



REPUBLIC OF KENYA



**KENYA LAW**  
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**M’ujuri v M’ujuri (Civil Appeal E141 of 2021)  
[2023] KEHC 21952 (KLR) (30 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21952 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E141 OF 2021  
EM MURIITHI, J  
AUGUST 30, 2023**

**BETWEEN**

**CHARLES MURURA M’MUJURI ..... APPELLANT**

**AND**

**ROSE KAMURI M’MUJURI ..... RESPONDENT**

*(Being an appeal against the whole of the judgment of /ruling delivered on 16/09/2021 by Honourable Tito Gesora- Chief Magistrate in Maua CM Succession Cause NO. 116 of 2017, in the matter of the Estate of M’Mujuri M’Liria (Deceased) Rose Kamuri Mujuri versus Charles Mutura M’Mujur)*

**JUDGMENT**

***Introduction***

1. The Petitioner who is a widow of the deceased filed a petition dated September 6, 2017 for Letters of Administration to the estate naming herself and her four children Samuel Kithure M’Mujuri, Benson Kinyua Mujuri, Silas Kirimi M’Mujuri and Samson Kithinji M’Mujuri as the survivors. The record shows that the trial court made the Grant of Letter of Administration dated January 9, 2018 and on application dated July 1, 2018 confirmed the Grant in terms of the Consent dated 3 July 1, 2018 signed by all the beneficiaries. Before the Confirmed Grant could be issued, the Appellant joined by his sister, both who claimed as children of the deceased by another wife made an application dated August 22, 2018 seeking primarily an Order for revocation of Grant together with ancillary orders, as follows:

- “ 1. That this application be certified urgent and the same be heard ex-parte in the first instance.



2. That this Honourable court be please to stay the signing and/or the release of the Certificate of Confirmation of Grant herein to the petitioner and/or to any other person pending the hearing and determination of this application.
3. That in the alternative and without prejudice to prayer 2 hereinabove, this Honourable Court be pleased to issue an order of inhibition restraining any dealings on Land Parcel No Njia/kiegoi/1213 and Land parcel No Kiegoji Kinyanka/477 and/or any sub-divisions thereon until this Application is heard and determined.
4. That this Honourable Court be pleased to revoke/annul the grant of Letters of Administration issued to the Petitioner on 09th January, 2018.
5. That this Honourable Court be pleased to issue a fresh grant of Letters of Administration to the Interested Party/Applicant herein.
6. That the costs of this application be provided for.”

2. The grounds of the application were set out in the application as follows:

“Grounds:-

- i. That the grant issued herein on January 9, 2018 was obtained secretly fraudulently and by any means of concealments of material facts.
- ii. That the Petitioner did the foregoing actions in collusion with fraudsters in order to fraudulently take away the deceased's Land.
- iii. That the interested party is one of the children of the deceased.
- iv. That the petitioner left out the interested party and some of the other children of the deceased
- v. That unless this honorable court intervenes urgently, the applicant might be disinherited.”

3. The facts relied on by the Applicant (appellant herein) were set out in his supporting Affidavit of 28/8/20-18 as follows:

- “2. That the deceased herein M'mujuri M'uria was my father, while the Petitioner is my step-mother. We also do have a sister called Monicah Mwathimba.
3. That the Petitioner, who's my deceased father's 2nd wife, filed this suit secretly and fraudulently and used a fraudulently drawn Chiefs Letter, from a different chief, who omitted the names of the children of my deceased mother's house. (annexed and marked "C.M.M 1" is a copy of the said Chiefs Letter dated August 24, 2017 indicating the children of the 2nd house only).
4. That the Petitioner neither informed me nor sought my consent before filing this cause. (Attached and marked" C.M.M. 2" is a correct Chiefs letter dated August 22, 2018 indicating the children from the deceased person's first house).



5. That the Petitioner filed this cause fraudulently and obtained a Temporary Grant which has since been confirmed.( annexed and marked " C.M.M. 3" is a copy of the said Grant).
  6. That during his lifetime, my father gave land to all my .maternal brothers except my sister (Monicah Mwathimba) and I.
  7. That the Petitioner has totally disinherited me and my above-stated sister and instead distributed the whole estate to her children only.
  8. That I discovered the said fraud on l'1h August 2018 after a friend spotted the petitioner and her children in court and he suspected that something fishy was happening thereby causing him to call me. '
  9. That Respondent and her children are threatening to dispose of and/or charge the said land in order to render it irrecoverable.
  10. That it is in the interest of justice and fairness that this application be allowed.”
4. The Respondent field a Replying Affidavit sworn on 27<sup>th</sup>/2/2019 raising a principal defence that that the applicant’s family from the 1<sup>st</sup> wife of the deceased had been given their land during the life of the deceased and that the applicant had sold his portion, as follows:
- “2. That I have read the Applicants application dated August 22, 2018.
  3. That I was married to the Deceased as second wife in 1970.
  4. That the Deceased had another wife by the name Salome Karunki who also died in 1999.
  5. That my deceased husband subdivided his parcels creating number Njia Kiegoi/1213 while he gave myself leaving the balance to the first wife. I had the following children
    - a. Samuel Kithure M'mujuri
    - b. Benson Kinyua M'mujuri
    - c. Silas Kirimi M'mujuri
    - d. Samson Kithinji M'mujuri.
  6. That the first wife had the following children
    - a. George Murungi Mujuri
    - b. James Meme Mujuri
    - c. Francis Muthoi Mujuri
    - d. Monicah Mwathimba
    - e. Charles Mutura Mujuri
    - f. Joseph Maore Mujuri



7. That the Applicant was given his inheritance just like his other siblings but he sold his share.
  8. That it is only the Applicant who is complaining while the other siblings are not.”
5. The appellant filed a further affidavit of 7/3/2019 responding to the replying affidavit and stating as follows:
- “2) That I have read and understood the Replying affidavit of Rose Kamuri M’ujuri sworn on 27<sup>TH</sup>February 2019 and the same has been explained to me by my advocates on record and do hereby swear this Affidavit in response to thereto.
  - 3) That the Deceased my late father partially distributed his estate prior to his death in exclusion of my sister, Monicah Mwathimba and myself.
  - 4) That the Respondent/Petitioner herein filed this succession in secrecy failing to involve us and/ or our other siblings (children of the 1st House) with the specific aim of disinheriting us of our Father’s estate.
  - 5) That I urge this Honourable Court to allow the Application dated August 22, 2018 as prayed and be pleased to issue further orders for expedient hearing and determination of this cause.
  - 6) That unless the order sought are granted the deceased estate comprising of land parcel Njia/kiogoi/1213 and Njia/kiny Anka/ 477 stands to be sold/ transferred to 3rd persons and the Applicant stands to suffer irreparable loss.”
6. In support of the application, the 2<sup>nd</sup> applicant Monica Mwathimba filed an affidavit sworn on May 27, 2021 in support of the Application for revocation dated August 22, 2018 as follows:
- “2) That I am daughter to the deceased person herein, M’ujuri M’liria.
  - 3) That my father has 2 wives and 10 children as follows:-
    - i). Salome Kanunku. (1st wife - Deceased).
      - a) George Murungi.
      - b) James Meme.
      - c) Francis Muthomi.
      - d) Monicah Mwathimba- Myself.
      - e) Charles Mutura.
      - f) Joseph Maore.
    - ii). Rose Kimuri - (2nd wife), petitioner.
      - a) Samuel Kithure.
      - b) Si/as Kirimi.
      - c) Benson Kinyua.



d) Samson Kithinji.

- 4) That during his lifetime, my father gave land to my maternal siblings Except Charles Mutura, myself and the children of the 2<sup>nd</sup> house.
- 5) That he left behind land parcels no's Kiegoukiny Anka/447 and Njialklegoili213.
- 6) That the Petitioner filed this Succession Cause using a fraudulent chiefs letter that omitted the names of the children of the 1<sup>st</sup> house.
- 7) That the petitioner neither sought my consent nor informed me before filing this Succession Cause.
- 8) That I pray that the Estate of the deceased person be distributed among the children of the 2<sup>nd</sup> house, plus Charles Mutura and myself since my other maternal siblings benefited during my father lifetime and they are not seeking anything else.
- 9) That therefore, I pray that distribution that had been made earlier herein be revoked/cancelled/set aside.”

7. Subsequently, Counsel for the appellant on 18/3/2021 moved and the Court so ordered as follows:-

“We propose that the Petitioner/Respondent remains the administrator but we now delve into the distribution. The Land Registrar can be called to say how the deceased’s land was distributed. i.e. to say how Kiego/Njia/35 and Keogi/Kinyanka/477 were distributed upto the current number.”

8. In his report dated March 24, 2021 and filed on 25/3/2021, the Land Registrar Meru North gave an explanation as to the registration of the deceased’s land as follows:

“March 24, 2021

The Chief Magistrate

Maua Law Court

Po. Box 68

Maua – Att. Hon. T. Gesora

Re: Njia/kegoi/35 & Kiegoi/kinyanka/477

Charles Mutura M’mujuri..... Interested Party/applicant

Versus

Rose Kamuri M’mujuru ..... Petitioner/respondent

*In The Matter Of The Estate Of M’mujuri M’liria Deceased* Succession Cause No 116 Of 2017

Reference is made to your order No 116 of 2017 dated March 18, 2021. The explanation of the above Parcels of land are analyzed hereunder: -

1. Njia/kegoi/35



According to our official records the above land was subdivided as follows:

On the 22<sup>nd</sup> day of July 1993 the title was closed on subdivision which resulted to parcels No 706, 707, 708.

Parcel No 706 was closed on subdivision on the 5<sup>th</sup> day of December, 2000 which resulted to Parcels No 1211, 1212 and 1213.

Parcel No 1211 was registered under Charles Kirimi M’Mweteria on the 28<sup>th</sup> day of January, 2002.

Parcel No 1212 was registered under Charles Kirimi M’Mwereria on 22<sup>nd</sup> day of February, 2006 vide Civil Case No 140/4.

Parcel No 1213 was registered under M’Mujuri M’Liria on December 5, 2000. There exists a caution placed on January 17, 2003 by Samuel Kithure M’Mujuri claiming beneficiary interest.

Parcel No 707 was transferred to John Mbiti M’Ithula on February 25, 1994.

Parcel no 708 was closed on subdivision on November 16, 2000 and resulted to Parcel 1180, 1181, 1182 and 1183.

Parcel No 1181 was transferred to Francis Muthogi M’Munjuri and further closed on subdivision resulting to Nos. 2133 and 2134.

Parcel No 2133 was transferred to Kobia Mwithali John on September 24, 2019.

Parcel No 2134 was registered under Francis Muthogi on August 31, 2017.

Parcel No 1182 was closed on subdivision on November 22, 2006 which resulted to 1491 and 1492.

Parcel No 1491 was transferred from James Meme M’Mujuri to Joel Kimathi Kubai and finally to Timothy Thurania Kajuki on the 10<sup>th</sup> of June, 2010.

Parcel No 1492 was registered under James Meme M’Mujuri on November 22, 2006.

Parcel no 1183 was transferred to George Murungi M’Mujuri on November 16, 2006.

## 2. Kiegoi/kinyaka/477

Parcel No 477 was registered under M’Mujuri M’Liria on August 9, 1983. There exists a caution by Silas Kirimi M’Mujuri claiming beneficiary interest.

All the encumbrances of the green card mentioned are Nil.

We have availed certified copies of the green cards.

M M. Murimi

Land Registrar

Meru North”

9. The application never went to full hearing. After some unsuccessful attempt at settlement between the parties Counsel for the respondent on July 1, 2018 suggested and the court agreed and directed that “parties to file affidavits as mode of distribution of all the property left by the deceased within 7 days.”



10. The respective affidavits on mode of distribution filed by the applicants and the protestors were as follows:

1. Petitioner/Administrator's mode of distribution by Affidavit of 5/7/2021  
Petitioner's Affidavit On Proposed Mode Of Distribution.

I, Rose Kamuri M'mujuri of P.O Box 57 Maua of Meru County in the Republic of Kenya do hereby make oath and state as follows:-

1. That the Petitioner / Respondent in this Proceedings.
2. That the Objector is my step son.
3. That my late husband was married to two wives namely;
  - i. Salome Kanuku
  - ii. Rose Kaimuri M'mujuri
4. That from the 1st house of Salome Kanuku there were the following children;
  - I. George Murungi
  - II. James Meme Mujuri
  - III. Francis Muthoi Mujuri
  - IV. Monicah Mwathimba
  - V. Charles Mutura Mujuri
  - VI. Joseph Maore Mujuri
5. That from my house we have the following children;
  - I. Samuel Kithure M'mujuri
  - II. Benson Kinyua M'mujuri
  - III. Silas Kirimi M'mujuri .
  - IV. Samson Kithinji M'mujuri
6. That before his death my late husband partially distributed his estate among the children of the first house.
7. That from the available records all the beneficiaries of the first house seems to have gotten a share of the estate, except the Objectors.
8. That the Objectors are missing from the available records.
9. That there are two parcels of land namely; Njia/kiegoi/1213 and Kiegoi/kinyankai447 which are the subject of this succession cause.



10. That parcel number Njia/kiegoi/1213 measuring 3.50 Hectares while parcel number Kiegoi/kinyankai447 measuring 1.14 Hectares.
11. That my children, Samuel Kithure M'mujuri, Benson Kinyua M'mujuri and Samson Kithinji M'Mujuri are in occupation of parcel number Njia/Kiegoi/1213.
12. That we have built and developed on parcel number Njia/Kiegoi/1213.
13. That on the contrary, parcel number Kiegoi/Kinyanka/447 which measures 1. 14 Hectares was given to my son Silas Kirimi M'mujuri who is a Deceased, by my late husband but has two children namely; Lennah Kageni Kirimi and Bridget Kirimi who inherited the above land.
14. That in view of the forgoing, I propose that the two parcels of land be shared as follows:
  - A. Njia/kiegoi/1213 measuring 3.30 hectares
    1. Rose Kaimuri M'mujuri 0.50 Acres
    - II. Samuel Kithure M'mujuri 1.00 Acres
    111. Benson Kinyua M'mujuri 1.00 Acres
    - IV. Samsu Kithinji M'mujuri 1.00 Acres
  - B. Kiegoi/nkinyanka/447 Measuring 1.14 Hectares
    1. Leah Kageni Kirimi 0.20 Acres.  
(Rose Kaimuri M'mujuri)
    - ii. Bridget Kirimi 0.20 Acres  
(Rose Kaimuri M'mujuri)
    - iii. Rose Kaimuri M'mujuri)  
0.44 Acres
    - IV. Monica Mwathimba 0.10 Acres
    - v. Charles Mutura 0.20 Acres
15. That I offer the above proposition full aware that the 1st house got their land and it is in explicable to me why the Objectors are now claiming a share of what we all along thought belonged to as beneficiaries to the 2<sup>nd</sup> house.
16. That I make this affidavit in support of our application for confirmation of the grant.”



2. The Applicant's (Appellant) mode of distribution by Affidavit of 2/7/2021

"We Charles Mutura M'Munjuri and Monica Mwathimba M'Munjuri of PO Box 57-60600 Maua do hereby make oath and state as follows:

1. That we are adult male and female persons of sound mind and children of M'Munjuri M'Liria.
2. That the deceased person herein had 2 wives, Salome Kanunku M'Munjuri (deceased) and Rose Kamuri M'Munjuri.
3. That Salome Kanunku had the following children:
  - a. George Murungi.
  - b. James Meme.
  - c. Francis Mothoi.
  - d. Monica Mwathimba.
  - e. Charles Mutura.
  - f. Joseph Maore. (Deceased).
4. That Rose Kamuri had the following children: -
  - a. Samwel Kithure M'Munjuri.
  - b. Benson Kinyua Mujuri,
  - c. Silas Kirimi M'Munjuri (Deceased).
  - d. Samson Kithinji M'Munjuri.
5. That the deceased left the following assets,
  - a. Land Parcel No NjialKieoil1213 measuring 3.5 Acres.
  - b. Land Parcel No Kieoi/Kinyankal477 measuring 1.136 Acres.

(Annexed herein and marked CMM 1 'i' and CMM 1 'ii' are copies of official searches for the ~, said land parcels in proof of the same)
6. That we propose that the estate of our deceased father be shared as stated hereunder: -
  - a. Land Parcel No Njia/Kieoi/ 12 J 3 be divided as follows: -
    - i. Monica Mwathimba. - 0.583 Acres



- ii. Charles Mutura - 0.583 Acres
  - iii. Samwel Kithure M'Mujuri. - 0.583 Acres
  - iv. Benson Kinyua Mujuri. - 0.583 Acres
  - v. Silas Kirimi M'Mujuri (Deceased). - 0.583 Acres
  - vi. Samson Kithinji M'Mujuri - 0.583 Acres
- b. Land Parcel No Kiegoi/Kinyanka/477 be divided as follows: -
- i. Monica Mwachimba. - 0.19 Acres
  - ii. Charles Mutura - 0.19 Acres
  - iii. Samwel Kithure M'Mujuri - 0.19 Acres
  - iv. Benson Kinyua Mujuri - 0.19 Acres
  - v. Silas Kirimi M'Mujuri (Deceased) - 0.19 Acres.
  - vi. Samson Kithinji M'Mujuri - 0.19 Acres
- c. That since the 1<sup>st</sup> wife was never given land and the 2<sup>nd</sup> wife lives with her children, Rose Kamuri M'Munjuri be granted life interest in the shares of her children, i.e. Samwel Kithure M'Mujuri, Benson Kinyua Mujuri, Silas Kirimi M'Mujuri(deceased) and Samson Kithinji M'Mujuri.
- d. That in the alternative and without prejudice to the foregoing, the said assets be divided/shared as follows while including Rose Kaimuri as a unit: -
- Land Parcel No NjialKieoil1213 be distributed as follows: -



- i. Monica  
Mwathirnba. -  
0.5 Acres
- ii. Charles Mutura  
- 0.5 Acres
- iii. Samwel Kithure  
M'Mujuri. - 0.5  
Acres
- iv. Benson Kinyua  
Mujuri, - 0.5  
Acres
- v. Silas Kirimi  
M'Mujuri  
(Deceased). - 0.5  
Acres
- vi. Samson Kirhinji  
M'Mujuri - 0.5  
Acres
- vii. Rose Kamuri  
M'Mujuri -0.5  
Acres

- Land Parcel No Kiegoi/  
Kinyanka/477 be distributed  
as follows: -

- i. Monica  
Mwathimba. -  
0.16 Acres
- ii. Charles Mutura  
- 0.16 Acres
- iii. Samwel Kithure  
M'Mujuri. -  
0.16 Acres
- iv. Benson Kinyua  
Mujuri. - 0.16  
Acres
- v. Silas Kirimi  
M'Mujuri  
(Deceased) -  
0.16 Acres



vi. Samson Kithinji  
M'Mujuri - 0.16  
Acres

7. That our brothers that we have left out, i.e. George Murungi, James Meme, Francis Mthoi and Joseph Maore (Deceased) were allocated a share of our father's estate during his lifetime.
  8. That therefore, we pray that this Honorable Court adopts our proposed mode of distribution as it takes into account all beneficiaries our father's estate.”
3. Protestor Evangeline Kaaka Mwereria's mode of distribution in support of Applicant (appellant) by Affidavit in Protest sworn on 31/8/2021
2. That I am conversant with the above mentioned cause as am the widow to Silas Kirimi M'mujuri who is also a beneficiary to the estate of the above deceased person.
  3. That my mother in law filed the succession cause on behalf of the whole family, but I feel my rights are being violated since I was not included after my husband died.
  4. That I went to the chief and he wrote a letter informing the court that I am the wife to the late Silas Kirimi M'mujuri and I have two (2) daughters from the marriage. (Attached is a copy of the Chief's letter marked as EKM 1)
  5. That I have read the distribution mode by the petitioner which I strongly dispute since I feel my daughters should benefit from both estates of the deceased.
  6. That I support the proposed mode of distribution by Charles Mutura M'mujuri save for that the portions meant for my late husband should be allocated to my daughters namely Prudence Claire and Medillne Lenah. (Attached is a birth certificate and a copy of identity card to show the correct names marked as EKM 2).
  7. That I am proposing that the distribution mode by the Objector should be adopted by the court as the favorable distribution.
  8. That I swear this affidavit in protest to distribution filed by the petitioner.”



## Hearing proceedings

11. When the matter next came up for hearing on 2/9/2021, the appellant unsuccessfully sought to cross-examine the petitioner in proceedings leading to reservation of the ruling on distribution, which is the subject of this appeal, set out in the record as follows:

“02/09/2021

Before Hon. T. Gesora CM

CA Mutegi

Petitioner

Objector

Nyamokeri for Petitioner

Ngunjiri for Interested Party

Protester - Evangeline Kaaka Mwereria

Evangeline:

My late husband's children are not taken care of. He is Silas M'Munjuri.

Ngunjiri:

She can be registered as trustee for the children. We wish to cross-examine the petitioner.

Nyamokeri:

We don't object but I don't see the value of the cross-examination. We have all filed.

Court:

The protest has been filed and concerns are noted. The deceased husband of the Protester has been provided for. There is enough material to go by and determines the distribution.

Ruling on the distribution will be delivered on 16/09/2021.

Tito Gesora

Senior Principal Magistrate”

12. The ruling of the court was to decline the equal sharing of the deceased's estate as proposed by the appellant/protester on the ground that the beneficiaries had already well settled on their respective portions of estate land and therefore only to allow the accommodation of the applicants in estate by allocation given to them by the petitioner. The full text of the ruling is set out below:

“Ruling

I have considered the 2 modes of distribution filed by the parties herein. Since the deceased had already distributed his estate partially and it is not clear why the Interested Party/Applicant and the sister were left out when' all the rest of the children of the 1st wife were given and seeing that all beneficiaries have settled on the places where they are, it will cause unnecessary disruption and bad blood to fully re-distribute the estate. All that is required is for them to be accommodated. The petitioners offer commends itself to me as the proper way to go and it is hereby confirmed.



Tito Gesora  
Senior Principal Magistrate  
September 16, 2021”

### The appeal

13. The appellant was dissatisfied with the decision and appeals on the grounds set out in the Memorandum of Appeal dated and filed 14/102021 as follows:

“The appellant being dissatisfied with the judgment/ruling of Chief Magistrate Hon. Tito Gesora dated September 16, 2021 11l Maua CM Succession Cause No1 16 of 2U 17, hereby appeals against the said decision and sets forth the following grounds: -

1. The Honorable Learned Trial Magistrate erred in law and in fact in that he wrongly held that property of the deceased per on herein had been distributed per house rather than per individual and as such he arrived at a wrong decision.
2. The Honorable Learned Trial Magistrate erred in law and in fact in that he failed to appreciate that the parties in this suit had agreed by consent to proceed and give their preferred mode of distribution on the understanding that no party to this suit had been given land and as such he arrived at a wrong decision.
3. The Honorable Learned Trial Magistrate erred in law and in fact in that his judgment/ruling he touched on matters that he could not determine unless the matter was heard through adduction of viva voce evidence and/or cross examination of the parties, which was not the case, thereby arriving at a wrong decision.
4. The Honorable Learned Trial Magistrate adopted the petitioner's mode of distribution yet the same was manifestly unfair unjust, unreasonable and/or discriminatory against the interested party (the appellant herein) and his sister and as such he arrived at a wrong decision.
5. The Honorable Learned Trial Magistrate erred in law and in fact in that he failed to take consideration of the proposed mode or distribution tender d b) the appellant, thereby arriving at a wrong decision.
6. The Judgment of the Honorable Learned Tnal Magistrate was against the weight of the evidence tendered.
7. The Judgment of the Honorable Learned 'trial Magistrate IS bad 111 law.

Reasons Wherefore, the appellant prays for orders: -

- a.) That Judgment/ruling of the Honorable Learned Trial Magistrate Tito Gesora dated September 16, 2021 I be set aside.
- b.) That the appellant's mode of distribution dated July 21, 2021 be adopted.
- c.) Alternatively, and without prejudice to the foregoing, this Honorable Court be pleased to distribute the estate of the deceased person herein equally, fairly and justly to the parties/dependents who had not been catered for during the deceased person's lifetime.



- d.) That the Respondent do pay costs of this Appeal and the costs of the Lower Court's suit.”

14. The appeal was canvassed by way of written submissions.

#### **Written submissions**

15. In urging the appeal, the appellants' Written Submissions dated March 8, 2023 addressed the principal questions whether there was sufficient evidence for the court to make the findings of fact on which it based its decision and whether the distribution and the Confirmed Grant should be revoked as follows:

“iii. Whether there was sufficient evidence for court to make conclusion of facts which had not been pleaded by parties.

24. Your Ladyship, there was no evidence as to how each beneficiary had settled on the estate property. Further, there was no evidence that all the free property of the deceased had been occupied by the members of the 2nd House. In addition, the allegations that the Appellant had been gifted land by the deceased and sold the same was not proved. Indeed, the Land Registrar report dated March 21, 2021 did not show any land that the Appellant had been given during the deceased's lifetime. In any case, there was no demonstrations of bad blood between the two houses for the court to assume the same.

25. Suffice to say, the court despite admission of the fact by the Petitioner that there were beneficiaries who were left out during petitioning, did not bother to call for the said beneficiaries to file their affidavits denouncing any rights to claim any share of the deceased property and/or to consent to the proposed mode of distribution. It is an error for the court to assume that the beneficiaries of the 1<sup>st</sup> House were not interested in any part of the net estate property that the deceased left in his own name.

26. We submit that albeit the fact that the court in distributing an estate ought to make considerations of gifts already passed by the deceased in light of Section 28 and 42 of the *LSA*, such considerations ought to be made after the proposals of the said beneficiaries (already gifted) are taken into account and/or after such parties have expressed their lack of interest on the remaining properties.

27. The court therefore made conclusions of facts without properly appreciating the need to have the already gifted beneficiaries denounce their right or consent to the mode of distribution. This was an error that this court ought to rectify.

IV. Whether the court should set aside the proposed mode of distribution and the grant confirmed revoked.



28. My Lady, as demonstrated above, the grant confirmed in terms of the Petitioner's proposed mode of distribution failed in the following:-
- a. The grant failed to shall equally the net intestate estate of the deceased among all the beneficiaries that had served the deceased;
  - b. The grant failed to consider that the beneficiaries of the 1K House that had allegedly been in possession of gift inter vivos were not involved to confirm the accuracy of the said allegations;
  - c. The grant as confirmed failed to appreciate the need for beneficiaries to denounce their right to inherit due to gift inter vivos before distribution;
  - d. The grant assumed that the two applicants (Charles and Monica) were not in possession of part of the deceased estate; and
  - e. The grant relegated the two applicants (Charles and Monica) as lesser children of the deceased entitled to less than half of what their siblings got from their father's estate.
29. As a result, it is our humble submissions that the mode of distribution as proposed cannot lead to any equitably distribution of the estate. The assumption that the two applicants just needed 'some accommodation 'was erroneous and against the dictates of the law on intestate and distribution.
30. We pray that the adopted mode of distribution be set aside. Consequently, the grant confirmed and the Certificate of grant issued pursuant to the Petitioner's proposal cannot stand. The same ought to be revoked and a new distribution done by court following the laid down legal principle.
31. The court can only do so upon being satisfied that the rest of the beneficiaries (other members of the I" House} have no interest UI the net intestate estate of the deceased. However, given that they have not approached the court seeking reliefs, we pray that the Appellants proposal as contained under page 74-76 of the R.o.A be adopted given that they all in consonant with principles of distribution of a polygamous intestate estate and made considerations of gifts made to some dependants.”

16. For the Respondent, by Written Submissions dated July 19, 2023 a case of convenience was set up that the court should not interfere with the distribution of the estate by the deceased's second wife as the



first wife's children had been provided for during the life of the deceased and the respondent second wife had already shared the remaining estate to the children of her house, as follows:

“The Deceased distributed his property to the children of the 1<sup>st</sup> wife. It is only one child, the Appellant who is claiming from what was left by the Deceased. No explanation was provided as to what happened to what he got. It is not worth pointing out that at time most of land was not registered at the time. Due to the efflux of time, and the fact that most of the land during that time were not registered, the Appellant was not able to explain why and what became of his share. The Respondent, years later, is being asked to share the remnant of the estate with the Appellant. The Respondent has already shared the estate amongst her five children. The net effect of interfering with the already shared estate would be to evict some of them from land they already occupy. The Appellant has also not explained where he lives.

To avoid a situation where there is interference with already shared and distributed land, the Respondent offered a portion to the Appellant, which was rejected. The court decided in its wisdom to give a verdict of the sharing. We urge the honorable court not to interfere with the lower court findings. It is not possible to distribute and draw boundaries on land which is already distributed among children of the Respondent.”

17. The protestor Evangeline Kaaka Mwereria did not make any written submissions.

#### **Issues for determination**

18. What started as an application of revocation morphed by the conduct and consent of the parties into an application for distribution or confirmation of Grant with the petitioner filing the principal proposed mode of distribution and the applicant for revocation joined by the widow to one of the Petitioner's children who supported the applicant's application for revocation.
19. The only issue arising for the memorandum of appeal is whether the appellant was heard before the decision on distribution made in ruling of the trial court.

#### **Determination**

##### **Duty of Succession Court on hearing of protest**

20. Section 71 (2) of the *Law of Succession Act* mandates the succession court to hear and determine applications for confirmation of Grant as follows:

- “(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-
  - a. if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
  - b. if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
  - c. order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or



- d. postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”

21. On procedure of the hearing, Rule 41 of the *Probate and Administration Rules, 1980* require the hearing of an application for confirmation of Grant as follows:

“41. Hearing of application for confirmation

- (1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.
- (2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.
- (3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.
- (4) In proceedings under subrule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of



the share or estate so appropriated and set aside and the provision of costs.

- (5) Where the court in exercise of its power under section 71(2)(a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval.
- (6) Where the court, in exercise of its power under section 71(2)(b) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55.
- (7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court's approval is given.
- (8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced.
- (9) On the date for approval of the accounts and on any adjourned date application may be made for an adjournment to a fixed date not longer than three months away."

### **No opportunity to be heard**

22. There were disputed and unclear matters of fact that the Court can only resolve upon hearing, with oral evidence and attendant cross-examination of the witnesses, namely:
  - i. Whether the applicants had been provided for in the gifting inter vivos by the deceased, and consequently-
  - ii. As alleged by the Respondent, whether the applicant had disposed his share of the land gifted to him by the deceased along with others.
  - iii. As claimed by the 2<sup>nd</sup> applicant, as a female child of the deceased, no provision was made for her by the deceased inter vivos and upon his death in the succession proceedings before the court, and finally,
  - iv. The entire size of the estate of the deceased, the beneficiaries and the respective shares of the beneficiaries, as required on an application for confirmation of grant, and taking into account the inter vivos gifts.
23. Rule 41 (2) of the *Probate and Administration Rules, 1980* clearly require a hearing where, as here, there is conflicting allegations of fact, and the Court may "adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue" including the issue, as here, of some beneficiaries gifted inter vivos.



24. The court declined the appellant’s request for cross-examination of the petitioner and, therefore, denied the appellant his right to be heard in accordance with Rule 41 of the Probate and Administration Rules and in further breach of the right to fair hearing under Article 50 (1) of *the Constitution*. Its decision was shocking, in view of the express request by the applicant’s counsel, and in contravention of the right to be heard under the applicable rules for the hearing of the application in the nature for confirmation of Grant before it and its decision on distribution must be set aside.

### **Distribution by way of accommodation of unprovided heirs unknown in law**

25. Though convenient to make an order for the accommodation of missing or unprovided heirs, it is unknown in law that an heir entitled to inherit in equal shares with the other heirs to an estate may be required to accept to be accommodated by grant of a share less than equal to the other persons equally entitled to share in the estate. One child cannot be forced to accept a lesser share than his/her siblings. The mode of distribution of an intestate estate is clear under section 40 of the Law of Section Act to the children in equal shares with a share added for every surviving spouse who takes a life interest in the share.

### **Remand of case for trial most appropriate remedy**

26. The court has been asked to distribute the estate, but it would suffer the same handicap that the trial court faced with evidence on the assets and the heirs and their respective portions occupied by them, whether by gift inter vivos, which ought to be taken into account in terms of section 42 of the *Law of Succession Act* or upon death of the deceased.
27. Consequently, the order that commends itself to this appellate court is to direct that the matter be fully heard before the trial court guided by the foregoing discussion and directions in the matter made herein. In view of this order, and so as not to prejudice the retrial, this court does not make any findings of fact on the disputed issues which shall be determined by the trial court in the rehearing.
28. Section 78 of the *Civil Procedure Act* provides for this course by direction for remand of the case to the trial court in terms as follows:

“78. Powers of appellate court

1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
  - a. to determine a case finally;
  - b. to remand a case;
  - c. to frame issues and refer them for trial;
  - d. to take additional evidence or to require the evidence to be taken;
  - e. to order a new trial.
2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”



29. The Court shall also direct, pursuant to the overriding objective of the civil process under sections 1A and 1B of the *Civil Procedure Act*, that the proceedings in the trial court be had on priority basis in view of the time taken before this court on appeal.

### **Orders**

30. Accordingly, for the reasons set out above, the Court finds merit in the appeal and makes the following orders:
1. The ruling of the trial court dated September 6, 2022 and the confirmed Grant of Letters of Administration based thereon are set aside and revoked, respectively.
  2. The matter is remanded for trial before the trial court differently constituted.
  3. The trial court shall take oral evidence with cross-examination to ascertain, in terms of subsection 2 of section 71 of the *Law of Succession Act*, the estate assets, the respective identities and shares of all persons beneficially entitled.
31. This being a succession cause, and no party being at fault for the decision of the trial court, each party shall bear its own costs.

Order accordingly.

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

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

Mr. Njindo Advocate for Mr. Ngunjiri Michael Advocate for the appellant.

Mr. Nyamokeri Advocate for the Respondents.

