



**In re Estate of Simon Munyua Muchira (Deceased) (Civil Appeal
48 of 2019) [2023] KEHC 22930 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 48 OF 2019
LM NJUGUNA, J
SEPTEMBER 29, 2023**

IN THE MATTER OF THE ESTATE OF SIMON MUNYUA MUCHIRA (DECEASED)

BETWEEN

**STEPHEN MUGWERU MUNYUA 1ST APPELLANT
MARGARET MICERE MUNYUA 2ND APPELLANT
JEREMIAH MUREITHI MUNYUA 3RD APPELLANT
PETER KANYUIRA MUNYUA 4TH APPELLANT
FRANCIS GACOKI MUNYUA 5TH APPELLANT
JOHN MURUGA MUNYUA 6TH APPELLANT
JAMES MUCHOMBA MUNYUA 7TH APPELLANT**

AND

JAMLICK MUTHIKE MUNYUA RESPONDENT

*(Appeal from the Ruling of Hon. E.H. Keago SPM delivered in Baricho Principal
Magistrate's Court Succession Cause No. 570 of 2016 on 21st June 2019)*

JUDGMENT

1. The appellants have filed the appeal herein seeking orders that the judgment of the trial court be set aside and costs be awarded to them. Grounds of the appeal are set out on the face of the memorandum, *inter alia*, as follows:
 - a. The magistrate erred in law and fact in holding that the deceased Estate be confirmed as per the grant issued on 25th June 2019;
 - b. The magistrate erred in law and fact in failing to consider the 2nd petitioner's evidence;



- c. The magistrate erred in law and fact in failing to consider the evidence of the protestor;
 - d. The magistrate erred in law and fact in failing to hold that the estate should be subdivided as per the award in Arbitration Cause No. 16 of 2006;
 - e. The magistrate erred in law and fact in failing to consider the number of children in each family; yet the appellant's family has more children;
 - f. The magistrate erred in law and fact in interpretation of section 40(1) of the [Law of Succession Act](#);
 - g. The magistrate erred in law and fact in awarding a part of the estate to one Jason Maragwa Kariuki who is a stranger to the estate;
 - h. The magistrate erred in law and fact in holding that the referenced arbitration cause was determined in 2001 but it had not even been filed then;
 - i. The magistrate erred in law and fact in disregarding the award of the arbitration; and
 - j. The magistrate erred in law and fact in failing to consider circumstances of the case in entirety.
2. The background of the case is that a grant of letters of administration had been issued on 10th February 2014 in the estate of the deceased to Jamlick Muthike Munyua (the respondent) and Stephen Mugweru Munyua (1st Appellant). The administrators filed summons for confirmation dated 1st July 2014 in which they sought orders that a certificate of confirmation of grant be issued and the land registrar do dispense with the old title number Mutira/Kiaga/140. In the supporting affidavit, the administrators deposed that the person holding the original title deed for the property has refused to hand it over for subdivision to enable the purchaser, Jason Maragwa Kariuki be allocated his portion.
 3. In that cause, the 2nd appellant herein and wife of the deceased filed an affidavit of protest opposing confirmation of the grant. She stated that the properties of the deceased had been the subject of arbitration before his demise in Wang'uru Arbitration Case no. 16 of 2006 and none of the family members has contested the award. She also stated that the 2nd petitioner has not been a party to the summons for confirmation of grant and that he did not sign the affidavit, even though the same has been signed. That the court adopted the said award.
 4. In an affidavit in reply to the protest, the 1st petitioner/respondent stated that the protester is a 2nd wife of the deceased and that she has been intimidating him for a while, even though the deceased had already shown all his sons how they should use the land. That the protester and her children have gone to an extent of chasing the 1st petitioner away from their father's land, thereby rendering them unable to provide for their families.
 5. At trial, the court took *viva voce* evidence and also considered the written submissions by the parties. The court proceeded to issue a certificate of confirmation of grant while distributing the estate equally between the two houses and accommodating the purchaser of half acre in Mutira/Kiaga/140. The trial magistrate noted that the arbitral award has since been overtaken by events and that the same could not now be executed within the succession cause following the demise of the deceased.
 6. In this appeal, the parties filed their written submissions as directed by the court.
 7. The appellants in their submissions, relied on the case of [Nyutu Agrovet Ltd v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators Kenya Branch](#) (Interested Party) SCK Petition No. 12 of 2016(2019) eKLR to reaffirm the purpose of arbitration to the judicial system. They also cited Section 35 of the [Arbitration Act](#) on adoption of arbitral awards and appeals emanating therefrom. They also



relied on the case of *Scolastica Ndululu Suva v Agnes Nthenya Suva* (2019) eKLR in arguing that section 40 of the *Law of Succession Act* is to be used as a guide in division of the estate where the deceased was polygamous and that the court ought to have applied itself to the circumstances of this case. That one family had more children than the other. They also contested the inclusion of a stranger in the estate of the deceased claiming purchaser's interest.

8. The respondent submitted that the arbitral award alluded to, cannot be implemented at this point as the same is time barred under Section 12 of the *Limitation of Actions Act*. That in any event, the arbitral award cannot be executed in the present succession cause as they are 2 different issues. That it is not in contest that the deceased had 2 wives who had been well settled by the deceased in equal measure. He relied on the case of *Peter Mwongera & Anor. v Enid Gatune Mwongera & Anor.* (2016) eKLR in supporting his case that the deceased was at liberty to deal with his property in whatever manner he wished. That some of the beneficiaries who had no problem disposing the half acre to a third party in order to raise money to cater for the expenses of succession, are not complaining and agreed to including the purchaser in the distribution schedule. That there is proof to show that the estate received money from the said purchaser whose interest must be protected.
9. From perusal of the grounds of appeal, the trial court's record and the submissions of the parties herein, I deduce the issues for determination to be:
 - a. Whether the estate of the deceased has been distributed equitably;
 - b. Whether the purchaser should be included as a beneficiary to the estate;
 - c. Whether the arbitral award in Arbitration Cause No. 16 of 2006 should feature in the present succession.
10. On the first issue of equitable distribution of the estate, I shall begin at section 40 of the *Law of Succession Act* which provides for distribution of the estate where the deceased was polygamous. It states:
 - “(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 interest within each house shall then be in accordance with the rules set out in sections 35 to 38”
11. It is not in contest whether or not the deceased had 2 wives and so I need not venture into this question. The bigger question is whether the trial court was correct in awarding the estate of the deceased equally in favour of each house. For clarity, "house" means a family unit comprising a wife, whether alive or dead at the date of the death of the husband and the children of that wife, according to Section 3(1) of the *Law of Succession Act*. This section was applied in the case of *Rono v Rono* Civil Appeal No. 66 of 2002, where the court stated;

“... More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children...”



12. It is important that in application of section 40 of the *Law of Succession Act*, the court must endeavour to distribute the estate in an equitable manner while keeping in mind the prevailing circumstances. This was reiterated in the case of *In re Estate of Adriano Welikhe Muliali (Deceased)* (2020) eKLR where the court held:

“This court must, therefore, distribute the estate as equitably as possible, taking into account the settlement on the ground. This is a principle set to cause minimum disruption of implementation Maraga J (as he then was) in *Benson Njoroge Gitau v Peter Mwangi Gitau*, Nakuru HCSC No. 330 of 2003 held: -

“Section 40(1) of the Law of Succession Act states that 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..... Taking all the circumstances into consideration, it is important that when the subdivision is effected over the main property the portions occupied by respective beneficiaries should revert to them ... ” (Emphasis added)

13. Similarly, in the case of *Stephen Gitonga M'murithi v Faith Ngira Murithi* [2015] eKLR, the court of appeal held thus:

“Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each house hold of a polygamous deceased. Applying the above principles..... it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the *Law of Succession Act* by discriminating against the married daughters of the deceased ... ”

14. In past decisions by the courts, the question has been whether equal means equitable. In the case of *Re Estate of John Musambayi Katumanga – Deceased* (2014) eKLR held as follows:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

15. I have noted that according to the certificate of confirmation of grant and the pleadings, none of the members of either house has been disinherited. There are fourteen(14) units, so to speak, as beneficiaries. In my view, the distribution is equitable and has accommodated all the units in good measure.
16. On the second issue of inclusion of a 3rd party to the distribution, property number Mutira/Kiaga/140 accommodates a purchaser’s interest. Documentation has been produced to show that Jason Maragwa Kariuki purchased half acre. Ideally, the purchaser has an interest in the estate of the deceased. That means, without the estate removing his share of the land he purchased, the net estate cannot be determined. However, when the purchaser is added as a beneficiary, his interest is met at the same time



when the remainder of the estate is being distributed. In the case of *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR the court stated:

“... It presupposed that administrators ought to identify the debts and liabilities of the estate first, settle them and thereafter move on to distribute the net estate after payment of debts and liabilities. For that reason, therefore, creditors and purchasers of property estate ought not to be entertained at this stage. They should be sorted out first before the administrators file the application for confirmation of grant. However, where they have not been settled, an application for confirmation of grant is mounted, the administrators can quite properly provide for them, within the proposed distribution.”

17. On the last issue of whether the arbitral award in Arbitration Cause No. 16 of 2006 can be executed herein, I do note that the deceased was the defendant in the arbitration. The arbitral award stated that the deceased together with the 2nd respondent herein be awarded 1.1 acres of property number Mutira/Kiaga/140 to hold together with their daughters. The award is dated 07th September 2001 and issued by the court on 09th May 2011. The appellants have pointed out discrepancies in the dates but I am not able to verify the correctness of the dates as I do not have the relevant record for perusal. Further, the parties were at liberty to have the award corrected under section 36 of the *Arbitration Act* or order 46 rule 14 of the *Civil Procedure Rules* 2010 but this was not done. It is also unclear to me what the issues that necessitated the arbitration were. In any event, and as correctly stated by the respondent, the order, whether issued in 2001 or 2011, cannot be executed in this succession cause because the issues herein are regarding succession. I shall therefore not dwell further on this issue because the context is unclear.
18. Having considered the submissions herein, and the applicable laws, I find that the appeal lacks merit and is hereby dismissed. Each party shall bear their own costs.
19. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

..... for the Appellants

..... for the Respondent

