



**In re Estate of M’Thambura M’Kiturathe alias M’Thambura Kiturathe (Deceased)
(Succession Cause 59 of 2002) [2024] KEHC 7329 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 59 OF 2002
TW CHERERE, J
JUNE 13, 2024**

BETWEEN

JOHN KIMATHI M’MARETE ADMINISTRATOR

AND

DENIS MUTUURA PROTESTOR

RULING

1. M’Thambura M’Kiturathe alias M’Thambura Kiturathe (Deceased) died sometimes on 22nd December, 1997.
2. Following the death of the initial administrator and widow Mary Kirigo MThambura, John Kimathi M’Marete was appointed as administrator and was on 15th December, 2014 issued with letters of administration.
3. Subsequently by summons dated 26th October, 2015, the administrator applied to distribute the deceased’s estate comprised in LR. Abothuguchi/Igane/1185 as follows
 1. 1 acre to Samson Kimathi Itonga whose relationship with the deceased has not been explained
 2. Balance to John Kimathi M’Marete
4. By protest filed on 12th July, 2021, Denis Mutuura (Protestor) opposed the mode of distribution on the grounds that the asset ought to be distributed to the family of his late father Agustino Kirimi M’Thambura who was not bequeathed any land during deceased’s lifetime.
5. The protest was heard by way of viva voce evidence after an attempt to settle the matter through mediation failed.
6. Protestor stated that deceased had 3 sons namely:
 - i. M’Marete Thamburi



- ii. Luijino Mbaya
 - iii. Agustino Kirimi M' Thambura
7. It was his evidence that during his lifetime, deceased transferred LR. Abothuguchi/Igane/574 to his son M'Marete Thamburi, LR. Abothuguchi/Igane/1186 which he transferred to his nephew Joseph Mputhia Maitima and LR. Abothuguchi/Igane/1187 to his son Luijino Mbaya Thambura and remained with LR. Abothuguchi/Igane/1185 which is still in deceased's name. Protestor contends that the land ought to be distributed to the family of his late father Agustino Kirimi M' Thambura who have settled on the land and did not receive any bequest of land during deceased's lifetime.
 8. John Kimathi M'Marete confirmed that deceased transferred LR. Abothuguchi/Igane/574 to his father M'Marete Thamburi during his lifetime. He also confirmed that Luijino Mbaya Thambura another of deceased's son was gifted LR. Abothuguchi/Igane/1187. He additionally confirmed that protestor's father Agustino Kirimi M' Thambura was not bequeathed any land. It was his evidence that deceased's wife Mary Kirigo M' Thambura sold a portion of LR. Abothuguchi/Igane/1185 to one Samson Kimathi whilst the land was still in the name of the deceased.
 9. I have considered the evidence on record and the issue in question is how LR. Abothuguchi/Igane/1185 ought to be distributed.
 10. Section 42 of the Law of Succession provides as follows:
Where—
 - (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.
 11. There is undisputed evidence that during his lifetime, deceased had settled his son M'Marete Thamburi on LR. Abothuguchi/Igane/574 and his son Luijino Mbaya Thambura on LR. Abothuguchi/Igane/1187.
 12. Flowing from the foregoing, I find that by application of Section 42 of the [Law of Succession Act](#), neither the family of M'Marete Thamburi nor Luijino Mbaya Thambura are entitled to a share of LR. Abothuguchi/Igane/1185 and the administrator's claim of one acre from the same is declined.
 13. I have considered whether the construct of the [Law of Succession Act](#) (LSA) gives this court the jurisdiction to declared Samson Kimathi Itonga a bona fide purchaser with a right over deceased's estate.
 14. The Court of Appeal had a chance to address this issue and Kiage JA in the case of [Mose v Kirwa \(Civil Appeal 125 of 2018\)](#) [2022] KECA 730 (KLR) stated as follows:

"I am persuaded by the dicta of W. Musyoka in IN RE Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR where he articulated the jurisdiction of the LSA, as follows; It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. The [Law of Succession Act](#), and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets



amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.” (Emphasis added)

From the foregoing decisions, it is clear to me that for a matter to fall within the purview of the LSA it must; concern itself with the determination of the assets of a deceased, the survivors of the deceased and persons with beneficial interest; involve itself with the distribution of the assets of a deceased among the survivors and any persons with beneficial interest. Those people do not include creditors, purchasers, or such other third parties.

15. It must be remembered that by dint of section 82(a)(ii) of the Law of Succession Act, immovable assets cannot be sold before the grant has been confirmed. It therefore follows that Mary Kirigo MThambura could not pass a good title to Samson Kimathi Itonga.
16. In view of the foregoing, I find that the protest has merit and summons dated 26th October, 2015 is determined in the following terms:
 1. LR. Abothuguchi/Igane/1185 shall be distributed to Denis Mutuura to hold on his behalf and on behalf of his siblings in equal shares
 2. Certificate of Confirmation of Grant shall issue
 3. Mention on 03rd October, 2024 to confirm transmission

DELIVERED AT MERU THIS 13TH DAY OF JUNE 2024

WAMAE. T. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Protestor/Respondent - Ms. mwanikifor HKM Associates Advocates

For Administrator/Applicant - Ms Mugo for Kiogora Arithi & Co. Advocates

