



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NO. 243 OF 1999**

**IN THE MATTER OF THE ESTATE OF TITUS GAKUHA MWANIKI alias TAITUS GAKUKA  
MWANIKI -DECEASED**

**Susan Wangui Gakuha.....Petitioner**

**versus**

**Stephen Mwangi Gakuha.....Protestor**

**JUDGEMENT**

**Titus Gakuha Mwaniki** (herein after referred to as the deceased) died intestate on 22<sup>nd</sup> September 1995 at the age of 81 years. On 25<sup>th</sup> June 1999 the deceased's widow, **Susan Wangui Gakuha**, (herein after referred to as the "**Petitioner**") petitioned for letters of administration. I note that form **P & A 5** is missing from the record. The letter from the chief dated 18<sup>th</sup> May 1999 names the persons surviving the deceased as the petitioner, Stephen Mwangi Gakuha, (hereinafter referred to as the **protestor**), Lilian Wachuka Gakuha, Mary Nyambura Gakuha, Joyce Waithiegeni and Gladys Murigi all of whom are daughters of the deceased.

The consent filed in court is duly signed by all the beneficiaries except the protestor herein. Together with the papers filed in court is a search for only one property, namely **Aguthi/Mungaria/667** measuring approximately **2.99 ha.** registered in the name of the deceased.

The protestor filed a petition by way of cross-application for a grant on 5<sup>th</sup> July 1999 in which he stated that the above parcel of land is supposed to be divided between himself and the petitioner herein who is his mother. He also prayed to be included as a petitioner in these proceedings. He also filed an answer to the petition and sought to have the petitioners petition dismissed accusing the petitioner of failing to disclose that he was the only son of the deceased. The protestor also filed an objection to the making of the grant.

On 13<sup>th</sup> March 2001, the court appointed both the Petitioner and the protestor as joint administrators. On 7<sup>th</sup> January 2011, the petitioner herein applied for the said grant to be confirmed and proposed equal distribution of the above parcel of land between herself and all her children including the protestor herein. All her daughters named above signed the consent to the said confirmation but the protestor herein did not sign it but instead, the protestor filed an affidavit of protest dated 31<sup>st</sup> March 2011 in which he avers *inter alia* that the distribution proposed by the petitioner is against the deceased's wishes and that the deceased had declared on many occasions that the lower part of the land in which the protestor had planted 600 coffee trees should be inherited by his (protestors) sons. He also stated that the deceased declared that the upper part of the land should be shared between the petitioner and himself and added that the deceased had clearly created a boundary separating the two portions.

I must point out that the above averments sharply differ from the contents of the petition by way of cross-application filed by the protestor herein referred to above in which the protestor stated at paragraph 3 thereof as follows; *"that the said piece of land is supposed to be divided amongst (i) Susan Wangui Gakuha, (ii) Stephen Mwangi Gakuha.* No explanation has been offered for the said drastic and diametrically opposed positions on the same issue emanating from the same person. Another notable contradiction is that in the said cross-petition, the protestor only mentioned 100 coffee trees while in the affidavit of protest, he mentioned over 600.

The protestor testified that prior to the deceased's death, the deceased had put a clear boundary marked by a 10 feet path and had planted trees clearly separating the portion occupied by himself and the protestor. He insisted that in 1977 his father gave him the upper portion and helped him to build his house. He also stated that the deceased gave his first born son land and that before his death, the deceased had divided his land between himself, the petitioner who is his mother and had also gave his four sons land. Again this evidence was not captured at all in the petition by way of cross-petition referred to above, which to me is another material contradiction.

The protestor opposed the mode of distribution proposed by the petitioner because according to him, his father had divided his land as stated above. He saw no reason for the daughters to be given a share of their fathers land or the children of the deceased daughters. He denied that his father ever talked about his land in a family meeting.

Upon cross-examination by his mother, the protestor admitted that even though his father was sick for 11 years, he came to see him twice.

Regarding the inconsistencies and or contradictions in the protestors evidence cited above in the evidence of the protestor, it is settled law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.[1] The question to be addressed is whether the contradictions cited above are grave and point to deliberate untruthfulness or whether they affect the substance of the protestors case.

It is important to examine the nature and meaning of the word contradiction. I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of *David Ojeabuo vs Federal Republic of Nigeria*[2] where the court stated as follows:-

*"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."*

Even though the above cited case was dealing with a criminal case, the passage does in my view apply with equal force to civil cases. In the above cited case it was held that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.[3] Its only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court. I find that the contradictions cited in this case are substantial, fundamental and material to the main issues. The protestor filed a document stating that the land should be divided into two as stated above. No explanation has been rendered as to why the issue of his sons was not mentioned. In the cross-petition referred to above, there was no mention at all that the deceased ever divided his land during his life time. To me such inconsistencies are sufficient to the extent of creating doubts in the mind of the court because they cast serious doubts as to the credibility of the protestor. The court cannot shut its eyes to such serious contradictions and inconsistencies emanating from the same person.

**PW2 Wilson Githaiga Kanja** testified that the deceased divided his land into two, one portion for the

Petitioner and the other portion for the protestor. He also stated that the lower part was allocated to a grandson to the deceased. In his evidence in chief he alleged that the deceased was his brother, but upon cross-examination, he stated that his father and the deceased' fathers are brothers, but upon further cross-examination his answers casted doubts on the alleged relationship with the deceased. Also, this witness did not state whether he was present at the time the deceased allegedly divided or gave out his land as alleged. In fact, upon cross-examination he admitted he was not present when the land was allegedly divided. I found this witness to be totally unreliable.

**PW3 Geoffrey Nderitu Gitonga** stated that the protestor and the petitioner occupy the same piece of land separated by a path. He also alleged that in 1986 he visited the deceased together with his in law and that the deceased took them to for a walk into his land and that the deceased explained to them how his land would be shared in the event of his death. (I note that this witness talked of the deceased having expressed his wishes as to how his land ought to be divided after his death). This differs with the protestors evidence who stated that the deceased divided his land before he died. This is another serious contradiction on a material issue which cannot be ignored). Upon cross-examination this witness admitted that he is not related to the deceased and further he admitted that he was not present when the deceased allegedly divided his land. Considering the above inconsistencies and having observed his demeanour in court, I also find this witness to be totally unreliable and his evidence is of little evidential value.

**PW4 Beatrice Nyambura Mwangi** a wife to the protestor testified that the deceased showed them the portion they build with her husband. She stated that the petitioner wants to give her daughters land yet they are married and this will disrupt the deceased's wishes. She did not state whether she was present when the deceased allegedly expressed the alleged wishes or how she learnt about it and this to me renders her evidence on the alleged wishes unreliable.

The petitioner's evidence was that the deceased never divided his land prior to his death. She stated that the protestor lived in Nairobi while she lived with the deceased and that her daughters used to look after them. After the deceased fell ill, she called her daughters to come and see their father. She also sent for the protestor but he never came, that the deceased was sick for 11 years and that there is no single time the protestor came to visit him. She insisted that the protestor only came to see the deceased after the deceased's condition deteriorated and at a time when the deceased was unable to talk. She insisted that she is the one who pleaded with the deceased to allow the protestor to build his house, and that the protestor only came home after the deceased died, and took the portion he cultivates without her consent. She denied that the protestor was given land by the deceased, but the deceased directed her to give the protestors son who is named after him a portion. She recalled that the protestor told the deceased to his face that he was not his biological father. She insisted that she will only give land to the protestors son who is named after the deceased. (I note that this evidence differs with her proposal contained in her affidavit in support of the confirmation whereby she proposed that the land be distributed among all her children among them the protestor and there was no mention of the protestors' son who is named after the deceased hence this proposal must be an afterthought ).

Upon cross-examination she insisted that the protestor moved into the land he cultivates after the deceased died and took it over by force and started cultivating and took over some coffee trees which were planted by the deceased. Asked why she wants to give her daughters land and they are settled elsewhere, she insisted that they are her children and that the deceased also said so.

**DW2 James Mwangi** testified that the protestor never used to come home and he was away for about 10 years and that by the time he came home the deceased was ailing, hence they never sat to discuss the land issue. He also stated that after the deceased died the petitioner called elders at her home among them himself and the petitioner and explained to them the deceased's wishes which were contained in her piece of paper, but the protestor rejected the contents of the document. (I must point out that the petitioner did not mention the alleged piece of paper in her affidavit or in her oral evidence tendered in court and it is highly unlikely that the petitioner could omit such crucial evidence if t all it existed).

**DW3 James Mwaniki Mwangi** testified that he grew up at the deceased's home and that the deceased and the petitioner brought him up and educated him. He stated that the protestor wants to be given land

together with his children, that the dispute was heard before the DO who decided that the land belongs to the petitioner. He also stated that the protestor never used to come home. I find that the evidence of this witness is credible and tallies with the evidence of the protestor who wants his sons to be given land claiming that they were given by the deceased.

Both parties filed written submissions. Counsel for the protestor concluded his submissions by submitting that the deceased shared his land between the petitioner and the protestor and urged the court to honour the deceased's wishes while the petitioner urged the court to strike off the protest.

I find it necessary to reiterate that cases are decided on evidence and the law applicable. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*<sup>[4]</sup> :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.

Turning to the facts of this case, as mentioned earlier I have noted key inconsistencies in the evidence of the protestor and I need not repeat the same here. The evidence of the protestor suffered not just from inconsistencies but contradictions hence it is un reliable.

The issues for determination are **(a)** whether the deceased divided his land prior to his death, **(b)** How is the deceased's land to be divided among his beneficiaries.

With regard to the first issue, I am fully aware that it is possible for a person to distribute properties during his/her lifetime. I am fully aware that sufficient evidence to prove that a deceased person distributed his properties during his life time is necessary. I am also aware that such proof cannot be mathematically precise and certain and so the test should be one of satisfaction of a prudent mind in such matters. The onus must be on the person alleging and there must be clear and convincing evidence and absence of suspicious circumstances surrounding the case.

Where, however, there are suspicious circumstances, the onus would be on the person alleging to explain them to the satisfaction of the Court before the court can accept such evidence. Where there are doubts or suspicious circumstances, it is the duty of the person alleging to satisfy the conscience of the court.

What are suspicious circumstances must be judged in the facts and circumstances of each particular case. The **burden of proof** (Latin: *onus probandi*) is the duty of a party in a trial to produce the evidence that will shift the conclusion away from the default position to that party's own position. In the present case it was necessary to adduce sufficient evidence such as involvement of clan elders, family members or local administration evidently demonstrating the deceased's unequivocal desire and actions to distribute his properties as alleged. Such evidence must be clear, cogent and must demonstrate evidence of absence of suspicious circumstances.

If the distribution of the property is unfair or skewed in such a manner that the person so alleging gets a prominent part in the alleged distribution of the estate which confers substantial benefits to him or his children to the exclusion of the other beneficiaries like in the present case, then, unless the contrary is sufficiently proved, that itself is a suspicious circumstance and in appreciating the evidence in such a case, the court should proceed with an open but nevertheless vigilant and cautious mind.<sup>[5]</sup>

Secondly, the evidence adduced must be clear and there should be no inconsistencies at all like in the present case. The inconsistencies and contradictions cited above in the evidence of the protestor raise serious doubts on the question of the alleged distribution. In fact, there is nothing to show that the deceased divided his land during his life time. In fact, no evidence was tendered establishing this fact to the required standard.

The burden of proof is often associated with the Latin *maxim semper necessitas probandi incumbit ei qui agit*, a translation of which in this context is: "the necessity of proof always lies with the person who lays charges." I find that the evidence tendered by the protestor falls short of the required standard to clear the doubts in the mind of the court that the deceased ever distributed his land during his life time.

I am aware that the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honoured and effected.[6] But it must be proved beyond doubt that indeed the deceased gave out the property or gift during his/her life time.

There is no tangible evidence to demonstrate that the deceased divided his land during his life time or gave the land to the grand children as alleged. In fact the petitioners evidence that the protestor moved into the land he cultivates by force and also put his sons into possession is more credible and was not rebutted. The protestors actions are aimed at ensuring that the married daughter(s) of the deceased do not inherit their fathers land. He stated so in his evidence. His actions are geared to allocating the land to himself and his children and exclude the deceased's daughters from benefitting from their fathers estate.

The evidence tendered by the protestor is manifestly inadequate to warrant this court to conclude that the deceased divided his land during his life time. I had the opportunity of observing the demeanor of the protestor and his witnesses as they gave evidence in court, and other than the evident inconsistencies and contradictions cited above, I found their evidence to be totally untruthful. I find that the petitioner despite her advanced age, was more composed, consistent and truthful, save for her evident shift in proposing that the land she had earlier proposed to give to the protestor should go to the protestors son named after the deceased. This change of position is not acceptable. I conclude that the deceased in this case died intestate. Hence, my answer to issue number one is in the negative.

Section 34 of the Law of Succession Act[7] provides that:- "*A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.*"

Having found that the deceased died intestate, and bearing in mind it is not disputed that the petitioner was the deceased's wife and the protestor a son to the deceased and the other beneficiaries are children of the deceased, the deceased's estate falls for distribution in accordance with part V of the Law of Succession Act.[8] The deceased was survived by a widow and children and therefore the relevant provision is Section 35 of the Law of Succession Act.[9]

It is not disputed that the deceased had 5 daughters and one son. Two of the daughters, namely Joyce Waithigeni Gitonga and Wanjiru Mugo are deceased but the petitioner proposes that their share be inherited by their children Titus Gakuha Gitonga and Titus Gakuha Mugo respectively. The petitioner insists that all the deceased's children are entitled to benefit from their fathers estate. In my view, a finding that excludes girls from inheriting their parents estate will amount to discrimination which would be contrary to **Article 27** of the **Constitution** which specifically prohibits discrimination of any person on the basis of race, sex, marital status or culture. **Article 27(3)** of the **Constitution** specifically provides that "*women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*"

In the present case, this court does not see any reason why the **Law of Succession Act**[10] should not be applied in the distribution of the estate of the deceased. In that regard, **Section 29(a)** of the **Law of Succession Act**[11] recognizes "**children**" of the deceased as dependants. It does not state that such children are sons or daughters, either married or unmarried. Any practice that discriminates between the male and female children of a deceased person is a retrogressive and cannot supersede the **Constitution**

and the **Law of Succession Act**.<sup>[12]</sup> This court agrees with the holding of **Makhandia J** (as he then was) in *In Re Estate of Solomon Ngatia Kariuki (deceased)*<sup>[13]</sup> at page 8 where he stated as follows:-

*“The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased’s estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father’s estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father’s inheritance because they are likely to enjoy inheritance of their husband’s side of the family.”*

In my view, the spirit of Part V of the Law of Succession Act<sup>[14]</sup> is equal distribution of the estate amongst the beneficiaries of the deceased. My reading of these provisions is that they envisage equal distribution. The word used in Section 35 (5) and 38 is "equally" as opposed to "equitably."<sup>[15]</sup> This is the plain language of the provisions. The provisions are in mandatory terms-"the property shall.....be equally divided among the surviving children." Equal distribution is envisaged. Guided by the above provisions I find that the petitioner, the protestor and the deceased's daughters herein are entitled to equal shares of the deceased's estate.

I find the protest has no merits. I accordingly dismiss the protest and order as follows:-

- a. ***That*** the Protest filed herein by **Stephen Mwangi Gakuha** on 31<sup>st</sup> March 2011 be and is hereby dismissed.
- b. ***That*** the Grant of letters of Administration to the deceased's estate issued to **Susan Mwangi Gakuha** and **Stephen Mwangi Gakuha** on 13<sup>th</sup> March 2001 be and is hereby confirmed.
- c. ***That*** Title number **Aguthi/Gathaithi/667** measuring approximately **2.99 Ha.** be divided into seven equal portions to be shared among the following:-
  - i. **Susan Wangui Gakuha-- Approximately 0.427 Ha.,**
  - ii. **Stephen Mwangi Gakuha--Approximately 0.427 Ha,**
  - iii. **Titus Gakuha Gitonga--Approximately 0.427 Ha.,**
  - iv. **Titus Gakuha Mugo--Approximately 0.427 Ha.,**
  - v. **Mary Nyambura Wamatu--Approximately 0.427 Ha.,**
  - vi. **Gladys Murigi Gakuha--Approximately 0.427 Ha.,**
  - vii. **Lilian Wachuka Chege--Approximately 0.427 Ha.**
- d. ***That*** the protestor herein is ordered to execute such documents as may be necessary to cause sub-division and transfer of the above portions to the respective beneficiaries.
- e. ***That*** in the event that the protestor does not execute the requisite documents to facilitate the said sub-division and transfer as aforesaid **within 60 days** from the date of this judgement, then the Deputy Registrar of this court shall upon request by the petitioner or any of the beneficiaries sign the said documents.
- f. ***That*** each beneficiary shall pay the requisite survey fees and transfer charges for their respective portion(s)
- g. ***That*** the protestor shall pay the costs of this cause.

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this 5<sup>th</sup> day September of 2016

**John M. Mativo**

**Judge**

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[1] See Uganda vs Rutaro {1976} HCB; Uganda vs George W. Yiga {1979} HCB 217

[2]{2014} lpelr-22555(ca), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.

[3] See Osetola vs State {2012} 17 NWLR (Pt1329) 251

[4] {2007} 4 SLR (R) 855 at 59

[5] See H. Venkatachala Iyengar vs B. N. Thimmajamma & Others, 1959 AIR 443, 1959 SCR Supl. (1) 426- Supreme Court of India

[6] See the Judgment o A. Mabeya J. in **Succession Cause No.43 of 2002, In the matter of the Estate of Noah Wanjala Kimawachi-Deceased**

[7] Cap 160, Laws of Kenya

[8] Ibid

[9] Ibid

[10] Cap 160, Laws of Kenya

[11] Ibid

[12] Ibid

[13] {2008} eKLR

[14] Ibid

[15] See Musyoka J in Succ Cause No 399 of 2007, In the Estate of John Musambayi Katumanga-Deceased.