



REPUBLIC OF KENYA



KENYA LAW

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**In re Estate of Githaiga Mutiga (Deceased) (Succession Cause
911 of 2014) [2023] KEHC 1849 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 911 OF 2014
FN MUCHEMI, J
MARCH 2, 2023**

BETWEEN

JOSEPH MATHENGE GITHAIGA PETITIONER

AND

MATHENGE THUKU PROTESTOR

RULING

1. This is a ruling on a protest dated August 13, 2017 in opposition to the mode of distribution of the deceased's estate as proposed by the applicant in the Summons for confirmation of grant dated March 22, 2017. Directions were given on June 22, 2020 to the effect that the protest be heard by way of *viva voce* evidence.

The Protestors' Case

2. The protestor PW1 testified that his father, Joseph Thuku Mutiga and the deceased were brothers and the deceased was older than the protestor's father. He further testified that he has no contention with the distribution of the estate save for LR No Othaya/Ihuririo/917 and 918 being resultant parcels in sub division of L.R Othaya/Ihuririo/48. He further testified that the said parcel was given to the deceased to hold in trust for himself and his father, Thuku Mutiga in equal shares.
3. The witness testified that before his mother died, she had instituted a case at the Land Disputes Tribunal against the deceased claiming her late husband's share of the LR. No Othaya/Ihuririo/48 but the case was never heard as both his mother and the deceased were sick and later passed on.
4. On cross-examination, the witness testified that he is aware that there is an Elders Award dated 18/4/1990 signed by the chief which emanated as his father and the deceased had a land dispute over the subject land. The elders in their decision apportioned 6.0 acres to the deceased and 3.2 acres to his father Thuku Mutiga. He further stated that although his father was claiming half of his share of the subject land, the elders apportioned a bigger share to the deceased. The witness contends that they



did this because the Assistant Chief, was a brother in law to the deceased and directed the chief do apportion the deceased with a bigger share. He further contended that his father did not sign the said elders' award.

5. The witness further testified that the deceased sub divided the said land into two parcels LR No Othaya/Ihuririo/917 and 918 without involving him or his family. He further argued that the land was sub divided in 1995 and although his father was alive, he did not know about the sub division and hence moved the land tribunal on the original parcel. PW1 urges the court to consolidate the two land parcels and then sub divide into two equal shares. Alternatively, he urges the court to carve out 0.64ha from land parcel number Othaya/Ihuririo/918 so that he can have an equal share as the deceased's family.
6. PW2, Peter Weru Gichuhi, testified that his grandfather had two wives who both had two sons each. Gichuhi and Gichuki were the sons to the first wife and the deceased and Thuku Mutiga were sons of the second wife. PW2 further testified that Gichuki was given land by his grandfather and put down as the registered owner of the land to hold in trust for himself and his brother Gichuhi. The deceased was also given land and registered to hold it in trust for himself and his brother Thuku Mutiga. The witness further testified that the deceased refused to give his brother his half share of the land and they intervened as their relatives. PW2 further testified that the deceased sub divided the said parcel of land allocating to himself a bigger share.
7. On cross-examination, the witness testified that although there was a dispute between the deceased and his brother over the land, the elders favoured the deceased by giving him a bigger portion. He further stated that the Assistant Chief was a son in law to the deceased and that is why the apportionment was not fair. The witness contended that he was aware of the elders' award dated April 18, 1990 although he stated that the protestor's father never signed the same.
8. PW3, Francis Kimondo Gichuhi testified that he is a brother to PW2, and that their father and the deceased were step brothers. He further stated that the deceased was registered as the owner of land parcel number Othaya/Ihuririo/48 to hold in trust for himself and for Thuku Mutiga. The witness testified that his father was registered as the proprietor of land to hold in trust for himself and his younger brother Gichuki. He further testified that his father gave his brother half his share as was required.

The Applicant's Case

9. The applicant testified that he is a son of the deceased and he proposes that the estate be distributed as per his affidavit in support for the confirmation of grant. He proposed that land parcel number Othaya/Ihuririo/918 be allocated to the protestor's family whereas land parcel number Othaya/Ihuririo/917 be allocated to the deceased's family. He further testified that the land parcels were as a result of sub division by the deceased during his lifetime. Land parcel Othaya/Ihuririo/918 was to be allocated to the protestor's family and it measures 3.2 acres. He further testified that the sub division was informed by the decision of the elders before the area chief. The witness further testified that land parcel number Othaya/Ihuririo/917 measuring 6 acres was registered in the name of the deceased and thus the family is entitled to inherit it.
10. On cross-examination, the applicant testified that the protestor's mother instituted a suit against the deceased in the Land Disputes Tribunal but the case was never heard. He further testified that in 1990, there was a dispute before the chief on the same property. He further testified that the deceased sub divided the land in 1995 but the protestor's father did not follow up on the transfer of the land to their names.



11. The witness further contended that the deceased was the registered owner of the land because he was the eldest son of their late grandfather.
12. DW2, Obed Ngetha Muraya, testified that he was one of the elders before the Chief hearing the land dispute between the deceased and the protestor's father in 1990. He stated that they decided that the deceased take 6.0 acres and the protestor's family gets 3.2 acres and they signed the award.
13. On cross-examination, the witness testified that the deceased was the registered proprietor of the subject land because he was the eldest son and that he was to hold the land in trust for himself and the protestor's father because his younger brother Thuku Mutiga was in detention at the time. The witness further testified that the protestor's father signature was not in the elder's decision.
14. On re-examination, the witness testified that the deceased had bought part of land parcel Othaya/Ihuririo/48 which was consolidated and therefore that part of land was consolidated with the deceased's father's land.
15. Parties disposed of the protest by way of written submissions.

The Protestor's Submissions

16. The protestor submits that the elders' award dated 18/4/1990 has not been signed by his father or the deceased. The protestor further submits that unless the matter had been referred for arbitration by the court, such an award cannot be enforced or adopted by the court. In spite of the award, the protestor submits that his father died in the year 2003 before the deceased had transferred his share to him and the two parcels are still registered in the name of the deceased.
17. The protestor further submits that after the death of his father, his mother filed a claim before the land disputes tribunal at Othaya but the case was never heard. The protestor argues that at the time, the deceased was still not willing to effect the transfer in spite of the two parcels of land having been issued with land reference numbers. The protestor contends that the applicant confirmed that other than land parcel number Othaya/Ihuririo/48, his father and the deceased had no other land thus the said land was ancestral land. The protestor further contends that the applicant's witness in cross-examination confirmed that the deceased was registered solely because his father was in detention. As such, the protestor submits that his father's entitlement in land parcel number Othaya/Ihuririo/48 is a half share as the parcel of land is what would have been his father's entitlement after demarcation and consolidation. The protestor relies on the case of *Gatimu Kinguru v Muya Gathangi* [1976] KLR to support his submissions.

The Applicant's Submissions

18. The applicant submits that in his mode of distribution, he distributed land parcel number Othaya/Ihuririo/918 to the protestor, Wangare Mohamed Tadi and John Maina Mutiga. He further submits that he relied on the elders' award in distributing the said parcel. The applicant further submits that the deceased was the registered proprietor of land parcel number Othaya/Ihuririo/48 measuring 3.72 hectares. He further contends that the deceased had purchased some portions of land that were consolidated together to measure 2.2 acres. The applicant contends that his grandfather's portion of land was 7 acres and it was consolidated with the deceased's 2.2 acres and registered as land parcel number Othaya/Ihuririo/48.
19. The applicant further submits that the deceased and the protestor's father referred a dispute on the sharing of the land parcel to the elders under the chairmanship of the Chief Iria Ini Location. The elders' award gave the deceased a portion of 6 acres and the protestor's father a portion of 3.2 acres



and thus the deceased implemented the said award by sub dividing land parcel number Othaya/Ihuririo/48.

20. The applicant submits that the protestor is asking the court to make a determination on whether the deceased was holding land parcel number Othaya/Ihuririo/48 on his behalf and in trust for the protestor's father. The applicant further submits that the protestor is not a dependant of the instant estate and yet he wants the court to make a determination of trust which is within the jurisdiction of the land court. The applicant contends that the trust is pegged on the protestor's belief that the deceased was holding the subject land in trust for his sibling. The applicant submits that the court does not have jurisdiction to make a determination of trust and to support his contentions, he relies on the cases of *in Re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR; *Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR; *Estate of Richard Karanja Javan* [2014] eKLR and *Monica Wangari Njiri & 4 Others v Eunice Wanjiru Igamba & Another* [2016] eKLR.
21. The applicant submits that the issue of distribution of land parcel number Othaya/Ihuririo/48 was deliberated on during the elders meeting and an amicable solution reached. Therefore the applicant contends that the protestor ought to pursue land parcel number Othaya/Ihuririo/918 which his father has an interest. The applicant further contends that the protestor lacks any legal basis for laying a claim over land parcel number Othaya/Ihuririo/917 and any other properties of the deceased. The applicant thus urges the court to confirm the grant in terms of his mode of distribution.

Issue for determination

22. The main issue for determination is whether the protest has merit.

Whether the protest has merit.

23. The applicant has raised an issue of the jurisdiction of this court arguing that the court is not clothed with the requisite jurisdiction to determine whether there was a trust over land parcel Othaya/Ihuririo/48.
24. The issue of jurisdiction has been discussed in the case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows:-

“I think that is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its stools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

..... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

25. Evidently, if this court finds that it lacks jurisdiction, it will have to down its tools and advise the parties to approach the right forum.



26. A court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court of Kenya in the case of Samuel Kamau Macharia v KCB & 2 Others, Civil Application No 2 of 2011 stated thus:-

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

27. Article 165(3) of the Constitution confers the High Court with jurisdiction and provides:-

“(3) Subject to clause (5), the High Court shall have-

- a. Unlimited original jurisdiction in criminal and civil matters;”

28. It is instructive to note that the jurisdiction is subject to Article 165(5) of the Constitution which provides:-

(5) The High Court shall not have jurisdiction in respect of matters:-

- a. Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- b. Falling within the jurisdiction of the courts contemplated in Article 162(2).

29. Pursuant to Article 162(2) of the Constitution, the Environment and Land Court Act 2011 was enacted and in Section 13 it confers the Environment and Land Court with jurisdiction as follows:-

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-

- a. Relating to environment planning and protection, climate issues, land use plannings, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b. Relating to compulsory acquisition of land;
- c. Relating to land administration and management;
- d. Relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land; and
- e. Any other dispute relating to environment and land.

30. The Law of Succession Act in section 47 provides for jurisdiction of the High Court in respect of matters falling under the Act as follows:-

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.



31. Rule 41(3) of the *Probate and Administration Rules* provides that:-

Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate of the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.

32. In the case of Priscilla Ndubi and *Zipporah Mutiga v Gerishon Gatobu Mbui*, Meru Succession Cause No 720 of 2013, held:-

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”

33. It is evident that the bone of contention is whether the deceased was holding land parcel number Othaya/Ihuririo/48 in trust for himself and for his brother, Thuku Mutiga. The protestor argues that land parcel number Othaya/Ihuririo/48 was ancestral land and therefore he is entitled to half of his father’s share whereas the applicant argues that land parcel Othaya/Ihuririo/48 is a consolidation of his grandfather’s land consisting of 7 acres and the deceased’s land, 2.2 acres and therefore since the distribution of the said land was deliberated on in 1990 by the elders, the deceased was rightful in subdividing the land and apportioning himself with a bigger share. It is therefore evident that before this court can deliberate on the issue of distribution of the said assets, a determination ought to be made on the issue of trust.

34. It is apparent that when a dispute regarding ownership in respect of the property of the deceased person arises, then the court can set aside the share in dispute to await the outcome of the resolution of the dispute from the court with jurisdiction. Therefore, this honourable has no jurisdiction and cannot make any determination regarding L.R. Othaya/Ihuririo/917 and 918 till the dispute over ownership has been determined. Once the issue of trust is ascertained by the Environment and Land court, the probate court shall proceed to distribute the said property to the rightful dependants.

35. I have noted that there is a further supporting affidavit for Confirmation of grant dated January 3, 2020 sworn by Catherine Warukira Mwangi, a beneficiary of the estate who has added an asset of the deceased namely L.R. Euasonyiro/Ilpejeta Block 1/476 with a proposal that the said parcel of land be distributed between herself, Margaret Wangari Kiburu and Philip Githaiga Kibii in equal shares. The deponent has annexed a letter from the applicant supporting the mode of distribution. I have perused the affidavit and noted that the proposed mode of distribution was consented to by only the applicant leaving out the other four beneficiaries. The court at this juncture cannot proceed to distribute the said asset without the beneficiaries namely Philip Githaiga Kabii, Nancy Nyaguthie Kariuki, Elizabeth Muthoni and Miriam Kanuthu Gitahiga being involved. This asset shall await the parties to file a consent of all beneficiaries to facilitate partial confirmation of grant which consent shall be filed within 30 days. The KCB accounts and KCB shares shall be part of the partial confirmation.



36. The protestor has a prima facie case which ought to be heard and determined by the ELC court before this succession cause is determined.
37. It is hereby ordered that these proceedings are stayed for a period of (60) sixty days only in respect of L.R Nos Othaya/Ihuririo/917 and 918.
38. Consequently, the protest is hereby struck out for want of jurisdiction with no orders as to costs.
39. It is hereby so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYERI THIS 2ND DAY OF MARCH, 2023.

F. MUCHEMI

JUDGE

