



**In re Estate of Nelson Gatumu Kamaitha (Deceased) (Succession Cause
13 of 2019) [2023] KEHC 1657 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1657 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 13 OF 2019
LM NJUGUNA, J
MARCH 8, 2023
FORMERLY EMBU HC MISC APP NO. 124 OF 2008
IN THE MATTER OF THE ESTATE OF NELSON GATUMU KAMAITHA (DECEASED)**

BETWEEN

PERSIAH MUTHONI MASINDE CO- ADMINISTRATOR

AND

ONESMUS MWANIKI GICOVI 1ST PROTESTOR

RODGERS JOHNNIE KAMAITHA MUREITHI 2ND PROTESTOR

RULING

1. The matter for determination before the court are two protests dated October 9, 2018 and the other filed on November 25, 2021 by Onesmus Mwaniki Gicovi and by Rodgers Johnnie Kamaitha Mureithi respectively.
2. The same are in relation to the estate of the deceased herein. The estate of the deceased previously had two administrators to wit Charity Gicuku who was the wife of the deceased herein and mother to the co-administrator, and to the 2nd protestor herein. Upon the death of Charity Gicuku, she was substituted by the applicant herein. The applicant thus filed summons for confirmation of grant wherein she provided her proposed mode of distribution in regards to the estate of the deceased. The same provoked the filing of the two protests.
3. The court gave directions that the matter be canvassed via oral submissions and thereafter parties filed their written submissions.
4. The co-administrator/applicant submitted that under section 26 of the LSA, the court has discretion when dealing with succession matters wherein it can make provisions for the deceased's children or dependents. That in this case, there is no doubt that the children of the deceased were: Rodgers Johnnie



Kamaitha Mureithi, Persiah Muthoni Masinde, Mary Wambogo Gatumu, Roseline Njura Gatumu, Chrales Kariuki Gatumu and Phyllis Mukami Gatumu (deceased). That for the 1st protestor and his sister admitted that they are children of the deceased. The co-administrator/applicant submitted that it was incumbent upon the 1st protestor to prove and discharge the burden that they actually depended upon the deceased herein. It was her case that the 1st protestor and his sister failed miserably to prove that indeed they are children or dependents of the deceased herein.

5. On the mode of distribution, it was submitted that as provided in section 28, the court while making provision for each child or dependent, will consider any advancement or allocation to the beneficiary during the lifetime of the deceased. That the deceased allocated or gifted to the 2nd protestor a T- Plot within Kirigi village which he sold. He also gifted Charles Kariuki Land Parcel No Ngandori/Kirigi/T3 where he built his home and further, the deceased also gifted his four daughters Land Parcel No Ngandori/Kirigi/T 203; and that in as much as the same were done verbally and, there was no transfer and registration before the death of the deceased, the same ought to be respected and considered. That the mode of distribution as proposed by the co-administrator/applicant is fair and in tandem with Sections 28, 29, 38 and 40 of the LSA. The co-administrator/applicant therefore urged this court to adopt the mode of distribution as exhibited in paragraph five of her supporting affidavit.
6. The 2nd protestor submitted that it is not disputed that section 28 of the LSA provides for equal distribution of the deceased's estate but this court possesses inherent jurisdiction to do justice to a party where legal provisions are not in support of the same and to consider the special circumstances in each case. The 2nd protestor in support of his case relied on the case of [*JM Kariuki Succession Cause No 26 of 1985*](#). He submitted that he has been on the land parcel number Ngandori/Karigi/355 more than thirty years and has carried out extensive developments on the same. That the 1st protestor is not a beneficiary nor a dependent and as such, this court was urged to dismiss his protest. He stated that he deserved to get five extra acres from the said estate for the reason that the same was his birthright in recognition of the Aembu customs. In the end, this court was urged to allow the protest as the same ensures just distribution of the estate herein.
7. I have considered and analyzed the evidence, and the submissions by the parties herein and I find that the issues for determination are as follows:
 - i. Whether the 1st protestor is a dependant.
 - ii. Appropriate mode of distribution.
8. The procedure for determination of an application for confirmation in the [*Probate and Administration \(P & A\) Rules*](#) requires hearing of the application for confirmation of grant as set out in Rule 41 of the Probate and Administration Rules, 1980:

'41. Hearing of application for confirmation

- a.
- b. The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.



9. On the part of the 1st protestor, no submissions were filed but his case is that the deceased herein was a brother to his late father Gicovi Kamaitha who is also deceased. That after the death of his father, his mother Virginia Runji Gicovi was inherited by the deceased herein, as a wife under Ki-embu Customary Law and he took care of him together with his siblings. That the deceased took care of them and provided for them and educated them as a father would normally do which fact the petitioners are well aware of. That the deceased even built a house for them and gave them 100 coffee stems and land where they used to grow crops. It was also his case that after independence the clan gave the deceased 15 acres of land being land parcel number Ngandori/Kirigi/355 which was registered in the deceased's name to hold in trust for himself and his two brothers namely Gicovi Kamaitha (the 1st Protestor's father and one Daniel Kathuri as he was the elder brother and son. That out of this land, his father was meant to get five (5) acres. That the deceased also held Land Parcel Gaturi/Weru/199 on his own behalf and on behalf of his two brothers aforesaid. He gave his proposed mode of distribution as stated in his evidence and further argued that his mother was supposed to benefit from the land as such, he is claiming his mother's share of the land.
10. The 2nd protestor on the other hand submitted that given that he has developed vast share of the land forming the estate of the deceased herein, he deserves inheritance as stipulated in his protest. That the 1st protestor did not deserve a share of the estate herein given that he is not a biological child of the deceased; further, that he did not prove that he was a dependant of the deceased. He contended that since his sisters are married, they do not deserve a big share of the estate. That being the first son of the deceased, he deserves five acres of the land as a birth right in recognition of the Aembu custom before he could be apportioned more from the estate of the deceased.
11. The applicant herein submitted that her mode of distribution was the most fair as the same is in tandem with Sections 28, 29, 38 and 40 of the LSA. The same is supported by other siblings as being the most fair. It was suggested that the share of Phyllis Mukami (deceased) should be inherited by her children and that Daudi Ndatha Gitau should hold in trust for his other siblings who are currently out of the jurisdiction of this court. Further, that the deceased had previously given his daughters land parcel Ngandori/Kirigi/203 and land parcel Ngandori/Kirigi/73 to Charles Kariuki.
12. In regards to the 1st protestor's case, the [Law of Succession Act](#) Cap 160 Laws of Kenya to be referred to as the Act, defines who is a dependant. At Section 29 of the Act provides:-
13. For the purposes of this Part, 'dependant' means:
 - a.
 - 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;
 - c.
14. In this case, the 1st protestor in his evidence stated that the basis of his claim is that the deceased herein adopted him together with his siblings as his own children. That although his biological father was one Gicovi Kamaitha and his mother Virginia Runji, the deceased inherited his mother as per the practices of Aembu custom. In short, even as claimed that the deceased took them and lived with them in one house where the children of Charity Gicuku lived, it was not proven that the deceased had been maintaining him/them prior to his death. Further, he identified himself as the son of Gicovi Kamaitha therefore showing that he was not deceased son.



15. Further, 1st protestor claimed that the deceased herein held the land in trust for his family. It is outright that this is a probate court and as such, the claim for trust should not arise. This is so since the mandate of the probate court is limited. A distinction ought to be made between a claim against the estate of a deceased and a claim on inheritance in respect of the estate of the deceased. [See *In re Estate of Samuel Kathieri (Deceased)* [2019] eKLR; HC Succession Cause No 864 of 1996 [2015] eKLR].
16. As a consequence of the above, I find that the 1st protestor was neither a child nor a dependant of the deceased herein and as such, he cannot benefit from the estate.
17. In regards to the 2nd protest, it is not in doubt that the protestor seeks to have a bigger chunk of the estate of the deceased herein. He argued that his sisters are married and as such, they do not deserve a bigger share of the estate. That being the first son of the deceased, he deserved five acres of land as a birth right in recognition of the Aembu custom, before he could be apportioned more from the estate of the deceased. Further that, he has developed a vast part of the estate herein and therefore he should be allowed to inherit the same. It was his submissions that his sisters should not inherit equal share as himself and his brother Charles Kariuki for the reason that they are married.
18. It is trite that the Law of Succession does not discriminate between gender in matters of succession or inheritance. Under the *Law of Succession Act* and indeed under the *Constitution*, a child is a child and every person has equal rights under the law irrespective of gender. The *Law of Succession Act* does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person. [See *Eliseus Mbura M'Thara Vs Harriet Ciambaka & Another* [2012] eKLR].
19. Further, the court in *Re Estate of John Musambayi Katumanga – Deceased* [2014] eKLR held as follows:

' 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.'
20. In the same breadth, in the case of *Re estate of Lerionka Ole Ntutu*, where there was conflict based on whether girls should inherit property from their deceased father, the court decided that girls whether married or unmarried, were entitled to get a share of inheritance from their father. [See *Re estate of Lerionka Ole Ntutu (Deceased) High Court of Kenya at Nairobi Family Division Succession Case No 1263 of 2000*].
21. As a result of the foregoing, the mode of distribution as proposed by the 2nd protestor is selfish and unfair, with what the other beneficiaries stands to acquire; and therefore, I find that the same is not tenable for adoption.
22. In regards to the co-administrator/applicant's mode of distribution which was supported by other siblings, the court is of the considered view that, it is a fair mode of distribution. However, considering that the 2nd protestor has been living on the land and has developed the same using his own resources, he should be given an extra one acre from land parcel number Ngandori/Karigi/355 for that effort. The balance of that land, and land parcel Gaturi/Weru/199 be shared equally amongst all the children.



The share of the late Phylis Mukami to go to David Ndatha to hold in trust for himself and his two brothers namely Richard Gatimu and Waweru Gitau.

23. Land parcel Ngandori/Kirigi T 3 to be inherited by Charles Kariuki Gatimu and land parcel Ngandori/Kirigi/T 203 to be inherited by the daughters equally.
24. The first protestor's protest is hereby dismissed.
25. Each party to bear their own costs of the cause.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Petitioner/Respondent

