



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**SUCCESSION APPEAL NO. 20 OF 2019**  
**IN THE MATTER OF THE ESTATE OF KAHIGA MWATHI (DECEASED)**  
**VIRGINIA KARUNGARI CHUMA.....APPELLANT**  
**VERSUS**  
**STEPHEN MWATHI KAHIGA.....RESPONDENT**  
**(Being an Appeal from the Judgment of Senior principal Magistrate Hon. P. Mutua delivered on 10/12/2019 in Nyeri Chief Magistrate's Court Succession Cause No. 489(B) of 2018).**

**JUDGEMENT**

**Brief facts**

1. On 10<sup>th</sup> December 2019 the Senior Principal Magistrate pronounced himself in a judgement in Succession Cause No. 489(B) of 2018 in a protest against confirmation of grant. The court after hearing the parties dismissed the protest.

2. Being aggrieved with the decision of the trial court, the appellant lodged this appeal citing nine(9) grounds thus:-

That the learned magistrate erred in law and in fact in:-

- a. failing to include all the properties that belonged to the deceased at the time of his death;
- b. failing to acknowledge the appellant as a beneficiary of the estate and thus entitled to a share;
- c. failing to appreciate that the land alleged to be given to the appellant had already been sold by the deceased during his lifetime;
- d. Failing to acknowledge that the appellant has been in occupation of AGUTHI/GAKI/1777 for over 29 years;
- e. dismissing the appellant's protest dated 23<sup>rd</sup> July 2019.

3. Parties disposed of the appeal by way of written submissions.

**The Appellant's Submissions**

4. The appellant submits that she filed her protest dated 23<sup>rd</sup> July 2019 opposing the mode of distribution as set out in the summons for confirmation of grant dated 7<sup>th</sup> June 2019 on the basis that the respondent had left out two properties of the deceased which are AGUTHI/GAKI/1772 and AGUTHI/GAKI/1776. Further, that Land Parcels No. AGUTHI/GAKI/1772, 1776 and 1777 were in the names of the deceased. The beneficiaries bequeathed the respective land parcels have been living there which information the respondent was aware of. Further the respondent testified that there was a meeting held in the presence of the deceased whereby the deceased bequeathed the respondent Land Parcel No. AGUTHI/GAKI/1777. The appellant contends that the meeting did not amount to an oral will in favour of the respondent. The appellant relied on the case of **In the Matter of the Estate of Simon Gitonga Gathirua (Deceased) Nyeri High Court Succession Cause No. 374 of 2011.**

5. The appellant further submits that the respondent did not prove by way of documentary evidence that the deceased had bequeathed the

appellant a share of NAROMORU/NAROMORU/BLK/AGUTHI/801. The respondent produced a bank statement showing a deposit of Kshs. 400,000/-, made on 23<sup>rd</sup> June 2010 by the appellant into the deceased's bank account. The appellant argues that the deposit is not sufficient evidence to show that the appellant was given proceeds from the sale of the said land parcel. This was supported by the respondent's oral testimony in which he admitted that he did not produce any documentary evidence to show that the appellant was given any money being her share from the proceeds of the sale of the said parcel of land.

6. The appellant submits that she was excluded from the distribution of Land Parcel No. UASONYIRO/SUGUROI/BLOCK IV/464 yet she is the daughter to the deceased and thus a beneficiary of his estate.

7. The appellant submits that the deceased had bequeathed her Land Parcel No. AGUTHI/GAKI/1777 and to support her contention she relies on **Section 42 of the Law of Succession Act** and on the **case of Nyeri High Court Succession Cause No. 374 of 2011 In the Matter of the Estate of Simon Gitonga Gathirua (Deceased)**. It is the appellant's submission that all the witnesses testified that she has been living on the land AGUTHI/GAKI/1777 and that Phyllis Wanjiku Kahiga and Lawrence Maina Kahiga were similarly bequeathed Land Parcels No. AGUTHI/GAKI/1772 and 1776 respectively. These two said parcels of land were left out in the list of assets of the deceased and that the respondent only included AGUTHI/GAKI/1777 in a bid to disinherit the appellant herein.

8. The appellant further submits that the respondent was already given AGUTHI/GAKI/1773 which he confirmed at the hearing, yet he gave himself Land Parcel No. AGUTHI/GAKI/1777 yet he is aware that it had been given to the appellant and that she has been living there.

9. The appellant submits that all the children of the deceased, are entitled to a share of their late father's estate. Hence, she ought to be given her rightful share in Land Parcel No. AGUTHI/GAKI/1777 and UASONYIRO/SUGUROI/BLOCK IV/464 together with her siblings who all got shares.

### **The Respondent's Submissions**

10. The respondent submits that the family held two meetings on 3<sup>rd</sup> January 2009 and 28<sup>th</sup> February 2011 and in the meeting of 3<sup>rd</sup> January 2009, the deceased bequeathed the Land Parcel No. AGUTHI/GAKI/1777 to him. He further stated that this fact was also admitted by the appellant in her oral evidence and she also confirmed that she attended the said meeting. The respondent states that the appellant contradicted her evidence by later stating that the deceased changed his mind on giving the respondent the said parcel of land but she did not produce any evidence to support her claim. Also in the same meeting, it was concluded that the deceased and the appellant would share Land Parcel No. NAROMORU/NAROMORU AGUTHI/BLI/801.

11. Further, in the meeting of 28<sup>th</sup> February 2009, it was recorded that the deceased had sold Land Parcel No. NAROMORU/NAROMORU/AGUTHI BLI/801 and that the proceeds (Kshs. 700,000/-) were shared between the deceased and the appellant at Kshs. 400,000/- and Kshs. 300,000/- respectively. The appellant is the one who deposited the money Kshs.400,000/= in the deceased's bank account and retained her share. Notably, the appellant did not attend the 2<sup>nd</sup> meeting but the deceased made the report on the sale and the sharing of the proceeds. Also in the meeting, the respondent submits that the deceased repeated in that meeting that Land Parcel No. AGUTHI/GAKI/1777 was given to him. He further stated that though the recordings in the said two meetings do not amount to a will, they clearly show the specific intentions of the deceased. Notably, all the beneficiaries other than the appellant were not opposed to the respondent's application for confirmation of grant.

12. The respondent submits that the appellant only intimated her interest in Land Parcel No. AGUTHI/GAKI/1777 and not Land Parcel No. UASONYIRO/SUGUROI/BLOCK IV/464.

13. The respondent further submits that he did not include the two properties because he thought that the persons who were bequeathed to had already effected the transfer to themselves. He adds that the omission of the said properties could be effected by an application for rectification of the grant at a later stage. According to him this was not a suitable ground of appeal.

14. The respondent argued that he and the appellant both benefited from the gifts inter vivos from their father. Although she claimed that the deceased changed his mind about giving the Land Parcel No. AGUTHI/GAKI/1777 to the respondent she did not give any evidence on how the deceased changed his mind. She therefore did not discharge the burden of proof.

15. The respondent in conclusion stated that the fact that the appellant lived on the said parcel of land does not mean that she ought to inherit the same. The minutes of meetings clearly show the intentions of the deceased.

### **Issues for determination**

I have identified the issues for determination herein as follows:-

- a. Whether the learned magistrate erred in not finding that some properties had been left out of the list of assets.
- b. Whether the appellant was excluded by the respondent from the deceased's estate in regard to inheritance.
- c. Whether the deceased distributed some of his properties to some beneficiaries during his lifetime, and, if not so, what is the mode of distribution to be adopted in accordance to the law.

### **The Law**

**Whether the magistrate erred in not making a finding that the respondent had left out some of the properties from the list of assets**

16. It is the appellant's contention that Land Parcel Nos. AGUTHI/GAKI/1772 and AGUTHI/GAKI/1776 were omitted from the list of assets. The respondent admits that the two said properties were not included in the list and states that he thought that the persons who were given the land parcels had effected the transfers to themselves. He further adds that the omission can be cured through an application to rectify the grant.

17. The respondent has not denied leaving out two of the deceased's properties out of the list of assets. The explanation by the respondent that the omission could be cured by an application to review or to rectify the grant is not satisfactory in my view.

18. The respondent as the administrator of the estate in my view ought to have used due diligence in preparing the list of the deceased's assets. In case he was not aware of the existence of some of the properties, and the matter was brought to his attention, he had an obligation to put the record right. I am surprised that even at this late stage of appeal, the respondent still wants the court to buy his argument that the omission was a minor issue. He ought to have moved and rectified the situation for the benefit of all the beneficiaries unless his action was meant to serve an ulterior motive.

19. The appellant alleges that one of the properties left out may have been transferred to another person whom she did not name. The respondent further stated that even if the two properties were left out, they can be included and be given to his nephew and brother Duncan Kahiga Wanjiku and Lawrence Maina Kahiga respectively because the deceased had given them the said parcels during his life time. I note that official search was produced by the appellant attached to her protest in respect of L.R Aguthi/Gaki/1772 and 1776 shows that the parcels of land are still in the name of the deceased Kahiga Mwathi. The omission herein is evidence of non-disclosure and breach of legal duty as an administrator on the part of the respondent.

20. It is imperative to note that this evidence was before the learned magistrate, yet he made no finding on the appellant's case that some assets of the deceased had been left out by the respondent in the list of assets. Neither did the court determine distribution of the said assets. I find that the magistrate erred in law and fact in failing to determine the said issue.

**Whether the deceased distributed some of his properties during his lifetime**

21. The property in contention is Land Parcel No. AGUTHI/GAKI/1777 to which the appellant says was given to her and that she resides therein for the last 29 years. The second item was the proceeds of sale for L.R No. Naromoru/Naromoru/801 allegedly given to the appellant. The respondent on the other had states that the deceased bequeathed him L.R Aguthi/Gaki/1777 which was reflected in the minutes dated 3<sup>rd</sup> January 2009.

22. There are certain elements which must be demonstrated to prove that indeed a deceased person gave out a gift inter vivos. Section 42 of the Law of Succession act is instructive on this it provides

**Where:-**

**(a) An intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate. That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child, grandchild or house.**

**That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child, grandchild or house.**

23. Section 42 provides that during the distribution of the estate, previous benefits or gifts inter vivos be taken into consideration when determining the share of each child.

24. However, he who alleges must prove that indeed the deceased gave out the property or gift during his/her lifetime. The respondent relies on the minutes of the meeting as proof that the deceased bequeathed to him the said property whereas the appellant states that the deceased changed his mind about giving the respondent the said land and gave it to her and that she has been in occupation for 29 years.

25. The minutes of 28/02/2011 and of 03/01/2009 that distributed the property of the deceased actually left out the appellant. She was to be given a share of L.R. Naromoru/Naromoru/Aguthi/Block 2/801 which the deceased later sold. It was further argued by the respondent that the deceased gave part of the proceeds of sale amounting to Kshs.300,00/- to the appellant. The banking slip produced was for crediting the account of the deceased with kshs.400,000/- by the appellant. The respondent did not produce any evidence to the effect that Kshs.300,000/- was given to the appellant. Even assuming that it was, that sum would not be sufficient to buy land for the appellant in Nyeri county to place her on equal or near to equal status with her siblings who were given the land at Aguthi and at Naromoru. The correct position is that the appellant's interest in the estate as a rightful heir was not addressed by the trial court.

26. Looking at the mode of sharing of the respondent which he says he based on the wishes of the deceased, a number of observations may be made. Firstly, three parcels of land belonging to the deceased were not accounted for in his affidavit. Secondly, one of the rightful beneficiaries the appellant was not included in the distribution of her late father's estate. Thirdly, the distribution did not consider equity in that one beneficiary has been given three(3) hectares of land in one parcel while another child of the deceased was disinherited.

27. In conclusion, I am of the view that the so called wishes of the deceased cannot pass the test of fairness among his children in the distribution of the estate.

### **Whether the deceased died testate or intestate**

28. The records and the evidence as a whole demonstrates that the deceased died intestate in that he left no will for the distribution of his property.

**Section 34 of the Law of Succession Act provides:-**

**“A person is deemed to die intestate in respect of all his life property of which he has not made any will which is capable of taking effect”**

29. Having died intestate in 2011, the Law of Succession Act Cap 160 which came into force in 1981 applies to the distribution of the deceased's property herein.

30. The relevant law where the deceased is not survived by a spouse but by children is Section 38 of the Act which provides:-

**“Where the intestate is survived by a child/children only the estate shall devolve upon the surviving child if there be one or shall be divided equally among the surviving children.”**

The mode of distribution by the respondent is therefore contrary to the law and to the constitution.

31. Article 27 of the Constitution outlaws discrimination in every aspect of life.

I am of the considered view that the children of the deceased ought to share the assets equally as provided by the constitution and by Section 38 of the Act

### **Identification of Assets and of the Beneficiaries**

32. The heirs of the estate have been identified as follows:-

1. Stephen Mwathi Kahiga
2. Margaret Nyambura Mukunya
3. Lawrence Maina Kahiga
4. Virginia Karungaru Chuma
5. Duncan Kahiga Wanjiku
6. Samuel Muchiri
7. Kahiga Wairimu

33. The known assets of the deceased are:-

1. Uasonyiro/Suguroi/Block iv/464 measuring 8 hectares
2. Aguthi/Gaki/1772
3. Aguthi /Gaki/1773
4. Aguthi/Gaki/1776
5. Aguthi Gaki /1777
6. Aguthi/Gaki/1778

34. From the searches annexed by the appellant, the Aguthi/Gaki parcels measure between 0.445 and 0.611 ha. As such, the difference in sizes is negligible. Except parcel No. Aguthi/Gaki/1777, both the appellant and the respondent agree that the deceased gave his children their respective parcels to cultivate and even reside therein. The court in distributing the properties will as much as possible not disturb the occupation of the said parcels located at Gaki - Aguthi area where most of the beneficiaries have settled.

35. In regard to LR. Aguthi/1777 the appellant states that she has been residing on the land with her children for the last 29 years. I have perused the evidence of the respondent and note that he did not dispute the appellant's evidence on the said occupation which was supported by other beneficiaries. Although the respondent claimed that the land was given to him by the deceased as shown in the minutes of the

family meeting, court has found said minutes to be contrary to law of distribution. Furthermore, the respondent has another parcel Aguthi/Gaki/1773 which no one disputes was given to him by the deceased and which he could be occupying like other beneficiaries have done in regard to theirs. It is also important to note that no other beneficiary claims more than one parcel of the Aguthi-Gaki parcels save for the respondent who claims a second parcel. Article 27 of the Constitution outlaws discrimination and Section 38 of the Act provides for the manner in which distribution ought to be done in a case like this one.

36. In conclusion, I find that the learned magistrate in his judgement failed to address the issues raised by the appellant in her protest regarding L.R Aguthi/Gaki 1777. I find further that the magistrate erred in holding without evidence that the appellant was given kshs.300,000/- by the deceased and by going further to hold that the said amount was sufficient share for the appellant in the estate. The court also erred in disregarding the appellant's evidence in regard to the assets that were omitted in the list of assets which are a demonstration of bad faith on part of the respondent.

37. It is my finding that this appeal is merited and I hereby allow it accordingly. I hereby set aside the judgment of the Senior Principal Magistrate delivered on 10<sup>th</sup> December, 2019.

38. I proceed to distribute the estate of the deceased as follows:-

**A) Uasonyiro/Suguroi Block IV/464 to be shared equally among the following:-**

- i. Stephen Mwathi Kahiga
- ii. Margaret Wanjiku Wandeto – Her share to go to her children Duncan Kahiga Wanjiku and Samuel Muchiri Waniku in equal shares
- iii. Margaret Nyambura Mukunya
- iv. Lawrence Maina Kahiga
- v. Virginia Karungari Chuma
- vi. Kahiga Wairimu

**B)L.R. Aguthi/Gaki/1773 - Stephen Mwathi Kahiga**

**C)L.R Aguthi/Gaki/1776 -Lawrence Maina Kahiga**

**D)L.R Aguthi/Gaki/1772 -Duncan Kahiga Wanjiku**

**E)L.R Aguthi/Gaki/1777 -Virginia Karungari Chuma**

**F)L.R Aguthi/Gaki/1778 - Margaret Wanjiku Wandeto**

**G)Shares Tetu Housing co-operative society limited**

-To be sold and proceeds be shared equally between all the beneficiaries.

39. Certificate of confirmation to issue.

40. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 3<sup>RD</sup> DAY OF JUNE, 2021**

**F. MUCHEMI**

**JUDGE**

**JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 3<sup>RD</sup> DAY OF JUNE 2021**