



In re Estate of Gatuto Kimaita aka Gatuto Kamaita (Deceased) (Succession Cause 105 of 2002) [2024] KEHC 4802 (KLR) (8 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 105 OF 2002
LM NJUGUNA, J
MAY 8, 2024**

BETWEEN

KIGORO CHIMBA ALIAS NTHIGA CIMBA (DECEASED) (SUBSTITUTED BY DENNIS NJERU) PROTESTOR

AND

BETH MBEERE NYAGA PETITIONER

RULING

1. A grant of letters of administration intestate was issued to the late Mugo Simba by this court on 20th February 2002. After his death, the petitioner substituted him and a grant was issued jointly in the names of the protestor and herself on 31st October 2007. The petitioner filed summons dated 30th September 2015 for confirmation of the said grant. Through her affidavit in support of the summons for confirmation, she deposed that the deceased was survived by 4 dependants namely Nyaga Cimba (deceased), Njura Cimba, the petitioner and the protestor. That the estate of the deceased comprises of property parcel number Ngandori/Kirigi/1892 which she proposed be distributed between herself and the protestor; 1 acre to herself and 2 acres to the protestor.
2. The protestor filed an affidavit of protest dated 26th November 2019 challenging the mode of distribution of the estate as proposed by the petitioner. He stated that he is a son of the deceased and that the petitioner is the wife of his late brother Nyaga Cimba. He deposed that the deceased owned parcel number Ngandori/Kirigi/1892 measuring 3 acres which he gave to the late Nyaga Cimba wholly and that he also owned parcel number Ngandori/Kirigi/1878 measuring 3 acres which he gave to the protestor wholly. This protest is the subject before the court for determination
3. The court took viva voce evidence in the matter. PW1 was Dennis Njeru, son of the protestor, who stated that the deceased herein is his grandfather and the petitioner is his aunt. That his father died in the pendency of this matter. In his witness statement which was adopted as evidence, he stated that the deceased was survived by Nyaga Cimba, Kigoro Cimba and Njura Cimba. That the deceased was given



- land parcel number Ngandori/Kirigi/1892 measuring 3 acres from the Gicuku clan and the land was registered in the name of the late Nyaga Cimba, who settled on it with the petitioner who is his wife.
4. That the deceased and the late Kigoro Cimba settled on parcel number Ngandori/Kirigi/1878 which also measured 3 acres. That the petitioner has never settled on parcel number Ngandori/Kirigi/1878 and she should not claim any part of it. It was his evidence that the clan elders determined the matter and found that parcel number Ngandori/Kirigi/1878 belonged to Kigoro Cimba since the petitioner's husband had already been given the other portion of land.
 5. On cross-examination, he stated that he is entitled to inherit parcel number Ngandori/Kirigi/1878 through his father and that the petitioner does not have any interest in the said land. That parcel number Ngandori/Kirigi/1892 is registered in the name of his deceased father and not in the name of the deceased herein. That the petitioner should not claim 1 acre from the said land.
 6. DW1 was Beth Mbeere who stated that the deceased was survived by the late Nyaga Cimba, her husband, the late Kigoro Cimba, the protestor herein and the late Njura Cimba. That parcel number Ngandori/Kirigi/1892 does not form part of the estate of the deceased as it was given to her husband by the clan. That the land can only be inherited by beneficiaries of her husband's estate. That parcel number Ngandori/Kirigi/1878 belonged to the deceased and that beneficiaries of his estate can lay claim on it.
 7. She stated that the mode of distribution proposed by the protestor is unjust. On cross-examination, she stated that by the time she was getting married to her deceased husband, the land was yet to be subdivided by the clan and so her husband did not have land. That when her husband was given land by the clan, Kigoro Cimba was a young boy and was not capable of owning land and so his father held the land in trust for him.
 8. That before the deceased died, he promised to give her husband 1 acre of the land but he died before transferring it to her husband. She stated that even while the deceased was alive, she used to utilize the land parcel number Ngandori/Kirigi/1878 but she does not reside on it. That she is only claiming one acre of the land and the protestor and his children can have the remaining 2 acres. That ideally, parcel number Ngandori/Kirigi/1878 should be divided amongst the grandchildren of the deceased through their deceased parents.
 9. The protestor filed his written submissions through which he stated that during the lifetimes of both the deceased herein and the late Nyaga Cimba, husband of the petitioner, it was known that parcel number Ngandori/Kirigi/1878 belonged to the protestor who had settled on it with the deceased. That Njura Cimba, a daughter of the deceased did not participate in these proceedings and she renounced her interest in the estate to the protestor. He urged the court to issue an amended grant of letters of administration in the estate of the deceased to Beth Mbeere Nyaga and Dennis Njeru Kigoo since his father who is the co-administrator of the estate of the deceased passed away. That parcel number Ngandori/Kirigi/1878 should be given to Dennis Njeru Kigoo to hold in trust for the children of Kigoro Cimba and issue a certificate of confirmation to that effect.
 10. The issue for determination herein is whether the protest is merited.
 11. The contentious issue from the pleadings is whether parcel number Ngandori/Kirigi/1878 forms part of the estate of the deceased. I do note that in the affidavit in support of the summons for confirmation of grant as deposed by the petitioner, she refers to parcel number Ngandori/Kirigi/1892 and not parcel number Ngandori/Kirigi/1878. Throughout the evidence adduced, it has been stated that the deceased owned parcel number Ngandori/Kirigi/1878. That parcel number Ngandori/Kirigi/1892 was given to Nyaga Cimba, the petitioner's husband by the clan and the same was registered in his name. The



petitioner, DW1, stated that when the clan was apportioning the land, Kigoro Cimba, the protestor was too young to own land and so the same was registered in the name of the deceased herein to hold in trust for him.

12. I have perused the petition for letters of administration filed by Nyaga Cimba on 25th July 2001 and the accompanying documents. The estate of the deceased therein was comprised in parcel number Ngandori/Kirigi/1878 measuring 3 acres. PW1 stated that his father lived on the said parcel of land with the deceased and that prior to his death, the deceased had subdivided the land but did not leave a will stating how it should be distributed. There is no doubt that parcel number Ngandori/Kirigi/1892 belonged to the late Nyaga Cimba therefore, it does not form part of the estate of the deceased herein.
13. In determining whether parcel number Ngandori/Kirigi/1878 formed part of the estate of the deceased, we shall go by the definition of free property under section 3(1) of the *Law of Succession Act* which states thus:

“free property”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”
14. DW1, in cross-examination, stated that the deceased only held the property in trust for the late Kigoro Cimba. At the point of petitioning for a grant, a copy of the greencard was produced showing that the deceased was the registered proprietor of the parcel number Ngandori/Kirigi/1878. The test here is whether during the lifetime of the deceased, he would have been free to dispose the land. The answer is in the affirmative since the land is registered in his name. This interest has not been terminated by the death of the deceased, meaning that regardless of any other arguments, the deceased owned the land during his lifetime and after his death, the land remains part of his estate.
15. The next question is how this estate of the deceased should be distributed. From the evidence and as discussed hereinabove, the estate of the deceased comprises of parcel number Ngandori/Kirigi/1878. The petitioner suggested that the property be distributed amongst herself and the protestor; she getting 1 acre while the protestor getting 2 acres.
16. From the available evidence, it is clear that the deceased was survived by 4 children, 3 of whom are now deceased while the surviving one relinquished her interest in the estate. Out of the 3 deceased children of the deceased, 2 of them have been substituted in these proceedings by the Dennis Njeru, son of Kigoro Chimba and Beth Mbeere, wife of Nyaga Chimba. There is no mention of a spouse of the deceased or any other relative of the late Mugo Simba. Therefore, the estate of the deceased should be distributed equally between the parties herein as representatives of the various estates of the deceased beneficiaries. Section 3 of the *Law of Succession Act* provides thus:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”
17. However, since the petitioner is seeking only 1 acre out of the 3 acres making up parcel number Ngandori/Kirigi/1878, I find it fair not to distort this arrangement.
18. In the end, I find that the protest lacks merit and the same is hereby dismissed. The following orders shall issue;
 1. An amended grant of letters of administration be issued in the names of Dennis Njeru Kigoo and Beth Mbeere Nyaga; and



2. A certificate of confirmation of grant to be issued distributing parcel number Ngandori/Kirigi/1878 as follows: Dennis Njeru Kigoo-2 acres and Beth Mbeere Nyaga- 1 acre.

19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 08TH DAY OF MAY, 2024.

L. NJUGUNA

JUDGE

.....for the Protestor

.....for the Petitioner/Respondent

