



In re Estate of M'Arithi M'Imwara (Deceased) (Miscellaneous Succession Cause E004 of 2020) [2023] KEHC 854 (KLR) (2 February 2023) (Judgment)

Neutral citation: [2023] KEHC 854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE E004 OF 2020**

**LW GITARI, J
FEBRUARY 2, 2023**

BETWEEN

GERVASIO MWENDWA RITHI 1ST PROTESTOR

VICTOR MURITHI RITHI 2ND PROTESTOR

AND

GERVASIO MWENDWA RITHI 1ST PETITIONER

VICTOR MURITHI RITHI 2ND PETITIONER

JUDGMENT

1. By an application dated February 25, 2021 and filed on March 11, 2021, the 1st and 2nd Petitioners herein sought confirmation of grant made to them in respect of the estate of the deceased in this matter on 3/3/2021.
2. The 1st Protestor responded via an undated affidavit of protest filed on March 2, 2022. He opposed the mode of distribution of the deceased's estate as proposed by the 1st and 2nd Petitioner on the basis that the same is, allegedly, not in accordance to the law, inequitable, and discriminatory against them and other beneficiaries.
3. The court gave directions that the matter be heard by way of viva voce evidence.

Protestors' Case

4. The 1st Protestor herein through his undated affidavit of protest and his testimony stated that he is the son of the deceased and one of the administrators. His father, M'Arithi M'Imwara alias Rithi Imwara (deceased), had three households and left behind the following assets:
 - a. Karingani/Mugirirwa/XXXX - 5.40 Acres



- b. Karingani/Muiru/XXXX - 5.60 Acres
 - c. Karingani/Mariani/XXXX - 2.00 Acres
 - d. Karingani/Muiru/XXXX - 4.00 Acres
 - e. Karingani/Mariani/XXXX - 2.00 Acres
 - f. Plot No. XXXX Chuka Township
 - g. Money in Equity Bank
5. On cross-examination, the 1st Protestor stated that land parcel no. Karingani/Mugirirwa/XXXX is occupied by the 1st household. That he has no issue with the occupation of land parcel no. 56 and 1395. He stated that he occupies Karingani/Muiru/XXXX and that Karingani/Muiru/XXXX is unoccupied as the same is allegedly preserved for his mother. It was his testimony that Joyce (widow from the 3rd house) and the children of Nicerata (widow from the 1st house) are supposed to take that land. He stated that there would be a problem if the said land parcel no. Karingani/Muiru/1395 is distributed among the three houses. As for Karingani/Mariani/XXXX, it was the 1st Protestor's testimony that the same is occupied by his two brothers and that he has no issue with that. He stated that Plot No. 268 Chuka Township is a rental property and that the beneficiaries have not been able to agree on the distribution of the rental income collected from the same.
6. The 1st Protestor's alleges that Karingani/Muiru/584 which he occupies is small and that he does not get equal shares with others in terms of the rental income collected from Plot No. 268 Chuka Township. He stated that the rental income is deposited in an Equity Bank account whose signatories are the 1st Petitioner, one Mutinda, and 1st Protestor, representing each of the households. That the said bank account was opened three years after the deceased died. The Protestors did not call any other witnesses to testify and in conclusion, they urged this court to confirm the grant and distribute the subject estate in terms of the proposal given under paragraph 7 of his affidavit of protest.

1st and 2nd Petitioner's Case

7. The 2nd Petitioner testified as DW1. He is also a son of the deceased. He confirmed that the protestors are his brothers and stated that land parcel no. Karingani/Mugirirwa/XXXX is occupied by the 1st and 3rd households who also occupy Karingani/Muiru/XXXX. He stated that 2nd household live on Karingani/Muiru/XXX. That the 2nd household also occupies Karingani/Mariani/XXXX where Erick Mwenda and Fameel Mutwiri live. DW1 thus refuted the Protestors' allegation that the 2nd household occupies a small share.
8. As for Plot No. XXXX Chuka Township, DW1 confirmed that the same has buildings that generate rental income. It was his testimony that the rental income is collected by one Patrick Kariuki and Augustino Mwiti (from the 1st household), Mugendi (from the 2nd household) and Famwel Mutwiri (from the 3rd household). He stated that the four collect rent every month and the distribute it. According to him, the rental income collected is about Kshs. 70,000/= which they give 20% to their two mothers who are still alive and the balance is shared among the sons. DW1 stated that the 1st Protestor always gets a share of the rental income and that he is the one who collects his brothers' shares. As for Karingani/Mariani/3546, it was DW1's testimony that the family agreed that the same be distributed to their mothers and sisters and that one Amil Mawira represented their late sister. With regard to the deceased's bank account, it was DW1's testimony that the money therein was withdrawn and loaned to some family members who never repaid the same and the money ended that way. In the circumstances,



it was DW1's prayer that the subject estate be distributed as proposed in his summons for confirmation of grant.

9. On cross-examination, DW1 stated that the deceased had distributed his estate before he died but did not formalize the process with the Land Board. That the distribution of the estate was agreed upon by family members as per the wishes of the deceased and not as per acreage. He denied the allegation that the land occupied by the 1st Protestor is rocky and unproductive.

Protestor's Submissions

10. It was the Protestors' submission that the mode of distribution proposed by the 1st and 2nd Petitioners disadvantages the 2nd house as the share allocated to the 2nd house is a rocky and unproductive parcel of land measuring approximately 1.90 acres. Further, that the 1st and 2nd Petitioners deliberately and negligently failed to disclose the acreage of the parcels of land forming the estate of the deceased and that this jeopardized the law, fair, and equitable distribution of the estate. The Protestors allege that the rental income collected from Plot No. XXXX Chuka Township is not accounted for and as such, it is their submission that the said Plot No. XXXX Chuka Township should be distributed to those beneficiaries with small shares of the estate. The Protestors thus urged this court to allow their protest and distribute the subject estate equally among the beneficiaries.

Petitioners' Submissions

11. It is the Petitioners submission that before the demise of the deceased, he had established distinct parcels of land that each of the three households should settle on and that each of the families settled in their respective parcels of land. That the status quo has always been maintained since 2009 when the deceased died. It was their case that all the land parcels are productive and that the developments made on the different parcels of land have been through sheer hard work of the families. They therefore refuted the claim that the 2nd House is disadvantaged for allegedly getting a rocky parcel of land. The 1st and 2nd Petitioners thus urged this Court to allow their summons for confirmation of grant as prayed.

Issues for determination

12. From the pleadings, the evidence on record and the respective submissions of the parties, the only issue that arises for determination by this Court is the mode of distribution of the deceased's estate.

Analysis

13. It is not disputed that the deceased died intestate and that he left behind the following assets:
 - a. Karingani/Mugirirwa/XXXX - 5.40 Acres
 - b. Karingani/Muiru/XXXX- 5.60 Acres
 - c. Karingani/Mariani/XXXX - 2.00 Acres
 - d. Karingani/Muiru/XXXX - 4.00 Acres
 - e. Karingani/Mariani/XXXX - 2.00 Acres
 - f. Plot No. XXXX Chuka Township
 - g. Money in Equity Bank
14. The deceased was survived by the following beneficiaries:



- a. 1st Household
 - i. Nicerata Naka (Deceased) - Wife
 - ii. Stephanie Njeri Naka - Daughter
 - iii. Boniface Kibara Naka - Son
 - iv. Gervasion Mwendwa - Son
 - v. Agostino Mwiti Naka - Son
 - vi. Patrick Kariuki Naka - Son
 - vii. Mutembei Naka (Deceased) - Son
 - viii. Samson Murithi Naka - Son
 - ix. Esther Ciakarima (Deceased) - Daughter
 - x. Flora Wanjiru Naka (Deceased) - Daughter
- b. 2nd Household
 - i. Esther Ciambura - Wife
 - ii. Robert Mugendi - Son
 - iii. Anderson Kimathi - Son
 - iv. Ephanuel Mutwiri - Son
 - v. Eric Mwenda - Son
 - vi. Stephen Mwiathi - Son
 - vii. Alex Mugambi - Son
 - viii. Ann Kangai - Daughter
 - ix. Ellijoy Wanja Rithi - Daughter
 - x. Casty Gacheri - Daughter
- c. 3rd Household
 - i. Joyce Kambura - Wife
 - ii. Victor Murithi - Son
 - iii. David Muchangi Naka - Son
 - iv. Dennis Mutinda Naka - Son
 - v. Caroline Kathambi Naka - Daughter
 - vi. Fridah Kainda Naka - Daughter
 - vii. Morris Micheni Naka - Son

15. Two different modes of distribution of the deceased's estate have been proposed by the Protestors, on the one hand, and the 1st and 2nd Petitioners, on the other hand.



16. Distribution of the assets of a deceased person in an intestate polygamous family is governed by the provisions of section 40 of the Law of Succession Act (Cap. 160 of the Laws of Kenya), which provides as follows -

- “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in section 35 and 38.”

17. Generally speaking, although the above statutory provisions apply, courts have long held that a person can divide his property to his dependants or beneficiaries before death, and that such division of assets is valid and effective.

18. In this case, the contesting parties agree that the deceased settled members of his three households on various portions of his land assets. The parties agree that 1st and 3rd households were settled on parcels no. Karingani/Mugirirwa/XXXX and Karingani/Muiru/XXXX and it was the Petitioners’ submission that the 1st and 3rd houses have been living on the said portions without interruption for several decades with most of the children having constructed permanent structures therein. To this end, the 1st Protestor testified that he had no issue with the occupation of the two parcels of land.

19. On the part of the 2nd household, it was the Petitioners’ submission that the members of the said household were settled on land parcels no. Karingani/Muiru/584 and Karingani/Mariani/3848. The Protestors do not dispute this but they however allege that the land parcel no. Karingani/Muiru/584 is small and that they ought to get equal shares with the other households. It was the 1st Petitioner’s testimony that he had no issue with the occupation of Karingani/Mariani/3848. He stated that the said portion of land was being occupied by his two brothers and proposed that the same be distributed between them (Erick Mwenda Naka and Ephamuel Mutwiri Naka) in equal shares.

20. I have considered the proposed modes of distribution by the parties as well as their submissions. The provisions of section 38 of the Law of Succession Act enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married or not.

I note from the evidence by the parties that the respective houses occupies the properties as they were left by the deceased. There is minimal difference on the sizes of the parcels of land where the parties are in occupation. The disruption on the mode of occupation of the land proposed by the protestor is not warranted.

21. Guided by the principle of equality enshrined in Constitution and the Law of Succession Act, it is my view that the subject estate should be distributed as follows:

- a. Karingani/Mugirirwa/XXXX - 5.40 Acres
- i. Stephanie Njeri Naka
- ii. Boniface Kibara Naka Jointly
- iii. Gervasion Mwendwa



- iv. Agostino Mwiti Naka
- v. Patrick Kariuki Naka
- vi. Samson Murithi Naka
- vii. Joyce Kambura
- viii. Victor Murithi Jointly
- ix. David Muchangi Naka
- x. Dennis Mutinda Naka
- xi. Caroline Kathambi Naka
- xii. Fridah Kainda Naka
- xiii. Morris Micheni Naka
- b. Karingani/Muiru/XXXX - 5.60 Acres
 - i. Stephanie Njeri Naka
 - ii. Boniface Kibara Naka
 - iii. Gervasion Mwendwa
 - iv. Agostino Mwiti Naka
 - v. Patrick Kariuki Naka Jointly
 - vi. Samson Murithi Naka
 - vii. Joyce Kambura
 - viii. Victor Murithi
 - ix. David Muchangi Naka
 - x. Dennis Mutinda Naka
 - xi. Caroline Kathambi Naka
 - xii. Fridah Kainda Naka Jointly
 - xiii. Morris Micheni Naka
- c. Karingani/Mariani/XXXX - 2.00 Acres
 - i. Erick Mwenda Naka Jointly in
 - ii. Ephamuel Mutwiri Naka equal shares
- d. Karingani/Muiru/XXXX - 4.00 Acres
 - i. Esther Ciambura
 - ii. Robert Mugendi
 - iii. Anderson Kimathi
 - iv. Stephen Mwiathi
 - v. Alex Mugambi Jointly
 - vi. Ann Kangai



vii. Ellijoy Wanja Rithi

viii. Casty Gacheri

e. Karingani/Mariani/XXXX - 2.00 Acres

i. Joyce Kambura Naka

ii. Esther Ciambura Naka Jointly

f. Plot No. XXXX Chuka Township

i. To all the beneficiaries jointly. Rental income collected to be distributed equally among the three households.

g. Money in Equity Bank

i. To be accounted for and shared equally among the three households.

In the circumstances I find that the protest is without merits and is dismissed. The grant issued on 3/3/2021 shall be confirmed and the distribution of the estate shall be as stated under paragraph 21.

I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 2ND DAY OF FEBRUARY 2023.

L.W. GITARI

JUDGE

2/2/2023

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

2/2/2023

