



REPUBLIC OF KENYA



**In re Estate of Mwai Mori (Deceased) (Civil Appeal 27 of 2019)
[2023] KEHC 21244 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 27 OF 2019
RM MWONGO, J
JULY 25, 2023**

BETWEEN

JOSEPH MWANGI MWAI APPELLANT

AND

ESTHER WAMUYU WAMWEA RESPONDENT

(Being an appeal against the Judgment delivered on 24th April, 2019 by Hon. SMS Soita, Chief Magistrate in Kerugoya Succession Cause No. 186 of 2005)

JUDGMENT

Brief Facts

1. Mwai Mori, the deceased, died on the 28.7.1979 and left behind property Ref. L.R Mwerua/ Kagio- ini/149 measuring approximately 5.2 Acres. The succession was dealt with under Succession Cause No. 186/2005 in the lower court, wherein the appellant was the administrator.
2. It was not in dispute in the lower court that the deceased was polygamous, and husband of Wanjingi Mwai and Wamwirua Mwai. The 1st wife Wanjingi Mwai had two sons, Peter Gichabaru Mwai and Joseph Wamwea Mwai. The latter is the husband to the Respondent and also the Protestor at the trial Court. The 2nd wife Wamwirua Mwai had 2 sons namely Joseph Mwangi Mwai and Castrol Muchoki Mwai who died and left no family.
3. The Appellant herein filed Summons for confirmation dated 6/7/2017 seeking to distribute the land as follows: to Esther Wamuyu Wamwea 1.3 acres; to Joseph Mwangi Mwai 1.3 acres; and to himself 2.0 acres because he said he was the only surviving child in their house.
4. Following a protest by the Respondent, the trial court determined that the three beneficiaries were entitled to share L.R Mwerua/Kagio- ini/149 equally. On April 24, 2019. the court distributed the land



equally as follows: Peter Gichabaru Mwai 1.73 acres; to Joseph Mwangi Mwai 1.73 acres and to Esther Wamuyu Wamwea 1.73 acres.

5. Aggrieved, the appellant appealed the said judgment on the following grounds:
 - i. That the learned magistrate erred in law and in facts after failing to consider that the deceased had two wives.
 - ii. That the learned magistrate erred in law and fact after failing to consider that the house of the respondent had not disputed the appellant getting half of the estate as per the application of confirmation of grant.
 - iii. That the magistrate erred in law and facts after failing to put into account that the respondent had a case with her brother-in law Peter Gichabaru Mwai but not the appellant.
 - iv. That the learned magistrate failed to account that the appellant was to get 2.6 acres and the Respondent and her brother-in-law to share the remaining 2.6 acres.
 - v. That the learned magistrate erred in law and fact after failing to account that parties had no dispute in distributing the estate equally amongst the houses of the deceased.

Parties'cases

6. The appellant's case is that the lower court's judgment failed to consider the evidence tendered by the appellant and erred in law and facts after failing to consider that the deceased had 2 wives. The appellant states that from the record the trial magistrate failed to consider that the house of the Respondent did not object and/or dispute to the appellant getting ½ share of the deceased estate.
7. Further, that the appellant was to get 2.6 acres and the respondent and her brother-in-law were to share the remaining 2.6 acres. That there was no dispute in the manner in which the parties agreed to distribute the deceased estate, but the trial magistrate continued and erred in suggesting his own mode of distribution.
8. In light of all this, the appellant prays that the appeal be allowed and Land Parcel No Mwerua/Kagioini/149 be distributed equally amongst the two (2) wives of the deceased.
9. On her part the respondent submits as follows. That from the analysis of the grounds of the Appeal, the main issue that arises is whether the trial Court erred in law and fact by distributing the estate of the late Mwai Mori equally among the beneficiaries.
10. The Respondent argues that it is not in doubt that between the 2 houses the only surviving children are Joseph Mwangi Mwai and Peter Gichabaru Mwai. However, due to the fact that the late Joseph Wamwea Mwai was married to the Respondent, she equally has the right to inherit from the estate.
11. The respondent submits that since the late Mwai Mori was polygamous and died intestate, the law governing the distribution of his estate is Section 40 of the Succession Act which provides that his personal and household effects and the residue of the net intestate estate should, 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 of the number of children; and that the distribution of the personal and household effects and the residue of the net intestate estate within each house should then be in accordance with the rules set out in sections 35 to 38.



12. In this instance there being no surviving spouse, the applicable section under the circumstances is to be found in Section 38 which provides that the estate of the deceased be divided equally between the surviving children of the deceased the section reads as follows;
13. The respondent relied on the case of *In re Estate of Peter Gitonga Kioma (Deceased)* [2020] eKLR where Mshila, J. distributed the estate in equal shares amongst the ten (10) children of the deceased.
14. The respondent finally submitted that the learned magistrate acted within the law by distributing the estate of the deceased equally among the surviving children, and that the appeal thus lacks merit and ought to be dismissed with costs to the Respondent.
15. This court has carefully considered the parties' representations and the material laid before it. It is trite that this court's role in a first appeal is to evaluate all the evidence adduced in the lower court and to come to its own conclusions.
16. The only issue that arises is whether the deceased estate should be distributed equally between the appellant and the respondent.

Analysis and determination

17. As earlier noted, it is not in dispute that the deceased, Mwai Mori, who died on the July 28, 1979 left behind as his only property, L.R Mwerua/Kagio-ini/149 measuring approximately 5.2 Acres. It is also not disputed that the deceased was polygamous, and the husband of 2 wives namely Wanjingi Mwai and Wamwirua Mwai.
18. The 1st wife Wanjingi Mwai had two sons, Peter Gichabaru Mwai and Joseph Wamwea Mwai. The latter is the husband to the Respondent and also the Protestor at the trial Court. The trial court decided that the estate of the deceased should be divided equally among the surviving beneficiaries.
19. The appellant's claim is that trial magistrate failed to consider that the house of the Respondent did not object and/or dispute to the appellant getting ½ share of the deceased estate. The appellant was to get 2.6 acres and the respondent and her brother-in-law share the remaining 2.6 acres. There was no dispute in the manner in which the parties agreed to distribute the deceased estate, but the trial magistrate continued and erred in suggesting his own mode of distribution. The appellant prays for Land Parcel No. Mwerua/Kagioini/149 to be distributed equally amongst the two (2) wives of the deceased.
20. There can be no doubt that since the late Mwai Mori was polygamous and died intestate, the law governing the distribution of the estate is section 40 of the *Succession Act* which provides as follows:
 - “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 of the number of children.
 2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shod then be in accordance with the rules set out in sections 35 to 38.”
21. In this case there being no surviving spouse, the applicable section in these circumstances is found to be Section 38 which provides that the estate of the deceased be divided equally among the surviving



children of the deceased. That section provides as follows where the intestate has left a surviving child or children but no spouse:

“ 38. 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.”

22. *In re Estate of Peter Gitonga Kioma (Deceased)* [2020] eKLR Mshila J held:

“It is also an undisputed fact that the deceased was survived by ten (10) children; therefore, the property known as Tetu/Muthuaini/350 shall be distributed equally amongst the ten (10) children of the deceased in accordance with Section 38 of the *Law of Succession Act*.”

23. As seen above, section 40 of the *Law of Succession Act* enjoins the inclusion of a surviving spouse as an additional unit to each household of a polygamous deceased.

24. In *Stephen Gitonga M’Murithi v Faith Ngira Murithi* [2015] eKLR it was held as follows:

“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. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each household of a polygamous deceased.”

25. The appellant in his proposed distribution of 1.3: 1.3: 2.6 acres, would be getting the lion’s share. That position taken by the appellant that he has a right to a larger share of the property is simply not supported by the law or any authority. That position must, and I hereby find has, no place and must fail.

26. In light of the foregoing, I see nothing in the grounds of appeal nor in the decision of the trial court that persuade me to interfere with the decision of the learned trial magistrate.

27. Accordingly, the appeal fails and is dismissed in its entirety.

28. This being a family matter, there is no order as to costs.

Dated at Kerugoya this 25th day of July 2023

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

Joseph Mwangi Mwai the appellant in person

No representation for the Respondent

Murage, Court Assistant

