



REPUBLIC OF KENYA



In re Estate of M'naivasha M'noti alias Naibasha Inoti (Deceased) (Succession Cause 349 of 2015) [2022] KEHC 11554 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
SUCCESSION CAUSE 349 OF 2015**

LW GITARI, J

JULY 28, 2022

**IN THE MATTER OF THE ESTATE OF THE LATE
M'NAIVASHA M'INOTI ALIAS NAIBASHA INOTI (DECEASED)**

BETWEEN

CATHERINE KARIMI FREDRICK PROTESTOR

AND

ALICE KAINYU NAIVASHA ADMINISTRATRIX

JUDGMENT

1. This succession cause relates to the estate of M'Naivasha M'Inoti alias Naibasha Inoti (deceased) who died intestate on 11th August 2009. A grant of letters of administration was issued on 2nd December 2013 to Alice Kainyu Naivasha who is the widow to the deceased.

The deceased was survived by the following:

- i. Alice Kainyua Naivasha - Widow
- ii. Dorothy Keeru Naivasha - Daughter
- iii. Allan Gitonga Naivasha - Son (deceased)
- iv. Christine Gatwiri Jasper - Daughter
- v. Florence Maken Naivasha - Daughter
- vi. Susan Mukami Kenneth - Daughter
- vii. Dunstan Gitari Naivasha - Son

The estate of the deceased comprise of the following:

Land Parcels:



- a. Mwimbi/Chogoria/3631
 - b. Mwimbi/Chogoria/58
 - c. Mwimbi/Chogoria/104
2. This court has now been called to determine the protest by the Catherine Karimi Fredrick dated 12th October 2020 against the Administratrix's summons for confirmation to grant dated 29th August 2020.
 3. In her application for confirmation of grant, the administratrix proposed under paragraph 5 of her affidavit in support of the application that the deceased's estate be distributed as follows:
 - a. L.R. No. Mwimbi/Chogoria/3631
 - i. Dunstan Gitari Naivasha – 1 Acre
 - ii. Catherine Karimi Fredrick – 1 Acre (to hold for her benefit and in trust of Dennis Mwenda Gitonga, Derrick Gitari Gitonga and Blessy Nyakio Gitonga)
 - iii. Dorothy Keeru Naivasha &
 - iv. Christine Gatwiri Jasper &
 - v. Florence Makena Naivasha - 2 Acres Jointly
Susan Mukami Kenneth
 - b. L.R. No. Mwimbi/Chogoria/58
 - i. Dunstan Gitari Naivasha – 4.5 Acres
 - ii. Susan Mukami Kenneth – 0.50 Acres
 - iii. Catherine Karimi Fredrick – 4 Acres (to hold for her benefit and in trust of Dennis Mwenda Gitonga, Derrick Gitari Gitonga and Blessy Nyakio Gitonga)
 - iv. Dorothy Keeru Naivasha &
 - v. Christine Gatwiri Jasper &
 - vi. Florence Makena Naivasha &
Susan Mukami Kenneth &
Alice Kainyu Naivasha - 5.5 Acres Jointly
 - c. L.R. No. Mwimbi/Chogoria/104
 - i. Dunstan Gitari Naivash – 2 Acre
 - ii. Catherine Karimi Fredrick – 1 Acre (to hold for her benefit and in trust of Dennis Mwenda Gitonga, Derrick Gitari Gitonga and Blessy Nyakio Gitonga)
 - iii. Dorothy Keeru Naivasha &
Christine Gatwiri Jasper &
Florence Makena Naivasha &
Susan Mukami Kenneth - 1 Acre Jointly



4. Catherine Karimi Fredrick filed an affidavit of protest sworn on 12th October 2020. She is the widow to the late Allan Gitonga Naivasha and acquired a limited grant of letters of administration *ad litem* in respect of the estate of his late husband.
5. She proposed that the estate be distributed as follows:
 - a. L.R. No. Mwimbi/Chogoria/3631
 - i. Cathereine Karimi Fredrick – 3 Acres
 - b. L.R. No. Mwimbi/Chogoria/58
 - i. Catherine Karimi Fredrick – 4.5 Acres
 - ii. Dunstan Gitari Naivasha – 4.5 Acres
 - iii. Dorothy Keeru Naivasha &
Christine Gatwiri Jasper &
Florence Makena Naivasha &
Susan Mukami Kenneth &
Alice Kainyu Naivasha- 4.5 Acres Jointly
 - c. L.R. No. Mwimbi/Chogoria/104
 - i. Dunstan Gitari Naivasha – 4 Acres
6. In response to the protest, the Administratrix filed an affidavit sworn on 8th February 2021. She deposed that L.R. Mwimbi/Chogoria/3631 is a prime property located near a well-developed area and services by a tarmac road hence her justification to share the same among all the beneficiaries. She further deposed that her proposal for the distribution of the estate was justified according to the meeting that the family had held in respect to the distribution of the estate.
7. The Administratrix further deposed that the family agreed that L.R. Mwimbi/Chogoria/58 was to be distributed equitably bearing in mind that Susan Mukani Kenneth and Dunstan Gitari Naivasha never had an opportunity to advance their education to secondary level and were to be compensated 0.5 acre each from this property.
8. The protest was heard by way of *viva voce* evidence.

Protestor's case

9. According to the protestor (PW1), the deceased had distributed his property before his demise. She alleges that she has been living in land parcel no. L.R. No. Mwimbi/Chogoria/3631 with her late husband for 25 years. She has built a house on the land and has been cultivating it alone. She thus urged this court to allow her to continue living there.
10. The Protestor further contends that Dunstan Gitari Naivasha, his brother-in-law, has been living in L.R. No. Mwimbi/Chogoria/104 and that the administratrix lives in L.R. No. Mwimbi/Chogoria/58. According to her, her late husband was also allocated ½ (half) an acre in L.R. No. Mwimbi/Chogoria/104.
11. On cross-examination, the protestor stated that she does not have any proof to show that L.R. No. Mwimbi/Chogoria/3631 belonged to her late husband. She further stated that the proposal by the



administratrix is unfair as Dunstan Gitari would end up getting a larger share than his late husband. Additionally, it was her contention the daughters of the deceased should not inherit their father's land hence it would be unfair if the property is divided equally.

12. PW2, Fredrick Ndoto Saverio, is the area manager. He corroborated PW1's evidence that PW1 and her husband lived in L.R. No. Mwimbi/Chogoria/3631 since 1997 and that Dunstan Gitari lives in L.R. Mwimbi/Chogoria/104. He stated that after the deceased died, the family held a meeting which he attended, and the deceased's land was sub-divided and each of his children were given their respective shares.
13. Denis Mwenda Gitonga, PW3, is the protestor's son. He testified that the mode of distribution proposed by his mother is in accordance with the wishes of the deceased.

The Respondent's case

14. The administratrix testified as DW1. She adopted her witness statement which was filed on 10/02/2021 as her evidence. It was her testimony that the mode of distribution she has proposed was agreed by all the family member except the protestor.
15. Dunstan Gitari Naivasha testified as DW2. He is a son of the deceased. He corroborated DW1's testimony that the family agreed on the mode of distribution as proposed and that one of the daughters was to receive $\frac{1}{2}$ an acre because she did not go to secondary school. He thus urged this court to distribute the subject estate as proposed by the administratrix. On cross examination, DW2 testified that he never used L.R. No. Mwimbi/Chogoria/3631 while his late brother was alive and that the protestor continued using the land after the demise of his husband, DW2's brother.
16. At the close of the Respondent's case, the parties filed their submissions in response to their respective cases.

Protestor's Submissions

17. The Protestor filed her written submissions through her counsel on record on 11th January 2022. It was her submission that the deceased had settled his children on various pieces of land before he died. According to her, her late husband was directed to move to L.R. No. Mwimbi/Chogoria/3631 which she states measures 3 acres. He moved together with the protestor and established their home there and planted tea bushes and nappier grass on the land.
18. Mr. Gitari, the deceased's second son was directed to move to L.R. No. Mwimbi/Chogoria/104 which she states measures 4 acres. She submitted that after the deceased died, the family had a meeting in which his late husband was present, and that the family agreed on how the estate would be subdivided. According to her, the mode of distribution proposed by the administratrix does not reflect the agreement that the family made on the subdivision of the estate. Further, the protestor contends that the mode of distribution proposed by the administratrix will take away portions of land which she has developed over the years.

Respondent's Submissions

19. The Respondent filed her submissions through her counsel on record on 6th April 2022. According to her, the justification for her proposal on the distribution of L.R. No. Mwimbi/Chogoria/3631 is that it is a prime property located near a well-developed area and serviced by a permanent tarmac road. She contends that the family agreed in 2020 for every beneficiary to have a portion of the property for commercial purposes given its location.



20. On the proposed distribution of L.R. No. Mwimbi/Chogoria/58 the Respondent contends that the family agreed for it to be distributed equitably bearing in mind that Susan Mukami Kenneth and Dunstan Gitari Naivasha never had an opportunity to advance their education to the secondary level hence should be compensated 0.5 acres each from the said property. The administratrix would get 1.5 acres because she lived on the land and each of the daughters of the deceased would get 1 acre each.
21. Finally, on the proposed distribution of on the proposed distribution of L.R. No. Mwimbi/Chogoria/104, the Respondent contends that it was the family agreement to sell 1 acre for purposes of financing sub-division. However, she contends that Dunstan Gitari agreed to bear the cost of the subdivision in consideration whereof he was to take 1 acre in L.R. No. Mwimbi/Chogoria/58. It was hence proposed that the remainder of L.R. No. Mwimbi/Chogoria/104, be distributed equally among the beneficiaries excluding the administratrix.
22. The Respondent was thus of the view that the mode distribution proposed in her affidavit in support of the summons for confirmation of grant was fair and just

Issue for determination

23. From the foregoing, it is my view that the main issue for determination is the mode of distribution of the deceased's estate.

Analysis

24. It is not in dispute that the deceased died intestate and was the registered proprietor of three properties which form part of his estate namely:
 - a. L.R. No. Mwimbi/Chogoria/3631;
 - b. L.R. No. Mwimbi/Chogoria/104; and
 - c. L.R. No. Mwimbi/Chogoria/58.
25. It also not in dispute that the deceased was survived by the following dependants:
 - a. Alice Kainyu Naivasha – Widow
 - b. Dorothy Keeru Njoroge – Daughter
 - c. Allan Gitonga Naivasha – Son (deceased)
 - d. Christine Gatwiri Muriuki – Daughter
 - e. Florence Makena Kimani – Daughter
 - f. Susan Mukami Mwalimu – Daughter
 - g. Dunstan Gitari Naivasha – Son
26. Having identified the properties forming the deceased's estate and the beneficiaries of the deceased, the next step is to undertake distribution. In this case, I hold the view that this estate should be distributed and governed by the provisions of Section 35 of the *Law of Succession Act* while taking into consideration the portions settled on by the beneficiaries and provision for access.



27. Section 35(1) and (2) of the Law of Succession Act provides as follows:

“(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely;
and

(b) 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 her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.”

28. From the evidence on record, the protestor has settled and developed L.R. Mwimbi/Chogoria/3631. However, the protestor’s contention that L.R. Mwimbi/Chogoria/3631 measures 3 acres is incorrect. From the copy of search on record, it measures 1.62 Ha hence approximately 4.05 Acres. L.R.Mwimbi/Chogoria/104 equally measures 1.62 Ha. On the other hand, Dunstan Gitari Naivasha is settled in L.R. Mwimbi/Chogoria/104 which also measures 4.05 acres and the administratrix lives on L.R.Mwimbi/Chogoria/58 which measures approximately 13.65 acres.

29. Article 27 of the Constitution envisages that men and women be accorded equal treatment, and that women should not be discriminated. The injunction against discrimination as provided above applies to succession with respect to distribution of the assets of the estate. Women, irrespective of their marital status, should not be treated as lesser beings. In this case, therefore, the Protestor is wrong to say that the daughters of the deceased should not inherit their father’s land.

Issues for Determination:

30. Taking into consideration the law on distribution of an intestate estate as well as the settlements and developments made in the respective lands aforesaid, it is my view that the estate should be distributed as follows:

a. L.R. No. Mwimbi/Chogoria/3631 – 4.05Acres

i. Catherine Karimi Fredrick – Whole

This is upon noting that the protestor has lived on the land for the last twenty five (25) years and is where she lived with her late husband. She will hold the land on her own behalf and in trust for her children Denis Mwenda Gitonga, Derrick Gitari Gitonga and Blessy Nyakio Gitari.

b. L.R. No. Mwimbi/Chogoria/104 – 4.05 Acres

i. Dunstan Gitari Naivasha – Whole

This will ensure that he gets an equal share with his late brother.

c. L.R. No. Mwimbi/Chogoria/58 – 13.65Acres



- i. Dorothy Keeru Naivasha
- ii. Christine Gatwiri Jasper
- iii. Florence Makena Naivasha
- iv. Susan Mukami Kenneth
- v. Alice Kainyu Naivasha - to be shared equally

On noting that it is where the widow of the deceased has lived and the daughters of the deceased are entitled to a share of the estate. The grant to be issued as per this Judgment.

I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 28TH DAY OF JULY 2022.

L.W. GITARI

JUDGE

