



In re Estate of M'Marete Kioga alias Marete Kioga (Deceased) (Succession Cause 149 of 1993) [2024] KEHC 7617 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 149 OF 1993
EM MURIITHI, J
JUNE 20, 2024**

BETWEEN

HARRIET NTIBUKA M'MARETE ADMINISTRATOR

AND

KARUNTIMI F MARETE ADMINISTRATOR

JUDGMENT

1. The deceased herein, M'Marete Kioga Alias Marete Kioga died on 26th October, 1989, and all the estate properties have since been distributed to the beneficiaries save for L.R No. Nkuene/uruku/269 (henceforth called the suit property).
2. In her summons for confirmation of grant dated 8/2/2022, the 1st Administrator proposes that the same should devolve wholly to her as it was gifted to her by the deceased during his lifetime.
3. The 1st Administrator swore a further affidavit on 24/1/2024 in support of her application.
4. In his undated affidavit of protest, the 2nd Administrator proposes that the suit property should be shared between himself, the 1st Administrator, James Kirimi Marete, Nanies Kagendo Mwirigi, Gladys Kagendo Mwirigi and Kinanu Mbogori Kindigo.

Oral Evidence

5. AWI Harriet Ntibuka Marete Kiojo and the 1st Administrator herein testified that, "I came from Kiamuga village. I am farmer. M'Marete Kioja is my father. Fredrick Karantimu 2nd Administrator is my brother. I have other brothers James Kariuki. Others John Gitau Mwiti. Mwirigi Marete. We were 6 children of the deceased. I was the only female child.

Assets of deceased.

1. Plot No. 258 original.



2. Plot No. 269.
3. Plot 191 Kithina/Mitunguu.
4. Plot at Kisima
5. Kithiruni Market.

It is plot 269, which I live on that exists. Plot 258 was distributed by the sons. They got their tittles. Plot 191 has not been taken by anyone but I do not know who lives on it. It has not been sold. It is a bush but there are people who cultivated on it. I do not know the details of Kisima plot. At Kiurine. The plot was taken by late Murithi who recorded it in his name. I am the only one who did not get a share. I work on plot 269 as it was the one I got from my father. It is only I who works on 269. I lived on the shamba before our father died. I used to cultivate coffee and I would go to receive the payments. I have never been married. [That plot 258 smaller]

Value of the shamba plot 258 is higher. Plot 258 is near the market and it has water connection, it is well cultivated and it has electricity. At 269 there if no water, it is a remote area. I rely on rain water. Plot 269 is on a hill and valley about 1 acre is a good piece but the lower parts are not good. It is the same 1 acre that my brothers wanted to sell to one Kithinji so that I would remain in the lower parts which are not good. The part plot is only 30 points and one cant get a place to dig a pit latrine. I pray for plot 269 should be distributed to me as a whole. I will look for money to install water.”

6. On cross examination, she stated that, “Plot 269 is registered in the name of my father. I pray for transfer to my name. The only good part of 269 is 1 acre. The others plots are near the river where we planted only trees. Plot 269 is 1 acre and 50 points. 50 points are the part in the downside in the river. The 50 points section should not be given to my brothers because the shamba at home P. 258, each have 1 acre about 10 points. Even if I took 1 acre and 150 points, I could still be at a loss because the plot 269 is not as good as plot 258.

[Plot 258 has 2.2. acres only]

Plot 258 was 5 acres and 50 points and each of my brothers got 1 and 10 points. Any documents in acreage of 258? I used to hear my father saying that a survey can go and take measurements. [Plot 258 divided with 0.44 acres for each brother]

It is first because I had been given the plot by my parents – my father and my mother. [It is proposed that you get 0.80 acres and brother 0.20 acres for 269]

No I do not want to share with my brother. I want the whole of it has I was given by my father. If they refuse, then I should be provided from the entire estate for plot 258 as with other children.”

7. On re-examination, she stated that, “Each of my brothers have 1 acre 10 points (1.10 acres). The 0.44 ha 1.1 acres. It is not 0.44 acres but hectares. I pray to be granted plot 219 and my brother may keep 258.”
8. PW1 Fredrick Karutimi Marete and the 2nd Administrator herein testified that, “Marete Kioga is my father. My father had plot 258 and 269. Plots 191 Mitunguu, plot at Kithurine market was sold to our own elder brother Silas Murithi Marete to settle debt which my father owed to Mr. Kirema of Meru. Plot 191 Mitunguu is father over squatters. No one lives on it. Plot 258 Nkuene is divided into 5 portion between the brother. Each is getting 0.44 acres. Plot 269 is 1.83 acres. The land should be



sub-divided among the 6 of us. We agreed under the guidance of late Kioga and other members agreed that the Applicant get 0.80 acres out of 269. Is it your father who gave the Applicant land?

No it is not correct. Even before my father died plot 269 had been divided into 2 portions already to his 2 wives one Janet Nyoroka and Raeli. Each wife had 4 children 1st wife and 2nd wife had 3 children. Harriet belongs to the first wife.

Our father gave instructions that the two houses should share the land but they were selling the coffee under the same number and after the money was paid our father would divided the money.

Plot 269 portion not utilized?

The shamba is good for farming tree and coffee can be planted. The lower part is not all that good but it is a small portion. My brothers, clan members agreed in the presence of the applicant that she could get 0.80 acres. It was during the life of the late Kioga advocate who represented her.”

9. On cross examination, he stated that, “Kisima plot 254. I do not know whether it is there. It is indicated among to the records which my brother had. It is my affidavit.

Debts of Marete

1. Finance loan at AFC.
2. Kirema businessman.

Plot sold to your brother to pay debt for Kirema. The other debt at AFC was paid by the brothers, it was 180,000/=. Of witness was referred to Affidavit paragraph 5] It my father who said so. [Paragraph 6 of Affidavit it is true]

[properties were sold to settle the loan. It is not true that you contributed to pay the loan].

[Plot 269 shared between the wives of Marete]

Plot 258 was also shared in a similar manner when we were sharing. Harriet is much older than me.

Why did you not consider me when sharing 258? There were our 2 brothers who were older than us. They were the ones who were organizing us. We shared plot 258 without including Harriet.

Why didn't share plot 269 among plot 258? Since we had another portion somewhere we said we would give her elsewhere. We shared plot 258 same years back. Why did you say there was another land 269 which you wanted to share.

[Your actions shows that you knew plot 269 was already given] We did not know that she had been given plot 269. We have got a purchaser for plot 269. You went to sell it off to get monetary reward. We agreed with our brothers to sell it.

Did you get authority of the court to sell the land? No.

[You have been intermediary in the estate. It is not true as we had already filed submissions.

Plot 269 is registered in the name of Marete. Plot 258 have been subdivided. We each got our titles.

[Titles should be cancelled and all estate subdivided into 6 parts for the children of the deceased. NO. Our sister already has a portion which we have given to her. We had a meeting with the clan members.”



Submissions

10. The 1st Administrator urges that although L.R No. Nkuene/Uruku/269 is slightly bigger than L.R No. Nkuene/Uruku/258, the latter has more value and facilities than the former. She urges the court to be persuaded by her evidence in court and buttressed by the fact that the suit property was a gift inter vivos which was exclusively reserved for her.
11. The 2nd Administrator did not file any submissions.

Analysis and Determination

12. The issue for determination is how the suit property ought to be distributed.
13. The court notes the certificate of official search which shows that the suit property, measuring approximately 0.73 Ha was as at 19/4/1993 registered in the name of the deceased.
14. The 1st Administrator testified that, “It is plot 269, which I live on that exists...I am the only one who did not get a share. I work on plot 269 as it was the one I got from my father. It is only I who works on 269. I lived on the shamba before our father died. I used to cultivate coffee and I would go to receive the payments. I have never been married...Value of the shamba plot 258 is higher. Plot 258 is near the market and it has water connection, it is well cultivated and it has electricity. At 269 there is no water, it is a remote area. I rely on rain water. Plot 269 is on a hill and valley about 1 acre is a good piece but the lower parts are not good. It is the same 1 acre that my brothers wanted to sell to one Kithinji so that I would remain in the lower parts which are not good...I pray for plot 269 should be distributed to me as a whole.” On cross examination, she stated that, “[It is proposed that you get 0.80 acres and brother 0.20 acres for 269] No I do not want to share with my brother. I want the whole of it as I was given by my father. If they refuse, then I should be provided from the entire estate for plot 258 as with other children.”
15. The 2nd Administrator testified that, “Plot 258 Nkuene is divided into 5 portion between the brother. Each is getting 0.44 acres. Plot 269 is 1.83 acres. The land should be sub-divided among the 6 of us. We agreed under the guidance of late Kioga and other members agreed that the Applicant get 0.80 acres out of 269. Is it your father who gave the Applicant land? No it is not correct. Plot 269 portion not utilized? The shamba is good for farming tree and coffee can be planted. The lower part is not all that good but it is a small portion.”
16. He affirmed on cross examination that they shared Plot No. Nkuene/Uruku/258 amongst themselves at the exclusion of the 1st Administrator.
17. Evidence has been led that the suit property is on a hill and it is less productive and of less worth compared to Plot No. Nkuene/Uruku/258, which has already been distributed amongst the 2nd Administrator and his 4 brothers.
18. Ordinarily, the suit property ought to be distributed equally among the 6 children of the deceased pursuant to the provisions of section 38 of the *Law of Succession Act*. Nonetheless, the record is clear that the 2nd Administrator and his 4 brothers already benefited from the distribution of Plot No. Nkuene/Uruku/258.
19. This court finds that the 1st Administrator has proved on a balance of probabilities that the suit property ought to be given solely to her considering that only 1 acre thereof is habitable and productive.



ORDERS

20. Accordingly, for the reasons set out above, the court does not find merit in the 2nd Administrator's undated protest, and it is dismissed.
21. The suit property shall be distributed as proposed by the 1st Administrator at paragraph 8 of her affidavit in support of the summons for confirmation of grant.
 1. L.R No. Nkuene/uruku/269 shall devolve wholly to Harriet Ntibuka M'Marete, the 1st Administrator herein.
22. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 20TH DAY OF JUNE 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kaumbi for 1st Administrator.

Ms. Mugo for 2nd Administrator.

