



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 98 OF 2013

IN THE MATTER OF THE ESTATE OF TABITHA WANJIRU MWITHIMBU alias WANJIRU M'MWITHIMBU (DECEASED)

IBRAHIM MUGWE GAKAU.....PETITIONER

VERSUS

DORIS NKIROTE KIMATHI.....1ST PROTESTOR

WILFRED GITHINJI WAMAI.....2ND PROTESTOR

JOSEPH KIAMA GACHUNGI.....INTERESTED PARTY

R U L I N G

1. **TABITHA WANJIRU MWITHIMBU alias WANJIRU M'MWITHIMBU (“the deceased”)**, died on 1st May, 2012. She left behind **Kirimara/Kithithina/Block I/71** as the only asset of her estate.
2. On 16th July, 2012, the Chief of Kirimara Location wrote a letter of introduction wherein he introduced **Philip Wamai Githinji, Kiama Matu, Joseph Kiama Gachungi and Ibrahim Mugwe Gakau** as those surviving the deceased. On 21st January, 2013, the Chief wrote yet another letter indicating that the deceased had left a will.
3. On 22nd February, 2013, the Petitioner petitioned for Probate of Written Will dated 10th March, 2004. In the Petition, he disclosed that there were no liabilities touching on the estate and that those who survived the deceased were; **Wilfred Githinji Wamae, Kiama Wamai Matu and Ibrahim Mugwe Gakau**.
4. On 20th August, 2014, the Deputy Registrar of this court made an endorsement granting the petitioner letters of administration intestate. On 21st January, 2016, **Doris Nkirote Kimathi (“the 1st protestor”)**, applied for the revocation of that grant on the grounds that the petitioner had failed to diligently administer the estate. She later withdrew that application and instead filed a Protest to the distribution.
5. On 5th April, 2016, **Wilfred Githinji Wamae (“the 2nd protestor”)** also applied for the revocation of the said grant on the grounds, *inter alia*, that the Will upon which the grant was based had been revoked. The 1st protestor opposed the application vide her Replying Affidavit sworn on 6th July, 2016. In that affidavit, she denied knowledge of the petitioner but acknowledged the 2nd protestor as a nephew of the deceased. She claimed 3 acres from the estate as her own having been so decreed in **Meru CMC LDT No. 38 of 1999**.
6. On 24th February, 2017, the petitioner applied for confirmation of the grant and proposed to distribute the estate as follows:-

(A) Kirimara/Kithithina/71

1. Philip Wamae Githinji - 3 acres
2. Kiama Matu - 1 acre
3. Kiama Gachungi - 2 acres
4. Ibrahim Mugwe Gakau - Balance

(B) Equity Bank Kenya Ltd Nanyuki Branch Account No. 0270198163978

To be released to Ibrahim Mugwe Gakau

7. Pursuant thereto, the 1st and 2nd protestors filed their protests to the confirmation on 24th May, 2017 and 20 April, 2017, respectively. On his part, **Joseph Kiama Gachungi (“the interested party”)** filed his Replying Affidavit on 11th December, 2017.
8. On 5th June, 2017, the court directed that the protests be determined by way of *viva voce* evidence. **P1W1 Doris Nkirote Kimathi** told the court that she is a daughter in law to M’Mwithimbu the husband of the deceased. She had married his son who left and disappeared in 1977. That M’Mwithimbu had purchased 6 acres for the deceased and 3 acres for her. That she had contributed for the purchase of the 3 acres and the Land Tribunal had awarded her the said acres. This had been confirmed through a court decree in the **Meru CMC LDT No. 38 of 1999**. She produced copies of proceedings before the Tribunal, the Award and the decree in the aforesaid **Meru CMC LDT No. 38 of 1999**.
9. **P2W1 Wilfred Githinji Wamai** told the court that the deceased had divorced M’Mwithimbu in 1994; that before her demise, the interested party had purchased from her 2 acres and was in occupation thereof. That the petitioner had been evicted from the estate property by the time the deceased passed on. That it was his son Phillip Wamae Githinji and the interested party who are in occupation of the property.
10. He further testified that the deceased had sold some other property and deposited the proceeds therefrom in the Equity Account in the joint names of herself, himself and his aforesaid son. That the deceased had revoked the will that the petitioner was relying on. He admitted that he is the one who caused the revocation to be stamped by the deceased’s advocate after her demise. He urged that the estate be distributed to his son 3 acres and to the petitioner. He was only interested in the funds in the Equity Bank Account.
11. **RW1 Ibrahim Mugwe Gakau**, the petitioner was originally being represented by Mr. B. G. Kariuki Advocate. When he attempted to produce a copy of the Will dated 10th March, 2004, it was objected to on the basis that it was a copy. Mr Kariuki applied for adjournment to enable him trace the original. When the matter resumed on the return date, Mr. Kariuki withdrew from acting for the petitioner. Although the petitioner was granted enough time to get an advocate, he failed to do so and when the hearing resumed, he proceeded in person.
12. He entirely relied on his replying affidavit sworn on 19th June, 2017. He told the court that the deceased was a sister to his grandmother and he had lived with the deceased for a very long time. The deceased came to court and made a will in 2004 together with her witnesses. He was also present when it was being made and he was one of the beneficiaries. That the deceased went to survey and came with the subdivisions but it was not properly surveyed. It was supposed to be repeated but she died before the re-survey could be done.
13. **IPW1 Joseph Kiama Gachungi** relied on his affidavit sworn on 14th December, 2017 as his evidence. He testified that he had entered into a sale agreement on 9th May, 2000 with the deceased whereby she sold him 2 acres from the estate land for a consideration of Kshs. 195,000/-. He has so far paid Kshs.130,000/- while the balance of Kshs. 65,000/- was to be paid on the date the Land Control Board shall issue its letter of consent. That he has been in possession of the portion of 2 acres sold to him which he has extensively developed.
14. After trial, the respective parties filed their respective submissions. In his submissions, the petitioner stated that the deceased died testate and had stipulated how the estate should be shared out. The revocation of the will was not genuine as it was not witnessed. That he should inherit the money at Equity bank in terms of the Will.
15. The 1st protestor submitted that the petitioner is not in any way related to the deceased. That it is not in dispute that she is a daughter in law of Mwithimbu. That she had produced evidence to prove that the tribunal had awarded her 3 acres. That the deceased had filed an application dated 21st May, 2007 for transfer of the 3 acres and another one dated 25th July, 2012 for inhibition orders to be lifted and for the executive officer to sign all the relevant documents to effect the award of the elders. The deceased had no children and her husband died before her. That for that reason, there was no legal representative that could have been substituted for purposes of effecting the decree made in her favour.
16. On his part, the 2nd protestor submitted that the deceased was a sister to Wamai Matu, Ngoiri Matu, Kiama Matu, Wangui Ndegwa, Waitherero Matu and Tabitha Gitonga who are all deceased. That Wangui Ndegwa who was a sister to the deceased was the grandmother to the petitioner. An intestacy like this one where the deceased left behind no children of her own a determination can only be arrived at by examining the degree of consanguinity and affinity.
17. It was further submitted that affinity in this case does not arise since by the time of the death of the deceased, she had divorced her husband. In consanguinity, the 2nd protestor is in the second degree while the petitioner is in third. Thus, the latter’s claim must fail in his opinion. The 1st protestor’s claim is based on her father in law, M’Mwithimbu, who was restrained from interfering with the proprietary interests of the deceased in estate land. That in the premises, the 1st protestor’s claim must fail.
18. As regards the interested party’s claim for 2 Acres, it was submitted that the same is based on a sale agreement. The balance of the consideration was to be paid upon the Land Control Board consent to transfer which has not been obtained. That the transfer cannot be legally effected and the claim must therefore fail. That the amount paid as partial purchase price of Kshs.130,000/- remains a liability of the estate and should be paid to the interested party.
19. The interested party submitted that his interest in this cause is limited to his interest as a purchaser. That even in her Will, the deceased included him as one of her heirs who should get 2 acres from the estate land.
20. I have considered the affidavits on record, the testimonies of witnesses and the submissions of the respective parties. The issues that arise for determination are; ***whether there was a Will and if so, whether it had been revoked; Who the beneficiaries of the estate are; and how the estate should be distributed?***

21. On the first issue, the petitioner testified that sometimes in March, 2004, he accompanied the deceased to the offices of **B. G. Kariuki, Advocate** and while thereat, she executed her Last Will. He testified that the said Will was dated 10th March, 2004 a copy of which he produced and sought to rely on for Probate.
22. The existence of the Will was objected to and challenged by all the other parties. Indeed, it was the 2nd protestor's case that the said Will was revoked. He produced a copy of a Deed of Revocation to that effect.
23. I will start with the revocation itself. **P2W1** told the court that when he was rummaging through the papers of the deceased after her demise, he discovered the deed of revocation amongst those papers. The revocation had not been stamped because the deceased had not paid her lawyer in order to stamp it. He then proceeded to the offices of **B. G. Kariuki Advocate** who stamped it for him.
24. To my mind, the authenticity of a document is verified by its execution and attestation. We are not told whether the thumb print appearing on the document produced as the revocation of the will was that of the deceased. We are not told who saw her execute that document. In the words of **P2W1**, the document was unattested and he took it to the Advocate who attested it after the deceased had already passed on. Surely, that attestation was unlawful as it could not seek to verify the execution of that document posthumously. That document remained just that, a mere piece of paper and could not be what it purported to be. It could not revoke a valid will.
25. The issue then is, was there a Will. As already stated, all the other parties challenged the authenticity or existence of the Will dated 10th March, 2004. What was produced was a copy. When objected to, the then Advocate acting for the petitioner **Mr. B. G. Kariuki Advocate** applied for time to go look for the original. On the return date, he indicated that he could not find the original and he withdrew from acting for the petitioner citing conflict of interest.
26. **Rule 7 (5) of the Probate and Administration Rules** provides:-
- “(5) Where the grant sought is one of probate of a written will or of letters of administration with the written will annexed there shall be lodged in the registry on the filing of the petition the original of the will or, if the will is alleged to have been lost or destroyed otherwise than by way of revocation or for any other reason cannot be produced, then a copy authenticated by a competent court or otherwise to the satisfaction of the court.*”**
27. From the foregoing, it is clear that where there is an allegation that a deceased left a Will, the original thereof must be produced. If it is not produced for any reason, a copy authenticated by a competent court must be produced. In the present case, there was no original copy that was produced. The petitioner's then advocate just informed the court that the original of the Will and the revocation could not be traced. In this regard, the provisions of **Rule 7** aforesaid were not complied with.
28. In any event, the petitioner told the court that he accompanied the deceased to the advocate's offices together with the witnesses who attested the alleged will. These witnesses were not called to testify and no reason was advanced for the failure to call them.
29. In this regard, I am of the view that the validity of the said will cannot be determined. The will was not propounded and for all purposes and intents, the deceased died intestate and her estate will be distributed according to the provisions of intestacy laid down under **Part V of the Law of Succession Act**.
30. The next issue for determination is, who the beneficiaries of the estate are? The jurisdiction of a family court was well put by Musyoka J **In re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR** as follows:-
- “It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”***
31. I will examine each parties' claim to establish if one qualifies as a beneficiary. The 1st protestor is a step-daughter of the deceased. Her father-in law M'Mwithimbu was married to the deceased but they later divorced vide the **Nanyuki CMCC No. 50 of 1994**. She claims that she is entitled to 3 acres out of the estate in terms of the award made in **Land Dispute Tribunal No. 22 of 1999** which was thereafter made a decree of the court in the **Meru CMCC LD No. 38 of 1999**.
32. It would seem that the 1st protestor has a valid claim. However, the decree was made in the year 2000. It was never executed as the title was never subdivided. She may seek to enforce her rights, if any, in a civil (ELC) court and not this court. Her submission that the estate is matrimonial property distributable to the family of M'Mwithimbu has no basis in view of the divorce of 1994 between the deceased and her father-in-law.
33. The claim by the interested party is that he purchased 2 acres from the deceased. That pursuant to the said purchase, he took possession of that portion and has extensively developed the same. All the parties were not opposed to this position including the 2nd protestor. However, in his submission, the 2nd protestor became greedier and challenged the interested party's claim by raising issues relating to the absence of the Land Board Consent. The 2nd protestor now sought to have the entire estate distributed to him.
34. Accordingly, since the interests of the 1st protestor and interested party are yet to crystalize upon the estate and that there may be issues such as the effect of the decree in **Meru CMC LD 38 of 1999**, the long occupation of 2 acres in the estate by the interested party, adverse

possession, amongst others may need to be thrashed out, by virtue of **Rule 41 (3) of the Probate and Administration Rules**, I hereby set aside 5 acres out of the estate to await the 1st protestor and interested party to take out and prosecute appropriate suits to establish their claims before any confirmation of grant and distribution of that portion can be undertaken on that share.

35. With regard to the interests of the petitioner and 2nd protestor I will discuss them together. The petitioner is related to the deceased by virtue of her being his grandmother's sister. The 2nd protestor testified that the deceased was his auntie. The deceased left behind no spouse or children.

36. **Section 39 of CAP 160** provides that:-

“(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

37. In this cause, the deceased's father, mother and brother and sisters are all deceased. The 2nd protestor and Petitioner are related to the deceased in one way or the other. Hence to determine how the estate ought to be distributed, the court will be guided by the table of consanguinity set out in the **Second Schedule of the Probate and Administration Rules**.

38. The 2nd Protestor is a nephew of the deceased which means he is in the third degree. The petitioner is a grandnephew to the deceased for his grandmother was the sister to the deceased. He is therefore in the fourth degree. The third degree takes priority over the fourth degree.

39. The other parties interested in the estate are Phillip Wamae Githinji and Kiama Wamai. The said Phillip is a son to the 2nd protestor and is therefore a grandnephew. He falls under the fourth degree while Kiama Wamai who is a nephew to the deceased is under the third degree.

40. Accordingly, the balance of the property in the estate land measuring 4.213 acres is to be distributed equally to the 2nd protestor and Kiama Wamai.

41. As regards the account in Equity bank, there was evidence that the same was in the joint names of the deceased, the 2nd protestor and Philip Wamai Githinji, the intention was that the same belongs to the said persons jointly. Upon the demise of the deceased, the monies in that account devolve to the remaining joint owners.

42. Accordingly, this court makes the following orders:-

a) the grant of letters of administration intestate made on 20th August, 2014 to Ibrahim Mugwe Gakau are hereby revoked;

b) a grant of letters of administration hereby issues to Wilfred Githinji Wamai;

c) the grant is hereby partially confirmed as follows:-

i) Kirimara/Kithithina/Block1/71

Wilfred Githinji Wamai - 2.10 acres

Kiama Wamae - 2.10 acres

ii) Equity Bank Kenya Ltd, Nanyuki Branch A/C No. 0270198163978

Wifred Githinji Wamai

Philip Wamae Githinji - In equal shares

iii) As regards the claim by the 1st protestor and the interested party for 3 and 2 acres, respectively, I direct that they take appropriate proceedings to establish their claims against the estate before the right forum within 24 months before the grant for that part of the estate can be confirmed.

d) This being a family matter no award as to costs.

Signed at Meru by me

A. MABEYA

JUDGE

DATED and DELIVERED AT MERU THIS 4TH DAY OF OCTOBER, 2018

F. K. GIKONYO

JUDGE