



REPUBLIC OF KENYA



**Nduku v Nduku & another (Civil Appeal 85 of 2019)
[2023] KEHC 22898 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 85 OF 2019
LM NJUGUNA, J
SEPTEMBER 29, 2023**

BETWEEN

BEATRICE GICHIGU NDUKU APPELLANT

AND

DANSON MUBARI NDUKU 1ST RESPONDENT

PAULINE WANJIRU NDUKU 2ND RESPONDENT

*(Appeal from the Judgment of Hon. Y.M. Barasa SRM delivered in Kerugoya
Chief Magistrate's Court Succession Cause No. 170 of 2018 on 23rd October 2019)*

JUDGMENT

1. By a memorandum of appeal dated 12th November 2019, the appellant seeks orders that the appeal herein be allowed, the 2nd protester's mode of distribution be adopted and summons dated 06th February 2019 be dismissed with costs. The appeal is premised on the grounds that the learned magistrate erred in law and fact by:
 - a. Distributing the estate of the deceased herein to a deceased person namely Paul Muriuki Nduku;
 - b. Completely disregarding the mode of distribution put forth by the appellant;
 - c. Stating that the share of Paul Muriuki Nduku (deceased) be sold and proceeds be shared among the sons of the deceased herein yet the said Paul had no share to be sold and the costs of subdivision was not ascertained as no receipts were produced;
 - d. Failing to realize that no receipts were produced in court and so for the other sons to be compensated amounts to injustice;
 - e. Failing to evaluate evidence tendered by the parties;



- f. Directing that the shares of minors be held in trust jointly by the administrators yet the said minors are adults.
2. Brief facts of the case are that on 24th September 2018, a grant of letters of administration was issued jointly to Beatrice Gichugu Nduku, Danson Mubari Nduku and Paul Muriuki Nduku. That vide summons dated 06th February 2019 for confirmation of the said grant, the applicant suggested a mode of distribution as follows:
1. 1st House
 - Grace Mabuti Muriuki
 - Jecinta Kariuko Nyaga
 - Danson Mubari Nduku
 - Edith Ruguru Mwangi 0.355 Ha equal share
 - Cyrus Muthike Nduku
 - Rose Wangeci Nzioka
 2. 2nd House
 - Paul Muriuki Nduku 0.255 Ha
 - Pauline Wanjiru Nduku
 - Julius Chege Gachuhi
 - Daniel Chomba Gachuhi 0.1 Ha equal share
 - Julius Irungu Gichuhi
 3. 3rd house
 - Beatrice Gichugu Nduku
 - James Muriuki Nduku
 - Susan Wanjiru Nduku
 - Joyce Muthoni Nduku
 - Ann Wairimu Nduku 0.355 Ha
 - Regina Wambura Nduku
 - John Muriithi Nduku
 - Hellen Njoki Nduku
 - Gladys Njeri Nduku
3. Pauline Wanjiru Nduku, 1st Protestor filed an affidavit of protest contesting the portion intended to be allocated to Paul Muriuki Nduku as indicated in the summons for confirmation of grant, stating that he should only receive 0.41 Ha like his brothers who had been given property by the deceased before his death. Further that the remaining property, 1.065 Ha, in the name of the deceased at the time of his death should be distributed to all those who did not receive any land from the deceased prior to his death. Through a further affidavit, the 1st Protestor suggested the following mode of distribution following the death of Paul Muriuki Nduku:



1. 1st House
Jecinta Kariuko Nyaga
Edith Ruguru Mwangi 0.355 Ha equal share
Rose Wangeci Nzioka
2. 2nd House
Pauline Wanjiru Nduku.....0.355 Ha
3. 3rd house
Beatrice Gichugu Nduku
Susan Wanjiru Nduku
Joyce Muthoni Nduku
Ann Wairimu Nduku 0.355 Ha equal share
Regina Wambura Nduku
Hellen Njoki Nduku
Gladys Njeri Nduku
4. Beatrice Gichugu Nduku, the appellant herein also filed an affidavit of protest to the summons for confirmation of grant contesting the mode of distribution of the only property of the deceased namely L.R. No. Inoi/Kamondo/1814 among the 12 beneficiaries who did not receive any share from the deceased before his death. She suggested that the estate be distributed as follows:

1st House- 3/12, 2nd House- 2/12 and 3rd House- 7/12 and those who did not receive property from the deceased during his lifetime were the following:
 1. 1st House
Jecinta Kariuko Nyaga
Edith Ruguru Mwangi
Rose Wangeci Nzioka
 2. 2nd House
Paul Muriuki Nduku
Pauline Wanjiru Nduku
 - 3rd House
Beatrice Gichugu Nduku
Susan Wanjiru Nduku
Joyce Muthoni Nduku
Ann Wairimu Nduku
Regina Wambura Nduku
Hellen Njoki Nduku
Gladys Njeri Nduku



By a further affidavit of protest, she also deposed that Paul Muriuki Nduku had since passed away and that his share of the estate should be given to the 1st protestor Pauline Wanjiru Nduku.

5. At trial, the court took viva voce evidence and also considered the written submissions by the parties. It was held that the parcel no. Inoi/Kimondo/1814 be divided amongst the daughters and the surviving widow in equal measure and the portion belonging to Paul Muriuki Nduku be sold and the proceeds thereof be shared amongst the other sons of the deceased to compensate for the land subdivision costs. It was also held that the shares of the minors be held in trust jointly by the administrators. The grant was confirmed and a certificate of confirmation of grant was issued on 23rd October 2019.
6. In this appeal, the parties filed their written submissions as directed by the court.
7. The appellant in her submissions relied on article 27 of the Constitution of Kenya 2010 and sections 40(1) and 42 of the Law of Succession Act. She also relied on the cases of Madris Mukwabiwo Muchiri v Njeru Muchiri (2016) eKLR and William M'Arimi Mutuambae v Rosemary Karamuta (2017) eKLR. She submitted that the persons assumed to be minors at trial were not minors and are in fact adults all along. That the amounts of money spent on subdivision were unascertained and cannot therefore be compensated as the claim is based on hearsay.
8. The respondents submitted that the deceased owned land title number Inoi/Kimondo/814 which he subdivided and distributed to his sons leaving for himself Inoi/Kimondo/1814 which is the subject of this appeal. That if a beneficiary died before distribution of the estate, his portion is subjected to the applicable rules of testacy or intestacy as the case may be. That the share of Paul Muriuki Nduku (deceased) can be inherited by his grandchildren through their parents as was discussed by the undersigned in the case of Eddah Wangu & Another v Sacilia Magwi Kivuti (deceased) substituted with Reiberta Ngai (2021) eKLR. That the sons of the deceased beneficiary can inherit their father's portion directly. That it is not in issue that the other portions emanating from the subdivision of the property by the deceased, do not form part of the estate as they had been distributed by the deceased during his lifetime as he wished. That the trial court had no jurisdiction to address the same and he cited the cases of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR and Estate of Col. Meshack Kiptoo Birgen (deceased) (2021) eKLR where the court declined to address any issues regarding ownership and dispensation to land and referred the same to the Environment and Land Court.
9. Having perused the memorandum and record of appeal together with the submissions herein, I find the issues for determination to be as follows:
 - a. Whether the mode of distribution of the estate is equitable; and
 - b. Whether the deceased beneficiary is entitled to a share in the estate.
10. To begin with, I shall limit my discussion to the remainder of the estate of the deceased which is land parcel number Inoi/Kamondo/1814 as the net estate. The part of the estate devolved before death of the deceased is not in issue. On the mode of distribution and seeing the circumstances of the case, this court is well guided by sections 40 and 42 of the Law of Succession Act which provide:
 - “ 40. Where an 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.

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 of this *Act*, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

11. The deceased herein had three wives, that makes it three houses. "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*. In the case of *Rono v Rono* Civil Appeal NO. 66 of 2002, the court applied section 40 of the *Law of Succession Act* and 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. In order to achieve equitable distribution of the estate, sometimes (not always) equal distribution is the way to go. I agree with the argument that all the members of the family of the deceased from the 3 houses, who did not receive any property from the deceased prior to his death should be the focus of this appeal. In the case of *Rono v Rono* (*Supra*) – Omolo J. A. had this to say;

“my understanding of that section is that while the net intestate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution has a discretion to take into account or consider the number of children in each house. If parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

Nor do I see any provision in the *Act* that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained and generally seen through life. If such a child whether girl or boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act did not provide for such equality.”

13. However, the court retains its autonomy to apply discretion on this matter depending on the circumstances of the case. This was the position taken in the case of *In re Estate of Waweru Mwaniki*



Gatuba (Deceased) [2020] eKLR where the court was guided by the decision in Scolastica Ndululu Suva v Agnes Nthenya Suva [2019] eKLR where it was held:

“It is therefore evident that although Section 40 of the Law of Succession Act provides a general provision for distribution of the estate of a polygamous deceased person, the court has the discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”

14. At trial, it was argued that Paul Muriuki Nduku was the only son of the deceased who was not given any property prior to the death of the deceased. The deceased, before his death was at liberty to deal with his property in whatsoever way he wished, which he did. He subdivided his land and transferred it to his sons except one. The trial court and this appellate court are bound by the rules of intestate succession.
15. This leads me to the second issue of whether or not the deceased beneficiary can inherit from the estate of the deceased. The deceased beneficiary can only inherit through his dependents, if any. It is not clear to me whether the deceased beneficiary had dependents as none have sought to be included in place of the deceased beneficiary. Being that Paul Muriuki Nduku died before distribution of the estate of the deceased, his share of the inheritance would have been taken up by his dependents, if any. However, none of his dependents, if any, has moved the court to be included as a beneficiary of the estate of the deceased in place of Paul Muriuki Nduku.
16. The respondents submitted that sons of the deceased beneficiary should be allowed to inherit under section 38 of the Law of Succession Act. I have considered page 82 of the record of appeal at line 1 where the 1st protestor testified that the deceased beneficiary did not have any family. I find no further evidence that the deceased beneficiary left behind any spouse or children who can inherit his share of the estate according to section 38 of the Law of Succession Act.
17. Therefore, the share of the estate intended for the deceased beneficiary will revert back to the estate of the deceased for redistribution. In light of this, the trial magistrate indeed erred in awarding a part of the estate to Paul Muriuki Nduku.
18. Additionally, when it comes to Paul Muriuki Nduku as a deceased administrator of the estate, section 81 of the Law of Succession Act applies. However, as a deceased beneficiary, any substitution of his person in the cause must be done formally and through procedures laid down in the Act. This was well explained in the case of Kambora Mamau v Esther Nyambura Kirima [2002] eKLR where the court stated:-

“As I said in this court’s Succession Cause No 1086 of 1995, in the matter of the estate of Ndungu Kariuki (unreported); a certificate of confirmation of grant confers upon a beneficiary under it a beneficial interest. I stated:

“As a certificate of confirmation of grant, also referred to as a certificate of confirmation, confers upon a beneficiary under it a beneficial interest in the estate of the deceased person, where such a beneficiary subsequently dies before the executor or administrator of the estate for which the certificate of confirmation was issued transfers the resultant legal interest or title to the aforesaid beneficiary, it is not proper and lawful to proceed under rectification of that certificate of confirmation to replace the deceased beneficiary with a person other than a confirmed executor or administrator of the estate of the deceased beneficiary.”



...To get to be a confirmed executor or administrator of the estate of a deceased beneficiary, the proper procedure would be for the person aspiring to replace the deceased beneficiary to start the ball rolling in separate proceedings being a petition for the grant of probate or letters of administration in the estate of the deceased beneficiary. The aspirant will start those proceedings either as a petitioner as well as a beneficiary or as a purely beneficiary influencing others interested to have the petition filed.” Emphasis added

19. On the question of compensation for expenses incurred during subdivision of the land, the amounts were not substantiated and so the same cannot be recovered through disposing the inheritance of the deceased beneficiary as we have established the inheritance will go to the estate of the deceased beneficiary.
20. On the issue of the shares to be held in trust for the presumed minors, it is too late in the day to bring this issue as an appellate court may not be able to take any evidence on whether or not they are now adults. In any event, the alleged minors can move the court to be acknowledged as adults for purposes of inheritance in this estate.
21. In conclusion, I have considered the competing arguments and the relevant law and I do find that the trial court’s distribution of the estate is in accordance with Section 40(1) of the Law of succession Act.
22. However, the appeal herein partially succeeds with orders as follows:
 - a. The trial court’s judgment only with regard to apportioning of a share of the estate of the deceased to Paul Muriuki Nduku (deceased), is hereby set aside;
 - b. The certificate of confirmation of grant issued on 23rd October 2019 is hereby upheld; and
 - c. Each party shall bear their own costs as this is an issue between members of the same family.
23. It is so ordered.

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

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondents

