In re Estate of Agnes Muthoni Ng'ethe (Deceased) (Succession Cause E43 of 2020) [2025] KEMC 245 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEMC 245 (KLR)

REPUBLIC OF KENYA

IN THE NAKURU LAW COURTS

SUCCESSION CAUSE E43 OF 2020

PA NDEGE, SPM

MAY 22, 2025

IN THE MATTER OF THE ESTATE OF AGNES MUTHONI NG'ETHE (DECEASED)

BETWEEN

MARGARET WANGUI ..... 1ST ADMINISTRATOR

JOYCE NYAMBURA NG'ETHE ..... 2ND ADMINISTRATOR

AND

SIMON NG'ETHE GICHIMU ..... PROTESTOR

JUDGMENT

1. For determination is the Summons for Confirmation of Grant filed on 16th November, 2021 and brought under Section 71 (1) and 3 of the *Law of Succession Act*. The Applicants desire that the grant of letters of administration intestate made to themselves, Margaret Wangui and Joyce Nyambura Ng'ethe on 26th April 2021 be confirmed.

2. One of the beneficiaries herein, the administrators' co-beneficiary, Simon Ngethe Gichimu has filed an affidavit of protest against confirmation of grant on 30th May 2022. He deposed that he never consented to the appointment of the administrators herein nor to the filing of the petition herein and that it was by sheer luck that he discovered the present petition and proceedings upon information from a confidant of his. That upon receiving the information concerning the petition herein, he instructed his advocates on record who perused the court file herein and discovered that the administrators had forged his signature in form 38, the consent to the making of a grant of administration. That following the forgery, he shall be pursuing criminal charges against the administrators herein. That he is not in agreement with the proposed mode of distribution as per paragraph 5 of the supporting affidavit. That the administrators have, without any explanation, included strangers to the estate herein, namely: Norman Gicheru Githambo and Ruth Wairimu Mucheru. That the mode of distribution suggested was never discussed and agreed upon hence, it's a

forced mode. That the assets to be distributed formed part of parcel no. Bahati/Kabatini Block 1/2623 (hereinafter referred to as the 'mother parcel') which was family land held by the deceased and on which the deceased family resided hence the Deceased's house stands on the mother parcel. That the administrators carried out illegal subdivision work of the mother parcel of land without approval of the estates dependants nor without grant of letters of administration hence the same amounted to tampering with the estate of the Deceased. That in line with Kikuyu customs, a mother's house ought to be inherited by the youngest son and/or the only surviving son and since he is the only surviving son, he is entitled to inherit his mother's house. That the administrators, while imposing their mode of distribution as per paragraph 5 of the supporting affidavit, failed to consider the Kikuyu customs and hence his disagreement with the proposed mode of distribution. That he cannot be part of a fraudulent process and he is therefore not in agreement with the proceedings herein and therefore prays that the summons for confirmation of grant dated 29/11/2021 be disallowed and criminal charges be preferred against the administrators for tampering with the estate of the Deceased and forgery of his signature. That moreover, the title deeds disclosed by the administrators in form P&A5 and in the proposed mode of distribution be cancelled as they have been obtained illegally.

3. Joyce Nyambura Ng'ethe, in her replying affidavit deposed that the protestor has always been obstinate and self-willed even before the demise of their late mother. That he never turns up for meetings and could only turn up later just to cause chaos while protesting at every decision made by the family. That they were therefore not shocked when they received the affidavit of protest herein as that has always been his conduct. That the protestor herein has always been invited to all the meetings organized by the family and that he could always be adequately briefed about the same whenever he fails to appear. That he has created bad blood with almost everyone in their family. That after the demise of their mother, a meeting was held on 21/12/2019 in which all the family members were notified. That the main agenda of the meeting was succession. She annexed copy of the minutes of the meeting as JNG-1. On the allegation of forgery, she responded that the protestor is misleading this court that his signature was forged as he has not tendered any evidence proving the same and has further not taken the necessary steps to have whoever he suspects to have committed the forgery to be prosecuted in a court of law. That the protestor has also failed and/or neglected to propose his alternative mode of distribution as preferred by himself so as to enable this honorable court to adjudicate on the issue touching on the estate. That their late mother sold one of the plots to Norman Gicheru Githambo and Ruth Wairimu Mucheru so as to defray some of her medical expenses. That the two are therefore not strangers but bona fide buyers of Bahati/Kabatini Block 1/19104. That the permanent buildings at home are hers, and that the foundation was put up back in the year 2008, and the Protestor is therefore lying that the same formed part of family land in which the deceased's house was situated. That the land was subdivided by their late mother who invited all of them after which balloting was done. That it is only the protestor herein who failed to turn up. That the parcels that remained in the name of their late mother are the ones that are subject of these succession proceedings. That the protester is their only brother and that he has always felt like he should be the one controlling everything and making every decision concerning the family. That such veritable male chauvinistic and atavistic notion as that exhibited by the protestor is not supported by any existing law in Kenya. That indeed the *Law of Succession Act* and our Constitution outlaws gender discrimination in law, customs and practices related to land and property. That in any case, the protestor has been allocated the largest share in their proposed mode of distribution and it is therefore perplexing that he is still demanding more from the estate. That the Protestor's affidavit of protest is unmeritorious as the protestor has been problematic to their family and should not be allowed to come in and muddy the waters in the estate of the deceased. That the protester's intention is to endlessly delay the conclusion of this matter.

4. The Summons and protest were heard by way of viva voce evidence. Simon Ngethe Gichimu (PW1) mainy adapted his affidavit as his evidence herein. In cross-examination, he conceded that he has not made any counterproposal. That he wants them to sit down, all of them, and agree on the mode of distribution afresh. He admitted that the plots subject to the succession cause remains in the name of their late mother. He denied attending any meeting to discuss the issue of distributing the plot. That the court should direct that they have a family meeting to discuss the issue. He wants the court to follow Kikuyu customary law in the distribution process herein.

5. Joyce Nyambura Ng'ethe (AW1) also adopted her affidavit as her evidence. She wants the court to follow the Kenyan laws and not customary laws in the distribution process herein. She admitted that the deceased had 6 children, but that one of them Nancy Wangechi is deceased. It was however not clear on whether she involved or include one of the beneficiaries, Ros Wanjera, in these proceedings and whether the children of her deceased's sibling was or were involved. She could also not prove that she informed the protester about these proceedings. She was also not aware as to whether the protestor signed the petition or not. She also admitted that she had no evidence of the sale of the land parcels herein by her mother to Norman and Ruth, the third party herein.

6. The parties subsequently filed their written submissions. The Applicant framed the issues for determination as follows: -

    a. Whether the Protest is merited

    b. Whether the inclusion of third parties was proper

    c. Whether there were any children of the deceased who were not listed in the petition

7. On the first issue, she submitted that the protesters reliance on Kikuyu customary law to claim exclusive inheritance rights as the only male child is retrogressive and contrary to Article 27 of *the Constitution* of Kenya, which guarantees equality and freedom from discrimination. That section 38 of the *Law of Succession Act* (Cap 160) provides that where an intestate has left a surviving child or children, the net intestate estate shall be equally divided among them, irrespective of gender. That courts have repeatedly held that cultural practices that promotes gender inequality are unconstitutional. That moreover, the protester has admitted that the subdivisions was done by the deceased, and not the administrators. That it is therefore disingenuous to claim illegality.

8. As to whether the inclusion of third parties, Norman Gicheru and Ruth Wairimu as beneficiaries was proper, learned counsel for the Applicant argued that their inclusions was not as beneficiaries, but was part of acknowledging their financial support of the deceased during her illness. That the property in question, Bahati/ Kabatini Block 1/19104 was sold and the proceeds went towards medical expense and land subdivision. That that was done pursuant to the provisions of section 83 of the *Law of Succession Act*, which allows administrators to settle debts and obligations of the estate, which can include expenses incurred during illness.

9. As to whether there were any children of the deceased who were not listed in the Petition, learned counsel for the Applicants submitted that all the deceased's children were duly listed and are appropriately set to benefit from the estate. That the protester's conduct, however, demonstrate bad faith. He urged the court to dismiss the protest with costs and allow the summons for confirmation of grant as proposed by the Administrators.

10. The Protestor equally filed his written submissions and framed the issues for determination as follows: -

    a. Whether the administrators intermeddled with the Deceased estate prior to confirmation of the grant

b. Whether the administrators forged the Protestor's signature at the time of filling the petition for letters of administration ad litem

c. Whether the honorable court should dismiss and/or reject the summons for confirmation of grant dated 29/11/2021

11. On the first issue, learned counsel for the protestor relied on the provisions of section 45(1) of the *Law of Succession Act* which provides as follows: -

> Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

12. Learned counsel then submitted that the 2nd Administrator admitted during the hearing that the mother parcel was subdivided by their late mother notwithstanding that there was no evidence to that effect. That no minutes were produced to prove that all the beneficiaries were present to affirm that a ballot exercise was arguably conducted where each beneficiary would choose which plot number to acquire. That even if the same were true, it would have been prudent for the witness to avail the necessary conveyance instruments that were used to effect the alleged subdivision and transfer of title deeds of the resultant subdivisions. That in the absence of the same, it is clear and evident that the said subdivision and the resultant subdivisions that were crated from the mother parcel were illegally and fraudulently obtained by the administrators herein. That none of the witnesses who were present during the balloting and or subdivisions were called as witnesses herein. That it is not clear who sold the land parcels to Norman Gicheru Githambo and Ruth Wiriumu Mucheru, as the evidence tendered herein is contradictory on the same. That furthermore, no sale agreement was produced to confirm that in deed the deceased sold the aforementioned parcel of land. That there is therefore no evidence that the deceased disposed of the said parcel of land to the alleged purchasers and it has also been proved that she never subdivided the other parcel. That it is therefore evident that the Administrators tampered and/or interfered with the Deceased's estate prior to the issuance of certificate of confirmation of grant.

13. On to the second issue as to whether the administrators forged the Protestor's signature at the time of filing the petition for letters of administration ad litem, learned counsel for the protestor submitted that the administrator admitted that she was not present when the signature of the protester was being appended. That even then, a comparison of the signature belonging to the protestor herein, with the one he signed on the affidavit of protest shows a disparity. That the disparity is so evident that one does not need a handwriting expert to establish the same.

14. On to the third issue, learned counsel referred the court to the provisions of Article 27(3) of *the Constitution* and section 3(2) of the *Judicature Act* which mandate the courts to be guided by African Customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality, or inconsistent with any written law. He submitted that under Kikuyu Customary law of intestacy, succession is patrilineal. That devolution under the custom is in favour of the male relatives of the deceased. That in the present case, the Protester herein does not wish to disinherit the other siblings save for the fact that as the only surviving son, it is fair and just that he gets to inherit his late mother's house in the said homestead. That further, the administrator's evidence confirms that there are other beneficiaries who are deceased and that she did not bother to include their children in the said succession. That that was discriminatory on her part as the grandchildren are next in line to inherit from a deceased's person's estate in case if the death of the children.

15. In conclusion, learned counsel for the protester submitted that the succession proceedings herein are marred with illegalities and that it is in the interest of justice and fairness that this honorable court does issue an order rejecting and dismissing the summons for confirmation of grant dated 29/11/2021.

16. The court has considered the evidence led by the parties, and their submissions in respect of the summons for confirmation of grant and protest. There is no dispute that the deceased herein, Agnes Muthoni Ng'ethe died intestate on the 10th July 1019. A petition for grant of letters of administration was filed on 07th October 2020 jointly by her daughters Margaret Wangui and Joyce Nyambura Ng'ethe. According to the affidavit sworn by the Petitioners in support of the Petition, the deceased was survived by six children as follows:

    a) Margaret Wangui - Daughter/ Administrator/ Applicant

    b) Annah Wanjiru Ng'ethe – Daughter/ Administrator/ Applicant

    c) Simon Ngethe Gichimu – Son/ Protester

    d) Jane Wanjira - Daughter

    e) Joyce Nyambura Ng'ethe - Daughter

    f) Simon Mwaniki Gichimu - Grandson

17. Two questions fall for determination, namely, the law applicable to the distribution of the estate of the deceased and secondly, whether all the real beneficiaries have been involved in the distribution process herein and the shares due to the beneficiaries.

18. The protestor herein insists that Kikuyu customary inheritance law is applicable herein, while the applicant objects. Kikuyu customary law of inheritance is notorious as stated in Eugene Cotran's Restatement of African law, Kenya Volume 2: The Law of Succession1969 (London, Sweet & Maxwell). The Kikuyu customary law of inheritance provided that only sons of the deceased person could inherit his land. However, if a daughter remained unmarried past the marriage age, the 'Muramati', usually the eldest son of the deceased, could allocate a piece of land for her use during her lifetime. Thus, succession was based on the patriarchal system and favored male beneficiaries over females. This is however patently discriminatory and, in a period, post the promulgation of the 2010 Constitution cannot be upheld. For Article 10(2)b) of *the Constitution* includes among national values and principles the values and principles of human dignity, equity, social justice, inclusivity, equality, human rights, protection of the marginalized and non-discrimination.

19. Under Article 27 discriminatory practices are outlawed as all persons are declared equal before the law. Both men and women are entitled to equal treatment and equal benefit of the law and their right to equal opportunities in political, economic cultural and social spheres is guaranteed. Indeed, any customary practice or law that is inconsistent with these provisions is void to the extent of the inconsistency, by dint of Article 2(4) of *the Constitution*.

20. In the case of The Estate of Seth Namiba Ashuma (Deceased) [2020] eKLR. Musyoka J. juxtaposed the application of Luhyia customary law visa- vis the *Law of Succession Act*, *the Constitution* of Kenya 2010 and international instruments in a case where a step brother to the deceased person who died in 1965, had sought to revoke the grant issued to the daughter of the deceased on the basis that, his clan had appointed him guardian of the estate pursuant to customary law.

21. The court, having set out the provisions of Article 27 of *the Constitution*, asserted that:

This is not just a matter of municipal law. International law also applies to the matter, and has imposed universal standards when it comes to how women are to be treated, generally. Article 2 of *the Constitution* states that international law is part of Kenyan law and any treaty or convention ratified by the Kenyan State forms part of the Kenyan law, including treaties and conventions ... whether domesticated or not ... Among the conventions that the Kenyan state has ratified is the convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in 1984. By appending its signature to that convention Kenya condemned discrimination against women in all forms, and committed itself to eliminate the vice

22. The learned Judge then set out some of the Articles of the convention (CEDAW) before concluding that:

    33. The standards that are set by the Law Succession Act, *the Constitution* of Kenya 2010 and the Convention on the Elimination of All Forms of Discrimination against Women requires that women be treated equally with men in all spheres of life, including succession. They frown upon women being treated as lesser beings. With respect to succession, it would be discriminatory and unfair for the daughter of the deceased, who is the surviving immediate blood relative of the deceased, to be overlooked, so that the deceased's estate devolved upon the deceased's stepbrother instead of the deceased's own daughter. To sanction such a development or devolution would be to go contrary to the law as stated in the *Law of Succession Act*, *the Constitution* of Kenya 2010 and the Convention on the Elimination of All Forms of Discrimination against Women.

23. I am bound entirely by these sentiments, and for the purposes of this case, have no difficulty in finding that all the children who survived the deceased in this case ought to be treated equally in considering distribution. The Protestor has however claimed that he is entitled their late mother's house, while the applicants insists that the buildings in the homestead belongs to her as she is the one who developed them. Section 107 of the *Evidence Act* 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 has on that person.

24. Section 108 of the *Evidence Act* states that 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. In this instance, the burden of proof lay with the applicant to prove her claims. No evidence was tendered as to the developments therein. Further no evidence was tendered as to the sale of any of the plots to the third parties herein.

25. The provisions governing proof of sale of land are clear. The ingredients of a contract for sale of land are contained in Section 3(3) of the *Law of Contract Act* which states:

    (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

        (a) the contract upon which the suit is founded—

            (i) is in writing;

            (ii) is signed by all the parties thereto; and

        (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

26. The above provision is mirrored under Section 38 *Land Act* as follows;

38.

(1) No suit shall be brought upon a contract for the disposition of an interest in land unless —

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

27. There was no such proof of the above elements or ingredients of a valid sale of any parcel herein to the third parties and as such I do find their inclusion as beneficiaries herein illegal and/or irregular. This court finds that only the Protestor and his siblings are entitled to an equal share of the suit properties including the land and any developments thereon. In case of a deceased beneficiary or, in this case, sibling, then the spouse or the children would benefit and this need to be confirmed by the attachment of death certificate and a letter from the chief as to who is entitled to inherit the share of a deceased beneficiary.

28. The estate herein comprised of four assets namely, land parcels Bahati/Kabatini Block 1/19099, Bahati/ Kabatini Block 1/19100, Bahati/ Kabatini Block 1/10101 and Bahati/Kabatini Block 1/19102, all registered and title deed issued on 29/072019, a few days after the death of the deceased.

29. Before this court, the Protestor has claimed that the subdivision and registration of these parcels were done unproceduraly by the administrator herein. Whereas there is no evidence tendered by either side as to whether the subdivisions herein were done procedurally or otherwise, I do find that with the period of registration having been done a few days after the death of deceased, it is highly probable that the processes of sub-divisions and the subsequent registrations were initiated when the deceased was still alive and thus do hereby dismissed the protester's clam of intermeddling by the administrators in the subdivisions of the parcels herein.

30. The only issue I find in the confirmation proceedings herein, is the inclusion of the 2 third parties herein. I have already found the reasons offered not to have been backed by any evidence as eloquently submitted by the learned counsel for the protester, and to that extent, I do find the mode of distribution proposed herein to be marred with illegality. The second issue I do agree with the protestor herein is that there is no evidence that the children of the deceased's beneficiary was or were adequately involved in the succession proceedings herein.

31. From the material placed before the court, the Protestor and his siblings do not see eye to eye. During the course of the hearing of the protest herein, the protester however appeared ready and willing to have a sit-down with the administrators and the other siblings so as to amicably share the assets herein. However, going by the response from the administrator, it does not appear that the beneficiaries can co-exist peacefully on this issue. I do however, grant the parties herein one more opportunity to have a sit down, possibly by referring this matter to an alternative justice resolution mechanism the parties herein may recommend, failure to which the only prudent way or option, noting the sizes of the parcels

herein, and the number of the beneficiaries, including the children of the deceased, would be to sell the said assets and thereafter share the proceeds equally.

32. In the circumstances, I do therefore dismiss the summons for confirmation of grant dated 29/11/2021 and do hereby uphold the protest herein and direct that parties to have a fresh sit-in session to have the distribution done afresh on all the real beneficiaries of the state herein, including the spouse or children of the deceased's beneficiaries who must be properly identified in a letter by the chief.

    Parties will bear own costs.

SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 22ND DAY OF MAY.2025.

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Applicants' Counsel: N/A

Protester's Counsel: N/A

1st Applicant/ Administrator: N/A

2nd Applicant/ Administrators: N/A

Protester: N/A