



In re Estate of Justus M'kirera Murebu (Deceased) (Succession Cause E098 of 2022) [2024] KEMC 107 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEMC 107 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
SUCCESSION CAUSE E098 OF 2022
AT SITATI, SPM
JUNE 28, 2024
IN THE MATTER OF THE ESTATE OF JUSTUS M'KIRERA MUREBU**

BETWEEN

TABITHA KARIKI M'KIRERA PETITIONER

AND

LYDIA KARWITHA MBOGO PROTESTOR

JUDGMENT

1. By a Summons dated 2nd June, 2023 supported by the affidavit of the petitioner, the Petitioner proposed the following mode of distribution of Abothuguchi/Katheri/802:
 1. Tabitha Kariuki M'Kirera= 1acre.
 2. Stanley Mwirigi Kirera and Nelson Mutuma Mwirigi = 1 ½ Acres jointly.
 3. Caroline Nkatha Mwirigi= ¼ Acre.
 4. Jackline Naitore Mwirigi= ¼ Acre.
2. The firm of Ndubi Ondubi & Associates Advocates represented the Protestor while the firm of Kiogora Ariithi & Company Advocates represented the Petitioner.

The Protestor's Case

3. Lydia Karwitha Mbogo opposed the Summons for the Confirmation of Grant by way of a protest dated 15th June, 2023 accompanied by a Supplementary Affidavit of Protest dated 7th February, 2024. By these affidavits, the objector told the court that the proposed distribution by the petitioner was no acceptable to the objector. She told the court that she was a daughter of the deceased and a co-beneficiary alongside the following survivors of the deceased: Stanley Mwirigi Kirera (son). Stephen



Kimathi Kirera (son).Silas Mbaabu Kirera (Deceased) (son).Rael Gaceri Karuri (daughter).Isabella Gatwiri Karuri (daughter).Susan Kanja Mbogo (daughter).Lucy Mwendwa M’Kirera (daughter).

4. In her further protest, she raised 6 contentions:
 1. The petitioner has wholly excluded the petitioner from the distribution of the estate
 2. The petitioner had wrongly included Nelson Mutuma Mwirigi, Caroline Nkatha Mwirigi And Jackline Naitore Mwirigi yet they were the children of her brother Stanley Mwirigi Kirera and should not be listed as direct beneficiaries of the estate since they were grandchildren.
 3. The deceased in his lifetime owned Ontulili/Ontulili/Block I (Katheri)/918 which he subdivided and transferred therefrom parcel number Ontulili/Ontulili/2264 measuring 3 acres and Ontulili/Ontulili/2265 also measuring 3 acres which he gave to Silas Mbaabu Kirera (deceased) through his widow Beatrice Gacheri Mwenda and Stephen Kimathi Kirera. She produced a Mutation Form dated 6/5/2011 to prove this.
 4. The deceased during his lifetime owned Abothuguchi/Katheri/1222 measuring 1.215HA (3.175Acres) which he sold during his lifetime and gave the proceeds to Stanley Mwirigi Kirera. She produced the Sale Agreement dated 6/4/2020 to prove this.
 5. By transferring 3 acres each to Silas (Deceased)’s wife Beatrice and Stephen, the deceased had intended that Silas and Stephen should not inherit from 802.
 6. The fair distribution would be equal sharing of Abothuguchi/Katheri/802(3acres) should exclude Silas family and Stephen and be done between Tabitha, Rael, Isabella, Susan, Lydiah and Lucy.

The Petitioner’s Response

5. By a Replying Affidavit dated 30th January, 2024 the petitioner challenged the protest by Lydiah. In her reply, the petitioner told the court that the deceased had directed how the estate was to be distributed upon his demise and that is what was later discussed and agreed upon by the family in a meeting. She urged the court to dismiss the objections. She conceded that the deceased during his lifetime had disposed of Ontulili/Ontulili/Block I (Katheri)/918 and Abothuguchi/Katheri/1222 leaving Abothuguchi/Katheri/802 for sharing. She urged the court to approve the family meeting resolution to share out the land as per the Summons for Confirmation.
6. In her Supplementary Affidavit, the protestor stated that there was no documentary proof or material to prove the petitioner’s replying affidavit about a family meeting agreeing to the distribution in the Summons for Confirmation.

Submissions by the Parties

7. The Protestor lodged written submissions dated 24th May, 2024. She contended that she was discriminated against and disinherited by the petitioner who was excluding her from the shares of the estate property. She argued that this was because she had been a favourite child of the deceased. In her further submission, she told the court that the deceased had already gifted some of the beneficiaries some property and this was to be taken into account in the sharing of the estate.
8. On her part, the Petitioner lodged written submissions dated 6th June, 2024. In sum, the petitioner told the court that the protestor was shifting her positions amounting to approbation and reprobation. She pointed that on the first part the protestor had admitted that the beneficiaries had consented to the proposed distribution but then changed saying that she had herself not consented to the distribution



hence the protest. The authority of *Republic v Institute of Certified Public Secretaries of Kenya Ex Parte Munda Njeru Geteria* (2010)eKLR was relied on for the following legal principle:

The doctrine of approbation and reprobation required for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgement cannot allege the invalidity of the judgement which conferred the benefit.

Again, in *Banque De Moscou v Kindersley* (1950)2 ALL ER 549 Sir Evershed said of such conduct:

This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish lawyers (frame it) approbating and reprobating or, in the more homely English phrase, blowing hot and cold.”

9. In the final submissions, the petitioner told the court that the protestor was only concerned about her share but not the rest. At the end of their respective submissions, the court was called upon to determine the dispute at hand.

Issues for Determination

10. The only issue to be decided is the mode of distribution of the estate property namely Abothuguchi/Katheri/802.
11. From the mutation form and sale agreement produced by the Protestor, the court is satisfied that Silas And Stephen were gifted 3 acres each during the lifetime of their father. As was correctly contended by the Protestor, their respective gifts must be taken into account during the distribution of the present estate property. Looking at the acreages that the Silas (through his widow) and Stephen were gifted the court is satisfied that by that acreage, being 3 acres each, the deceased had automatically removed Silas and Stephen from the eventual net estate. The court, therefore, finds that Silas (through his widow Beatrice) and Stephen are not entitled to a share of the remainder of the estate since they already received their 3 acres each from the deceased as proved by the mutation form and sale agreement.
12. In arriving at this determination, the court was guided the provisions of section 42 of the *Law of Succession Act*:
 42. Previous benefits to be brought into account.
Where—
 - (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.
13. This section was discussed by the authority of *Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others* [2021] eKLR (L.W. Gitari J.) held that:

The characteristics of the gifts inter vivos are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be



considered as having received his share and may reduce or diminish any entitlement to the net intestate estate. The gift which is transferred and settled for the beneficiary during the life-time of the deceased, will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary.

The concept of gifts is divided into two categories. First gifts inter-vivos and gifts causa mortis. Gifts inter-vivos as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death...Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee....In regard to the matter at hand, there are family members who happened to have been gifted property inter vivos; and the beneficiaries seem to all agree on the same.”

14. The Petitioner did concede that it was true that the deceased had gifted Silas (through his widow Beatrice) and Stephen 3 acres each. In the result, the court upholds the protest as merited to the effect that the children of Stanley cannot be super-imposed on the protestor yet Stephen had received his share long ago. The deceased had reserved the 3acres for his daughters and widow should he have pre-deceased his wife as it eventually happened. Same for Silas’s children who cannot inherit from the net intestate of Abothuguchi/Katheri/802.
15. In conclusion, the court hereby orders the distribution of Abothuguchi/Katheri/802 measuring 3acres equally amongst the following:Rael Gaceri Karuri (daughter).Isabella Gatwiri Karuri (daughter).Susan Kanja Mbogo (daughter).Lucy Mwendwa M’Kirera (daughter).Tabitha Karuki (widow).
16. A certificate of the confirmation of Grant is hereby issued in the equal sharing identified above. It is so ordered. Right of appeal is 30 days.

DATED, READ AND SIGNED AT GITHONGO THIS 28TH DAY OF JUNE, 2024

HON. T. A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS

Present

Miss Mukaburu Adv Hb For Kiogora Arithi for The Petitioner

Stephen Kimathi

Stanley Kirera

Tabitha Karuki Kirera

