



REPUBLIC OF KENYA



KENYA LAW
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**Ngeretha v Ngeretha (Civil Appeal 32 of 2019)
[2022] KEHC 11346 (KLR) (2 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 11346 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL 32 OF 2019
LW GITARI, J
AUGUST 2, 2022**

BETWEEN

NJOKA NGERETHA APPELLANT

AND

AGNES CIAMBAKA NGERETHA RESPONDENT

JUDGMENT

Background

1. These proceedings relate to the estate of Ngeretha M’Muribia (deceased) who died on 9th May 2006.
2. The deceased was the registered proprietor of the property known as L.R. Karingani/Mugirirwa/411 (the original parcel of land) which was subdivided into 8 resultant parcels now known as L.R. Karingani/Mugirirwa/1648, 1649,1650, 1651, 1652, 1653, 1654 and 1655.
3. The deceased was polygamous with two wives. The late Lydia Kaguna was the first wife but is now deceased. The deceased herein was survived by the second wife, the Respondent herein. The deceased had fifteen (15) children from the two houses as indicated below:
 - a. 1st House
 - i. Njogu Ngeretha – Deceased son
 - ii. Kaari Ngeretha – Daughter
 - iii. Kabubu Ngeretha – Son
 - iv. Japhet Njoka Ngeretha – Son
 - v. Mutegi Ngeretha – Son
 - vi. Karimi Ngeretha – Daughter



- vii. Kinyua Ngeretha – Son
- b. 2nd House
 - i. Lucy Muthoni Micheni – Daughter
 - ii. James Gitonga Nthambara – Son
 - iii. Benson Murithi Nthambara – Son
 - iv. Karen Gatakaa Ngeretha – Daughter
 - v. Stella Kagendo Nthambara – Daughter
 - vi. Poline Kawira Nthambara – Daughter
 - vii. Ellyjoy Wanja Ngeretha - Daughter
- 4. A grant of representation was issued on 30th May 2018 to the Respondent herein in Chuka SRM Succession Cause No. 10 of 2017. Vide an application dated 27th March 2018, the Respondent applied for confirmation of grant. The Respondent contended that the deceased subdivided the original parcel of land with the intention that the resultant land parcels would be distributed as follows:
 - a. L.R. Karingani/Mugirirwa/1648
 - i. The deceased, his two wives and all the deceased’s daughters
 - b. L.R. Karingani/Mugirirwa/1649
Benson Murithi Nthambara - Son (Whole)
 - c. L.R. Karingani/Mugirirwa/1650
James Gitonga Nthambara - Son (Whole)
 - d. L.R. Karingani/Mugirirwa/1651
Japhet Njoka Ngeretha – Son (Whole)
 - e. L.R. Karingani/Mugirirwa/1652
Kinyua Ngeretha – Son (Whole)
 - f. L.R. Karingani/Mugirirwa/1653
Mutegi Ngeretha – Son (Whole)
 - g. L.R. Karingani/Mugirirwa/1654
Kabubu Ngeretha – Son (Whole)
 - h. L.R. Karingani/Mugirirwa/1655
Njogu Ngeretha - Son (Whole)
- 5. According to the Respondent, Njogu Ngeretha, James Gitonga and Benson Murithi went for their titles while the rest of the sons had not gone for their titles at the time the deceased died. James Gitonga sold off his portion. The Respondent thus contended that the said Njogu Ngeretha, James Gitonga and Benson Murithi were not entitled to a share of the deceased’s estate having benefited inter vivos and that the only share of the estate that was available for distribution was L.R. Karingani/Mugirirwa/1648, 1651, 1652, 1653 and 1654.



6. As per paragraph 12 of the affidavit sworn in support of the application for confirmation of the grant, the Respondent proposed the distribution of the deceased's estate as follows:
- a. L.R. Karingani/Mugirirwa/1648
 - i. Agnes Ciambaka Nthambara – Widow (0.25 Acres)
 - ii. Lucy Muthoni Micheni – Daughter (0.25 Acres)
 - iii. Karen Gatakaa Ngeretha – Daughter (0.25 Acres)
 - iv. Stella Kagendo Nthambara – Daughter (0.25 Acres)
 - v. Poline Kawira Nthamabara – Daughter (0.25 Acres)
 - vi. Ellyjoy Wanja Ngeretha – Daughter (0.25 Acres)
 - vii. Karimi Ngeretha – Daughter (0.25 Acres)
 - viii. Kaari Ngeretha – Daughter (0.25 Acres)
 - b. L.R. Karingani/Mugirirwa/1651
Japhet Njoka Ngeretha – Son (Whole)
 - c. L.R. Karingani/Mugirirwa/1652
Kinyua Ngeretha – Son (Whole)
 - d. L.R. Karingani/Mugirirwa/1653
Mutegi Ngeretha – Son (Whole)
 - e. L.R. Karingani/Mugirirwa/1654
Kabubu Ngeretha – Son (Whole)
7. The Appellant had filed an affidavit of protest sworn and filed on 21st January 2019. He took issue with the ownership of L.R. Karingani/Mugirirwa/1650 alleging that the children of the 1st House were raised on the said land parcel and had developed their homestead there before they were supposedly evicted forcefully by the Respondent and her sons, and the said parcel of land disposed to one Wilfred Kinyua Njoka and one Esther Makandi, who are the current joint owners.
8. In dismissing the Appellant's protest, the subordinate court noted from the green card provided that the said land parcel L.R. Karingani/Mugirirwa/1650 was registered under James Gitonga Nthambara in 2009 and later, Wilfred Kinyua Njoka and Esther Makandi bought the land jointly. The learned magistrate stated that it only made sense that the parcel was sold by James Gitonga Nthambara who was registered owner at the time.
9. The subordinate court further went with the assumption that the deceased herein predeceased her late daughter, Njeri Nthambara. The court thus held that the children of the late Njeri Nthambara were entitled to a share of the estate herein. As such, the court held that the estate would be distributed as follows:
- a. L.R. Karingani/Mugirirwa/1648
 - i. Agnes Ciambaka Nthambara – Widow (0.1561 Acres)
 - ii. Njeri Nthambara – Deceased Daughter (0.1561 Acres)



- iii. Lucy Muthoni Micheni – Daughter (0.1561 Acres)
- iv. Karen Gatakaa Ngeretha – Daughter (0.1561 Acres)
- v. Stella Kagendo Nthambara – Daughter (0.1561 Acres)
- vi. Poline Kawira Nthamabara – Daughter (0.1561 Acres)
- vii. Ellyjoy Wanja Ngeretha – Daughter (0.1561 Acres)
- viii. Karimi Ngeretha – Daughter (0.1561 Acres)
- ix. Kaari Ngeretha – Daughter (0.1561 Acres)
- b. L.R. Karingani/Mugirirwa/1651
Japhet Njoka Ngeretha – Son (Whole)
- c. L.R. Karingani/Mugirirwa/1652
Kinyua Ngeretha – Son (Whole)
- d. L.R. Karingani/Mugirirwa/1653
Mutegei Ngeretha – Son (Whole)
- e. L.R. Karingani/Mugirirwa/1654
Kabubu Ngeretha – Son (Whole)

The Appeal

10. Dissatisfied by the said judgment, the Appellant filed the instant appeal vide the Memorandum of Appeal dated 20th November 2019. The appeal is based on the following grounds:
 - a. The Learned Magistrate erred in law and fact by failing to regard the facts that the Appellant was forcefully evicted from his own matrimonial land by the Petitioner’s sons.
 - b. The Learned Magistrate erred in law and fact by failing to ensure the directions were taken on how to proceed with the matter when he took the matter.
 - c. The Learned Magistrate erred in law and facts by proceeding to hear and determine the main cause without considering the protest by the Appellant.
 - d. The Learned Magistrate erred in law and fact by failing to regard that the evidence by the Appellant and other beneficiaries in the estate hence she proceeded to determine the matter.
 - e. The Learned Magistrate failed to appreciate the submissions of the Appellant by finding in favour of the Respondent herein.
 - f. In all circumstances of the case, the findings of the Learned Magistrate are insupportable in law or on the basis of the evidence adduced.
11. The appeal was disposed off by way of written submissions.



The Appellant's Submissions

12. The Appellant filed his submissions on 12th January 2022. He largely submitted on the issue of whether the deceased died intestate. It was his submission that the deceased left behind a valid oral will which the lower court failed to take into consideration.
13. He further submitted that succession cause filed before the lower court was irregular as the Respondent did not get the necessary consent of all the parties that are dependents of the deceased. he contends that the wishes of the deceased were ignored, and that the distribution as effected was unjust as it led to his eviction.
14. The Appellant finally submitted that the findings of the learned magistrate were not based on law and his protest ought to have been allowed. He thus urged this court to allow the appeal and set aside the decision of the trial court.

The Respondent's Submissions

15. The Respondent filed her comprehensive submissions through her advocate on record on 12th January 2022. She submitted that issue of ownership of the L.R. Karingani/Mugirirwa/1650 should not be entertained by this court as it falls within the jurisdiction of the Environment and Land Court and not this Court as a probate court.
16. On the issue of procedure taken by the subordinate court in giving directions in the matter, the Respondent submitted that the same was never challenged during the trial and the Appellant should therefore not raise the same at this stage.
17. On whether the protest should have been heard first before the main cause, the Respondent submitted that once a protest is filed it forms part of the main cause and thus cannot be heard separately.
18. The Respondent finally submitted that the trial magistrate did take the Appellant's evidence and submissions into account, applied the correct legal principles on the evidence on record and arrive at a correct decision. She thus urged this court to find that the Appellant has no cause of action in this appeal against the Respondent.

Issues for determination

19. Having considered the record of appeal and the respective submissions by the parties, it is my view that the issues for determination by this court are as follows:
 - a. Whether the deceased died intestate
 - b. Whether the distribution of the subject as effected by the subordinate court was in accordance with the law.
 - c. Jurisdiction.

Analysis

20. This is an appeal from the lower court. Section 50(1) of the [Law of Succession Act](#) (hereinafter the "Act") states as follows:

“An Appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.”



21. As an appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny before drawing its conclusion. However, the court must bear in mind the fact that it did not have an opportunity to see and hear the witnesses firsthand. [See: *Selle v Associated Motor Boat Company Limited* [1968] E.A. 123]

22. I shall now proceed to analyse the issues identified herein above.

Whether the deceased died intestate

23. Intestacy is defined under Section 34 of the [Law of Succession Act](#) as follows:

“A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.” [Emphasis mine]

The Act gives a definition of will. Under Section 2 it states:

“Will” means the legal declaration of a person of his wishes or intention regarding the disposition of his property after his death, duly made and executed according to the provisions of part II and includes a codicil”

It follows though not defined under the Act, intestacy is where a person dies without a will. A will may be written or oral.

24. In this case, the Appellant contends that, in dismissing his protest, the trial magistrate erred by ignoring the fact that there was a valid oral will in place that stipulated how the mode of distribution was to be done.

25. The validity of an oral will is dictated by Section 9(1) of the [Law of Succession Act](#) which states:

- “1) No oral will shall be valid unless –
- a) it is made before two or more competent witnesses
 - b) the testator dies within a period of three months from the date of making the will...”

26. At the hearing of his protest, the Appellant testified on cross examination that the deceased left a will which was witnessed by Benard Njau, the late Kireu(deceased), Kawegi, the late M’Mbaka. He stated that the late M’Mbaka was the one who wrote the will. The Appellant did not produce the alleged will despite stating that he had it. Coming to this appeal, he now states that there was an oral will.

27. Sections 107(1) and 109 of the [Evidence Act](#) (Chapter 80 of the Laws of Kenya) provide as follows:

“107(1). Whoever desires any court to give judgment as to any legal right or liability dependent in the existence of facts which he asserts must prove that those facts exist.”

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact lie on any particular person.”

28. It follows that whether or not the deceased had an oral or written will is not the issue. What is necessary for this court to determine is the evidence that was tendered to prove the existence and validity of the alleged will. However, the Appellant did not tender any documents or called any witnesses to support



his allegations. In the absence of evidence to prove that there was a will, whether oral or written, the trial court was therefore correct in finding that the deceased died intestate.

Whether the distribution of the estate was done in accordance with the law

29. The deceased in this case was survived by a spouse and children. It follows that the distribution of the estate should have been guided by the provisions of Sections 35 and 40 of the *Law of Succession Act*. Sections 35(1) of the Act states:

- “(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
- (a) the personal and household effects of the deceased absolutely; and
 - (b) a life interest in the whole residue of the net intestate estate:
- Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”

30. Section 40 of the Act provides that:

- “(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.”

31. In this case, it is not in dispute the deceased was the proprietor of L.R. Karingani/Mugirirwa/411 which he subdivided into 8 parcels in his lifetime, allocated the different parcels to his wife and children, and some children consequently took out titles over the apportioned land parcels. The subdivisions comprise of the land parcels L.R. Karingani/Mugirirwa/1648-1655.

32. Noting that some beneficiaries were awarded land by the deceased inter vivos, Section 42 of the *Law of Succession Act* comes into play and should be taken into account in determining the ultimate entitlement of such beneficiaries. The said provision states that:

- “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.”



33. *In Re Estate of Marete Mbui alias M^oMarete M^oMbui alias Justus Marete (Deceased)* [2017] eKLR the court stated that:

“...section 42 of the *Law of Succession Act* serves two important purposes; one, it fends off selfish tendencies of human beings in seeking for double portions in the estate of the deceased; and two. It enables the court to attain equity in the sharing out of the estate property among the rightful beneficiaries.”

34. Section 28(d) of the *Law of Succession Act* also provides that:

“In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

- a.
- b.
- c.
- d. whether the deceased had made any advancement or other gift to the dependant during his lifetime”

35. In this case, the following beneficiaries took out titles over the lands they were allocated:

- a. L.R. Karingani/Mugirirwa/1649
Benson Murithi Nthambara - Son (Whole)
- b. L.R. Karingani/Mugirirwa/1650
James Gitonga Nthambara - Son (Whole)
- c. L.R. Karingani/Mugirirwa/1655
Njogu Ngeretha - Son (Whole)

36. The remaining estate that was therefore available for distribution was land parcels L.R. Karingani/Mugirirwa/1648, 1651, 1652, 1653 and 1654. The Respondent proposed the distribution as stated in paragraph 6 herein above. However, the Appellant took an issue with the distribution of L.R. Karingani/Mugirirwa/1648.

37. In considering his protest, the trial court noted the Appellant’s contention that he had built on L.R. Karingani/Mugirirwa/1650 but was allegedly evicted by the Respondent and her sons and the land sold off to third parties. Guided by the evidence on record, that being the green card, the court noted that the said land was registered in the name of James Gitonga and later sold to Wilfred Kinyua and Esther Kinyua. In his protest, the Appellant’s proposed that the said James Gitonga and his mother were entitled to get L.R. Karingani/Mugirirwa/1648. It is clear from the foregoing that James Gitonga did sell his portion of land and after the demise of the deceased, hoped to get another portion from the estate. I agree with the trial court that the land could not have been sold to the said Wilfred Kinyua and Esther Kinyua if not by James Gitonga.

38. I observe that the Appellant’s proposed mode of distribution suggests that the daughters of the deceased are not entitled to a share, leave alone an equal share, of the estate. The Appellant’s proposed mode of distribution offends the principles of natural justice, equity and good conscience and the same could not be adopted by a court of law.



39. *The Constitution*, which takes hierarchical primacy in the mode of exercise of jurisdiction, outlaws any law that is discriminatory. Article 27 of *the Constitution* 2010 expressly prohibits discrimination on the basis of gender or marital status. All children are equal before the law as such, the distribution of the deceased's estate ought to have been at par between the deceased's sons and daughters. However, and as noted by the trial court, the deceased had apportioned the estate according to his wishes and some beneficiaries had already taken possession of the portions. In the circumstances, it was only just that the court avoids unfair displacement of those who had already occupied their respective portions. Thus, it is my view that the distribution of the subject estate by the trial court was just and in accordance with the law.

The appellant claims that he was evicted from estate. This is a matter which fall within the jurisdiction of environment and land court established under Article 162(2) of *the Constitution*. The Land Parcel No. 1650 was not registered in the name of the deceased. It did not form part of his estate and could not be included in the distribution

Conclusion

40. The upshot of the foregoing, in my view, is that the appeal lacks merit and ought to be dismissed.
41. I also note that the extracted decree did not include the land parcel no. L.R. Karingani/Mugirirwa/1648 which the trial court correctly allocated to the Respondent and the deceased's daughters, including the late Njeri who survived the deceased. The same was to be shared equally at 0.1561 acres and the decree should thus have reflected the same.

I find that the appeal lacks merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 2ND DAY OF AUGUST 2022.

L.W. GITARI

JUDGE

2/8/2022

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

