



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 221 OF 2015**

**IN THE MATTER OF ESTATE OF GATUMO NJIMUKO (DECEASED)**

JONES NJURA GATUMU.....1<sup>ST</sup> APPLICANT/ PETITIONER

KANYIVA GATUMU.....2<sup>ND</sup> APPLICANT/ PETITIONER

FAUSTINE NDWIGA GATUMU.....3<sup>RD</sup> APPLICANT/ PETITIONER

**VERSUS**

**MARIGU GATUMU.....RESPONDENT/ PROTESTOR**

**JUDGMENT**

1. Letters of Administration in relation to the estate of deceased herein (Gatumu Njimuko) was granted jointly to the applicants herein and the respondent on 2.09.2015. The said grant was confirmed vide the orders of 23.05.2016. However, the respondent herein filed summons for revocation of the said grant dated 10.04.2019 and which application was allowed in a ruling delivered on 25.07.2019 by Hon. Muchemi J. The court in its ruling directed that the administrators jointly or separately file an application for confirmation of grant taking into account all rightful beneficiaries within sixty (60) days.

2. In compliance with the said orders, the applicants herein filed summons for confirmation of grant dated 20.09.2019 and in the affidavit in support of the same, they made their proposed mode of distribution of the estate of the deceased and which was indicated to be comprised of LR. Gaturi/ Nembure/xxxx, LR Gaturi/Nembure/xx, LR Gaturi/Nembure/ xx, Plot No. x Kihumbu, LR Mbeti/Gachuriri/xxxx and LR. Nthawa/ Gitiburi/xxxx.

3. The summons was opposed by the respondent vide an affidavit of protest to confirmation of grant and wherein she opposed the mode of distribution of LR. Gaturi/Nembure/xx and LR. Mbeti/Gachuriri/xxxx. The applicants herein swore a joint replying affidavit wherein they opposed the mode of distribution as proposed by the respondent in relation to the said LR Gaturi/ Nembure/ xx. However, they agreed to the respondent getting a ¼ of LR Mbeti/ Gachuriri/xxxx in her own name.

4. When the application came up for hearing, the parties herein recorded a consent in relation to the distribution of LR Mbeti/ Gachuriri/xxxx. The parties further recorded a consent as to the distribution of LR Gaturi/Nembure/xx save for the distribution as was proposed in paragraph 5(iii) of the affidavit in support of summons for the confirmation of grant by the applicants herein dated 20.09.2019. The parties consented that they do file submissions in respect to the said paragraph and more so on **“whether the protestor Marigu Gatumu should get an extra portion of land measuring 0.3 Hectares out of LR Gaturi/ Nembure/ xx being a share of her late son Sylvester Ngari Gatumu”**.

5. In compliance with the said orders, the parties herein filed their respective submissions. In a nutshell, the protestor submitted that she is opposed to one Lawrence Ndwiga Gatumu getting 0.47 Ha as he ought to be getting 0.30 Ha out of land parcel no. Gaturi/Nembure/xx like the rest of the beneficiaries. She further submitted that she ought to get 0.30Ha out of land parcel No. Gaturi/Nembure/xx being her late son’s Silverster Ngari Gatumu’s portion. She further submitted that she had problems with Anastacia Wanjira Gatumu and Faustine Ndwiga Gatumu getting 0.17Ha and 0.3xHa respectively. It was her submissions that once herself, Margaret Wanja Murithi, Diana Mukami Muriithi, Maureen Nyawira Muriithi (jointly), Festus Ileri Gatumu and Lawrence Ndwiga Gatumu get 0.30 Ha each, the balance which is 0.5xx Ha should be shared by the 4 houses at 0.147ha per house. She submitted that the said Silverster Ngari Gatumu died in 199x leaving a widow Honesty Mwari Nkabu and daughter Joan Mukami Ngari who is now deceased and after his death, the said widow became the administrator of his estate vide succession 212 of 199x at Embu Law Courts.

6. Further that the deceased herein had sub-divided LRs Gaturi/ Nembure/ xx and Gaturi/Nembure/xx into ten portions so as to settle his ten children Silverster Ngari included and the nine sons given their respective share but Silverster Ngari’s wife was not given her deceased husband’s share and she later left the family. She thus demands the said land parcel which belongs to her deceased son as he left a widow who should inherit just like the other sons. That she wants the land so that she can give the same to Ngari’s wife who left the family

frustrated after she was not settled like the other family members.

7. The petitioners on their part submitted that the protestor is getting a share out of parcel numbers LRs Gaturi/ Nembure/ xxxx, xx and Plot No. x Kihumbu and also ¼ share of LR Mbeti/ Gachuriri/xxxx. As such, it was submitted, the protestor was not left out or discriminated in the distribution of the deceased's property and thus it was selfish and greedy for her to demand that she given an extra 0.30 ha that could have been given to her son. Further it was submitted that the legal position is that where there are more than one wife of the deceased then his property ought to be shared out amongst all his wives and children who are alive. As such the petitioners prayed that the petition be dismissed.

8. I have considered the summons, affidavit of protest herein, the reply thereto and the rival written submissions. As I have already pointed out, the parties herein agreed on the issue which this court ought to determine (**whether the protestor Marigu Gatumu should get an extra portion of land measuring 0.3 Hectares out of LR Gaturi/ Nembure/ xx being a share of her late son Sylvester Ngari Gatumu**). It is my considered view therefore that this court ought to restrict itself to that issue only. I therefore proceed to determine the same.

9. It is not disputed that the protestor is the mother to **Sylvester Ngari Gatumu** who was the son to the deceased. Further it is not disputed that the said Sylvester is now deceased. From the records, the deceased herein died on 26.10.2009. The Chief's letter attached to the petition indicates that Sylvester Ngari Gatumu is deceased. The respondents in their joint replying affidavit deposed that the said Sylvester Ngari died on 24.04.199x and which was about 11 years prior to the death of the deceased. They annexed the copy of the death certificate belonging to the said Silvester. From the said certificate, it is clear that the said Sylvester died on 24.04.199x. It is thus clear that the deceased herein predeceased his son Silvester.

10. The deceased having died intestate, it means that his estate and distribution thereof is subject to the rules of intestacy. According to the Law of Succession, a person can either distribute his estate by way of a will or in absence of a will, the estate is subjected to the rules of intestacy. From the reading of Sections 35, 36, 3x and 40 of the Act, the legislature contemplated the rules to apply where the deceased left behind survivors. That is why the heading of the said sections has the word "surviving". What this means therefore is that where a child of a deceased person has predeceased him or her, then such a child cannot be said to be a beneficiary. The rightful beneficiary ought to be the spouse of the deceased child (who should hold his share in trust for the children of the deceased child) or where the deceased child is not survived by a spouse but has children, the right person as the beneficiary of the deceased's estate ought to be his children (grandchildren of the deceased). Where the child who predeceased the deceased was not survived by either a child or spouse, then such a deceased child cannot be said to be a beneficiary of the estate. It is in the same breath that even under testate succession, a gift will always fail if the legatee predeceases the testator. It is my considered view that the protestor is misguided in law when she deposed that she ought to inherit the share which ought to have been inherited by her deceased son (Silvester).

11. In her written submissions, she appears to change the position and she submitted that she demands the said land parcel which belongs to her deceased son as he left a widow who should inherit just like the other sons. That thus she wants the land so that she can give the same to Ngari's wife who left the family frustrated after she was not settled like the other family members. She deposed and further submitted that the wife to Silvester left home after she was denied her share and that they had a daughter who is now deceased. Further that Silvester died and left a widow one Honesty Mwari Nkabu and daughter Joan Mukami Ngari who is now deceased and after his death, the said widow became the administrator of his estate vide **succession 212 of 199x at Embu Law Courts**.

12. This means that she acknowledges that the said Silvester was survived by a spouse and a child who is now deceased.

13. Where a beneficiary son predeceases the deceased and such beneficiary had a spouse, the surviving spouse (daughter in law to the deceased) ought to be the beneficiary of the estate in the place of the deceased son. I am guided by the case of **Nahashon Karungu Macharia –vs- Rosemary Kahura Njoroje (2016) eKLR** where the court recognized a daughter in-law (a widow to a son of the deceased) as one of the beneficiaries of the estate of the latter deceased parent-in-law. (See also **In Re Estate of Samuel Gichuhi Mugambi Alias Gichuhi S/O Mugambi (Deceased)201x eKLR**).

14. What this means therefore is that it is the said spouse who ought to be litigating on behalf of her deceased husband's estate as a beneficiary and not the protestor herein. There is no evidence that she appointed the protestor herein to institute the said protest on her behalf. Neither is there any affidavit by the said widow in support of the protestor's averments in relation to the issue herein (either that she wants the deceased husband's share or that the same be given to the protestor). Her whereabouts are not disclosed either.

15. It is my considered view that the said spouse, whom the protestor seems to be litigating on behalf of, ought to have been the right protestor being the spouse of one Sylvester and the administrator of the estate of her deceased husband. The protestor having recognized the existence of the said widow, she is the right person to follow up on the share of her deceased husband. It would be prejudicial for instance if this court was to give the alleged share to the protestor and thereafter Silvester's widow comes out claiming her husband's share.

16. Further, it would be illegal to give Silvester's share to the protestor whereas he left behind a spouse and whose existence the protestor acknowledges and brought to the attention of the court. In my view, Silvester's wife is the right person entitled to administer his estate. It is my considered view therefore that the objector herein does not have *locus standi* to file the instant protest. The protestor would be having *locus standi* if she was following up on her own share but not that of her late son. (Silvester).

17. In the premises, the protest fails. This being a succession cause and which involves close family members, each party should bear his/ her own costs.

18. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16<sup>TH</sup> DAY OF JUNE, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicants

.....for the Protestor