



**In re the Estate of Mbarire Garu (Deceased) (Civil Appeal  
E079 of 2023) [2024] KEHC 9634 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9634 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E079 OF 2023  
LM NJUGUNA, J  
JULY 31, 2024**

**BETWEEN**

**GLADWEL MURINGO MBARIRE ..... 1<sup>ST</sup> APPELLANT**

**MILICENT NJURA MBARIRE ..... 2<sup>ND</sup> APPELLANT**

**JAMES KAMAU MBARIRE ..... 3<sup>RD</sup> APPELLANT**

**AND**

**GODFREY NJUE MBARIRE ..... RESPONDENT**

*(Being an appeal arising from the decision of Hon. S. Ouko SRM in Runyenjes Senior Principal Magistrate's Court Succession Cause No. 120 of 2021 delivered on 16th November 2023)*

**JUDGMENT**

1. The appellant filed the memorandum of appeal dated 14<sup>th</sup> December 2023 through which he has sought the following orders:
  1. That the ruling of the trial court be set aside;
  2. That the Honourable court do distribute the estate of the deceased as per the affidavit of protest filed on 23<sup>rd</sup> September 2022;
  3. That the appeal be allowed; and
  4. That costs of the appeal and trial court be awarded to the appellants.
2. The appeal is premised on grounds that the learned trial magistrate erred in law and fact:
  1. When she distributed the estate of the deceased as per the mode proposed by the respondent in the affidavit in support of the summons for confirmation of grant, whereas some of the beneficiaries of the estate had benefitted from the deceased prior to his death;



2. When she unfairly distributed the estate of the deceased and discriminated against the appellants herein who are members of one house;
  3. As she did not take into account the factual circumstances on the ground in ensuring equitable and fair distribution of the estate in that the deceased had given land and had settled some of the beneficiaries in their respective portions of the land, who went ahead and developed it; and
  4. By dismissing the appellants' mode of distribution as per his wishes that the estate be distributed according to the 2 houses.
3. A grant of letters of administration was issued in the estate of the deceased to the respondent herein on 30<sup>th</sup> September 2021. He proceeded to file summons for confirmation of grant dated 1<sup>st</sup> August 2022 together with a supporting affidavit in which he proposed a mode of distribution for the estate which comprises of LR. Kyeni/Kigumo/1537 as follows:
- Godfrey Njue Mbarire  
Gacigu Mbarire  
Njiru Mbarire  
Samson Njiru Mbarire  
Edward Njue Mbarire To get 9/13 jointly  
Dorothy Njoki Mbarire  
Flora Kina Thumi  
Rose Mbere Kaumbuthu  
Harriet Muringo Njiru  
Gladwel Muringo Mbarire  
Millicent Njura Mbarire To get 4/13 jointly  
James Kamau Mbarire
4. The same was met with an affidavit of protest filed by the 3<sup>rd</sup> appellant on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> appellants, in which they deposed that some of the beneficiaries had already been given land by the deceased before his death. They proposed that parcel number LR. Kyeni/Kigumo/1537 be divided into 2 equal shares and distributed between the 2 houses and not amongst the children of the deceased.
  5. The protest was heard viva voce. PW1 was the 3<sup>rd</sup> appellant, who stated that the deceased had 2 wives. The first one is Jerusha Njoka who had 4 children namely Gladwel Mbarire, James Kamau, Njura Mbarire and the late Igoki Mbarire. The second wife is Jeniffer Mbarire who had 9 children namely Wintoro Mbarire, Gacigu Mbarire, Kinyua Mbarire, Njiru Mbarire, Kina Mbarire, Mbeere Mbarire, Muringo Mbarire, Njoki Mbarire and Njue Mbarire. He relied on his affidavit of protest wherein he stated that Godfrey Njue Mbarire, Gicugu Mbarire and Njiru Mbarire had already been given land by the deceased before his death and so they do not deserve to be included in the distribution herein. That there are 2 houses and distribution should be according to the 2 houses.
  6. DW1 was the respondent who relied on the contents of his replying affidavit to the affidavit of protest. He stated that the allegations made by the 3<sup>rd</sup> appellant were blatant lies and that no evidence was produced in proof thereof.



7. In its finding, the trial court relied on the provisions of section 40 of the *Law of Succession Act* and distributed LR. Kyeni/Kigumo/1537 amongst the 12 children of the deceased in equal shares. A certificate of confirmation of grant was issued on 17<sup>th</sup> November 2023. That the land referred to did not form part of the estate of the deceased and the same was not acquired from the deceased. That all the children of the deceased are entitled to equal shares of the deceased's estate in accordance with the *Law of Succession Act* and that the proposal by the protestors is unjust and unfair as it seeks to disinherit some beneficiaries and the same should not be allowed. He urged the Court to dismiss the affidavit of protest.
8. The court directed that this appeal be canvassed by way of written submissions but only the appellants complied with the directions on filing of submissions.
9. It was their submission that Godfrey Njue Mbarire, Gicugu Mbarire and Njiru Mbarire acquired ancestral lands before the death of the deceased thus they are not entitled to a portion of the estate of the deceased herein. Reliance was placed on section 42 of the *Law of Succession Act*. They stated that the trial court erred in failing to take into account the previous benefit of the 3 sons who had been given land before the death of the deceased. That at the point of petitioning, the property of the deceased that had been given before the death of the deceased should have been considered but this was not the case. They urged the court to allow the appeal.
10. The issue for determination is whether the trial court erred in its distribution of the estate of the deceased and whether the same is fair and equitable.
11. In order to determine the issue before it, this court must re-evaluate the evidence adduced at trial. In the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, it was held thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
12. PW1 testified that the deceased had 2 wives and children, thus there are 2 houses in this estate. DW1 does not counter this position, neither does any other evidence on record. It was PW1's testimony that 3 of the sons of the deceased, including the respondent, had been given land by the deceased before he died. On his part, DW1, the respondent, stated that whatever land him and his brothers acquired was given to them by his grandfather. He stated that the said land does not form part of the estate of the deceased herein. The Court notes that no evidence was adduced by PW1 or indeed any other witnesses to the effect that three sons of the deceased had been given land by the deceased before his death. The evidence by PW1 was just mere allegations that were not proven and it remains just that.
13. From the testimony, there is no question as to whether the deceased was polygamous, therefore, the estate should be subjected to Section 40 of the *Law of Succession Act* which provides:

“ 40. Where an intestate was polygamous;

  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 intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."

14. The estate of the deceased comprises of parcel number LR. Kyeni/Kigumo/1537. Even though the appellants alleged that the deceased also owned another parcel of land besides this one, no evidence was given in that regard. Therefore, the only parcel to be distributed herein is LR. Kyeni/Kigumo/1537. In her finding, the trial magistrate relied on section 40 of the *Law of Succession Act* and divided the said parcel of land in equal shares amongst the surviving children of the deceased since the 2 widows and one child are deceased.

15. The appellants submitted that the court ought to have considered the factual circumstances of the case on the ground in its determination. From the evidence on record, the respondent's occupation of his land does not affect the distribution herein since it has already been found that his land does not form part of the estate of the deceased. Had it been found that the land occupied by the respondent forms part of the estate, this court would have been guided by jurisprudence to consider that fact. In the case of re Estate of Waweru Mwaniki Gatuha (Deceased) [2020] eKLR the court held thus;

"I agree with the holding in Scholastic Ndululu Sura v Agnes Nthenya Sura[2019] eKLR that;

"It is therefore evident that although Section 40 of the *Law of Succession Act* provides a general provision for distribution of the estate of a polygamous deceased person, the court has the discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate."

16. From a perusal of the trial court's judgment, the trial magistrate did indeed consider all the relevant factors as presented through evidence in her finding and distribution of the estate. It is my considered view that the distribution of the estate by the trial court is fair and equitable since the learned trial magistrate considered all the children of the 2 houses as units to benefit from the estate in light of section 40 of the *Law of Succession Act*.

17. Therefore, I find that the appeal lacks merit and the same is hereby dismissed. Each party to bear their own costs.

18. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF JULY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the 1st Appellant

.....for the 2nd Appellant

.....for the 3rd Appellant

.....for the Respondent

