



REPUBLIC OF KENYA



In re Estate of the Late Antony Gitonga Mutembei (Deceased) (Miscellaneous Succession Cause 25 of 2018) [2023] KEHC 853 (KLR) (7 February 2023) (Judgment)

Neutral citation: [2023] KEHC 853 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE 25 OF 2018**

LW GITARI, J

FEBRUARY 7, 2023

**IN THE MATTER OF THE ESTATE OF THE LATE
ANTONY GITONGA MUTEMBEI (DECEASED)**

IN THE MATTER OF

LUCY GATUMI MARETE 1ST ADMINISTRATRIX

MARGARET MUKWARAMA M'KANGA 2ND ADMINISTRATRIX

JUDGMENT

1. This cause relates to the estate of the late Antony Gitonga Mutembei (the “deceased”) who died intestate on 20th June 2013. On 13th May 2019, both the Applicant and the Respondent were appointed as joint administratrixes to the estate of the deceased.
2. Before this court are two applications for confirmation of grant. One is dated 4th June 2019 and the other one is dated 21st June 2019. The application dated 4th June 2019 was brought by the 1st Administratrix herein while the one dated 21st June 2019 was brought by the 2nd Administratrix.
3. Vide the summons application dated 4th June 2019, the 1st Administratrix sought to have the grant issued to her on 13th May 2019 confirmed as follows:
 - i. Mwimbi/Ntunene/416 – Lucy Gatumi Marete to hold in trust of CM (Minor)
 - ii. Mwimbi/Ntunene/463 - Lucy Gatumi to hold in trust of CM (Minor)
 - iii. Mwimbi/Ntunene/693 - Lucy Gatumi to hold in trust of CM (Minor)
 - iv. Plot No. 38A Kaare Market - Lucy Gatumi to hold in trust of CM (Minor)
 - v. Co-operative Bank Savings – Lucy Gatumi to hold in trust of CM (Minor)



4. On the other hand, the 2nd Administrator/Protector, vide the summons for confirmation of grant dated 21st June 2019, sought to have the grant issued to her on 13th May 2019 in respect of the subject estate be confirmed as follows:
 - i. Mwimbi/Ntunene/416 – Alibina Kawira and MM Gitonga (Whole Jointly)
 - ii. Mwimbi/Ntunene/463 - Alibina Kawira and MM Gitonga (Whole Jointly)
 - iii. Plot No. 38A Kaare Market - CM (Whole)
 - iv. Plot No. 82 B Kaare Market – Margaret Mukwarama M’Kanga (Whole)
 - v. Co-operative Bank Savings – MM Gitonga and CM Gitonga
5. The 1st Administratrix mentioned two dependants as the beneficiaries of the estate of the deceased. These include herself, as the widow of the deceased, and her son, CM. On the other hand, the Protector listed the following as the dependants of the deceased:
 - i. Margaret Mukwarama – Mother
 - ii. Alibina Kawira – Wife
 - iii. Lucy Gatumi – Wife (Remarried)
 - iv. CM – Son
 - v. MM – Son
6. The background of this cause is as follows. The Protector instituted this cause on 29th October 2013. On 9th December 2013, the Protector was issued with a grant of letters of administration in respect of the subject estate. The said grant was confirmed on 13th August 2014. In her petition, the Protector listed the following persons as the beneficiaries of the estate:
 - i. Margaret Mukwarama M’Kanga
 - ii. Doreen Mumbi
 - iii. Pius Muthoni
7. In the said confirmed grant, the Protector bequeathed herself the entire estate of the deceased. As stated herein above, this court, although differently constituted issued a ruling revoking the aforesaid grant made to the 2nd Administratrix and appointed the Applicant and the Protector herein as the legal administratrixes of the estate. The parties have now filed separate application for confirmation of the said grant.

Issues for determination

8. From the pleadings on record and the respective submissions of the parties, the main issues for determination are:
 - i. Who are the rightful beneficiaries of the deceased?
 - ii. What constitutes the estate of the deceased?
 - iii. How should the estate of the deceased be distributed?
9. Below is an analysis of the above highlighted issues.



a. Who are the rightful beneficiaries of the deceased?

10. Section 29 of the Law of Succession Act, Chapter 160 of the Laws of Kenya (the “Act”) provides as to who a dependant is. The said section provides as follows:

“For the purposes of this Part, “dependant” means –

- (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, 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”

11. The 1st Administratrix is a widow to the deceased. She married the deceased in 2005 in accordance with Kitharaka customs and they were blessed with one issue namely CM . The 1st Administratrix alleged that she lived with the deceased and his parents until the demise and burial of the deceased when she alleges that she was chased away from her matrimonial home.

12. On the other hand, the Respondent herein is the mother of the deceased and hence the mother-in-law of the 1st Administratrix. According to her, the Administratrix was married to the deceased but the two had separated by the time the deceased passed on. It is her claim that the Administratrix remarried one Elijah Mutegi Kirimi. She conceded that CM Gitonga is her grandson and therefore entitled to the estate of the deceased.

13. According to the Respondent, one Alibina Kawira was the wife of the deceased and she sired one MM with the deceased. The Respondent thus submitted that the estate of the deceased should be distributed amongst herself, Alibina Kawira, MM and CM. However during cross-examination, the respondent admitted that Albina was not married to Gitonga. She went on to say that Albina went to her home after the demise of Gitonga and that MM was born after the death of Gitonga. She then stated that she did not know when MM was born then said he was born in 2017. The said Albina has not laid a claim to the estate of the deceased.

14. The 1st Administratrix testified before this court that she never married someone else and she is still unmarried. She further denied that they had separated with the deceased.

The respondent called Julius Mburio Mwenda DW1, Chief Tunyai Location who testified that Lucy Gatumi re-married to one Elijah Mutegi and they got one child.

15. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:

“ 107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

16. The 1st Administratrix submitted that when the 2nd Administratrix filed this cause, she listed herself, one Doreen Mumbi and one Pius Muthomi as the dependants of the deceased’s estate. She stated that after the initial grant issued to the 2nd Administratrix was revoked, the 2nd Administratrix introduced new characters in the name of Alibina Kawira and MM alleging that they were the widow and son to the deceased respectively. It was thus the contention of the 1st Administratrix that the 2nd Administratrix did not provide any evidence such a birth or marriage certificate to substantiate her claim that Alibina Kawira and MM were dependants of the deceased or if the said persons even exists.
17. From the testimony of the 1st Administratrix, MM is the son to Doreen Mumbi who is her sister-in-law. However, according to the 2nd Administratrix, the deceased had 2 (two) wives, the 1st Administratrix and Alibina Kawira who had one child, MM. The 2nd Administratrix testified that she attended the traditional wedding of Alibina where they took 50kgs of sugar, 2 crates of soda, tea leaves, and Kshs. 10,000/= to her parents. According to her, the family never chased the 1st Administratrix from her matrimonial home. She contended that the 1st Administratrix left the home on her own volition during the lifetime of the deceased.
18. Taking all the above into account, it is my view that the beneficiaries of the estate of the deceased are as follows:
- i. Margaret Mukwarama M’Kanga - Mother
 - ii. Lucy Gatumi Marete – 1st widow
 - iii. CM - Son

The alleged 2nd wife Albina Gatumi and MM were ruled out as beneficiaries by the respondent. Indeed she never included the two as beneficiaries when she filed succession and obtained a grant which was revoked. The *Law of Succession Act* at Section 29 (supra) recognizes parents as dependants and gives court discretion to cater for them when distributing the estate of their children.

b. What constitutes the estate of the deceased?

19. According to the 1st Administratrix, the estate of the deceased constituted of:
- i. Mwimbi/Ntunene/416, there is a green card confirming that the property belonged to the deceased before the respondent transferred it to herself after succession.
 - ii. Mwimbi/Ntunene/693. There is a green card confirmed that it was owned by deceased prior to his death.
 - iii. Mwimbi/Ntunene/463. No supporting document availed to prove ownership.
 - iv. Plot No. 38A Kaare Market
 - v. Co-operative Bank Savings

The transaction which were carried out under the revoked grant were reversed with the result that the properties reverted to the estate of the deceased and are available for distribution to the beneficiaries.

20. On the other hand, the 2nd Administratrix alleged that the estate of the deceased constituted of:
- i. Mwimbi/Ntunene/416



- ii. Mwimbi/Ntunene/463
 - iii. Plot No. 38A Kaare Market
 - iv. Plot No. 82 B Kaare Market
 - v. Co-operative Bank Savings
21. The difference between the two accounts given is whether Mwimbi/Ntunene/693 and Plot No. 82 B Kaare Market constitute the estate of the deceased. In her affidavit in support of her petition for letters of administration in this cause, the 1st Administratrix included land parcel no. Mwimbi/Ntunene/693. It is therefore not clear why she decided to leave out the said parcel of land in her application for confirmation of grant. On the other hand, the 1st Administratrix in her application for revocation of grant that was made to the 2nd Administratrix included Plot No. 82 B Kaare Market as part of the assets forming part of the estate of the deceased. She however excluded it in her application for confirmation of grant.
22. In compliance with the ruling of this court that was delivered on 24th November, 2022, the 1st Administratrix has produced the green card for Mwimbi/Ntunene/693 which proves that the land was registered in the name of the deceased on 28th January 2014 and transferred to the 2nd Administratrix on 13th December 2017 following succession proceedings. The 2nd Administratrix has also provided this Court with two letters both dated 8th December 2022 from the County Government of Tharaka Nithi which confirms that the deceased was the owner of Plots No. 38A and 82 B Kaare Market.
23. The copies of search on record are in respect of Mwimbi/Ntunene/416 and Mwimbi/Ntunene/463 measuring approximately 0.58 Ha and 0.17 Ha respectively, and which were both registered in the name of the deceased and transferred to the 2nd Administratrix in 2017 following succession proceedings.
24. Considering the evidence that is on record, it is my view that the estate of the deceased comprised of:
- i. Mwimbi/Ntunene/416
 - ii. Mwimbi/Ntunene/463
 - iii. Mwimbi/Ntunene/693
 - iv. Plot No. 38A Kaare Market
 - v. Plot No. 82 B Kaare Market
 - vi. Co-operative Bank Savings
25. Thus, the final issue for determination is how the estate of the deceased should be distributed.

c. How should the estate of the deceased be distributed?

26. Section 40 of the Act provides for distribution of estates in circumstances where the intestate is polygamous. The estate is to be distributed to the children of the deceased equally with each one of them acting as a separate unit if any of the widows is alive, she is also to be taken as a separate unit.
27. *In Re Estate of John Musambayi Katumanga – deceased* [2014] eKLR W. Musyoka J, held that:-
- “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.”

The alleged second wife of deceased did not testify to support her claim that she was the wife of the deceased. She does not qualify as a beneficiary and to that extent the deceased was not polygamous and this section does not apply.

28. At paragraph 8 of the affidavit in support of the instant application for confirmation of grant, the 1st Administratrix proposed that the deceased's estate be distributed as highlighted in paragraph 3 herein above. On the other hand, the 2nd Administratrix proposed that the estate should be distributed as highlighted in paragraph 4 herein above.

29. I have considered the two different modes of distribution proposed by the parties. It is my view that the two applications for confirmation of grant both partly succeed to the extent that the estate of the deceased should be distributed to the wife and children and make a provision for the parent. The 1st administratrix= said to have re-married. Section 35 of the *Law of Succession Act* provides as follows:-

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to- (a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by section (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court may award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to- (a) the nature and amount of the deceased's property; (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will, if any; and



- (g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.
- (5) Subject to the provisions of sections 41 and 42 and subject to any appoint mentor award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”
- i. Mwimbi/Ntunene/416 – Alibina Kawira and MM(Whole Jointly)
 - ii. Mwimbi/Ntunene/463 - Alibina Kawira and MM (Whole Jointly)
 - iii. Mwimbi/Ntunene/693 - Lucy Gatumi to hold in trust of CM (Minor)
 - iv. Plot No. 38A Kaare Market - Lucy Gatumi to hold in trust of CM (Minor) - (Whole)
 - v. Plot No. 82 B Kaare Market – Margaret Mukwarama M’Kanga (Whole)
 - vi. Co-operative Bank Savings – MM and CM .

The grant issued on 13/5/2019 to the two administrators shall be confirmed and distribution of the estate shall be as stated at paragraph 29 above.

I make no orders as to costs, each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 7TH DAY OF FEBRUARY 2023.

L.W. GITARI

JUDGE

7/2/2023

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

7/2/2023

