



REPUBLIC OF KENYA



**In re Estate of Zakayo Mulei (Deceased) (Civil Appeal 61 of 2018)
[2022] KEHC 13153 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 61 OF 2018
GV ODUNGA, J
SEPTEMBER 26, 2022
IN THE MATTER OF THE ESTATE OF ZAKAYO MULEI (DECEASED)**

BETWEEN

GEORGE KIOKO MULEI APPELLANT

AND

JOHN MUTUA Z. MULEI 1ST RESPONDENT

BONIVENTURE PETER NZIOKI 2ND RESPONDENT

(Being an appeal from the judgement of the learned Senior Principal Magistrate Hon. D. Orimba sitting at Kangundo his Succession Cause No. 45 of 2016 and dated 5/12/2018)

JUDGMENT

1. On December 5, 2018, the Learned Senior Principal Magistrate, Kangundo (Hon D Orimba) delivered a ruling in Succession Cause No 45 of 2016 by which he dismissed a protest that had been made by the Appellant herein in respect of Summons for Confirmation of Grant dated June 27, 2017. The Summons were taken out by the Respondents herein. It ought to be pointed out that all the three parties herein were appointed joint administrators of the Estate of the deceased herein. It is not disputed that the deceased had three wives and that, the 2nd Respondent, the 1st Respondent and the Appellant were from the houses of the 1st wife, 2nd wife and 3rd wife respectively.

The Protest

2. In the affidavit in support of the said Summons, it was averred that the deceased's properties were Plot No xx Kangundo Market, Kangundo/Muisuni/xxx and Kangundo/Isinga/xxxx. It was proposed that Plot No xx Kangundo Market be shared equally by PBNM and JMM; Motor Vehicle Reg No xxxx and Kshs 50,000.00 be confirmed to GKM; and Kangundo/Muisuni/xxx and Kangundo/Isinga/xxxx be confirmed to the various beneficiaries whose who were identified therein.



3. In his affidavit protest, the Appellant averred that while the 1st and 2nd Respondents represented the 2nd and 1st houses respectively, he was representing the 3rd house. In his said protest he took issue with the manner in which the Grant was drawn and issued. It was his case that the deceased herein did intestate on May 30, 1998. According to him, some of the properties sought to be distributed vide the said Summons were never included in the Petition forms as required and that some of the said properties did not exist and were unknown to him. In his view, the deceased's properties were Plot No xx Kangundo Market, Kangundo/Muisuni/xxx and Kangundo/Isinga/xxxx.
4. He therefore protested at the manner in which the distribution of the deceased's assets was proposed by the Respondents herein. In his view Plot No xx Kangundo Market ought to have been divided equally amongst all the three houses of the deceased and ought to have been registered in the three names of the administrators to hold in trust for their benefit and for the benefit of all the beneficiaries of the estate. According to him, the proposal by the Respondents was informed by the fact that they had sold the property to a third party without the consent of the third house before the commencement of the succession proceedings. He disclosed that the third house had already filed a case challenging the said transaction being SPMCC No 10 of 2016. It was his averment that the Respondents' intention was to confirm the granting order to validate the said transaction.
5. According to the Appellant, motor vehicle registration no xxxx was sold in 1992 by the said Respondents and that the 3rd house had never set its eyes on it. He also denied knowledge of the alleged KShs 50,000/- as it had not been declared as one of the assets of the deceased's estate and the 3rd house was unaware of its source.
6. It was his view that Kangundo/Muisuni/xxx be shared to the house of N while Kangundo/Isinga/xxxx be shared equally between the houses of M and N. From the evidence on record, the deceased's wives were MN, NM and NM.
7. In his evidence, the Appellant stated that the dispute was over Plot No xx Kangundo Market which he proposed be distributed equally amongst all the three houses. He stated that the other two houses did not want their house to get a portion of the said plot for the reason that it had been sold to one RMM and he exhibited a copy of the agreement. He also stated that the deceased who died without writing a Will, left behind a pick up vehicle which was taken by the first wife. He denied that the deceased left KShs 50,000/- with the 3rd wife. In his evidence, the clan did not subdivide the deceased's property as the clan had no power to do so.
8. In cross-examination he admitted that the deceased was not his biological father and that by the time his mother was married, the deceased had acquired some properties with the 1st and 2nd wives. He admitted that the plot in question was acquired a long time ago though he could not confirm whether it was acquired in 1943 but stated that he was born in 1947. He took issue with the manner in which the deceased's properties were divided. According to him the deceased had expressed his wish that Plot No xxx be given to the 2nd wife while Plot No xxxx be given to the 1st and 3rd wives.
9. He maintained that he was not informed when Plot No 86 Kangundo Market was being sold but admitted that prior to its sale, it was the 1st and 2nd wives who were receiving the rent therefrom and that his wife was not in possession of the said Plot having been forced out by the clan. He however admitted that the clan did not force his mother from plot no xxxx and that by the time he married his wife plot no xx had been acquired and that plot nos xxxx and xxx were inherited.
10. In his evidence by the time his father died in 1988 only his mother was alive among the wives and that the 1st and 3rd wives had been settled on plot no 1327 while the 2nd wife was settled on plot no xxxx.



However, plot No xxxx was owned by the 3rd and 2nd wives while plot no xx was being used by all the houses. He however did not know when that plot was acquired by the deceased.

11. BTK, OW2, the wife of the appellant testified that she was married in 1977 when the deceased was still alive. In her evidence, she was staying on plot no xxxx with the family from the 1st house though the deceased had not subdivided the said plot. According to her plot no xx Kangundo was being used as a restaurant by all family members and proposed that the same be divided into three portions. She however disclosed that the clan had resolved that the 3rd wife had no entitlement to plot no 86 and admitted that she was unaware how it was acquired since she did not know when her mother in law was married in the family. It was her evidence that she was unaware of what happened in 1943 but admitted that her brothers in law were older than her.
12. According to her, the said plot no xx had already been sold to two people without their knowledge though it was still in the name of the deceased.

The Respondents' Case

13. On behalf of the Respondents, PBNM, testified that he was one of the beneficiaries from the 1st wife having been the 7th born in 1954. According to him their first born was born in 1920' and together with the 2nd and 3rd born they were all alive. It was his evidence that the 2nd wife was married before he was born but she came with two children. The 3rd wife was however, married in 1959.
14. According to his evidence, the shop in question was built with mud and that his wife and the second wife contributed in its acquisition and construction. However, it was his mother and the 2nd wife who operated the shop. According to him, when the shop was leased out, it was his father who used to collect the rent. He stated that his mother passed away in 1957, the second wife died in 1987 and the father died in 1988. According to him, the said shop had two lanes, plots A and B. It was his evidence that the father left the plot to the 1st and 2nd wives and that the other plots were also subdivided by the deceased and there was no issue with their subdivision. According to him, the clan also confirmed the position regarding plots nos xxxx and xxxx and that the Appellant herein had no problem with the manner in which plot no xxx plot no xxxx were subdivided.
15. According to him, the 3rd wife was given a pick-up which the 3rd wife gave to Samuel in exchange for a house. However, the amount in the account was given to the 2nd wife. It was his evidence that he sold what belonged to him since it was him who was paying the rates as each account had distinct accounts with the council. He stated that the 3rd house had no claim over the plot.
16. In cross-examination, he stated that he was born in 1954 while the 3rd wife was married in 1959 by which time he was 6 years old. He however admitted that he had no minutes showing that the deceased subdivided the plot. He explained that the deceased had three wives and that plot no 86 was in the name of the deceased but he also had plots nos xxx and xxxx, a pick-up and Kshs 54,000.00 which was given to the third wife. While admitting that there was no will he insisted that he was the one paying rates and had receipts for the same. He stated that he sold the plot to one Maithya in 2013.
17. In re-examination, he stated that the third wife received the money and the pick-up.
18. PW2, JMM, testified that he was the assistant chief for the area. According to him, there was a time his chief sent him to attend a meeting by the clan over the deceased's property. In his evidence, the clan only confirmed the property the way the deceased had proposed. In his evidence, the deceased stated that the 3rd wife was to be given a pick up. He explained that he only attended the meeting once and that they recorded the minutes and he reported back to the Chief. According to him, he did not know the wives but stated that the deceased had three wives but he was unaware of the number of children the



deceased had. By the time of the meeting the deceased was already dead. He stated that he did not know how the deceased acquired the property in question and he was not aware of any dispute over the plot.

The Ruling

19. In his ruling the learned trial magistrate found that since the deceased died intestate, the applicable provision when it came to distribution of his estate was section 40 of the *Law of Succession Act*. He found that the only property whose distribution was in contest was plot no 86 Kangundo. Based on the decision *In the Matter of the Estate of Mwangi Giture (Deceased) [2004] eKLR* and *Nyeri Civil Appeal No 131 of 2012 – Douglas Njuguna Muigai vs John Bosco Maina Kariuki and Another [2014] eKLR* the trial court found that the failure by the court to take into account the contributions made by the spouses towards the acquisition of the property amounts to discrimination.
20. The Court found that from the evidence on record, the 3rd wife never contributed to the acquisition of the said plot and that it was the 1st and 2nd wives who occupied the same even before the deceased passed away. The Court also noted that the Appellant was not a biological son of the deceased yet he was the only one protesting and that none of his siblings testified in his support.
21. The trial Court accordingly found that the protest had no basis as the Appellant had been adequately provided for and it would be unfair to dislodge the 1st and 2nd wives from the property they had been using even during the lifetime of the deceased.

Grounds of Appeal

22. Aggrieved by the said decision, the Appellant preferred this appeal in which he sets out the following grounds:
 - a. The learned magistrate erred in fact and in law in finding that only the 1st and 2nd wives contributed to the acquisition of the Plot No xx in Kangundo Market.
 - b. The learned magistrate erred in fact and in law in finding that only the 1st and 2nd wives were entitled to a share of Plot No xx by merely having been married earlier than the 3rd wife.
 - c. The learned magistrate erred in fact and in law in finding that the Third Wife was not entitled to a share of Plot Number xx in Kangundo Market.
 - d. The learned magistrate erred in fact and in law in failing to recognize that indirect contribution of the 3rd wife in property known as Plot Number xx in Kangundo Market
 - e. The learned magistrate erred in fact and in law by ignoring the Protestors assertion that the Respondents had sneaked in unknown properties with a view of misleading the Court.

Appellant's Submissions

23. It was submitted that this being a first appeal the rules governing the evaluation hereof are well established and reliance was placed on the case of *Francis Lokadongoy Lokogy vs Reuben Kiplagat Kiptarus [2020] eKLR* and it was submitted that this court has the authority under Section 78 of the *Civil Procedure Act*, 'to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions.'
24. According to the Appellant, the following are the key issues for determination herein:
 - a. Who are the beneficiaries of the deceased's estate?
 - b. What are the deceased's assets which are available for the distribution?



- c. Whether the Trial Court erred in fact and law in distributing the deceased's estate as shown in the Certificate of Confirmation?

a) Who are the beneficiaries of the deceased's estate?

25. It was submitted that it is imperative that the Court in a succession cause to determine who the actual beneficiaries of the deceased's estate for the Court before embarking on the mode of distribution are. It was noted that it was evident that at the time of issuing of the letter from the chief, all the deceased's wives were dead. Therefore, when the Court was making its ruling on May 23, 2019 it was only the deceased's children who were the actual and real beneficiaries of the deceased's estate. None of the wives was available and should have formed the basis of the distribution of the deceased's estate. It was submitted that by finding that it was unfair to dislodge the first and second wife from the property they had been using even when the deceased was alive; that it was only the first and the second wife who were receiving rent; and that the Plot had only two doors which was occupied by the first and second wife respectively, the Trial Court came up with its own evidence for the following reasons:
- i. From the evidence of all the witnesses on record, the first and second wives died in the years 1955 and 1957 respectively hence cannot be said that, they had been using and receiving rent'.
 - ii. Nowhere did the Protestor in the evidence on record state that the first and second wives were receiving rent.
 - iii. That the determination in favour of the alleged first and Second wives, was not reflected in the Certificate of Confirmation of Grant.
26. The Appellant cited Rule 40(3) (a) & (b) of the *Probate and Administration Rules* and it was submitted that the wives of the deceased having died long before the institution of the Succession proceedings should not have formed the basis of the determination and that according to the letter from the Chief, the deceased's beneficiaries are twenty (21)-who are deceased's children.
27. As regards the deceased's properties that were available for distribution, it was submitted that though the issue of Plot No xx Kangundo market, Kangundo/Muisuni/xxx and Kangundo/Isinga/xxxx as forming part of the deceased's estate is not contested, the issue of motor vehicle registration No xxxx and Kshs 50,000 was contested and that no evidence was adduced as to the existence and or ownership of the said motor vehicle and the money as required under Sections 107, 108 & 109 of the *Evidence Act* as read with Rule 40(4) of the Probate and Administration Rules.
28. Taking into account the foregoing, it was submitted that the trial Court erred in considering the motor vehicle and Kshs 50,000 as forming part of the deceased's estate and that only Plot No xx Kangundo, Kangundo/Muisuni/xxx and Kangundo/Isinga/xxxx can be deemed as forming part of the deceased's estate based on the evidence on record.
29. On the issue whether the Trial Court erred in fact and law in distributing the deceased's estate as shown in the Certificate of Confirmation, it was submitted that the Court did not in any way pronounce itself on the mode of distribution of the estate as a whole and that it only distributed Plot No xx. It was noted that the following stands out from the Ruling and the Certificate of Confirmation of Grant;
- i. Nowhere, in the said ruling did the Court state that the Grant had been confirmed.
 - ii. Nowhere in the said ruling did the Court state that it was adopting the mode of distribution proposed by the Petitioners in totality



- iii. Nowhere in the said ruling did the Court state that it had considered the mode of distribution as proposed by the Protestor over Kangundo/Muisuni/xxx and Kangundo/Isinga/ xxxx
 - iv. Nowhere in the said Ruling was it indicated the reasons for not considering the mode of distribution proposed by the Protestor over Kangundo/Isinga/xxxx & Kangundo/Muisuni/xxx.
 - v. Nowhere did the Court address the issue of existence and ownership of motor vehicle registration No xxxx and Kshs 50,000.
 - vi. It was all clear that the Court in the Certificate of Confirmation of grant adopted the proposals by the Petitioner.
 - vii. It was also clear that whereas the Trial Court in the Ruling gave plot No xx Kangundo to the deceased's 1st & 2nd wives but in the Certificate of confirmation of Grant, the said plot is registered in the name of the PB and JM.
 - viii. No order was issued determining the mode of distribution hence the Certificate of Confirmation not anchored on the proceedings.
 - ix. Nowhere did the Court give an explanation as to the law it applied in the distribution of the estate.
 - x. Some beneficiaries were getting more than one share of the deceased's estate absolutely whereas some beneficiaries had been left out.
30. According to the Appellant, it is curious that whereas the Trial Court distributed only Plot No xx in the Ruling, the certificate of Confirmation of Grant captured other properties. It was even also curious to note that the Court was alleging that the Protestor has been adequately provided for whereas some of the assets he was given namely motor vehicle registration No xxxx and Kshs 50,000 which he states clearly in the Protest were none existent after having been sold by the 1st and 2nd Petitioners.
31. Indeed, it was noted, BP in confirming that the motor vehicle was not available for distribution testified that the Pick Up was given to the third wife and the money in the account was given to the second wife. Thus corroborating the Appellant's objection that the said assets did not form part of the deceased's estate hence not available for distribution.
32. According to the Appellant, whereas there was an argument that the 1st and 2nd wives who died in the years 1955 and 1957 contributed in the acquisition and development of Plot No xx, no evidence was led to show when it was acquired, when it was developed and in what way the 1st and 2nd Wives contributed whether directly or indirectly. Even if they could have contributed, it was submitted that the sharing would have been between the 1st and the 2nd wives on one part and the deceased on the other part wherein the Third house would have been entitled to a share of the deceased portion in Plot No xx.
33. The Appellant accused the trial Court of trying to introduce its own evidence by finding that the 1st and 2nd wives were using the Plot No xx while both died in the years 1955 and 1957. Secondly, even though the Protestor testified that it was being used by all houses, the Court never addressed this fact. It was further noted that the Appellant's case that Plot No xx had been sold by the 1st & 2nd Petitioners, though affirmed by the Bonifenture Peter who stated in his testimony that he sold the Plot to Maithya in 2013, the Trial Court aided an illegality with all this evidence on record.
34. It was submitted that though the Appellant proposed to have the estate distributed amongst the deceased's three houses representing each of the Houses, the Trial Court did not comment or in any



way determine the Objector's proposal. According to the Appellant, the law on distribution of the deceased estate is well settled. Having established that it is only the deceased's children-twenty one (21) of them surviving him at the time of the distribution of the estate, the estate could only be distributed amongst the deceased's children excluding the wives who were long deceased. Reference was made to the case of *In Re Estate of John Musambayi Katumanga – (Deceased) [2014] eKLR*, where Musyoka, J held that;

' The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is 'equally' as opposed to 'equitably'. This is the plain language of the provisions. The provisions are in mandatory terms – the property 'shall be equally divided among the surviving children.' Equal distribution is envisaged regardless of the ages, gender and financial status of the children'

35. It was contended that in the present Case, the Deceased having been survived by Children only, the deceased's estate should have been distributed amongst his children since his wives died long ago and should not have been factored in the distribution. In support of this position the Appellant relied on Section 38 of the *Law of Succession Act*.
36. Based on the foregoing, this Court was urged to find that this Appeal is merited, allow the same and proceed to redistribute the Estate equally amongst all the beneficiaries of the deceased's estate.

Respondents' Submissions

37. On behalf of the Respondents, it was submitted that the succession proceedings in Kangundo Senior Principal Magistrate Court (hereinafter referred to as the lower court) started after the Respondents cited all their siblings to either petition for or refuse letters of administration and when no one did petition for letters of administration the Respondents petitioned for the said letters of administration. The Appellant joined the lower court proceedings as an Objector to grant of temporary letters of Administration to the two Respondents. In the said objection at ground number C the appellant said:-

' That the house of the third wife where the objector is a beneficiary were not consulted in the succession and their representative is not an administrator of the estate hence their interest will not be carted for by the Petitioners as they are involved in the Succession Cause.'
38. It was submitted that pursuant to the said concern by the objector the advocates for the three parties with the instructions of the siblings of each of the three parties recorded a consent making the three parties administrators with a view to having each administrator represent their house. The said consent was however recorded despite the fact that no written consents were given by each and every beneficiary individually. However, the third house was represented by the law firm of Priscillar Kioko and company while the first and second houses were represented by the firm of Kingoo Wanjau and Company and the three houses consented to being appointed co-administrators each representing their house.
39. The Respondents then filed Summons for Confirmation of Grant together with an Affidavit in Support thereof which Summons were objected to by an Affidavit of Protest to Confirmation of Grant



sworn by the Appellant on September 22, 2017. In the said affidavit, it was noted that the Appellant deposed in paragraph two that:-

' The 1st and 2nd administrators are my step brothers representing the 1st and the 2nd house of the deceased while I represent the House of the 3rd wife.'

40. It was disclosed that in the said Affidavit of Protest the Appellant declared the mode of distribution of the estate of the deceased preferable to him and to his siblings which was that the assets should be shared as per the three wives.
41. It was this stalemate that led to the hearing of the Objection by way of oral evidence.
42. According to the Respondents, following the dismissal of the Protest, the Summons for Confirmation of Grant succeeded meaning the mode of distribution proposed by the objector was rejected and the mode of distribution suggested by the Respondents upheld and a certificate of Confirmation of Grant was issued in terms of paragraph five of the Affidavit in Support of Summons for Confirmation of Grant.
43. It was noted that the dispute was only about one property out of all properties of the deceased which was plot number xx Kangundo. The Appellant's proposal that the same be divided equally by three houses was rejected and the Respondents' proposal that the said plot be given to the 1st and the 2nd wives of the deceased succeeded. The rest of the assets were divided as done by deceased when he lived and nothing changed as no one not even the appellant and his siblings objected to that. The reasons advanced by the Respondents was that the said plot was acquired and developed by the deceased and his first two wives before the third wife got married. That from the onset deceased and his first two wives agreed that the plot was for the said two houses hence the manner in which it was officially divided in his lifetime into two registered parts that is plot xx A and B.
44. Apart from that it was submitted that the plot was constructed in a manner that showed that it comprised of two equal sections for each of the two wives who collected rent and occupied each their distinct section before and after the demise of the deceased. According to the submissions, it was not in dispute that when the 3rd wife married the deceased the acquisition and development of plot 86 was complete. It was submitted that after the issuance of the Grant, the local authority allowed transfer of ownership of the said plot from deceased to Respondents and then to new persons who are buyers. According to the Respondents, the local authority needed no execution of many documents but production of a Grant from court showing to whom plot xx A and B was distributed. After registration was effected in the names of the two respondents each sold their part. The first respondent with the leave of his siblings sold part A that belonged to his mother to one RMM while the second Respondent with the leave of his siblings sold part B of the said plot xx to one JMM. Accordingly, as for now the property changed hands before the appeal herein was lodged a position acknowledged by the appellant in his submissions.
45. Regarding the issue whether the Learned Magistrate err in law and in fact in finding that only the first and second houses of deceased deserved inheriting plot xx Kangundo, it was submitted that when the plot was bought and developed the Appellant's mother was not yet married and although the appellant said he was born in the year 1951 he admitted on cross examination that he was not the biological son of the deceased herein and that when his mother married the deceased, the deceased and his first two wives had already acquired some properties. The two Respondents told the court that their respective mothers contributed directly or indirectly to the acquisition of the said plot and that that was long before the appellant's mother married deceased.



46. It was therefore submitted that the plot was not purely the deceased's property and that the two wives occupied, owned and received income from the said plot when deceased was alive to the exclusion of the appellant's mother. The plot, it was submitted, from the onset, divided into two, designed and constructed in a manner that two families would occupy each one part independent of the other in terms of user with the first house getting plot xxA while the second house getting xx B. The third wife, however, never occupied or received income from the said property. It was submitted that the aforesaid was an arrangement between the deceased and the two wives before the third wife came into the picture hence the children of the 3rd wife should not insist on getting part of the matrimonial property that belonged to the others.
47. It was contended that there is no dispute that the third wife was given her land by deceased where she now lives. She also got money that was in deceased's bank account after sale of a motor vehicle. Moreover, the trial court listened to evidence on this property, observed the demeanor of the witnesses and it was satisfied that plot xx should be given to the first two houses. According to the submissions, the third wife never questioned this mode of occupation when deceased was alive hence the objection lodged after deceased passed on was just but an afterthought.
48. On the contention that the Learned Magistrate erred in law and in fact by ignoring the protester's assertion that the respondents had sneaked in unknown properties with a view of misleading the court, it was submitted that the respondents through their witnesses clearly explained how the properties were shared out by deceased when he was alive. Surprisingly it is only this plot xx that has generated contention. The appellant as an administrator had a duty to gather all assets of deceased and present them to court for division. Equally the appellant had a duty to point any misrepresentation by the respondents if any. As none of the aforesaid was done, the Court was urged to disregard this ground of appeal as well and dismiss this appeal with costs to the respondents.

Determination

49. I have considered the issues raised in this appeal. This being a first appeal, I agree that in arriving at its determination the Court is to be guided by the position reiterated in holding of the Court of Appeal in case of Francis Lokadongoy Lokogy vs Reuben Kiplagat Kiptarus [2020] eKLR where the court opined as follows:

' Court is under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter. In carrying out this duty this court has to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. The court has also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement.'

50. In this appeal, it is clear both from the affidavit of protest and the evidence adduced by the Appellant that he was representing the 3rd house while the Respondents represented the 1st and 2nd houses respectively. It is also clear from the evidence on record that the only property in contest was Plot No xx Kangundo Market. From the foregoing, it follows that there was no objection to the confirmation of Grant by the Appellant in so far as the other properties set out in the Summons for Confirmation



of Grant were concerned. Accordingly, I find that the grounds and submissions touching on the other two properties are inconsequential in so far as this appeal is concerned.

51. It was, however, contended by the Appellant some of the properties sought to be distributed vide the said Summons were never included in the Petition forms as required and that some of the said properties did not exist and were unknown to him. It is true that the Petition for Grant of Letters of Administration is required to set out the particulars of the deceased's assets and liabilities. However, those assets and liabilities can only be particularised to the extent known to the Petitioner at the time of petitioning for Grant. It does not therefore follow that the Petitioner cannot, in the distribution of the Estate include other properties whose existence came to his knowledge subsequent to the filing of the summons. Neither does it mean that he cannot, subsequently, exclude properties which it has come to his knowledge were not part of the deceased's estate at the time of his death. In other words, so long as the properties sought to be distributed at the time of the confirmation of Grant were properties of the deceased at the time of his death, no serious objection can be raised to the fact that they were not disclosed at the time of the filing of the petition. It is not unknown that petitioners do in the course of administration discover properties which the deceased did not disclose to the family when he was alive and it would be unjust to bar the petitioner from having them included in the estate. However, it is upon the person applying for confirmation of Grant to prove that the properties set out in the affidavit in support of the Summons belong to the Estate of the deceased.
52. It is submitted that whereas the trial court only dealt with the protest, the resultant Certificate of Confirmation of Grant deal with the distribution of the whole estate. To an extent I agree with the Appellant that since what was before the Court was Summons for Confirmation of Grant and a Protest thereto, the Court ought to have expressly dealt with both since the two were intertwined and a determination on the protest impacted upon the Summons for Confirmation of Grant. However, having disallowed the protest, it had to follow that the court would confirm the Grant in the manner proposed by the Respondents since the only objection taken by the Appellant was with respect to Plot No xx Kangundo Market. Section 78 of the Civil Procedure Act, however, provides as hereunder:
- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - (a) To determine a case finally;
 - (b) To remand a case;
 - (c) To frame issues and refer them for trial;
 - (d) To take additional evidence or to require the evidence to be taken;
 - (e) To order a new trial.
 - (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.
53. Since this Court has the power 'to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions' the mere fact that the trial court fell short of what it was expected to do does not bar this Court from doing so.
54. According to the Appellant, since there was no evidence that the deceased left behind the pick up and the sum of Kshs 50,000.00 the same ought not to have been included in the Certificate of Confirmation. Having gone through the evidence presented as well as taking into account the fact that the trial Court did not make any express finding as regards the existence of the said pick up and



the said sum, I find that it was erroneous to certify the said items as having been confirmed to the Appellant. The reason why the Appellant took up this issue, if I understand him well, was due to the fact that the trial Court found that he had been adequately provided for. I agree with the Appellant that if this finding was based on the fact of the two said items, then the decision was erroneous since no concrete evidence was laid regarding the existence of the said items as assets for the Estate of the deceased. Accordingly, I direct that the Certificate of Confirmation be rectified by removal of the said two items therefrom.

55. According to the Appellant, Plot No xx Kangundo Market ought to have been distributed equally amongst all the three houses. According to him, the reason why the other two houses did not want the third house to get a portion of the said plot was because it had been sold. to one RMM and he exhibited a copy of the agreement. On the other hand, the Respondents' position was that the said property was acquired by the deceased and the 1st and 2nd wives before the 3rd wife was married and during the lifetime of the deceased it was being utilised by the said two wives who were collecting rents therefrom. That the rents were being collected by the 1st and 2nd wives was confirmed by the Appellant who was not aware of when the property was acquired. Based on the evidence on record, I find that the said property was acquired before the deceased married the 3rd wife and that its acquisition was jointly by the 1st and 2nd wives and the deceased.

56. Section 40 of the [Law of Succession Act](#) provides that:-

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 next 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.

57. While the foregoing provision sets out the general mode of distribution of the estate of a deceased intestate, over a period of time the Courts have realised that a strict application of the said provision may on occasion cause injustice to the parties. It was therefore held by Koome, J (as she then was) in [Succession Cause No 1033/1996 - In the Matter of the Estate of Mwangi Gitire - Deceased](#) that: -

' Perhaps it is the high time, the commission charged with the responsibility of law reform addressed the issue of the inequality raised under Section 40 of Cap 160. The 1st widow's entitlement vis vis the 2nd widow or subsequent widow who perhaps come into a marriage much later to find that the 1st widow has worked tirelessly and sometimes denying herself tremendous comfort to enable her husband create and accumulate wealth. The 1st widow is then relegated by virtue of Section 40 of the Law of Succession to the same position as the last born child of the 2nd or subsequent widows. The widow is supposed to be considered as a unit alongside the children.

In this regard the last born child of the subsequent widow who will have contributed nothing is elevated in law because he will have notarily (sic) absolute rights but will be entitled to an equal share with the 1st widow. The 1st widow is only entitled to a life interest and after the life interest the property devolves to her children in equal shares absolutely. I agree with counsel for the protester 1st widow that this state of affairs bleeds inequalities and inequities in our law and ought to be addressed urgently to enable our courts dispense justice that meets the provisions of the [Constitution](#) of Kenya and give due regard to the principles of nondiscrimination on the basis of sex which are also the principles of nondiscrimination provided for under the International Conventions especially the Convention Against all



forms of Discrimination against women (CEDAW) which Kenya has signed and ratified. If the principles laid down in the International conventions were to be applied, the 1st widow would get a share of the property acquired during her marriage to the deceased, leaving the other half share to be shared by all the deceased heirs. If the distribution is of a polygamous intestate, each widow would get a share of what she contributed to.'

58. Similarly, Makau, J in *Succession Cause No 110 of 2010- In The Matter of the Estate of Samwel Miriti (Deceased) M M M M vs A I M* expressed himself as hereunder:

' In the instant application the 1st petitioner is opposed to equal distribution while the interested party/2nd petitioner seeks and favours distribution according to Section 40 of the *Law of Succession Act*. This court is bound by Section 40 of the *Law of Succession Act* and has no discretion. The section clearly provides that the estate be divided between the houses taking into account the number of children in each house. It is fortunate that the two houses have equal number of children. However, this court shall not shut its eyes to unfairness meted on a deceased's widows who are not allowed to take an extra share and whose efforts in acquisition of the properties are ignored and treated merely like children of the deceased not withstanding having been equal partners with the deceased. It is further unfortunate when the first wife who sacrificed a lot of her energy and who participated in the acquisition of the greater part of the deceased estate and even in situation where the properties are solely acquired by the first wife but registered in husbands have ended up being shared equally among all the wives not taking into account of less contribution by the younger wife who is married after acquisition of the bulk of the properties if not all the estate and who has contributed very little or nothing towards the acquisition of the estate. It is the court's hope that the unfairness to widows, and discrimination on first wife as reflected under Section 40 of the *Law of Succession Act* will soon be corrected so that the distribution of the deceased estate takes into account the contribution of the first wife and that of the 2nd wife or any other wife and the shares of the wife or wives is calculated differently from that of children who are treated as the same as their mother.'

59. The said provision was extensively dealt with by the Court of Appeal in *Scolastica Ndululu Suva vs Agnes Nthenya Suva [2019] eKLR* where the Court expressed itself at paras 15-21 as hereunder:

' In *Mary Rono vs Jane Rono & another* (supra), Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased's estate but that the discretion must be exercised judicially on sound legal and factual basis. In the same judgment, Omollo JA stated the position more clearly as follows:

'My understanding of that section is that while the net intestate estate is to be distributed according to houses each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that they must be equality between houses they would have been no need to provide in the section that the number of children in each house be taken into account. Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work injustice particularly in the case of a young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be



provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.’

In *Douglas Njuguna Muigai & vs John Bosco Maina Kariuki & another* (supra) this Court noted the absurdity of a blind application of section 40(1) of the *Law of Succession Act* as follows:

‘Back to section 40(1) of the *Law of Succession Act*, that provides that a widow shall be considered as a unit alongside the children of the deceased when it comes to the distribution of the deceased’s estate. In this case, JW the first wife of the deceased who even participated in the dowry negotiations for her co-wives is equated to the last born child of the 3rd wife of the deceased. Her contribution and support to the deceased as a spouse is not recognized and, in our view, that failure to recognize her contribution is tantamount to discrimination.’

It is therefore evident, that, although section 40 of the *Law of Succession Act* provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate. In regard to the question whether the respondent contributed towards the purchase of the two (2) properties, the trial judge had this to say:

‘The protester testified that she was married to the deceased in the year 1983 and found the applicant already married to the deceased. She further stated that she found the two properties in issue herein had already been acquired, though she was not sure of the exact year of the acquisition. It was her testimony that at the time of her marriage to the deceased she found him living together with the applicant on the same land. It is thus safe to hold that the protester never contributed to the purchase of the two properties herein. It also emerged that the applicant herein was gainfully employed as a teacher in the year 1973 and retired in the year 2005. It was admitted by the protester and her witness Johnson Musyimi Suva that the applicant was working as a teacher when the deceased bought the parcels, she signed one of the agreements as the purchaser. I accept her evidence that she contributed financially towards the acquisition of the two parcels; Kathekani/xx and Kathekani/xxx. In the circumstances, it would be unfair to share the proceeds half - half between the two (2) widows of the deceased, or to find that each beneficiary should get equal proceeds of the share.’

On our own evaluation of the evidence, we are entirely in agreement with the conclusion that the trial judge arrived at that the respondent contributed financially to the acquisition of the two properties. We are alive to the fact that what was before the learned judge was a succession cause and not a matrimonial dispute. However, the succession cause was anchored on the matrimonial circumstances of the deceased. The fact that the deceased acquired the two (2) properties during the subsistence of his marriage to the respondent, before the appellant came into the scene, and the fact that the respondent was employed, clearly, supported her allegation that she contributed to the acquisition of the two (2) properties. It would not therefore be fair nor just to treat the appellant and the respondent equally in the distribution of the estate. The following excerpt of the judgment reflects the distribution adopted by the trial Court as follows:

‘All the 13 beneficiaries (including the applicant and the protester) entered into a consent on February 10, 2015 and shared Kshs 11,000,000/= equally. The balance from the proceeds of the parcels at Kshs 11,908,595/=. (sic). In the circumstances of the case, I ask (sic) that 40% of the Kshs 11,908,595/= shall go to the applicant AN. It works to Kshs 4,763,438/=. The protester SNS, MMS, FMS, BIS, CMS, JKS, MKS, INS, Roy S S, MMS, AAM and SMS shall equally share the balance of Kshs 7,145, 157/=. Each will get Kshs 595,429/75.’



Lastly the proceeds of the treasury Bills Nos A000xxxx and A000xxxx shall be equally shared among all the 13 Beneficiaries.’

From the above it is apparent that apart from the amount of Kshs 11,908,595/= of which the respondent received 40 percent, the rest of the proceeds were shared out equally. An arithmetical calculation reveals that the respondent actually got only about 25 percent of the total sum whilst the rest was shared out equally amongst the remaining 12 beneficiaries. In the circumstances the appellant’s contention that the distribution was unfair has no substance.’

60. It is therefore clear that the court has discretion in distributing the estate of a deceased intestate and in doing so various factors ought to be considered are inter alia the age of the beneficiaries, the contributions of the beneficiaries towards the acquisition of the property and whether an intestate had, during his lifetime or by will, paid, given or settled any property to or for the benefit of a beneficiary.
61. In this case, it is clear that the Respondents’ mothers were married before the Appellant’s and that at the time the Appellant’s mother was married, the Appellant was already born since the Appellant admitted that he was not a biological son of the deceased. He, however, did not know when and how the plot in question was acquired. From the evidence on record, even after the Appellant’s mother came into the picture, the said plot was being utilised exclusively by the 1st and 2nd wives and there was no evidence that the 3rd wife took any issue with that. It is clear that the 3rd wife accepted that to be the position. It is therefore my finding before the Appellant’s mother came into the scene, the Respondents’ mothers contributed to the acquisition of the property which may not have been necessarily in financial terms but could have been in other non-monetary terms as well or both. In my view to treat the first two wives in the same position as the Appellant’s mother would be unfair to them.
62. How then should the distribution be undertaken? Having found that Plot No xx Kangundo was acquired by the joint efforts of the 1st and 2nd wives of the deceased together with the deceased, in the absence of evidence of the respective contributions, this Court must resort to equity. One of the maxims of equity is Equity Is Equality, a maxim that stems from the notion of impartiality and equality but which simply means that the parties would be treated equally. One of the instances in which the maxim is applied is with the development of presumption of tenancy in common. Under common law, whenever two or more people acquired property together, it would be taken that their title in the property would be covered by joint tenancy. The implication of this was that if any of the joint owners of the property died, the surviving owners would acquire the interest of the deceased in the property. This was called the principle of survivorship — *jus accrescendi* in latin. This occasioned justice in some circumstances. Accordingly, equity introduced the concept of tenancy in common which meant that when one of the joint owners dies, in equity, the surviving owner would hold the property in trust for the beneficiary of the deceased owner. Accordingly, applying the said equitable maxim, I find that Plot No xx Kangundo Market was owned by the first two wives of the deceased together with the deceased in common and each had equal shares of one third each. Therefore, in the first instance, each of them ought to have gotten one third of the value of the said plot. Since the deceased died intestate his share ought to have been divided amongst the three houses. However, since the deceased’s wives pre-deceased him, his share ought to have been divided in accordance with Section 38 of the *Law of Succession Act*, which provides that;

’ Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children ’



63. However, it would make no sense sub dividing the deceased's one third share to 27 children, particularly now that the property itself does not even exist. Accordingly, in the exercise of this Court's discretion, these are the orders that commend themselves to me and which I hereby make:

1. That Motor Vehicle Reg No xxxx and Kshs 50,000.00 be excluded from the confirmed Grant.
2. That Plot Nos Kangundo/Muisuni/xxx and Kangundo/Isinga/xxx be confirmed in the manner proposed in the Summons for Confirmation of Grant.
3. That one third of the amount of money received by the Respondents herein from the proceeds of the sale of Plot No xx Kangundo Market be deemed to be part of the Estate of the deceased. That one third thereof be paid over to the Appellant on his behalf and on behalf of the beneficiaries from the 3rd house. The said sum to be paid by the Respondents who received the proceeds of the sale thereof.
4. That the Certificate of Confirmation of Grant issued herein be revoked and a new one issued in accordance with this ruling.
5. That each party to bear own costs of these proceedings.

64. It is so ordered.

G V ODUNGA

JUDGE

Judgement read, signed and delivered in open Court at Machakos this 26th day of September, 2022

M W MUIGAI

JUDGE

Delivered the presence of:

