



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthee & another v Mwiti (Civil Appeal 88 of 2019)  
[2023] KEHC 459 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 459 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL 88 OF 2019  
EM MURIITHI, J  
JANUARY 30, 2023**

**BETWEEN**

**BERNARD MUTHEE ..... 1<sup>ST</sup> APPELLANT**

**JAPHET KIMAYA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ANITA KAMBA MWITI ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. On February 27, 2018, the respondent filed a petition for letters of administration intestate in respect of the estate of M'Rintuara M'Rwito *alias* Rituara Rwito (deceased) in her capacity as the deceased daughter. The chief of Ngiine location in his introductory letter dated November 19, 2010 listed the appellants, the respondent, Janet Nkatha Salesio, Jennifer Gatirithu, Sarah Karuga, Lydia Kananira and Zipporah Kinya as the beneficiaries of the estate of the deceased.
2. After the respondent was issued with a grant of letters of administration intestate, she applied for confirmation of the said grant, but the appellants and Lydia Kananira protested to the said confirmation and the court ordered all beneficiaries to attend court on May 20, 2019 to express their views, and they did so as follows:
  1. Bernard said, "I want us to go speak at home."
  2. Japhet said, "I want us to go sit as family we talk."
  3. Sarah said, "I want it divided as recommended by the petitioner."
  4. Zipporah said, "I want to divide as recommended by the petitioner."
  5. Anita said, "I want to divide as recommended in the mode of distribution."



6. Jennifer was sick but she had signed the consent.
  7. Lydia said, “I do not agree with mode of distribution.”
3. Since the beneficiaries did not seem to agree on the mode and distribution of the estate, the court on June 24, 2019 dismissed the protests and ordered that –
- “The estate of the deceased herein be distributed equally to all the beneficiaries (his children) in terms of section 38 of the [Law of Succession Act.](#)”

### **Appeal**

4. Aggrieved by the dismissal of their protests and the manner in which the estate was ordered to be distributed, the appellants filed their memorandum of appeal on July 24, 2019 raising 6 grounds of appeal as follows:
1. The learned trial magistrate erred in law and fact by failing to seek the approval of the parties before deciding the matter on affidavit evidence instead of *viva voce* evidence when protests arose.
  2. The learned trial magistrate erred in law and fact by failing to consider no party sought an equal sharing of the estate.
  3. The learned trial magistrate erred in law and fact by failing to find that all the parties were in agreement over sharing of land parcel LR No Nyaki/Munithu/220.
  4. The learned trial magistrate erred in law and fact by failing to realize that the disputed part of the estate was only land parcel LR No Nyaki/Munithu/1457.
  5. The learned trial magistrate erred in law and fact by failing to appreciate that the parties were unrepresented and had no benefit of legal counsel to articulate their proposals on affidavits and/ or any other mode of evidence.
  6. The learned trial magistrate erred in law and fact by making a decision against the weight of the evidence and the law.

### **Submissions**

5. The respondent did not file any submissions.
6. The appellants urge the court to heed to their proposed mode of distribution of the estate and not as per the law since it is their father’s estate and they all agree to the mode of distribution which they deem fit. They fault the trial court for failing to consider that no party sought an equal sharing of the estate, and cite [Re estate of John Musambayi Katumanga](#) (2014) eKLR. They further fault the trial court for failing to find that all the parties were in agreement that land parcel LR No Nyaki/Munithu/220 was to be shared equally between the sons. They urge that all the parties were in agreement over the sharing of land parcel LR No Nyaki/Munithu/1457, and ask the court to heed to their request.

### **Analysis And Determination**

7. From the grounds of appeal as framed, the principal issue for determination is whether the beneficiaries were in agreement on how the estate properties were to be distributed.
8. It is not factual that the beneficiaries had agreed how LR No Nyaki/Munithu/220 was to be distributed. It is only the appellants and Lydia Kananira who proposed that the said parcel be shared



equally by the appellants. The petitioner, the respondent herein, was of a totally divergent view. Whereas Sarah Karuga and Jennifer Gatirithu agreed with the mode of distribution as proposed by the respondent, the appellants and Lydia Kananira insisted that they needed time to go sit as a family and talk.

9. It is not in dispute that the deceased herein died intestate. The applicable provisions of the law is therefore section 38 of the [Law of Succession Act](#), which provides that:

“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.”

10. This court respectfully notes and hails the decision of the Court of Appeal in [Stephen Gitonga M'murithi v Faith Ngira Murithi](#) [2015] eKLR that:-

“section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”

### **Orders**

11. Accordingly, for the reasons set out above, this court finds the appellants' appeal to be without merit and it is dismissed. There shall be no order as to costs.

Order accordingly.

**DATED AND DELIVERED ON THIS 30<sup>TH</sup> DAY OF JANUARY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances**

Mr. Gichunge Muthuri Advocate for the Appellants.

Respondent in person.

