



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**SUCCESSION CAUSE NO. 187 OF 2009**  
**IN THE MATTER OF THE ESTATE OF EUSTUS MWAI KAGIRI -DECEASED**  
**CHARLES KAGIRI MWAI.....PETITIONER**  
**VERSUS**  
**MOSES MUTHEE MWAI.....PROTESTOR**

**JUDGEMENT**

**Eustus Mwai Kagiri** (herein after referred to as the deceased) died intestate on 6<sup>th</sup> August 1996 at the age of 60 years. On 25<sup>th</sup> February 2009 **Charles Kagiri Mwai**, a son to the deceased (herein after referred to as the "**Petitioner**") took out citations for service upon *Ann Nymbura Mwai, Moses Muthee Mwai, Wachira Mwai, Muriithi Mwai, Ndiritu Mwai* and *Daivid Githaiga Mwai* who filed an entry of appearance to the citation on 7<sup>th</sup> March 2009.

On 3<sup>rd</sup> December 2009 the petitioner petitioned for letters of administration intestate to the deceased estate. The only property listed comprising the deceased's estate is **Ruguru/Sagana/358** measuring approximately **2.06 ha.** registered in the name of the deceased. The grant was issued on 14<sup>th</sup> July 2010 and on 24<sup>th</sup> May 2011 the petitioner applied for confirmation of the said grant and proposed distribution of the above land as follows:-

*a. Charles Kagiri Mwai to get 1.03 Ha to hold in trust for himself and for David Githaiga Mwai, Joseph Gachucha Mwai, Eliud Gichohi Mwai, Francis Kariuki Mwai, Nancy Muthoni Mwai, Charity Muringi Mwai and Elizabeth Wanjiku Mwai.*

*b. Moses Muthee Mwai, Wachira Mwai, Muriithi Mwai, Ndiritu Mwai and David Githaiga Mwai to get 1.03 Ha.*

On 15<sup>th</sup> September 2011, the protestor **Moses Muthee Mwai**, a son to the deceased filed an affidavit of protest in which he averred that prior to his death, the deceased made his wishes pertaining to distribution of his estate and sub-division of the above land into two portions measuring one acre and five acres.

He averred that the applicants mother who was not living with them was awarded one acre, while five acres was given to himself and his six brothers and annexed an application for sub-division form allegedly seeking consent to have the land divided as herein above stated, and further deposed that the deceased died before the land could be sub-divided as aforesaid. He also stated that his brothers have developed their respective portions. He also stated that the petitioner is their adopted brother and came to

live on the land after the deceased's death and prayed that the deceased's wishes be upheld.

At the hearing, the protestor adopted the contents of the affidavit of protest and stated that the protestor is his step brother but denied that he knows the other persons mentioned in the petition and insisted that he only came to know them after the deceased died. He maintained that prior to his death, the deceased divided his land and that the petitioner was given his portion. He insisted that the petitioner was given one acre, and all the persons he mentioned in the protest were given their respective portions and build on their portions. He insisted that the rest were not given land because they were not there. He urged the court to uphold the deceased's wishes and recalled that the deceased had even taken steps to sub-divide the land as evidenced by the application for consent of the land control board.

Upon cross-examination he admitted that the application for consent of the land control board related to parcel number 356 while the deceased land is parcel number 358. He however admitted that there was a previous sub-division which created the new number casting doubts on the said exhibit. Also he admitted that the said exhibit is dated 1992 and that between 1992 and 1996 the deceased did not attend the Land control board. No explanation was offered for his inability to attend the land control board. He further admitted that the petitioner's mother was buried on the same land.

He also admitted that similar names for the sons such as David Githiga do exist in both houses. The court takes judicial notice of the practice among the Kikuyu community whereby children are named after their parents. These are the sons described as strangers in the protest.

The petitioner's case was that the deceased owned parcel number 358, that he sold a portion of the said land to another person, that the original number was 81 which was divided to 357 and 358. He produced search certificates in support of the above. He confirmed that the deceased's parcel is 358 measuring 5.1 acres. He denied that the deceased intended to divide the said parcel. He insisted that his mother was buried on the father's land. He also insisted that all of them are sons and daughters of the deceased. He also stated that the protestors lied that he did not know his brothers. He also denied that his father intended to give him one acre as alleged. He also stated he built on his portion and that his brothers have also built on the land except the one who lives in Nairobi. He insisted the foregoing is the position on the ground. He proposed that the land be divided as per his proposal.

Upon cross-examination he admitted that his mother separated from the deceased in 1984 but came back in 1985 and the deceased died the following year.

Both counsels filed written submissions which I have considered. Counsel for the protestor maintained that the protestor does not recognize his step brothers and cited the case of *Kimani Mathenge Muriuki & two others vs Patricia M. Muriuki* [1] to support his position. But to me, the facts of the said decision can be distinguished from the facts in the present case. In the said decision, the child in question was born after her mother left the deceased. That is not the position in the present case.

Counsel for the petitioner casted doubts on the application for consent of the land control board which he submitted was meant to mislead the court.

To me, it is clear, the purported application for Land Control Board Consent refers to a different parcel of land and also it is evident that the deceased at one point owned parcel number 81 which he divided and created two new numbers, namely 357 and 358 and sold one portion. Certainly, the purported consent was deliberately introduced to mislead the court and raises serious doubts on the credibility of the protestors. The same protestor conveniently denied knowing his step brothers and stated he does not know them, yet evidence adduced was that they live on the same piece of land and their mother was buried on the same parcel of land. The protestor could not adequately explain why the deceased could give one acre to the petitioner and provide nothing for the protestors' brothers.

I find glaring inconsistencies on the evidence of the protestor. Regarding the inconsistencies and or contradictions in the protestors' evidence cited above, it is settled law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being

rejected.[2] The question to be addressed is whether the contradictions cited above are grave and point to deliberate untruthfulness or whether they affect the substance of the protestors case.

It is important to examine the nature and meaning of the word contradiction. I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria[3] where the court stated as follows:-

*"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."*

Even though the above cited case was dealing with a criminal case, the passage does in my view apply with equal force to civil cases. In the above cited case it was held that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.[4] Its only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court. I find that the contradictions cited in this case are substantial, fundamental and material to the main issues. The contradictions also point towards deliberate untruthfulness on the part of the protestor which cannot be tolerated. The protestor relied on a document stating that the deceased applied for consent to divide the land. It is evident that the said document related to a different parcel of land and to be specific it was meant to mislead the court.

To me such inconsistencies are sufficient to the extent of creating doubts in the mind of the court because they cast serious doubts as to the credibility of the protestor. The court cannot shut its eyes to such serious contradictions and inconsistencies emanating from the same person and evident untruthfulness such as denying that he knows his own step brothers. Such a denial evidently casts doubts on the truthfulness of the witness.

The petitioner's evidence was that the deceased never divided his land prior to his death. I find it necessary to reiterate that cases are decided on evidence and the law applicable. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[5] :-

*"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*

With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. 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. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.

Turning to the facts of this case, as mentioned earlier I have noted key inconsistencies in the evidence of the protestor and I need not repeat the same here. The evidence of the protestor suffered not just from inconsistencies but contradictions hence it is un reliable.

On whether the deceased divided his land prior to his death I am fully aware that it is possible for a person to distribute properties during his/her lifetime. I am fully aware that sufficient evidence to prove that a deceased person distributed his properties during his life time is necessary. I am also aware that such proof cannot be mathematically precise and certain and so the test should be one of satisfaction of a prudent mind in such matters. The onus must be on the person alleging and there must be clear and

convincing evidence and absence of suspicious circumstances surrounding the case.

Where, however, there are suspicious circumstances, the onus would be on the person alleging to explain them to the satisfaction of the Court before the court can accept such evidence. Where there are doubts or suspicious circumstances, it is the duty of the person alleging to satisfy the conscience of the court.

What are suspicious circumstances must be judged in the facts and circumstances of each particular case. The **burden of proof** (Latin: *onus probandi*) is the duty of a party in a trial to produce the evidence that will shift the conclusion away from the default position to that party's own position. In the present case it was necessary to adduce sufficient evidence such as involvement of clan elders, family members or local administration evidently demonstrating the deceased's unequivocal desire and actions to distribute his properties as alleged. Such evidence must be clear, cogent and must demonstrate evidence of absence of suspicious circumstances.

If the distribution of the property is unfair or skewed in such a manner that the person so alleging gets a prominent part in the alleged distribution of the estate which confers substantial benefits to him or his children to the exclusion of the other beneficiaries like in the present case, then, unless the contrary is sufficiently proved, that itself is a suspicious circumstance and in appreciating the evidence in such a case, the court should proceed with an open but nevertheless vigilant and cautious mind.[6]

Secondly, the evidence adduced must be clear and there should be no inconsistencies at all like in the present case. The inconsistencies and contradictions cited above in the evidence of the protestor raise serious doubts on the question of the alleged distribution. In fact, there is nothing to show that the deceased divided his land during his life time. In fact, no evidence was tendered establishing this fact to the required standard.

The burden of proof is often associated with the Latin *maxim semper necessitas probandi incumbit ei qui agit*, a translation of which in this context is: "the necessity of proof always lies with the person who lays charges." I find that the evidence tendered by the protestor falls short of the required standard to clear the doubts in the mind of the court that the deceased ever distributed his land during his life time.

I am aware that the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honoured and effected.[7] But it must be proved beyond doubt that indeed the deceased gave out the property or gift during his/her life time.

There is no tangible evidence to demonstrate that the deceased divided his land during his life. The evidence tendered by the protestor is manifestly inadequate to warrant this court to conclude that the deceased divided his land during his life time. I had the opportunity of observing the demeanor of the protestor and his witnesses as they gave evidence in court, and other than the evident inconsistencies and contradictions cited above, I found their evidence to be totally untruthful. I find that the petitioner was more composed, consistent and truthful.

Section 34 of the Law of Succession Act[8] provides that:- "*A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.*"

Having found that the deceased died intestate, and bearing in mind it is not disputed that the deceased had two wives, the deceased's estate falls for distribution in accordance with the provisions of section 40 of the Law of Succession Act[9] which provides as follows:-

*'(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal estate and household effects and 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 section 35 to 38.'*

Section 40 of the Act address the case of a polygamist where the deceased had several wives at some stage of his life. Under Section 40 of the Act, if the deceased had several wives, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the Act, the children would divide the estate equally amongst themselves. In the present case both spouses are dead.

The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is “*equally*” as opposed to “*equitably*”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “*shall ... be equally divided among the surviving children.*” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.

I have considered the issues raised in the protest and in my humble view, I find the protest has not merits. As stated above, the deceased's estate falls for distribution as provided under section 40 of the Act. I accordingly I dismiss the protest.

I also find that the proposal by the protestor doe not ensure equality in that the beneficiaries in the petitioners house are more that the beneficiaries in the protestors house, and this means that the beneficiaries in the protestors house will be more advantaged if the petitioners proposal is adopted. This court has a final say on distribution and this court stands guided by the above provisions and the need to maintain equality and fairness and sees no reason to adopt a mode of distribution that will be unfair to some beneficiaries.

Guided by the law and the need to do justice, I find that all the beneficiaries are entitled to equal shares of the deceased's estate. I therefore order and decree as follows:-

a. *That the grant of letters of administration intestate to the estate of Eustus Mwai Kagiri-deceased made to Charles Kgiri Mwai on 14<sup>th</sup> July 2010 be and is hereby confirmed.*

b. *That title number Ruguru/Sagana/358 be divided into equal portions among the following:- Charles Kagiri Mwai, David Githaiga Mwai, Joseph Gachuca Mwai, Eliud Gichohi Mwai, Francis Kariuki Mwai, Nancy Muthoni Mwai, Charity Muringi Mwai, Elizabeth Wanjiku Mwai, Moses Muthee Mwai, Wachira Mwai, Muriithi Mwai, Ndiritu Mwai and David Githaiga Mwai.*

c. *That the protestor shall pay the costs of this cause.*

Right of appeal 30 days

Dated at Nyeri this 24<sup>th</sup> day November of 2016

**John M. Mativo**

**Judge**

Delivered at Nyeri this 24<sup>th</sup> day November of 2016

**Hon. Justice Jairus Ngaah**

**Judge**

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[1] High Court Succession Cause Number 976 of 94

[2] See Uganda vs Rutaro {1976} HCB; Uganda vs George W. Yiga {1979} HCB 217

[3] David Ojeabuo vs Federal Republic of Nigeria, {2014} Ipelr-22555(ca), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA

[4] See Osetola vs State {2012} 17 NWLR (Pt1329) 251

[5] {2007} 4 SLR (R) 855 at 59

[6] See H. Venkatachala Iyengar vs B. N. Thimmajamma & Others, 1959 AIR 443, 1959 SCR Supl. (1) 426- Supreme Court of India

[7] See the Judgment of A. Mabeya J. in **Succession Cause No.43 of 2002, In the matter of the Estate of Noah Wanjala Kimawachi-Deceased**

[8] Cap 160, Laws of Kenya

[9] Ibid