



In re Estate of Muiruri Kamau Gichuri (Deceased) (Succession Cause 35 of 2017) [2023] KEHC 21422 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21422 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
SUCCESSION CAUSE 35 OF 2017
AC MRIMA, J
JULY 31, 2023**

IN THE MATTER OF: THE ESTATE OF MUIRURI KAMAU GICHURI (DECEASED)

BETWEEN

PRISCILLAH WANGECHI MUIRURI 1ST ADMINISTRATRIX

GRACE WAMBUI MUIRURI 2ND ADMINISTRATRIX

AND

ANNE WAMBUI MUNA OBJECTOR

JUDGMENT

Introduction:

1. The dispute herein relates to the distribution of the estate among the beneficiaries of the deceased. The beneficiaries comprise of two houses each with children.
2. One of the houses fronted for equal distribution in line with section 40 of the *Law of Succession Act*, cap. 160 of the Laws of Kenya (hereinafter referred to as ‘the *Succession Act*’) whereas the other house relied on section 42(a) of the *Succession Act* to the effect that the distribution be as per how the deceased settled the houses prior to his demise.
3. The dispute was heard by way of *viva voce* evidence where witnesses testified.

Background:

4. The petitioning for the administration of the estate of the Muiruri Kamau Gichuri (hereinafter referred to as ‘the deceased’) began in 2017. The first Petitioner herein, Priscillah Wangechi Muiruri, and one Benard Kamau Muiruri initiated intestate proceedings as the widow and son of the deceased respectively.



5. A grant of Letters of Administration Intestate was issued on May 2, 2018 to the two Petitioners. The Grant was confirmed on June 13, 2019 and the properties forming the estate of the deceased were transferred to the said Priscillah Wangechi Muiruri and Benard Kamau Muiruri to hold in trust for themselves and others.
6. In September, 2021, Grace Wambui Muiruri and Waweru Muiruri Kamau filed Summons for the Revocation of the Grant. The main claim was that the deceased was polygamous and one house was not involved in the proceedings leading to the issuance of the impugned grant.
7. When the matter came up before court on October 26, 2021, the parties recorded a consent revoking the grant and a fresh one was issued in the joint names of Priscillah Wangechi Muiruri (hereinafter referred to as 'Priscillah') and Grace Wambui Muiruri (hereinafter referred to as 'Grace'). Parties also undertook to file for the confirmation of the new grant within 30 days thereof.
8. It was Grace who filed the Summons for confirmation of the Grant dated December 14, 2021. She deposed that she was the first wife of the deceased whereas Priscillah was the second wife.
9. Grace also listed the children in each house in her affidavit in support of the confirmation. She also listed the properties left behind by the deceased and her proposal on how they be shared between the beneficiaries.
10. In her proposal, Grace pitied for equal distribution of the property under Section 40 of the Succession Act.
11. Priscillah filed her proposal on the distribution and rooted for a certain mode of distribution. She only brought up the issue of section 42(a) of the Succession Act in her written submissions to the effect that the deceased had settled each house.
12. Before the issue of distribution was heard by the court, one Ann Wambui Muna, the Objector herein, filed a Summons dated August 1, 2022 claiming one-half of the property known as Plot No. 125 Liyavo Scheme No. 517 in Trans Nzoia county. She contended that the said one-half did not belong to the deceased, but to herself.
13. On October 24, 2022 the parties allowed the Summons dated August 1, 2022 thereby transferring one-half of the property known as Plot No. 125 Liyavo Scheme No. 517 to the said Ann Wambui Muna. The one-half was said to be 5 acres. The one-half remainder (allegedly 5 acres) was retained as the property of the deceased thereby leading to the hearing of the Summons for confirmation of the grant.
14. This Court, however, realized later that the said Plot No. 125 Liyavo Scheme No. 517 measured around 5 acres and not 10 acres as indicated and consented to by the parties. That is going by the documents filed by Ann on the ownership of the said property and which reveal as much.
15. Ann, therefore, did not take part in the hearing of the Summons for confirmation since her claim was amicably settled.

The hearing:

16. As stated elsewhere above, the Summons was heard by way of oral evidence. Grace was deemed as the Plaintiff and Priscillah as the Defendant.
17. It was Waweru Muiruri Kamau, (hereinafter referred to as 'Waweru') who testified as PW1 and the Plaintiff's case was closed. Priscillah testified as DW1 and also closed her case. Both parties largely relied on their respective proposals on distribution of the estate property in their testimonies.



18. Waweru, testified that he was one of the sons of the deceased and that Grace was her mother. He was, therefore, from the 1st house. He also admitted that Priscillah was his step mother.
19. He buttressed the contents of the Summons for Confirmation of Grant and the affidavit thereto. He listed the dependents of the estate in paragraph 2 of the Affidavit and the properties of the deceased in paragraph 4 of the Affidavit. The mode of distribution was in paragraph 5 thereof.
20. PW1, however, testified that the Kitale Commercial plot did not exist. He added that the land in Makui was 4 acres in size, but he couldn't ascertain in whose name the property was registered in favor of as at the time of his testimony.
21. PW1 further narrated that the deceased left around Kshs. 90,000/= to Kshs. 95,000/= in an account in Equity Bank.
22. It was his testimony that the plot in Moi's Bridge and part of the one known as Waitaluk/Kapko Block 12/Chamgei/160 were wrongfully sold by Priscillah and that he personally didn't approve of the sale. He contended that the two plots were used by the deceased and Priscillah for purposes of poultry and farming. He, however, proposed that the remainder of the Waitaluk/Kapko Block 12/Chamgei/160 (which was around 12 acres) be inherited by Priscillah since that was where Priscillah's matrimonial home was situate.
23. It was his further testimony that the property known as Waitaluk/Kapko Block 12/Muna/4 measuring 10 acres was similarly irregularly solely sold by Priscillah.
24. Regarding the parcel of land known as Ndeiya/Nderu/No. T325, PW1 testified that it measured 50 by 100 ft and that it was occupied by her mother Grace as her matrimonial home. He clarified that initially the whole family lived there, but later Priscillah and her children moved out.
25. According to PW1, Grace was supposed to move into Nzoia/Moi's Bridge Block 1/1099 which land measures about 17 acres. For this reason, he urged this Court to allow Grace to wholly inherit the same.
26. As for the Umoja Inner core Plot located in Nairobi, PW1 testified that the deceased sold the same to one of his sons, James Kamau Muiruri (now deceased) for a sum of Kshs. 100,000/=. He relied on a letter dated 24th September, 1999 from the Nairobi City Council in corroborating his evidence. PW1, therefore, posited that the said plot did not form part of the estate.
27. PW1 continued that the deceased was at one time employed at Bata Shoe Company in Limuru. He then acquired several properties in Limuru including Plot No. Limuru/Biribirion/T796 where he built a house and lived with Priscillah. PW1 stated that the said property was currently under a tenancy having been leased out to the church and that the rent therefrom, was being collected by Grace. PW1 ultimately affirmed that when the deceased left employment, he was two years old.
28. Waweru also testified that the deceased set up two businesses in Limuru as under: -On Plot No. Limuru Biribirion/24 which was a commercial plot. That the property was vandalized and remains occupied by his brother and a son of Grace one Simon Njoroge; On Plot No. Limuru/Biribirion/30. PW1 proposed that the same be inherited by Grace as compensation for land sold by Priscillah.
29. PW1 continued that the deceased had also purchased property in Kindaruma that had since been acquired compulsorily by the State.
30. It was PW1's further testimony that the house of Grace never contributed to the acquisition of any of the properties in Kitale. He also affirmed that all his siblings from the first house completed their secondary education and some proceeded to the university and that they were all leading very good



- lives. PW1 also admitted that the house of Grace did not contribute towards settling the hospital bills which had been incurred by the deceased prior to his death.
31. Finally, PW1 posited that the shares in Barclays Bank and Safaricom be sold and the proceeds be divided equally between Grace and Priscillah.
 32. In the end, PW1 proposed that the estate be distributed in accordance with Section 40 of the Succession Act and as follows: -
 - a. Ndeiya/Nderu/T325 – Grace Wambui Muiruri;
 - b. Limuru/Biribirion/T796 – Grace Wambui Muiruri;
 - c. Limuru Biribirion/24 – Grace Wambui Muiruri;
 - d. Limuru Biribirion/30 – Grace Wambui Muiruri;
 - e. Nzoia/Moi’s Bridge Block 1/1099 – Grace Wambui Muiruri;
 - f. Makui land – Grace Wambui Muiruri;
 - g. Waitaluk/Kapkoi Block 12/01 – Priscilla Wangeci Muiruri;
 - h. Waitaluk/Kapkoi Block 12/Chamgei/160 – Priscilla Wangeci Muiruri;
 - i. Waitaluk/Kapkoi Block 12/Muna/04 – Priscilla Wangeci Muiruri;
 - j. Toyota Pick Up KAL 504C – to be sold and the proceeds shared between the two (2) houses;
 - k. Kitale Commercial Plot – to be sold and the proceeds shared between the two (2) houses;
 - l. Moi’s Bridge Commercial Plot – to be sold and the proceeds shared between the two (2) houses.
 33. Priscillah testified as DW1. She relied on her proposed mode of distribution as contained in her affidavit. Praying that her proposed distribution be adopted by this Court, she recalled that she married to the deceased as a 2nd wife in 1960. Following their union, both Grace and herself lived with the deceased on Plot No. Ndeiya/Nderu/T325 measuring 100 by 100 ft for a while.
 34. During that time, Priscillah and the deceased engaged in the business of selling charcoal whereas Grace sold firewood. It was her evidence that she used to ferry the charcoal on her back to customers. DW1 testified that it was out of the business proceeds that the deceased and herself managed to purchase Plot No. Limuru/Biribirion/T796 measuring 50 by 50 ft. Her evidence was that though her matrimonial home was initially set up therein, she eventually moved out.
 35. It was Priscillah’s further evidence that the charcoal business prospered so much that enabled them to purchase Plot No. Limuru/Biribirion/24 and Limuru/Biribirion/30 each measuring 20 by 100 ft.
 36. DW1 also stated that she set up shops on Limuru/Biribirion/24 and used to collect rental until 2016 when one of Grace’s sons forcibly moved into the plot, took over the same and has remained thereon to date.
 37. Priscillah observed that Grace’s eight children, except one who was still in school, were all well-educated and some are university graduates who have since acquired their own properties in their own names and lived well. Further, Priscillah recalled that Grace’s first-born child one James Kamau Muiruri (now dead), was even gifted the Umoja Inner core plot by the deceased.



38. Desirous of relocating back to Kitale where her parents resided, Priscillah testified that her father purchased Plot No. L.R. 5558/2 (Moy Farm) measuring 12.2 acres on 1st March, 1974 and gifted her. An agreement to that end was produced in evidence.
39. Consequently, Priscillah moved with her family onto the said parcel of land in 1976 where they, including their children who majority never schooled, resided thereat. They established their poultry business and cultivated thereon. It was on this plot that her last born, one John Muna Muiruri, was born and raised. That they eventually obtained a title deed for the property which property was named as Plot No. Waitaluk/Kapkoi Block 12/Chamgei/01 and that the property was registered in the deceased's name at her pleasure. She testified that this is the plot where the deceased and her son were buried and that she continues to live thereon as her matrimonial home.
40. Following the acquisition of wealth from the poultry business and the farming activities, Priscillah's house, who all participated in the business, purchased the following plots: -
- i. Nzoia/Moi's Bridge Block 1/1099 measuring 17 acres;
 - ii. Waitaluk/Kapkoi Block 12/Chamgei/160 measuring 3 acres.
 - iii. Waitaluk/Kapkoi Block 12/Muna/4 measuring 10 acres;
 - iv. Plot in Moi's Bridge.
41. Priscillah observed that while her family acquired wealth out of hard work, Grace and her family resided in Ndeiya and benefitted from the properties in Limuru and Nairobi. She maintained that it was only her house that financially contributed towards settling the deceased's hospital bills and a larger portion of the funeral expenses.
42. Priscillah also testified that at the time of his death, the deceased had an outstanding hospital bill of around Kshs. 1,891,653/=.
43. It was Priscillah's further testimony that in order to offset the hospital bill, the representatives of both houses agreed to excise and sell a portion of three acres from Plot No. Waitaluk/Kapkoi Block 12/Muna/4. She annexed a copy of the family agreement in that retrospect. She also produced a bundle of receipts towards settlement of the hospital bill totaling Kshs. 2,222,652/= as exhibits.
44. Priscillah also testified that she had to sell the remainder of Waitaluk/Kapkoi Block 12/Muna/4 in order to raise revenue for the deceased's burial arrangements as well as the balance of the hospital expenses.
45. While testifying in Court from a wheel chair, Priscillah affirmed that her health had steadily deteriorated and was by then confined to a wheel chair and was wholly dependent on a care giver at all material times.
46. She was emphatic that the deceased was never in any gainful employment. Additionally, that the house of Grace never contributed towards the acquisition of any of the properties in Kitale.
47. Regarding the deceased shares in Barclays Bank and Safaricom, she urged this Court to distribute them equally as between the two houses.
48. Finally, she stated that 2½ acres out of Plot No. 125 Liyavo Scheme be allowed to form part of the deceased's estate since the other 2½ acres was given to and is in occupation by his son one Benard Kamau.



49. Priscillah also testified that the motor vehicle make Toyota Hilux had been sold for her upkeep and medical expenses and also affirmed that the house of Grace had also received a lot of income from the various properties in Limuru. She also averred that Grace had similarly sold some of the properties.
50. She accused Grace of not being candid and failed to testify unlike in her case and faulted PW1 in that he knew not much of the dealings between the two houses.
51. In the end, Priscillah urged this Court to distributed the estate in accordance with the manner she proposed in her proposal in settling the two houses. For certainty, Priscillah proposed that each house retains their current matrimonial homes in Ndeiya and Kitale respectively. Priscillah further proposed that she be allowed to get back her properties in Limuru and that she had no objection to the 1st house to have a share of the land in Nzoia in Kitale.
52. Priscillah clarified that the alleged Kitale Commercial Plot and the Makui land did not form part of the deceased's estate as they were unknown to her. She also remained unaware of any monies in any Bank account and urged this Court to disregard that testimony for want of proof.
53. To Priscillah, Plot No. Waitaluk/Kapkoi Block 12/Chamgei/160 and the Plot in Moi's Bridge were sold well before the deceased's death. That Plot No. Waitaluk/Kapkoi Block 12/Muna/4 and the Toyota Hilux registration number KAL 504C were sold after the deceased's death to cater for the deceased's hospital bills and Priscillah's medical expenses.
54. Based on the foregoing and in the interest of justice and fairness, Priscillah proposed that the following properties be given to the 1st house: -
 - i. Ndeiya/Nderu/T325.
 - ii. Nzoia/Moi's Bridge Block 1/1099 – 6 acres.
 - iii. Half of the proceeds from the sale of Barclays Bank and Safaricom shares.
 - iv. Umoja Inner core Plot in Nairobi.
55. She then proposed the following properties be given to the 2nd house: -
 - i. Limuru/Biribirion/T796;
 - ii. Limuru/Biribirion/24;
 - iii. Limuru/Biribirion/30;
 - iv. Nzoia/Moi's Bridge Block 1/1099 – 11 acres.
 - v. Half of the proceeds from the sale of Barclays Bank and Safaricom shares.
 - vi. Waitaluk/Kapkoi Block 12/Chamgei/01 – 12 acres.
56. At the close of the hearing, both parties filed elaborate written submissions. It was in the submissions where Priscillah brought in the issue of section 42(a) of the *Succession Act*.

Analysis:

57. Having carefully examined the record and on perusal of the written submissions and the decisions referred to therein, two main issues arise for determination in this matter.
58. The two issues are as follows: -



- a. Whether the deceased acquired any property prior to his death;
 - b. If the answer to issue (a) above is in the affirmative, then how such property should devolve.
59. Going forward, this Court will deal with the issues in seriatim.

a. Whether the deceased acquired any property prior to his death:

60. From the record, there is no doubt that the deceased owned several properties. There is, however, no consensus on the ownership of some of the properties.
61. The following are the undisputed properties of the deceased: -Ndeiya/Nderu/T796 measuring 100' x 100; Shares in Barclays Bank and Safaricom; Nzoia/Moi's Bridge Block 1/1099 measuring 17 acres; Waitaluk/Kapkoi Block 12/Changei/01 measuring 12 acres; Waitaluk/Kapkoi Block 12/Muna/04 measuring 10 acres; Waitaluk/Kapkoi Block 12/Changei/160 measuring 3 acres; Moi's Bridge commercial Plot; Limuru/Biribirion/T796 measuring 50' x 100'; Limuru/Biribirion/24 measuring (20' x 80'); Limuru/Biribirion/30 measuring 20' x 80'; 2½ acres of Plot No. 125 Liyavo Scheme No. 527; Motor vehicle registration number KAL 504C make Toyota Hilux;
62. There are, however, some disputed properties in this matter. They are as follows: -Kitale Commercial Plot; Umoja Inner Core Plot; Monies in Bank Accounts.
63. Having identified the disputed properties, this court is under a duty to resolve that legal impasse. To that end, the court will address the contentions in each of the said properties, and as under.

i. Kitale commercial Plot:

64. No evidence was adduced to confirm the existence and ownership of such a property in this matter.
65. This court, therefore, finds that the deceased never owned such a property.

ii. Umoja Inner Core Plot:

66. Grace contended that the property initially belonged to the deceased, but he legally assigned it to his son one James Kamau Muiruri in 1999 vide a Deed of Assignment.
67. This Court finds the evidence uncontested and hereby finds that the Umoja Inner core Plot was lawfully assigned by the deceased.
68. The property is, hence, not part of the estate of the deceased.

iii. Monies in Bank Accounts:

69. Apart from the assertion by PW1 of the existence of the deceased bank accounts, nothing tangible was adduced in proof thereof.
70. As such, the court finds that, unless otherwise proved, the deceased held no bank accounts.
71. Having ascertained that the deceased did not own the alleged Kitale commercial plot, the Umoja Inner core Plot and any Bank accounts, the focus now turns to the second issue.

b. How the estate should devolve:

72. There is no dispute that the deceased was polygamous. He had two wives. The first one was Grace and the second one was Priscillah.



73. Both wives were blessed with children. Grace had 8 children whereas Priscillah had 7 children.
74. The 1st wife (Grace) had the following 8 children: -
- i. James Kamau Muiruri (now Deceased);
 - ii. Waweru Muiruri Kamau;
 - iii. Gichuru Muiruri;
 - iv. Gachie Muiruri;
 - v. John Githaiga;
 - vi. Simon Njoroge Muiruri;
 - vii. Jane Wangui Kariuki;
 - viii. Nancy Nyambura Muiruri.
75. The 2nd wife (Priscillah) had the following 7 children: -
- i. Ann Wangui Muiruri;
 - ii. Jane Mwiwaki Muiruri;
 - iii. Benard Kamau Muiruri;
 - iv. Kenneth Munga Muiruri;
 - v. Monica Nyambura Muiruri;
 - vi. George Gichuru Muiruri;
 - vii. John Muna Muiruri.
76. The two houses filed their respective proposals on their preferred modes of distribution of the properties.
77. In urging the court to adopt its mode of distribution, Priscillah took the court through how the properties were acquired in Ndeiya, Limuru and Kitale. Since there was no meaningful opposition to such background evidence, this court shall be accordingly guided by such, going forward.
78. The position taken by Grace was that the properties be equally shared between all the beneficiaries.
79. On her part, Priscillah initially relied on her filed mode of distribution. It was her position, which she reiterated in Court, that the Moi's Bridge commercial Plot and Plot No. Waitaluk/Kapkoi Block 12/Chamgei/160 which measured 3 acres were sold before the death of the deceased.
80. She further testified that Plot No. Waitaluk/Kapkoi Block 12/Muna/04 was sold to clear the deceased's hospital bill and related funeral expenses and that the Motor vehicle registration number KAL 504C was sold to finance her medical expenses.
81. It was readily admitted that the deceased was involved in a road traffic accident and stayed in hospital for a long period. He was also diabetic which condition deteriorated with time and was constantly in and out of hospital.
82. At the time of his death, the deceased had accumulated a hospital bill of over Kshs. 2,000,000/=. There is uncontroverted evidence that Grace and her children never contributed towards the settlement of



- the said expenses and not even the burial expenses. They had also not taken care of the deceased during his illness and had not even checked on how Priscillah fared on since the burial of the deceased.
83. There is also evidence that the children from the first house were well educated and were leading good and successful lives unlike the children from the second house who were largely uneducated. PW1 confirmed that many of his siblings from the first house owned properties and lived independently.
84. On her part, Priscillah had to contend with taking care of the deceased during his sunset days despite her failing health. To that end, some properties were sold during the lifetime of the deceased and some were disposed of after the death of the deceased.
85. By considering the foregoing, this Court finds that the disposal of some of the properties (namely the Moi's Bridge commercial Plot, Plot No. Waitaluk/Kapkoi Block 12/Chamgei/160 and Plot No. Waitaluk/Kapkoi Block 12/Muna/04) to take care of the deceased during his lifetime and for clearing his medical and funeral expenses on his demise, to be justified. There was no way Priscillah would have single-handedly raised all the funds. Further, a funds drive organized by Priscillah managed to raise such a pitiable amount. Again, Grace and her children never even attended the funds drive.
86. There was also the issue of the disposal of the motor vehicle by Priscillah after the demise of the deceased to enable meet her medical needs. Priscillah testified before court while seated on a wheel chair. She stated that she had been confined to that state due to various ailments and for such a long time. She also stated that there were even times when she used to be admitted in hospital together with the deceased. She also stated that she had been evicted from her rental premises in Limuru by the first house and that the first house had been collecting rent from all the developments in Limuru which were acquired out of her effort in the charcoal business.
87. This court finds favour in treating the vehicle as having been properly disposed of given the state of Priscillah's age and health. The court will, however, deal with this issue further in this judgment.
88. Having deduced as much, this Court settles that the net estate to be devolved in this matter is comprised of the following properties: -Ndeiya/Nderu/T796 measuring 100' x 100;Shares in Barclays Bank and Safaricom;Nzoia/Moi's Bridge Block 1/1099 measuring 17 acres;Waitaluk/Kapkoi Block 12/Chamgei/01 measuring 12 acres;Limuru/Biribirion/T796 measuring 50' x 100';Limuru/Biribirion/24 measuring (20' x 80');Limuru/Biribirion/30 measuring 20' x 80';2½ acres of Plot No. 125 Liyavo Scheme No. 527;
89. As stated above, Priscillah initially proposed that the above properties be shared in a certain manner in her mode of distribution filed in court. However, in her written submissions she took another perspective on the distribution and vouched that the distribution be in line with section 42(a) of the Succession Act.
90. With that development, this court will now consider whether section 42(a) of the Succession Act is applicable in this matter.
91. Section 42 of the Succession Act states as follows: -
42. Previous benefits to be brought into account:
- Where-
- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in



determining the share of the net intestate estate finally accruing to the child, grandchild or house.

92. It was Priscillah's submission that the deceased settled the two houses separately and that the distribution ought to be on the basis of such settlement. To Priscillah, the first house was settled in Ndeiya while the second house in Kitale.
93. It is apparent that Priscillah did not intend to rely on section 42(a) of the Succession Act on how the estate ought to devolve. This Court takes the said view because the mode of distribution dated March 20, 2022 by Priscillah was not based on the said section 42(a) of the Succession Act. The said proposal instead shared the properties in Ndeiya, Limuru and Kitale among the two houses.
94. The matter was heard based on the parties' proposals on record. PW1 and DW1 testified and were examined on the basis of the proposals then filed in Court.
95. The issue of section 42(a) of the Succession Act only arose in the written submissions filed by Priscillah.
96. Whereas the said legal provision can be referred to by parties at any time, the nature of section 42 of the Succession Act calls for evidence to be adduced as a basis for relying on the said provision. In this case, if Priscillah wanted to rely on that provision, she ought to have stated as much in her proposed mode of distribution so as to enable the other party consider such a position. Priscillah did not do so.
97. What Priscillah did at the submissions stage amounts to introduction of new issues which were not part of those which were raised by the parties and evidence tendered at trial.
98. Courts, as well as Legal Scholars, have severally upheld the position that parties are firmly bound by their pleadings. Just to mention a few; the Court of Appeal in Independent Electoral and Boundaries Commission & Anor. v Stephen Mutinda Mule & 3 others (2014) eKLR cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation...

99. The Supreme Court of Kenya in its ruling on *inter alia* scrutiny of votes in an election dispute in Raila Amolo Odinga & Another v IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

(52) Further, the Court went on and observed that: -

.... In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied



by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....

100. This discussion was taken up further in Kitale High Court Election Petition No. 1 of 2017 *Robinson Simiyu Mwangi & Another v IEBC & 2 Others* (2017) eKLR in Ruling No. 4 on scrutiny of votes. This is what the Court partly stated: -

77. But what if the issues although not pleaded came up during the cross-examination of the witnesses and are therefore part of the record? The answer is found in the above decisions of the Supreme Court and the Court of Appeal. Such evidence goes to no issue. That seems to be the position taken by the Scholar Hon. Justice (Prof.) Otieno-Odek in his article aforesaid where he stated that ‘A party cannot be allowed to introduce, through cross-examination contests which were previously not specifically raised in the pleadings.....

101. Therefore, the prevailing position in an adversarial system of dispute resolution is that the issues which a Court is to determine in a matter must flow from the pleadings. Without such a basis, no new matter can be dealt with even if it arose during the hearing.

102. Turning back to the case at hand, the new mode of distribution based on Section 42(a) of the *Succession Act* made by Priscillah in her submissions cannot, therefore, be considered in determining how the estate ought to devolve for the reason that such new mode was not the initial proposal in her pleadings. It is also worth-noting that Priscillah did not amend her initial proposed mode of distribution.

103. As this Court has now found that the estate cannot devolve on the basis of Section 42(a) of the *Succession Act*, then the applicable and guiding legal provision is Section 40 of the *Succession Act*.

104. Section 40 of the *Succession Act* provides as follows: -

40. Where 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.

105. By applying the above provision in this case, it comes to the fore that there are 8 children from the 1st house and 7 children from the 2nd house. Even though it was stated that James Kamau Muiruri died, his estate survives and that is why the property in Umoja Inner core in Nairobi still remains in his name. There are, therefore, 15 children of the deceased.

106. Both widows survived the deceased. Pursuant to Section 40 of the *Succession Act* the widows ought to be added as independent units to the estate. That brings the total number of beneficiaries to 17.

107. Before this Court applies the provisions of Section 40 of the *Succession Act*, it remains alive to the fact that the Court is under a duty to defend, uphold and respect the *Constitution*. That is the calling in Article 3 thereof. In doing so, the Court is bound in Article 10 of the *Constitution* by the national values and principles of governance whenever it applies or interprets the *Constitution*, enacts, applies or interprets any law or makes or implements public policy decisions.



108. Among the national values and principles of governance in Article 10 of the Constitution include human dignity, equity, social justice, inclusiveness, equality, human rights and non-discrimination. All these are now raised to the cadre of constitutional principles.
109. Chapter 4 of the Constitution provides for the Bill of Rights. Articles 53 and 57 of the Constitution provides for Children and older members of society respectively.
110. Parents and/or those having parental responsibilities over children are under an unwavering constitutional duty to ensure that the child's best interests are of paramount importance in every matter concerning the child. They are to ensure that children have names, nationalities, are educated, well fed, sheltered, access health care, are protected from abuse, neglect, harmful cultural practices, from all forms of violence, inhuman treatment, punishment and hazardous or exploitative labour.
111. Children are also not to be detained except within the confines of the Constitution and the law.
112. With such carefully-guarded environment, children are, therefore, enabled to pursue their life goals.
113. As the children grow, their parents or those with their parental responsibilities also get older and may eventually attain the age of sixty years. With such an age, a person is recognized by Article 260 of the Constitution as an older member of society.
114. The rights of the older members of society are provided for in Article 57 of the Constitution as under: -
57. Older members of society:
- The State shall take measures to ensure the rights of older persons—
- (a) to fully participate in the affairs of society;
 - (b) to pursue their personal development;
 - (c) to live in dignity and respect and be free from abuse; and
 - (d) to receive reasonable care and assistance from their family and the State.
115. Of paramount importance is the duty bestowed upon the families of older members of society to ensure that such persons receive reasonable care and assistance from their families.
116. It is, therefore, the finding of this Court that the Constitution bestows upon each member of a family of an older member of society the duty to ensure that such older persons receive reasonable care and assistance from their families. When members of a family of a person who is at least 60 years old and who are capable of providing care and assistance to such a person fail, refuse, ignore or neglect to discharge that duty, without any reasonable justification, then such persons stand in open violation of the Constitution.
117. This Court must, however, clarify that the above duty on the family members is further to other duties the Constitution places on the State in respect to the older members of society. As is the position in Kenya, the State continues to endeavour in putting in place some initiatives towards fulfilment of its duty on the older members. Such include the stipends payable to those over 70 years of age.
118. In applying the foregoing to the case at hand, there is evidence that the children of Grace are well educated and lead good lives. They now own their properties. It cannot be gainsaid that it was the deceased who ensured that he stood to his constitutional duty under Article 53 and ensured that the children are whom they are today given that the evidence of Priscillah to that end was not controverted.



- There is no evidence that the deceased abandoned the children from the first house or in any way failed to uphold Article 53 of the *Constitution*.
119. There is also uncontroverted evidence that Grace and her children neglected the deceased especially during his sunset times when the deceased needed them most. That was the time when the deceased was battling ailments and injuries from a traffic accident and used to be in and out of hospital. Of much pain and concern to this Court is that even when the deceased died and left behind huge hospital bills, still the children of Grace bothered not to attend to them. That happened even on the footing that the first house was in possession of all the properties outside Kitale some of which are fully developed and generated income. It is further on record that Priscillah was even evicted from one of the properties by one of the children from the first house.
 120. It was all left upon the ailing Priscillah to see how to pay the bills and what to do thereafter. That explains why Priscillah had to sell some of the properties to offset such bills and take care of some funeral expenses.
 121. It is also on record that the children of Priscillah did not get good education. Resultantly, they are all dependent on Priscillah and have clung unto some of the properties left behind by the deceased. Even Priscillah herself relies wholly on the properties in Kitale.
 122. Priscillah testified before Court. She was on a wheel chair and confirmed that she had been in that state for a long time due to diabetes and old age. According to a copy of her identity card presented to Court during the petitioning of the grant, Priscillah was born in 1943. She is now 80 years old. As the deceased died on 20th August, 2015 at the age of 77 years, then Priscillah was 67 years old by then. She was already an older member of society since the instant *Constitution* was long promulgated in 2010.
 123. The members of the family of the deceased, therefore, remained under a duty to ensure that the deceased, Priscillah and Grace, being of at least 60 years of age as at 2010, were well taken care of in their old age. However, it seems that it is only Grace who enjoys such a status since the deceased and Priscillah were abandoned. This position is further embellished by the fact that none of the children of Grace have ever interacted with or sought to find out how Priscillah is fairing on since the burial of the deceased.
 124. Given the above state of affairs, this Court finds that the members of the family of the deceased, especially the children from the first house, have failed to demonstrate why they have not been reasonably taking care and assisting Priscillah who is an older member of their family. To that end, this Court finds and hold that Priscillah was justified in disposing the motor vehicle to take care of her medical needs.
 125. This Court would have gone further to address a pertinent constitutional issue on whether the children and spouses of a deceased ought to be regarded as equals in the devolution of estates. However, the Court hereby restrains itself since the issue was not formally raised in this matter. It is the Court's hope that the constitutionality of Section 40 of the Succession Act in that perspective will be tested at one time.
 126. On the basis of the foregoing discussion, with the restraint at hand and in line with Section 7 of the Sixth Schedule to the *Constitution* which states that 'all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution', this Court, therefore, further finds and hold that Section 40 of the Succession Act should apply on a case-by-case basis and subject to considerations including whether the members of the family acted with Articles 53 and 57 of the



Constitution, whether there are members of the family who are still minors, previous provisions by the deceased among other considerations.

127. With the above guidance, the focus now turns to the rest of the properties. Despite the tribulations which Priscillah has been going through, she has nevertheless offered part of the properties which she acquired with the deceased to the first house. This Court finds Priscillah a good-hearted and fair-minded person.
128. By keeping hope alive and with a view to allow the family of the deceased to remain as part of the natural and fundamental unit of our society and the necessary basis of social order and coupled with the provisions of Sections 40 (as discussed) and 47 of the Succession Act, this Court shall endeavour a fair distribution of the estate.
129. In coming up with the distribution, the Court will consider the fact that each house ought to retain on the matrimonial property it has all along been occupying. Further, since Priscillah had put up the rental premises on Limuru/Biribirion/24 and had been collecting rent therefrom until when he was evicted after the demise of the deceased, such property ought to revert to her. Since the other properties in Limuru have been in occupation by the first house and also generate income, then it will only be fair that the first house so continues in occupation.
130. As Priscillah has taken part of the property in Limuru known as Limuru/Biribirion/24, then Grace should also have a portion of Nzoia/Moi's Bridge Block 1/1099. Given that Benard Kamau Muiruri has been in occupation of the 2½ acres of Plot No. 125 Liyavo Scheme No. 527, there is no need of disturbing that status quo.
131. The shares in Barclays Bank and Safaricom ought to be equally shared between the widows.

Conclusions:

132. This matter has elicited very cardinal issues in succession matters and has joined the band-wagon in riding towards transforming the Law of Succession Act to be in line with the Constitution.
133. The cause has come up with the following findings and conclusions: -
 - a. The Constitution bestows a duty upon each member of a family of an older member of society to ensure that such older persons receive reasonable care and assistance from their families except where it is reasonably proved otherwise. When members of a family of a person who is at least 60 years old and who are capable of providing care and assistance to such a person fail, refuse, ignore or neglect to discharge that duty, without any reasonable justification, then such persons stand in open violation of the Constitution.
 - b. Section 40 of the Succession Act should apply on a case-by-case basis and subject to considerations including whether the members of the family acted with Articles 53 and 57 of the Constitution, whether there are members of the family who are still minors, previous provisions by the deceased among other considerations.

Disposition:

134. Drawing from the above, the estate of the deceased shall devolve as follows: -
 - a. To the 1st House of Grace Wambui Muiruri:
 - i. Ndeiya/Nderu/T325;
 - ii. Limuru/Biribirion/T796;



- iii. Limuru/Biribirion/30.
 - iv. 6 acres of Nzoia/Moi's Bridge Block 1/1099;
 - v. 50% of the shares in Barclays Bank and Safaricom.
- b. To the 2nd House of Priscillah Wangechi Muiruri:
- i. Waitaluk/Kapkoi Block 12/Chamgei/01;
 - ii. 11 acres of Nzoia/Moi's Bridge Block 1/1099;
 - iii. 2½ acres of Plot No. 125 Liyavo Scheme No. 527;
 - iv. Limuru/Biribirion/24;
 - v. 50% of the shares in Barclays Bank and Safaricom.
- c. The members of each house shall agree on how their respective properties shall devolve among themselves. In the event of failure to agree, the parties shall inform this Court and the Court shall refer the matter to mediation.
- d. For clarity, the shares in Barclays Bank and Safaricom shall equally and only devolve to the widows of the deceased.
- e. Parties shall bear their respective costs.
- f. A Certificate of Confirmation of the Grant shall be forthwith issued. Since the Certificate of Partial Confirmation of the Grant dated 22nd December, 2022 indicated the size of the property known as Plot No. 125 Liyavo Scheme No. 527 as 10 acres instead of 5 acres, then the said Grant shall stand recalled and cancelled.
- g. The correct acreage to Ann Wambui Muna shall be 2½ acres of Plot No. 125 Liyavo Scheme No. 527 and such shall appear in the certificate in (f) above.
- h. The Administrators shall endeavour to, without delay, process the title document for Ann Wambui Muna for her share of 2½ acres and any resultant costs thereof shall be equally borne by the said Ann Wambui Muna and the house of Priscillah Wangechi Muiruri.
- i. Parties remain at liberty to apply.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF JULY, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Kiarie, Learned Counsel for Priscillah Wangechi Muiruri, the 1st Administratrix.

Mr. Gemenet, Learned Counsel for Grace Wambui Muiruri, the 2nd Administratrix.

Mr. Byaruhanga, Learned Counsel for Ann Wambui Muna, the Objector.

Regina/Chemutai – Court Assistants.

