



**In re Estate of M'mutungi Rithuri Alias M'mutungi M'notui alias  
M'mutungi Rithurui alias M'mutungi Rithurui (Deceased) (Succession  
Cause 42 of 2008) [2024] KEHC 4921 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4921 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 42 OF 2008  
TW CHERERE, J  
MAY 9, 2024**

**IN THE MATTER OF THE ESTATE OF M'MUTUNGI RITHURI ALIAS M'MUTUNGI  
M'INOTUI ALIAS M'MUTUNGI RITHURUI ALIAS M'MUTUNGI RITHURUI (DECEASED)**

**BETWEEN**

**MICHAEL' KOOME ..... 1<sup>ST</sup> PROTESTOR**

**HENRY MUTUMA M'MUTUNGI ..... 2<sup>ND</sup> PROTESTOR**

**AND**

**PAUL RIUNGU M'MUTUNGI ..... ADMINISTRATOR**

**RULING**

1. M'Mutungi Rithuri Alias M'Mutungi M'notui Alias M'Mutungi Rithurui Alias M'Mutungi Rithurui (Deceased) died sometimes on 12<sup>th</sup> February, 2007.
2. Letters of Administration were issued to the Respondent on 05<sup>th</sup> June, 2008 and a disagreement arose concerning the distribution of the estate. I directed that the matter of distribution be heard by way of viva voce evidence.
3. By his oral evidence, Paul Riungu (Administrator/Respondent) stated that his father had three wives and the mother of Henry Mutuma Mutungi, Johnson Kimathi M'Mutungi and Josephine Kagwiria Mutai was not married to the deceased and her three children are not entitled to a share of deceased's estate.
4. The Administrator/Respondent by his affidavit sworn on 09<sup>th</sup> October, 2023 averred that deceased owned 6 parcels of land. He denied that Henry Koome and Sabera Nkatha were children of the deceased. He excluded their names from the list of beneficiaries and proposed distribution as follows:



1. LR. Kibirichia/Kibirichia/1998 in equal shares to the Administrator Paul Riungu M’Mutungi to hold in trust for himself and Martin Bundi, Leah Mwari, Gladys Mukiri and Rachael Nkandau Kinoti, sister Zipporah Gakii Kinoti to hold in trust for herself and Raymond Kiruki, Lydia Karegi Jonah, Margaret Kagendo M’Mukindia and Mary Kinya Mbae and brothers Michael, Ngunjiri to hold in trust for himself and Margaret Kibea and Henry Mutuma to hold in trust for himself and Susan Nkirote and Josephine Kagwiria
  2. LR. Kibirichia/Kibirichia/2007 to the Administrator Paul Riungu M’Mutungi, sister Zipporah Gakii Kinoti and brothers Michael, Ngunjiri and Henry Mutuma jointly
  3. LR. Kibirichia/U-Kaongo/1027 in equal shares to deceased’s five daughters namely Leah Mwari, Rachael Nkandau Kinoti, Zipporah Gakii Kinoti, Mary Kinya Mbae and Josephine Kagwiria Mutai to hold in trust for themselves and their siblings
  4. Endana Shamba No. 193 one share to the Administrator Paul Riungu M’Mutungi, sister Zipporah Gakii Kinoti and brothers Michael, Ngunjiri and Henry Mutuma in equal shares to hold in trust for themselves and their siblings
  5. Plot No. 9 Timau to the Administrator Paul Riungu M’Mutungi, sister Zipporah Gakii Kinoti and brothers Michael, Ngunjiri and Henry Mutuma in equal shares to hold in trust for themselves and the other siblings
  6. Plot 15 Kaongo to the Administrator Paul Riungu M’Mutungi, sister Zipporah Gakii Kinoti and brothers Michael, Ngunjiri and Henry Mutuma in equal shares to hold in trust for themselves and the other siblings
5. The Administrator’s first witness Henry Mutuma M’Mutungi, a son of the deceased denied that Michael Koome was deceased’s son. He however confirmed that deceased had given his 11 sons who included Michael Koome 2 acres of land each and that he had indicated that Michael Koome was not entitled to any other share.
  6. The Administrator’s second witness Rachael Nkandau who is a daughter of the deceased similarly denied that Michael Koome was a son of the deceased but confirmed that deceased had while giving his other sons land given Michael Koome LR. Kibirichia/Kibirichia/2006.
  7. The Administrator’s second witness Zipporah Gakii Kinoti who is a daughter of the deceased similarly denied that Michael Koome was a son of the deceased but confirmed that deceased had while giving his other sons land given Michael Koome LR. Kibirichia/Kibirichia/2006.
  8. The Administrator’s second witness Kimathi M’Mugwika stated that Michael Koome was not a member of deceased’s Abunthiga clan.

**Protestor’s case**

9. By his evidence, Michael Koome (Protestor) stated that deceased’s family comprised of the following:

1<sup>st</sup> house

Sarah Ntibuka M’Mutungi - widow- Deceased

Children

- i. Paul Riungu
- ii. John Mwiti



iii. Kinyua M'Mutungi

iv. Leah Mwari

v. Rachael Nkandau

2<sup>nd</sup> house

Diana Nduru M'Mutungi - widow- Deceased

Children

i. Kiruki M'Mutungi - son- deceased

ii. Solomon Kirero

iii. Julius Muriungi

iv. Zipporah Gakii

v. Mary Mbae

3<sup>rd</sup> house

Martha Ngito M'Mutungi - widow- Deceased

Children

i. Kaburu Magambo - son - deceased

ii. Michael Koome

iii. Paul Kibea - son -deceased

4<sup>th</sup> house

Elizabeth Nguta M'Mutungi - widow- Deceased

Children

i. Henry Mutuma

ii. Johnson Kimathi

iii. Josephine Kagwiria

10. The protestor additionally stated that prior to his death, deceased gave 2 acres of land to each of his 11 sons. He identified his gift as LR. Kibirichia/Kibirichia/2006.
11. The protestor stated that at the time of his death, deceased's estate comprised of the following three assets and proposed they be distributed as follows:
1. LR. Kibirichia/Kibirichia/1998 to the 11 sons in equal shares
  2. LR. Kibirichia/Kibirichia/2007 to be sold and the proceeds shared by the sons in equal shares
  3. LR. Kibirichia/U-Kaongo/1027 to the daughters of the deceased in equal shares



## Analysis and Determination

- (4) At the time of filing this cause, Paul Riungu (Administrator/Respondent) indicated that the Deceased's family comprised of the following:

### Widows

- i. Sarah Ntibuka M'Mutungi
- ii. Diana Nduru M'Mutungi

### Children

1. Paul Riungu
2. John Mwiti
3. Solomon Kirera
4. Kinyua M'Mutungi
5. Michael Koome
6. Paul Kibea
7. Henry Mutuma Mutungi
8. Johnson Kimathi M'Mutungi
9. Michael Ngunjiri Magambo
10. Raymond Edward Kiruki
11. James Gichuru Muriungi
12. Leah Mwari
13. Rachael Nkandau Kinoti
14. Zipporah Gakii Kinoti
15. Mary Kinya Mbae
16. Josephine Kagwiria Mutai

12. I have considered the evidence on record and deduced the issues for determination as follows;

- (1) Who are the beneficiaries of deceased's estate?
- (2) What comprises the estate of the deceased
- (3) Who is entitled to Deceased's estate

### **(1)Who are the Beneficiaries of Deceased's Estate?**

13. At the time of filing this cause, Paul Riungu (Administrator/Respondent) also filed the chief's letter dated 27<sup>th</sup> June, 2007 which indicated that the Deceased's family comprised of the following:

### Widows



1. Sarah Ntibuka M'Mutungi
2. Diana Nduru M'Mutungi

Children

1. Paul Riungu
2. John Mwiti
3. Solomon Kirera
4. Kinyua M'Mutungi
5. Michael Koome
6. Paul Kibea
7. Henry Mutuma Mutungi
8. Johnson Kimathi M'Mutungi
9. Michael Ngunjiri Magambo
10. Raymond Edward Kiruki
11. James Gichuru Muriungi
12. Leah Mwari
13. Rachael Nkandau Kinoti
14. Zipporah Gakii Kinoti
15. Mary Kinya Mbae
16. Josephine Kagwiria Mutai

14. The court record demonstrates subsequent pleadings filed by the Administrator/Respondent bear the name and signature of the Protestor as son of the deceased.
15. In fact, the Administrator/Respondent's application for confirmation of the grant dated 23<sup>rd</sup> February, 2009 is supported by a consent signed by beneficiaries among them the Protestor and a proposal is made for his share in the mode of distribution filed on 27<sup>th</sup> October, 2009.
16. From their testimonies, I found that the Administrator/Respondent and his siblings were at pains to explain where at what point in time the Protestor ceased to be deceased's son when all along he was recognized as such.
17. It is to be remembered that no party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit. This procedural imperative was discussed by the Court of Appeal in *Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others* [2014] eKLR, in which the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC* 91/2002 was quoted with approval thus:

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings,



or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

18. Flowing from the above, I find that the Administrator/Respondent and his siblings are estopped from departing from the pleading that Protestor is son of deceased and their allegation that he is not son of deceased is thus rejected.
19. Similarly, evidence by the Administrator/ Protestor’s witness Rachael Nkandau that Paul Kibea (Deceased) and Michael Ngunjiri Magambo (Deceased) are not sons of deceased whilst all along they have appeared in the pleadings as sons of deceased and provision proposed to be made in their favour is rejected. My considered view is that this allegation is made to deny the families of Paul Kibea (Deceased) and Michael Ngunjiri Magambo (Deceased) their rightful share now that they are dead.

## **(2) What Comprises of Deceased’s Estate**

20. The only assets that have been demonstrated to belong to the deceased with copies of title deeds filed are the following:
  - (1) LR. Kibirichia/Kibirichia/1998
  - (2) LR. Kibirichia/Kibirichia/2007
  - (3) LR. Kibirichia/U-Kaongo/1027
21. There being no evidence that Endana Shamba No. 193, Plot No. 9 Timau and Plot 15 Kaongo belonged to the deceased, this court finds that they do not form part of deceased’s estate and are therefore not available for distribution as proposed by the Administrator/Respondent.

## **(3) Who is Entitled to Deceased’s Estate**

22. Section 38 of the *Law of Succession Act* which is applicable to this cause where only the deceased’s children are left provides that:

“Where an intestate has left a surviving child or children but no spouse the net estate shall subject to the provisions of Section 41 and 42 devolve upon the surviving child, if there be only one or shall be equally divided among the surviving children.”
23. In the case of *Stephen Gitonga M’Murithi v Faith Ngira Murithi* [2015] eKLR, the Court of Appeal noted that Section 38 of the *Act* enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried. Also see *Rono v Rono & another* [2008] 1 KLR).
24. I have considered the proposal made by an affidavit sworn by Administrator/Respondent and his two siblings Zipporah Gakii Kinoti and Henry Mutuma Mutungi on 09<sup>th</sup> March, 2023 and they propose to have LR. Kibirichia/Kibirichia/2007 distributed only to themselves and one other brother Michael Ngunjiri jointly.
25. This foregoing proposal is in my considered view self-centred for the reason that it excludes the deceased’s 12 other children without the proposers giving a reasonable explanation for such exclusion. The same is against the provisions of Section 38 of the *Act* and is rejected.



26. By the same affidavit sworn on 09<sup>th</sup> March, 2023, Administrator/Respondent and his two siblings Zipporah Gakii Kinoti and Henry Mutuma Mutungi propose to distribute LR. Kibirichia/Kibirichia/1998 and LR. Kibirichia/U-Kaongo/1027 to some of the siblings to hold on behalf of all the others. Even though they did not explain why they want the assets to be held in trust, I understand them to say that LR. Kibirichia/Kibirichia/1998 ought to be shared by the deceased's four houses in equal shares and LR. Kibirichia/U-Kaongo/1027 by the daughters.
27. On the other hand, the Protestors proposal for sale of LR. Kibirichia/Kibirichia/2007 and the proceeds be distributed only to the sons is rejected for the reason that it is not supported by cogent evidence and it also discriminates the daughters of the deceased.
28. Similarly, the Protestor's proposal that LR. Kibirichia/Kibirichia/1998 be distributed to the sons only does not seem to have the support of most of the siblings. However, his proposal that LR. Kibirichia/U-Kaongo/1027 be distributed to daughters only is reasonable for the reason that the 11 sons had each been given 2 acres each by the deceased during his life time.
29. In the end, the summons for confirmation dated 09<sup>th</sup> October, 2023 and the Protest dated 11<sup>th</sup> December, 2009 are determined as follows:
1. LR. Kibirichia/Kibirichia/1998 shall be distributed into four equal shares for each house as follows:
    - a.  $\frac{1}{4}$  share jointly to Paul Riungu, John Mwiti, Kinyua M'Mutungi, Leah Mwari and Rachael Nkandau
    - b.  $\frac{1}{4}$  share jointly to the estate of Kiruki M'Mutungi, Solomon Kirera, the estate of Julius Muriungi, Zipporah Gakii and Mary Mbae
    - c.  $\frac{1}{4}$  share jointly to the estate of Kaburu Magambo, Michael Koome and the estate of Paul Kibea
    - d.  $\frac{1}{4}$  share jointly to Henry Mutuma, Johnson Kimathi and Josephine Kagwiria
  2. LR. Kibirichia/Kibirichia/2007 into four equal shares for each house as follows:
    - a.  $\frac{1}{4}$  share jointly to Paul Riungu, John Mwiti, Kinyua M'Mutungi, Leah Mwari and Rachael Nkandau
    - b.  $\frac{1}{4}$  share jointly to the estate of Kiruki M'Mutungi, Solomon Kirera, the estate of Julius Muriungi, Zipporah Gakii and Mary Mbae
    - c.  $\frac{1}{4}$  share jointly to the estate of Kaburu Magambo, Michael Koome and the estate of Paul Kibea
    - d.  $\frac{1}{4}$  share jointly to Henry Mutuma, Johnson Kimathi and Josephine Kagwiria
  3. LR. Kibirichia/U-Kaongo/1027 in equal shares to the daughters of the deceased namely Leah Mwari, Rachael Nkandau Kinoti, Zipporah Gakii Kinoti, Mary Kinya Mbae and Josephine Kagwiria Mutai
  4. Certificate of Confirmation to issue
  5. Mention on 03<sup>rd</sup> October, 2024 to confirm progress in transmission

**DELIVERED AT MERU THIS 09<sup>th</sup> DAY OF May 2024**



**WAMAE T. CHERERE**

**JUDGE**

Appearances;

Court Assistants - Kinoti/Munene

For Administrator/Applicant - Present in person

For Protestor /Applicant - Present in person

