



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 103 OF 2014**

**IN THE MATTER OF THE ESTATE OF GEOFFREY MUKUNU MUTUGI Alias MUKUNU MUTUGI (DCD)**

**MARGARET MUTHONI MUKUNU .....PETITIONER**

**V E R S U S**

**FLORENCE WANGUI MUKUNU ..... PROTESTOR**

**JUDGMENT**

1. This matter relates to the estate of Geoffrey Mukunu Mutugi alias Mukumu Mutiga(deceased).

2. The petitioners Florence Wangui Mukunu and Margaret Muthoni Mukunu applied for Grant of letters of administration intestate of the estate of Geoffrey Mukunu Mutugi alias Mukunu Mutugi (deceased) which they were granted on 04/07/2014. They proceeded to file an application for confirmation of grant dated 22/12/2014 in which they stated that the deceased was survived by the following dependants;

- a) Margaret Muthoni Mukunu - 1<sup>st</sup> Widow
- b) Florence Wangui Mukunu - 2<sup>nd</sup> Widow
- c) James Kinyua Mukunu - Son
- d) Teresia Wakagio Mukunu - Daughter
- e) Catherine Wambura Mukunu - Daughter
- f) Lucy Njeri Mukunu - Daughter
- g) Lucy Nyambura Mukunu - Daughter
- h) Joyce Wambui Mukunu - Daughter
- i) Caroline Wanjiru Mukunu - Daughter

The petitioner proposed that the estate of the deceased be distributed as follows:-

**Land Parcel No. Mwerua/Kagio/1495 – Ten Acres.**

- Florence Wangui Mukunu - 7 Acres

- Margaret Muthoni Mukunu – 3 Acres

**Land Parcel No. Mwerua/Kagio/1494 – Five Acres.**

James Kinyua Mukunu – Whole Share.

**Land Parcel No. Mwerua/Kagio/1952 – Measuring 2 Acres**

- Margaret Muthoni Mukunu - 1 Acre.

- Florence Wangui Mukunu - 1 Acre.

**Land Parcel No. Mwerua/Kabiriri/1105 – Measuring 2 Acres.**

- Florence Wangui Mukunu - 1 Acre.

- James Kinyua Mukunu - 1 Acre.

**Kagio Plot No. C 62 – Measuring 50ft\*100ft**

- Margaret Muthoni Mukunu.

**Kagio Market Plot No. A9**

- Florence Wangui Mukunu - whole share.

**Plot No. Mwerua/Kagio/1578**

- Margaret Muthoni Mukunu

- Florence Wangui Mukunu Share equally.

**Plot No. 33B Kagio Measuring 25ft\* 100ft**

James Kinyua Mukunu

**Bank Account – Equity (jointly with Florence Wangui Mukunu & Geoffrey Mutugi Mukunu alias Mukunu Mutugi.**

To be shared by (MARGARET MUTHONI MUKUNU & FLORENCE WANGUI WANGUI MUKUNU - EQUALLY).

**Bank Account Equity – Geoffrey Mutugi Mukunu alias Mukunu Mutugi.**

To be shared by (MARGARET MUTHONI MUKUNU & FLORENCE WANGUI MUKUNU – EQUALLY).

**PICK-UP KYP 791**

To be shared by (MARGARET MUTHONI MUKUNU & FLORENCE WANGUI MUKUNU – EQUALLY).

**NINE COWS**

To be shared by (MARGARET MUTHONI MUKUNU & FLORENCE WANGUI MUKUNU – EQUALLY).

3. Florence Wangui Mukunu filed an affidavit of protest against confirmation of grant.

**Protestor’s case**

The protestor Florence Wangui Mukunu proceeded to file an affidavit in protest on 17/04/2015. She stated that she was not a party to the summons for confirmation of grant and the same was filed before expiry of 6 months. That the distribution proposed leaves out the daughters of the deceased who are entitled to share their father’s estate.

4. That the cows are not immovable property and therefore not subject to distribution. In addition, no proper details of the bank accounts have been provided.

5. Later she filed another affidavit of protest on 17/06/2015 claiming that **Plot No. Mwerua/Kagio/1578** is subject to ownership dispute in Kerugoya PMCC No. 67 of 2010 and was bought by Caroline Wanjiru Mukunu through her father. In addition, **Plot No. 33B Kagio** is hers through sale agreement dated 30/09/1999 jointly bought with the deceased. That motor vehicle **KYP 791** is not registered in the deceased’s names. The equity bank accounts were closed for lack of funds and the deceased does not have the 9 cows as alleged and the 4 cows in the homestead belong to her.

In her evidence, she proposed the deceased’s estate be subdivided as hereunder;

**L.R. Mwerua/Kagio/1494**

Margaret Muthoni Mukunu

**L.R. Mwerua/Kagio/1495**

Margaret Muthoni Mukunu – 1 ½ acres

Florence Wangui Mukunu – 8 ½ acres

**L.R. Mwerua/Kagio/1952**

Margaret Muthoni Mukunu

**L.R. Mwerua/Kabiriri/1105**

Margaret Muthoni Mukunu – 1 acre

Florence Wangui Mukunu – 1 acre

**Kagio Plot No. C62**

Margaret Muthoni Mukunu

**Kagio Plot No. A9**

Florence Wangui Mukunu

**Plot No. 33B Kagio**

Florence Wangui Mukunu

6. Margaret Muthoni vide an application dated 29/5/2015 joined in her son James Kinyua Mukunu as a co-petitioner as she was of poor health. James Kinyua Mukunu proposed the mode of distribution as follows:-

**L.R. Mwerua/Kagio/1494**

Margaret Muthoni Mukunu – 2 ½ acres

Florence Wangui Mukunu – 2 ½ acres

**L.R. Mwerua/Kagio/1495**

Margaret Muthoni Mukunu – 5 acres

Florence Wangui Mukunu – 5 acres

**L.R. Mwerua/Kagio/1952**

Margaret Muthoni Mukunu – 1 acre

Florence Wangui Mukunu – 1 acre

**L.R. Mwerua/Kabiriri/1105**

Margaret Muthoni Mukunu – 1 acre

Florence Wangui Mukunu – 1 acre

**Kagio Plot No. C62**

Margaret Muthoni Mukunu

**Kagio Plot No. A9**

Florence Wangui Mukunu

**Plot No. Mwerua/Kagio/1578 – shared equally**

Margaret Muthoni Mukunu

Florence Wangui Mukunu

**Plot No. 33B Kagio**

Florence Wangui Mukunu

7. The court gave directions that the protest would proceed by way of oral evidence. At the hearing, the parties informed the court that the dispute was on plot No. 33 Kagio. The court directed that parties adduce evidence on the contested property.

8. The protestor Florence Wangui testified that she is the wife of the deceased. Margaret Muthoni Mukunu is her co-wife. She had two children who are Carloline Wanjiru Mukunu and Joyce Wambui when she got married. She got one daughter with deceased, and she is Lucy Nyambura Mukunu born in 1996.

9. The house of Margaret Muthoni has four children, namely Catherine Nyambura, Lucy Njeri, James Kinyua and Teresia Wakagio.

10. The protestor testified that the distribution of the estate be as per the affidavit of protest. The protestor stated that plot No. Mwerua/Kagio/160-1578 has a dispute which is still pending in court.

11. She testified that Plot No. 33 Kagio which measures 25 x 100 is the one in dispute. She bought the plot on 30/9/1989 together with her deceased husband. Her prayer is that the plot be given to her.

12. James Kinyua Mukunu testified on behalf of Margaret Muthoni Mukunu. On the issue of Plot No. 33 he testified that the plot should be share equally as that would be a fair distribution.

13. From the evidence tendered, parties were in agreement that the motor vehicle KYP 791 was not registered in the name of the deceased. It was also confirmed that the cows have since been sold. It was agreed that land parcel No. Mwerua/Kagio/1578 has a dispute and is still pending in court. This is only free properties of the deceased which can be distributed to his beneficiaries. **Section -3- of the Law of Succession Act** defines estate as follows:-

***“Estate” “means the free property of a deceased person”.***

14. Free estate is the property which the deceased could deal with during his lifetime. In the circumstances since the cows were sold, they cannot form part of the estate of the deceased. Similarly, since the vehicle KYP 791 is not registered in the name of the deceased it cannot be included in the schedule of properties which can be distributed to his beneficiaries.

15. As regards Plot No. 33 B Kagio which the court was informed that the parties have not agreed the protestor Florence Wangui Mukunu proposes that she should be given the plot absolutely while Margaret Muthoni proposes that she gets a whole share. There is no dispute that the plot is registered in the name of the deceased and therefore forms the estate of the deceased and available for distribution to his dependants and beneficiaries.

16. The protestors claim to plot No. 33B Kagio is based on her assertion that she contributed to the purchase of the plot. She supported her claim with the agreements **annexures FWM 7a – b**. The issue is whether the fact that it was bought by the deceased and the protestor excludes other rightful beneficiaries from getting a share of the plot.

17. The **Law of Succession Act** provides for the equal distribution of the estate amongst all the beneficiaries in equal shares and any surviving wife or wives as an additional unit. **The Act** provides at **Section 40(1):-**

***“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”.***

18. The protestor testified that she also contributed to the purchase of Plot No. 62, and Plot No. 1105 but has left the plot for them. The protestor has not proved that the plot No. 33 was given to her by the deceased during his lifetime. Though the deceased is at liberty to distribute his property during his lifetime, the protestor or a party who alleges that the property was given to her bears the burden to prove that allegation on a balance of probabilities. **Section 107(1) & (2) of the Evidence Act Cap 80 Laws of Kenya** provides that:-

***“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”***

The party must demonstrate certain elements as provided under **Section 42 of the Act** which provides:-

“Where

*(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*

*(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”*

My view is that the sections seeks to protect the clear wishes made by the deceased in his lifetime. The party claiming a gift *intervivos* must prove that the deceased settled the property claimed in his lifetime by a Will, paid or given the property for or for his benefit. The protestor has not proved that the plot was given to her by the deceased to the exclusion of all the other beneficiaries. This was not the intention of the deceased. Had it been the intention, the deceased would have registered the plot in the name of the protestor or have it registered jointly with the protestor. This is not the case as the deceased had the plot No. 33B Kagio registered in his name. The alleged contribution in the purchase does not entitle her to get the plot exclusively. This is so because by her own evidence, there were other plots she bought with the deceased which she has no objection to their distribution to the other beneficiaries.

19. Plot No. 33B forms the estate of the deceased, it is free property which the deceased could have dealt within anyway during his lifetime. It has not been proved that the property was settled for the protestor during the lifetime of the deceased. **Section 40 of the Act** applies. Plot No. 33B Kagio should be distributed equally between the two houses with the widows forming an additional unit as provided under the section.

20. I have considered the decision in **Joseph Wairugo Migwi –v-Mikielina Ngina Munga (2016) eKLR** though I am persuaded by the finding that clear wishes of the deceased are to be protected and are not subject to disruption, change or frustration, are to be honoured and effected, this cannot be with regard to Plot No. 33B Kagio. This was the only plot in dispute as the parties informed the court at the hearing of the protest. I fail to see any express wishes made by the deceased during his lifetime with regard to Plot No. 33B Kagio which this court can protect other than the assertions by the protestor.

In conclusion, I find that plot No. 33B Kagio should be distributed equally between the two houses as provided under **Section 40 of the Law of Succession Act**. The properties be distributed as follows:-

**L. R. No. Mwerua/Kagio/1495 – 10 Acres.**

- Florence Wangui Mukunu - 7 Acres
- Margaret Muthoni Mukunu – 3 Acres

**Land Parcel No. Mwerua/Kagio/1494 – 5 Acres.**

- Margaret Muthoni Mukunu – Whole Share
- 

**Land Parcel No. Mwerua/Kagio/1952 - 2 Acres**

- Margaret Muthoni Mukunu - Whole share.

**Land Parcel No. Mwerua/Kabiriri/1105 –2 Acres.**

- Margaret Muthoni Mukunu Equally
- Florence Wangui Mukunu

**Kagio Plot No. C 62 –50 x100ft**

- Margaret Muthoni Mukunu – Whole share.

**Kagio Market Plot o. A9**

- Florence Wangui Mukunu - whole share.

**Plot No. Mwerua/Kagio/1578**

- Margaret Muthoni Mukunu
- Florence Wangui Mukunu Share equally

**Plot No. 33B Kagio**

Margaret Muthoni Mukunu

Florence Wangui Mukunu Share equally

**Bank Accounts at Equity Bank**

Margaret Muthoni Mukunu

Florence Wangui Mukunu Share equally.

The grant shall be confirmed in those terms.

Each party will bear its own costs.

**Dated at Kerugoya this 13<sup>th</sup> day of November 2019.**

**L. W. GITARI**

**JUDGE**