



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO 69 OF 2016

IN THE MATTER OF THE ESTATE OF MUNYUA GACHATHI (DECEASED)

JUDGMENT

1. Before me is the Summons for Confirmation of Grant filed on 21st November 2013 and brought under Section 71 of the Law of Succession Act and Rule 40(1) of the Probate and Administration Rules. The Summons seeks to confirm the Grant of letters of Administration intestate made to PETER NGARUIYA GACHOKA, JOHN MBURU MUNYUA 'A' and JOHN MBURU MUNYUA 'B' on 15th February 2012.

2. In support of the summons, **PETER NGARUIYA GACHOKA** swore an affidavit in which he identified fifteen beneficiaries of the deceased. He identified the two assets of the deceased's estate as land parcels **LR. Nos. Githunguri/Githunguri/1384** and **Githunguri /Githunguri/1385** and proposed that they be distributed as follows; -

- a) Gachoka's family 4.25 acres
- b) Wanjiku's family 4.25 acres
- c) Muthoni's family 4.25 acres

3. However, **JOHN MBURU MUNYUA 'B'** filed an affidavit of protest to the summons on behalf of the house of **Ruth Muthoni Munyua**. He deposed that he is the deceased's son through the second wife **Ruth Muthoni Munyua**. He listed the deceased's beneficiaries from his house and that of the first wife of the deceased. He asserted that the deceased's asset LR No. Githunguri/Githunguri/1385 comprising of 10.45 acres should be distributed in accordance with an agreement dated 31/3/1996 between the deceased and his sons. He contended that he and his stepbrother **James Kibe Munyua** had each purchased 0.25 acres from the deceased and were hence entitled to a larger share of parcel no. 1385. Lastly, he deposed how the 2 acres reserved for the deceased under the agreement dated 31/3/1996 ought to be distributed among the female children of the deceased. Concerning the family of the deceased's brother **Kibe Gachathi** who died in 1940s, he stated that they are entitled to 2.25 acres being **LR Githunguri/Githunguri/1384** which they currently occupy pursuant to an agreement dated 20/7/1970 and allegedly made between Kibe Gachathi's son, one **Gachoka Kibe** (deceased) and the deceased herein.

4. **JOHN MBURU MUNYUA 'A'** equally filed his affidavits. He deposed that the deceased inherited **Njambi** wife of Kibe Gachathi and her children under the customary law, after Kibe's death. It was his position that the deceased therefore had three wives and that he bequeathed to each of his three houses about 4 acres of his two land parcels, that **Ruth Muthoni** and her sons contested the bequest and that the said house continues to occupy the largest portion of the land. He proposed the land be distributed according to the deceased's wishes so that each house gets 4.25 acres.

5. Subsequently, **JOHN MBURU MUNYUA 'B'** filed a further affidavit disputing the assertions by John Mburu Munyua "A". **RUTH MUTHONI MUNYUA** in her statement filed on 6/10/2017, indicated that she is the deceased's second wife and occupies 2 acres on LR Githunguri/Githunguri/1385. She also stated that on 31/3/1996 the deceased allocated each of his eight sons a piece of land measuring an acre out of LR Githunguri/Githunguri/1385 and left two acres to himself. Further, she stated that the deceased had sold 0.50 acres to both John Mburu Munyua "B" and James Kibe Munyua of the first house. She stated that the family of Gachoka Kibe was in occupation of land parcel LR Githunguri/Githunguri/1384 which is their only entitlement.

6. The court directed that the Summons proceeds by way of *viva voce* evidence. **JOHN MBURU MUNYUA 'B'** the protestor herein adopted his affidavit of protest as his evidence. Under cross-examination, he contended that he is opposed to the mode of distribution proposed in the summons as it is inconsistent with the deceased's wishes as stated in the agreement dated 31/3/1996. He stated that the deceased was healthy and mentally lucid at the time of signing the said agreement in the presence of all his children. He denied allegations that the said agreement was a forgery. It was his contention that Kibe Gachathi, the deceased's brother, is entitled to 2.25 acres as per the agreement made in the year 1970, the deceased having had held the land in trust for Kibe Gachathi who was deceased. He asserted that the portion due to Kibe's family was a half share of 4.5 acres being an inheritance to Kibe Gachathi and the deceased from their father to his two sons. In her evidence,

RUTH MUTHONI MUNYUA adopted her statement.

7. JOHN MBURU MUNYUA 'A' adopted his statement as his evidence. During cross-examination, he contended that after the deceased's brother Kibe Gachathi died in 1945, the deceased took care of his deceased brother's wife and children. He stated that under the terms of the distribution of disputed assets by the deceased in his life time, each house got 4 acres and the deceased retained with 0.75 acres for himself; and that the deceased also sold a quarter acre each to John Mburu Munyua 'A' and James Kibe Munyua.

8. PETER NGARUIYA GACHOKA is the administrator who filed the summons to confirm the grant. Adopting his filed depositions, he testified that he is Gachoka Kibe's son and supports the mode of distribution proposed in the summons. He disputed both the agreements allegedly made in 1970 and 1996 stating that in that period, there existed a dispute between the deceased and his own father concerning the share of land due to Kibe Gachathi's family. He maintained during cross-examination that his family is entitled to half the share of the entire parcel co-owned by his father and the deceased.

9. Subsequently, the parties were directed to file their written submissions. Only the protestor filed his written submissions. It was submitted that evidence of Ruth Muthoni Munyua stood unchallenged. The said statement formed the basis of the protestor's submissions emphasizing that the deceased had only two wives and was survived by fifteen beneficiaries. The protestor submitted that the deceased had on diverse dates distributed his estate under Kikuyu Customary Law. The court was urged to reject the proposals in the summons to confirm the grant.

10. The court has now considered the summons for confirmation of grant, the parties' evidence, and the entire record. The brief undisputed background to this matter is that the deceased herein, **Munyua Gachathi** (hereafter Munyua) was a brother to **Kibe Gachathi**. Kibe Gachathi died in the 1940s before the demarcation of land, leaving a wife, one **Njambi Kibe** and children, including the eldest son Gachoka Kibe and daughters including Teresia Wangui Gachwe. It is not in dispute that an original land parcel No. Githunguri/Githunguri/445 measuring 12.70 acres though registered in the name of the deceased herein was owned by the deceased and his deceased brother Kibe Gachathi. Although there is dispute on their exact shares, it is admitted that the said parcel was registered in the name of the deceased herein.

11. In 1989, the deceased caused the said parcel to be subdivided into two parcels, namely, LR No. Githunguri/Githunguri/1385 (10.45 acres) and LR No. Githunguri/Githunguri/1384 (2.25 acres). Both parcels were once more registered in the name of the deceased. By the date of this subdivision, a dispute had erupted between the deceased and Gachoka Kibe, the eldest son of his deceased brother who had pursued Munyua, seeking his father's share of the suit property. Gachoka Kibe died in 1993 and his mantle apparently fell on his son Peter Ngaruiya Gachoka, the applicant in the summons to confirm the grant. Munyua himself had two undisputed wives in his lifetime, namely, **Margaret Wanjiku** who predeceased him, and **Ruth Muthoni Munyua** who survived the deceased.

12. Several claimants who included two sons born to Munyua and his first wife, Margaret Wanjiku had apparently joined the Gachoka family in demanding their portions of land from the deceased. There is evidence that Munyua may have developed senile dementia in the meantime and the role of defending these claims was taken up by Ruth Muthoni and her eldest son John Mburu Munyua "B", the protestor herein. Thus, until 2002, the said parties were caught up in a dispute heard initially before the Land Disputes Tribunal at Githunguri and the appeals tribunal at Nyeri, culminating in Nairobi HCCA No. 210 of 2001 in which the decision of the tribunals was set aside. Another suit being Nairobi HCCC No. 1588 of 1994 apparently by the same claimants was subsequently withdrawn.

13. The deceased herein died on 30th July 2001, and although his family and that of his brother had continued to cultivate and reside on specific portions of the suit properties, the titles thereto had never been transferred from Munyua's name. Munyua was survived by his second wife Ruth Muthoni Munyua and her nine children, namely:

- a) Grace Wangui Munyua
- b) Hannah Wanjiku Munyua
- c) Samuel Kibe Munyua
- d) George Kimemia Munyua
- e) John Mburu Munyua 'B'
- f) Peter Muiruri Munyua
- g) Isaack Kamonjo Munyua
- h) Pauline Njeri Munyua
- i) Nancy Wairimu Mutitika

These siblings and their mother gave authority to their brother the protestor to plead on their behalf in this case.

14. In the house of the first wife Margaret Wanjiku, the deceased was survived by:

- a) John Mburu Munyua “A”
- b) Pauline Njeri
- c) James Kibe Munyua
- d) Mukuhi Munyua alias Mukuhi Muchai

15. On the other hand, was the family of the deceased’s brother including Teresia Wangui Gachwe and Gachoka Kibe the latter who had died in 1993 but was survived by among others, a son, Peter Ngaruiya also an active claimant. Gachoka Kibe son of Kibe Gachathi was survived by ten children (therefore grandchildren of Kibe Gachathi) :

- a) Peter Ngaruiya Gachoka
- b) James Kibe Gachoka
- c) Isaac Mburu Gachoka
- d) Joseph Mwangi Gachoka
- e) James Mbugua Gachoka
- f) John Kamau Gachoka
- g) Mary Njambi Gachoka
- h) Monica Wangari Gachoka
- i) Lucy Wangui Gachoka

16. By their evidence, the protestor’s family and indeed the family of Munyua’s wife Wanjiku agreed in principle that the family of their uncle Kibe Gachathi are entitled to the share of the estate of the deceased arising from the joint ownership by the brothers of the original parcel No.445. However, according to the protestor, the family of Kibe Gachathi is only entitled to the portion No. 1384 measuring 2.25 acres which according to him was ancestral inheritance held in the name of the deceased. To fortify this assertion, he relied on an alleged agreement dated 20/7/70 between Munyua and Gachoka Kibe and asserted that the parcel No.1384 was by the said agreement handed over by their father to Gachoka Kibe. That the alleged agreement recognized that the remaining parcel No. 1385 which was 10.45 acres in size had been purchased by the deceased herein.

17. Unsurprisingly, the children of Gachoka Kibe with the support of Munyua’s first house led by John Mburu Munyua “A” assert that the original parcel No. 445 was jointly acquired by the two brothers Munyua Gachathi and Kibe Gachathi (hereafter Kibe) through purchase from the Manyoro and Kingaca families and/or inheritance from their father. They dispute the 1970 agreement and question why Munyua would have proceeded to obtain two titles in 1989 to the subdivisions in his name if indeed, a sharing formula had been agreed upon in 1970 between Munyua and Kibe Gachathi’s son (Gachoka Kibe).

18. With regard to the two houses of Munyua, there is a dispute as to the sharing formula, the house of the first wife led by John Mburu Munyua “A” (hereafter Munyua “A”) asserting that in 1984 Munyua had distributed his land into three equal portions including his two houses and Kibe’s. For their part, the protestors assert that Munyua had in 1996 shared out his land parcel No. 1385 among his eight sons, and executed an agreement, later referred to as a will, dated 31st March 1996.

19. The protestor’s proposed mode of distribution is based on the said alleged agreement, but it also distributes a portion measuring 2 acres which Munyua had by the alleged agreement reserved for himself, while increasing his (protestor’s) share and that of James Kibe Munyua by 0.25 acres each which the two allegedly purchased from Munyua in 1994. The protestor proposes that in the house of Margaret Wanjiku the sons James Kibe Munyua and John Mburu Munyua ‘A’ take 1.25 acres and 1.00 acres respectively, while daughters of the deceased take about a quarter acre each. He proposes that the family of Gachoka Kibe shares equally the parcel No. 1384. The latter family proposes that the two land parcels No.1384 and 1385 be consolidated and shared equally by the houses of Wanjiku, of Ruth and the family of Gachoka Kibe.

20. The issues arising for determination are therefore as follows.

- a) Whether the Munyua owned the original parcel LR. No. Githunguri/Githunguri/445 jointly with Kibe Gachathi and in what shares.
- b) Whether Munyua died intestate or had distributed his estate in his lifetime.

c) How should the shares of the landed assets due to Munyua and Kibe be distributed?

21. On the first question, it is evident the deceased herein held the original parcel (12.70 acres) on his own behalf and on behalf of Kibe who had died before demarcation and registration of land. It has been alleged by the protestor that while 4.5 acres of the said land was ancestral inheritance by the brothers, the balance was purchased by Munyua solely. There is no evidence to prove such purchase and indeed the 1970 agreement relied on by the protestors was not apparently perfected through the consent of the land control board concerned. It was denied by the children of Wanjiku and Kibe. But worse, no witness was called to testify on the making thereof and its chain of custody since then is a matter of guess work. In a case where allegations and counter allegations of forgery have persisted, it behoved the party relying on the alleged handwritten agreement to demonstrate its bona fides.

22. If indeed Kibe's son Gachoka had pursued the deceased prior to 1970 leading to this sharing agreement, what would be the basis for the further term in the agreement that the entire land parcel be registered in Munyua's name, which in fact happened in 1989 when the original parcel was subdivided? If indeed Munyua had separately purchased his own 10.45 acre parcel prior to demarcation, which was apparently contiguous with the alleged inheritance land of 4.5 acres, there is no explanation for the fact that the two were merged into one parcel – No. 445 -prior to 1970 under Munyua's name, and later subdivided but retained under the same name. It seems more probable that the two brothers jointly inherited and/or acquired the entire land comprising the original parcel No.445.

23. In the circumstances, the entire parcel ought to have been shared equally by the said brothers, except that Munyua possibly assumed an upper hand as a result of the early death of Kibe. It is telling that by 1993 when Kibe's son Gachoka Kibe died and up until now, both parcels of land are still registered in the name of Munyua. One would wonder in the circumstances what the purpose the purported 1970 agreement was intended to serve. In my view, the facts point more to the possibility that no such agreement was executed in 1970 between Kibe's son and Munyua. Nevertheless, in view of the fact that Kibe's family appeared by the proposals in the summons and affidavits agreeable to receiving 4.25 acres out of the entire land parcel, I will find that such portion is due to them.

24. The deceased's alleged will of 31/3/1996 was also simultaneously referred to in earlier depositions of the protestor as an agreement between the deceased and his sons. This document fails the test in Section 13(2) of the Law of Succession Act which provides that:

“A bequest to an attesting witness (including any direction as to payment of costs or charges) or a bequest to his or her spouse shall be void, unless the will is also attested by at least two additional competent and independent witnesses, in which case the bequest shall be valid”.

25. In that case only one attesting witness **Mukura Kamau** signed the document. He is allegedly deceased, according to the protestors. Moreover, by the alleged will/agreement the deceased also retained a portion of the land measuring 2 acres for himself. This document is not a will. Moreover, by this disposition, no provision was made for the female children of the deceased who are Munyua's dependents by dint of Section 29 of the Law of Succession. At best this document contains the wishes of the deceased in respect of the distribution of his land among male children in his already fractured family. These wishes were not accepted by his first house as evidenced by claims filed against Munyua before the Land Disputes Tribunal where Munyua “A” sought a larger share for the first house.

26. Another agreement dated 3/3/1996 was tendered by Munyua “A”. It too purported to contain the disposition of the suit land by Munyua to his family. The protestor dismissed it as a forgery, but no independent witness or evidence could vouch for his own document either. Once more, the chain of custody of these documents is not known. The documents being handwritten, are susceptible to manipulation and/or tampering. The court is wary of placing any weight on them. In the result, the court finds that the Munyua died intestate.

27. Moving on to the final issue, I have found no credible evidence that Munyua inherited his brother Kibe's wife Njambi Kibe and therefore had three wives. On the evidence on record, Munyua had two wives in his lifetime. It is correct therefore that the family of Kibe are not dependents of the deceased herein. However, the family of Munyua does not dispute that the Kibe family are entitled to the share due to their grandfather. Hence Section 40 of the Law of Succession ought to apply to the distribution of Munyua's share of the land parcels herein. Having found that Munyua and Kibe jointly owned the original parcel No.445 in the ratio of 8.45 acres to 4.25 acres, the first task is to subtract 2 acres from **LR No. Githunguri/Githunguri/1385** as the additional portion due to Kibe's family which, added to the undisputed share in parcel No.1384, makes 4.25 acres which is the total share due to Kibe's family.

28. That leaves 8.45 acres in parcel No.1385 for the benefit of Munyua's family – the two houses. Section 40 of the Law of Succession Act provides that;

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

29. There were four children in the deceased's first house (Margaret Wanjiku's) and nine children in the house of his second wife Ruth Muthoni Munyua who is still alive. Thus, there are 10 units in the latter house and four in Wanjiku's house. The proposals by the Protestors herein do not take into account the provisions of the Law of Succession Act. Both male and female children of an intestate are equal and entitled to share equally of their father's estate. See **Rono v Rono [2005] e KLR**. In that case, the Court of Appeal reiterated that female and male beneficiaries of an intestate are to be treated as equals and that distribution must achieve equity. The protestor's proposals are patently inequitable as the female children receive the smallest portions while male beneficiaries receive much larger portions. Moreover, the alleged sale agreement between the protestor, **John Mburu Munyua B**, a step-brother **James Kibe Munyua**, on one hand, and the deceased on the other, in 1994 for the purchase from their father of a quarter acre each out of the parcel 1385 which on all accounts is

agricultural land, does not appear to have received consent from the relevant land control board. In terms of Section 6(1) of the Land Control Act the agreement is void for want of consent. It matters not that the parties were members of the same family or is admitted by some of them. The agreement related to a controlled transaction under Section 6 (1) of the Land Control Act.

30. Similarly, the proposals in the summons filed by administrator Peter Ngaruiya Gachoka while urging equal sharing between the two houses of the deceased and the family of Kibe, falls short of the proviso to Section 71 of the Law of Succession Act which states that:

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed, such grant shall specify all such persons and their respective shares.”

31. Besides, the family of Kibe are not part of the family of the deceased herein. Their beneficial interest in Munyua’s estate is derived from the fact that their father/grandfather co-owned the suit property with Munyua who, though registered as sole proprietor, held the determined share of Kibe in trust for the benefit of Kibe’s family. In the circumstances the balance of 8.45 acres in parcel No.1385 ought to be distributed equally between the 14 units of the two houses of Munyua. Thus, $8.45 \text{ acres} \div 14 = 0.6035 \text{ acres}$ or thereabouts. This means that the following beneficiaries will each receive the following shares: -

A. MUNYUA’S Share - 8.45 acres

i) First House- Margaret Wanjiku)

a) John Mburu Munyua “A” - 0.6035 acres

b) Pauline Njeri Munyua - 0.6035 acres

c) James Kibe Munyua - 0.6035 acres

d) Mukuhi Munyua alias Mukuhi

Muchai (deceased) through her

surviving children - 0.6035 acres

Total - 2.414 acres

ii) Second House - Ruth Muthoni Munyua

a) Ruth Muthoni Munyua - 0.6035 acres

b) Grace Wangui Munyua - 0.6035 acres

c) Hannah Wanjiku Munyua - 0.6035 acres

d) Samuel Kibe Munyua - 0.6035 acres

e) George Kimemia Munyua - 0.6035 acres

f) John Mburu Munyua ‘B’ - 0.6035 acres

g) Peter Muiruri Munyua - 0.6035 acres

h) Isaack Kamonjo Munyua - 0.6035 acres

i) Pauline Njeri Munyua - 0.6035 acres

j) Nancy Wairimu Mutitika - 0.6035 acres

Total - 6.035 acres

32. Regarding the share of 4.25 acres due to Kibe Gachathi, the said deceased and his wife Njambi Kibe were survived by:

a) Njambi Kibe- widow, deceased

b) Gachoka Kibe - son, deceased

c) Wanjiku Nguni-daughter

d) Leah Muchahi Njuguna- daughter, deceased

e) Teresia Wangui Gachwe-daughter

f) Njeri Wango-daughter

In this cause, the children of Gachoka Kibe, who are grandchildren of Kibe Gachathi led by Peter Ngaruiya Gachoka have been most involved. Teresia Wangui Gachwe, Kibe Gachathi's daughter swore an affidavit herein but appeared to merely support the cause of her deceased brother's children rather than clamoring for a share of her own or her siblings. The other surviving children of Kibe Gachathi did not participate in this cause. Nor have they renounced any claims to their father's estate.

33. In the circumstances, the court will defer the distribution of the share of 4.25 acres due to Kibe Gachathi's family to enable the surviving members agree among themselves on the mode of sharing their portion and to file an appropriate summons through **Peter Ngaruiya Gachoka** in that regard. Such summons shall be filed in this cause within 30 days of this judgment and will identify all the living and deceased children of Kibe Gachathi and shares due to them or if deceased, their children surviving them. For the avoidance of doubt, the deferred distribution only relates to the share of 4.25 acres found due to Kibe Gachathi, and only beneficiaries in that family will be involved in the summons to distribute that share.

34. In view of the foregoing, the court will allow the partial confirmation of the grant issued herein on 15/2/2012 and rectified on 29/10/12 in terms of paragraph 31 above. In the meantime, it is imperative that the parcels Githunguri/Giuthunguri/1384 and 1385 be reconsolidated to the original parcel No. Githunguri/Githunguri 445 and the court makes an order to that effect. Despite the partial confirmation of the grant, the parcellation and transmission of the suit property in terms of paragraph 31 herein will await the distribution of the share due to Kibe Gachathi's family, or the further order of this court. Parties will bear own costs.

DELIVERED AND SIGNED ELECTRONICALLY THIS 7TH DAY OF AUGUST 2020

C. MEOLI

JUDGE