



**In re Estate of Theondere Mbugaugia alias Mbugaugia Theondere alias Mbugaugia Ithinyai
(Deceased) (Succession Cause E006 of 2022) [2024] KEHC 5857 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE E006 OF 2022**

EM MURIITHI, J

MAY 23, 2024

**IN THE MATTER OF THE ESTATE OF THEONDERE MBUGAUGIA ALIAS
MBUGAUGIA THEONDERE ALIAS MBUGAUGIA ITHINYAI (DECEASED)**

BETWEEN

ELIZABETH KINANU MBUGAUGIA 1ST PETITIONER

CHARLES GITONGA MBUGAUGIA 2ND PETITIONER

AND

ELIZABETH KANINI KIAMA PROTESTOR

**(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EMMANUEL
MURIUKI)**

JUDGMENT

1. Theondere Mbugaugia, the deceased herein died on 25th August, 2010 survived by Martha Nchurubi Mbugaugia – widow, Mary Muuthia – daughter, Angelica Nkatha Ndegwa – daughter, Emmanuel Muriuki – son (deceased), Teresia Kathure – daughter, Elizabeth Kinanu Mbugaugia – daughter, Pauline Nkirote – daughter, Charles Gitonga Mbugaugia – son, Gregory Macharia – son, Paul Murungi – son and Veronica Ngugi – daughter.
2. The estate of the deceased comprises of Abothuguchi/Igane/1139, Abothuguchi/Igane/978 and Abothuguchi/Igane/825 (henceforth called the estate properties).
3. On 24/5/2023, Charles Gitonga Mbugaugia, the 2nd Petitioner herein filed summons for confirmation of grant urging the court to adopt his mode of distribution as proposed at paragraph 5 thereof.
4. Elizabeth Kanini Kiama, the Protestor herein, filed an affidavit of protest on 9/8/2023 contending that the deceased had bequeathed her late husband Emmanuel Muriuki 8 acres of LR No Abothuguchi/Igane/825, which he extensively developed and established a permanent dwelling house.



5. The 2nd Petitioner swore a replying affidavit to the protest on 30/1/2024 urging that the deceased had bequeathed Emmanuel Muriuki 14½ acres of LR No Abothuguchi/L-Kijja/191 inter vivos, and he only gave the Protestor ¼ acre of LR No Abothuguchi/Igane/825 to avoid demolishing their house which is built there. He distributed to his sisters 1.3 acres each as per the wishes of the deceased, and therefore his mode of distribution is fair and just. Each beneficiary has settled in their respective portion as per his mode of distribution and he urges the court to adopt it.
6. Elizabeth Kinanu Mbugaugia, the 1st Petitioner herein swore a replying affidavit in opposition to the protest on 16/1/2024. She withdrew her summons for confirmation of grant dated 18/10/2023 and filed on 23/10/2023 and proposed that the estate properties should be distributed equally to all beneficiaries. She also sought appointment of one administrator amongst the beneficiaries.

Submissions

7. The 1st Petitioner did not file any submissions.
8. The 2nd Petitioner urges that the Protestor already benefited from the estate having been bequeathed 14 ½ acres inter vivos. He urges that the deceased had indicated how he wished his properties to be shared and even went ahead to show them their respective portions. He urges that since the other beneficiaries have not disputed what they have been awarded, they are comfortable with their portions.
9. The Protestor urges that that the mode of distribution proposed by the 2nd Petitioner directly discriminates against the daughters of the deceased and her deceased husband Emmanuel Muriuki. She is thus seeking equal distribution of the estate amongst the 10 children of the deceased in accordance with section 38 of the *Law of Succession Act*, and relies on *Naomi Wangechi Munene & another v Dorcas Wanjiru Gitonga* (2016) eKLR. She prays that Plot No 7 Mutharene Market be sold and the proceeds be equally distributed amongst all the beneficiaries as its acreage is quite small. She further prays that the shares of Nkando farm and Pension be shared equally to all beneficiaries as proposed by the Petitioners.

Analysis and Determination

10. The issue for determination is how the estate should be distributed.
11. There is no dispute that the Petitioners are children of the deceased while the Protestor is the sister in law to the Petitioners, and thus they are all beneficiaries of the deceased.
12. The 2nd Petitioner has proposed that LR Nos. Abothuguchi/Igane/978 and Abothuguchi/Igane/1139 be shared equally among himself, Gregory Macharia and Paul Murungi, while Plot No 7 Mutharene Market goes wholly to him. He contends he has shared out LR No Abothuguchi/Igane/825 as per the wishes of the deceased by giving his sisters including his sister in law, the Protestor herein 1.3 acres each. He contends that the Protestor's husband had received 14 ½ acres as a gift inter vivos from the deceased.
13. The court notes the copy of green card for LR No Abothuguchi/L-Kijja/191 measuring approximately 4.2 Ha which was transferred by the deceased to Emmanuel Muriuki on 1/2/2005.
14. The provisions of section 42 of the *Law of Succession Act* mandates the court to take into consideration the properties, gifts or bequests made to any of the beneficiaries during the lifetime of the deceased, during distribution of the estate properties.
15. The Protestor and the 1st Petitioner contend that the estate properties ought to be distributed equally to all the beneficiaries.



16. It is not in doubt that the deceased was survived by a wife and 10 children. The general rule is that, where a deceased has left one surviving spouse and child or children, his estate is to be distributed in accordance with the provisions of section 35 of the *Law of Succession Act*. That section provides that;

“(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to - (a) the personal and household effects of the deceased absolutely; and (b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to - (a) the nature and amount of the deceased's property; (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse; (c) the existing and future means and needs of the applicant and the surviving spouse; (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will; (e) the conduct of the applicant in relation to the deceased and to the surviving spouse; (f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and (g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”



17. In *Tau Katungi v Margrethe Thorning Katungi & another* [2014] eKLR the court (W. Musyoka J.) stated that:-

“The effect of Section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated.

18. The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance. The other aspect is that life interest ties up with the concept of matrimonial property: the said property would in most part be property acquired during marriage and with the contribution of the surviving spouse. Direct devolution of such property to the children would deny the surviving spouse of enjoyment of their own property.”

18. In the absence of any evidence that the deceased had settled his children in their respective portions before his death, and not having transferred the said portions during his life, this court finds that the mode of distribution as proposed by the 2nd Petitioner is an outright discrimination against the daughters of the deceased, which is expressly outlawed under the *Constitution* and the law of succession which provides for succession by children of the deceased, female or male, married or unmarried.
19. This court, however, finds that the 2nd Petitioner has proved on a balance of probabilities on the basis of the Green Card entry on LR No Abothuguchi/L-Kijja/191 measuring approximately 4.2 Ha which was transferred by the deceased to Emmanuel Muriuki on 1/2/2005, that the deceased had gifted the Protestor’s husband LR No Abothuguchi/L-Kijja/191 during his lifetime.
20. The proposal that due to the impracticality of equally sharing Plot No 7 Mutharene Market amongst all beneficiaries due to its small acreage, it ought to be sold and the proceeds shared equally, is accepted by the Court.

Orders

21. Accordingly, for the reasons set out above, this court finds the protest to be without merit and it is hereby dismissed.
22. Consequently, the grant of Letters of Administration Intestate issued to the Petitioners is hereby confirmed in the following terms:
- a. ¼ Acre of LR No Abothuguchi/Igane/825 to go to the Protestor and the Balance to be shared equally amongst the remaining 9 children namely Mary Muuthia, Angelica Nkatha Ndegwa, Teresia Kathure, Elizabeth Kinanu Mbugaugia, Pauline Nkirote, Charles Gitonga Mbugaugia, Gregory Macharia, Paul Murungi and Veronica Ngugi.



- b. LR No Abothuguchi/Igane/978 to be shared equally amongst Mary Muuthia, Angelica Nkatha Ndegwa, Teresia Kathure, Elizabeth Kinanu Mbugaugia, Pauline Nkirote, Charles Gitonga Mbugaugia, Gregory Macharia, Paul Murungi and Veronica Ngugi.
- c. LR No Abothuguchi/Igane/1139 to be shared equally amongst Mary Muuthia, Angelica Nkatha Ndegwa, Teresia Kathure, Elizabeth Kinanu Mbugaugia, Pauline Nkirote, Charles Gitonga Mbugaugia, Gregory Macharia, Paul Murungi and Veronica Ngugi.
- d. The widow, Martha Nchurubi Mbugaugia shall have a life interest in the estate properties.
- e. Plot No 7 Mutharene Market to be sold and the proceeds to be shared equally amongst Mary Muuthia, Angelica Nkatha Ndegwa, Teresia Kathure, Elizabeth Kinanu Mbugaugia, Pauline Nkirote, Charles Gitonga Mbugaugia, Gregory Macharia, Paul Murungi and Veronica Ngugi.
- f. Nkando Farm Shares and the Pension of Ksh.150,000 to go wholly to the widow, Martha Nchurubi Mbugaugia.

23. File closed.

Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF MAY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Batista Mwirigi for the Protestor.

Ms. Elizabeth Kinanu, 1st Petitioner in person.

Mr. Sandi for Mr. K. Kiara for the 2nd Petitioner.

