



REPUBLIC OF KENYA



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**Kabunga v Kabunga & another (Civil Appeal E032 of 2021)  
[2023] KEHC 24189 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24189 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E032 OF 2021  
FN MUCHEMI, J  
OCTOBER 26, 2023**

**BETWEEN**

**MWAI KABUNGA ..... APPELLANT**

**AND**

**LEONARD KAROKI KABUNGA ..... 1<sup>ST</sup> RESPONDENT**

**NANCY WAMUNGE KARUIRU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment of Hon. L. W. Kabaria (SRM)  
delivered on 13th August 2021 in Gichugu PM Succession Cause No. 72  
of 2017. In the Matter of the Estate of Kabunga Mwembu (Deceased))*

**JUDGMENT**

**Brief Facts**

1. This appeal arises from the judgment of Gichugu Senior Resident Magistrate in PM Succession Cause No. 72 of 2017 in which court distributed the estate of the deceased equally amongst his three (3) children based on the [Law of Succession Act](#) as opposed to the appellant's preferred mode of distribution under Kikuyu customary law.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 6 grounds of appeal summarized as follows:-
  - a. The learned trial magistrate erred in law and in fact in distributing the estate of the deceased according to the [Law of Succession Act](#) yet the deceased died in the year 1975;
  - b. The learned trial magistrate erred in law and in fact in finding that land parcel number Kabare/Njiku/278 was the only asset available for distribution not taking into account the Rice holding No. 548 Unit 11 Tebere Section.



- c. The learned trial magistrate erred in law and in fact by holding that the Rice holding No. 548 Unit 11 Tebere Section of the National Irrigation Scheme is not part of the estate of the deceased capable of being distributed.
3. Parties filed written submissions to dispose of the appeal by consent.

### **Appellant's Submissions**

4. The appellant submits that the deceased died in the year 1975 and had three children, the two respondents and the appellant. It is further submitted that the deceased left land parcel number Kabare/Njiku/278 measuring approximately 2.78 Ha and later on 26/10/1962 he was awarded Rice Holding No. 548 Unit 11 Tebere section. The appellant states that in the 1960s, the deceased allocated to him land parcel number Kabare/Njiku/278 where he has lived and developed since then. He further states that the 1<sup>st</sup> respondent lived in Mwea and has never settled or cultivated land parcel number Kabare/Njiku/278.
5. The appellant contends that the 1<sup>st</sup> respondent filed succession cause in Wan'guru being DM Succession Cause No. 43 of 176 after the deceased died and he was awarded Rice Holding No. 548 Unit 11 Tebere section. He further filed the succession cause in the trial court in respect of land parcel number Kabare/Njiku/278 and was awarded a share.
6. The appellant argues that the trial magistrate erred by applying the [Law of Succession Act](#) in distributing the deceased's estate yet he died in 1975. He further argues that the trial court erred by allocating a share of the estate to the 2<sup>nd</sup> respondent and yet she was already married before the deceased died. In support of his contentions, the appellant relies on Section 2(2) of the [Law of Succession Act](#) and the case of *Re Nduati Mbuthia (Deceased) (2015) eKLR*. The appellant submits that the deceased's estate ought to have been administered under Kikuyu Customary Law as the deceased was a man of Kikuyu ethnic. He relies on Section 3(2) of the [Judicature Act](#), Eugene Cotran's Restatement of African Law II cited in the case of *Kerugoya H.C. Misc. Application No. 11 of 2016 In the matter of the Estate of Gitigi Ngaita (Deceased)* and the case of *Embu High Court Misc. Civil Application No. 140 of 2007* to support his contentions.
7. The appellant argues that the 1<sup>st</sup> respondent is not entitled to inherit land parcel number Kabare/Njiku/287 since he inherited solely Rice Holding No. 548 Unit 11 Tebere section measuring approximately 6 acres. He further argues that the appellant is not qualified to succeed any portion of land parcel Kabare/Njiku/278 as he must be satisfied with what the deceased gifted him during his lifetime and which inheritance was confirmed by DM Succession Cause No. 45 of 1976.

### **The Respondents' Submissions**

8. The respondents submit that the appellant confirmed that he had his own Rice Holding in Thiba Unit and confirmed that rice holdings are properties of National Irrigation Board (NIB). The respondents state that rice holdings are given to people to hold as licensees since they are properties of National Irrigation Board established under the [Irrigation Act](#) Chapter 347 of the Laws of Kenya. As such, they are not persona properties of the licensees and they do not form part of the estate of a deceased person to be distributed under the [Law of Succession Act](#). The respondents further submit that the licensees usually appoint people to succeed them as licensees pursuant to Section 7(1) of the Irrigation (National Irrigation Schemes) Regulations 1977. If a licensee dies without appointing a successor, then their authorized dependants are required to nominate a successor to be approved by the court pursuant to Section 7(4) of the Irrigation (National Irrigation Schemes) Regulations. To support their contentions, the respondents rely on the case of *Naomi Wanjeri Ayub vs Mary Nyambura Wang'ombe & Another*



[2019] eKLR. The respondents further expounded that a person cannot give another rice holdings as a gift inter vivos since it is not property that is capable of being passed down. From the foregoing, the respondents contend that the only property forming the estate of the deceased was land parcel number Kabare/Njiku/278.

9. The respondents argue that the trial court did not err in distributing the estate equally amongst the three of them. It was argued that despite the fact that the deceased died on 5/9/1975 leaving out the 2<sup>nd</sup> respondent out of the distribution just because she is a woman and was married amounts to discrimination against women which goes against Article 27 of *the Constitution*. Relying on the case of Peter Karumbi Keingati & 4 Others vs Dr. Ann Nyokabi Nguthi & 3 Others [2014] eKLR the respondent submit that the 2<sup>nd</sup> respondent is a daughter of the deceased and leaving her from the distribution of her father's estate just because she was married is archaic and primitive customary law. The respondents further contend that all children are equal before the law and a son should not have priority over a daughter simply because he is male.
10. The respondents further submit that the record of appeal was filed on 3/4/2023 while the memorandum of appeal was filed on 10/9/2021 which is 1 year 7 months after yet no explanation was given for the delay. Consequently, the respondents argue that this is a proper case of dismissal and urge the court to do so.

### **Issues For Determination**

11. The main issues for determination are:-
  - a. Whether the trial magistrate erred in identifying the assets available for distribution in the estate of the deceased;
  - b. Whether the trial magistrate erred in distributing the estate equally between the two beneficiaries.

### **The Law**

12. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
13. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.
14. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly



wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

15. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

**Whether The Trial Magistrate Erred In Identifying The Assets Comprising The Estate Of The Deceased;**

16. The appellant, land parcel number Kabare/Njiku/278 and the Rice Holding No.548 Unit 11 Tebere section are the assets that comprise of the estate of the deceased.
17. To determine the nature of holding of Rice holdings, it is important to refer to the law under which such holdings are created. The National Irrigation Board established under the *Irrigation Act* Chapter 147 Laws of Kenya. Section 3 provides:-

There is hereby established a board known as the National irrigation Board, which shall be a body corporate having perpetual succession and a common seal, with power to sue and be sued, and capable of providing or otherwise, acquiring, holding, managing and disposing of any property moveable or immovable, entering into contracts, and doing all things necessary for the proper performance of its duties and discharge of its functions under this Act and any subsidiary legislation made there under.

18. Section 7 of the Irrigation (National Irrigation Scheme) Regulations 1977 provides:-
  1. A licensee may at any time after the date of being granted license, nominate in writing to the manager, another person to succeed him as licensee in the event of his death; and a licensee may at any time, in writing to the manager, revoke or alter the nomination which may have been made by him. Provided that no person nominated as a successor may succeed until he has attained the apparent age of eighteen years; if he has not reached that age, his guardian under customary law may within one month of the licensee’s death, and with the approval of the manager, appoint a person to act on his behalf until the successor is of age.

(4) The authorized dependant may:-

  - a. Where a licensee dies without having nominated a successor in accordance with paragraph (1); or
  - b. Where, under paragraph (3) an appeal to the court against the nomination of a successor has been successful. Within one month of the death of the licensee or one month after the determination of the appeal, as the case may be, nominate in writing to the manager, a successor who must be approved by the court.

19. In the case of Republic vs National Irrigation Board & Another ex parte Paul Ikonya Njoroge [2017] eKLR the court in determining whether rice holdings can be the subject for distribution under the *Law of Succession Act* stated:-

It is not in doubt that the rice holding is an irrigation scheme and therefore vests with the National Irrigation Board. It was not therefore part of the free property of the applicant’s late mother Margaret Wambui John which the Principal Magistrate at Kerugoya Court could distribute to her heirs as was done in Kerugoya Principal Magistrate’s Court



Succession Cause No. 189 of 2010. It follows therefore that the confirmation of grant issued on 30<sup>th</sup> May 2011 in so far as it purported to distribute the rice holding was a nullity as the court had no jurisdiction to do so.

20. Notably, the appellant on cross examination confirmed that he had rice holdings and proceeded to state that the rice holdings belong to the board and they should not be subjected to succession. It is surprising that in his appeal, he has taken the opposite route by including the issue as one of his grounds of appeal.
21. I am persuaded and guided by the foregoing decisions that rice holdings are properties of the Irrigation Scheme and not personal property to be succeeded under the Succession Act as argued by the appellant. The court below, in my considered view did not err in its decision regarding this issue. As such, the only asset available for distribution in the estate of the deceased is L.R. number Kabare/Njiku/278.

### **Whether The Trial Magistrate Erred In Distributing The Estate Equally.**

22. The appellant faults the trial court for applying the *Law of Succession Act* whilst distributing the deceased's estate yet the deceased died on 5/9/1975 by which period the Law of Succession had not been enacted. He argues that the trial court ought to have used Kikuyu Customary Law as the deceased hailed from the Kikuyu community.
23. I have perused the trial record and it is not disputed that the deceased died on 5/9/1975 which was prior to the commencement of the *Law of Succession Act*. The issue that arises is what law is applicable where the deceased died prior to the commencement of the *Law of Succession Act*. Section 2(2) of the *Law of Succession Act* provides:-

The estate of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death but nevertheless the administrator of their estate shall commence and proceed so far as possible in accordance with this Act.

24. In this case, the law applicable in this case in ordinary circumstances would be Kikuyu customary law. The general principle given is that kikuyu customary law of inheritance is patrilineal, that is equal distribution of the man's property amongst his sons. This was stipulated by Eugene Cotran in his book *Restatement of African Law II The Law of Succession* at page 8:-

Inheritance under Kikuyu Customary Law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons subject to the proviso that the eldest son may get a slightly larger share ....Daughters are normally excluded but may also receive a share if they remain unmarried. In the absence of sons, the heirs are the nearest patrilineal relatives of the deceased namely the father, full brothers, half-brothers and paternal uncles.

25. The applicability of customary law is provided in Section 3(2) of the *Judicature Act* which provides:-

The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any other written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

26. Thus customary law will be applicable as long as it is not repugnant to justice and morality or inconsistent with any other written law. The appellant' mode of distribution is based on kikuyu



customary law which is patrilineal meaning it is discriminative against women particularly married women. Notably, this law cannot stand in today's constitutional dispensation. The supremacy of the Constitution has been provided in Article 2(4) which provides:-

Any law including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in contravention of this Constitution is invalid.

27. Article 27 of the Constitution is against any form of discrimination against men and women. It provides:-

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any grounds specified or contemplated in clause (4).

28. It is therefore evident that Kikuyu customary law in this case should not apply as it is inconsistent with the provisions Article 27 of the Constitution which outlaws discrimination on grounds of sex among other tenets. The 2<sup>nd</sup> respondent is a daughter of the deceased and although she is married, by virtue of Article 27 of the Constitution she is entitled to inherit from her late father's estate. Therefore since all the two surviving children of the deceased are equal before the law, both of them are entitled to equal shares of their late father's estate. In *Re Estate of Solomon Ngatia Kariuki (Deceased) (2008) eKLR Makhandia J (as he then was)* stated:-

The LSA does not discriminate between female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to state a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu customary law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.

29. As such, it is my considered view that the trial magistrate did not err by distributing the estate of the deceased equally between the two surviving beneficiaries. The distribution was done by the court below in accordance with the Constitution and the Law of Succession Act.

### **Conclusion**

30. In view of the foregoing, I find that this appeal lacks merit and is hereby dismissed.

31. Each party will meet their own costs.

32. It is hereby so ordered.

**DATED AND SIGNED AT KERUGOYA THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023.**



**F. MUCHEMI**

**JUDGE**

Judgement delivered through video link this 26<sup>th</sup> day of October, 2023

