



REPUBLIC OF KENYA



In re Estate of Munyithya alias Munyuithya Mwendwa (Deceased) (Succession Cause 21 of 2015) [2023] KEHC 20685 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
SUCCESSION CAUSE 21 OF 2015**

LW GITARI, J

JULY 13, 2023

BETWEEN

PETER KAVITA MUNYITHIA ADMINISTRATOR

AND

DANIEL MWANZEA MWENDWA 1ST PROTESTOR

JENIFER MUTHIO MWENDWA 2ND PROTESTOR

STEPHEN MBUVI MWENDWA 3RD PROTESTOR

CRYMANT MASAI NYAGA 4TH PROTESTOR

JUDGMENT

1. This cause relates to the estate of Munyuithya Nyaga alias Munyuithya Mwendwa (deceased) who died intestate on July 30, 2001. A grant of letters of administration intestate was made to the 1st Administrator herein in Chuka Chief Magistrate’s Court Succession Cause No. 3 of 2013 but the same was consequently revoked on September 16, 2019 and a fresh grant issued to the 1st Administrator herein, as the sole administrator.
2. By a Summons for Confirmation of Grant dated and filed on September 25, 2019, the Administrator sought for an order distributing the estate of the deceased to his sons and daughters as per paragraph 8 of his affidavit in support of the application.
3. Subsequently, the protestors brought forth their protests against the mode of distribution of the estate proposed by the Administrator vide their respective affidavits of protest all sworn on February 10, 2020. They protested against the aforementioned Summons for Confirmation of Grant dated September 25, 2019 claiming that they were entitled to a share of the deceased’s estate.
4. The Protestors based their protest on the following grounds, *inter alia*:



- i. That one of the persons listed as a beneficiary of the deceased, one Mangangi Munyithiya, who is the son of the deceased and who is listed as a beneficiary of 4 acres of the suit land is now deceased.
 - ii. That one Annet Wanja Kinyua, who is listed as a beneficiary of 1 acre of the suit land is a purchaser and therefore a stranger to the estate.
 - iii. That the entire estate comprised in the suit land measures 12.30 Acres but the Administrator has distributed a total acreage of 23 Acres which is more than the entire land.
 - iv. That the protestors claim a share from the estate herein and have filed a suit at the lower court being Civil Suit No. 160 of 2018 where they are claiming a share thereof since the deceased was a step brother to the 1st, 3rd and 4th protestors and a step son to the 2nd Protestor, and that the deceased had been registered as the proprietor of the suit land by the deceased to hold in trust for the family since he was the first born son.
5. The 1st, 3rd and 4th Protestors herein are related to the administrator by virtue of being his step uncles. The 2nd Protestor is the administrator's step grandmother. The deceased left behind land parcel no. L.R. Magumoni/Mukuuni/465 (hereinafter the "suit land"). It is the Protestors' contention that the deceased was holding the suit land in trust for them.

The Protestors' Submissions

6. The Protestors' written submissions are dated October 11, 2022 and were filed on even date. It is their submission that the 2nd Protestor is the deceased's step mother whereas the 1st, 3rd, and 4th Protestors are the deceased's step brothers. That the land parcel no. L.R. Magumoni/Mukuuni/465 was registered in the name of the deceased to hold as trustee for the second household of the late which includes the protestors herein.
7. According to the Protestors, the allegation that the 2nd, 3rd and 4th Protestors are the registered owners of land parcel No. L.R. Magumoni/Mukuuni/464 or its subdivisions to wit L.R. Magumoni/Mukuuni/2806, 2807 and 2807 is false as the said land parcels are registered in the name of their step brother Jackson Muthamia Nyaga (deceased) as per the copies of the green cards attached to their affidavits. The Protestors thus maintain that they are entitled to a share of the estate herein the same being land parcel no. L.R. Magumoni/Mukuuni/465 and urged this Court to distribute half of the suit land amongst the Protestors despite the fact that their claim of the same based on trust has been dismissed by court.

The 1st Administrator's Submissions

8. On the other hand, the Petitioner's written submissions are dated October 24, 2022 and were filed on even date. He submitted that the deceased died intestate leaving one wife (now deceased) and 6 surviving children. Further, that the deceased left behind one parcel of land that is L.R. Magumoni/Mukuuni/465 which constituted his estate.
9. It was the submission by the 1st Administrator that the protestors claim on the subject estate is based on trust and that in this regard, the proceedings in this cause were stayed pending the hearing and determination of Chuka ELC Case No. 160 of 2018 which suit was dismissed. This led to the institution of an appeal the same being Chuka ELC No. 14 of 2021 which was heard and the court held that L.R. Magumoni/Mukuuni/465 was not a trust land. Given this backdrop, the 1st Administrator submitted that the protestors' claim of trust has already been determined in the proper court and that as such, the protests are not tenable in this cause.



10. The 1st Administrator thus prayed for the protests dated 10th February, 2020 be dismissed with costs to him and that the application for confirmation of grant dated September 25, 2019 be confirmed in terms of the paragraph 8 of the affidavit in support of the said summons application.

Issues for Determination

11. From the pleadings on record, the evidence adduced by the parties as well as their respective submissions, the main issues that arise for determination are:
- i. Whether the protests by the 1st – 4th Protestor are merited; and if not,
 - ii. Whether the grant issued on September 16, 2019 should be confirmed as proposed by the 1st Administrator.

Analysis

a. Merit of the Protest

12. According to PW1, the 2nd Administrator herein, the deceased was his step brother. He testified that their father had two parcels of land to wit, L.R. Magumoni/Mukuuni/464 and L.R. Magumoni/Mukuuni/465 and that parcel no. L.R. Magumoni/Mukuuni/465 was registered in the name of the deceased herein while L.R. Magumoni/Mukuuni/464 was registered in the name of Muthengi Nyaga Mwendwa. It was further PW1's testimony that the protestors used to utilize L.R. Magumoni/Mukuuni/465 together with the deceased during his lifetime and that they moved out of the land after the deceased died and the 1st Administrator chased them away from the land.
13. The 3rd, 4th and 2nd Protestors testified as PW2, PW3, and PW4 respectively. They all corroborated PW1's evidence and maintained that land parcel no. L.R. Magumoni/Mukuuni/465 was registered in the deceased's name for him to hold in trust for them.
14. From the Protestors' testimonies, it is not in dispute that the Protestors' claim on the suit land is based on trust. It is the protestors' contention that they used to utilize the suit land with the deceased and that after his death, the 1st Administrator went and chased them away from the land. The protestors allege that they moved to land parcel no. L.R. Magumoni/Mukuuni/464 after being chased away from the suit land.
15. This court has no jurisdiction to determine a claim based on trust or give any relief thereof. In any case, the protestors' claim based on trust was lodged before the Environment and Land Court which determined that there was no trust and dismissed the suit.

This matter was stayed on 12/2/2020 when the court was informed that there was a pending matter in the Environment and Land Court. On 4/10/2021 this court was informed that the Environment and Land Court had given its decision. An appeal was filed in the Environment and Land Court from the Magistrate's Court. The Judgment in ELC Appeal Case No.E014/2021 was availed to this court by counsel for the administrator. The parties in the suit were:-

Jennifer Muthio - 1st appellant

Daniel Mwanzia – 2nd appellant

Stephene Mbuvi Mwendwa – 3rd appellant

Cryman Masai Nyaga- 4th appellant

Versus



Peter Munyithia- (sued as the Administrator of the Estate of Munyithia Nyaga alias Munyithia Mwendwa – 1st respondent.

Annet Wanja Kanyua - 2nd respondent.

This was an Appeal from Chuka Chief Magistrate Case No.160/2018. The parties involved are the same parties before this court.

I have perused the Judgment. At page 29 of the Judgment the Judge, C. Yano held that-

“In this case the appellants were claiming the suit parcel based on alleged trust. The weight of the evidence presented to the trial court did not prove that the property was held in trust.

From the evidence presented, I am not persuaded that there was proof of the alleged fraud.”

It is clear that the land in reference in the said Judgment was Land Parcel Number Magumoni/Mukuuni/465 which is the same parcel of land in dispute in this succession cause. The Environment and Land Court presided over by Justice C.Yano is a court of equal status to the High Court. The court is established under article 162 (2) (b) of the Constitution which states as follows:

“Parliament shall establish courts with the status to the High Court to hear and determine disputes relating to-

(b) The environment and use and occupation of and title to land.”

It follows that this court cannot sit on appeal, on decision emanating from that court. The parties had agreed that this court should wait for the determination in the Environment and Land Court. That was an appreciation that the jurisdiction to determine the question of trust was in the Environment and Land Court. The question whether the deceased held the Land in dispute in trust was determined in the right forum. This court is not sitting on appeal against that decision. It follows that the protestors' claim in this court has no basis. The deceased did not hold the land in trust. The protestors have failed to prove that they are entitled to the estate of the deceased. Their claims must fail.

In deed even considering the evidence presented by the protestors in this court, the administrators proved that Land Parcel No. Magumoni Thuita/641 and Magumoni/Mukuuni/464 existed and Nyaga Kibondo husband of 2nd Protestor and was registered in trust for the 2nd protestor and her children. The claim that the deceased held the land in trust is unfounded.

b. Distribution of the estate

16. The provision of Section 71(1) of the Law of Succession Act provides:-

- “(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
- (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-
 - (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or



- (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
- (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
- (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”

It is clear that an application for confirmation of the grant is meant to authorize the distribution of any capital assets by the holder of a grant. It is not in dispute that the only asset forming part of the estate of the deceased is land parcel no. L.R. Magumoni/Mukuuni/465.

17. According to the 1st Administrator, the deceased left behind the following dependants:

- i. Kamomoya Mutemi – Daughter
- ii. Peter Kavita Munyithya – Son
- iii. Kamengele Munyithya – Daughter
- iv. Alice Gachoka Munyithya – Daughter
- v. Mwangangi Munyithya – Son
- vi. Bahati Munyithya – Daughter
- vii. Kathini Munyithya – Daughter (Deceased)

18. In the affidavit in support of the application for confirmation of the grant, the 1st Administrator herein proposed the distribution of the deceased’s estate as follows:

L.R. Magumoni/Mukuuni/465

- i. Peter Kavita Munyithya – 4.0 Acres
- ii. Mwangangi Munyithya – 4.0 Acres
- iii. Kamomoya Mutemi – 3.50 Acres
- iv. Kamengele Munyithya – 3.5 Acres
- v. Alice Gachoka Munyithya – 3.5 Acres
- vi. Bahati Munyithya – 3.5 Acres
- vii. Annet Wanja Kinyua – 1.0 Acres



19. This mode of distribution proposed by the 1st Administrators suggests that L.R. Magumoni/Mukuuni/465 measures 23 Acres. However as per the copy of the green card on record, the said parcel of land measures 12.30 Acres. As such, the proposed mode of distribution by 1st Administrator is not tenable. The administrator is empowered to distribute the net intestate Estate of the deceased and no more. In this case section 38 of the [Law of Succession Act](#) is applicable.
20. The administrator has proposed to distribute 1.0 Acres to one Annet Wanja Kinyua. The said Annet Wanja Kinyua is alleged to have purchased 1 Acre out of the suit property. The Sale Agreement between the 1st Administrator and the said Annet Wanja Kinyua was entered into on 26th January, 2013. This was before the confirmation of the initial grant that had been issued to the 1st Administrator. The said Annet Wanja Kinyua was not a survivor of the deceased. Section 82 (b) (ii) of the [Law of Succession Act](#) provides that – “no immovable property shall be sold before confirmation of the grant.” The purchaser Annet Wanja is not protected under section 93 of the [Law of Succession Act](#). The only remedy available to her is to pursue the 1st Administrator to recover the land that was allegedly sold to her from his share of the estate or a refund of the purchase money received from her.

All the beneficiaries are siblings and children of the deceased. Section 38 of the [Law of Succession Act](#) provides:-

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

The beneficiaries are all siblings. The Act advocates for equitable distribution of the estate to all the beneficiaries who are entitled to the estate. The proposed mode of distribution by the administrator is not equitable. Section 71 (2) of the [Law of Succession Act](#) gives the court the power to determine the rightful beneficiaries and their shares before a grant can be confirmed. It is provided:

“(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.”

This court cannot endorse the mode of distribution by the administrator as it does not conform to the provisions of the Act and is not capable of taking effect as he has distributed more than what forms the estate of the deceased.

Conclusion

21. From the foregoing analysis, I order that the estate of the deceased herein to wit L.R. Magumoni/Mukuuni/465 should be distributed as follows:
- i. Peter Kavita Munyithya – 2.05 Acres
 - ii. Mwangangi Munyithya – 2.05 Acres
 - iii. Kamomoya Mutemi – 2.05 Acres
 - iv. Kamengele Munyithya – 2.05 Acres
 - v. Alice Gachoka Munyithya – 2.05 Acres
 - vi. Bahati Munyithya – 2.05 Acres



22 The protests have no basis and are dismissed. I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 13TH DAY OF JULY 2023.

L.W. GITARI

JUDGE

