



REPUBLIC OF KENYA



Geoffrey & another v M'Buri ((Legal representative of the Estate of Geoffrey M'Mbuuri Magiri alias Buuri Magiri alias Mhuri Magiri – Deceased) (Civil Appeal E015 of 2020) [2023] KEHC 23152 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E015 OF 2020
LW GITARI, J
OCTOBER 5, 2023**

BETWEEN

RAPHAEL MURUNGI GEOFFREY 1ST APPELLANT

ELIAS MUTEGI M'BURI 2ND APPELLANT

AND

KENNETH MICHENI M'BURI RESPONDENT

**(LEGAL REPRESENTATIVE OF THE ESTATE OF GEOFFREY M'MBUURI
MAGIRI ALIAS BUURI MAGIRI ALIAS MBURI MAGIRI – DECEASED**

RULING

1. This cause relates to the estate of Geoffrey M'mbuuri Magiri alias Buuri Magiri alias Mhuri Magiri (Deceased) who died intestate on February 14, 1997. This ruling concerns the distribution of the deceased's estate.
2. The deceased left behind the following known assets:
 - a. LR Mwimbi/Murugi/1055 – 2.524 Ha
 - b. LR Mwimbi/Chogoria/367 – 1.42 Ha
 - c. LR Mwimbi/Murugi/520 – 2.02 Ha
3. The deceased was survived by the following beneficiaries:
 - a. Philis Keeru Geoffrey –widow
 - b. Raphael Murungi Geoffrey – son
 - c. Elias Mutegi M'Buri –son



- d. Watson Kithuci M'Buri –son
 - e. Anderson Mugambi M'Buri – son
 - f. Edwin Murithi M'Buri – son
 - g. George Njagi Geoffrey– son
 - h. Kenneth Micheni M'Buri– son
 - i. William Geoffrey Kithinji – son
 - j. Harriet Wanja M'Buri– daughter
 - k. Jane Karimi Mugambi – daughter
 - l. Winfred Kaari Kiogora – daughter
 - m. Alice Njeri Geoffrey - daughter
4. As per the judgment of this court delivered on November 3, 2022, the distribution of the subject estate was to be done by this court taking into consideration the report filed by the District Surveyor ascertaining the situation on the ground.
5. Below are the findings of Magdalene W. Njuki, the National County Surveyor – Chuka, as per her report that is dated March 13, 2023:
- a. LR Mwimbi/Chogoria/367
 - i. This parcel of land exists on the ground as on the map and it is not disputed by anybody.
 - ii. It measures 3.20 acres (1.30 Ha) as per ground measurements.
 - iii. A portion of 0.22 acres (0.09 Ha) is occupied by Elias Mutegi M'buri.
 - iv. Only 0.18 acres(0.07 Ha) of the remaining part can hold development and human settlement.
 - v. 2.65acres (1.07 Ha) cannot support human settlement but only cultivation. Currently, part of it contains tea plantation.
 - vi. The parcel of land can only be accessed from Embu-Meru road which is very steep. The family accessed the parcel from the upper side through somebody's land. Proposed access road from the main road is 0.14 acres (0.057 Ha)
 - b. LR Mwimbi/Murugi/1055
 - i. This parcel of land exists on the ground as on the map and it is not disputed by anybody.
 - ii. It measures 6.30acres (2.55 Ha) as per ground measurements.
 - iii. A portion of 0.21 acres (0.09 Ha) is occupied by Phylis Keru Geoffrey and 0.18 acres (0.07 Ha) is occupied by Edwin Muriithi M'Buri as per the sketch attached to the surveyor's report.
 - iv. The remaining part of 5.88 acres (2.38 Ha) can support development, human settlement as well as cultivation.



- v. Access road for the two people on the ground is 0.07 acres (0.02 Ha). This may change in case of future subdivision as it will be guided by scheme plan.
- c. LR Mwimbi/Murugi/520
- i. This parcel of land exists on the ground as on the map and it is not disputed by anybody.
 - ii. It measures 5.30 acres (2.15 Ha) as per ground measurements.
 - iii. It is occupied by:
 - a. Phylis Keru Geoffrey – 0.21 acres (0.09 Ha)
 - b. Kenneth Micheni M’Mhuri – 0.20 acres (0.08 Ha)
 - c. Anderson Mugambi M’Buri – 0.11 acres (0.04 Ha)
 - d. Raphael Murungi Geoffrey – 0.25 acres (0.101 Ha)
 - e. Elias Mutegi M’Buri – 0.41 acres (0.165 Ha)
 - f. George Njagi Heoffrey – 0.26 acres (0.15 Ha)
 - iv. 1.60 acres (0.65 Ha) can support development, human settlement as well as cultivation.
 - v. 1.30 acres (0.53 Ha) cannot support development only cultivation. Currently is under tea plantation.
 - vi. Access road for the people on the ground is 0.08 acres (0.03 Ha). This may change in case of future subdivision as it will be guided by scheme plan.
6. In the judgment dated November 3, 2022, this COurt was guided by the holding in the case of Justus Thiora Kiungu & 4 others v Joyce Nkatha Kiugu & another [2015] eKLR where the Court of Appeal noted that a random distribution is likely to misplace some members of the family who have settled and perhaps developed some assets that are distributed to others, which would fuel more conflicts in the family. Guided by that decision, this court found that in distributing the estate of deceased person, a probate court should be inclined to consider the developments on the ground and should as much as possible not disturb the occupation on parcels where permanent structures have been built.
7. In this case, the deceased died intestate leaving behind a spouse and twelve (12) children. The distribution of his estate is thus catered for under the provisions of section 35 of the [Law of Succession Act](#). Section 35(1) of the Act provides that:
- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
 - (a) the personal and household effects of the deceased absolutely; and
 - (b) a life interest in the whole residue of the net intestate estate: provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”
8. The rights the spouse and the surviving children of the deceased are well captured in section 35 (2), (3) (5) of the [Law of Succession Act](#) which provides as follows:

“



- “(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
- (3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.
- (4)...
- (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

9. From my reading of section 35 of the [Law of Succession Act](#), it is clear that the said section was expressly meant to cater for the surviving spouse and the children of the deceased. In arriving at an appropriate formula on the mode of distribution in this case, the letter and spirit of part (v), of the [Law of Succession Act](#) and more specifically section 35 and 38 should be adhered to unless there are exceptional circumstances for the court to exercise discretion to the contrary.
10. I have carefully considered the surveyors report by Magdalene W. Njuki. I have noted that some beneficiaries are in occupation of some of the parcels of land left by the deceased. I have also noted that there are portions of land in LR Mwimbi/Chogoria/367 and LR Mwimbi/Murugi/520 that cannot support human settlement but only cultivation. Further, I have noted that there are some beneficiaries who are not in occupation of any portion of the land parcels forming part of the estate of the deceased and 2.65 acres in LR Mwimbi/Chogoria/367 and 1.3 acres in LR Mwimbi/Murugi/520 cannot support human development but can only support cultivation and are currently under tea plantation. In addition, I have considered that a total of 0.29 acres has been attributed to access roads to the three properties. I now turn to address and determine the distribution of the estate of the deceased to his beneficiaries.
11. Considering that the provision of section 35(5) and 38 of the [Law of Succession Act](#) emphasize the doctrine of equal share and not equity, and also considering the facts of this case, it is my view that the subject estate should be distributed as follows:
- a. LR Mwimbi/Murugi/1055 – 6.3 acres
 - i. Watson Kithuci M’BurI – 0.81 acres
 - ii. Edwin Murithi M’Buri – 0.8 acres
 - iii. William Geoffrey Kithinji – 0.8 acres
 - iv. Philis Keeru Geoffrey – 0.59 acres
 - v. Raphael Murungi Geoffrey – 0.55 acres
 - vi. Watson Kithuci M’Buri – 0.8 acres
 - vii. Anderson Mugambi M’Buri – 0.19 acres



- viii. Edwin Muriithi M'Buri – 0.62 acres
- ix. William Geoffrey Kithinji – 0.8 acres
- x. Harriet Wanja M'Buri – 0.8 acres
- xi. Jane Karimi Mugambi – 0.8 acres
- xii. Winfred Kaari Kiogora – 0.8 acres
- xiii. Alice Njeri Geoffrey – 0.8 acres
- b. LR Mwimbi/Chogoria/367 – 3.2 acres
 - i. Elias Mutegi M'Buri – 0.4 acres
- c. LR Mwimbi/Murugi/520 – 5.3 acres
 - i. Philis Keeru Geoffrey – 0.21 acres
 - ii. Raphael Murungi Geoffrey – 0.25 acres
 - iii. Elias Mutegi M'Buri – 0.41 acres
 - iv. Anderson Mugambi M'Buri – 0.61 acres
 - v. George Njagi Geoffrey – 0.76 acres
 - vi. Kenneth Micheni M'Buri – 0.8 acres
- d. The 2.65 acres in LR Mwimbi/Chogoria/367 and 1.3 acres in LR Mwimbi/Murugi/520 which can only support cultivation and not human development and which are currently under tea plantation to be shared equally by all the 13 beneficiaries.

The grant be confirmed and the estate be distributed as stated under paragraph 11 above.

Dated, signed and delivered at Chuka this 5th day of October 2023.

L.W. GITARI

JUDGE

