



**Gitonye v Karanja & 2 others (Succession Cause E196 of 2021)
[2023] KEHC 1693 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE E196 OF 2021
JM CHIGITI, J
FEBRUARY 28, 2023**

**IN THE MATTER OF THE ESTATE OF HANNAH NJERI KARANJA
ALIASHANA NJERI KARANJE (DECEASED)**

BETWEEN

VERONICA WANJIRU GITONYE APPELLANT

AND

PAUL NDERO KARANJA 1ST RESPONDENT

JOHN KAMAU KARANJA 2ND RESPONDENT

MARY NJOKI MUMBI 3RD RESPONDENT

*(Being an appeal from the ruling of the Principal
Magistrate Gatundu in succession cause No. 3 of 2017)*

JUDGMENT

Brief Background:

1. The estate of the deceased comprises two properties, Ngenda/ Gathage 4xx and Ngenda / Kimunyu/11xx. The appellant filed summons for confirmation of the grant dated August 26, 2019, seeking confirmation of the grant of letters of administration issued on February 18, 2019. In her affidavit in support of the summons, she proposed that the estate of the deceased to be distributed equally amongst the 6 children.
2. The trial court in its ruling allotted ¼ share of Ngenda/Kimunyu/11xx to the appellant and the remaining share was to be distributed equally amongst Paul Nderi Karanja, John Kamau Karanja and Mary Njoki Wathana. Plot Ngenda/Gathage/4xx was to be distributed equally amongst Paul Nderi Karanja, John Kamau Karanja and Mary Njoki Wathana.



3. Aggrieved by the said ruling the appellant filed the instant appeal by a memorandum of appeal dated October 18, 2021 citing the following 7 grounds:
 - a. That the trial magistrate erred in law and in fact by failing to consider that the appellant was entitled to an equal share of her mother's estate.
 - b. That the learned trial magistrate erred in law and in fact by reaching a decision that the appellant had accepted a quarter (1/4) an acre while she had accepted the same as a temporary relief pending the determination of the succession cause and the same had no bearing on the final distribution hence reaching at an unjust decision.
 - c. The learned trial magistrate erred in law and in fact in reaching an erroneous distribution of the deceased estate.
 - d. The learned trial magistrate in his ruling erred in law and in fact in failing to appreciate that the appellant was entitled to be treated equally without discrimination as envisaged under the constitution of Kenya.
 - e. The learned trial magistrate erred in law and in fact in reaching a decision that discriminated against the male children during distribution.
 - f. The learned trial magistrate erred in law and in fact by failing to uphold the distribution as proposed by the appellant. Even if the married daughters did not assert their inheritance rights, the appellant was still entitled to an equal share to the other members of the family.
 - g. The learned magistrate erred in law and in fact in failing to consider all the evidence tendered, the facts of the case and submissions tendered, as a result, reaching an unfair decision.

She proposed to ask the court for the following orders:

- i. Set aside the ruling of the trial court.
 - ii. Uphold the proposed distribution by the appellant.
 - iii. Costs of the appeal be borne by the respondents.
4. The appeal was heard through written submissions.

Analysis And Determination:

Appellant's submissions:

5. The appellant filed submissions on July 26, 2022 and argued that she is among the surviving children of the deceased and therefore entitled to an equal share with the other siblings. She cited the case of *Rono v Rono* [2005] where the court held that all children of the deceased have equal rights to inherit the property of the deceased without discrimination to their sex.
6. She submits that section 38 of the Succession Act is clear on equal distribution of the net intestate estate to the surviving children of the deceased. She submitted that the protestors have always been hostile to her to an extent of evicting her from her mother's house.



7. She urged the court to distribute the estate of the deceased equally amongst all beneficiaries.

Respondent submissions:

8. Counsel for the respondent on his part filed submissions on October 4, 2022, wherein he submits that the deceased distributed her estate to his sons in 1986, and they each occupied their individual portions. She stated that the deceased had explained the position to the daughters. She cited section 42 of the Law Succession Act.
9. She submits that the trial court was not unfair to the appellant as she was allocated ¼ of an acre of the deceased estate.
10. She urged the court to uphold the trial court’s ruling.
11. The estate of the deceased comprises two properties, Ngenda/ Gathage 4xx and Ngenda / Kimunyu/11xx. The appellant proposes to have the two properties distributed equally amongst all beneficiaries regardless of whether status. The protestor proposes that the appellant be allocated ¼ share of Ngenda /Kimunyu/11xx and the remainder be shared equally amongst the sons.
12. PW1 testified that the deceased had distributed the estate prior to her demise and even settled the sons, he told the court that the deceased did inform the daughters who were satisfied of the allocation.
13. According to him, the appellant is only entitled to ¼ of Ngenda /Kimunyu/11xx, as she was married. The evidence of PW1 was corroborated by PW2 who told the court that the deceased had informed him that he had distributed his property to his sons prior to her death.
14. The trial court in its ruling correctly cited the case of Re Estate of Waweru Mbatia (deceased) [2021] eKLR where the court stated that ... “the law is very clear that assets given by the deceased to beneficiaries during his lifetime shall be taken into during distribution of the estate. It is trite law that if a deceased person had distributed his estate during his lifetime, his wishes ought to be respected. However, if it can be demonstrated that the wishes of the deceased are illegal, unfair or discriminatory to the beneficiaries or some of them, the deceased’s wishes should not be respected.”
15. The trial court departed from the above holding and unfairly distributed the estate of the deceased ignoring the interests of other beneficiaries.
16. 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.
17. Applying the above principles and the reasoning of the above-cited case, I find the trial magistrate fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the Law of Succession Act, by discriminating against the appellant on the basis of being a married daughter.
18. I also fault the trial magistrate who failed to seek the views of the other married daughters by way of an affidavit to confirm whether or not they wished to participate and get anything from the estate of the deceased.
19. Article 27 of the Constitution stipulates that:
 - “(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.



- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”

20. I find that The appellant is a victim of discrimination as a result of her marital status which is forbidden under article 27 (4) and (5). The trial court had a duty to protect promote and fulfil the rights of the appellant which it failed to uphold. This court cannot allow such an injustice to prevail.
21. In any event as is the case here, the wishes of a deceased person if not expressed in a written will or proved oral will cannot be considered. As such the Estate remains intestate and the proposed mode of distribution by the protestor which is discriminatory cannot stand. The intestate estate should be distributed as per section 38 of the *law of succession Act*.
22. Further *in Re Estate of Chesimbili Sindani (Deceased)* [2021] eKLR, where the court noted the following: “The estate shall be distributed amongst all the children, regardless of their gender and marital status. There is no consent or consensus amongst the children on distribution...”
23. I do agree with the judge in the case *Eliseus Mbura M’thara v Harriet Ciambaka & Another* [2012] eKLR the court held:

The *law of Succession Act* does not discriminate between gender in matters of succession or inheritance. Under the *law of Succession Act* and indeed under the *Constitution* a child is a child and every person has equal rights under the law irrespective of gender. The *Law of succession Act* does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.

Disposition:

24. I allow the appeal, and set aside the trial court’s ruling dated October 1, 2021 and substitute it with an order that the property forming the net estate of the deceased be distributed equally amongst all beneficiaries irrespective of their gender.
25. Each party shall bear the costs.

DATED, SIGNED AND DELIVERED AT KIAMBU THIS 28TH DAY OF FEBRUARY 2023.

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J. CHIGITI (SC)

JUDGE

