



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**In re Estate of M'Mwamba M'Inoti (Deceased) (Succession Cause E144 of 2021) [2024] KEMC 96 (KLR) (31 May 2024) (Judgment)**

Neutral citation: [2024] KEMC 96 (KLR)

**REPUBLIC OF KENYA  
IN THE GITHONGO LAW COURTS  
SUCCESSION CAUSE E144 OF 2021  
AT SITATI, SPM  
MAY 31, 2024**

**IN THE MATTER OF THE ESTATE OF M'MWAMBA M'INOTI (DECEASED)**

**BETWEEN**

**MADARINA NDURU MUKETHA ..... PETITIONER**

**AND**

**NTHAMBURI HEZAH DAVID ..... PROSECUTOR**

**JUDGMENT**

1. By a Summons dated 23<sup>rd</sup> January, 2023 for the confirmation of the grant supported by an affidavit of similar date, the petitioner identified the following estate properties as estate properties:
  - i. Abothuguchi/Gitie/255
  - ii. Abothuguchi/Gitie/765
  - iii. Abothuguchi/Gitie/766
  - iv. Abothuguchi/Gitie/777
  - v. Abothuguchi/Gitie/778
2. Consequent upon the identification of the said properties, the Administratrix proposed the following distribution to the beneficiaries: James Murithi ¼ acre from any of the parcels, Jeniffer Ncheri Gideon 1 acre from any of the above parcels to hold in trust for her children. Balance shall be shared equally between Madarina Nduru Muketha and Vaskwerina Mutura Kiunga.
3. The Summons for Confirmation aforesaid was opposed by the Protestor who filed a Supplementary Affidavit dated 13<sup>th</sup> April, 2023. He was represented by Mwarania & Company Advocates.



4. In summary, he contended that some of the listed properties for distribution were non-existent and not available for distribution to the estate beneficiaries. He further averred that the original parcel number Abothuguchi/Gitie/255 was first subdivided on 22/08/2006 into Abothuguchi/Gitie/765 and Abothuguchi/Gitie/766.
5. The Protestor added that 765 measuring ½ acre was sold to him by the deceased following its excision from 255. After the sale, the deceased applied for the Land Control Board consent on 21/11/2006 but the approval was deferred to 19/11/2006. The deceased, however, died before attending the subsequent Land Control Board meeting leaving the protestor in active occupation of 765 as a purchaser. He added that he was still occupying 765 to date from the year 2006. He urged the court to cause 765 to be allocated to the protestor during the distribution.
6. It was further deposed that Abothuguchi/Gitie/766 was further subdivided on 12/07/2007 into Abothuguchi/Gitie/777 and Abothuguchi/Gitie/778. The protestor stated that the result was that the registers and titles for 255 and 766 were closed following the said subdivision and sale meaning that these no longer in existence.
7. It was his further deposition that Abothuguchi/Gitie/777 underwent two transfers: First, on 30/03/2007 from the deceased M'mwamba M'inoti to one Anthony Muthiora M'Ikunyua. Second on 13/05/2021 from Anthony Muthiora M'Ikunyua to Humphrey Mwangera Mburugu.
8. In the Protestors averments, the only estate property available for distribution was 778 and this should be shared to the beneficiaries. The protestor produced the following exhibits:
  - i. Green cards for 255 and 766.
  - ii. Green card for 777.
  - iii. Mutation form showing the adjacent parcels to 255 at the time of excision.
  - iv. Search certificate of 765.
  - v. Land Control Board Consent Form application for consent.
  - vi. Search certificate for 778.
9. In cross-examination it emerged that the protestor had informed the petitioner and her family of the transaction long ago and had excised his plot far away from where the petitioner and her family were occupying while the deceased was still alive.
10. At that stage, the protestor closed his case

### **The Petitioner's Case**

11. The petitioner affirmed their summons for confirmation as supported by its affidavit.

### **Issue for Determination**

12. The only issues for determination are:
  1. Are the listed properties part of the deceased's estate?
  2. What is the correct mode of sharing the deceased's properties?



## Issue 1: Identification of Properties

13. From the material placed before the court, it was established by clear documentary proof by the protestor that parcel 255 underwent subdivision and ceased to exist. It was further proved that parcels 765, 766 and 777 were the properties of third parties. The only available property for distribution was Abothuguchi/Gitie/778.
14. As for Abothuguchi/Gitie/765, the protestor proved that the deceased had recorded a sale agreement with him over 765 which was an excision of Abothuguchi/Gitie/255. The sale agreement confirms the purchase price was paid in full and that the deceased applied and signed the Consent for transfer form by the Land Control Board and actually appeared before the Land Control Board only for the approval to be deferred to a new date. The further established evidence showed that on the deferred date, the deceased did not attend as he passed away shortly before he appeared. By this time, a mutation form giving effect to the proposed subdivision had already been prepared and the new number 765 issued.
15. The question that arises is this: did the failure of the deceased to appear before the Land Control Board after signing the consent to transfer deprive the purchaser of a protectable interest in the parcel 765 so that 765 remained part of the deceased's estate?
16. To answer this question, the court found guidance from the authority of *Mwangi & another versus Manyeki* (Environment and Land Appeal E003 of 2023) [2024] KEELC 220 (KLR) (25 January 2024) (LN Gacheru J.) where it was held as follows:

“ 64. In the instant suit, the late Kinurio Manyeki, had executed transfer in favour of the Respondent. Therefore, from the date of execution of the said transfer, he held the Suit land in trust for the Respondent and this Court is equally persuaded that it does not form part of the estate of Kinurio Manyeki.

This Court is also persuaded by the findings in the case of *Sammy Some Kosgei vs Grace Jelel Boit* ( 2013) eklr, where the Court held;-..... I am of the view that the deceased signed all the disputed documents including the applications to subdivide and the transfer forms. I believe the Plaintiff's evidence that the sub division was done inter -alia in order to transfer the two plots to the Plaintiff”

65. Equally, this Court believes that the late Kinurio Manyeki signed the transfer form in order to transfer the suit land to the Respondent herein. He did so during his lifetime, and his intention was very clear and the Court can also conclude that the said transfer was gift *intervivos* and the suit land is not part of the estate of the deceased Kinurio Manyeki.
66. The Appellants had also alleged that the Respondent is guilty of *intermeddling*, by registering the property of the deceased property without following the procedure of distribution of such property through succession proceedings. However, this Court will take refuge in the doctrine of equity which provides that “equity regards as done what ought to have been done”. This maxim of equity means that when an individual is required by an agreement or by law to perform some act of legal significance, equity will regard that act as having been done as it ought to have been done, even before it has actually happened.
67. In this case, the Respondent was supposed to have registered the suit property in his name immediately the transfer form was executed. He did not and he has



given reasons for the delay. Equity will therefore regard as done, what ought to have been done registration in favour of the Respondent.

68. The Court of Appeal in the case of Willy Kimutai Kitil vs Michael Kibet (2018) eKLR, had the following to say on the application of the doctrine of Equity in determination of matters in Court.

..... By Article 10(2)(b) of *the Constitution* of Kenya, equity is one of the national values which binds the Courts in interpreting any law. Article 10(1)(b)... Further, by article 159(2)(e), the Courts in exercising judicial authority are required to protect and promote the purpose and principles of *the Constitution*.... Thus, since the current Constitution by Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle and requires the Courts in exercise of judicial authority to protect and promote that principle, amongst others. it follows that the equitable doctrines of constructive trusts and estoppel are applicable....”

69. Bearing in mind the above holding of the Court of Appeal, this Court finds and holds that the maxim of equity applies herein and thus finds and holds that the transfer form once it was executed by the late Kinurio Manyeki, transferred the suit land absolutely to the Respondent”

## Issue 2: Mode of Sharing

17. On the strength of this authority, the court finds that the deceased’s intention was clear but was hampered by his untimely demise. The maxim of equity of equity regards that which ought to be done as done is relevant and applicable with the result that the court rules that Abothuguchi/Gitie/765 was held by the deceased in trust for the Protestor who shall be entitled to its transfer to him. The court hereby orders that 765 shall be and is hereby transmitted to the Protestor.
18. As for 766 and 777 the court finds that these do not constitute estate properties as per the green cards in court.
19. Finally, the court holds that 778 is the only estate property and the same shall be shared according to the provision of section 35 and 38 of the *Law of Succession Act*:
38. Where intestate has left a surviving child or children but no spouse Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.
20. Relatedly, Abothuguchi/Gitie/255 is declared as a non-existent property not available for distribution while Abothuguchi/Gitie/766 and Abothuguchi/Gitie/777 are declared to be properties belonging to third parties who are strangers to the estate and not available for distribution. To give effect to this, the court issues a Certificate of the Confirmation of Grant in the following ratio:
1. Abothuguchi/Gitie/765 – to Nthamburi Hezah
  2. Abothuguchi/Gitie/778 – equally to Madarina Nduru Muketha, Vaskwerina Mutura Kiunga, James Murithi and Jeniffer Ncheri Gideon (Ncheri to hold in trust for herself and her children)

Right of appeal is 30 days.



**DATED, READ AND SIGNED AT GITHONGO THIS 31<sup>ST</sup> DAY OF MAY 2024**

**HON. T.A. SITATI**

**SENIOR PRINCIPAL MAGISTRATE**

**GITHONGO LAW COURTS**

**Present**

Petitioner Madarina

Objector Nthamburi

Miss Kajuju Advocate for the Protestor

