In re Estate of Monicah Wangari Kiogora (Deceased) (Succession Cause 531 of 2012) [2025] KEHC 13986 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KEHC 13986 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE 531 OF 2012

MA ODERO, J

OCTOBER 3, 2025

IN THE MATTER OF THE ESTATE OF MWK (DECEASED)

JUDGMENT

1. Before this court for determination are two (2) Affidavits of Protest JWK (the 1st protestor) filed the Affidavit of protest dated 15th December 2022 whilst WKK (the 2nd Protestor) filed the Affidavit of Protest dated 19th October 2022.

2. The Respondent/Administrator PWK opposed the two protests. The Court directed that the protests be heard together by way of Vive Voce evidence.

Background

3. This succession cause relates to the estate of the late MWK (hereinafter 'the Deceased) who passed away on 7th November 2010. A copy of the Death Certificate Serial No. 296190 is annexed to the Petition for Probate of written will which was filed in court on 31st May 2012.

4. According to the letter dated 20th February 2012 authored by the Chief of Kamburiaini location, Naromoru the Deceased was survived by the following persons;-

   (1) WKK - Son

   (2) MMK- Daughter

   (3) JWK - Son

   (4) EWM- Daughter

   (5) PWK - Son

   (6) WN - Daughter (Deceased)

   (7) BWM - Daughter (Deceased)

5. The estate of the Deceased was said to comprise of the following asset - Land Parcel No. Othaya/Ihuririo/XXX comprising approximately 2.5 acres (hereinafter referred to as the 'suit land').

6. Following the demise of the Deceased, one of her sons, PWK on 29th May 2012 filed a Petition for Grant of Probate with written will. Grant of letters of Administration Intestate was on 18th January 2013 issued by the High Court in Nyeri.

7. On 20th August 2013 the said PWK filed a Summons for confirmation of Grant in which Summons he prayed that the property known as Othaya/Ihuririo/XXX be allocated to himself in accordance with the written will of the Deceased dated 25th October 2010.

8. In response JWK filed a summons for revocation of Grant dated 5th September 2013 alleging that the Grant had been obtained fraudulently by means of untrue allegations. The 1st Protestor JWK then filed a summons for confirmation of Grant dated 3rd November 2021, which was treated as a Protest against the Administrators Summons for confirmation of Grant dated 20th August 2013. Thereafter the 2nd protestor WKK also filed the Affidavit of Protest dated 19th October 2022.

9. The matter was referred for Court Annexed Mediation. The parties only managed to record a partial mediation Agreement dated 22nd March 2019 which partial Agreement was however by consent of all the parties set aside by the court on 4th May 2021.

10. The matter then proceeded for full hearing of the two protests.

The Evidence

11. The 1st Protestor JWK confirmed that he was a son to the Deceased. He opposed the proposal that the suit property (Plot XXX) devolve entirely to the Administrator of the estate. The 1st Protestor argued that this parcel of land initially belonged to their father and that upon the demise of their father the suit property devolved to the Deceased.

12. The 1st Protestor argued that it would be unfair to allow only one son to benefit from their fathers land to the exclusion of the other children in the family. That being a son of the late father he was entitled to inherit a share of the suit property.

13. The 1st protestor proposed that the suit land be divided into four equal portions to be shared between the three surviving sons of the Deceased and their sister 'M'. He stated that their other loving sister EW had indicated that she had no interest in inheriting from the estate of the Deceased.

14. The 2nd Protestor WKK gave unsworn evidence. He confirmed that he too was a son of the Deceased. The 2nd Protestor denied that the Deceased had left behind a written will. He also opposed the mode of distribution proposed by the Administrator and opined that the suit land ought to be divided 'equally' between the three (3) sons of the Deceased and their sister 'M'. The 2nd Protestor told the court that their last born sister 'EW' had waived all right and interest in the estate property.

15. PW3 SM was also a child of the Deceased. She did not appear to have much knowledge and/or involvement in this succession cause. However she indicated that she too being a child of the Deceased desired to be allocated a share of the land left behind by the Deceased.

16. The Administrator PWK insisted that the Deceased had died testate having left behind a written will dated 25th October 2010 in which will the Deceased had bequeathed the property known as Othaya/Ihuririo/XXX to himself entirely. He prayed that the court uphold the written will and direct that the estate be distributed in accordance with the last wishes of Deceased.

17. The Administrator proceeded to explain that the reason none of the other children of the Deceased were to benefit from the suit land was because they each had other larger parcels of land elsewhere. That William Karimi had twenty (20) acres in Naromoru whilst Joseph Wachira had eleven (11) acres in Nyeri Lusoi. The Administrator admitted the he held four (4) acres in Naromoru land which he claims he received as dowry from one "Ngatia Ole Thegenge the husband of his late sister Lucy WN. The Administrator asserted that his sister 'M' was not entitled to a share of the suit land as she was married.

18. DW2 DMI told the court that he and one JK witnessed the will of the Deceased in the office of Advocate W wa G.

19. Upon conclusion of oral evidence the parties were invited to file and exchange written submissions. The protestors filed written submissions dated 4th June 2025 whilst the Administrator/ Respondent relied upon his written submissions which were not dated.

Analysis And Determination

20. I have carefully considered the protests filed in this matter, the reply filed by the Administrator, the evidence on record as well as the written submissions filed by the parties.

21. It is common ground that the Deceased in this matter passed away on 7th November 2010. It is also not in dispute that the Deceased had seven (7) children four (4) daughters and three (3) sons. The names and identities of the beneficiaries to the estate are agreed upon.

22. The parties all confirm that two (2) of the Deceased's daughters have since passed away namely Lucy WN and BWM.

23. The extent of the estate left behind by the Deceased is not in any dispute. The parties all agree that the estate consisted of only one asset being the parcel of land known as Othaya/Ihuririo/XXX comprising approximately 2.5 acres.

24. The main bone of contention in this cause revolves around the question of the validity of the written will allegedly left behind by the Deceased and whether the mode of distribution of the estate proposed by the Administrator ought to be upheld.

Validity of the Will

25. The Administrator insists that the will dated 25th October 2010 is a genuine document which was validly executed by the Deceased indicating her wishes regarding the disposal of her estate.

26. The Protestors on the other hand categorically deny that the Deceased left behind a written will.

27. The requirements of a valid written will are set out in Section 11 of the *law of Succession Act* Cap 160 Laws of Kenya which provides as follows:-

    No written will shall be valid unless -

    a. the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

    b. the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;

    (c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal

acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form to attestation shall be necessary."

28. I have carefully perused the document purported to be the last written will of the Deceased which document was annexed to the Petition for Grant of Probate dated 29th May 2012. I note that the document bears on the second page a mark alleged to be the left hand thumb print of the Deceased. There is nothing to prove that this is indeed the Deceased's thumb-print. No officer from the Registrar of Persons was called to confirm that this thumb-print corresponded with that which appears on the National Identity Card of the Deceased. Moreover the Deceased thumb-print appears on only one page of the document.

29. DW2 Duncan Murathe told the court that he was present in the Advocates office when the Deceased thumb-printed the will. He told the court that he witnessed the will by signing the same. I note that this witness apparently signed the will on both pages giving his Identity Card Number as 22336442.

30. Section 11 of the *Law of Succession Act* provides that for a will to be valid it must be witnessed by two (2) people. Dw2 claims that he and one JKM of ID Number XXXXXXX went to the Advocates offices and that both signed the will as witnesses. DW2 told the court that the said JK has unfortunately passed away and was therefore not available to testify in court.

31. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:-

" Burden of Proof"

1. Whoever desires any court to give judgement as to any legal 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 facts it is said that the burden of proof lies on that person."

32. Therefore if it is the Administrators position that this JK is no longer alive then he must avail sufficient evidence to prove this claim.

33. Firstly no evidence has been availed to show that Id Number XXXXXXX, was ever issued to JK. No records from the Registrar of persons were availed to prove who was registered under that number.

34. Secondly no evidence was brought before the court to prove that the said JK is now Deceased or when he died. No Death Certificate and/or burial permit was produced as proof of his demise.

35. I have seen in the court file a statement dated 12th September 2019 purported to have been signed by said JK. Even to the naked and untrained eye the signature on this statement is very different from the signature purported to be that of JK as it appears on the alleged will. Moreover given that the court has not been told (or given any evidence) to show when this JK died, there remains doubt as to whether he did in fact author this statement. In the circumstances it has not been proved that the will was witnessed by two (2) persons as required by law and therefore does not comply with Section 11 (c) of the Act.

36. Thirdly and most importantly the Administrator failed to call as a witness the Advocate who prepared the alleged will. The court was told that one Mr. W wa G Advocate prepared the will and that the same was executed and witnessed in his office. This therefore was a critical witness to prove the validity of

the will. This court takes judicial notice of the fact that the said Advocate practices in Nyeri Town and as such there ought to have been no difficulty in securing his attendance as a witness. No application was made to have the Advocate summoned to testify in court.

37. Based on the above omissions this court harbours grave doubt as to whether the written will alleged to have been made by the Deceased is a genuine document.

38. Finally I note that the Grant which was issued to the Administrator which Grant is dated 18th January 2013 indicates that he was issued with a Grant of letters of Administration 'Intestate' implying that the Deceased did not leave behind a written will. This is the Grant which Administrator relies upon as the basis for his prayer to have the Grant confirmed. The court did not issue to the Administrator a Grant of Probate with written will. At no time did the Administrator move to amend this Grant.

39. For the above reasons I find that it has not been proved that the deceased died testate. The written will relied upon by the Administrator has not been satisfactorily proved. I therefore find and hold that the Deceased died 'intestate' and her estate is to be distributed as such.

Distribution of the Estate

40. Having found that the Deceased in fact died intestate the next question is how the estate ought to be distributed.

41. It is not in dispute that the Deceased had seven (7) children. However following the demise of two (2) daughters only five (5) children survive the Deceased three (3) sons and two (2) daughters. Being the biological children of the Deceased all the five (5) surviving children are 'dependants' of the Deceased as defined by Section 29(a) and are entitled to inherit a share of the estate.

42. Section 39 of the *Law of Succession Act* provides that

> " Where an intestate has left a surviving child or children but no spouse, the net estate shall, subject to the provisions of Section 41 and 42 devolve upon the surviving child if there be only one, or shall be equally divided among the surviving children." [Own emphasis]

43. This law provides for equal inheritance for all the children of a Deceased person. Therefore all five (5) children of the Deceased have equal rights of inheritance. The attempt by the protestors and the Administrator to exclude their sister 'M' as a beneficiary on grounds that she is married cannot be supported by this court. In this thinking the brothers were probably being guided by Kikuyu customary law by which daughters are normally excluded from inheriting a share of their parents estate.

44. However Section 38 of the *Law of Succession Act* which provides for the mode of distribution of an estate where the Deceased died intestate leaving behind a child or children but no spouse provides that the net estate is to be divided equally to the surviving children irrespective of gender and whether married or not.

45. In RE Estate Of Joel Mithara Ruria (Deceased) [2021] eKLR, the court held that

> " A court of law cannot invoke a customary law which is repugnant to natural justice, equity and good conscience....."

46. Further in Stephen Gitonga M Muriithi -vs- Faith Ngira Muriithi [2015] eKLR the Court of Appeal stated that

> " Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried." [Own emphasis]

47. Similarly in RE Estate Of Francis Andachila LutA (Deceased) [2022] eKLR. Hon. Justice Musyoka stated as follows;-

> " Let me revisit Section 38 of the *Law of Succession Act*. It provides for equal distribution of the estate amongst the children. The language of Section 38 is gender neutral. It does not classify children into male and female nor sons and daughters, nor men and women. There is no discrimination nor categorization along gender lines. That would mean that sons and daughters of a dead person are entitled to a share in the estate of their dead parent. Section 38 does not make marriage a factor in the distribution of the estate of a dead parent. Gender and marital status are factors under customary law, but not under the *law of Succession Act*....."

48. The parties all state that one of the daughters of the Deceased namely 'EW' indicated that she had no interest in inheriting from the estate. That may well be so and the court on its part cannot compel a beneficiary who has no interest in inheriting to receive a share of the estate. However for the avoidance of any doubt in a disputed case such as this one the said 'EW' ought to have indicated in writing her renunciation of any right to inherit by executing a written 'Deed of Renunciation'.

49. In Re estate of Simon Ikandi Gitunga (Deceased). Succession Cause No. 5 of 1995 it was stated thus;-

> " Concerning renunciation of right to inheritance, it should be noted that a beneficiary under a will or a survivor in intestacy cannot be compelled to take a share in the estate against their wish. In other words, it is not mandatory that a beneficiary take his bequest or legacy under the will of the Deceased or that a survivor in intestacy takes the share allotted to them. In both cases there is liberty to renounce or disclaim the right to the share. The usual practice is for such a beneficiary or survivor or her to file a Deed or instrument of renunciation disclaiming such right....."

50. The Administrator has opposed the sharing of the suit property with his siblings on grounds that they own other parcels of land elsewhere. The fact that the siblings own or possess other parcels of land is neither here nor there – that fact does not in law extinguish their right to inherit a share of their late mother's estate.

51. Finally I find merit in the two protest filed in this matter. I direct that the Administrator file a fresh summons for confirmation of Grant. I further direct that the parcel of land known as Othaya/Ihuririo/XXX be distributed to the five (5) surviving children the Deceased in equal shares. This being a family matter I make no orders on costs.

DATED IN NYERI THIS 3RD DAY OF OCTOBER 2025

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MAUREEN A. ODERO

JUDGE