



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Iracha Gakiri (Deceased) (Succession Cause
97 of 2019) [2024] KEMC 92 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEMC 92 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
SUCCESSION CAUSE 97 OF 2019
AT SITATI, SPM
MAY 29, 2024**

BETWEEN

EUNICE M'RIMBERIA PETITIONER

AND

FREDERRICK MURUNGI NTOIRACHA OBJECTOR

JUDGMENT

1. On 18th February, 2021 the Petitioner Administratrix filed the Summons for the Confirmation of Grant proposing the following mode of distribution:
 - A. Abothuguchi/Uruku/467(2.44Ha)
 - i. 0.85Acres to Evangeline Kairigo Julius.
 - ii. 0.70Acres to Eunice Karuru.
 - iii. 0.70Acres to Pauline Kainda.
 - B. LR.Uruku/Nkuene/472 (1.21Ha)
 - i. 1.29Acres to Loise Riinya Kinoti.
 - ii. 0.63Acres to Eunice M'Rimberia.
 - iii. 0.68Acres to Paulina Kainda.
2. The Petitioner later replaced this Summons with a fresh one dated 28th November, 2022 in which the proposed mode of distributed was as follows:
 - A. Abothuguchi/Uruku/467(2.44Ha)
 - i. 0.85Acres to Evangeline Kairigo Julius.



- ii. 0.70Acres to Eunice Karuru.
 - iii. 0.70Acres to Pauline Kainda.
 - B. LR.Uruku/Nkuene/472 (1.21Ha) Equally to
 - Eunice M’Rimberia, Paulina Kainda, Loise Riinya Kinoti and Frederrick Murungi.
3. Upon the aforesaid Summonses being lodged, the Protestor Frederrick Murungi lodged an affidavit of protest dated 23rd March, 2021 stating that he was a son of the deceased and entitled to a share with the following counter-proposal on distribution:
- A. Abothuguchi/Uruku/467(2.44Ha): Equally to
 - 1. Mathew Muthamia Iracha.
 - 2. Mberia Gichuru M’Iracha.
 - 3. M’Ithinji Kaburu M’Iracha.
 - B. LR.Uruku/Nkuene/472 (1.21Ha) Equally to
 - i. Frederrick Murungi Ntoiracha.
 - ii. Moses Kinoti M’Iracha
4. Later on 19th December, 2022 he filed a new affidavit of protest adjusting the identities of the beneficiaries to reflect the surviving widows of his brothers in the place of the now deceased 4 brothers as follows:
- A. Abothuguchi/Uruku/467(2.44Ha): Equally to
 - i. Pauline Kainda Mathiu as a widow of Mathew Muthamia Iracha.
 - ii. Eunice M’Rimberia as a widow of Mberia Gichuru M’Iracha.
 - iii. Evangeline Kairigo Kaburu as a widow of M’Ithinji Kaburu M’Iracha.
 - B. LR.Uruku/Nkuene/472 (1.21Ha) Equally to
 - i. Frederrick Murungi Ntoiracha.
 - ii. Loise Riinya Kinoti as a widow of Moses Kinoti M’Iracha.
5. Additionally, the Protestor filed a Further Affidavit of Protest dated 2nd November, 2023 specifying that each beneficiary ought to inherit 0.984Acres as equal share. He also filed the following additional pleadings:
- a. List of witnesses dated 24th August, 2022 containing the statement of the Protestor, Peter Marangu and Joshua M’Mbijiwe.
 - b. List of documents dated 24th August, 2022 containing the following exhibits:sale agreement dated 22/08/1980acknowledgment receipt dated 22/08/1980receipt dated 26/08/1980receipt dated 28/08/1980Copy of title deed for LR Nanyuki/marura Block 8/1152Search certificate for LR Nanyuki/marura Block 8/1152
6. Thereafter, to oppose the protest, the Petitioner countered with a List of 4 witnesses dated 5th July, 2021 containing the written witness statement of:



- i. Eunice M'Rimberia.
 - ii. Joseph Murugu Mathew.
 - iii. Joseph Gituma Kwirigia.
 - iv. Andrew Kobia Mburugu.
7. The firm of Gikunda Anampiu & Company appeared for the Administratrix/Petitioner while the firm of Mwirigi Kaburu & Company Advocates represented the Objector

The Protestor's Case

8. PR1 Frederrick Murungi Ntoiracha adopted his witness statement dated 24th August, 2022 in which he told the court that his Protest was that the Administratrix was excluding him from inheriting a share from his deceased father's estate. He added that it was false in fact for the Petitioner to allege that the deceased had given him the Nturukuma land and ordered him to move out of the estate land in 1974. To the contrary, he stated that he bought the subject parcel which the petitioner was claiming that the deceased had gifted him. He said that the purchase was in 1980 after the demise of the father in 1979. He produced his above-listed documents as exhibits in support of the case and urged the court allow equal distribution as by law provided.
9. PR2 Peter Marangu adopted his witness statement of 24th August, 2022 in which he told the court that prior to his demise the deceased had directed that 467 be occupied by Mathew, Mberia and M'Ithinji while 472 was meant for Frederrick and Moses.
10. PR3 Joshua Murianki M'mbijiwe adopted his witness statement of 24th August, 2022 in which he affirmed that the protestor bought his own land in 1980 after the demise of their father in 1979.
11. In his written submissions dated 27th April, 2022 the Protestor submitted as follows in summary:
 - a. It was untrue that the deceased made an oral will in 1974 requiring him to move to Nturukuma and if such a will had been made it automatically lapsed after 3months by dint of section 9 of the Law of Succession Act which provided that oral wills would only be valid for 3months after being made and that the maker of the oral will had to die within 3 months. It was submitted that the deceased died in 1979 after allegedly making the oral will in 1974 which was a 5 years' gap.
 - b. The subject parcel 1152 was bought by the protestor in 1980 using his own resources as proved by the sale agreement and search certificate and therefore should not be regarded as a gift to him by the deceased.
 - c. Intestate succession required equal sharing of properties under the Law of Succession Act.

The Petitioner's Case

12. PTW1 Eunice M'rimberia adopted her witness statement dated 5th July, 2021 in which she told the court that the deceased had 5 sons:
 - a. Mathew Muthamia Iracha now deceased but survived by his widow Paulina Kainda Mathiu.
 - b. Mberia Gichuru M'Iracha now deceased but survived by his widow Eunice M'Rimberia.
 - c. Moses Kinoti M'Iracha now deceased but survived by Loise Riinya Kinoti.



- d. M'Ithinji Kaburu M'Iracha now deceased but survived by his widow Evangeline Kairigo Kaburu.
 - e. Frederrick Murungi Ntoiracha who was the only son alive and is now the protestor.
13. The petitioner added that the Protestor had been well provided for by the deceased father prior to his demise by being facilitated to purchase 2 acres in Nturukuma whereon he lived since 1974 to date. As a result of this, it was stated that the protestor was not entitled to the remainder of the estate properties the subject of this succession cause.
 14. PTW2 Joseph Murugu Mathew adopted his written witness statement of 5th July, 2021 where he told the court that he was the son of Mathew Muthamia (Deceased) who was a brother to the protestor and was aware that the Protestor had been living in Nturukuma since 1974 where he was settled by the deceased Iracha.
 15. PTW3 Joseph Gituma Kwirigia a grandson of the deceased's brother adopted his written witness statement of 5th July, 2021 telling the court that the Protestor was long ago facilitated to settle on his 2 acres in Nturukuma from 1974. He added that the protestor was just bent on harassing the widows of his now deceased brothers.
 16. PTW4 Andrew Kobia Mburugu adopted his witness statement of 5th July, 2021 in which he affirmed that, as neighbour to the deceased, he witnessed the deceased person bequeath the land to the now deceased 4 brothers while the protestor was settled in Nturukuma on 2 acres. This was done in 1974 by the deceased gifting the protestor a bull and cash to buy the said 2 acres in Nturukuma and the transaction was done in the presence of clan elders. In support of the petition and summons for the confirmation of grant the petitioner lodged written submissions dated 9th April, 2022 contending that:
 - a. The protestor was gifted his land way back in 1974 and was not entitled to inherit from the remaining shares. He occupied the subject Nturukuma parcel from 1974 and did not have any legitimate claim over 472 and 467.
 - b. If the protestor was to succeed in his claim, it would result in the eviction of Eunice, Paulina and their children from their homes where they have loved all their lives.

Issue For Determination

17. At the end of their respective cases, the court was called upon to determine the correct mode of distribution taking into account that there was no dispute about the following:
 - a. Parcels 467 and 472 are the only Estate properties available for distribution.
 - b. The deceased died Intestate in 1979.
 - c. The deceased had 5 sons including the Protestor herein.
 - d. The Petitioner and the other beneficiaries are the surviving widows to the respective sons who died at different times.
 - e. An oral will, if any, expires after 3 months under section 9 of the *Law of Succession Act*.

Determination

18. The issue for arising determination is whether or not the deceased made a gift inter vivos of the Nturukuma land to the Protestor herein so that the said gift is deducted from the final share available to the Protestor.



19. In making this determination, the court considered the sale agreement and official search produced by the Protestor which proved that the Protestor bought the Nturukuma land in 1980 after the deceased had already died in 1974. This dislodges the claim by the petitioner and her witnesses that the Nturukuma land was gifted to the Protestor in 1974 BEFORE the demise of the deceased father. In the result, the court firmly rejects the assertion that the Nturukuma land was a gift inter vivos to the protestor.
20. In making this rejection the court was guided by the principles of the Parole Evidence Rule which demand the exclusion of oral extrinsic evidence which the Petitioner herein and her witnesses that sought to use to contradict the contents of a clearly written sale agreement of 1980: *Universal Education Trust Fund –v- Monica Chopeta* (2012)eKLR the High Court had this to say:
- “It is also clear that the defendant cannot seek to present extrinsic evidence when her relationship with the plaintiff is already spelt out in the written agreement. In the book by Treitel entitled ‘Law of Contract’, the learned author discussed parole evidence rule as follows:
- The parole evidence rule states that evidence cannot be admitted (or even if admitted cannot be used) to add to, vary or contradict a written contract. In relation to contracts, the rule means that, where a contract has been reduced to writing, neither party can rely on extrinsic terms alleged to have been agreed i.e. on evidence not contained in the document, although the rule is generally stated as applying to parole evidence, it applies just as much as to other forms of extrinsic evidence. Of course, if a contractual document incorporates another document by reference, evidence of the second document is admissible, but the rule prevents a party from relying on evidence that is extrinsic to both documents.”
- The learned Judge went on to hold:
- The defendant is forbidden by that rule from introducing, as she does in her defence and counterclaim, verbal representation to alter written agreement. This was also the holding in *Muthuuri –v- National Industrial Credit Bank Ltd* (2003)KLR 145.”
21. The foregoing legal principles on parole evidence are a replication of the provisions of section 97 and 98 of the [Evidence Act](#):
- 97.
- (1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.
98. When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms
22. In the final consideration of this issue, the court regards the sale agreement as the correct factual position on the status of the Nturukuma land i.e. it was purchased by the protestor after the demise of their deceased father using the protestor’s own resources. The court’s admission of the sale agreement



which was over 40 years old as evidence is made under section 96 of the Evidence Act which provides that:

96. Documents twenty years old

- (1) Where any document purporting or proved to be not less than twenty years old is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.
- (2) Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

23. Having arrived at this factual position, the court finds that the net intestate properties of the deceased are only 467 and 472 which shall be and are hereby shared equally by all the beneficiaries to the deceased estate under sections 35 and 38 of the Law of Succession Act which provide as follows:

35. Where intestate has left one surviving spouse and child or children

- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
 - (a) the personal and household effects of the deceased absolutely; and
 - (b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

38. Where intestate has left a surviving child or children but no spouse

24. 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.

Conclusion

25. In the final orders, the court issues a Certificate of the Confirmation of Grant in equal sharing of the 2 parcels Abothuguchi/Uruku/467 and Uruku/Nkuene/472 amongst all the listed beneficiaries as follows:

- a. Pauline Kainda Mathiu as a widow of Mathew Muthamia Iracha to hold in trust for herself and their surviving children.
- b. Eunice M'Rimberia as a widow of Mberia Gichuru M'Iracha to hold in trust for herself and their surviving children.
- c. Evangeline Kairigo Kaburu as a widow of M'Ithinji Kaburu M'Iracha to hold in trust for herself and their surviving children.
- d. Frederrick Murungi Ntoiracha.



- e. Loise Riinya Kinoti as a widow of Moses Kinoti M'Iracha to hold in trust for herself and their surviving children.
- 26. The court rejects the mode of sharing by the petitioner as unfair because it sought to unreasonably exclude the protestor from inhering an equal share alongside the rest. It is so ordered. Right of appeal is 30 days.

DATED, READ AND SIGNED AT GITHONGO THIS 29TH DAY OF MAY, 2024

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS

Present

Mwirigi Advocate for the petitioner

Ronny Court Assistant

