



REPUBLIC OF KENYA



**In re Estate of Misheck Nyingi Gathiore (Deceased) (Family Cause
508 of 1999) [2025] KEHC 1918 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
FAMILY CAUSE 508 OF 1999
MA ODERO, J
FEBRUARY 21, 2025**

IN THE MATTER OF THE ESTATE OF MISHECK NYINGI GATHIORE (DECEASED)

JUDGMENT

1. Before this court for determination are two protests dated 22nd October 2019 filed by Stephen Wachira Koro as well as the joint Affidavit of Protest dated 30th August 2019 filed by Joseph Kibicho Nyingi And Irene Wanjiku Murage.
2. This is a succession matter that has been alive in the court corridors for several decades. The case has gone all the way to the court of Appeal and was thereafter returned back to the High Court for retrial.

Background

3. This succession Cause relates to the estate of the late Misheck Nyingi Gathiore(hereinafter ‘the Deceased’) who died intestate on 14th August 1998 in Nyeri County. A copy of the Death Certificate Serial Number 565074 is annexed to the Petition for Grant of letters of Administration Intestate dated 8th May 2000.
4. The Deceased who was a polygamous man had five (5) wives namely
 - i. Kirigo W/O Nyingi
 - ii. Marion Waihuini Nyingi
 - iii. Wanjiru W/O Nyingi
 - iv. Rachel Wangechi Nyingi
 - v. Elizabeth Wanjiru Nyingi
5. The estate of the Deceased comprised the following assets;-
 - ”1. Gitumba/muhotetu Block 1/83
 2. Eusonyiro Suguru Block 5/595



3. Mugunda Rurii Block 1 Muthangira/92
4. Mweiga Estate Settlement Scheme/126
5. Mweiga Estate Settlement Scheme/120
6. Tetu Kihuyo 121
7. Tetu Kihuyo 24
8. Tetu Kihuyo 9
9. Ndaragwa/murichu/131
10. Ndaragwa/murichu/132
11. Ndaragwa/kahutha Block 1/10
12. Ndaragwa/kahutha Block/ii/115
13. Tetu Kihuyo 38
14. Tetu Kihuyo Nyarugumu
15. Muhotetu Plot
16. Nyamothe & Company Plots
17. Pyrethrum, Company Plots (gatemu) No. 183
18. Muhotetu Company Plots
19. Ruringu Plot 206
20. Ruringu Plot 19
21. Ruringu Plot 30
22. Kingongo Plot 109
23. Kingongo Plot 6
24. Ihururu Plot 6
25. Ewaso Nyiro Suguroi Block VI/317
26. Gituamba/muhotetu Block 2/15/8 Muhotetu
27. Nyeri District Co-operative Union Ltd – A/CNo.
0284-11-xxxx
28. Nyeri District Co-operative Union Ltd – A/c 1905-07-xxxx
29. Nyeri District Co-operative Union Ltd – A/c No.
0284 – xxxx
30. Fixed Deposit Account - 001xxx
31. Fixed Deposit Account - 0017xxxx – Co-operative Bank Nyeri
32. Shares Kenya Commercial Bank
33. Shares Co-operative Bank”



6. There is no dispute regarding the names and identities of the beneficiaries to the estate. The main bone of contention which has led to the protracted litigation in this matter relates to the mode of distribution of the estate. On 20th February 2001 Hon Justice JV Juma (as he then was) appointed Paul Kiruhi Nyingi and John Wanjohi Nyingi as joint administrators of the estate. The two Administrators then filed a summons for confirmation of Grant dated 22nd October 2003 in which they set out a proposed mode of distribution of the estate. Several of the other beneficiaries filed Affidavits of protest to the summons for confirmation of Grant objecting to the mode of distribution as proposed by the Administrators.
7. Vide a judgment delivered on 22nd July 2009 Hon. Justice Makhandia (as he then was) upheld the mode of distribution as proposed by the Administrators. The Honourable Judge proceeded to confirm the Grant in line with the mode of distribution as set out by the Administrators.
8. The protestors who were aggrieved by this decision of the High Court moved to the Court of Appeal. The court of Appeal held that the mode of distribution proposed by the Administrators was ambiguous. The court of appeal further faulted the High Court for relying on an undated black book (diary) written in Kikuyu vernacular as indicative of the wishes of the Deceased, which black book the court of Appeal found had not properly been admitted into evidence.
9. Therefore vide their ruling delivered on 14th November 2013, the Court of Appeal allowed the appeal and set aside the judgment of the High Court and ordered that the issue of distribution be heard afresh in the High Court.
10. The Co-Administrator Paul Kiruhi Nyingi later passed away leaving John Wanjohi Nyingi as the sole Administrator of the estate.
11. As directed by the Court of Appeal the matter was referred back to the High Court for re-trial on the issue of distribution of the estate. The parties were then referred for Court Annexed Mediation. They were able to reach consensus on distribution of all the assets comprising the estate save for one being the property known as L.R No. Ewaso Nyiro/suguroi BlockV/595 (hereinafter referred to as the ‘suit land’)
12. The Administrator John Wanjohi Nyingi filed a Summons for confirmation of Grant dated 12th June 2019 in which he proposed inter alia that the parcel of land known as LR Ewaso Nyiro/Suguroi Block V/ 595 be allocated entirely to James Miugo Nyingi.
13. The Protestors in their Affidavit of protest dated 30th August 2019 proposed instead that the suit land be distributed as follows:-
 - (a) Joseph Kibicho Nyingi - 8 acres
 - (b) Irene Wanjiku Murage for Estate of Stephen Nderitu Nyingi - 20 acres
 - (c) James Mugo Nyingi - 20 acres
14. One of the protestors namely Stephen Wachira Koro withdrew his protest dated 22nd October 2009. Thus the court was only left to consider the joint protest dated 30th August 2019 filed by Joseph Kibicho Nyingi and Irene Wanjiku Murage.
15. The hearing commenced before Hon. Lady Justice Florence Muchemi who heard the evidence of two witnesses. Upon the transfer of the trial judge I took over the matter and concluded the hearing.



The Evidence

16. PW1 Joseph Kibicho Nyingi and PW2 Irene Wanjiku Murage were the joint protestors in this matter. They stated that the land in question comprised of 48 acres. That the Deceased during his life time had purchased twelve (12) shares from Gatarakwa Farmers Company Limited. That vide an Affidavit dated 25th August 1986 the Deceased indicated that he intended to transfer his twelve (12) shares to his 3 sons namely Joseph Kibicho Nyingi, Stephen Nderitu Nyingi (now deceased) and James Miugo Nyingi in the ratio of 8:20:20. Irene Wanjiku Murage who is the widow of Stephen Nderitu Nyingi is the daughter in law of the Deceased and represents the estate of her late husband. The joint protestors urge the court to uphold the intention of the Deceased by distributing the suit land in the manner set out in the Affidavit of 25th August 1986.
17. The Administrator John Wanjohi Nyingi filed a Replying Affidavit dated 24th January 2020 against the Protest filed by the Protestors. The Administrator clarified that the suit land comprised of 29 acres and not 48 acres as claimed by the Protestors.
18. The Administrator avers that he is fully aware of the Affidavit dated 25th August 1986. He contends that the same is no longer applicable as the land allocated to the Deceased is far much smaller than the acreage indicated in that Affidavit.
19. According to the Administrator upon receiving the 29 acres the Deceased authorized his son James Miugo Nyingi to occupy the suit land exclusively. The said James Miugo has occupied and worked the said parcel of land to date.
20. DW2 James Miugo Nyingi is a son to the Deceased. He told the court that he has occupied the suit land since the year 1989 and has built his home thereon. He states that the Deceased during his lifetime allocated the entire 29 acres to him. Dw2 categorically denies the claim by the protestors that they used to work on or rear livestock on the suit land.

Analysis And Determination

21. I have carefully considered the evidence adduced by the witnesses as well as the submissions filed by the parties. The only issue for determination is how the suit land should be distributed.
22. The Protestors advocate for the distribution of the suit land in the ratio of 8:20:20. The protestors sought to rely on the distribution as set out by the Deceased contained in a 'black book' (diary), which they asserted reflected the wishes of the Deceased regarding the distribution of the suit land which wishes they urge the court to uphold. This they state conforms with the intention of the Deceased as set out in the affidavit dated 25th August 1986 sworn by the Deceased. A copy of the said affidavit is annexed to the joint Affidavit of Protest dated 30th August 2019.
23. In the said Affidavit the Deceased referred to 12 shares in Gatarakwa Farmers Company Limited comprising of 48 acres.
24. However it has been conceded by the parties (including the protestors) that the suit land does not measure 48 acres but in fact measures 29 acres only.
25. The said Affidavit therefore does not reflect the true picture on the ground. The Protestors explain the anomaly by stating that the Deceased was not allocated all the shares he had applied for – that the land allocated to the Deceased was of smaller acreage. The Deceased cannot give what he does not have, he cannot give out 48 acres when the land registered to Deceased was only 29 acres. Similarly the court cannot distribute what does not exist. For this reason I reject the distribution as set out in the



Black book relied on by the Protestors as those wishes do not reflect the reality on the ground. In the circumstances I find that the court cannot place reliance on this Affidavit.

26. One of the Protestors Joseph Kibicho Nyingi alleges that he purchased two (2) shares of the suit land from the Deceased for a price of Kshs. 2.4000. He therefore claims to be entitled to the two shares which he purchased. The protestor did not avail any evidence of such purchase. No Sale Agreement was exhibited and no evidence of payment of Kshs. 2,400/- to the Deceased was tendered. Moreover the Protestor in evidence states that he does not recall when he made the purchase.
27. It is surprising that in the Affidavit dated 25th August 1986, the Deceased made no mention of having sold any shares in the suit land to his son.
28. If this James Kibicho wishes to stake a claim to 'ownership' of part of the suit land then the proper forum for him to prosecute that claim is in the Environment and Land Court (ELC). As far as this court is concerned there is no evidence to prove the claim that James Kibicho purchased a share in the suit land from the Deceased and I reject this claim as a pure fabrication.
29. Lastly on this point the protestors urge the court to place reliance on the Affidavit dated 25th August 1986 as reflective of how the Deceased wished to have the suit land distributed. Firstly the Deceased died intestate. He did not leave a written or an oral will indicating how his estate was to be distributed.
30. Secondly Pw1 admits under cross-examination that the suit land was registered in the name of the Deceased in June 1987 one year AFTER he swore the Affidavit dated 28th August 1986. Therefore at the time he was purporting to distribute the parcel land the same did not belong to the Deceased. One cannot distribute what one does not own. I therefore reject the Affidavit dated 25th August 1986.
31. The Protestors are in effect claiming that the Deceased made a gift of the suit land to them during his lifetime i.e a 'Gift inter Vivos.'
32. It is trite law that 'he who alleges must prove.'" In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the Evidence Act Cap 80, Law of Kenya provides as follows;

“ Burden of Proof.

107 whoever desires any court to given judgment as to any legal or liability
(1) 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.”

33. A gift 'inter vivos' is a gift between a living donor and a living donee. This refers to a gift made during the lifetime of the donor. There must be evidence of a transfer executed by the Deceased as well as evidence of consent from the Land Control Board. In other words the gift to the donee must be shown to have been perfected.
34. In Estate Of Godana Songoro GuyoMalindi Succession Cause No. 15 of 2018 the Court referred to Odunga's Digest on Civil, Law and Procedure Vol (iii) Page 2417 and 5484(d) where it is stated that:-

“ Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If on the other hand, the donee has under his control everything necessary to constitute his title completely



without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control at those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor.” [own emphasis]

35. In this case the gift purportedly made by the Deceased was not perfected. The Title Document for the suit land indicates that the same was still registered in the name of the Deceased at the time of his death and therefore forms part of his estate. Indeed under cross-examination Pw1 confirms that

“This is a search for Ewaso Nyiro Block 5/595. The search is dated 3/2/2020. The registered proprietor indicated as Nyingi Gathiore [the Deceased herein]. He was registered on 16/6/1987.”

36. For the above reasons I reject the mode of distribution as proposed by the protestors.

37. The Administrator has proposed that the suit land devolve entirely to one James Miugo DW2. He states that the said James Miugo took up occupation of the said parcel of land during the lifetime of the Deceased, That DW2 has tilled the land and has built his home thereon.

38. The Protestors claim that they have also farmed the suit land with the 2nd Protestor Irene claiming that she reared livestock there. However no evidence was presented before the court to prove those claims.

39. I have perused the mode of distribution proposed by the Administrator. It provides for all the beneficiaries of the estate. The protestors complain that Miugo is to be allocated 29 acres of land whilst Irene was only given 2.7 acres. However it is important to assess not only the acreage alone but the value of the said land. Although no valuation reports were produced by either side to provide guidance on the value of the two parcels of land, I take judicial notice of the fact that land in this Nyeri Municipality would be more valuable than land in Laikipia County in a place which the court was informed is in fact a semi- arid area.

40. Moreover in his evidence Dw2 James Muigo told the court that though he used to live in the land allocated to Irene (the 2nd protestor) he has opted to relinquish that parcel of land in Nyeri to her and moved to ‘Gobit’ where he has established his home.

41. I have perused the mode of distribution proposed by the Administrator. All the beneficiaries have been provided for. None has been left out. It is my view that it represents an equitable and fair mode of distribution of the estate.

42. Finally I find no merit in the joint protest dated 30th August 2019. The same is dismissed in its entirety. This being a family matter I make no orders on costs.

DATED IN NYERI THIS 21ST OF FEBRUARY, 2025.

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MAUREEN A. ODERO

JUDGE

