



**In re Estate of Githumbi Kanyari (Deceased) (Succession Appeal
2 of 2017) [2022] KEHC 12673 (KLR) (29 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
SUCCESSION APPEAL 2 OF 2017**

K KIMONDO, J

AUGUST 29, 2022

RE ESTATE OF GITHUMBI KANYARI (DECEASED)

BETWEEN

JOSEPH KANYARI GITHUMBI APPELLANT

AND

PETER KANYARI GITHUMBI RESPONDENT

*(Appeal from the judgment of J. W. Onchuru, Principal Magistrate, in
Murang'a Succession Cause 231 of 2001 delivered on 17th August 2017)*

JUDGMENT

1. The core issue in this appeal is whether the estate of Githumbi Kanyari (hereafter the deceased) should be divided equally among his four sons or whether it should devolve equally between his two households. Paraphrased, did the trial court err by disregarding section 40 of the *Law of Succession Act*?
2. The facts are fairly straightforward: The deceased died intestate on 10th May 1999 at Thuita Sub-Location. He was polygamous and was survived by one of the two widows and four sons. The first wife had one son while her co-wife had three. The only asset seems to be a parcel of land known as Loc. 14/ Kamune/758 measuring 3.6 acres or thereabouts (hereafter the suit property).
3. A grant was issued by the Chief Magistrates Court at Murang'a jointly to the appellant and respondent on 23rd January 2013. However, there was disagreement on distribution of the suit property.
4. After hearing the testimony of the petitioner and protestor and other witnesses, the learned trial magistrate agreed with the protestor that the estate should devolve equally among the four sons.
5. The appellant was aggrieved and lodged a memorandum of appeal on 8th September 2017. It raises five grounds. I will compress them into two: Firstly, that the learned trial magistrate misapprehended the



- evidence; and, secondly, that he failed to apply clear provisions of the Law of Succession Act where the deceased was polygamous.
6. The learned counsel for the appellant, Mr. Mbue Ndegwa, filed written submissions. The respondent is lay and acting in person. I thus directed that the appeal be heard by oral submissions.
 7. I take the following view of the matter. This being a first appeal to the High Court, it is on both facts and the law. *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123.
 8. The respondent is a son of the second wife. His evidence in the lower court was simple: “Our late father’s intention was that we share equally...each should get one acre”. He also denied that the deceased had distributed the land prior to his death. That aspect was supported by his witness Robert Kariuki (PW2). According to the respondent and another witness (PW3), there were other proceedings before the chief on claims of encroachment between the appellant and respondent.
 9. But according to the appellant, the deceased had informed him since 1977 that the land belonged to the two wives: Margaret Wandori and Esther Wanjiku Githumbi. Being the only son from the first wife, he asserted a right to half of the land.
 10. According to his witness, Kanyari Ndari, the land measuring about 4 acres was never subdivided. According to another witness, Onesmus Karuri, each of the wives “used to cultivate the land on one side” but there was no boundary. He said that the appellant uses half of the land.
 11. It is common ground that the deceased was polygamous. He died intestate. I thus find that section 40 of the Law of Succession Act is generally applicable in this case. It provides-
 - 40 (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 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 within each house shall be in accordance with the rules set out in section 35 to 38.
 12. Section 40 does not however take away the discretion of the court to distribute the estate fairly. By dint of sections 26, 27, 28, 29 and 35 of the Act, as read together with Rule 73 of the Probate and Administration Rules, the court has been clothed with complete discretion to provide for dependents or beneficiaries.
 13. That point was succinctly captured by Omollo J A in *Rono v Rono & another* [2008] 1 KLR (G&F), [2005] 1 KLR 538 at 553. See generally *Re Estate of Morgan Njoroge Gakuo* (Deceased), Nairobi High Court Cause No. 591 of 2007 [2016] eKLR; *Re Estate of Manasseh Mwea Kariuki* (Deceased), Murang’a High Court Cause No. 57 of 2014 [2021] eKLR.
 14. The learned trial magistrate was of the opinion that sharing the land equally between the two houses was unjust. He was “persuaded by the protestor’s [respondent’s] proposal” and not that of the appellant who would end up with “a big share of 1.8 acres and the rest be shared equally”.
 15. I thus disagree with the submissions by Mr. Mbue Ndegwa, learned counsel for the appellant, that the learned trial magistrate misapprehended the evidence or offered no reasons for his decision.



16. Like I discussed earlier, Section 40 of the *Law of Succession Act* does not wipe away the discretion of the court to distribute the estate fairly. By dint of sections 26, 27, 28, 29 and 35 of the Act, as read together with Rule 73 of the Probate and Administration Rules, the court has been clothed with unfettered discretion to provide for dependents or beneficiaries.
17. Dividing the property equally between the two houses would leave the appellant with half of the suit property while his three step-brothers would share only 1.8 acres. Furthermore, there was no cogent evidence that the deceased set such boundaries during his lifetime. Granted those facts, the law and precedents, I decline to substitute my discretion with that of the learned trial magistrate.
18. The upshot is that the appeal is unmerited and is hereby dismissed.
19. Costs normally follow the event and are at the discretion of the court. Considering that this is a succession matter and the disputants are brothers, and in the interests of justice, each party shall bear its own in the lower court and in this appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 29TH DAY OF AUGUST 2022.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Mbue for the appellant instructed by Mbue Ndegwa & Company Advocates.

Respondent (in person).

Ms. Susan Waiganjo, Court Assistant.

