



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndoro v Ngigi (Civil Appeal 23 of 2020)  
[2023] KEHC 24183 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24183 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL 23 OF 2020  
FN MUCHEMI, J  
OCTOBER 25, 2023**

**BETWEEN**

**JOHN MWANIKI NDORO ..... APPELLANT**

**AND**

**ROSE WAMBUI NGIGI ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. A. K. Mwicigi (SPM) delivered on 22nd May 2020 in Baricho SPM Succession Cause No. 381 of 2016. In the Matter of the Estate of Ndoro Mbungu Mugarura alias Ndoro Mbungu (Deceased))*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Baricho Senior Principal Magistrate in SPM Succession Cause No. 381 of 2016 where the learned magistrate distributed the estate of the deceased pursuant to Section 40 of the *Law of Succession Act*.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 8 grounds of appeal summarized as follows:-
  - a. The learned trial magistrate erred in law and in fact in distributing the estate of the deceased yet the deceased had distributed his estate during his lifetime;
  - b. The learned trial magistrate erred in law and in fact by finding that the way the deceased had distributed his land amongst his children during his lifetime was unfair and discriminative;
  - c. The learned trial magistrate erred in law and in fact in distributing the estate to the grandchildren of the deceased as separate beneficiaries notwithstanding that they are both the children of the same deceased daughter of the late Ndoro Mbungu;



- d. The learned magistrate erred in not considering the fact that Elizabeth Wamwirua Ndoro, a widow to the deceased was still alive and provide for her.
3. Parties put in written submissions to dispose of the appeal.

### **Appellant's Submissions**

4. The appellant relies on Section 42 of the [Law of Succession Act](#) and the case of [Joseph Wairuga Migwi vs Mikielina Ngina Munga](#) [2016] eKLR and submits that it is trite law that if a deceased person had distributed his estate during his lifetime his wishes out to be respected. The appellant further relies on the case of [Re Estate of Phyllis Muthoni M'Inoti \(Deceased\)](#) [2018] eKLR and submits that the deceased during his lifetime distributed his estate amongst his wives and sons but they did not have money to transfer the properties to themselves and thus he urges the court to look at the deceased's intention and conduct in making the gifts inter vivos.
5. The appellant submits that PW1, PW2 and PW3 testified that the deceased sub divided his land during his lifetime around the year 1998 and that the beneficiaries occupied their portions. Some went ahead and built their respective homes. The appellant contends that the respondent confirmed seeing boundaries on the parcels of land when the deceased was alive. She further confirmed that she was aware of the portions of land where her step brothers reside and that those boundaries were set up by the deceased. As such, the appellant argues that by allocating the various portions and setting boundaries on the respective portions, the deceased expressed his wishes. Further after being assigned the said properties, the wives and sons were put in possession of the portions of the land shown to them. Boundaries were marked and the beneficiaries settled and continue residing there to date. As such, the appellant argues that the properties in question do not form part of the deceased's estate and cannot be distributed.
6. The appellant further submits that no one protested when the deceased divided his land to the beneficiaries, not even the respondent. Therefore, the appellant contends that it was not up to the trial magistrate to delve into the merits of the deceased's grounds for dividing the land the way he did. The appellant further contends that the deceased gave a bigger share to the second house because he almost lost the property and he intervened and single handedly settled the debt.
7. The appellant further argues that the trial court erred by distributing the estate as per Section 40 of the [Law of Succession Act](#). Relying on the case of [Joseph Wairuga Migwi vs Mikielina Ngina Munga](#) [2016] eKLR, the appellant contends that Section 40 of the Act is not applicable as the deceased distributed his estate as he wished and such wishes should not be changed or disrupted. The appellant further contends that unless it can be demonstrated that the wishes of the deceased were illegal, unfair, discriminatory or unjust to the beneficiaries or some of them, such wishes ought to be respected. In this case, the appellant argues that since he saved the suit premises from being auctioned and the deceased gave him a bigger share such a decision cannot be said to be illegal, unfair discriminatory or unjust.
8. The appellant states that the grandchildren of the deceased being Eric Muriithi and Anthony Gitonga, both children of the deceased's daughter received a share of the deceased's estate as separate beneficiaries. The appellant argues that the law allows grandchildren to inherit from their grandparents through their dead parents. As such, the appellant submits that the two siblings were only entitled to one share that ought to have gone to their mother and divide it between themselves as opposed to them receiving two shares directly from the deceased's estate.



## The Respondent's Submissions

9. The respondent submits that it is not in dispute that the deceased died intestate and was survived by the following:-
- 1<sup>st</sup> House
- a. Sarah Muthoni Ndoro – wife (deceased)
  - b. Rose Wambui Ngigi – daughter
  - c. Caroline Wangui Ndoro -daughter
  - d. Mercy Wanjiru Ndoro – daughter (deceased) survived by Erick Muriithi & Anthony Gitonga
  - e. Esther Micere Ndoro - daughter
  - f. Purity Karimi Ndoro - daughter
- 2<sup>nd</sup> House
- a. Elizabeth Wanjiku Ndoro – wife
  - b. Amos Mbungu Ndoro – son
  - c. Josephine Wakini Ndoro – son
  - d. Antony Murage Ndoro – son
  - e. Gladys Micere Ndoro – daughter
  - f. John Mwaniki Ndoro – son
10. The respondent further states that it is not in dispute that the deceased in his lifetime transferred land parcel Mweura/Kagio/2593 to the appellant.
11. Relying on the case of *Re Estate of Miraiji Kithiano (Deceased)* (2017) eKLR the respondent argues that whereas the gift passed to the appellant was valid the gifts the appellants alleges comprising of land parcel numbers Mweura/Kagio/2594, 2595, 2596 and 2597 are not valid. The respondent argues that the said properties are under the name of the deceased and therefore are free and available for distribution to all the beneficiaries and dependants. The respondent further relies on the case of *Re M'Iraiji Kathiano (Deceased)* (supra) and submits that the mere fact that some of the persons are in occupation of the suit properties does not establish the promise or unfulfilled intention of the deceased to make the gifts.
12. In the event the court find some promise or unfulfilled intention was made in respect of land parcel numbers Mweura/Kagio/2594, 2595, 2596 and 2597, the respondent argues that the wishes were illegal, unfair, discriminatory and unjust to some of the beneficiaries. The respondent relies on the cases of *Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi* (2009) eKLR and *Estate of George Chumomibei (Deceased)* (2017) eKLR and submits that the appellant's proposal on distribution of the deceased's properties is unfair and biased against the 1<sup>st</sup> house and discriminatory to the daughters. The respondent cites the case of *Re Estate of Lerionka Ole Ntutu (Deceased)* 2008 eKLR and Article 2(4) of *the Constitution* and submits that *the constitution* is the supreme law and any law including customary law that is inconsistent with it is void.



13. The respondent submits that the estate ought to be distributed pursuant to Section 40 of the [Law of Succession Act](#) in view of the fact that the deceased was polygamous and died intestate. The respondent urges the court to adopt her mode of distribution which is in line with Article 27 of *the Constitution*.
14. The respondent contends that in the absence of their parents, grandchildren are entitled to inherit the share that would be allocated to their parents. Thus the trial court was correct in ordering that land parcel number MWEURA/KAGIO/2594 – 2597 be distributed among 11 units with Eric Muriithi and Antony Gitonga getting one (1) share that belongs to their late mother Mercy Wanjiru Ndoro.

### Issues for determination

15. The main issues for determination are:-
  - a. Whether the trial magistrate erred in distributing the estate of the deceased in accordance with section 40 of the [Law of Succession Act](#);
  - b. Whether the trial magistrate erred in distributing property to the grandchildren of the deceased.

### The Law

16. 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.”

17. 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.

18. 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.”

19. Therefore this Court is under a duty to examine 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 distributing the estate of the deceased in accordance with Section 40 of the [Law of Succession Act](#).



20. According to the appellant, land parcel numbers Mweura/Kagio/2594 – 2597 should not form part of the estate of the deceased as they are not available for distribution. The appellant argues that the said properties were distributed by the deceased during his lifetime and the respective beneficiaries moved into the said pieces of land and developed them.
21. The record shows that the testimony of the protestors through PW1, PW2 and PW3 put together was that their father called them for a meeting and divided his land amongst his wives and sons. The daughters were to inherit the shares of their mothers' share upon death of the mothers. It was their case that the deceased sub divided land parcel number Mweura/Kagio/187 into 5 portions and shared them as follows:-
- a. Mweura/Kagio/2595 – Anthony Murage (son)
  - b. Mweura/Kagio/2594 – Elizabeth Wamwirua Ndoro (wife)
  - c. Mweura/Kagio/2596 – Amos Mbungu Ndoro (son)
  - d. Mweura/Kagio/2593 – John Mwaniki Ndoro (son)
  - e. Mweura/Kagio/2597 – Sarah Muthoni Ndoro (wife)
22. The protestors further testified that they moved into their respective portions and developed the land. It was further stated that the protestors did not effect the transfers of the land save for the appellant's in respect of land parcel number Mweura/Kagio/2593. It was the protestors' further case that the appellant was given a larger share than the rest because he redeemed his father's land from being auctioned. The protestors stated that no one raised any complaints when the deceased shared out his land.
23. The evidence of the applicant was that she was not aware of any loan borrowed by the deceased that led to the appellant taking the responsibility to redeem it so as to be given land L.R. Mwerua/Kagio/2593 by the deceased as pay back. Neither was the applicant aware that the deceased had given gifts inter vivos to children of the second house leaving the first house empty-handed. She described the act of the deceased, if it was true, as unfair and discriminatory to the daughter of both houses. Her mode of distribution was that the assets of the deceased be shared equally between the two houses.
24. It is trite law that a court will not uphold the wishes of a deceased if it can be demonstrated that the wishes are illegal, unfair, discriminatory and unjust. This was portrayed by Makhandia J (as he then was) in *Paul Kirubi Nyingi & Another vs Francis Wanjohi Nyingi* [2009] eKLR :-
- “Unless it can be demonstrated that those wishes of the deceased as captured in the black book were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view. Nothing has been brought to my attention that remotely suggests that the deceased's was biased, unfair and/or discriminatory against any of the beneficiaries in the manner he wanted his estate shared out of his demise. In any event, it would appear that some of the beneficiaries were aware of the contents of the black book during the deceased's lifetime. If they were despatched with the distribution they should have taken it up with him.”
25. From the evidence of the protestors, it is evident that the deceased apportioned his assets in a disproportionate way. He allocated the 1<sup>st</sup> house only 1 acre whereas the 2<sup>nd</sup> house was allocated a total of seven (7) acres. The appellant justified the disproportionate distribution to the fact that he



redeemed his father's property from public auction. Even if this court could find that the act of deceased amounted to his wishes, the distribution of the land is glaringly unequal.

26. Moreover, from the evidence of the protestors, the titles in respect of the said parcels of land are registered in the names of the deceased. The reason given that they did not have money to effect the respective transfers. Section 42 of the Law of Succession Act provides that any gifts given to the beneficiaries during the lifetime of the deceased must be taken to account. They give the reason that they did not have money to effect the respective transfers. Relying on the case of Re Estate of the late Gedion Manthi Nzioka (Deceased) (2015) eKLR that a gift inter vivos may be granted by deed, an instrument in writing or be delivery, by way of declaration of trust by the donor or by way of resulting trust or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. Therefore, it is evident that the only gift that materialized is in respect to land parcel Mweura/Kagio/2593. The appellant moved to effect the transfer of land given to him by the deceased. The other beneficiaries did not do so. It was their duty to ensure that their gifts were valid and complete. The only reason given for failure to effect the transfers was that the protestors had no funds to pay for the transfers. In the absence of evidence that the deceased transferred the respective parcels to the beneficiaries, it is my considered view that the land parcels Mweura/Kagio/2594 – 2597 are free and available for distribution.
27. Both parties gave their proposals on distribution of the estate. The proposal of the appellant is unfair unjust and discriminatory to the daughters and to the 1<sup>st</sup> house. The proposal allocates a total of 7 acres to the 2<sup>nd</sup> house whereas the 1<sup>st</sup> house gets 1 acre. *The Constitution* in Article 27 condemns any form of discrimination. This was stipulated in the Court of Appeal in Peter Karumbi Keingati & 4 Others vs Dr. Ann Nyokabi Gotha & 4 Others Nairobi Civil Appeal No. 235 of 2014 [2015]eKLR held:-
- “ Article 27 of *the Constitution* guarantees for the equality of all before the law and the right to equal protection and the benefit of the law. The Article further proscribes discrimination on grounds including race, sex and marital status. These Articles (27 & 45(3)- parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and dissolution of the marriage) bind the court when applying Section 35 of the Law of Succession Act to ensure that all beneficiaries are treated equally though that may not mean, for purposes of distribution of an estate, a surgical precision in sharing of the assets of the estate.”
28. The trial court found that the gift of the appellant LR. Mwerua/Kagio/2593 was a complete gift intervivos under section 42 of the Law of Succession Act. For that reason the appellant was to remain with the parcel that had already been transferred to the deceased to him. However, the provisions of Section 42 guided the court to exclude the appellant from claiming a share of the estate of the deceased. I have looked at the official searches for the parcels available for distribution and their limited acreage as opposed to the appellants land measuring seven (7) acres. The total acreage of the estate if shared equally by all the beneficiaries will be far much less than what the appellant holds. For this reason, I find that the magistrate was right and fair to the other beneficiaries to exclude the appellant from sharing in the parcels available for distribution.

The court below cited the provisions of Article 27 of *the Constitution* that out laws discrimination on grounds of sex and treated all beneficiaries equally whether male or female. I will walk the same path in declaring all the beneficiaries equal in the eyes of the law. Time is long gone when daughters were disinherited by sons. *The Constitution* came into play to address the customary modes of inheritance irrespective of whether daughters are married or not. In my view the learned magistrate did not err in



her finding in that she ordered that the estate be shared under the provisions of Section 40 of the *Law of Succession Act*. Section 40 provides

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 shall, in the first instance, be divided among the houses in accordance, but also adding any wife surviving him as an additional unit to the number of children.

29. As such, it is my considered view that the trial magistrate did not err by distributing the estate of the deceased in line with Section 40 of the *Law of Succession Act*.
30. The assets available for distribution were five parcels of land of different sizes and shares at Embakasi Ranching company as follows.
  - a. Mwerua Kagio/2594 0.81ha
  - b. Mwerua Kagio/2595 0.606ha
  - c. Mwerua Kagio/2596 0.606ha
  - d. Mwerua Kagio/2597 0.348ha
31. The court directed that the assets be shared equally between the two houses among the following beneficiaries:-
  - a. Rose Wambui Ngige – Daughter
  - b. Esther Micere Ndoro -Daughter
  - c. Caroline Wangui Ndoro - Daughter
  - d. Purity Karimi Ndoro - Daughter
  - e. Eric Murithi  
Antony Gitonga share of Mercy Wanjiru Ndoro (deceased)equally  
2<sup>nd</sup> House
  - f. Amos Mbugungu Ndoro -son
  - g. Jospheine Wakini Ndoro -Daughter
  - h. Judy Muthoni Ndoro -Daughter
  - i. Anthony Murage Ndovo -Daughter
  - j. Elizabeth Wanjiku Ndoro -widow
32. Contrary to what the appellants claims that the court below gave the two sons of Mery Wanjiru Ndoro, a deceased daughter of the 1<sup>st</sup> house equal shares with the beneficiaries is not true. It is clear from the record that the two sons Eric Muriithi and Antony Gitonga were to take their deceased mother’s share equally which is provided for by the law being grandchildren of the deceased.
33. As such, it is my considered view that the trial magistrate did not err by distributing the estate of the deceased in line with Section 40 of the *Law of Succession Act*.
34. In view of the foregoing, I find that the appeal lacks merit and is hereby dismissed.
35. Each party to meet their own costs of this appeal.



**DATED AND SIGNED AT KERUGOYA THIS 25<sup>TH</sup> DAY OF OCTOBER, 2023.**

**F. MUCHEMI**

**JUDGE**

Judgement delivered through video link this 25<sup>th</sup> day Of October, 2023.

