



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**FAMILY APPEAL NO. E1 OF 2020**

**NDILI MUTHOKA ..... 1<sup>ST</sup> APPELLANT**

**PATRICK MUSEMBI MUTHOKA ..... 2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**FERDINAND MAWEU KANYASYA.....1<sup>ST</sup> RESPONDENT**

**MATHIAS MUTULA KANYASYA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the original ruling of the Hon. Otieno J – Resident Magistrate delivered on 24/9/2020 in Makueni Chief Magistrates’ court Succession Cause No. 159 of 2017 – In the Matter of the Estate of the late Kanyasya Ngathu Mulitu)*

**JUDGMENT**

1. In a ruling delivered on 24<sup>th</sup> September 2020, the learned magistrate concluded as follows –

**“Consequently, the grant issued in this cause on 19/01/2018 is hereby confirmed and the deceased’s parcel of land known as MAKUENI/KIKUMINI/172 shall be divided as follows –**

- 1) 1<sup>st</sup> house: Jackson Muthoka 10.2 acres (to be shared by his surviving dependants, the petitioners herein included).**
- 2) 2<sup>nd</sup> house: Mathias Mutula Kanyasya – 10.2 acres**
- 3) David Kanyasya – 10.2 acres**
- 4) Ferdinand Maweu Kanyasya – 10.2 acres.**
- 5) Mbelete Kanyasya – 10.2 acres (to be shared by her surviving dependant)”**

2. Aggrieved by the above distribution of the assets by the magistrates’ court, the appellants, who were petitioners in the succession court Ndili Muthoka and Patrick Musembi Muthoka filed the present appeal on the following grounds –

- 1) That the learned trial magistrate erred both in law and facts when she found that the deceased’s distribution of the estate inter vivos dated 29/8/2004 was null and void thus occasioning miscarriage of justice.**
- 2) The learned trial magistrate erred both in law and facts when in holding that the provisions of section 32 and section 33 were not applicable to this case and therefore greatly misguided herself resulting in miscarriage of justice.**
- 3) The learned trial magistrate erred both in law and facts when she ignored the fact that none of the beneficiaries disputed the distribution of the deceased dated 29/8/2004 in his lifetime and that the beneficiaries were since settled as per the distribution and thus in doing so occasioned miscarriage of justice.**
- 4) The learned trial magistrate erred both in law and facts by awarding land to Mbelete Kanyasya who is deceased daughter of the deceased herein in so doing granted unfair advantage to the 2<sup>nd</sup> house contrary to section 40 of the Law of Succession Act.**

3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant's counsel O.N Makau & Mulei, and those filed by the respondent's counsel M/s Kyalo Muia & company. I note that both counsel have relied on decided court cases.

4. The appellants have raised several grounds of appeal. The first ground is that the trial magistrate erred in finding that the distribution of the estate by the deceased *inter-vivos* on 29/08/2004 was void. I note that this distribution is what is said to be contained in a record of a meeting held on 29/8/2004.

5. It is important to note that no evidence was tendered that the deceased made his own decision to distribute his estate and communicated the said decision. What I see from the proceedings of the meeting of 29/8/2004, is an alleged copy of a draft attempted will which is neither clear, nor dated nor witnessed as required by law. The appellants now say, on appeal, that the document is the customary distribution of the land. In my view, the document was neither Kamba customary distribution of the land by the deceased, nor a will with precise and clear distribution of the estate.

6. Thus in my view, the magistrate was correct in finding that there was no such valid distribution of the land asset by the deceased *inter-vivos* when he was alive. This also covers ground 3 of the appeal.

7. The appellants have also complained that the magistrate erred in finding that section 32 and 33 of the Law of Succession Act (cap 160) did not apply to the matter herein.

8. I note that, section 32 and section 33 of the Law of Succession Act (*cap 160*) deal with property that is excluded from application of the other provisions of the Act. Section 32 provides –

**“32. The provisions of this part shall not apply to –**

**a) Agricultural land and crops thereon, or**

**b) Livestock in various Districts set out in the schedule**

**Schedule**

**West Pokot Wajir**

**Turkana Garissa**

**Marsabit Lamu**

**Samburu Kajiado**

**Mandera Narok.”**

9. On the other hand, section 33 provides for the law applicable to such excluded properties. It states as follows –

**“33 The law applicable to the distribution on intestacy of the categories of property specified in section 32 should be the law or custom applicable to the deceased community or tribe as the case may be.”**

10. From the above provisions of the law, it cannot be said that Makueni is one of the areas where section 32 and 33 of the Law of Succession Act applies. Thus in my view, the learned magistrate did not err when she made a finding that the above provisions of the law did not apply to the present case.

11. In ground 4 of appeal, the appellants complain that the magistrate erred in awarding land to a deceased daughter of the owner of the estate, thus giving advantage to the 2<sup>nd</sup> house contrary to section 40 of the Law of Succession Act.

12. In this regard, I note that section 40 of the Law of Succession Act deals with distribution of a deceased's estate in a polygamous household. The section states as follows -

**40(1) Where an intestate has married more than once under any 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 must 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 section 35 to 38”**

13. My understanding of the above provision of the law, is that no child is excluded from the distribution of a father's estate in an intestate polygamous family. Thus a deceased adult child, especially one who has left behind living children, is not excluded from the distribution of the estate. In my view therefore, the magistrate's court did not err in awarding land to a child of a deceased daughter of the owner of the

estate.

14. From the above findings therefore, I find no merits in the appeal, and dismiss the same.

15. I order that parties bear their respective costs of the appeal, this being a family matter.

**Delivered, signed & dated this 24<sup>th</sup> day of March, 2022, in open court at Makueni.**

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**GEORGE DULU**

**JUDGE**