



**In re Estate of Kithambara alias Miru Kithambara (Deceased) (Miscellaneous Succession Cause 10 of 2016) [2023] KEHC 3213 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3213 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
MISCELLANEOUS SUCCESSION CAUSE 10 OF 2016**

**LW GITARI, J**

**APRIL 18, 2023**

**IN THE MATTER OF THE ESTATE OF KITHAMBARA ALIAS  
MIRU KITHAMBARA (DECEASED)**

**BETWEEN**

**JOTHAM KINYUA M'RITHAA ..... ADMINISTRATOR**

**AND**

**MUCHUNKU CHABARI ..... 1<sup>ST</sup> PROTESTOR**

**JOHNSON MBAE ..... 2<sup>ND</sup> PROTESTOR**

**AND**

**MWENDA KINYUA ..... INTERESTED PARTY**

**JUDGMENT**

1. This matter relates to the estate of Kithambara alias Miru Kithambara who died intestate sometime in 1962. The estate of the deceased comprised of Land Parcel No. Mwimbi/Chogoria/261 (the "suit land"). A grant was issued to the 1<sup>st</sup> Protestor herein on December 29, 2014 in Chuka SPM Succession Cause No. 74 of 2011 and the same was confirmed on 9<sup>th</sup> September, 2015. The said grant was however revoked on 14<sup>th</sup> June, 2017 on account that the lower court was not clothed with the requisite jurisdiction to entertain the cause. A fresh grant was then issued to Jotham Kinyua M'Rithaa, the administrator herein.
2. By the Summons for Confirmation of Grant dated January 12, 2018, the administrator herein sought for the confirmation of the grant made to him on 15<sup>th</sup> June, 2017. He listed the following properties as the assets constituting the estate of the deceased:
  1. Land Parcel No. Mwimbi/Chogoria/261



2. Plot No. Magongo/2011
3. At paragraph 6 of the Administrator's affidavit in support of the said summons for confirmation of grant, the administrator proposed that suit land be distributed to the following persons as follows:
  - a. Land Parcel No. Mwimbi/chogoria/261
    1. Agnes Karimi Maiti - 100Ft x 40Ft
    2. Jotham Kinyua M'Rithaa - 100Ft x 40Ft
    3. John Mbii M'Rithaa - 100Ft x 40Ft
    4. Caroline Kawira M'Rithaa - 100Ft x 40Ft
    5. Jane Muthoni M'Rithaa - 100Ft x 40Ft
    6. Catherine Ruguru M'Rithaa - 100Ft x 40Ft
    7. Solomon Gitonga M'Rithaa - 100Ft x 40Ft
    8. Jennifer Njeri M'Rithaa - 100Ft x 40Ft
    9. Martin Kimathi M'Rithaa - 100Ft x 40Ft
    10. Loyford Mutua M'Rithaa - 100Ft x 40Ft
    11. Kellen Kanjiru M'Rithaa - 100Ft x 40Ft
    12. Esther Nkatha M'Rithaa - 100Ft x 40Ft
    13. Josephine Umotho M'Rithaa - 100Ft x 40Ft
    14. James Mugereki M'Rithaa - 100Ft x 40Ft
    15. Nelson Bundi M'Rithaa - 100Ft x 40Ft
    16. Dadson Njeru M'Rithaa - 100Ft x 40Ft
    17. Esther Nkatha M'Rithaa - 100Ft x 40Ft  
(to hold in trust of Pius Murimi M'Rithaa)
  - b. Plot No. Magongo/2011
    - i. Jotham Kinyua M'Rithaa - Whole
4. Two protests to the confirmation of grant were separately filed by the 1<sup>st</sup> and 2<sup>nd</sup> protestors herein. The 1<sup>st</sup> Protestor filed his protest on July 6, 2018 in his capacity as the grandson of the deceased. On the other hand, the 2<sup>nd</sup> Protestor filed his protest on 1July 9, 2018 claiming to be a bona fide purchaser for value.
5. The protests were heard by way of viva voce evidence. Noticeably, the parties have been differently referred to in the affidavits and submissions on record. For the sake of consistency in this judgment, I shall refer to the parties per the heading herein.
6. PW1, Jotham Kinyua M'Rithaa, took the stand on June 4, 2019 and told the court that the deceased was his grandfather and that the 1<sup>st</sup> Protestor, Muchunku Chabari, is his cousin. That the deceased



- had 4 wives and 4 parcels of land. According to him, the deceased had distributed his estate to his sons. That deceased's sons namely Muchunku Chabari and Marete, who are both deceased, got shares at Kiguuru. That his (PW1's) late father, M'Rithaa Miiru, got L.R. No. Mwimbi/Chogoria/261 and that M'Kanga Miiru, who is the only son of the deceased who is still alive, lives in his own land. PW1 stated that land parcel L.R. No. Mwimbi/Chogoria/261 is the only property remaining for distribution in the deceased's estate. Further, that the 1<sup>st</sup> Protestor should not get a share from the suit land as he benefitted from his late father's share, and that the purchasers have no right to claim a share.
7. PW2, Agnes Karimi, stated that she is the deceased's daughter-in-law as she was the second wife to the late M'Rithaa, who was a son to the deceased. She corroborated PW1's testimony that his late husband was given L.R. No. Mwimbi/Chogoria/261 by the deceased. On cross examination, she however stated that his late husband was given a parcel of land which is adjacent to L.R. No. Mwimbi/Chogoria/261. She claimed that he was also given L.R. No. Mwimbi/Chogoria/261 as an addition. It was PW2's testimony that when she got married, she found her mother-in-law utilizing the suit land and that it is her mother-in-law who told her to continue utilizing it. She thus maintained that L.R. No. Mwimbi/Chogoria/261 does not form part of the deceased's estate.
  8. As for the case by the protestors, the 1<sup>st</sup> Protestor (DW1) stated that he is son of the late Chabari Miiru, who was the deceased's son. That the administrator is his cousin as their fathers were brothers. DW1 testified that he involved the father of the administrator herein, while he was still alive, in the process of getting a grant in respect to the deceased's estate. That after the grant was confirmed, he sold a share of the estate to the 2<sup>nd</sup> Protestor and the Interested Party herein and that he still involved the administrator's father in the sale. On cross-examination, DW1 stated that he gave the Interested Party a plot measuring 40 by 100 ft for services offered by him in the succession cause in the lower court and that he sold another share also measuring 40 by 100 ft to the 2<sup>nd</sup> Protestor at a consideration of Kshs. 400,000/=.
  9. DW2 was Silas Njeru Kirigia. He stated that he is the deceased's grandson as his late mother was a daughter to the deceased. That PW1 and DW1 are his cousins. He adopted his affidavit sworn on October 4, 2018 and stated that DW1 is rightful beneficiary who should get the entire estate as all the children of the deceased allegedly consented to DW1 getting the estate.
  10. DW3 was Justa Mbaabu. He stated that he is also the deceased's grandson and a cousin to both PW1 and DW1. He adopted his affidavit which he swore on October 4, 2018 as his evidence. He corroborated DW2's testimony that it is DW1 who should inherit the suit land.
  11. The parties then filed their written submissions which I have summarized hereunder.

### **The Administrator's Submissions**

12. In his written submissions that were filed on January 17, 2022, the Administrator started off by stating that Plot No. Magongo/2011 didn't form part of the estate of the deceased and was therefore not subject to distribution.
13. The Administrator further submitted that he is a grandson of the deceased and is entitled to get the suit land since his father, who was the son of the deceased, died and that it is his father who buried the deceased herein. According to him, the deceased had three wives namely: MWA-Kanyua, MWA-Mwenda, and MWA-Gituma who he alleges the deceased had settled each of them in parcels of land situated in Kairuni, Chakure, and Kiguuru respectively. It was his submission that the Applicants in the application for revocation of the grant as well as his family are settled in the suit land situated in Kairuni. As such, he submitted that the interest of justice dictates that the suit land should be distributed equally among all the applicants and the administrator after deducting 0.038 Ha sold to the 1<sup>st</sup> Protestor.



### **The Interested Party's Submissions**

14. The interested party denied the allegation by the administrator that he purchased land forming part of the estate before the succession cause was instituted. It was his submission that the transfer of the suit land from the 1<sup>st</sup> Protestor to him was done after the grant made to the 1<sup>st</sup> Protestor was confirmed. It was further his submission that him and the 2<sup>nd</sup> Protestor are entitled to the respective shares of land that were transferred to them as they are both innocent purchasers who acquired interests in the particular portions of land from a bona fide owner.

### **The 1st Protestor's Submissions**

15. The 1<sup>st</sup> Protestor submitted that the administrator misled the court by passing himself as the son of the deceased who was pursuing the interests of his mother and his siblings. He stated that the administrator admitted, on cross-examination, that he was the deceased's grandson and that his co-applicants in the application for revocation of grant included his mother, who is the deceased's daughter-in-law, and his siblings, who are also the deceased's grandchildren.
16. In addition, the 1<sup>st</sup> Protestor submitted that the administrator was trying to mislead the court further by not referring to the registration number of the land where the administrator's family lives and only referring to its location. According to the 1<sup>st</sup> Protestor, he ranks the same as the administrator in priority when it comes to the subject estate as they are both grandsons of the deceased. That the administrator admitted that his late father benefited from the deceased's estate during the lifetime of the deceased but failed to prove that the protestor's father had a similar benefit. It was thus the 1<sup>st</sup> Protestor's submission that the administrator and his siblings were not entitled to a share of the deceased's estate.

### **The 2nd Protestor's Submissions**

17. It was submitted on behalf of the 2<sup>nd</sup> Protestor herein that the grant made to the 1<sup>st</sup> Protestor in the lower court was revoked on the strength of the deception by the administrator and his co-applicants. That the applicants therein misled the court by stating that they were children and widow of the deceased yet they are the grandchildren and daughter-in-law of the deceased.
18. Further, the 2<sup>nd</sup> Protestor submitted that he bought land parcel no. Mwimbi/Chogoria/6303 (measuring 0.0038 Ha) out of the suit land from the 1<sup>st</sup> Protestor after the 1<sup>st</sup> Protestor had obtained a grant and the same was confirmed. That he conducted due diligence and found that the 1<sup>st</sup> Protestor had the legal capacity to sell and transfer the land to him. The 2<sup>nd</sup> Protestor thus submitted that he was an innocent purchaser for value and as such, his interests ought to be protected under the law. Further, that the revocation of the grant did not affect the validity of the transfer of the share of land he bought from the 1<sup>st</sup> Protestor and that the title of the same should be restored in his name given that the parties are allegedly not opposed to the same. To buttress his stand, the 2<sup>nd</sup> Protestor relied on the provisions of section 93(1) and (2) of the *Law of Succession Act* as well as the cases of *Onkobo Matundura & another - vs- Julius Moracha Matundura & another* [2014] eKLR and *Evangeline Kagumo Ndubi -vs- Cyprian Kitbara Ndubi* [2012] eKLR.

### **Analysis**

19. I have considered the summons for confirmation of grant dated January 12, 2018 as well as the affidavits in support and the affidavits of protests, together with the annexed documents. I have also considered the evidence tendered by the witnesses for the Administrator and the Protestors as well as the submissions by the learned counsels for the parties. It is not in dispute that the deceased died



- intestate. It is also not that the deceased had 4 wives. It is however in dispute whether the deceased had prior to his death distributed his estate comprising of different parcels of land to his sons. The issues that therefore arise for determination is whether land parcel no. L.R. Mwimbi/Chogoria/261 constitutes the estate of the deceased and if so, which is the suitable mode of distribution of the estate.
20. On the issue of whether land parcel no. L.R. Mwimbi/Chogoria/261 comprises the deceased's estate, it was the testimony of PW2 that the deceased gave his late husband, M'Meru M'Rithaa, a portion of land which is adjacent to the suit land. That her mother-in-law is the one who used to utilize the suit land and she is the one who gave her the land to utilize. According to PW1 and PW2, the suit land did not form part of the estate of the deceased. Going by their evidence and considering that L.R. Mwimbi/Chogoria/261 is the only property that is listed as comprising the deceased's estate, it would mean that there is no property available for distribution to the heirs of the deceased herein. However, that is not the case.
  21. On cross examination, PW2 testified that her children were all living in the land that her late husband was given and not on L.R. No. Mwimbi/Chogoria/261 which is the suit land herein. That she was not present when the deceased allegedly gave her late husband L.R. No. Mwimbi/Chogoria/261.
  22. On the other hand, when the 1<sup>st</sup> Protestor was questioned by this Court, he confirmed that he has never lived in the suit land. Further, that it is M'Rithaa who used to utilize the suit land. He however alleged that no one lives on the land at present.
  23. The evidence on record shows that title to the suit land was only transferred in the name of the 1<sup>st</sup> Protestor after the grant made to him in the lower court was confirmed. No evidence was adduced to substantiate the claim by the administrator herein that the deceased gave the suit land to the administrator's father or the claim by the 1<sup>st</sup> Protestor that the children of the deceased consented that the suit land should wholly be distributed to him. As such, it follows that L.R. No. Mwimbi/Chogoria/261 comprised the estate of the deceased at the time of his death. Indeed a certificate of official search dated 14/5/2010 which was filed in the lower court when the succession cause was filed in the lower court shows that the suit land was registered in the name of deceased on 9/12/1967.
  24. On the issue of the mode of distribution of the deceased's estate, it goes without saying that the rules of intestacy are applicable in the instant case given that the deceased died intestate. It is clear from the evidence of PW1, DW1, and DW2 the deceased had four wives; Mwagituma Miiiru (mother to Chabari Miiiru); Mwakanyua (mother to M'Rithaa Miiiru); Mwamwenda (mother to M'Kanga) and Mwandira (mother to M'Ndaka). From the family of the deceased, it is only the 1<sup>st</sup> Protestor, who is a son of the late Chabari Muriu, and the family of the late M'Rithaa Miiiru who have expressed interests in the suit land. The interests expressed by the 2<sup>nd</sup> Protestor and the Interested Party are as purchasers for value of the respective portions of land out of the suit land. Having noted that, I will first address the interests claimed by the purchasers.
  25. Vide its ruling dated June 14, 2017, this court found that the lower court had inadvertently handled the succession cause when it did not have the jurisdiction to do so. In revoking the grant issued to the 1<sup>st</sup> Protestor, this Court, vide an order issued by Justice Limo, was categorical that the value of the estate which was indicated to be Kshs. 300,000/= was way above the monetary jurisdiction of the then magistrate's court as per the provisions of the section 48 of the *Law of Succession Act*. It is therefore not true, as alleged by the 2<sup>nd</sup> Protestor, that the grant made to the 1<sup>st</sup> Protestor was revoked on the strength that the 1<sup>st</sup> Protestor had indicated that he was the son of the deceased and that his co-applicants were the widow and children of the deceased. The record shows that the grant was cancelled by the court on its own motion. Although there were other grounds in the summons for revocation of grant dated 26/4/26 they were not determined on merits.



26. The 2<sup>nd</sup> Protestor and the Interested Party further argue that their interests in the portions of the suit land that were transferred to them after the confirmation of the grant made to the 1<sup>st</sup> Protestor should be protected in line with the provisions of section 93(1) of the *Law of Succession Act*. The said provision stipulates as follows:

“All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

27. The question that begs determination at this point is the effect of the revocation of the grant made by the lower court for want of jurisdiction. It is trite that any act done without jurisdiction is a nullity and therefore bereft of any force of law. The Supreme Court in the case of *Samuel Macharia & Another vs. Kenya Commercial Bank Ltd & 2 others* [2012] eKLR had this to say on jurisdiction of courts:

“68. 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

28. From the foregoing, and in light of the facts of this case, it is my view that the grant issued by the lower court was a nullity in law and therefore null and void ab initio. This leads me to the undeniable conclusion that the grant made to the 1<sup>st</sup> Protestor in the lower court as well as any subsequent transactions stemming from the said grant were also null and void ab initio. In other words, the provision under section 93(1) of the *Law of Succession Act* cannot be used to justify the sale and transfer of portions of the suit land, which transactions were premised on an illegal grant. For avoidance of doubt, it is my view that the sub-division of the suit land into land parcels No. Mwimbi/Chogoria/6300; Mwimbi/Chogoria/6301; and Mwimbi/Chogoria/6303 were null and void.



29. Having found so, it follows that the suit land ought to be distributed only to the beneficiaries of the deceased. The wives of the deceased herein are all dead. It thus follows that the estate should be distributed in accordance with section 38 of the Law of Succession Act which provides as follows:-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Section 41 and 42 devolved upon the surviving child, if there be only one or shall be equally divided among the surviving children”.

30. Section 41 of the Law of Succession Act provides that:

“Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”

31. In this case, the 1<sup>st</sup> Protestor and the Administrator herein as well as the administrator’s siblings are all grandchildren of the deceased. In the case of Cleopa Amutala Namayi v Judith Were Succession Cause 457 of 2005 [2015] eKLR Mrima, J. observed that:

“... 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...”

32. It is believable from the evidence on record that the deceased distributed his estate to his sons. It was DW1’s testimony that the only son of the deceased that is still alive is one M’Kanga Miiru, who is in his sunset days as he is almost 90 years old. That the said M’Kanga Miiru has his own land which he was given by the deceased. PW2 confirmed in her testimony that his late husband was also given land by the deceased which is separate from the suit land. According to PW1, the 1<sup>st</sup> Protestor’s father also got land in Kiguru. While neither the registration numbers nor the sizes of the shares given to the deceased’s sons have been indicated or proved, it is clear from the evidence of the parties that the sons of the deceased benefited from estate of the deceased in his lifetime.

33. While there is evidence that the deceased also had daughters and one of them, Mugai Kirigia is still alive, it is only 1<sup>st</sup> protestor and the widow and children of the late M’Rithaa Miiru who have shown interest in the suit land. Neither the daughters of the deceased nor the family of the late N’Ndaka have however laid a claim in the estate. It can therefore be presumed that they renounced their right to claim a share in the estate as is allowed under the Act. This therefore leaves the 1<sup>st</sup> protestor and the widow and children of the late M’Rithaa Miiru as beneficiaries.



## **Conclusion**

34. In view of the foregoing, I opine that the most equitable of distributing the suit land, that is land parcel no. Mwimbi/Chogoria/261, to be distributed equally between the houses of the late M'Rithaa Miiru and the late Chabari Miiru.

I therefore order as follows:-\*\*

1. The protest has merits.
2. The estate of the deceased shall be distributed equally to the houses of M'Rithaa Miiru and that of the late Chabari Miiru.
3. The grant issued to the administrator shall be confirmed and distribution be as stated in (2) above.
4. Costs to the 1<sup>st</sup> protestor payable by the administrator.

**Dated, signed and delivered at Chuka this 18<sup>th</sup> day of April 2023.**

**L.W. GITARI**

**JUDGE**

**18/4/2023**

The Judgment has been read out in open court in presence of Mr. Mugambi holding brief for Ms Kaaria, Mr. Murithi for Petitioner and Mr. Kijaru for Protestor.

**L.W. GITARI**

**JUDGE**

**18/4/2023**

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