In re Estate of David Kiruki Mukindia (Decesaed) (Succession Cause E073 of 2022) [2024] KEMC 88 (KLR) (31 May 2024) (Judgment)

Neutral citation: [2024] KEMC 88 (KLR)

REPUBLIC OF KENYA

IN THE GITHONGO LAW COURTS

SUCCESSION CAUSE E073 OF 2022

AT SITATI, SPM

MAY 31, 2024

IN THE MATTER OF THE ESTATE OF DAVID KIRUKI MUKINDIA (DECEASED)

BETWEEN

MONICAH NKIROTE KIRIMI ..... PETITIONER

AND

GACHERI DAVID MUKINDIA ..... PROTESTOR

JUDGMENT

1. By a Summons dated 28th November, 2023 supported by an affidavit of the Administratix, the petitioner proposed the following mode of distribution:

   A. LR Kibirichia/Kibirichia/3481 acre to Lucy Kinanu.1 acre to Beth Naitore.1 ½ acres to Nimrod Gitonga.1 ½ acres to Geoffrey Kaimenyi,1 ½ acres to Elijah Muthuri,1 acre to Monicah Nkirote to hold in trust for Denis Mworia and Doreen Kaari Mutwiri.

   B. 1 acre each out of Abothuguchi/L-Kaongo/1189 to Monicah Nkirote, Isabella Murugu, Nimrod Gitonga, Geoffrey Kaimenyi, Elijah Muthuri, Beth Naitore and Lucy Kinanu.

   C. Ntugi Market Plot 4: Geoffrey Kaimenyi and Elijah Muthuri.

   D. Kibirichia Market Plot 48A: Nimrod Gitonga

   E. Cooperative Bank Meru Branch No. 011032XXXXX200: equally by all beneficiaries.

   F. Equity Bank Meru Branch ACC 014001XXXXX036: Equally to all beneficiaries.

2. The Summons for Confirmation of Grant was opposed by the filing of an Objection dated 13th March, 2024. The objector/protestor contended that the summons should be revoked because the petitioner

had excluded her from the succession proceedings by failing to notify her and by not giving her a share out of the deceased estate.

3. The Objection was accompanied by an Affidavit of Protest dated 13th March, 2024. The summary of the protest was that:The petitioner had excluded her from the list of beneficiaries.Her official name was Gacheri David Mukindia and not Isabella Gacheri Murugu as captured in the pleadings by the petitioner.The petitioner failed to include a monetary award for the deceased who had suffered a road traffic accident in 2018 and an award made.The amounts of money in the Cooperative Bank and Equity Bank Accounts had not been disclosed and the manner of sharing the same.The petitioner had not included Kithirune Plots in the list of assets.The petitioner had failed to share out all the acreages available for distribution by leaving out undistributed 1 acre out of Abothuguchi/L-Kaongo/1189.The petitioner had failed to share out all the acreages available for distribution by leaving out undistributed 1 acre out of Kibirichia/Kibirichia/348.

4. Upon being served with the protest, the petitioner filed an Affidavit dated 5th May, 2024 in reply to the Protest wherein she averred that Gacheri David Mukindia was one and the same person as Isabella Gacheri Murugu since she had been known by the latter name since her childhood days.

5. At the end of their respective contentions, the court directed the parties to exchange written submissions and this was complied with.

The Petitioner's Submissions

6. On 23rd May, 2024 the Petitioner lodged her written submissions contending that it was dishonest of the Protestor to conceal her official names and then allege that she had been excluded yet she had been invited to the family meetings to decide the way forward but she snubbed the meetings. It was submitted that Gacheri David Mukindia and Isabella Gacheri were one and the same person. She submitted that if this was not the case, the objector would simply have filed a copy of her national identification card and this had not been provided in the affidavit of protest. It was argued that the protestor had been included and allotted a fair share alongside the rest of the beneficiaries. The petitioner contended that the protestor had not discharged the burden of proof regarding the allegation of exclusion. Praying for a dismissal of the protest with costs, the petitioner cited the following authorities in support of the submissions:

    1. Mbuthia Macharia –v- Annah Mutua & Anor (2017)eKLR which held that the burden of proof which remains constant is for the establishment of fact and contentions which will support a party's case.

    2. Sections 108 and 109 of the *Evidence Act* setting out the burden of proof.

7. At that stage, the petitioner closed her submissions. The firm of Gichunge Muthuri & Company Advocates represented the petitioner.

The Protestor's Submissions

8. The protestor filed written submissions dated 22nd April, 2024. She contended that as a daughter of the deceased, she was entitled to a share of the estate and it was illegal for the petitioner to omit her from the list of beneficiaries. She contended that the petitioner deliberately misrepresented the objector's name as Isabella Gacheri Murugu instead of Gacheri David Mukindia so as to deprive her of the rightful share.

9. Citing the authority of Njeru M'Chiuri Nthiga Mitaru (2016)eKLR the protestor argued that it was illegal for the Administratix to fail to consult all the family members and obtain their consent on the

mode of distribution of the deceased's estate. It was argued that the proof of the failure to obtain the consent is supported by the consent form which was not signed by all the beneficiaries.

10. It was argued further that the Administratix had failed to include the all the assets of the estate and this offended section 83 of the *Law of Succession Act*.

11. It was argued further that the parcel 348 on which stood the homestead, houses and other structures and fixtures had not been fully described and specified in details as to whom it shall be inherited. In her further submissions, the objector cited Re Estate Of Moses Wachira Kimotho (Deceased) Succ Cause 122 of 2002(2009)eKLR where it was held that the failure to act candidly and openly on the part of the administrator amounted to fraudulent conduct which entitled the court to revoke the grant under section 76 of the *Law of Succession Act*. She ended her protest at that stage.

12. The firm of Kisuya Weyombo & Company Advocates represented the Objector.

Undisputed Issues

1. The deceased died Intestate as per the petition for letters of Administration.

2. The consent form is not signed by all the beneficiaries.

3. As per the Chief's letter dated 5th May, 2021, the deceased was survived by the following:4 daughters Nkirote, Gacheri, Kinanu and Naitore.4 sons Gitonga, Muthomi, Kaimenyi and Muthuri.

Issues for Determination

A. whether there were other estate properties that had been omitted from the summons for confirmation.

B. Whether or not Isabella Gacheri Murugu was one and the same person as the objector who states that she was Gacheri David Mukindia.

C. Has a case been made out for the revocation of grant in this case?

D. How should the estate properties be distributed amongst the beneficiaries?

Determination

Issue A: Omission of Estate Properties

13. The objector contended that "Kithirune Plots" owned by the deceased had been excluded from the list of properties. The court has studied the affidavit of protest as well as the objection itself and noted that the Objector failed to provide any documentary proof of the existence of the purported "Kithirune Plots". Without either a green card or search certificate, the objection lacks merit and the court dismisses the same as unproven. This also applied to the alleged monetary award for the alleged road accident – no court file number or cheque provided. As was correctly submitted by the petitioner, the burden of proof and the evidential burden lay on the objector to provide proof of the existence of the said "Kithirune Plots" as well as the monetary award for the traffic accident and this had not been provided.

14. It is the finding, therefore, of the court that the deceased did not own any parcel of land known as "Kithirune Plots" and consequently there is no property excluded from the summons for the confirmation of grant.

15. Furthermore, the court finds that the allegation that some acreages of 348 and 1189 had been left unshared was unproved. There is no green card and no official search that confirms the precise acreages

of the lands in question and therefore the court finds that the objector has failed to establish that 1 acre each for 348 and 1189 had been left undistributed.

Issue B: Correct Names of the Objector

16. The objector said that her real name is Gacheri David Mukindia while the petitioner stated that Isabella Gacheri Murugu was her correct name. In order to generate light as opposed to heat on this issue, nothing could have been easier for the objector to prove her name other than by just providing the copy of her national identity card. The Objector has not furnished either her birth certificate or national identity card or even passport to settle this issue yet these are in her possession. By withholding this crucial information, the objector had not acted in good faith. Whoever comes to equity must come with clean hands, make a full and frank disclosure and act with utmost good faith.

17. Having heard the petitioner on this, it is the court's finding that the petitioner's explanation that she used the objector's known alias and childhood name ISABELLA GACHERI MURUGU was a satisfactory explanation and nothing will turn on this. Even the Chief by his letter of introduction stated that the known name of GACHERI was ISABELLA MURUGU and this corroborates the petitioner's explanation.

Issue C: Revocation of Grant

18. Revocation is such an adverse and monumental order that the ends of allowing the revocation should far outweigh the inconvenience that would arise: In Mary Wangari Kihika –vs- John Gichuhi Kinuthia &2 Others (2015)eKLR it was held:

> " The above finding of concealment of material facts or untrue allegations of facts essential in point of law on the part of the respondent would warrant a revocation by the court of the confirmed grant. However, taking into account the fact that the present case been ongoing since 1997 that would not be a just course of action, a revocation of the confirmed grant would cause the parties to return to the drawing board and it could likely take a long time before the distribution of the suit is concluded."

19. In respect of this and from the material placed before the court, it is clear that the objector was not served with any written notice of the filing of the succession cause. This was so notwithstanding the fact that the Petitioner had included her name in both the petition and summons for confirmation of grant.

20. The court finds, that in the interests of justice, taking into account the age of the case and the inclusion of the objector's name in the pleadings which, prima facie, shows that the objector was proposed to inherit a share equivalent to that of others, there was no substantial loss or prejudice occasioned to the objector's real interests. While on the letter of the law, the revocation would be merited, in the court's view the revocation would occasion greater harm than good to the majority of the beneficiaries by winding back the clock of time yet the proposed distribution, on the face it is fair. Therefore, in the court's considered discretion, the revocation is declined.

Issue D : Mode of Sharing the Estate Properties

21. On this issue, the court shall be guided by section 38 of the *Law of Succession Act* which provides that:

    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.

22. The deceased died Intestate as per the petition for letters of Administration. In the result, the court orders an equal sharing of the deceased's Parcel and cash in the banks by all the beneficiaries under section 38 of the *Law of Succession Act* provided that the homestead where the deceased parents are buried and where there is a homestead shall be held registered in the name of the the child who was last to concurrently live with the parents prior to their demise and in the absence of such a person, it shall be registered in the name of the Administratix as a compromise taking into account the equal sharing.

Conclusion

23. In the final orders, the court makes the following orders:

    1. Upon the delivery of this judgement, the objector shall provide a certified copy of her national identity card to the Court Administrator clear the air on the correct names to be included in the certificate of the confirmation of grant.

    2. Upon the delivery of this judgement, the Administratix and the beneficiaries shall inform the court of the name of their sibling(s) who were concurrently living with their parents in the homestead and compound forming the burial site for the purpose of being indicated in the certificate of the confirmation of grant hereafter.

    3. At the cost of all the beneficiaries who shall share the fees and costs equally, a survey exercise shall be undertaken within 45 days of this judgement to establish the precise acreages of the 2 estate properties namely Abothuguchi/L-Kaongo/1189 as well as that of Kibirichia/kibirichia/348.

    4. A certificate of the confirmation of the grant is hereby issued to the parties in the ratio of equal sharing of all estate properties by ALL the beneficiaries subject to the limitation surrounding the homestead and parents' burial grounds.

    Right of appeal is 30 days.

DATED, READ AND SIGNED AT GITHONGO THIS 31ST DAY OF MAY, 2024

HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS

Present:

Petitioner

Objector

Miss Weyombo Advocate for the Protestor

Miss Mugo Advocate for the Petitioner