



**Nkonge v Njeru & another (Succession Cause E401 of 2022)
[2024] KEHC 12888 (KLR) (Family) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E401 OF 2022
PM NYAUNDI, J
OCTOBER 11, 2024
IN THE MATTER OF THE ESTATE OF PLASIDO NJERU NKONGE (DECEASED)**

BETWEEN

MARTIN GITONGA NKONGE PROTESTOR

AND

NANCY WANJIKU NJERU 1ST RESPONDENT

JUSTUS KARIUKI NJERU 2ND RESPONDENT

JUDGMENT

1. This matter relates to the estate of Plasido Njeru Nkonge (Deceased) who died intestate on 8th May 2016. Nancy Wanjiku Njeru and Justus Kariuki Njeru, in their capacity as wife and son of the deceased petitioned this court to be issued with letters of administration intestate. They were issued with letters of grant of representation dated 22nd November 2022.
2. By a summons dated 18th November 2022, the Administrators sought to have the grant of representation made to them confirmed.
3. Upon filing of summons for the confirmation of the grant, Martin Gitonga Nkonge (the protestor) filed an affidavit of protest sworn on 3rd January 2023 protesting the confirmation of the grant on the ground that he was excluded as a beneficiary of the estate of the late Plasido Njeru Nkonge. He stated that he was the foster son of the Deceased. He further avers that he has been in occupation of some assets of the estate during the life time of the deceased. These include LR No. Muthambi / Upper Karimba/ 267, where he has constructed his house. LR No. Muthambi/ Upper Karimba/1895 where he has planted over 400 trees of Coffee and LR NO. Muthambi/Upper Karimba/1892 on which he is undertaking horticultural farming and has a kiosk.



4. The Deceased is said to be survived by the following;
 - a. Nancy Wanjiku Njeru- wife.
 - b. Justus Kariuki Njeru- son.
5. The Estate of the Deceased was said to be comprised of the following properties;
 - a. Nairobi LR No. 13418/142.
 - b. Nairobi LR No. 13418/143.
 - c. Nairobi LR No. 13418/144.
 - d. Muthambi/U.Karimba/1895.
 - e. Muthambi/U.Karimba/1892.
 - f. Muthambi/Gatua/3578.
 - g. Portion Of L.R NO. 78/Kasuku.
6. Parties adduced viva voce evidence and later filed their submissions in support of their respective cases.

Summary Of The Protestor's Evidence

7. The Protestor, Martin Gitonga Nkonge's evidence was that the deceased was his uncle and foster father. He told the court that the 1st Respondent was the deceased's wife while the 2nd Respondent was an adopted son of the deceased. His mother left him under the care of his grandparents when he was two years old and went to marry. The deceased took full responsibility of him by paying school fees at all levels, providing food and clothing. At some point, he lived with the deceased. The deceased participated and acted like his father in the initiation ceremony, dowry negotiations and his wedding. He learnt of the succession proceedings in November 2022, when he was issued with Notice to vacate the land.
8. During the deceased's lifetime, the deceased showed him his properties and allowed him to utilize them. After the deceased's death, the 1st Respondent threatened to evict him from the deceased's properties known as Muthambi/Upper Karimba/1895 where he has planted coffee trees; Muthambi/Upper Karimba/1893 where he has built his matrimonial home; Muthambi/Upper Karimba/1892(ancestral land) where he has put up a kiosk and some horticultural farming.
9. When the deceased died, he sat in the committee preparing for his burial, as the treasurer. In the advertisement of death, he was included as a child of the deceased. He spoke on behalf of the deceased's children. He told the court that he had a close relationship with the deceased and his grandparents. He sought to rely on some photographs where he and the deceased was present during several functions. He went on vacations and all functions with the deceased as a family. He had a good relationship with the respondents until when they threatened to evict him. This prompted him to file a suit in Chuka Magistrates Court ELC No. 064 of 2022. He asked the court to recognize him as a dependant of the deceased as he will be rendered destitute if he is not recognized and provided for in this suit.
10. During cross examination, he stated that the deceased still had responsibility of a parent over him when he was an adult. The deceased started taking care of him when he was 12 years old. He visited the deceased in hospital when he was unwell. He filed a suit against the 1st Respondent in the Magistrate's court as a dependant of the deceased. The case was dismissed but he filed an appeal in the High Court.



11. PW2, Casperina Mumu Nkonge told the court that the 1st respondent was the wife of her late brother (deceased) while the 2nd respondent is the deceased's adopted son. The protestor, PW1 is the son of her elder sister. Her evidence was that the deceased was the foster father of the Protestor. The Protestor's mother left him under the care of his grandparents when he was two years old. The deceased took over responsibility of Protestor when he was in class 5. He provided fully for the protestor and the protestor moved in with him and lived with the deceased's first wife and children as a family. The relationship between Protestor and the 1st Respondent was cordial before this suit was filed in court. Protestor constructed a house in their ancestral land which was originally registered in the name of the deceased's father.
12. The 1st Respondent and her other siblings of participated in the succession proceedings of her father's estate. The Protestor made developments on that land with the approval of the deceased. The Protestor was not provided for in their father's succession because the deceased had taken in him as his son. During a family meeting held on 17th August 2013, the deceased told his siblings that the Protestor was entitled to inherit from him like every other son would.
13. During cross examination, she stated that when the deceased was sick, the protestor supported him.
14. PW3, Benjamin Miriti told the court that the deceased was his cousin. The Protestor was left under the care of his grandparents when he was two years old. The deceased took care of the protestor. That the protestor put up a house where a timber house had been put up for him before and if evicted, the protestor has nowhere to call home.
15. During cross-examination, he stated that the protestor was adopted within the Mathiru Clan. The farm where the protestor built his house belonged to his grandfather. The Protestor grand mother informed him that the deceased supported the Protestor and paid his school fees. The deceased was buried in a family cemetery near the protestor's house. According to the Meru culture, a deceased man's house is left for the widow and her children. In this case, the home was left to the protestor. The intention to adopt the protestor was communicated to his mother. He was not aware that the chief's letter indicated that the deceased was survived by the two respondents. The protestor was educated by several family members including his mother. The Protestor constructed the house after the deceased died.
16. PW4, Ephantus Nyaga Munyua, the chairman of Mathiru clan and treasure Njuri Ncheke Mithuri Location adopted his witness statement dated 18th February 2023 as his evidence in chief. His evidence was that the protestor was left under the care of his grandparents when he was two years old. His grandfather built him a house before his initiation. He later married and built himself a house. He was informed about the dispute between the respondents and the protestor. A meeting was held on 18th February 2023 to try and resolve the dispute. He told the court that the protestor has no other place to call home.
17. During cross examination, he stated that the deceased did not have a house in the village. He was buried near the protestor's house. He was not aware that the deceased and the protestor lived together. The Protestor grandparents handed him to the deceased to provide for him. During circumcision, an initiate is escorted by his father or uncles. The protestor was taken by his grandfather. In Meru culture, there is no ceremony for adoption. A child becomes the responsibility of the maternal grandparents. He denied that in the meeting that they held they distributed the assets of the deceased, they met to resolve the dispute between the Petitioner and the protestor.



Summary Of The Protestor's Case

18. RW1, Nancy Wanjiku Njeru, stated that the protestor is her nephew. Her evidence was that, she and the deceased got married in 2009. The deceased introduced the Protestor as the son of his sister. The protestor never lived with her and the deceased. The deceased never told her that he educated the protestor.
19. When she got married to the deceased, the protestor was already an adult. When the protestor married in 2008, the entire family attended his wedding. The deceased was buried in a property he inherited from his late father. The protestor demolished a house in the deceased's land and planted coffee. She asked him to vacate the land but instead, he filed a suit against her in the magistrate's court. The suit was dismissed and he preferred an appeal which was also dismissed. The court stated that the protestor could only claim from his grandfather.
20. She was not aware of any support the protestor gave the deceased. In the obituary, the protestor was included as the deceased's son. The protestor's mother, Santina attends all the family functions with her husband. The protestor is always introduced as the son of Santina. She argued that the protestor is wealthy and is not a dependant of her late husband. The protestor has a piece of land he inherited from his grandfather. He has put a house worth Kshs. 10 million on her husband's land.
21. During cross examination, she stated that the protestor occupied the deceased's property after his death. The portion which the protestor occupied was in the name of Didacus (the deceased's sibling), her mother-in law (the mother of the deceased) and the deceased. The land was later sub divided into three portions and new titles were issued in 2023.
22. The protestor and her brothers in law were in the committee for the burial of the deceased. She was not consulted about what was to be written in the eulogy. The protestor eulogized the deceased.
23. In re-examination, she stated that the deceased did not indicate that he had given land to the protestor.
24. RW2, Saturina Ithira Mutegi stated that the protestor was her nephew. She has a good relationship with the protestor. The protestor's mother left him under the care of their parents when he was two years old. Her parents and siblings paid for his education throughout. They used to send money to their parents to pay school fees for the protestor. During school holidays, he would go stay with his grandparents. The protestor used to live with her when he was in college and when he got his first job.
25. During his dowry negotiations, the protestor's step father played a role as his step father. According to her, the protestor never lived with the deceased. The deceased built a house in Mutheru in 1993. When the 1st respondent and the deceased got married in 2009, the house was still there. After the protestor's initiation, he lived in a mud house constructed his grandparents. Their mother moved to a stone house and left a timber house for the protestor.
26. She paid school fees for the protestor while he was studying at Visions School. The property in Mutheru was divided into three parts. Two portions were given to her brothers and the other portion was to be held in trust by their mother for the 5 daughters. However, that land is registered in the protestor's name. She was not aware of any meeting where the deceased stated that the protestor should be recognized as his son.
27. During cross examination, she stated that the protestor is an adult and can establish a home. That the protestor's interest should be weighed against that of the deceased's wife since both parties have other properties.



28. In re-examination, she stated that the 1st respondent is entitled to the parcel of land on which the protestor has constructed a house.
29. RW3, James Maina Mbacha is the uncle of the 1st Respondent and a friend of the deceased. He renovated the deceased's house in 2010. The deceased was buried near his house. According to him, the deceased only had one son who is the 2nd Respondent. He never saw the protestor in the deceased's home.

Protestor's Submissions.

30. The protestor's submissions are dated 8th May 2024. The protestor submitted that he had proved beyond reasonable doubt that he is a beneficiary in the deceased's estate. He submitted that he occupied some of the deceased's properties while he was still alive. That if he is not recognized as a beneficiary and given his portion, he will be rendered destitute.
31. The Protestor relies on Section 29 (a) and (b) of the *Law of Succession Act* and Articles 27 and 45 of *the Constitution* of Kenya, 2010.

Respondent's Submissions.

32. The Respondents submissions are dated 3rd June 2024. The Respondents submitted that the protestor has not met the legal threshold for a claim under Section 29. That the protestor does not fall within the definition of a child who should lay a claim on the deceased's estate. In this case, they argued that the protestor was 41 years old when the deceased died. They rely on the Court of Appeal decision in *Beatrice Adhiambo Sijenyi v Josephine Kaphuka Kisa & 2 others* [2018] eKLR where the court held that the children claiming to be dependants were over 18 years old and did not qualify as dependants under Section 29 and were not entitled under Section 26 of the *Law of Succession Act* to be provided for. They submitted further that the protestor was a nephew of the deceased and therefore, did not fall under the list of persons who should prove that they were maintained by the deceased under Section 29.
33. They further submitted that the protestor was required to prove that the deceased had taken him in as his own and that he was maintained by the deceased prior to his death. In this case, they submitted that the protestor had not proved any of these. Reliance was placed on the decisions in *re Estate of Mathenge Gichobi (Deceased)* [2022] eKLR, *Makacha v Ndakaka (Succession Appeal No. E014 of 2022)* [2024] KEHC 1228 (KLR) (9 February) (Judgment) where the parties failed to prove that the deceased had taken them in as his own or that they were maintained by the deceased before he died.
34. Further, that the protestor cannot lodge his claim as a beneficiary of his grandfather's estate in this Succession cause.

Analysis And Determination

35. I have carefully considered the oral evidence, the competing submissions by the parties and the proposed modes of distribution by the parties. I have also considered the authorities relied on, and the relevant provisions of the law cited. In my view, three main issues arise for determination:
 - i. Whether the protestor is a dependant or beneficiary of the Estate of the deceased.
 - ii. How should the estate of the deceased be distributed?
36. The Protestor's evidence was that he is a nephew/ foster son of the deceased and therefore a dependant. The meaning of dependency is defined under Section 29 of the Act.



It provides:-

“(a) (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death; (b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

37. There is a condition precedent which a person claiming dependency has to establish. It requires that the person claiming dependency must prove that he/she was being maintained by the deceased immediately prior to his demise. The protestor has deponed that the deceased had taken him as his son and he has not known any other home. He submits that through his actions the deceased demonstrated that he considered him to be his son.
38. The actions included, educating him, housing him, being present and participating in significant ceremonies such as circumcision, dowry negotiations and wedding. Allowing him to utilise the family ancestral land by planting coffee bushes and constructing his house. He has called witnesses including the deceased’s sister who testify that the deceased treated and recognised him as a son. He was also recognised as a son to the deceased in the obituary and spoke on behalf of the children of the deceased at his funeral.
39. His evidence is corroborated by the witnesses he called except for whether or not he constructed the house during the life time of the deceased. Benjamin Miriti M’ Reri states that the house was constructed after the deceased died. The Petitioner also contended that he demolished the deceased hose and constructed his house during the COVID 19 pandemic when she could not access the house.
40. The Petitioner denies that the Petitioner was a son or dependant of the deceased. Her evidence is supported by a maternal aunt of the protestor who testified that the protestor having been left under the care of his maternal grandparents at the age of 2 years, his maternal uncles and aunt supported him. She in particular paid his fees in secondary school and college. She concedes that the protestor has always stayed at the home but qualifies this to say his interest must be weighed against the rights of the widow.
41. The question then is whether the Protestor is a child to the deceased. The definition of a ‘child’ in Section 3(2) of the [Law of Succession Act](#) includes a child whom the deceased has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
42. The issue for determination is whether the relationship between the protestor and the deceased was such as to mutate from that of an uncle and nephew to father and foster son.
43. It is not in dispute that the deceased was the maternal uncle and that over the years he has supported the protestor. It is also acknowledged that the mother to the protestor is alive and along with her husband she participates in the family events. No evidence has been led to demonstrate that she has surrendered her parental responsibility to the deceased. I am persuaded by the evidence of Saturnina Ithiru Mutegi that the protestor was supported by his grandparents, the deceased and her. The support extended to the protestor by the deceased was what is expected of a responsible uncle to his nephew.



44. For the foregoing reasons I find that the protestor is not a child of the deceased. The Protestor does not fit within the parameters of a dependant as provided for under Section 29 (a) of the [Law of Succession Act](#).
45. The protestor also relies on Section 29 (b) which defines dependants to mean -
such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;
46. This is a closed list. It does not extend to a nephew. I am guided by the cited decision in *Beatrice Adhiambo Sijenyi v Josephine Kapukha Khisa & 2 Others* [2018] eKLR, it is not contested that at the time the deceased died the protestor was aged 41 years. I am not persuaded that the protestor was being maintained by the deceased immediately prior to his death. His claim as a dependant on this basis must fail too.
47. The meeting of family elders convened on 18th February 2023 cannot salvage the protest. Whereas Courts are obliged to promote resolution of disputes via alternative justice systems, the same must be conducted in a manner that safeguard rule of law and access to justice. In this instance the matter was already before court and the Petitioner was not afforded an opportunity to present her case.
48. The deceased died intestate, Part V of the [Law of Succession Act](#) is clear that his wife and child rank in priority. With his mother alive and she having not surrendered her parental responsibility, his claim to his grandfather's estate will be through her. There is evidence that his grandmother was allocated a share of his grandfather's estate to hold in trust for his mother and aunts. That is the share he is entitled to and where he can establish his claim. This is well established and was well articulated in the decision of *Cleopa Amutala Namayi v Judith Were* [2015] eKLR where Mrima J stated
“Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents indirectly through their own parents.... The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren's own parents are dead...”
49. For the foregoing reasons, I dismiss the Protest and allow the summons for confirmation dated 30th November 2022. The Grant of letters of Administration Intestate issued to Nancy Wanjiku Njeru and Justus Kariuki Njeru on 17th May 2022 is confirmed. The mode of distribution will be that set out in paragraph 8 of the supporting affidavit sworn on 30th November 2022.
50. Owing to the relationship between the parties there shall be no order as to costs.
51. Consequently, the final orders are that
- a. The Protest dated 3rd January 2023 is dismissed in its entirety
 - b. Grant of Letters of Administration Intestate issued to Nancy Wanjiku Njeru and Justus Kariuki Njeru on 17th May 2022 is confirmed.



- c. The mode of distribution will be that set out in paragraph 8 of the supporting affidavit sworn on 30th November 2022.
- d. There shall be no order as to costs

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 11TH DAY OF OCTBER, 2024.

P. NYAUNDI

JUDGE

In presence of: -

Fardosa Court Assistant

Mr. Kimani Advocate for Petitioner

Mr. Kiriimi Advocate for Protestor

