



**In re Estate of Gatemi Buri (Deceased) (Civil Appeal 69 of 2019)  
[2023] KEHC 3367 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3367 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL 69 OF 2019  
FR OLEL, J  
APRIL 25, 2023**

**BETWEEN**

**MWANGI GATEMI BURI ..... APPELLANT**

**AND**

**MICERE WAMUNDARA WAKAGEO ..... RESPONDENT**

*(Appeal from judgement of Hon. Y. M. Barasa (SRM) in Kerugoya  
in succession cause .no.116 of 1991 dated 27th September 2019)*

**JUDGMENT**

1. This appeal arises from the judgment/decree dated September 27, 2019 issued in Kerugoya chief Magistrate court Succession Cause No 116 of 1991 delivered by Hon YM BARASA (SRM) where she found that the petitioner and protestor are the only surviving beneficiaries of the deceased Gatemi Buri and that section 38 of the Law Of Succession Act was applicable thus the only property of the Estate of the late Gatemi Buri( Kiine/gacharo/277 measuring approximately 4.75 acres) was to be shared equally. The appellant/petitioner being dissatisfied with the said Judgment preferred this appeal and raised the following ground of appeal;
  - a. That the learned trial magistrate erred in law and in fact by failing to appreciate that the deceased herein died before the commencement of the Law of Succession Act, Cap 160 and therefore the law applicable in distributing the estate of the deceased was customary law but not the Law Of Succession Act. A miscarriage of justice was thereby occasioned.
  - b. That the learned magistrate erred in law and in fact by holding that section 38 of the Law Of Succession Act was applicable in distributing the estate of the deceased. A miscarriage of justice was thereby occasioned.



- c. That the learned trial magistrate erred in law and in fact by failing to appreciate that the deceased prior to his demise had gifted his land parcel Kiine/gacharo/277 to the Petitioner. A miscarriage of justice was thereby occasioned.
- d. That the learned trial magistrate erred in law and in fact by failing to take consideration that the protestor has never utilized the said parcel number Kiine/gacharo/277 and also the developments which had been done by the Petitioner.
- e. That the learned trial magistrate erred in law and in fact by revoking the grant under section 76 of the Law Of Succession Act which such law was not applicable to the estate of the person who dies before commencement of the said Act. A miscarriage of justice was thereby occasioned.
- f. That the learned trial magistrate erred in law and in fact by misinterpreting the Law of Succession Act and particularly the sections dealing with the distribution of the estate of the deceased. A miscarriage of justice was thereby occasioned.
- g. That the decision and judgment of the learned trial magistrate is not only flawed by error on the record but total misunderstanding of the legal principal involved in Law of Succession Act which deals with distribution of the estate of the deceased.

### **Brief Facts**

2. The late Gatemi Buri (deceased) died on July 15, 1970. The appellant and Respondent herein are his surviving children. In 1991 the appellant being the only son did apply for letters of Administration and was issued with letters of administration intestate on January 22, 1999. The same were confirmed on May 10, 2001. On May 14, 2018, the respondent in this appeal, who is the appellants only surviving sister and sibling did file, summons for revocation of grant on the basis that the same was obtained by fraud, making of a false statement and by concealment of fact since she was not included in the succession process.
3. Vide a ruling dated May 3, 2019 the trial court did agree with the respondent and accordingly revoked the grant issued on May 10, 2001. The parties then did agree on May 3, 2019 and recorded a consent, where both the appellant and the respondent were jointly appointed as joint administrators and then they were directed to file for confirmation of grant. The appellant did file summons for confirmation of grant vide his application dated May 31, 2019. In the said petition, he contended that the deceased left two children, Mwangi Gatemi Buri And Micere Wamundara Wakageo, Son And Daughter Respectively. The Asset Of The Deceased Was Listed As Land Parcel No Kiine/gacharo/277, and his proposal was that he gets the whole share of this property.
4. The Respondent in the Appeal filed her affidavit of protest dated July 8, 2019 on July 9, 2019 where she stated that the estate property should be distributed in equal shares. The parties through their advocates opted to rely on the affidavits filed by both parties dated July 8, 2019 and May 31, 2019 and further elected to file written submissions for the courts consideration.
5. The Trial Court in her considered judgment did find that that the customary law that the Petitioner wanted the court to rely upon was discriminatory as under the Kikuyu Customary Law, married women were not supposed to inherit land. Relying on Article 27 (3) of the Constitution, Section 2 (1) & 38 of the Law of Succession Act, the Trial court ordered that the land parcel No KIINE/GACHARO/277 be shared equally between the Petitioner and the Protestor.



6. Dissatisfied by the said judgment, the Appellant filed his Memorandum of Appeal on October 2, 2019 seeking to set aside the judgment of the Trial Court and to have the suit property be distributed as per the Appellant's proposal. He raised several grounds of appeal as already captured above.

### **Appellant Submissions**

7. The Appellant filed submissions on June 30, 2022 in which he contended that the [Law of Succession Act](#) came into existence on July 1, 1981 long after the deceased had died and it stated clearly under section 2(2) of the said Act that estates of persons dying before the commencement of the Act are subject to written laws and customs applying as at the date of death but nevertheless the administration of their estate shall commence or proceed so far as possible in accordance with this Act. It was the appellant's contention that the law applicable in this instant case was written laws and customs applying at the date of death. However the administration shall commence or proceed so far as possible in accordance to the Act.
8. It was further submitted that the deceased was a kikuyu man who died in 1970 and distribution of his property was to be done according to kikuyu customary law. Reliance was placed on a book on Restatement of Customary Law vol 2 by Eugene Contran at page 12 and 13, where it was stated that as per kikuyu customary law, 'married daughter's do not normally share the inheritance of their father. They live with their mother until they are married. If however a daughter remained unmarried she may be allocated a piece of land by muramati for use during her lifetime, and if she has illegitimate male then they inherit her portion after her death.'
9. They submitted that section 38 of the [Law of succession Act](#) was not to applicable in this case as, the law applicable was kikuyu customary law. Further the appellant had been gifted the land by his father way before succession Act came in force and thus was entitled to the entire parcel. They placed reliance on the case of [Phillis Michere Mucembi vs Wamai Muchembi \(2010\) eKLR](#), estate of [Josiah Mwangi Kariuki \(deceased\)\[2009\] eKLR](#) and [Peter M Murungi & Another vs Enigatune Mwongera & another](#) to buttress this point.
10. The appellant also submitted that under provisions of section 3(2) the [Judicature Act](#) Cap 8, the high court, court of Appeal and all the subordinate courts were to be guided by African customary law in civil cases in which one or more parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law. It was their submissions that while the Kikuyu customary law excluded married daughters from getting a portion of their fathers estate and may be viewed as repugnant to justice or morality, the law of succession was not in effect at the time of demise of the deceased, and therefore it would be just and logical to use the customary law on the basis of substantive justice. Heavy reliance was placed on Kerugoya Succession 364 of 2012, [Nelson Kariuki Gakeru vs Susan Wangeci Kimani & 15 others](#) & Josiah Mwangi Kariuki (Deceased ) 2009 where the court stated that the Act does not apply to the estate of deceased person who died before the commencement of the Act and therefor the trial magistrate erred in applying the succession Act while distributing the estate.

### **Respondent Submissions**

11. The Respondent filed her submissions on July 21, 2022 wherein it was submitted that the succession proceeding herein commenced were commenced in 1991 and the law applicable is the [Law of Succession Act](#). The respondents relied on Article 27(3) and (4) of the [Constitution](#) of Kenya 2010 which provided that women and men have equal right to equal treatment, including the right to equal opportunity in political, economic , cultural and social spheres and should also not be discriminated against on the basis of marital status. They submitted that under sec 2(2) an administration of the estate of a



- deceased who died before the Act commenced would only be subject to African customary law, where administration was sought before commencement of the Law of Succession Act came into force on July 1, 1981, but the later part of sec 2(2) would be applicable and the administration of the deceased estate would commence or proceed as far as possible in accordance to the said Act. Reliance was placed on the case of Estate of Seth Namiba Ashuma(Deceased) 2020eKLR.
12. Further reliance was placed on Article 2(4) of the Constitution of Kenya which provided that any law or custom that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omissions the contravenes the Constitution is invalid. Reliance was placed in the case of Re Estate of Solomon Ngatia Kariuki(Deceased) 2008 eKLR where the court stated that the Law Of Succession Act does not discriminate between the female and male children or married and unmarried daughters of the deceased person when it comes to the distribution of his estate, and that Judicature Act did bar application of any custom that was repugnant to justice and morality.
  13. Further the respondent submitted that Kenya as a country was a signatory to numerous international instruments and covenants that expressly forbidden discrimination based on Gender. One such instrument was (CADAW). In Rono v Rono (2006) eKLR It was held that 'a daughter whether married or not is entitled to inherit his father's Estate', it matter not that she is married and that she may inherit as well from her husband's side. The respondents submitted that the proceedings herein commenced in 1991 and as per section (2) of the said Act, there should be no discrimination on married daughters.
  14. It was submitted that the learned magistrate having considered that married daughter are entitled to inherit and distributing the estate equally as per provisions of section 38 of Law of succession did the right thing. That there was no evidence that the deceased had gifted the Appellant the said parcel of land inter vivos and therefore that ground of the Appeal could not stand. Further that there was no requirement for a beneficiary to utilize land to qualify to inherit it. The only requirement was for one to be a beneficiary within the meaning of section 29 of the Law of succession Act. The respondent prayed that this appeal should be dismissed with costs.

### **Determination**

15. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
16. As held in *Selle & Another Vs Associated Motor Boat Co ltd & others (1968) EA 123* where it was stated that;

' I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed Aif V Ali Mohammed Sholan(1955), 22 EACA 270'



17. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (*Shantilal M Ruwala-Vrs-R (1975) EA 57*. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.
18. The appellant raised seven (7) grounds of appeal and they all revolve around the following issues as synthesized by this court.
- a. Was the trial Magistrate err in revoking the grant while applying section 76 of the *Law Of Succession Act*.
  - b. Which law is applicable in distribution of the estate of the deceased, was it customary law or *Law Of Succession Act*.
  - c. Was the entire suit parcel Kiine/gacharo/277 gifted to the petitioner and/or was the protestor entitled to a portion thereof.
  - d. How should the Estate property Kiine/gacharo/277 be distributed?
  - e. Who should bear costs of this appeal.

**Was the trial Magistrate right in revoking the confirmation of grant certificate dated May 10, 2001 pursuant to provisions of section 76 of the *Law Of Succession Act*.**

19. The respondent herein had vide her application dated May 14, 2018 applied to have the said grant revoked on grounds that she was a daughter of the deceased and thus a beneficiary of the said estate but had not been consulted and/or included in the succession process. Vide a ruling dated May 3, 2019 the court did find merit in the said application and revoked the grant issued on March 13, 2007, subsequent to the said order being issued, the parties by consent did appoint both parties herein as joint administrators and the said consent was adopted as an order of the court on the same day May 3, 2019.
20. The appellant did not appeal as against this ruling, and or consent adopted and has only appealed as against the ruling on distribution dated September 27, 2019. It is therefore not open for the appellant to raise this ground of appeal and the same cannot be considered.

**Which law is applicable in distribution of the estate of the deceased, was it customary law or *Law Of Succession Act* section 38.**

21. The first issue to determine in this case is if the *Law of Succession Act* (LSA) was applicable to this case. It is not in contention that the deceased herein died on July 15, 1970 leaving two beneficiaries, the parties herein. The date of commencement of the *Law of succession Act* is July 1, 1981. Section 2 (1) and (2) of the Act provides as follows;

'(1)Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.



(2)The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.'

22. The interpretation of this section was done by Musyoka J in *In Re Estate of Nduati Mbutia (Deceased) [2015] eKLR* where he stated as follows;

The effect of Section 2(1) of the *Law of Succession Act* is that the provisions of the said Act are to apply to the estates of all persons dying after the commencement of the Act on July 1, 1981, subject of course to the exceptions created by the Act. The Act applies both as the substantive law as well as the procedural law to the estates affected.

Section 2(2) of the *Law of Succession Act* defines the application of the *Law of Succession Act* with respect to persons who died before the said Act commenced on 1st July 1981. The provision is categorical that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. The substantive provisions of the Act are those governing devolution or distribution of the estate of the dead person, whether such person died testate or intestate. These provisions are to be found in Parts II, III, IV, V and VI of the *Law of Succession Act*. The substantive law of succession for estates of the persons who died before July 1, 1981 is not to be found in Parts II, III, IV, V and VI of the *Law of Succession Act*, but in the written laws and customs that applied at the date of the death of the person in question.

The second part of Section 2(2) of the *Law of Succession Act* states that the administration of the estates of persons who died before 1st July 1981 should commence or proceed so far as possible in accordance with the provisions of the *Law of Succession Act*. In other words the procedure with respect to administration of estates of such persons is to be governed, not by the law as at the time of death, but by the procedures set out in the *Law of Succession Act*. The said provisions in the *Law of Succession Act* governing procedures and processes in administration of estates are to be found in Part VII. Part VII of the *Law of Succession Act* applies universally to the estates of persons dying either before or after the commencement of the Act.

It is not in dispute that the deceased person the subject of these proceedings died before the *Law of Succession Act* came into force. Consequently, the substantive law governing devolution to his estate is that stated in Section 2(2) of the *Law of Succession Act* that is the written laws and customs in force as at the time of his death in 1966.

The Kikuyu customary law of intestate succession is notorious. It is well documented in such treatises as Eugene Cotran's Restatement of African Law: Kenya II the Law of Succession, and Jomo Kenyatta's Facing Mount Kenya: The Tribal Life of the Gikuyu, among others. It has also been restated in several judicial pronouncements, such as in *Kanyi vs. Muthiora (1984)KLR 712*. I am though conscious of the dynamism of African Customary Law and alive to the caution sounded by the Court of Appeal in *Atemo vs Imujaro (2003)KLR 435* that the position as stated in the treatises may not be true today.

Under the Kikuyu Customary Law of intestacy, succession is patrilineal. Devolution is in favour of the male relatives of the deceased. Daughters are not entitled to inherit, they play their part in the family or clan in which they married, but it is permissible for daughters who attain the age of marriage but never marry to inherit from their parents. Where the deceased person has daughters only and the said daughters are all married, the property will pass to his brothers or their sons, with the widow having life interest.



The position stated in paragraph 24 here above is no doubt discriminatory in favour of men and against women. This was however sanctioned by Section 82(4) of the old Constitution. Section 82(1) of the said Constitution states that no law shall make any provision that is discriminatory either of itself or in its effect. Section 82(4) of the said Constitution make a number of exceptions to Section 82(1); it states that:

Subsection (1) shall not apply to any law so far as that law makes provision (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.'

23. This court is persuaded by the above authority. Further *in Re The Estate of Mugo Wandia (Deceased) (2009) eKLR* Justice M Koome ( as she was then ) stated that;

' The petitioner has a duty to adduce expert evidence on kikuyu customary law to establish that the applicant is not entitled to her father's estate. In the absence of such evidence I find the submissions that the applicant should be left out discriminatory and the existence of such custom and its requirement would not pass the threshold of the provisions of the *Judicature Act*. Besides the *Judicature Act*, there is the *Constitution* of the Republic of Kenya. Under section 82 of the *Constitution* out-laws discrimination on the basis of sex. Upholding and affording unsubstantiated custom that offers differential treatment to the petitioner is unconscionable.'

'It would also go against the reasonable expectation by the applicant that when she comes to a court of law she will be afforded equal treatment and access to justice. Kenya is amongst other countries under the United Nations and is a party to several human rights conventions and treaty which prohibit discrimination against women. Key amongst them is the universal declaration of human rights especially Article 1 and the convention on all forms of discrimination against women (CEDAW). It is for those reasons that at this day and age when the government has made a lot of effort to eradicate poverty and embrace equitable policies and programs of development a court of law cannot pronounce a judgment that goes against the spirit. The applicant is entitled to a share of her deceased fathers estate even if he died in 1976 and his properties were distributed in 2004.'

24. The Appellant contends that the applicable law was Kikuyu customary law as their deceased father died in 1970 before the succession Act took effect. As stated in Cotran on Restatement of customary law vol 2 by Eugene cotran, which did not allow women/ girl child to inherit the properties of their father, and if she was unmarried and had male children the said children could be considered. This custom was to be considered and applied as long as it did not fall foul of provision's the *Judicature Act*. Section 3 (2) of the *Judicature Act* provides as follows;

' The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.'

25. The appellant and his witness testified in objection/opposition to the protest filed by the respondent herein. They stated in General terms that under Kikuyu customary law, married women were not entitled to inherit their father's land. The respondent had been married by 1970 when their father died



and that the suit parcel of land had been gifted to the appellant. The appellant did not provide expert evidence to buttress his claim and hence reliance on Cotran on Restatement of customary law Vol 2 by Eugene Contran.

26. As rightly pointed out in *Re The Estate of Mugo Wandia* (deceased), it is the duty of the petitioner to adduce evidence that Kikuyu customary law did not entitle the respondent to inherit part of her father estate. In absence of such evidence, it would be discriminatory to hold a such against the respondent. Further such custom would not pass the test/threshold as provided under the *Judicature Act*.
27. Also in the case of *Wambugi w/o Gatimu v Stephen Nyaga Kimani* {1992} 2 KAR 292, Kwach JA discussed extensively the application of customary law vis a vis Section 3(2) of the *Judicature Act* stated as follows:-  

' The former Court of Appeal for East Africa in the case of *Kimani vs Gikanga* {1965} EA 735 held that where African Customary Law is neither notorious nor documented, it must be established for the court's guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases, the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinions adduced by the parties'.
28. The Appellant contention that married woman are not allowed to inherit their fathers property under Kikuyu Customary, may hold accurate and is proved by the book, Restatement of customary law vol 2 by Eugene contran, the said custom as it stands is discriminatory and falls foul of the provision of section 82(1) of the pervious constitution, which prohibited discrimination based on sex.
29. Based on the foregoing it is thus the finding of this court that Kikuyu customary law cannot be used to distribute the estate of the deceased.

**Was the entire suit parcel Kiine/Gacharo/277 gifted to the petitioner and/or is the protestor entitled to a portion thereof.**

30. The petitioner did testify and alleged that the entire suit property was bequeathed to him by his father before he died. In his evidence in chief he specifically stated that, 'My dad died in the 1970's. I used to stay with him. He gave me the land before he died. My sister was not given land. She has never utilized the land'.

The appellant's submitted that his late father did gift him the suit property before he died and he resides thereon with his family.

31. Section 107(1) of the *Evidence Act* provides that;  

' Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts exist.'

Section 108 of the *Evidence Act* further provides that;  

'The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side.'
32. In the supreme court case of *Raila Amolo Odinga & others Vs IEBC & 2 others* [2017] eKLR it was stated inter-alia that;  

' Though he legal and evidentiary burden of establishing he facts and contentions which support a parties case is static and remains constant through a trial with the plaintiff,



however depending on the effectiveness with which he or she has discharged this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were to be introduced.'

33. The court of appeal in *Mbutia Macharia V Annab Mutua & Ano [2017]eKLR* also discussed this issue and stated that;

' The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore while both the legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case the incident of both the legal and evidential burden was with the appellant.'

34. I also refer to *The Halsbury's laws of England, 4<sup>th</sup> Edition, Volume 17* at para 13 and 14 where it states that;

' The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.

{16} The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence.'

35. While it is not in dispute that the appellant and his family have had exclusive possession of the suit property, no proof was led to conclusively prove that the late Gatemi Buri (deceased) - his father gifted him the said parcel before he died and therefore that allegation remains unproven.

**the estate property Kiine/Gacharo/277 should be distributed.**

36. While it is not in doubt that the appellant and his family have been in occupation of the suit parcel ever since his father died in 1970, which fact was confirmed by the respondent. In her evidence in chief the respondent stated that, 'In kikuyu customary law, when parents wished to give land to a married daughter, they could do so. Mwangi and his family stay on the land. My father said he would give me a portion at the furthest corner when he was still alive.

37. In the ruling dated September 27, 2019, after considering all the evidence adduced, the trial magistrate held that the sole estate property comprising parcel of land KIINE/GACHARO/277 be shared equally between the parties herein based on provisions of section 38 of the *Law Of Succession Act*.



38. While section 38 provides for equal distribution of the estate property to the children of the estate, sight should not be lost of the fact that equitable distribution of the estate does not always work justice to the case as it ignores the peculiar circumstances of each case.
39. *In Re Estate of John Musambayi Katumanga-Deceased (2014) eKLR* Judge W Musyoka stated that
- ' The inequality in the distribution principle has often caused disquiet. In *Rono v Rono* and another (2005)1 EA 363, Omolo JA remarked that, 'Equal division works injustice especially in the case of a young child who still has to be maintained and educated and generally seen through life. The appeal judge took the view that section 40 of the Act did not provide that each child must receive the same or equal portion. That was the opinion of the higher bench. Section 40 of the Act is not independent of section 35 and 38 of the Act. The plight of minors is no doubt precarious in this scenario.'
40. Further in the said citation of *Re Estate of John Musambayi Katumanga-Deceased (2014) eKLR*
- ' Equal distribution does not always work justice, especially in polygamous situations, where the youngest child of the deceased maybe one (1) year old, while the eldest maybe over fifty (50) years of age. The infant no doubt would have far greater needs that the fifty year old, who would generally have received education and has probably been settled in life by the deceased. There cannot be justice in equal distribution in such case. The law as currently framed does not do justice in the circumstances. Ideally, equal distribution should be the principal, with some discretion left to the court to consider the circumstances of each case.'
41. In this the respondent specifically testified that her father before he died had promised to give her a portion of the suit parcel on the far end. Her evidence was that, 'Mwangi and his family stay on the land. My father said he would give me a portion at the furthest corner when he was still alive. The respondent did not ask for half of the suit property to be apportioned to her in her evidence in chief. She also conceded that it is her brother who had resided on the suit parcel from the 1970's. In circumstances peculiar to the facts herein would it be unfair to them award the respondent half share of the suit property without considering the long uninterrupted stay of the appellant and his children on the suit parcel?
42. The deceased died on July 15, 1970. By then the respondent was already married and resided in her home. This succession was filed in the year 1991 by the appellant and on May 10, 2010 the grant was confirmed. In May 2018 the respondent applied for revocation of grant leading to cancellation of the same in 2019. The appellant has had uninterrupted possession of the suit for over fifty (50) years and has obviously settled his children and their families thereon. In the special circumstances of this case equitable distribution of the suit property would be more appropriate than equal distribution which cannot be undertaken without great disruption of the developments already undertaken and further litigation by affected parties.
43. In the proceeding before the trial court, the parties did not offer further evidence on use and possession of the land and relied on the affidavits already filed. Unfortunately the affidavits filed provided little or no solution as to which portion on the far end can be subdivided and given to the respondent as her rightful share.

## **Disposition**

44. This appeal partially succeed. The Judgement of Hon YM Barasa (SRM) dated September 27, 2019 issued in Keruoga Succession case no 116 of 1991 is set aside.



45. In the circumstance of this case I do direct that the matter be referred back to the Chief Magistrate court at Kerugoya for purpose of allowing the parties to adduce further evidence as to what equitable share of the suit parcel shall be hive doff and given to the respondent as her rightful share of the estate.

46. That each party shall bear their own costs of this Appeal.

**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF APRIL 2023.**

**RAYOLA FRANCIS**

**JUDGE**

**Delivered on the virtual platform, Teams this 25<sup>th</sup> day of April, 2023.**

**In the presence of;**

.....for the Applicant

.....for Respondent

.....**Court Assistant**

