Both sides agree on one fact that the deceased had made various bequests during his lifetime. What is not agreed and no evidence has been availed to guide the court upon is whether Lawrence Mukaria and Charles Ntongai ever received any gift from the deceased. The other agreed fact is that while the first and second protesters are children to the deceased, the administrator is a grandchild. The law is that a grandchild has no right to succeed a deceased directly unless through the parent as a child to the deceased.
 5. The issue for determination is how the suit asset, measuring approximately 0.90 acres, should be distributed and whether some of the beneficiaries had been provided for by *gifts inter-vivos*. It is not in doubt that the deceased herein was polygamous. He had two wives, both of whom are deceased. He had a total of 7 children. The general rule is that, where a deceased dies intestate and has left behind children from a polygamous union, his estate is to be distributed equally amongst his children with the widows, if alive, forming a separate and independent unit in accordance with section 40 of the [Law of Succession Act](#). That general position of the law is however, by dint of section 42, subject to any previous benefits bestowed on a beneficiary which must be taken into account.
 6. According to the adjudication register exhibited in court in the affidavit of protest, the deceased had bequeathed land, during his life time, to his daughters namely Julia Ciakauna, Susan Karambu, Severina Kathure, Lucy Kainda and Margaret Ncororo.
 7. The official search annexed to the affidavit of protest reveals that the suit asset was as at 17/01/2017 registered in the name of the deceased herein. The petitioner is the grandson of the deceased by virtue of being a son to Lucy Kainda. It would appear the petitioner described himself as a son to the deceased, in order to be appointed administrator in place of Elizabeth Mukombiro (deceased). From the evidence on record, it is crystal clear that the deceased had distributed most of his properties during his lifetime. The petitioner's mother Lucy Kainda had already benefited from a bequest of 0.40 acres by the deceased during his lifetime. It was the petitioner's contention that deceased bequeathed



the protestor and his brother Lawrence land parcel numbers Ithima/antuambui/2790 And Ithima/antuambui/1323. However, he failed to adduce credible or any evidence to prove his allegations. The official searches allegedly attached to his affidavit in support of the summons for confirmation of grant are conveniently missing from the record.

8. As already said, the provisions of law under Section 40 of the Act dictate that the suit asset be distributed equally among the 7 children where no bequests or benefits were made and bestowed on any beneficiary during the life of the deceased. Nonetheless, the court is obligated by the provisions of Section 42 of the *Act*, to take into consideration the properties, gifts or bequests made to any of the beneficiaries during the lifetime of the deceased, when distributing the suit asset.
9. In this case the protesters assert, with evidence of the exhibited adjudication records, that all except the 1st protestor and the objector while the petitioner contends that the protestor and his brother, were bequeathed a property Known as Ithima/Antuambui/2790 and 1323 as exhibited in the certificates of official searches annexed to the affidavit of Amos Karani M'Achiuki. While the proprietorship of the two parcels is not in doubt, the fact that they were gifts from the deceased has not been demonstrated.
10. Looking at the two sets of assertion of advancements by both sides, I do find that the assertion that there was advancements to Margaret Ncororo, severina Kathure Ntoburi, william Ntoburi, Susan Karambu M'Achiuki, Lucy Kainda and Julia Ciokauna to have been satisfactorily proved.
11. I have dully considered the proposal and contentions by the petitioner and the protestor in equal measure, including the allegation by the protesters that the 2nd administrator has sought to have the asset distributed among strangers and the disclosed size of the land. I make a determination that the administrator, as a grandchild cannot stand in pari passu with the children of the deceased and that he can only seek to benefit on account of his parent as a child to the deceased. This because Section 29 of the *Act* gives priority to the children of the deceased to inherit first as opposed to grandchildren. In *Veronica Njoki Wakagoto (deceased)* (2013) eKLR, the court held:-

“... grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. 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.”
12. There are two conflicting chief’s letters dated 11/06/2003 and March 13, 2012. I say conflicting because each lists its own distinct beneficiaries. In the first letter dated 11/06/2003, one Sebastian Murungi is described as a buyer while the petitioner is described as a son to the deceased. The second letter lists the protestor and his brother Lawrence as the only beneficiaries of the suit asset. On that basis alone, even without regard to the previous benefits, I would still determine that the objector and his brother get and share the suit property equally.
13. In the end, I find the protest to be merited and the same is hereby allowed. The suit asset will be distributed equally between the protestor and his brother Lawrence Mukaria. I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 25TH DAY OF MAY 2022

PATRICK J O OTIENO

JUDGE



In the presence of:

Mr. Mbumbuya for the Petitioner

No appearance for the Objector

No appearance for the Applicants

Court Assistant: Mwenda

