



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

PROBATE AND ADMINISTRATION

SUCCESSION CAUSE NO. 101 OF 2016

IN THE MATTER OF THE ESTATE OF KITHOGU CHARII (DECEASED)

EVANSON NJAGI GATUKU.....APPLICANT

GEOFFREY KARINGI MUCHIRI.....3 OTHERS

JUDGEMENT:

1. The matter relates to the Estate of Kithogu Charii alias Kithogu Charii the deceased who died on 22nd July, 2000. A grant of letters of administration was issued to Evanson Njagi Gatuku and Jamlick Karingi Muchiri on 29th October, 2007.
2. The estate of the deceased land parcel number Kabare/Nyangati/438. The Petitioner Evanson Njagi Gatuku filed an application on 25th April, 2008 for confirmation of grant. An affidavit of protest to the confirmation of grant was filed by the protestors Geoffrey Karingi Muchiri, Peter Muriuki Muchiri and Jamlick Karingi Muchiri claiming that the deceased is their grandfather as they are the sons of Muchiri Gatuku who is the son of the deceased herein. Muchiri Gatuku died on 13th June, 2004 and left them on land parcel number Kabare/Nyangati/ 438.
3. Their contention is that they are entitled to have a share out of land parcel number Kabare Nyangati 438 as the share of the deceased father Muchiri Gatuku who was a son of the deceased.
4. The court directed that the protest be heard by way of Viva Voce evidence and the parties adduced evidence and filed submissions at the close of the hearing.
5. The petitioner Evanson Njagi Gatuku denies that the protestors are the sons of the deceased Muchiri Gatuku, the protest proceeded.
6. The evidence which was produced was as follows;
 - Geoffrey Karimi Muchiri (PW1) testified that Muchiri Gathuku is his father who is a brother to Evanson Njeru Gatuku. He told the court that Muchiri his father was living on his grandfather's land and he was buried there.
 - He told the court that Peter and Jamlick are his brothers. He testified that they have been using the land but have not built, and he testified that Evanson wanted to get the whole share of the land. They took the dispute to the chief and the clan elders stated that they should get half a share of the estate of the deceased.
 - On cross examination he told the court that his identity card got lost and he never took a birth certificate. He further testified that his mother re-married in 1970 and was born in the year 1972 and he told the court that it is the clan that decided that they get half a share but Evanson refused to sign and they had to take four acres which they are using by force.
 - The second protestor Peter Munyeki Muchiri stated that Muchiri Gatuku is his father, he could not recall when he died. He said his identity card got lost and he did not have a birth certificate. He said he would wish to get 7 and ½ acres out of the land parcel of the deceased.
 - The third protestor Jamlick Karingi testified that the deceased had two sons and he said his father is Muchiri who is

deceased and Evanson Njagi is his uncle. He told the court that the three of them who are the protestors they use seven acres of the land, the rest is used by Evanson and he prays that the land be sub-divided into two.

- In cross-examination he told the court that his father is called Muchiri and that is the name he knows and he denies that he was pretending to be a son of Muchiri and he told the court that his mother is Jane Wagura and she died before his father and he further stated that he did not know if she had been married elsewhere.
- The mother was not buried in the land in dispute. He told the court that he had no document from school to show that Muchiri was his father. He did not have a birth certificate and his identity card was obtained on the 13th of June, 2008 and by then the deceased had passed away.
- He further told the court that the deceased did not give him any document to enable him get an identity card in the name of Muchiri.
- He admitted that he got an identity card when the case was still pending in court, and he told the court that they did not enter the land by force, they went and talked to the petitioner and he refused and decided to go to the Government and attached the letter from the Chief.
- They testified that they use 7 acres, and he stated that if his brother said they entered by force it is not true. He further said that he is not aware that his mother was married in the 1970's.
- He also told the court that his brother Geoffrey Karingi was born by another wife of Muchiri who is alive. The late Muchiri had two wives and his mother is Nyambura.
- He further testified that he has one sister by name Priscilla Wambui and Peter Muriuki and Geoffrey Karingi are the children of Priscilla Wambui who is at Kibibi.
- He told the court that Peter Muriuki who is his brother has no other name, and that if he gave evidence by name Peter Muriethi Munene was not his name which had been given to him by the Chief.

FOR THE PETITIONER:

- Evidence was adduced by Peterson Njagi Gatuku and he testified that the deceased is his father Kathogu Charii.
- He told the court that he does not know the protestors who claim to be the children of his brother Muchiri.
- He told the court that Muchiri had no wife and had no children.
- He told the court that he had never seen the protestors before and they don't leave on the land, he told the court that he saw them at the Mortuary when the deceased died.
- He told the court that he cannot give the protestors land because he does not know them. That one of them was arrested by the chief when he produced an identity card.
- He told the court that Muchiri died in the year 2002 and the protestors went to the Mortuary and took the body and he did not know where they went. They went away with the death certificate and the burial permit.
- They further testified that the protestors came to the land by force. They have not built but they planted rice by force, and have been using four acres.
- He further testified that he did not participate in the clan meeting and he does not know the clan members who said they are children of his brother.
- Douglas Murigi (DW2) testified that he knows Evanson (DW1). He told the court that the deceased (Muchiri) had no wife
- He (Dw2) further told the court that the protestors have never lived on the land.
- The Protestors' filed submission through their advocate Kiguru Kahiga Advocate.
- He submits that it is not in dispute that the deceased herein Kithogu Charii alias Kithogu Cacia Karingi died intestate on 22nd July, 2000 and the deceased was survived by two sons Evanson Njagi Gathuku and Muchiri Gathuku who died on 13th June, 2004 and that the Estate of the deceased whose land parcel number Kabare /Nyangati /438.

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He submits that there two issues for determination

- (i) Whether the protestors are lawful beneficiaries and/or dependants of the deceased herein or are strangers to the estate.
- (ii) Whether they are lawful beneficiaries? What share are they entitled to in the share of the estate.

- He submits that from the evidence tendered the protestors are not strangers to the estate of the deceased who died on 13th June, 2004 and live and rely on the estate.

- For the Petitioner he submitted that it is not in dispute that the deceased is survived by his two sons Evanson Njagi Gatuki (Petitioner) and Muchiri Gatuki (deceased) who died after his father.

- What is in dispute is whether the protestors are entitled to a share of the estate, by virtue of being alleged sons of Muchiri Gatuki.

For the respondents submissions were filed by; Magee Law LLP Advocates.

- He submits that the protestors could not produce their national identity cards or birth certificates to prove that the late Muchiri Gatuku was their father and the reasons given was that they had been lost or never issued.

- That is surprising that the protestors lost all their identification documents and none had sort replacement, and this can only be interpreted to mean that the said documents would have been adverse to their case.

- When faced with the question whether they were really children of Muchiri Gatuku they protestors did not have an iota to prove their claim save for minutes of an alleged meeting dated 23rd July, 2004 where the area chief and elders purported to distribute the estate.

- That it is worthy noting that the petitioner denied having ever attended such a meeting and on perusal of the meeting the petitioner did not append his signature. The minutes have no bearing in this matter.

- The chief and the elders had no authority to usurp the powers of this court and attempt to distribute the estate.

- It is worth noting that none of the wives of the late Muchiri Gatuku were called to testify, and no witness was called to prove that Muchiri Gatuku was ever married and that he sired children, and without this evidence the court is left to speculate.

- He submits that the protestors have failed to prove that they are indeed the children of the late Muchiri Gatuku and therefore entitled to a share of the deceased estate.

- That the evidence of the petitioner and his brother that he was unmarried at the time of his death remain uncontroverted.

- The protestors are strangers to the estate and therefore not entitled to benefit from it.

- It is further submitted that they have not discharged the burden of prove that they were children of the deceased Muchiri Gatuku.

- He submits that the protestors have not obtained letters of administration in the estate of Muchiri Gatuku and on this ground alone the protest should be dismissed.

- He submits that the petitioners claim that they buried the deceased Muchiri Gatuku, that burying the body of a deceased does not entitle him to benefit from their estate and it is absurd for the Petitioner to base their claim on this reason.

- That the petitioner testified that it was the Chief who forcefully gave the protestors possession of part of the estate, and has submitted that the chief over-stepped his mandate.

- He submits that the protest be dismissed the application for the confirmation of the grant be allowed.

ANALYSIS AND DETERMINATION

- I have considered all the evidence adduced by the protestor and the petitioner.
- I have also considered the submissions,

The issue for determination is whether the protestors are entitled to a share of the estate of the deceased by virtue of been the alleged sons of Muchiri Gatuki.

Section 29 of the Law of Succession Act. Defines the meaning of a dependant.

“For the purposes of this Part, dependant means-

(a) The wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

(b) Such of the deceased's parents, step parents, grand parents, grandchildren, step children , children whom the deceased had taken into his family as his own, brothers and sisters and half brothers and half sisters as were being maintained by the deceased immediately prior to his death and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

- A party claiming dependency must proof that he or she is a dependant as defined Under Section of the Act.

- Under the Section a person claiming dependency as a grandchild must prove that the deceased had taken him into his family as his own. This is because grandchildren are not entitled to inherit the estate of their deceased grandparents.

In the estate of John Musombayi Katumanga (deceased) 2014 eklr. Justice Musyoka stated as follows;

“ with regard to the issue whether or not grandchildren are beneficiaries to the estate of their grandparents, we refer to the holding by Musyoka J, in the Estates of John Musombayi Katumanga (deceased) 2014 eklr rendered himself as follows;

“ I suspect that she is a daughter to the said heir, and therefore a granddaughter of the deceased. She is described in one of the papers as a dependant of the deceased. The said Laura Mesitsa is not entitled to a share in the estate of the estate of the deceased there are two reasons for this. She is not an heri of the deceased for grand children are not entitled to inherit from their grandparents so long as their own parents, the children of the deceased, are alive and themselves taking a share in the estate.

Secondly, she is not a dependant of the estate. She did not apply, as she should have, for provision under Section 26 of the Act, and there is no court order making her a dependant of the deceased.

Under section 29 of the Act, a grandchild can be a dependant of her grandparent but for her to qualify a such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was dependant on the grandparent immediately before his death”

- I am persuaded by this decision as it lays down the correct position of the Law of inheritance with regard to grandparents and grandchildren.

- The protestors have not proofed dependency as they admitted that he went to the land after the deceased died and after the

Chief held a clandestine meeting and said that the appellants were entitled to have a share of the estate.

- The Chief had no authority to do that. The deceased died on 22nd July, 2000 and therefore administration of his estate is governed by the Law of Succession Act Cap 160 Laws of Kenya

Under Section 2 (1) of The ACT. IT is provided;

“ Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons”

- The chief had no authority to purport to arbitrate the dispute relating to the estate of a deceased person and determine who was next of kin and who was not. Such determination can only be done by the court which has the mandate under the Law of Succession Act.

- The minutes of the Chief on the 23rd of July, 2004 has no bearing in the matter as the Chief and the elders had no

authority to usurp the powers of the court and attempt to distribute the estate herein.

Indeed under the Constitution Judicial Authority is vested in the courts which have the power to arbitrate disputes as provided under the law. **Article 159 (1) of The Constitution provides;**

“ Judicial Authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under this Constitutions”

- The deceased abused his powers and purported to exercise Judicial authority when he had no authority to do so.

The claim by the protestors that they were given the land by the chief and clan elders is of no consequence at all.

Dependency is established by proof that one is indeed related to the Intestate in a Court of Law.

- The Protestors claim to be beneficiaries of the Estate of Muchiri Gatuku who they claim is their father, and it should be noted that this proceedings relates to the estate of their deceased father.

- The Protestors' when they were cross-examined admitted that they have other siblings who are surviving. Those siblings have not been joined in this suit nor have the Protestors produced authority to show that they have given them Authority to file Succession on their behalf.

- If indeed they have other siblings they are beneficiaries entitled to the estate and should have given authority.

The protestors do not have 'locus standi' in this proceedings.

Locus standi in Blacks' Law Dictionary 9th Edition at Page 26 as the right to bring an action or to be heard in a given forum.

The court of appeal in the case of; **Alfred Njau & 5 Others -versus- City Council of Nairobi (1983) eklr** put it while considering the term Locus standi stated as follows:

“ the term locus standi means a right to appear in court and conversely as stated in Jowitts Dictionary of English Law to say that a person has locus standi means that he has no right to appear or to be heard in such proceedings.”

Section 79 of the law of Succession Act provides that:

“ the executor or administrator to whom representation has been granted shall be the personal representative of the deceased or purposes of that grant, and subject to any limitation imposed by the grant or the property of the deceased shall vest in him as personal representation.”

In the case of Virginia Edith Wambui Otieno -versus- Joash Ochieng Ougo & Another: C.A.No. 31 of 1987

“The court of appeal stated that an administrator is not entitled to bring an action as before..... He has taken letters of administration. If he does the action is incompetent from the date of inception.”

- It has been emphasized that for a person to bring a claim for and on behalf of the estate of a deceased person he must be appointed as a personal representative as provided under the law.

The law is under **Section 82 of The Law of Succession Act** which provide that personal representatives shall subject only to any limitation imposed by their grant have the following powers.

“ To enforce by suit or otherwise , all causes of action which by virtue of any law survive the deceased or arise out of death.”

- This was declared to be the position by the Court of Appeal in **the case of Trouistik Union International & Ingrid Ursula Heinz -vs- Jane Mbeyu and Alice Mbeyu Civil Appeal No. 269 of 1997**

(quoted by counsel for the Petitioner).

The court while reiterating that it is only an administrator who can sue on behalf of the deceased person under the law of succession act, the Judges of Appeal stated;

“ The Act came into force on the 1st July, 1981. The person whose death and succession gave rise to this suit, namely John KAtembe, died on the 10th April, 1984. To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to Section 82 (a) of the Law of Succession Act. that Section

confers that power on personal representatives within the contemplation of the Act. That Section confers that power on personal representatives and on them along.

As to who are personal representatives within the contemplation of the Act, Section 3 the interpretive section, provides an all-inclusive answer, it says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case died intestate.

Therefore, the only person who can answer the description of a personal representative is the administrator of the deceased. The next enquiry must answer the question, who is an administrator with the true meaning and intentment of the Act “Section 3 says “administrator means a person to whom a grant of letters of administration has been made under this Act.”

The protestors have not obtained a grant of letters of administration in the estate of their alleged father Muchiri they have not proved that they are his personal representatives.

They have no ‘locus standi’ in this proceedings to bring any claim arising from the estate of Muchiri Gatuku.

The appellants endeavoured to adduce evidence to proof that they were children of Muchiri who is a brother of the petitioner in this case.

Having considered the evidence they did not impress me as truthful witnesses who were telling the truth in this court.

I can point out like the evidence of PW3 Jamlick Karingi Muchiri who when he gave evidence in this court could not tell the name of his father. I indeed noted that the witness said he can only read, and he read and said his father is Muchiri and one would wonder how somebody claiming interest under his father does not even know his name and how to read.

The protestors did not identify themselves in this court. Court can only assume their names are as given in this proceedings as none of them was able to identify himself in any of the modes provided under the Law for one to identify himself.

This is by production of; Birth certificates, identity cards, passports, etc.

- None of the protestors could produce their national identity cards, or birth certificates to proof that they are indeed children of the late Muchiri Gatuku.
- The protestors gave flimsy reasons as to why they could not produce such crucial documents and as submitted by the counsel for the petitioner, it is surprising that all the protestors have lost all these crucial documents, and none had sought replacement.
- In Succession matters identification of a person is very important, and a witness or like in this a protestor must be able to satisfy the court he is the person who he purports to be.

The law of Succession requires that;

The person claiming in the estate of the deceased, must be identified and there is relationship with the deceased established.

Section 51 (1) (d) (g)

It is provided that;

“(d) the relationship with (any) of the applicant to the deceased.

(g) In cases of partial or (total) intestacy the names and addresses of all surviving spouses children, parents brothers and sisters of the deceased, and the children of any child of his/her deceased”

It is therefore that such beneficiaries identify themselves.”

In this case my finding is that it is not a coincidence that all the protestors had no identity cards nor did they have birth certificates.

I must come to the conclusion that;

- They withheld this documents as it would have been adverse to their case, it is Trite law that where a person is supposed to prove a fact and that the evidence to proof that fact he is the only person in possession of it.

Failure to produce that evidence must lead to the inevitable conclusion that if he produced that evidence it would have been adverse to their case.

A Party is supposed to prove a fact by producing evidence. It was fatal to the protestors claim to fail to produce identification documents proving their relationship with the deceased Muchiri Gatuku.

- Indeed one of the protestors obtained an identity card during the pendency of this proceedings. It must have been so obtained with the sole purpose of misleading this court to believe that he is a son of the late Muchiri Gatuku.
- From the record of proceedings I came across a letter dated 25th June, 2007 from the office of The Sub- chief Wanguru which was altering the names of some of the protestors and is said the name Jamlick Karingi Muchiri to read Geoffrey Karingi Muchiri, Peter Mureithi Muchiri to read Peter Muriuki Muchiri, while Musee Muchiri remains unchanged.
- Before that the Chief had given their names on 14th June, 2007 without quoting their identity cards' numbers. No reason is given for the change of these names by the Chief who again is not the authority authorized to give change of names.
- I find that this was done in an attempt to show that the protestors are children of Muchiri which is not the case.
- First protestor gave his name as Geoffrey Karimi Muchiri, the chief's letter dated 25th June, 2007 gives the name Geoffrey Karingi Muchiri.
- The second protestor gave his name as Peter Munyeki Muchiri and the chief's letter gives his name as Peter Muriuki Muchiri.
- Third protestor (Pw3) gave his name as Jamlick Karingi Muchiri and in the chief's letter it read Geoffrey Karingi Muchiri.

The chief's letter seems to say that Jamlick Karingi Muchiri to read as Geoffrey Karingi Muchiri meaning this is one and the same person. While in court we have had Geoffrey Karingi Muchiri and Jamlick Karingi Muchiri, and the Chief had also included one Musee Muchiri who did not give evidence and the letter of the chief dated 14th June, 2007 had identified: Jamlick Karingi, Peter Mureithi, and Musee none of these names had the surname Muchiri.

The Chief's letter dated 25th of June, 2007 was meant to mislead the court and was also fraudulent, meant to hoodwink the court to believe that the protestors are the children of Muchiri.

The applicants had the burden to prove that they are indeed children of Muchiri Gatuku (deceased).

He who alleges must prove;

Section 107, 108 and 109 of The Evidence Act Cap 80 Provide as follows:

Evidence _____ **Act** _____ **provides;** _____

Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The protestors bear the legal and evidential burden to prove that they are children of the late Muchiri Gatuku.

It is trite law that the onus of proof is on he who alleges, and the protestors who are alleging that they are the sons of Muchiri Gatuku had the burden to prove before this court that they are indeed the sons of the late Muchiri.

I find that the evidence tendered was insufficient and to say the least incredible.

They have failed to proof that they are children of Muchiri with cogent and tangible evidence and they have not discharge this burden of proof which was only on them being the people who were making the allegation before this court.

The evidence by the petitioner that his brother was unmarried and childless at the time of his death remains uncontroverted. Indeed it is supported by the Chief's letter dated 14th June, 2007 which had clearly stated that;

“ at the time of the death of Mr. Muchiri he was not living with any wife and he was not living with any children.”

I find that the protestors appeared to have crafted a scheme to be impositors in the estate of the deceased herein with the blessing and assistance of the chief's office.

I find that they are impositors and they have not proofed that they are entitled to the estate of the deceased in this case and the estate of Muchiri Gatuku.

In conclusion;

- The Protestors are not properly before this court, as they are not administrators as they are not personal representatives of Muchiri Gatuku
- They have failed to proof that they are dependant of the estate of the deceased in this case and the late Muchiri.
- The protest is without merit and is dismissed.
- I therefore: Order that Jamlick Karingi Muchiri is removed as the administrator of the Estate of the deceased.
- The summons for confirmation of grant dated 25th April, 2008 is confirmed and the certificate of confirmation of grant shall be issued.
- The estate of the deceased shall be distributed to; Evans Njagi Gatuki as deponed at Paragraph 5 of the affidavit in support of summons for confirmation of grant.
- Cost to the petitioner.

Dated, signed at Kerugoya this 29th day of May 2020.

L.W. GITARI

JUDGE