



REPUBLIC OF KENYA



In re Estate of the Late Ruth Wangari Kagotho (Deceased) (Succession Cause 892 of 2014) [2025] KEHC 7385 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7385 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 892 OF 2014**

**M MUYA, J
MAY 29, 2025**

BETWEEN

FRANCIS NGETHE KAGOTHO PETITIONER

AND

SAMUEL KIRAGU KAGOTHO 1ST PROTESTOR

MARGARET KAGOTHO 2ND PROTESTOR

ISAAC MWAURA KAGOTHO 3RD PROTESTOR

RULING

1. The protest is by way of an affidavit of protest against the confirmation of grant dated 7th June, 2017. Basically it was in opposition to the Summons for confirmation brought by the petitioner and filed on 24th July, 2015. The Petitioner had proposed to have the Estate comprising land parcel Nyeri/ Gatarakwa/1443 to be distributed in the following manner:-
 1. Isaac Murimi Kagotho - 1 acre
 2. Margaret Wangui Kagotho - 1.5 acres
 3. John Nganga Kagotho - 1.5 acres
 4. Paul Muchogo Muhoro - 3.8 acres
 5. Jane Wambui Njebere - 2.6 acres
2. The Protestors advanced the following grounds:-
 - a. The Protestors were never consulted or involved in the succession process.
 - b. The Protestors never gave their approval to the mode of distribution.



- c. The Protestors never appended their signatures and the signatures appearing on P & A 38 were forgeries.
 - d. The deceased had communicated her wishes regarding distribution fundamentally different from the Petitioner's mode.
 - e. The Petitioner had disposed more than half of the Estate to third parties in the pendency of the cause without consulting the Protestors.
 - f. The actions of the Petitioner were tantamount to intermeddling with the Estate.
 - g. The 3rd Protestor was altogether left out but should have been listed among the beneficiaries by reason of being an adopted son.
 - h. The Estate was supposed to be shared between the three Protestors in equal measure. (1st protestors share going to Peter Kagotho Kiragu) since they were the only ones who never shared in Nyeri/Gatarakwa/786 while the rest of the siblings had each received a share of thirty five (35) acres (intervivos during the life time of the deceased)
 - i. The land subject to the succession plot 1443 was a remnant of plot 786 which the deceased had retained for herself after sub-division.
3. In answer to the affidavit of protest the Petitioner sought for dismissal of the protest by contending that:-
- a. Plot 786 never belonged to the deceased during her lifetime.
 - b. Plot 786 measuring 130 acres was land issued by SFT to the Petitioner and the Petitioner paid off the loan leading to the discharge of the land to him exclusively.
 - c. Plot 1443 measuring 9.785 acres was the only free property of the deceased.
 - d. The 1st and 3rd Protestors could not share in the Estate in any shape or form. Similarly Peter Kagotho Kiragu was not entitled to a share.
 - e. The second Protestor was entitled to a share of 1.55 acres.
 - f. Four siblings namely:
 - i. Joseph Waiyobo was entitled to a share of 0.8 acres.
 - ii. Mary Njeri was entitled to 0.8 acres
 - iii. Elizabeth Muthoni entitled to 0.8 acres
 - iv. Isaac Murimi was entitled to 0.8 acres.

All had jointly and severally disposed their collective entitlement to one Paul Muchogo Muhoro.
 - g. In short the only land available for distribution was 0.1235 acres and which was the family graveyard.



Determination and Conclusion

Issues

1. Whether the Protest meets the threshold required?

4. There are three Protestors in this protest. Samuel Kiragu Kagotho and Margaret Wangui Kagotho (1st and 2nd Protestors respectively) passed on during the pendency of this cause. There has been no substitution in respect of the two and their protests cannot hold as they have no legs to stand on.
5. What remains is the protest by the 3rd Protestor one Isaac Mwaura Kagotho.
6. It is not in dispute that the third Protestor is the grandson of the Deceased. His mother Beth Muthon Mugo is the daughter of the Deceased and she is still alive.
7. The gist of the 3rd Protestors protest hinges on the allegation that his grandfather left behind an oral will to the effect that the 3rd Protestor should share land Reference No. Nyeri/Gatarakwa/786. In the 3rd protestors proposed mode of distribution he proposed to get a share of 1.32 hectares (3.26 acres) of land from LR Nyeri/Gatarakwa/1443.
8. The Protestor's witness was one John Ng'ang'a Kagotho who testified that there was an oral will made by the Deceased and her husband.
9. The petitioner in his evidence testified that his siblings did sign an agreement on the mode of distribution on 4th December, 2021.
10. The 3rd Protestor's mother Beth Muthoni Mugo did file a further affidavit sworn on 14th October, 2022 to which she deposes that the 3rd protestor who is her son is not entitled to a share of her mother's Estate and his entitlement is through her. She also attached an agreement dated 2nd October, 2021 whereby the beneficiaries consented on the mode of distribution.

Whether the oral will was valid?

11. Section 9(1) of the *law of Succession Act* provides:-
 - a. It is made before two or more competent witnesses and
 - b. The testator dies within a period of three months from the date of making the will.....”
12. In the present case, there is no evidence as to when the alleged oral will was made.
13. There is no evidence as to who was present at the time of making the oral will and whether the testator died within three months from the date of making the will.
14. I am of the considered view that the validity of the alleged oral will has not been proved.

Whether a grandchild whose parent is alive can inherit the Estate of his grandparents?

15. Section 29 of the *law of Succession* defines who is a dependent thus:-
 - a. The wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.



- b. Such of the deceased parents, step parents, grandparents, grand children, step grandchildren, children whom the deceased had taken to his family as his own, brothers and sisters, half-brothers and half-sisters, as were being maintained by the Deceased immediately prior to his death.
 - c. Where the deceased was a woman, her husband, if he was being maintained by her immediately prior to the date of death.
16. I have perused the affidavits of protest and the evidence tendered before this court and I am not satisfied that dependency has been proved. His own mother who is alive did not testify to that effect and did indicate that any entitlement to the 3rd protestor who is her son has to be through her. The 3rd protestor and his witness did not testify on the form and nature of the dependency from the grandparents.
17. Further the protestor did not make an application to bring himself under the provision as envisaged under Section 26 of the *Law of Succession Act*.
18. Section 38 of the law of Succession provides:-
- “Where an intestate has left a surviving child or children but no spouse, the net intestate Estate shall, subject to the provisions of Section 41 and 42 devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”
19. The 3rd Protestor is a grandchild of the Deceased. His parent who is his mother is still alive. His entitlement is through his mother who is in agreement with that arrangement.
20. I find that this protest has no merit and it is dismissed. This being a family matter each party to bear his own costs.

RULING DELIVERED IN OPEN COURT THIS 29TH DAY OF MAY, 2025.

In the presence of:-

- 1. Wahome for the Petitioner
- 2. Nganga for the Protestors

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M. MUYA
JUDGE

