



**In re Estate of Wanjiru Mubiri Kimani (Deceased) (Succession Cause
468 of 2008) [2024] KEHC 6710 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 468 OF 2008**

HM NYAGA, J

JUNE 5, 2024

**IN THE MATTER OF THE ESTATE OF THE
LATE WANJIRU MUBIRI KIMANI (DECEASED)**

BETWEEN

ALICE WANGARE NDUNGU 1ST APPLICANT

MARY WANJIKU NGIGI 2ND APPLICANT

JOSPHAT NJOGU MUBIRI 3RD APPLICANT

AND

GEOFFREY KIMANI MUBIRI RESPONDENT

RULING

1. The Succession herein relates to the estate of Wanjiru Mubiri Kimani who died intestate on 2nd July, 1995 aged 70 years.
2. Following her demise, the protestor Geoffrey Kimani Mubiri petitioned for letters of administration intestate on 4th of September 2008 and the same was issued to him on 29th October, 2009.
3. In his affidavit in support of the said petition, the protestor listed the deceased sons i.e. Johnson Mwangi Mubiri, Josphat Njogu Mubiri & himself as the only beneficiaries of the deceased.
4. On 24th February, 2020, Johnson Mwangi Mubiri, Josphat Njogu Mubiri, Mary Wanjiru Ngigi, Alice Wangari Ndungu and Pauline Murugu Mwangi filed summons for revocation of the grant issued to protestor on grounds inter alia that the same was obtained fraudulently as all the beneficiaries of the deceased's estate was not disclosed and their consent obtained prior petitioning for the grant of letters of administration intestate. The Respondent did not respond to the summons and when the matter came up for hearing on 8th December, 2020 the respondent told court that he was not opposed to the



- grant being revoked. Consequently, the court revoked the grant and directed parties to agree on who will be appointed as administrators and how the estate of the deceased will be distributed.
5. Subsequently, this court on 27th March, 2023 issued grant for letters of administration Intestate to Alice Wangari Ndungu, Josphat Njogu Mubiri, Mary Wanjiku Ngigi and Geoffrey Kimani Mubiri.
 6. On 30th May, 2023, the Administrators/Applicants herein filed summons dated 29th May, 2023 seeking confirmation of letters of administration that was issued to them, property forming part of the deceased's estate be distributed as per their mode of distribution and for costs to be in the cause.
 7. The summons is premised on the grounds on its face and supported by an Affidavit of the Applicants sworn on 19th May, 2023.
 8. They deponed that the deceased was survived by the following children:
 - i. Geoffrey Kimani Mubiri- Son
 - ii. Johnson Mwangi Mubiri- son(deceased)
 - iii. Mary Wanjiku Ngigi- Daughter
 - iv. Josphat Njogu Mubiri- Son
 - v. Alice Wangare Ndungu- Daughter
 - vi. Pauline Murugi Mwangi- Daughter
 - vii. Grace Njoki Mwenda- Daughter(deceased)
 - viii. Lucy Muthoni Mikia- Daughter(deceased)
 9. They averred that the deceased's estate comprises of Bahati/Kabatini Block 1/464 and they proposed that the same be shared equally amongst the above listed beneficiaries save for Geoffrey Kimani Mubiri for reasons that the deceased had given him a property known as Bahati/Kabatini Block 1/1618 which he holds a title deed thereto and that the deceased had also stated that the protestor, Johnson Mwangi Mubiri and Josphat Njogu Mubiri would get a share of property known as Banita Ndungiri Block 1/486 which is registered in the deceased's name and is yet to be distributed.
 10. Geoffrey Kimani Mubiri swore an affidavit of protest on 21st July, 2023. He deponed that the Applicants want to disinherit him, that the family properties are not shared on allegations and assumptions, That Engashura(Kibatini /Kabatini Block 1/1618 is his personal property and does not form part of the estate and that he is surprised that an in law has stepped into this matter.
 11. He asserted that in 1997 the Applicants placed a caution on one of the deceased parcel yet they want to inherit the same.
 12. He stated that his late father was a squatter and he could not have had property in 1976.
 13. It was his further deposition that he purchased the property in question when he was working and he should be left to enjoy it. He attached a copy of the title deed to prove that he is the registered owner of Bahati/Kabatini Block 1/1618.
 14. The Applicants swore a response to the affidavit of protest on 11th October, 2023. They reiterated that the protestor was adequately provided for and he is therefore not entitled to a share of the estate herein.



15. They asserted that a caution was placed on the deceased's property to ensure it was not interfered with until this matter is determined since the protestor was demanding to be given the title deed for the said property and the deceased's Identification Card.
16. They invited the protestor to strictly prove that the deceased was a squatter and could not have owned property in the year 1976.
17. They averred that the protestor confirmed before the Chief that the property in Engashura was given to him by their father.
18. The matter was heard through *viva voce* evidence.

Protestor's Case

19. He relied on his affidavit of protest as his evidence in chief.
20. He proposed that the deceased's property be shared equally amongst all the beneficiaries.
21. In cross examination, he stated that their mother predeceased their father and upon her demise their father called for a meeting where he apprised them that the land he had was in the name of their mother and gave the land to the sons equally. He said plot no.1618 is his property as he purchased it way back in 1976. He disputed that he told the chief that the deceased had given him land while she was alive.
22. In re-examination, he stated that the title to his land was issued in 1995.

Applicant's Case

23. Alice Wangari Ndungu testified on behalf of the Applicants.
24. She relied on her statement and affidavit filed and prayed that the court distribute the estate's property as prayed. She stated that their late father was not a squatter. She said before the deceased died, he called for a meeting and said that the land in issue was for 3 people i.e. Johnson, Josphat and himself and said his portion was to be given to the girls. She stated that their father said the protestor had already been given land in Engarusha. It was her testimony that the protestor was given the plot in 1979 and he then had the title issued in his name.
25. In cross examination, she stated that their deceased father gave his portion to girls. She said Geoffrey was given his Plot 464 which is two acres.
26. Parties were directed to file submissions on 22nd November 2023 but none of them had filed theirs by the time I was writing this ruling.

Analysis & Determination

27. Having carefully considered the Summons, Affidavits on record and the evidence of the parties, it is my view that the substantive issue for determination is how the estate of the deceased should be distributed.
28. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property and the rightful beneficiaries must be identified. The court also has a duty to ensure that as far as is practicable, there is equal and equitable distribution to all beneficiaries.
29. All the parties herein are children of the deceased. According to the evidence on record, the estate of the deceased herein comprised Bahati/Bahati Block 1/464.



30. The Applicants propose that this property be distributed equally to all beneficiaries save for the Protestor herein as he had been given a parcel of land Known as Bahati/Kabatini Block 1/1618 and that he had also been given another property known as Banita Ndungiri Block 1/486 which is the name of the deceased and is yet to be distributed.
31. The protestor on his part maintained that the aforesaid property known as Bahati/Kabatini Block 1/1618 solely belong to him. He said he purchased it and the title deed was issued to him in 1995. He proposed that the deceased's estate be distributed equally amongst all beneficiaries.
32. It should be noted that there is no evidence on record to show that parcel of land known as Banita Ndungiri Block 1/486 belonged to the deceased. This court therefore will only focus on the distribution of the aforesaid property known as Bahati/Bahati Block 1/464 which indisputably and evidently belonged to the deceased herein.
33. Article 27 of the Constitution bars discrimination particularly on sex, marital status or social status etc. Additionally, the provisions of Section 38 of the Law of Succession Act do not discriminate and provides that all the beneficiaries have equal rights. The said Section states as follows:-

“ where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Section 41 and 42, devolve upon the surviving child, If there be only one, or be equally divided among the surviving children.”
34. My comprehension of the above provisions is that no beneficiary of an estate should be left out or discriminated against. Each ought to at least get a share from the deceased estate whether male or female.
35. I have considered the evidence of both parties to that effect. The applicants seem to allude that their deceased's father left an oral will regarding the distribution of the property in issue and they have asked this court to respect the wishes of their father. It should be noted that although the applicants allude there was an oral will there is no petition for probate of a will. Further the estate herein relates to their deceased's mother, not their father.
36. What this court should thus determine is whether the protestor was bequeathed property by the deceased herein prior her death.
37. There is no dispute that the deceased herein predeceased her husband. There is also no dispute that the parties herein held a meeting with their deceased father prior his death. The protestor stated that their deceased father told them that all the land he had was registered in the name of the deceased herein and he gave the land to his sons to distribute it equally. He agreed they had a meeting with the chief but disputed that he told him that the deceased had given him land. He said plot no.1618 is his property and that he purchased it and title deed issued to him in the year 1995.
38. The Applicants on their part stated that their father in the meeting distributed the land in question to Johnson, Josphat and himself and stated that his portion would go to the girls. In their affidavit of response to the protest, they deponed that the Protestor confirmed to the chief that plot no. 1618 had been given to him by their father.
39. I have perused the chief's letter on record and I note the protestor stated that the said plot was transferred to him and he had been living there since the year 1976. However, the letter does not state from whom the land was transferred. Is it the deceased or her husband, who is also now deceased?
40. In my opinion the title deed presented by the protestor must be taken as it is. Without any history being given in writing, there is nothing provided in court to hold that the land belonged to the deceased



herein and that a gift inter vivos was made to the protestor. Thereupon the provisions of Section 42 of the Law of Succession Act would have been invoked. They provide 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, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

Gifts inter vivos are gifts that are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be considered as having received his share and may reduce or diminish any entitlement to the net intestate estate. The gift which is transferred and settled for the beneficiary during the life-time of the deceased, will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary. (See Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others [2021] eKLR.)

- 41. It was the duty of the applicants to have proven that a gift inter vivos was made to the protestor so as to invoke the provisions of section 42 of the Act. This they could have done by availing the Green Card, mutation or transfer forms, any consents and so on that relate to the land so that the court could be able to ascertain if their averments were correct. They have failed to do so.
- 42. In the circumstances the property in question shall be deemed to have been registered and to belong to the protestor and is not a gift inter vivos as alleged.
- 43. Having so found I hold that the only property available for distribution herein is parcel Bahati/Bahati Block 1/464. The deceased having died intestate, the law is that her estate ought to be distributed equally and fairly amongst all her children.
- 44. I therefore order that;
 - a. The said property Bahati/Bahati Block 1/464 shall be distributed equally amongst all the deceased’s children, without any discrimination as to gender or marital status.
 - b. For the deceased’s children who are also deceased their shares shall be transmitted to their children or dependants as provided by law. If they did not leave any such children or dependants then the provisions of the Act in this respect shall apply.
 - c. The parties shall equally contribute to the costs of survey and subdivision of the land in question.
 - d. Being a family dispute, each party is to bear its own costs.
- 45. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU 5TH DAY OF JUNE, 2024.

H. M. NYAGA,

JUDGE.



In the presence of;

Court Assistant Jeniffer

Ms Kinuthia for Petitioner

No appearance for Protestor (Mr. Simiyu now present)

