



In re Estate of Gabriel Mbuna M'mugambi (Deceased) (Miscellaneous Succession Cause 29 of 2016) [2022] KEHC 12639 (KLR) (2 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE 29 OF 2016**

LW GITARI, J

AUGUST 2, 2022

IN THE MATTER OF THE ESTATE OF GABRIEL MBUNA M'MUGAMBI (DECEASED)

M'MURITHI MBUNA.....PROTESTOR

-VERSUS-

CHRISTINE KARIMIMBUNA.....ADMINISTRATIX

JUDGMENT

1. This succession cause relates to the estate of Gabriel Mbuna M'Mugambi who died intestate on June 14, 1994. Letters of administration were issued to Christine Karimi Mbuna, the deceased's widow, vide a ruling of this court delivered on May 11, 2017, by Justice Limo.
2. The administratix has now moved this court vide summons dated January 31, 2020 seeking confirmation of the grant dated May 11, 2017. The application is supported by the affidavit sworn by the said administratix on the same January 31, 2020. At paragraph 6 of the said affidavit, she proposes that the estate of the deceased be distributed as follows:
 - i. Land parcel no Muthambi/Lower Karimba/922
 1. Christina Karimi Njeru – 0.30 acres
 2. Nicholas Kaburu Kaburiere – 0.75 acres
 3. James Mwiti Gabriel - 0.75 acres
 4. Polycena Mukwairu Nkonge – 0.30 acres
 - ii. Land parcel no Muthambi/Lower Karimba/721
 1. Violet Njoki Marangu – 0.10 acres
 - iii. Land parcel no Muthambi/Lower Karimba/44
 1. Nkonge Kaburiere – 0.75 acres



2. Mbae Kaburier – 0.75 acres
 3. M’Muriithi Mbuna – 1.5 acres
3. The protestor herein filed an affidavit of protest which he swore on February 24, 2020. He deponed that he is a dependant of the deceased by virtue of being his brother and that the administratix has recognized her dependency in her application for confirmation of grant. According to him, land parcels numbers Muthambi/L Karimba/922, Muthambi/L Karimba/721, and Muthambi/L Karimba/44 are ancestral land that belonged to his grandfather M’Mugambi M’Mburia.
 4. The protestor alleges that his father and grandfather caused the aforesaid parcels of land to be registered in the name of the deceased herein, Gabriel Mbuna M;Mugambi, to hold for himself and on behalf of all dependants.
 5. The protestor further alleges that land parcel no Muthambi/L.Karimba/44 was subdivided a long time ago to the family members as follows:
 - i. M’Murithi Mbuna – 1.5 Acres – The protestor herein
 - ii. Gabriel Mbuna – 1.5 Acres – The deceased herein

In his evidence he stated that he is satisfied with the mode of distribution of this particular parcel.
 6. It is the protestor’s averment that he currently lives and occupies land parcel no Muthambi/L Karimba/922 together with all his children and the children of his brother.
 7. The protestor takes issue with the administratix for naming one Violent Njoki as a daughter of the deceased. According to the applicant, the said Violet Njoki is a purchaser who bought land from the estate of the deceased by the grant which was confirmed. He thus proposed that the estate be distributed as follows:
 - a. Land parcel no Muthambi/Lower Karimba/922 – 1.70 acres.
 - i. Fredrick Mugo – 0.60 acres
 - ii. Bonface Njabani – 0.60 acres
 - iii. Virginia Muthoni – 0.30 acres
 - iv. Murithi Mbuna – 0.20 acres
 - b. Land parcel no Muthambi/Lower Karimba/721
 - i. Roy Macharia – 0.10 acres
 - c. Land parcel no Muthambi/Lower Karimba/44 -1.50 acres
 - i. Christina Karimi Njeru
 - ii. Nicholas Kaburu
 - iii. James Mwiti in equal shares
 - iv. Nkonge Gabriel
 - v. Mbae Gabriel

The parties filed affidavit evidence and adduced ‘*viva voce*’ evidence in court. The protestor M’Murithi Mbuna (PW1) testified that the deceased Gabriel Mbuna Mugambi is his brother as Mbuna



M’Mugambi is his father. According to him his father had land totaling fifteen acres. One parcel of land measured three acres and was shared equally long time ago between him and the deceased and each of them got one and half (1½) acres. This is Land Parcel no Muthambi/Karimba/44. He relied on a green card for the land parcel no Muthambi/Lower Karimba/44 which measures 0.10 Hectares. The land was registered on March 24, 2000 in the name of Gabriel Mbuna M’Mugambi (deceased). According to protestor all the land which the deceased had was fifteen acres and the remaining land is what is in dispute.

The protestor testified that he lives on Land Parcel no Muthambi/Karimba/922 where the administrator and her family lives. It is his testimony that the deceased never showed him an agreement to prove that he had bought this parcel of land. He further testified that the deceased had sold two other parcels of land. The protestor further claimed that he has no claim on Land Parcel no Muthambi/Lower Kirimba/721. He also testified that he was satisfied with the 1 1/2 acres which he got from Muthambi/L Karimba/44. In cross-examination the protestor testified that he had no evidence to support his claim that his father had owned fifteen acres and that part of it was sold. He denied that he moved on Land Parcel no Muthambi/L Karimba/44 after the deceased died. He further told the court that they have never agreed on the mode of distribution of Land Parcel no Muthambi/L Karimba/922. The protestor called PW2 Nkanya Nyaga Francis who testified that he is a neighbor of the protestor and that Land Parcel no Muthambi/L Karimba/44 was shared equally between the protestor and the deceased and each got 1 1/2 acres. According to him Land Parcel no 922 was not distributed as it had dispute. He testified that this land parcel should be equally between the protestor and the deceased. In cross-examination, the witness admitted that in his sworn affidavit he had deposed that he presided over the dispute on Land Parcel no 44. The disparities in his evidence raised doubts on his credibility. The protestor called Pius Mbae (PW3) who testified that he had presided over the dispute involving the deceased and the protestor over land parcel no Muthambi/L Karimba/922 where the two had lived. In cross-examination the witness stated that they presided over the dispute on Land Parcel number Muthambi/L.Karimba/44 and he retracted his affidavit where he had deposed that he had presided over the dispute on Land Parcel no 922 & 921 and that the committee held that the land parcels be shared equally between the deceased and the protestor. The witness contradicted the protestor on material particulars a fact which shows that he was not telling the truth.

The administrator Christina Karimi (DW1) testified the deceased had bought Land Parcel no Muthambi/L Karimba/922 and had inherited ancestral Land Muthambi/Lower Karimba/44. The administrator called David Mwanyuku M’nanu M’Mugwika (DW2) and he testified that the deceased bought Land Parcel no Muthambi/L Karimba/922 from one Mbubua M’Maruru. It was his testimony that this parcel of land was not family land. He told the court that after death of the deceased herein, the children of the protestor moved into the land and refused to vacate. He further testified that the protestor lives on the land which is at Tungu and was left to him by his grandmother, which land is ancestral land. The parties filed submissions. For the applicant, it is submitted that Muthambi/L Karimba/44 should be distributed to the rightful beneficiaries who include the protestor here. I have considered this submission against the testimony of the administrator. It is clear from the testimony that Land Parcel no Muthambi/L Karimba/44 was the share of the deceased and the protestor from the ancestral land and the protestor is only entitled to half share of the land. The deceased as per the green card was registered in 2009. The issue of this parcel of land is not in contest and the administrator has proposed to give the protestor a portion of 1 ½ from this land parcel.

The submission by the protestors that they have lived on parcel no 922 was disapproved by the administratrix and her witness who impressed me as a credible witness. For the administratrix it is submitted that the protestor is not a beneficiary of the estate of the deceased as defined under section 29 of the *Law of Succession Act*.



It is submitted that the issue of trust is not tenable in a succession cause. The administratrix submits that the claim is based on trust and the protestor never claimed the land during the lifetime of the deceased. The administratrix submits that the deceased acquired land parcels no Muthambi/L Karimba/921 and 22 through purchase and that he supported this fact by the evidence of DW2- who was a witness to the transaction. The administratrix submits that the protestor failed to prove the existence of trust over these two parcels of land.

I have considered the submissions. From the evidence tendered by PW3, DW1, and DW2 and even the protestor, the deceased was given land parcel no 921 was not ancestral land but is a plot which was given to the deceased as a committee during land demarcation. The protestor has not proved his claim over Land Parcel no 921. With regard to parcel no 922, the claim is based on trust which the protestor needed to prove. This court is a probate and administration court whose jurisdiction is spelt out on the pre-ambule to the *Law of Succession Act*. In short the mandate of the court is to deal with intestate and testamentary succession and the administration of estates of deceased persons, dying after the commencement of the Act. A claim based on trust cannot be determined in a probate and administration court.

8. From the evidence led by the parties and their respective submissions, the main issue for determination by this court is whether the grant issued to the administratrix should be confirmed as proposed and if so, how the estate of the deceased should be distributed.

Analysis

9. The applications for confirmation of grants are guided by the provisions of section 71(1) of the *Act* which provides that:

“(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.”

10. In this case, the administratrix has identified the following persons as surviving the deceased:

- a. Christina Karimi Njeru - wife
- b. Nicholas Kaburur Kaburiere – son
- c. James Mwiti Gabriel – son
- d. Violet Njoki Marangu – daughter
- e. Nkonge Kaburiere –son
- f. Mbae Kaburiere – son
- g. M’Muriithi Mbuna – brother
- h. Polycena Mukwairu Nkong’e – daughter

11. By the ruling of this court delivered on May 11, 2017, the court rightly found that that Violet Njoki Marangu was not a daughter of the deceased but a purchaser. The administratrix admitted to selling a portion of the deceased’s estate to the said Violet Njoki Marangu although the full details of this transaction were not given. As noted by this court in the said ruling of May 11, 2017, the administratrix should not purport to legitimize the illegal transaction through confirmation of grant.



12. The duty of this court as a probate court is to oversee and supervise the distribution of the estate to the genuine beneficiaries. *In the Estate of Alice Mumbua Mutua (Deceased)*[2017] eKLR Hon Justice Musyoka stated as follows:-

“.....The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

13. The administratrix herein has therefore not complied with section 71 of the Act requiring the ascertainment of all the rightful persons beneficially entitled to a share in the estate of the deceased.

14. In addition, the administratrix contends that the land parcels numbers Muthambi/L Karimba/922 and Muthambi/L Karimba/721 are not ancestral land and that they were bought by the deceased. According to her, the only ancestral land is Muthambi/L Karimba/44. As such, she contends that the protestor should not claim a share of the other two parcels of lands.

15. Rule 41(3) of the *Probate and Administration Rules* provides as follows:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.”

16. Order XXXVI refers to the current Order 37 of the *Civil Procedure Rules 2010*. For better appreciation of the effect of the determination of ownership under order 37 of the Civil Procedure Rules on a succession cause and the relationship between the two proceedings, see Musyoka J *in Re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR that:

“...If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

17. Accordingly, this court does not have jurisdiction to determine the dispute on ownership of the land parcels purported to have belonged to the deceased.

See *Re-Estate of Mbai Wainaina deceased* (2015) eKLR where Justice Musyoka held:

“ Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the *Law of Succession Act* is limited.

See also in *Re- Estate of Patrick Murithi Njogu* 2017 eKLR where I held that the probate and administration court lacks jurisdiction to determine issues of trust. This view was also stated by Justice



A K Ndungu in *Re-Estate of the late Jonathan Kinyua Waititu* (2017) eKLR where he stated that-
“The claim of trust is or ought to be subject matter of a separate suit or proceedings.”

It follows that the protestors claim on the disputed properties which is based on trust is not properly before this court.

Conclusion

18. The upshot of the foregoing, in my view, is that the summons for confirmation of grant dated January 31, 2020 should be dismissed for non-compliance with the law on confirmation of grants. The administratrix should then be directed to file fresh summons for confirmation of grant and only include the rightful beneficiaries to the estate.
19. On the protest I find that this court vide a ruling by Justice Limo dated May 11, 2017 clearly held that the protestor has no evidence to support his claim. There was no appeal by the protestor. I have considered his evidence and that of his witnesses and it is clear that he did not adduce evidence to support his claim that his brother held the estate in trust. I must point out that court orders are not made in vain. The protestor has not applied for the review of the finding nor has he appealed.

I find that the protest is an abuse of court process. I therefore find that the protest is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 2ND DAY OF AUGUST, 2022.

L W GITARI

JUDGE

2/8/2022

