



REPUBLIC OF KENYA



**In re Estate of the Late Harun Gathaara (Deceased) (Succession Cause  
2122 of 1995) [2024] KEHC 12435 (KLR) (Family) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12435 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 2122 OF 1995  
MA ODERO, J  
OCTOBER 11, 2024  
IN THE MATTER OF THE ESTATE OF THE LATE HARUN GATHAARA (DECEASED)**

**JUDGMENT**

1. Before this Court is the Summons for confirmation of Grant dated 10<sup>th</sup> April 2007 filed by George Macharia and James Macharia as the 1<sup>st</sup> and 2<sup>nd</sup> Administrators of the Estate of the Deceased. The 3<sup>rd</sup> Administrator/Protestor Winnie Wanjiku Waweru who opposed the mode of distribution of the estate as proposed by the 1<sup>st</sup> and 2<sup>nd</sup> Administrators filed a separate Summons for confirmation of Grant dated 16<sup>th</sup> August 2007 in which she proposed an alternative mode of distribution of the estate. Despite several attempts at mediation the parties were unable to reach a consent on distribution of the estate, and the matter was heard by way of Vive Voce evidence.
2. The hearing commenced before Hon. Justice Muchelule (as he then was) who heard the first witness. Following the elevation of the trial Judge to the court of Appeal, I took over the matter and heard the remaining witnesses.
3. At the outset I wish to apologize to the parties for the delay in delivery of this judgment. This was occasioned by my transfer from Nairobi to the Nyeri High Court, a bout of ill health on my part and the necessity to have the proceedings typed as I was unable to read the handwriting of the first trial judge. Any inconvenience to the parties occasioned by this delay is sincerely regretted.

**Background**

4. This Succession Cause relates to the estate of the late Harun Gathaara (hereinafter 'the Deceased') who died intestate on 28<sup>th</sup> July 1995. According to the Chief's letter dated 15<sup>th</sup> May 2003 the Deceased who was a polygamous man was survived by three Houses as follows:

1<sup>st</sup> House

1. Elizabeth Wangari Gathaara - Wife



2. Rahabu Wanjeri - Daughter
3. Moses Waweru - Son (Deceased) represented in this matter by his widow Winnie Wangari Waweru).
4. Peris Wambui Ndungu - Daughter
5. Sophia Wathoni Kabui - Daughter
6. Mary Nyambura Mwaniki - Daughter
7. Peninah Wanjeru - Daughter

2<sup>nd</sup> House

1. Peris Nyahura Gathaara - Widow (Deceased)
2. George Macharia Gathaara - Son
3. Catherine Wanjeri Gathaara - Daughter
4. Moses Hungu Gathaara - Son
5. Joseph Waweru Gathaara - Son
6. Zacahry Njagi Gathaara - Son
7. Grace Muthoni Waikinyai - Daughter

3<sup>rd</sup> House

1. Wanjiku Gathaara - Wife
  2. James Macharia Gathaara - Son
  3. Peter Kiragu Gathaara - Son
  4. Francis Waweru Gathaara - Son
  5. Zaveru Wanderi Gathaara - Son
  6. Elizabeth Wangeci Kiai - Daughter
  7. Hellen Wathoni Gathaara - Daughter
5. The estate of the Deceased was said to consist of two parcels of land namely;-
- i. LR No 7585/17 Nyeri Municipality
  - ii. LR No Tetu/Ihururu 319

6. Following the demise of the Deceased Grant of letters of Administration Intestate was on 8<sup>th</sup> September 1998 made to George Macharia and James Macharia. That Grant was duly confirmed on 30<sup>th</sup> March 2000.
7. Thereafter two of the beneficiaries of the estate namely Rahab Wanjeri and Winnie Wanjiku Waweru filed a Summons dated 26<sup>th</sup> May 2023 seeking revocation of the Grant which had been issued to the two sons of the Deceased.



8. Vide a Consent recorded by the court on 6<sup>th</sup> October, 2004 the Summons for revocation of Grant was compromised and with the agreement of all the beneficiaries a fresh Grant was on 3<sup>rd</sup> December 2003 issued to George Macharia, James Macharia and Winnie Wanjiku. When the Grant fell due for confirmation the parties were unable to agree on the mode of distribution of the estate which resulted in the three Administrators filing two (2) separate Summonses for confirmation of Grant, each proposing a different mode of distribution of the estate. It is this dispute that is before this court for determination.

### **The Evidence**

9. Pw1 was the Protestor Winnie Wanjiku Waweru. She told the Court that she was the widow of one Moses Waweru who was a son of the Deceased from the 1<sup>st</sup> House PW1 told the court that in the year 1963 her late husband and the Deceased jointly purchased the parcel of land known as LR No. 7585/17 Nyeri Municipality (hereinafter referred to as the 'Suit Land').
10. The Protestor states that her late husband sold his property being Tetu/kiriti/351 and utilized the proceeds of sale to purchase the suit land. That her husband who died in the year 1966 predeceased his father. The protestor claims that she is entitled to Sixteen (16) acres out of the suit land and states that she began demanding her portion of the suit land from the Deceased before he died.
11. According to the protestor in 1978 or thereabouts the Deceased began the process of sub-dividing the suit land into three (3) portions. One (1) acre was to be donated to the PCEA Church, Seven (7) acres was to go to the Deceased and sixteen (16) acres was to be transferred to the protestor. That the transfer of the 16 acres to herself was not concluded because one beneficiary Moses Hungu from the 2<sup>nd</sup> House registered a caution on the suit land and filed a suit against the Deceased demanding that he also be given Sixteen (16) acres out of the suit land.
12. The protestor therefore claims to be entitled to Sixteen (16) acres to be carved out of LR NO 7585/17. She asks the court to approve the distribution of this suit land as was intended by the Deceased i.e Seven (7) acres of the land to go to the estate of the Deceased one (1) acre to the church and sixteen (16) acres to herself.
13. PW2 Peter Waibochi Gitahitold the court that he knows the family of the Deceased well. That his father and the father of the Deceased were close friends.
14. PW2 states that he is aware of the suit land. He states that on one occasion he was with his father the Deceased and Waweru (son to Deceased). That the Deceased told the father of PW2 that the suit land belonged to 'Waweru'
15. DW1 Dr Moses Hungu Gathaaratold the court that he was a son of the Deceased from the 2<sup>nd</sup> House. DW1 stated that he is aware of the parcel of land known as LR NO 7585/17. Dw1 stated that he claims a share of the suit land being the portion on which he had planted coffee. The witness confirms that he filed a case being the Land Tribunal Case No 2 of the 1999 against his late Father to prevent the sub-division of the suit land.
16. DW1 opposed the transfer of sixteen (16) acres to the protestor as it included the land on which he had planted coffee. DW1 told the Court that he later withdrew his case. That on 3<sup>rd</sup> November 1999, the land Tribunal made an award. However there is no indication that said award was adopted by any court.
17. DW1 averred that the Deceased suffered from a mental incapacity which rendered his alleged decision to subdivide the suit land flawed. The witness pointed out that whereas the Protestor initially claimed that he late husband contributed towards the purchase of the suit land, she later changed course and



claimed that the Deceased had intended to give her the sixteen (16) acres as a 'gift'. According to DW1 all the documents presented to the court by the protestor are forgeries.

18. DW2 Joseph Patrick Waweru Gathaara told the court that he is also a son of the Deceased from the 2<sup>nd</sup> House. He told the court that he was not aware of any intention by the Deceased to gift sixteen (16) acres out of the suit land to the protestor. He claims that the claim by the objector to a portion of the suit land is nothing but an afterthought.
19. Upon conclusion of oral evidence the parties were invited to file their written submissions. The Protestor filed the written submissions dated 25<sup>th</sup> July 2023 whilst the Petitioners relied upon their written submissions dated 22<sup>nd</sup> September 2023.

### **Analysis And Determination**

20. I have carefully considered the facts of this case, evidence on record as well as the written submissions filed by both parties. The main issue for determination is whether the protestor's claim to sixteen (16) acres out of LR No7585/17 is valid and ought to be allowed.
21. It is common ground that the Deceased herein passed away way back in July 1995. There is no dispute regarding the names or identities of the beneficiaries to the estate. There is however contention regarding the assets which comprise the estate of the Deceased.
22. The petitioners insist that the suit land forms part of the estate of the Deceased and as such is available for distribution to all the beneficiaries. However the protestor asserts that sixteen (16) acres out of the suit land rightfully belongs to her and is not available for distribution. However all the parties agree that the Deceased donated one (1) acre out of the suit land to the PCEA Church. They confirm that the church has already taken possession and occupies that one (1) acre portion.
23. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows;-  
"Burden of Proof"
  - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.
24. Therefore the onus lies on the protestor to prove on a balance of probability that she is entitled to sixteen (16) acres out of the suit land.
25. The Title Document in respect in respect of the suit land indicates that on 17<sup>th</sup> October 1961 the transfer of the suit property to Chief Harun Gathaara (the Deceased herein) was registered. Thereafter a caveat was registered against the title by Moses Hungu (DW1)
26. Therefore despite consent for sub-division having been given no actual transfer of the suit property to the church or to the Protestor was ever affected.
27. The Protestor claims a portion of the suit property on behalf of her late husband whom she claims paid part of the purchase price. No evidence has been tendered to prove that the late 'Waweru' paid part of the purchase price. Further if the late 'Waweru' did indeed pay part of the purchase price then why was he not registered as a joint owner of this property. Why was the entire property registered solely in the name of the Deceased.



28. The protestor further claims that her late husband sold a property known as LR Tetu/kiriti/351 and that the proceeds of that sale were utilized towards the purchase of the suit land.
29. Once again no evidence has been tendered to prove the sale by the late Waweru of LR No Tetu/kiriti/135. How much was the said plot sold for? How much did Waweru contribute towards the purchase of the suit land? None of these critical questions have been answered. Under cross-examination the protestor claims that her later husband contributed Kshs. 12,000 towards the purchase of the suit land. There is no documentary evidence of such contribution made by ‘Waweru’ towards the purchase of the suit land.
30. DW2 Joseph Patrick Gathaarais a son of the Deceased from the 2<sup>nd</sup> House. He categorically denies that Tetu/Kiriti/135 ever belonged to the late Waweru. In the absence of any ownership documents and without any proof of Sale of the Tetu property this court is unable to determine if indeed Waweru ever owned and/or sold that land.
31. The parties are all in agreement that at no time before his death did the Deceased actually sign a transfer of the suit property to the protestor or her husband the late ‘Waweru’ as at the time of his demise the suit property was still registered in the name of the Deceased.
32. The Protestor claims that the Deceased gifted Sixteen (16) acres to her. She is therefore claiming that the Deceased made to her a ‘gift inter vivos’ In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR the court stated as follows:

“.....However, the court is tasked to investigate whether the applicants claim suffices to be gift inter vivos or causa mortis?

What is the requirement of law as far as a gift inter? Vivos is concerned? I find useful guidance in Nyamweya J in her decision in the case of Re Estate of the late Gedion Manthi Nzioka (Deceased) [2015] eKLR where she stated as follows:

“In? law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the [law of Succession Act](#) provides as follows with respect to gifts made in contemplation of death:

.....For gifts intervivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”?

In Halsburys? Laws of England? 4<sup>th</sup>? Edition Volume 20 (1) of paragraph 67 1 is stated as follows with respect to incomplete gifts:?

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property and which it was in his power to do” It may be noted that the concept



of gifts is divided into two categories. First gifts *intervivos* and gifts *causa mortis*. Gifts *intervivos* as contemplated in the law of Succession are such that the owner of the property or asset donates it to another without expectation of death. In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift be perfected. In the case of *intervivos* the gift must go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee.

Secondly, the test on a gift *causa mortis* is defined as a gift made in expectation of death. The donor causes the property or goods in his possession to be delivered to another. The general between a gift *causa mortis* and a gift *intervivos* is that its revocable by the donor and the capacity must meet the requirements under Section 11 of the law of succession in the making of a Will.”

33. The Protestor states that the sub-division of the sixteen (16) acres was approved by the Nyeri Municipal Council. Approval of subdivision does not amount to a transfer of property. It merely indicates an intention which intention was never realised. There is no evidence that the Deceased during his lifetime effected the transfer of sixteen (16) acres of the suit land to the protestor (or indeed to her late husband). As such the gift *intervivos* remains incomplete and cannot be given effect by this court.
34. The Protestor is asking this court to give effect to the alleged intention of the Deceased to gift to her Sixteen (16) acres out of the Suit land. The Deceased did not leave behind a written will expressing this intention. The court can only give effect to what exists and not to what the Deceased may have wished and/or intended.
35. I find that at the time of his death the suit property was still registered in the name of the Deceased. As such I find that the same forms part of his estate and is available for distribution to the beneficiaries.
36. The Protestor remains at liberty to pursue any claim she may have to estate property by filing a suit in the Environment and Land Court which is the only court mandated by Article 62 (2) (b) of *the Constitution* of Kenya, 2010 to determine issues relating to ownership, use and occupation of land. The Protestor is at liberty to pursue her claim to ownership of the suit land in that court.
37. Finally I find no merit in the protestors claim to a portion LR No 7584/17.
38. I therefore dismiss this protest. I allow the summons for confirmation of Grant dated 10<sup>th</sup> April 2007. I direct that the Grant be confirmed and the estate be distributed in accordance with paragraph 6 of the Supporting Affidavit dated 10<sup>th</sup> April, 2007.
39. This being a family matter I make no orders on costs.

**DATED IN NYERI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024**

.....

**MAUREEN A. ODERO**

**JUDGE**

