



**In re Estate of Ishmael Gichingu Muongi (Deceased) (Succession Cause 2855 of 2001) [2024] KEHC 12377 (KLR) (Family) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12377 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 2855 OF 2001  
HK CHEMITEI, J  
OCTOBER 17, 2024  
IN THE MATTER OF THE ESTATE OF ISHMAEL GICHINGU MUONGI (DECEASED)**

**BETWEEN**

**ISABLE GATHONI GICHUNGU ..... ADMINISTRATOR**

**AND**

**KENNETH MUONGI GICHUNGU ..... PROTESTOR**

**JUDGMENT**

1. This Judgement relates to the summons for confirmation of grant application dated 15<sup>th</sup> June, 2015, the affidavit of protest against confirmation of grant dated 17<sup>th</sup> January, 2017 and summons dated 30<sup>th</sup> March, 2017.
2. The summons for confirmation of grant dated 15<sup>th</sup> June, 2015 filed by the Administrator/Applicant, Isabel Gathoni Gichungu, seeks for Orders That:
  - (a) The grant of letters of administration intestate issued to Isabel Gathoni Gichungu in this matter on 24<sup>th</sup> September, 2010 be confirmed.
  - (b) The costs of this application be in the cause.
3. The application is supported by affidavit sworn by Isabel Gathoni Gichungu on 15<sup>th</sup> June, 2015.
4. She avers inter alia that the grant of letters of administration intestate were made to her on 24<sup>th</sup> September, 2010. The deceased was survived by the following beneficiaries – Doris Wanjiku Gichungu, Kenneth Muongi Gichungu, Esther Njambi Gichungu, Annabel Wanjiru Gichungu and Isabel Gathoni Gichungu.



5. Her proposed mode of distribution is as follows: L.R. No. Muguga/Gitaru/556 (Kenneth Muongi Gichungu and Isabel Gathoni Gichungu, equally), L.R. No. Muguga/Gitaru/807 (Kenneth Muongi Gichungu and Isabel Gathoni Gichungu, equally), L.R. No. Ngong/Ngong/3004 (Kenneth Muongi Gichungu and Isabel Gathoni Gichungu, equally), L. R. No. Maela/Ndabibi Block 2/29 (Kenneth Muongi Gichungu and Isabel Gathoni Gichungu, equally) and Plot No. 26 Kahuho Market (Kenneth Muongi Gichungu and Isabel Gathoni Gichungu, equally).
6. The making of the grant was consented to by Doris Wanjiku Gichungu, Esther Njambi Gichungu and Annabel Wanjiru Gichungu and they also renounced their rights to a share in the deceased's estate.
7. The application is opposed vide affidavit of protest against confirmation of grant dated 17<sup>th</sup> January, 2017, filed by Kenneth Muongi Gichungu who stated that a grant of representation was issued to him on 22<sup>nd</sup> May, 2001 and a certificate of confirmation of grant issued on 9<sup>th</sup> April, 2003 – and all the aforementioned beneficiaries agreed to both these processes. Despite his being chosen as the sole heir of the deceased's estate, all the beneficiaries have benefitted from the deceased's estate to wit L. R. No. Ngong/Ngong/3004 was sub – divided and all the beneficiaries sold their respective portions, he and Isabel Gathoni Gichungu live on L. R. No. Muguga/Gitaru/807 where the deceased had built his residential home and all the beneficiaries share, equally, the dividends that accrue from the deceased's shares in Ngugakio Investment Limited in line with their mother's wishes who passed away shortly after the deceased died.
8. That the applicant applied for revocation of grant in 2009 on the grounds that she was not aware of what she was signing and the application was stood over to allow the family to resolve the dispute reasonably. During the negotiations, the Applicant set the application for revocation of grant for hearing without the knowledge of the other beneficiaries and obtained ex parte orders and failed to disclose that she had sold her portion of the land at Kshs. 650, 000/=.
9. The application for revocation of grant had an unequitable proposed mode of distribution which was the basis upon which the new grant was issued to her. She was ordered to serve the order to this effect to the other beneficiaries but she did not and he only became aware of the proceedings when he was served with the application for conformation of grant dated 17<sup>th</sup> June, 2015, on 3<sup>rd</sup> November, 2016 which was two days before the scheduled hearing of 8<sup>th</sup> November, 2016.
10. The protest is opposed by affidavit sworn by Dorsi Wanjiku Gichungu, Esther Njambi Gichungu and Annabel Wanjiru Gichungu on 14<sup>th</sup> February, 2017. They aver, inter alia, that the protestor disinherited the other beneficiaries and that he has to give an account of his administration of the estate. The only benefit they have received from the deceased's estate is the portion of land that they sold and shares in L. R. No. Ngong/Ngong/3004. They are entitled to an equal share of the whole of the deceased's estate.
11. Isabel Gathoni Gichungu has also filed an affidavit opposing the protest and sworn on 14<sup>th</sup> February, 2017. She avers inter alia that the court determined that the summons for revocation of grant was properly served upon the protestor. The protestor did not file any response to the summons for revocation of grant. The consent that was the basis for the protestor obtaining a grant was obtained through fraudulent means. The protestor disinherited the other beneficiaries.
12. She deponed further that the other beneficiaries got 0. 1 HA instead of 0. 32 HA each of L. R. No. Ngong/Ngong/3004. She denied that she had sold her portion of the land and challenged him to produce a sale agreement showing that she sold her portion of land. On the contrary it was the protestor that sold the land for an undisclosed amount and deposited Kshs. 625,000/= to her bank account.



13. She accused the protestor of severally threatening to evict her from L.R. No. Muguga/Gitaru/807 alleging that it belongs to him alone. She accused him of solely benefiting from the shares in Ngugagakio Investments Limited until the other beneficiaries confronted him about them. He has not, she averred shared the deceased's estate equitably with the other beneficiaries to wit he kept to himself the bulk of L. R. No. Ngong/Ngong/3004 where he retained 1. 2 HA and he solely inherited Muguga/Gitaru/556, Muguga/Gitaru/807, Maela/Ndabiri Block 2/29 and Plot No. 26 Kahuhu Market; to the exclusion of the other beneficiaries. The remainder of the deceased's estate be distributed equally amongst all the beneficiaries.
14. The summons dated 30<sup>th</sup> March, 2017 filed by the Applicant Kenneth Muongi Gichungu, seeks for Orders That:-
  - (a) Spent.
  - (b) Pending the hearing and determination of this application the honourable court be pleased to issue an order staying the hearing of the application dated 15<sup>th</sup> June, 2015.
  - (c) This honourable court be pleased to issue an order staying the hearing of the application dated 15<sup>th</sup> June, 2015.
  - (d) The honourable court be pleased to set aside the orders revoking the grant issued herein on 24<sup>th</sup> September, 2010.
  - (e) The costs of this application be provided for.
15. The application is supported by affidavit sworn by Kenneth Muongi Gichungu on 30<sup>th</sup> March, 2017. He avers inter alia that he did not participate in the proceedings that led to the revocation of grant on 24<sup>th</sup> September, 2010. He learnt about the revocation of the grant when he was served with the summons for confirmation of grant which he has responded to vide affidavit sworn on 17<sup>th</sup> January, 2017.
16. On the basis of the grant issued to him, he disposed off and transferred the deceased's parcels of land for over 10 years with no objection from the other beneficiaries and that was holding some of the properties in trust for his sisters and he has disposed them off and sent them their share of the money. All the processes leading to the grant issued to him were above board and all the beneficiaries appeared before Hon. Rawal J where they confirmed their consent to the mode of distribution. There was no valid ground for revocation of the grant issued to him.
17. The application is opposed vide replying affidavit sworn by Isabel Gathoni Gichungu sworn on 18<sup>th</sup> May, 2017. She avers inter alia that the application for revocation of grant was heard and determined on the basis that the protestor was properly served. He did not file a response to the application for revocation of grant despite not denying that the application was served upon him. He disposed off the deceased's properties without informing the rest of the beneficiaries. There is nothing on record indicating that he held the properties in trust for his sisters, the rest of the beneficiaries.
18. The Administrator/Applicant has filed written submissions dated 20<sup>th</sup> February, 2024.
19. The protestor has filed written submissions dated 6<sup>th</sup> May, 2024 placing reliance on the following:



- a. Re Estate of Apel Moranga Abea (Deceased) (Succession Cause 131 of 1995) [2023] KEHC 27134 (KLR) (18 December 2023) (Ruling) where the court stated:
- “ 11. Section 47 of the *Law of Succession Act*, Cap 160 of the Laws of Kenya and Rule 73 of the Probate and Administration Rules vest this court with jurisdiction to issue such decrees and orders as may be expedient and necessary for the ends of justice.
12. In view of the circumstances of the present case, that the Applicant was not served with the notice to show cause, that she was unable to prosecute the matter owing to ill health and financial hardships, I am inclined to allow the application as prayed.
13. In the end, I allow the application dated 16. 5. 2023 in the following terms:
1. I hereby set aside the orders of 9. 7. 2015.
  2. The grant of letters of administration intestate issued on 26. 5. 1995 is reinstated.
  3. The applicant shall apply for confirmation of grant within 30 days of the date of this ruling otherwise this file shall be automatically closed and be taken back to the national archives.
  4. There shall be no order as to costs.”
- b. Kipkoske Arap Tuimising Tecla Chasang Tuimising v Henry Kipkurui Rotich [2016] eKLR where the court stated, “... Accordingly, in accordance with the inherent powers of the court and in order to meet the ends of justice as provided in Rule 73 of the Probate and Administration Rules, I hereby set aside the orders of Ang’awa J made on 19<sup>th</sup> May, 2009 in which she revoked the grant issued on 12<sup>th</sup> of June, 2007.”
- c. In Re Estate of Musomba Kioko (Deceased) [2010] eKLR where the court upheld section 93 of the *Law of Succession Act*.

### **Analysis and Determination**

20. I have gone through the applications, the protest, the responses thereto and the rival submissions and the issues to be determined are:-
1. Whether due process was followed by the protestor in acquiring the first grant.
  2. Whether the protestor disinherited the other beneficiaries.
  3. Whether the protest has merit.
21. The court takes notice that the issue of dependency and or who are the deceased beneficiaries herein is not in dispute. The ruling by Nambuye J (as she then was) in my view was based on sound law and I do not see any reason to allow the protestors prayers to set it aside.



22. There is no evidence that he was not aware of the matter and that the consent which he used to have the grant confirmed was concluded by the court that the same was the one used in applying for the first grant.
23. In addition, the Applicant/Protestor has not demonstrated that he transferred any of the properties to her siblings of at all. What he claimed to be holding in trust has not been shown and even what he alleged that he has sold and proceeds given to them has not been exhibited.
24. It must be noted that the grant issued in his favor did not permit him to deal with the deceased estate as he wished and that is the reason the court set aside the same.
25. Having stated so it was therefore incumbent upon him to agree or disagree with the mode of distribution proposed by her sister. Even if the court was to reinstate him as an administrator, he will still be expected to confirm the grant and seek to distribute the estate.
26. As it is and as rightly submitted by the Administrator the Protestor has not given any proposal or denied the line she has taken to have the estate divided.
27. Assuming that the Protestor disposed some of the properties during her tenure as an administrator which the court found that it was illegal then he has to bear the burden. The same goes to the other beneficiaries who may have profited from the protestors grant either monetarily or otherwise.
28. I think I have said much to show that this estate must be allowed to move forward. The matter has been in these corridors for almost 25 years and there must be a finality.
29. I have seen the proposed mode of distribution by the administrator in her affidavit of support dated 15<sup>th</sup> June 2015. The same has not been opposed save by the Protestor. The other beneficiaries have endorsed it. I think it accords well with the authority below where the court In re Estate of Gideon Nthiw'a Mutinda (Deceased) [2023] KEHC 3229 (KLR) the court stated as follows:
  - “ 59. In Re Estate of John Musambayi Katumanga – (deceased) [2014]eKLR Hon. W. Musyoka stated as follows;(27)The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”
30. In light of the foregoing, I do not find merit in the application dated 30<sup>th</sup> March 2017 and I proceed to disallow it with no order as to costs.
31. In transmitting the above estate, as I shall do so below, it is probable that there may be other third parties who may have benefited directly from the estate courtesy of the beneficiaries herein and probably while the protestor held that grant which was set aside and or revoked by this court. If there are such and without any prejudice the affected beneficiaries must deal directly with those parties without impeding the rights of the rest of the beneficiaries herein or dragging them into further litigation.



32. At the same time and since the parties squandered their chance when they were referred to mediation and in allowing the application dated June 15, 2015, I direct that the deceased estate herein be distributed as proposed by the Administrator as hereunder:-

- (a) Ngong/Ngong/3004
  - (i) Kenneth Muongi Gichungu ..... 0.32 ha.
  - (ii) Doris Wanjiku Gichungu..... 0.22 ha.
  - (iii) Esther Njambi Gichungu..... 0.22 ha
  - (iv) Annabel Wanjiru Gichungu ..... 0.22 ha.
  - (v) Isabel Gathoni Gichungu ..... 0.32 ha.
- (b) LR No Muguga/Gitaru /556 to be transmitted to Kenneth Muongi, Doris Wanjiku Gichungu, Esther Njambi Gichungu, Annabel Wanjiru Gichungu all in equal shares.
- (c) LR No Muguga/Gitaru/807 to be transmitted to Kenneth Muongi Gichungu, Doris Wanjiku Gichungu, Annabel Wanjiru Gichungu, Isabel Gathoni Gichungu and Esther Njambi Gichungu all in equal shares.
- (d) Lr No Maela/Ndabiri Block 2/29 to be transmitted to Kenneth Muongi Gichungu, Esther Njambi Gichungu, Doris Wanjiku Gichungu, Annabel Wanjiru Gichungu and Isabel Gathoni Gichungu all in equal shares.
- (e) Plot Number 26 Kahuho to be transmitted to Kenneth Muongi Gichungu, Doris Wanjiku Gichungu, Esther Njambi Gichungu, Annabel Wanjiru Gichungu and Isabel Gathoni Gichungu all in equal shares.
- (f) Ngugagakio Investment Limited to be transmitted to Kenneth Muongi Gichungu, Doris Wanjiku Gichungu, Esther Njambi Gichungu, Annabel Wanjiru Gichungu and Isabel Gathoni Gichungu all in equal shares.

33. Costs shall be in the cause.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**H K CHEMITEI**

**JUDGE**

