



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CASE NO. 252 OF 2005**

**IN THE MATTER OF THE ESTATE OF KIRIGU MAHINDA alias KIRIGO MAHINDA -  
DECEASED**

**JAMES MAHINDA KIRIGU.....PETITIONER/APPLICANT**

**VERSUS**

**JESSEE NDIRANGU KIRIGU.....PROTESTOR/RESPONDENT**

**JUDGMENT**

Kirigu Mahinda died on 30 May 1973 aged 74; he hailed from Kaburu location of the then Nyeri District and was domiciled in the Republic of Kenya.

As early as 4 October 1982, the petitioner petitioned for grant of letters of administration intestate of the deceased's estate; the petition was initially filed in this court as High Court Succession Cause No. 5 of 1982 but on 15 April 1983 the court (V.V. Patel, J) ordered that the cause be transferred to the resident magistrates' court. It was transferred and registered in that court as Succession Cause No. 155 of 1983.

Sometimes in 1997, this court declared that all succession cases in the magistrates' court at Nyeri were erroneously there and ordered that they be transferred to the High Court. In the wake of this order, this cause was retransferred to this court and registered afresh as High Court Succession Cause No. 252 of 2005.

In the petition filed by the petitioner, the latter swore in the affidavit in support of the petition that the deceased was survived by two children; himself and his sister only named as Gathoni. He also stated that the only asset comprising the deceased's estate was a parcel of land identified as Title No. Nyeri/Warazo/64 measuring approximately 6.11 hectares. This land was registered in the name of the Government of Kenya at the time of the deceased's demise but was eventually registered in his name.

The protestor objected to the grant being made to the petitioner alone contending that contrary to what the petitioner had stated in his affidavit in support of the petition, the deceased had two wives the first of whom was the mother to the petitioner and his sister Gathoni Kirigu. This first wife apparently predeceased their father and, in fact, it was as a result of her death that the deceased married the protestor's mother whom he named as Dorcas Wanjiku Kirigu. According to him, Dorcas Wanjiku had two children with the deceased; the protestor himself and his brother Kingori Kirigu.

After many years of back and forth, the grant of letters of administration intestate was eventually made in the joint names of the petitioner and the protestor on 30 June 2011.

By a summons dated 13 August 2011, the petitioner sought to have the grant confirmed and in the affidavit in support of the summons, he named himself, his sister Gathoni, the protestor and Kingori Kirigu as the surviving children of the deceased. He sought to have the entire estate devolve upon himself absolutely.

The protestor filed his own summons for confirmation of grant dated 30 September 2011; his affidavit in support of the summons was consistent with that of the petitioner except that he proposed that the deceased's estate be shared equally between himself, his brother King'ori and the petitioner. On 11 October 2011, he also filed an affidavit of protest reiterating that the estate should be shared equally amongst the deceased's three sons. He swore that the only other child, Gathoni Kirigu was deceased.

The petitioner, on the other hand, swore his own affidavit of protest in which he insisted that the deceased was married to his mother only and he had no other wife. He thus denied that the protestor and his brother were the deceased's children.

In the face of this rival positions, oral evidence was taken on the summons and affidavits of protest.

At the hearing, the protestor produced several documents to demonstrate that his mother and he himself were related to the deceased. For example, he produced a receipt issued by the colonial government in 1959 showing that on 5 August 1959 the deceased was fined Kshs 15/= in African Court Criminal Case No. 58 of 159, at Ngong. It is not clear what the offence was. He also produced a licence also issued by the colony and the protectorate of Kenya to the deceased under the provisions of the Outlying Districts Ordinance of the then cap. 44 Laws of Kenya. This was a licence for the deceased to enter what was then referred to as a 'closed district'. According to this licence, the deceased was allowed to enter the district of Ngong and he was described in the license as an employee of one Njoroge ole Ngaruyia. The licence was issued on 26 November 1959 and was set to expire on 30 June 1960. He testified that he was given these documents by the deceased.

Apart from these documents, he also produced a driving licence he acquired on 28 January, 1975 and in which he is identified as J.N. Kirigu and a burial permit showing that the death of his mother had been entered by the records of registrar of births and deaths as D/E 1900227/75 of 30 December 1975. He subsequently obtained a death certificate for the death of his mother; the certificate bears the entry number as that shown in the burial permit and his mother's name is indicated as Dorcas Wanjiku Kirigu in the certificate while in the burial permit it is shown as Dorcas Wanjiku wife of Kirigu.

The protestor also produced a photograph in which he was taken together with the petitioner on 21 January 1972 at a bus terminus in Nyeri

It was his evidence that he was born in 1946 in Ngong, to Kirigu Mahinda (the deceased) and Wanjiku Kirigu while his brother Joseph King'ori was born of the same parents in 1957. He also stated that the deceased was initially married but his first wife died before his mother was married. The first wife had two children, the petitioner and Gathoni who was also deceased.

He lived with the deceased, his late mother and King'ori in Ngong until the end of 1962 when they moved to Warazo Jet Settlement Scheme in Nyeri. The petitioner also lived in Ngong where he ran a butchery business. It was his evidence that it was the petitioner himself who provided the vehicle in which they travelled as they migrated from Ngong to Nyeri.

The deceased built him a hut in the land where they settled in 1964. In 1966 his mother was struck by a mental illness to which she eventually succumbed in 1975. During the period of the illness, his brother was taken care of by their aunt.

After completing primary school, the protestor moved to Nakuru where he worked as a farm hand. It is there that he joined a driving school and obtained the driving licence which he provided as part of his evidence to prove the fact that he was named after the deceased.

He was aware when the deceased was taken ill but he died when he was in Nakuru; he learnt of his death when he came to visit him.

The protestor's witness, James Gikonyo Mugio, (PW2) testified that he knew the deceased because they met and settled at the Warazo Jet settlement scheme at the same time in 1962. The deceased had come from Ngong while he came from Mukureweini. Initially, they shared the same house and it is only after the demarcation of the land that each one of them moved to their respective parcels of land.

Before the demarcation, they lived with the protestor's mother whom he understood to be the deceased's wife, and her two children; the protestor and his brother Kingori. He himself also had a wife and two children. He disputed the allegation that the protestor's mother was the deceased's employee. Even after each one of them got their land, they lived near each other.

He recalled that when the deceased arrived from Ngong, the protestor was about 7 or 8 years old and his brother Kingori was a toddler then.

On his part, the petitioner reiterated that he was the only child of the deceased surviving, his sister Gathoni having died.

He admitted that the deceased lived in Kajiado before 1962 and that he lived with him there and that there were other family members whom they left behind when they moved to Nyeri. His mother died in 1944.

He testified that he knew the protestor's mother but in her capacity as his father's employee and not his wife. As far as he was concerned, she was employed in 1962 and it is him who used to pay her. He stated that the protestor's mother had come to Kajiado to assist his father harvest maize and after that they came back to Nyeri together. He also admitted that he knew the protestor in 1963 when he came to Warazo settlement scheme. He found his father living with the protestor's mother; there were two children living with them; the protestor and his brother. He also admitted that the protestor schooled at Warazo and he together with his brother and their mother lived with the deceased.

He disputed a receipt showing that his father had at one time been fined by a court in Kajiado. However, he admitted that he had made a report to the police reporting that he had lost certain documents including this particular receipt.

He admitted that he was a businessman in Kajiado when his father lived there. He also admitted that he paid for the transportation of his father and the protestor's mother from Kajiado to Nyeri.

When he was referred to his affidavit in which he acknowledged the protestor and his brother as the deceased's children, the petitioner said that he did not know what he was swearing.

Wangeci Murigo testified in support of the petitioner's case that the protestor's mother was once her co-wife and their husband was one Murigo. However, they disagreed and the protestor's mother left together with two children. This was before independence.

Contrary to her evidence, one Samuel Wanjohi Nduguru who also testified for the petitioner stated that in fact the father to the protestor and his brother was one Wetima. Like the petitioner, he testified that the protestor's mother was the deceased's employee.

Also testifying for the protestor was one Lucy Muthoni who testified that she was a nephew to the deceased. She also testified that she knew the protestor's mother but that she was not the deceased's wife.

Turning to the law, the deceased died in 1973 long before the commencement of the Law of Succession Act, Cap 160. Ordinarily, going by the provisions of section 2 (2) of the Law of Succession Act, its application to the present circumstances would be restricted to a certain extent; that section states as follows:

***The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.***

While the estates of persons who died prior to the commencement of this Act are subject to written laws and customs applicable at the time of their demise, there is still a window to apply the Act to those estates nonetheless. How much of the Act will apply would depend on the circumstances of each particular case; I suppose it all depends on how much of the written law and customs applicable to the deceased's estate at the time of his death are proved and how consistent those laws and customs are with the constitution and are not repugnant to justice and morality.

In the present case it was never suggested that the deceased's estate should be administered or distributed in any particular way because of the written laws and customs that applied at his death; indeed, there was no evidence of such laws. In such circumstances the fallback position can only be the relevant provisions of the Law of Succession Act.

There is no dispute as to the extent of the deceased's estate; rather, the major bone of contention is on the extent of his immediate family and, by extension, his rightful heirs.

As much as the petitioner vehemently disputed the relationship between the deceased and the protestor's mother the evidence suggests that the latter was the deceased's wife. This is apparent even from the petitioner's own testimony. He admitted that prior to 1962 his father was living with the protestor's mother in Kajiado and the two moved together to Warazo Jet Scheme in 1962 where they settled together with the protestor and his brother. This testimony is not only consistent with the protestor's evidence but it is also corroborated by the evidence of James Gikonyo who confirmed that the deceased arrived at the settlement scheme in 1962 accompanied by Dorcas Wanjiku and his two children who are the protestor and his brother. Gikonyo and his wife shared the same house with the deceased and Dorcas Wanjiku whom he knew to be his wife before they moved to their respective parcels of land.

The documentary evidence provided by the protestor also demonstrates he and his mother were closely related to the deceased. The burial permit together with the death certificate show that his mother shared the deceased's surname, Kirigu. The protestor himself shared the same surname.

The information he gave about the deceased's life in Kajiado was never contradicted. For example, he provided evidence that the deceased worked for a particular individual in Ngong in the late fifties. The fact of employment was proved by a movement licence that could only be issued by the colonial government that was keen on restricting the movement of people from one place to another.

The evidence that the deceased was fined in an African court at Ngong around the same time that he worked there was also controverted. I believe his evidence that he got these documents from his father, the deceased.

The petitioner's attempt to dispute the legality of some of these documents was self-defeatist because he testified that he had reported the loss of the same documents to the police. But this report was made in bad faith and obviously was meant to pre-empt the production of these documents by the protestor because it was made after the protestor had filed a list of his documents.

One other document which the petitioner could not dispute was a picture that was taken of him and the protestor in 1972; that picture would suggest that the protestor and the petitioner were not strangers to each other but they were people who lived together and their point of convergence was the deceased.

Based on this evidence, it is difficult to believe, as the petitioner suggested that the protestor's mother was only an employee of the deceased; on the contrary, everything points to a much higher and closer relationship than that of employer-employee.

It is even baffling that although the petitioner went to great lengths in denying his step-mother together

with his step-brothers, he acknowledged the protestor and his brother as the children of the deceased in, not one, but two affidavits he swore in support of the summons for confirmation of grant; the first affidavit was sworn on 14 November 2006 and filed on 20 November 2006 while the second affidavit was sworn on 13 August 2011 and filed on 16 August 2011.

When he was asked about these affidavits all the petitioner said was that he did not know what he was signing or rather he did not know what he had sworn. It certainly cannot be true that the petitioner was aware that he had sworn that he wanted to inherit the deceased's entire estate to the exclusion of the protestor and his brother but was not aware that he had acknowledged, in the same affidavit, the latter as his brothers. In fact, the question of the extent of the deceased's family could properly be disposed of on the basis of the depositions made in any of these two affidavits.

And with that, I come to the inevitable conclusion that the protestor's mother was the deceased's wife and the protestor and his brother were his children as much as the petitioner was.

Having come to this conclusion, the only question pending is the best scheme that this court should adopt in the distribution of the deceased's estate. In my humble view the estate should be distributed in accordance with section 38 of the Law of Succession Act; that section states as follows:

***38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.***

Section 41 to which reference has been made deals with the devolution of property upon a child; such property, so it states, shall be held in trust until such time that the child attains the age of the majority. The heirs here are all adults and therefore this provision of the law does not apply to their case. Section 42, on the other hand says where an heir is a beneficiary of an inter vivos transfer from the deceased, whatever he received must be taken into account in distributing what has been left as the deceased's estate; again this section does not apply since none of the beneficiaries was ever gifted by the deceased in his lifetime.

It follows that, everything else being equal, the estate should be shared out equally amongst the deceased's surviving children. Title No. Nyeri/Warazo/64 measures approximately 6.11 hectares which is equivalent to 15.099 acres. The land shall be sub-divided into three equal portions and distributed as follows:

1. James Mahinda Kirigu – 5.033 acres
2. Jesse Ndirangu Kirigu – 5.033 acres
3. Joseph King'ori Kirigu – 5.033 acres

The grant made in the joint names of the petitioner and the protestor is confirmed in the foregoing terms. Parties will bear their respective costs.

It is so ordered.

**Dated, signed and delivered in open court this 22<sup>nd</sup> day of January, 2020**

**Ngaah Jairus**

**JUDGE**