



REPUBLIC OF KENYA



**In re Estate of Kaburu Muriithi (Deceased) (Succession Cause
367 of 2004) [2025] KEHC 7925 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 367 OF 2004
DKN MAGARE, J
MAY 28, 2025**

BETWEEN

MARY MUTHONI WATATUA PETITIONER

AND

BENSON THAIRU KIAMBO PROTESTOR

JUDGMENT

1. The late Kaburu Muriithi (Deceased) died at a ripe old age of 87 years on 7.10.1997. Since then his estate has not known peace. There has been machinations, subterfuge and skullduggery that has lasted for almost 30 years. This was coupled by the arrest and incarceration of the widow of the deceased, then aged 93 years. The deceased left behind a piece of earth namely, Muhito/Thiha/553 measuring 1.94 hectares. Four persons got a chief's letter stating that they were the sole beneficiaries of land parcel number Muhito/Thiha/553.
2. On 6.8.2004, John Njoani Kaburu (now deceased) applied for letters of administration stating that the estate was worth 150,000/=. He listed the following as beneficiaries:
 - a. John Njoani Kaburu - son
 - b. Joseph Hungura Kaburu - son
 - c. Gathiga Muriithi – daughter in law
 - d. Mary Muthoni Watatua - daughter in law
3. On 10.08.2004, the deceased petitioner John Njoani Kaburu, filed citation against the sisters-in-law to accept or refuse letter, which he had already applied. Mary Muthoni Watatua entered appearance to the citation and cross petitioned for grant of letters of administration. She stated that she was married to the deceased's son, Watatua Kaburu (deceased). She did not indicate who her children were or the children of the late husband.



4. Soon thereafter, on 12.10.2004, Mary Muthoni Watatua made an objection to making of the grant. The grant was subsequently made to Mary Muthoni Watatua and John Njoani Kaburu (now deceased) on 15.02.2006.
5. Parties filed evidence tendered in form of affidavits that the deceased left the following properties:
 - a. Muhito /Thiha/553 measuring 1.94 Ha.
 - b. Githi/Muthambi/643 – measuring 2.635 hectares (6.511 acres) registered in the names of Githiga Muriithi Kaburu on 3.02.2005
 - c. Muhito /Thiha/117- Measuring 0.89 hectares (2.1992 acres) registered in the names of Joseph Hungura Kaburu on 12.09.1988.
6. The petitioner, John Njoani Kaburu (now deceased) died on 10.1.2014 at 71 years old. He was then represented by Benson Thairu Kiambo, the eldest son, then aged 46 years, and now should be 57 years old. On 15.12.2014 the court, J Wakiaga allowed the application for grant of letters of administration ad litem to Benson Thairu Kaburu.
7. The parties dealt with an application for injunction dated 5.3. 2010. The court, Serгон J allowed the application on 7.5.2010. The court found that the protestor Mary Muthoni was using a purported elders award to interfere with occupation of the suit land, Muhito/Thiha/553 measuring 1.94 Ha, before succession was concluded.

Evidence

8. The matter proceeded for hearing on 17.12.2009 where the protestor testified that she opposed the confirmation. Mary Muthoni Watatua testified as PW1. The deceased was her father-in-law. She testified that Muriithi Kaburu and Joseph Hungura were already given land. She proposed that plot No. 553 be shared equally with John Njoani Kaburu. That the deceased told her to reside on plot No. 553. She stated that Watatua had not been given 3 acres. She was only claiming Muhito/Thiha/553.
9. Kaburu Wa Muriithi was son of the deceased. He testified the deceased had 4 sons. The land was registered in other people's names because the law did not allow one person to own more than one acre. Plot 643 was divided into 2 equal parts, one to Watatua and the other to Muriithi.
10. He stated that the deceased's parcels of land were consolidated and registered in his names. The other two in the names of his sons Muriithi and Hungura. He stated that the land registered in the names of Watatua is registered in his sons' names. On cross examination he stated that the law did not allow registration in more than one parcel of land. Parcel number 643 was registered in the names of Watatua and Muriithi Kaburu.
11. John Njoani Kaburu testified as DW1. He prayed for the grant to be confirmed. His elder brother was registered as proprietor of Githi/Muthambi/643. He testified that he could not share land with the petitioner because she had Githi/Muthambi/643 given to her husband.
12. John Njoani Kaburu (deceased), testified (then he was alive) that the deceased left 7 siblings, three sisters and 4 sons. One sister was not married and was to be treated as a son. The elder brother was registered as proprietor of Githi/Muthambi/643. Joseph Hungura was given the share of the land vide a court case. He stated that he cannot share Muhito/Thiha/553 as the protestor had her own land, Githi/Muthambi/643.
13. During the lifetime of the deceased, it was his case that Wairimu Kaburu and John Njoani Kaburu were given Muhito/Thiha/553.



14. It was also not in doubt that Mary Muthoni Watatua had issues with the deceased and her mother in law that caused her to be arrested and jailed, when she was at a ripe old age of 90 years.
15. Vide the Summons for Confirmation of Grant dated 10.5.2019, the Petitioner applied for an order that the grant of probate or letters of administration intestate (or with will annexed) made to Mary Muthoni Watatua and Benson Thairu Kiambu on 2.11.2015 be confirmed.
16. Subsequently, the Protestor opposed the confirmation of the grant vide the Affidavit of Protest sworn on 15.9.2019 by Benson Thairu Kiambo as follows:
 - a. The Protestor is son of the late John Njoani Kaburu and a grandson of the deceased herein.
 - b. The said John Njoani Kaburu had indicated that the land ought to be shared into four portions as per the wishes of the deceased as follows:
 - i. John Njoani Kaburu - 3.6 acres
 - ii. Joseph Hungura Kaburu - 0.7 acres
 - iii. Gathigia Muriithi - 0.6 acres
 - iv. Mary Muthoni Watatua - 0.6 acres
 - c. The deceased left three daughters and four sons and prior to his demise he had bequeathed the parcel known as Githi/Muthambi/643 measuring six and a half acres to Gathigia Muriithi and Mary Watatua.
 - d. The Petitioner's husband got 3 acres out of L.R No. Githi/Muthambi/643 and she ought not to claim 2.395 acres from L.R No. Muhitu/Thiha/553 as she will be benefitting twice.
 - e. The Protestor proposed that the land be shared among the 3 units as follows:
 - i. Benson Thairu - 3.6 acres
 - ii. Lydia Njoki Hungura on behalf of Joseph Hungura's house (deceased) - 0.9 acres
 - iii. Mary Muthoni Watatua - 1.0 acres.

Submissions

17. The Protestor filed submissions dated 13.11.2024. It was submitted on the basis of Section 42 of the *Law of Succession Act* that as the deceased had given some property during his lifetime, the same should be taken into account in determining the shares of the net intestate.
18. I have not had sight of the Petitioner's submissions.

Analysis

19. The issue before me for determination is whether the protest is merited. The grounds upon which the Protestor protested the summons for the confirmation of grant were inter alia that the deceased left three daughters and four sons and prior to his demise he had bequeathed the parcel known as Githi/Muthambi/643 measuring six and a half acres to Gathigia Muriithi and Mary Watatua.
20. Further, that the Petitioner's husband got 3 acres out of L.R No. Githi/Muthambi/643 and she ought not to claim 2.395 acres from L.R No. Muhitu/Thiha/553 as she will be benefitting twice. It is not in doubt that the deceased registered land parcel number Githi/Muthambi/643 in the names of his



son. It was submitted and no opposition was shown that Muriithi Kaburu and Watatua Kaburu were given this parcel of land.

21. The Protestor proposed that the land be shared among the 3 units as follows:
 - a. Benson Thairu - 3.6 acres
 - b. Lydia Njoki Hungura on behalf of Joseph Hungura's house (deceased) - 0.9 acres
 - c. Mary Muthoni Watatua - 1.0 acres.

22. In essence, the court is to establish any ground upon which the court could have issued a confirmed grant when in fact it ought not to have issued it at all. This is because by dismissing the summons for confirmation of grant, the Administrator will either commence the process afresh or rectify that which is demonstrated to cause such dismissal. The grounds for revocation or annulment of grant of Letters of Administration are set out in Section 76 of the Law of Succession as follows:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

 - (a) That the proceedings to obtain the grant were defective in substance;
 - (b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
 - (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - (d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) To proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
 - (e) That the grant has become useless and inoperative through subsequent circumstances.

23. The case of the Protestor is largely uncontroverted. On a balance of probabilities, the Protestor has established a case against confirming the grant herein. Indeed it was the testimony of the protestor that the suit property was supposed to be divided between Muriithi Kaburu and Watatua Kaburu but this did not happen. DW1's testimony that Watatua Kaburu was to get 3 acres out of Githi/Muthambi/643 was also not controverted.

24. The Protestor's proposed mode of distribution does not bring into picture the nature of the deceased's estate in terms of bounds, beneficiaries and respective shares. Equal shares are also provided under Section 38 of the *Law of Succession Act* which provides as doth:

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.



25. Therefore, this court has established a basis for interfering with the mode of distribution proposed in the certificate of confirmation of grant as urged by the Protestor.
26. I find basis upon which to exercise my discretion in favour of the Protestor. The discretion of this court is premised on the law. In animating the discretionary powers of the Court in the case of Ramakant Rai v Madan Rai, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:
- “Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:
- “The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains.”
27. The Protest partly succeeds. However, the court is unable to apportion as the proportions proposed by both parties do not add up to the land that is available. Further, the three sisters have not been accounted for or filed to give up their shares. Land parcel number Githi/Muthambi/643, measuring 2.635 acres was registered in the names of Githiga Muriithi Kaburu on 3.02.2005. The same was a gift inter vivos to that husband of the current registered owner. He is not entitled to inherit from the rest of the parcels. The witness for Mary Muthoni Watatua confirmed and it was not controverted that she got 3 acres out of the said parcel of land.
28. Further, Muhito/Thiha/117, measuring 0.89 hectares (2.1992) was registered in the names of Joseph Hungura Kaburu on 12.09.1988. The said parcel is thus a gift intervivos to that dependant. He is not entitled to inherit any other parcel of land. This leaves the two protagonists and the sisters. There was evidence that the protestor, got 3 acres out of Githi/Muthambi/643. The protestor must therefore, give an election that she is not getting any share of that parcel before the parties share the remainder of the estate being Muhitu/Thiha/553.
29. The current petitioner listed sisters and brother without details. The parties must therefore set out, specifically, the persons entitled to inherit on behalf of the estate of the deceased petitioner.
30. It is thus necessary to establish from the ground, the portion of Githi/Muthambi/643 and Muhitu/Thiha/553 occupied by the parties. This will assist the court make a proper confirmation of grant. The net effect is that the protest partly succeeds. However, the proposal by the protestor does not have regard to gifts intervivos.

Determination

31. In the upshot, I make the following orders:-
- i. The Protest dated 15.10.2019 is merited and is partly allowed.
 - ii. The schedule to the Summons for Confirmation of Grant dated 8.5.2019 is hereby struck out. The protestor’s schedule is equally struck out.



- iii. The Petitioner and the Protestor as Administrators shall immediately file in court a schedule describing the size of L.R No. Muhitu/Thiha/553 to enable the court to issue a certificate of confirmation of grant together with the properties which were hitherto given as gifts *inter vivos*.
- iv. The protestor to give an election on any entitlement over land parcel number Githi/Muthambi/643.
- v. Each party to bear their own costs.
- vi. Confirmation on 24.7.2025.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28TH DAY OF MAY, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Kibaara Muthoni for the Petitioner

Mr. Nganga for the Protestor

Court Assistant – Michael

M. D. KIZITO, J.

