



In re Estate of M’rinkanya M’itwamwaru (Deceased) (Succession Cause 30B of 2020) [2024] KEMC 108 (KLR) (12 June 2024) (Judgment)

Neutral citation: [2024] KEMC 108 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
SUCCESSION CAUSE 30B OF 2020
AT SITATI, SPM
JUNE 12, 2024**

IN THE MATTER OF THE ESTATE OF M’RINKANYA M’ITWAMWARU (DECEASED)

BETWEEN

ABEL MPUATHIA M’RINKANYA PETITIONER

AND

DAVID MUTIWIRI NKANATA 1ST PROTESTOR

PHARIS MUGHIRA MBOGORI 2ND PROTESTOR

JULIUS MWENDA NKANATA 3RD PROTESTOR

JUDGMENT

1. This judgement relates to the Protest dated 21st July, 2023 filed against the Summons for Confirmation of Grant dated 2nd August, 2021. It was supported by the affidavit of Abel Mpuathia the Administrator of the Estate.
2. In the Summons aforesaid, the following was the proposed distribution:
 - i. L.R Abothuguchi/Gaitu/4003 equally to Evangeline Mwendwa M’Rinkanya, Harriet Ncabira M’Rinkanya, Florence Kathure M’rinkanya, Faith Kiario M’Rinkanya and Doris Kanya M’Rinkanya.
 - ii. L.R Abothuguchi/Gaitu/4004 wholly to Abel Mpuathia M’Rinkanya.
 - iii. L.R Abothuguchi/Gaitu/4005 wholly to Abel Mpuathia M’Rinkanya.
 - iv. L.R Abothuguchi/Gaitu/4006 wholly to David Mungiria Rinkanya.
 - v. L.R Abothuguchi/Gaitu/4007 wholly to Abel Mpuathia M’Rinkanya.
 - vi. L.R Abothuguchi/Gaitu/4008 wholly to Abel Mpuathia M’Rinkanya.



- vii. L.R Abothuguchi/Gaitu/4009: wholly to Isaac Kithinji M'Rinkanya.
- viii. PLOT 3A Ucheru Market: wholly to Abel Mputhia M'Rinkanya.
3. The Summons was opposed by 3 protestors. The petitioner was represented by Kithinji Kirigiah Advocate.

The Protestors Case

4. By a Joint Affidavit of Protest dated 12th October, 2021 the 3 protestors urged the court to count them as beneficiaries of the estate by way of purchase as follows: David Mutwiri Nkanata for Abothuguchi/Gaitu/4005. Pharis Mugiira Mbogori for Abothuguchi/Gaitu/4007. Julius Mwenda Nkanata for Abothuguchi/Gaitu/4004.
5. The 3 informed the court that they took possession of the subject portions of land. Annexed to the protest were photos showing various aspects of cultivation of structures and mutation forms showing the already subdivided portions. They thus proposed the following final distribution taking into account the purchases:
6. PR-1 David Mutwiri Nkanata adopted his witness statement dated 21st July, 2023 as his testimony affirming his purchase of a portion. In support of his testimony, he produced the following as exhibits:
 1. Sale agreement dated 30/01/2017.
 2. Acknowledgement of 30/01/2020.
 3. Sale agreement dated 11/06/2016.
 4. Acknowledgement dated 6/12/2016.
 5. Agreement dated 23/09/2015.
 6. Agreement dated 15/12/2020.
 7. Acknowledgement note dated 6/7/2020.
 8. Agreement of 17/10/2016.
 9. Acknowledgment of 30/06/2016.
7. In cross-examination by Mr. Kithinji for the Petitioners, the following came to light:
 - i. PR-1 was not a child of the deceased.
 - ii. PR-1 did not purchase any land from the deceased person.
 - iii. It was probable that he bought the land long after the demise of the deceased.
 - iv. He had lodged a criminal complaint against the sellers but had not filed any civil or land case to press for the purchase to be enforced.
8. In re-examination by Miss Mugo, he affirmed that he would later sue at the Land Court for the enforcement of his rights as a purchaser.
9. PR-2 Pharis Mugira Mbogori adopted his written witness statement dated 21/07/2023. He then produced an acknowledgement note dated 15/04/2016 as his protest exhibit. Upon being cross-examined, the following came to light:



- i. He could not tell if the deceased died on 28th March, 2016.
 - ii. He had produced only 1 acknowledgement note dated 15th April, 2016 which was after the date of the demise of the deceased.
 - iii. While contesting the date of demise in the death certificate showing 28.03.2016, he conceded that he had no contrary document to show a different date of death for the deceased herein.
10. PR-3 Julius Mwenda Nkanata adopted his written witness statement dated 21/07/2023 affirming that he made various purchases of portion of the estate land and produced 2 exhibits in support of his testimony:
 - i. Sale agreement dated 6th July, 2015.
 - ii. Acknowledgement note dated 30/02/2020.
11. In cross-examination by Mr. Kithinji, Advocate for the petitioners, the following came to light:
 - a. His agreement was recorded on 6th July, 2015 while the deceased was alive and was thus 9 years down the line.
 - b. He was unaware of any limitations of actions applicable to his transactions.
 - c. He had not filed any civil suit against the Administrator of the estate.
 - d. He confirmed that the deceased passed away sometimes in 2016.
 - e. In the chief's latter dated 24/01/2020 he was listed as a child of the deceased when in reality he was not a child of the deceased but a purchaser.
 - f. His Acknowledgement note of 22/04/2016 was signed by ABEL but not by the deceased who by then had already died.
 - g. He conceded that there was no way that the deceased could have signed the acknowledgement note of 22/04/2016 showing receipt of Kshs 60, 000/= since by then he was already dead. He admitted that the note was signed by Godfrey.
 - h. He affirmed that Kshs 200, 000/= was paid to the deceased personally and the balance was paid to his son Godfrey after the father's demise.
12. In re-examination by Miss Mugo, Advocate for the Protestors, the witness stated that the deceased was alive in 2015 and signed the sale agreement and received a substantial portion of the sale price and the balance was collected by his son Godfrey after the demise of the father.
13. PR-4 David Mungiria Rinkanya adopted his written witness statement dated 21/07/2023 and produced the O.B. Extracts dated 27/09/2021 and 29/09/2021. When cross-examined, the following came to light:
 - a. He disowned the 2 O.B. Extracts stating that he did not know what they were referring to.
 - b. He was a son to the deceased.
 - c. He admitted that there had been a family meeting.
 - d. In the consent to the distribution, he was allotted Abothuguchi/Gaitu/4006 and a portion of Abothuguchi/Gaitu/4005.



- e. He affirmed that he sold a portion of Abothuguchi/Gaitu/4006 to one Kendi who still occupies the same parcel as of the date of the litigation. He confirmed that once the title deed is issued to him, he would surrender it to Kendi.
 - f. He pointed out that for his share, he was the seller while for his brothers' cases, the parents were the sellers.
 - g. He confirmed that the deceased father sold directly to Mwenda, Pharis and Mutwiri their respective portions.
 - h. He agreed with the petitioner's advocate that the court could first allot each heir/heirress the respective share before the heir/heirress transfers the share to his/her respective purchasers.
14. In re-examination by Miss Mugo, Advocate for the protestors, he admitted that he had sold 4005 to David Mutwiri and another portion to Kendi. He confirmed that it was his brothers who had chased out Julius, Mutwiri and Pharis from the land which they had bought. He pointed out, however, that he did not witness their respective purchases. At the end of his testimony, the protestors closed their case.

The Petitioners Case

15. PW1 Abel Mputhia M'rinkanya adopted the Summons for the Confirmation of grant as well as its supporting affidavit. He affirmed that all the alleged purchasers had been excluded in the distribution of the estate as per the resolution of the family meeting following the demise of their deceased father.
16. In cross-examination by Miss Mugo, Advocate for the protestors, the following came to light:
- a. In the chief's letter of introduction dated 24/01/2020 a total of 11 beneficiaries had been listed while in the letter of 23/02/2021 a total of 10 beneficiaries had been listed.
 - b. David, Julius and Pharis are not sons of the deceased and that he had not received any cash from the 3.
 - c. He only signed as a witness on the acknowledgement of 30/01/2020 but no cash was paid to him.
 - d. He stated that he held Abothuguchi/Gaitu/4005 in trust for David and Godfrey his brothers.
 - e. He pointed out that he had 2 shares out of 4004, 4005, 4007, 4008 and plot 3A Ucheru Market while the other 3 were held by him in trust for the siblings but that these shares held in trust could go directly to the respective brothers.
17. In re-examination by his counsel, he stated that he held 4004, 4005, 4007 and 4008 in trust for his brothers. He affirmed that 4004 is for Godfrey Murangiri, 4005 jointly for Godfrey and Jediel while 4006 for Mungiria. He also stated that 4007 is for Jediel.
18. PW2 Jediel Muriungi Rinkanya adopted his witness statement dated 3rd October, 2022 as his testimony supporting the proposed shares in the Summons for Confirmation. When cross-examined, the following came to light:
- a. 4007 was earmarked for PW2 but he sold it to Pharis.
 - b. His equal share in 4005 was told to Mutwiri.
 - c. He admitted that he participated in chasing away the purchasers from their land after they claimed to be purchasers.



18. In re-examination, he affirmed that the land should first be devolved to the children before they could decide how each purchaser acquired his share.
19. PW3 Godfrey Murangiri M'rinkanya adopted his witness statement of 3rd October, 2022 as his evidence supporting the Summons for Confirmation. On cross-examination, the following came to light:
 - a. 4004 was meant for PW3 but their deceased father sold to Julius. He admitted that after their father's demise, they chased JULIUS out of 4004.
 - b. Pw3 had an interest in 4005 and was agreeable to PW1 holding it for trust for him.
 - c. He admitted that he agreed to his brother PW1 holding 4005 in trust for him to evade the purchaser's claim.
20. In re-examination, he stated that the court should transmit to him his share.
21. PW4 Florence Kathure M'rinkanya adopted her witness' statement dated 3rd October, 2022. She produced the chief's letter dated 29th March, 2022 as her exhibit. In cross-examination, she stated that:
 - a. 4003 was reserved for the deceased's daughters.
 - b. She affirmed that she sold her share to Mutwiri.
 - c. She did not consent to PW1 holding her share in trust for her.
 - d. She only recognized David Mutwiri as a genuine purchaser.
22. At the end of their testimonies, the parties were directed to exchange written submissions.

The Protestors' Written Submissions

23. On 30th April, 2024 the protestors lodged written submissions. The arguments in summary were that in the authority of Johnson Muinde Ngunza & Another –V- Michael Gitau Kiarie & 12 Others (2017)eKLR it was held that a purchaser of estate land is recognized as person beneficially interested in the estate. This was also held in the case of *Titus Muraguri Warothe & 2 Others –versus – Naomi Wanjiru Wachira (NYERI HCSUCC122 of 2002)*. In Michael Mwangi Maina –v- & 7 Others –V- Davidson Mwangi Kagiri (2014)EKLR. Possession by a purchaser was held to be a protectable interest. This court was duly guided by the foregoing authorities.

Determination

A. Purchases by Julius

24. From the record and tested evidence during cross-examinations as supported by the testimonies of the protestors and Mungiria, Kithinji and Doris it is proved that Julius entered into a sale agreement with the deceased Charles Rinkanya while he was alive. By this agreement, Julius transacted with the deceased on 6th July, 2015 by purchasing ½ acre which was to be deducted from the share of Godfrey Murangiri M'rinkanya and this transaction was witnessed by Mungiria, Kithinji and Murangiri himself. Julius took possession pending completion of the subdivision process and final formalities of transfer. During the cross-examination, of the Administrator Abel, he admitted that the children only chased out the purchaser after the demise of their father.



25. The question that arises is this: did the failure of the deceased to finalize the formalities including appearing before the Land Control Board after executing the sale agreement deprive the purchaser of a protectable interest in the estate parcel Abothuguchi/Gaitu/510?

26. 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 Jelal 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”
27. Consequently, it is the finding of this Honourable Court that Julius was protectable by the law by dint of the foregoing legal principles and the application of the maxim that equity considers that which ought to have been done as done. The deceased had, with the full consent and participation of his children, sold a portion of his land to Julius who paid the full consideration but was prevented by his demise from finalizing the formalities to give legal title to the purchaser. It was illegal for the children to chase out Julius after the father’s demise since in the case of Michael Mwangi Maina –V- & 7 Others –V- Davidson Mwangi Kagiri (2014) eKLR. possession by a purchaser was held to be a protectable interest. In the result his share acquired by way of purchase is protected by the law and shall be directly transmitted to him.

B. Purchases by Pharis and Mutwiri

28. The proved evidence shows that Pharis and Mutwiri recorded sale agreements with the children after the demise of their father. The issue that arises is this: did their transactions hold water in law?
29. To resolve this issue, the court studied the Mutation form marked as DMN 2 and found that this Mutation Form proved that the deceased herein had generally demarcated his land parcel Abothuguchi/Gaitu/510 and shown his children where each of their shares would fall. After showing them their respective portions, he initiated the sub-division process to give effect to his express and open wishes. This is supported by the date on the Mutation Form: 12th February, 2016 which was about a month prior to his demise on 28th March, 2016. This showed his clear intention.
30. The deceased’s action of demarcating and openly showing his children their respective shares amounted to what is called in law gift inter vivos as it went beyond a mere promise to his respective children. The deceased’s further action of giving possession of the different portions to his children and their acceptance thereof completed the gift inter vivos made by their father. Each child became aware and took possession of their respective shares. The subsequent new numbers that arose out of the Mutation form conformed and corresponded to the precise demarcations and portions that the father had given to each child.
31. This transaction by their father went beyond a MERE promise as was discussed in In re Estate of Godana Songoro Guyo (Deceased)[2020] eKLR:

“In Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift,



was necessary to be done by him in order to transfer the property and which it was in his power to do.”

32. By the time of his demise, the respective shares of the children had crystallized and there was no dispute in the family about the identity and portions for child. Ownership of the shares was clear and undisputed.
33. That being so, any child who opted to sell his fatherly gift could do so subject to his holding the gift in trust to the purchasers pending formalities of transfer. Consequently, the sale transactions by the children to the 3 purchasers were lawful since each heir had capacity to deal with his gift as he so wished pending the usual formalities of transfer. On the 2 authorities cited by the protestors in their submissions, the answer is that purchasers are protected as persons beneficially interested in the state. There was no dispute as to ownership to warrant the transfer of the dispute to the Environment and Land Court.
34. This means that the following transactions where the gifted shares were sold by the respective donees of the gift are recognized and upheld by this honourable Court as effective for the purposes of the succession and distribution of the estate: Sale of 1 acre share of his gift by Jediel Muriungi M'Rinkanya to David Mutwiri Nkanata. This will be transmitted directly to the purchaser. Sale of 0.78 Acres share of his gift by Godfrey Murangiri M'Rinkanya to David Mutwiri Nkanata. Sale of ¼ acre share of his gift by David Murangiri M'Rinkanya to David Mutwiri Nkanata. Sale of ¼ acre share of her gift by Florence Kathure M'Rinkanya to David Mutwiri Nkanata. Sale of 1 acre share of his gift of the estate by Jediel Muriungi M'Rinkanya to Pharis Mugiira Mbogori.
35. The final orders of the court are that the protests are merited and the court distributes the estate as follows: L.R Abothuguchi/Gaitu/4003 equally to Evangeline Mwengwa M'Rinkanya, Harriet Ncabira M'Rinkanya, Florence Kathure M'Rinkanya, Faith Kiario M'Rinkanya and Doris Kanya M'Rinkanya subject to the reduction of her share of Florence a. L.R Abothuguchi/Gaitu/4004 wholly to Julius Mwenda Nkanata in accordance to the acreage that he bought. L.R Abothuguchi/Gaitu/4005 wholly to David Mutwiri Nkanata. L.R Abothuguchi/Gaitu/4006 wholly to David Mungiria Rinkanya. L.R Abothuguchi/Gaitu/4007 to Pharis Mugiira Mbogori in accordance to the acreage that he bought. L.R Abothuguchi/Gaitu/4008 wholly to Abel Mputhia M'Rinkanya. L.R Abothuguchi/Gaitu/4009: wholly to Isaac Kithinji M'Rinkanya. Plot 3A Ucheru Market: wholly to Abel Mputhia M'Rinkanya.
36. The Certificate of the Confirmation of the Grant is hereby issued to the parties in accordance with the shares identified in the body of this judgement. Costs to the successful protestors. Right of appeal is 30 days.

DATED, READ AND SIGNED AT GITHONGO THIS 12TH DAY OF JUNE, 2024

HON. T. A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO

