



REPUBLIC OF KENYA



**In re Estate of M'imwonyo M'mukunga (Deceased) (Succession Cause 35 of 2017) [2024] KEMC 109 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEMC 109 (KLR)

**REPUBLIC OF KENYA  
IN THE GITHONGO LAW COURTS  
SUCCESSION CAUSE 35 OF 2017  
AT SITATI, SPM  
JUNE 28, 2024**

**BETWEEN**

**JOSEPH KIMATHI M'IMWONYO ..... PETITIONER**

**AND**

**GODFREY MWITI ..... PROTESTOR**

**JUDGMENT**

1. The petitioner was granted letters of Administration Intestate on 18<sup>th</sup> September, 2017 in the succession cause where the deceased was survived by:
  1. Martha M'Imwonyo – widow.
  2. Julius Kinoti M'Imwonyo – son.
  3. Joseph Kimathi M'Imwonyo – son (petitioner)
  4. Mardalina Kajira Muriuki – daughter.
  5. Silas Mbogori (deceased) but who had 7 surviving children.
  6. Sabastian Murugu (deceased) but who is survived by 6 children.
2. On 6<sup>TH</sup> June, 2019 the Petitioner through his advocates G.M. Wanjohi & Company filed Summons for Confirmation of Grant proposing the following mode of distribution:
  1. Abothuguchi/Katheri/3175 to Mary Munyange Mbogori.
  2. Out of Abothuguchi/Katheri/262: Joseph Kimathi M'Imwonyo = 0.83 Acres. Robert Muthee Murugu, Godfrey Mwiti Murugu and Robert Mwiti Murugu = 0.83 Acres jointly. 1.13 acres to Robert Muthee Murugu Thereafter, on 14<sup>th</sup> October, 2019 the Petitioner filed Supplementary Affidavit in Support of the Summons for Confirmation adding an extra parcel of land to the



shares of each beneficiary: Abothuguchi/Katheri/3176 to be shared equally in the ratio of 0.93acres to Joseph Kimathi M’Imwonyo, Robert Muthee Murugu, Godfrey Mwiti, Robert Mwiti Murugu and Robert Muthee Murugu. Later, on 22<sup>nd</sup> November, 2019 the Petitioner a fresh summons for confirmation of grant proposing the following mode of distribution:

- a. Abothuguchi/Katheri/3175 to Mary Munyange Mbogori.
  - b. Out of Abothuguchi/Katheri/262: Joseph Kimathi M’Imwonyo = 0.93Acres. Robert Muthee Murugu, Godfrey Mwiti Murugu 0.31 Acres Robert Mwiti Murugu = 0.31Acres. 1.13acres to Robert Muthee Murugu
3. In opposition to the foregoing, the Objector filed a Summons for the Revocation and/or Annulment of Grant dated 10<sup>th</sup> February, 2020. The main ground relied on was that the distribution was imbalanced and that the petitioner had not obtained the consent of the objector. Duncun Gichunge Muthuri Advocate represented the protestor while the petitioner eventually acted in person after his former advocates ceased to act for him.
4. The application for revocation was opposed by a replying affidavit dated 17<sup>th</sup> March, 2023. By it he averred that the deceased had 2 wives and that the first wife had 3 sons and lived on 3175 while the second wife 1 son (petitioner) who lived on 262 with his mother. He added that his father had subdivided the land 262 into equal parts for his 2 wives and he took one half of that subdivision and planted over 500 coffee bushes and constructed a semi-permanent house. He said that there was no good ground to revoke the letters of administration dated 18<sup>th</sup> September, 2017 as confirmed on 22<sup>nd</sup> November, 2019.
4. Subsequent to the protest, the Petitioner lodged a Summons dated 2<sup>nd</sup> November, 2022 for the Rectification of grant and proposed the following mode of distribution:
- a. Abothuguchi/Katheri/3175 to Mary Munyange Mbogori.
  - b. Out of Abothuguchi/Katheri/262: Joseph Kimathi M’Imwonyo = ½ Acres. Robert Muthee Murugu, Godfrey Mwiti Murugu, Robert Mwiti Murugu, Anne Ng’endo, Lucy Kajira Murugu and Jacinta Nevesa Murugu = ½ share jointly.
5. At the end of their pleadings the parties adopted their respective witnesses’ statements.

### **Issue For Determination**

6. The only issue for determination is the mode of distribution. There was no dispute that the deceased died intestate and was survived by 2 wives who had children each.
7. The guiding authority applied for this case was the decision in RE Estate Of Joseph Eric Owino (deceased) (2022)eKLR (Nyakundi J.):

#### “The Applicable Law

12. In a case of this nature where the deceased died intestate and was a polygamous man survived by two widows and children the anchor on distribution of his estate is Section 40 of the [Law of Succession Act](#) which primarily provides as follows;

- “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate, shall, in the first



instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

- (2) The distribution of the personal and household effects and the residue of the net interest within each house shall then be in accordance with the rules set out in sections 35 to 38”

The basic scheme is in line with the principles expounded in the following cases Rono –v-Rono Civil Appeal NO. 66 of 2002, where Waki J.A stated inter alia that;-“ More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife and children of that wife.”

8. In addition, in the Matter of Re Estate of Benson Ndirangu Mathenge(deceased) Nakuru HCSC NO. 231 of 1998(Ondeyo J), the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The court stated that the first house was comprised of five units while second had seven units. The two houses of the deceased combined and looked at in terms of units made up twelve units. The court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the court into twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children.
9. Further, In the Matter of the Estate of Nelson Kimotho Mbiti(deceased) HCSC NO.169 of 2000, Koome J directed that the estate of a polygamist be divided in accordance with the provisions of Section 40 of the Act. The estate was divided into units according to the number of children in each house with the widows being added as additional units. The same reasoning was also applied by Judge Ali Roni in the Estate of Ainea Masinde Walubengo(deceased) (2017)eKLR stating that “I am of the view that Section 40 of the *Law of Succession Act* will apply to the circumstances of this Case. Meaning that the Court will distribute the estate of the deceased according to each house taking into account the number of children in each unit including the surviving widow.”
10. Applying the foregoing principles guides this court to make the following orders:
  1. The deceased’s total survivors as of the date of his demise for the purposes of section 40 above counting the widows and children were as units were six (6) five (5) as follows:Martha M’Imwonyo widowJoseph Kimathi – sonMardarina Kajira – daughterSilas Mbogori (now deceased) son- but survived by his 7 childrenSabastian Murugu –son – deceased but survived by his 6children.
  2. The 2 parcels shall be subdivided into 6 5 portions and then shared equally amongst all the six five (5) survivors. For the survivors who are now deceased, their respective children shall inherit their shares in equal portions.
11. The court had considered that a revocation of the grant would serve no useful purpose since the parties are only interested in being allotted their rightful shares. 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.”

12. It is so ordered. Right of appeal is 30days. A certificate of the confirmation of grant issue hereby.

**DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 28<sup>TH</sup> DAY OF JUNE, 2024**

**HON.T.A. SITATI**

**SENIOR PRINCIPAL MAGISTRATE**

**GITHONGO LAW COURTS**

Miss Mugo Adv For The Interested Pary Godfrey Mwiti

Joseph Kimathi

