



M'Mwongera & another v M'Mwongera & 4 others (Succession Cause E086 of 2022) [2024] KEMC 103 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEMC 103 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
SUCCESSION CAUSE E086 OF 2022
AT SITATI, SPM
JUNE 28, 2024**

IN THE MATTER OF THE ESTATE OF M'MWONGERA GATWAN'THUNKU (DECEASED)

BETWEEN

SABELLA NKIROTE M'MWONGERA 1ST PETITIONER

AYUB MWITI GATUA 2ND PETITIONER

AND

MISHECK MUTWIRI M'MWONGERA 1ST PROTESTOR

MOSES KIRIMI M'MWONGERA 2ND PROTESTOR

JOHN MURIUNGI KATUA 3RD PROTESTOR

HENRY MWIRIGI M'MWONGERA 4TH PROTESTOR

HARUN GITONGA M'MWONGERA 5TH PROTESTOR

JUDGMENT

1. By a Summons dated 9th May, 2023 supported by an affidavit of similar date, the joint petitioners proposed that the only estate property ABOTHUGUCHI/GITHONGO/52 should be shared EQUALLY between the following 7 beneficiaries: Sabella Nkirote M'Mwongera, Misheck Mutwiri M'Mwongera, Moses Kirimi M'Mwongera, John Muriungi Katua, Henry Mwirigi M'Mwongera, Ayub Mwiti Gatua, Harun Gitonga M'Mwongera.
2. The distribution was supported by Henry, Harun and Faith Gakii. The firm of Wanjiku Muna & Company Advocates represented the petitioners.



The Protestors' Case

3. The summons for confirmation was challenged by 5 beneficiaries who were represented by Mwenda A.K. & Company Advocates:
 - i. Misheck Mutwiri M'Mwongera
 - ii. Moses Kirimi M'Mwongera
 - iii. John Muriungi Katua
 - iv. Henry Mwirigi M'Mwongera
 - v. Harun Gitonga M'Mwongera
4. Misheck Mutwiri M'mwongera swore the affidavit of protest 30th October, 2023 on the behalf of the other 4 protestors. Their protest was that the succession cause was secretly instituted without their consent and participation. Further that the equal sharing formula was unfair since their father had settled the 5 protestors on portions of the Abothuguchi/Githongo/52 where each had lived with his family after constructing houses and planted crops including more than 2,000 tea bushes. They urged the court to uphold this settlement done by their father before his demise.
5. The matter went for Alternative Dispute Resolution (ADR) before Chief Wilson Mutuma but no settlement was reached although the parties were in agreement that the father had settled each son on his portion and reserved 1acre to the wife and the daughters.

Petitioners' Response to the Protests

6. The 2 joint petitioners each filed Replying Affidavits dated 5th February, 2024. The 1st petitioner Sabella told the court that sometimes in 1992 deceased subdivided the land and settled each son on his portion before he died in 1999. She stated that each son got an average of 1acre plus a few decimals out of the land reference Abothuguchi/Githongo/52. Upon being given possession, the then adult sons Misheck, Moses, John and Henry erected temporary structures and planted crops. At the same time, the then Minor sons Ayub's and Henry's shares were held in trust by the 1st petitioner Sabella who utilized their portions pending their attainment of majority age.
7. She added that sometimes in 2022, she summoned all her children and informed them of her intention to file the succession cause to give effect to their father's (and her husband's) wishes for each child as per their respective settlement. A meeting was even held in the presence of the local chief but the protestors herein offered resistance. Even after filing the succession cause, the court referred them back to the chief but still no agreement was reached. She added that all along her sons were aware of the institution of the petition but had just refused to cooperate. Their resistance stemmed from an access road which had been excised to give common access to all the beneficiaries.
8. On his part, the 2nd petitioner Ayub Mwiti M'Mwongera and Nanyce Kajuju Kubai reiterated the 1st petitioner's averments confirming that the protestors were aware of the succession cause from the start but were resisting their mother's efforts without justification. The 2 petitioners relied on the following exhibits:
9. At the end of their respective cases, the parties recorded a consent whereby they agreed that the land should be surveyed and the report filed in court ahead of the scheduled judgment but as of the date of this ruling, no survey report had been filed as consented to.



Issue for Determination

The only issue for determination is the mode of distribution of the estate.

10. It was undisputed from Chief's letter of introduction dated 6th July, 2022 the following were the identified beneficiaries of the deceased Gatwanthuku: Sabella Nkirote – widow Nanyce Kajuju – daughter- daughter Misheck Mutwiri M'Mwongera -son Moses Kirimi M'Mwongera son John Muriungi Katua -son Henry Mwirigi M'Mwongera -son Ayub Mwitia Gatua -son Harun Gitonga M'Mwongera -son Jacynta Nkatha Gatua – daughter Faith Gakii M'Mwongera – daughter
11. It was also undisputed that the only estate property available for distribution is Abothuguchi/ Githongo/52 measuring 7.40HA.

Issue for Determination

The only issue for determination is the mode of sharing the deceased estate.

12. From the outset, there was general consensus between the petitioners and the protestors that the deceased had temporarily (not finally or absolutely) settled the sons on their portions measuring approximately 1 acre. The sons took possession and cultivated crops. This temporary allotment was done in 1992 which was 6 years before their father died. The deceased had also reserved 1 acre approximately to be held jointly by his widow and 2 daughters as per the failed ADR session before the chief. As pointed out, the grant of possession was only temporary and for expediency purposes. That explains why the father permitted the erection of temporary structures.
13. Furthermore, the hard stances taken by the sons works against the interests of the daughters who are by law entitled to equal sharing. In the court's view, the point of departure was quite unnecessary since an access road was a natural and automatic feature that had to be excised from the allotted portion. In the result, there being no consensus on the precise mode of sharing, the court will seek refuge in the law: equal sharing amongst all the beneficiaries –sons and daughters – under section 35 of the [Law of Succession Act](#) since the deceased died intestate with a surviving spouse who carries a life interest. This was considered in the authority of *In Re Estate of John Musambayi Katumanga – (Deceased) [2014] eKLR (W.Musyoka J.)* held that:
 25. Section 35 of the [Law of Succession Act](#) caters for a situation where the deceased is survived by a spouse and children. The surviving spouse is entitled to the deceased's chattels and a life interest on the residue. The deceased in this case was survived by a spouse and children, although not all are her children. Under Section 35 of Act, upon the determination a life interest the estate should be shared equally between all the children. There is also provision for appointment exercisable by the surviving spouse. The issue that would arise in the instance case is whether the surviving spouse can exercise life interest over property that ought to devolve to children other than her own.”
14. The surviving spouse is entitled to a life interest in the estate which court has ruled should be shared equally. None of the children has indicated that any of them is willing to continue accommodating their mother. In the result, the mother's life interest shall equally subsist on their respective equal shares to protect her from being disenfranchised.
15. A certificate of the confirmation of the grant is issued in equal sharing subject to the subsisting life interest on each child's equal share. Right of appeal is 30 days.



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

HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS

Present

Miss Wanjiku Muna Adv I Am For The Petitioner

Petitioner

Ayub Mwiti

