



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Anthony Nduiga Munyiri alias Nduiga S/O Munyiri (Deceased) (Succession Appeal E015 of 2021) [2022] KEHC 13094 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13094 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION APPEAL E015 OF 2021  
FN MUCHEMI, J  
SEPTEMBER 22, 2022  
IN RE THE ESTATE OF ANTHONY NDUIGA  
MUNYIRI ALIAS NDUIGA S/O MUNYIRI (DECEASED)**

**BETWEEN**

**NJATHEINI NDUIGA ..... APPELLANT**

**AND**

**GRACE WAMBUI MUNYI ..... RESPONDENT**

*(Being an appeal from the Ruling of Principal Magistrate, Hon. A. Mwangi in the Principal Magistrate court in Karatina, Succession Cause No. 190 of 2016 delivered on 20th May 2021)*

**JUDGMENT**

**Brief facts**

1. The appeal was lodged against the ruling of Karatina Principal Magistrate in Succession Cause No. 190 of 2016 in which the court distributed the deceased's estate among the beneficiaries. The proposed mode of distribution of the estate was discriminatory against the daughters of the deceased and distributed the estate equally amongst the children of the deceased.
2. Being aggrieved with the decision, the appellant lodged this appeal citing 6 grounds which can be summarised as follows:-
  - a. The Learned Magistrate erred in law and in fact in failing to appreciate that the deceased had left an oral will which distributed the estate;
  - b. The Learned Magistrate erred in law and in fact in failing to appreciate that Plot No. 16 Kiamuthanga was given to the appellant before the deceased's demise;



- c. The Learned Magistrate erred in law and in fact in upholding the protest against the weight of the evidence by the appellant;
  - d. The Learned Magistrate erred in law and in fact in ignoring the equal distribution of the estate as proposed by the appellant which allotted to others a bigger share than others without any justification;
  - e. The Learned Magistrate erred in law and in fact in applying the principle of prior settlement unfairly when she stated that the appellant could not share in Ruguru/kiamariga/1031 since he was not using any part of it yet she allowed the other beneficiaries, the protestor included while they had never occupied or contributed in the development to share Plot No. 16 Kiamuthanga.
3. By consent parties disposed of the appeal by way of filing submissions.

### **The Appellant's Submissions**

4. The appellant contends that the 1<sup>st</sup> to 8<sup>th</sup> beneficiaries confirmed to the court that they are daughters in law to the deceased having married the deceased's sons. The applicant states that the law of succession does not provide for in laws and in any event they could have obtained grants giving them the capacity to claim from the estate as spouses of the children of the deceased. Moreover, the applicant submits that they are not dependents pursuant to Section 29 of the *Law of Succession*.
5. The appellant submits that the estate ought to be divided amongst the deceased's children but not in equal measures. He states that the daughters ought to be excluded in the distribution of the land but they can only share in the proceeds in the bank account. The appellant further submits that the land parcels ought to be divided as per his affidavit with Plot No. 16 Kimuthanga being allocated to him solely as the deceased bequeathed it to him before he died. He further submits that the children of the deceased have not contested the proposal but the protest was made by the daughter in law of the deceased. The appellant further stated that there was a meeting during the lifetime of the deceased where he discussed the distribution of the property and thus the same should be given effect.

### **The Respondent's Submissions**

6. It is the respondent's case the instant appeal is misconceived, vexatious and an abuse of the court process. It does not raise any points of law. The respondent states that on the issue of the oral will, there was an alleged meeting in 1992 or 1994 where the deceased expressed his wishes. He then died in the year 2003 and therefore this exceeds the 3 months statutory period making such alleged will as invalid.
7. The respondent submits that she is a daughter in law and wife of a son of the deceased and is therefore not a stranger. The respondent further urges the court to look at the consent dated 14/5/2019 (page 43 record of appeal) by the appellant's and respondent's advocate to have the respondent substitute her late husband, Solomon Munyi Nduiga. Further, the respondent submits that the learned magistrate considered all the evidence by both parties and their witnesses, their written submissions and clearly set out the reasons for her decision.
8. The respondent submits that the trial court sub divided the two parcels of land amongst all the children with the appellant and his brother getting 0.35 acres of Mbogoini land where the deceased settled them before his death and the respondent, her brother and the 4 daughters of the deceased each getting 0.45 acres of the Kiamariga land. The trial magistrate considered the difference of 0.1 acres to be immaterial to constitute an equality. As such, the respondent prays that the appeal be dismissed with costs.



### Issue for determination

9. The main issue for determination is whether the appellant has established the grounds of appeal for this court to intervene in the distribution of the estate.
10. 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.”
11. 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.
12. 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.”
13. Therefore this Court is under a duty to delve 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.

### Analysis and Determination

14. The appellant contends that the deceased pronounced an oral will in presence of his family which distributed the estate. It is important to examine the provisions of the law in regard on oral will. Section 9 of the *Law of Succession Act* provides:-

No oral will shall be valid unless:

  - a. It is made before two or more competent witnesses and
  - b. The testator dies within a period of three months from the date of making the will.
15. While discussing the requirements of a valid oral will, Musyoka J in *Re Estate of Evanson Mbugua Thong’ote (Deceased)* [2016] eKLR said:-

An oral will is made simply by the making of utterances orally relating to disposal of property. In asserting whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there



was an oral utterance of the terms of the will. The other consideration is that the utterance ought to be made in the presence of two or more persons.

16. The appellant man contention in this appeal is that the learned magistrate disregarded the oral will of the deceased in hearing and determination of the protest of the respondent. The evidence of the respondent was that the deceased estate be shared equally by all beneficiaries. As for Ruguru/Kiamariga/1031, the respondent said the deceased had purchased the land and given it to his five children namely; Grace Wambui Munyi the respondent, James Muriuki Nduiga, Esther Nyamuiru Muchiri, Priscilla Njuguini Wachira, Mary Wanjiku Nduiga and Winrose Nungari Kanyoro who were still cultivating and utilising the land. The deceased had allocated the ancestral home on Kirimukuyu/Mbogoini/604 to his two sons Njatheini Nduiga and Bernard Munyiri now deceased. The respondent's proposal was that what the deceased had given should remain as he had allocated and that the share of the late Bernard Nduiga should go to his children. As for Laikipia/Tigithi/Matanya Block 5/24 the respondent proposed the land be shared equally among all the beneficiaries.
17. The appellant stated that plot No. 16 Kiamuthanga had been given to him solely by the deceased during a family meeting in 1994 through an oral will. The said oral will expired three (3) months after it was made under Section 9 of the Act and was never renewed by the deceased after 1994. As such, the position is that the deceased died intestate. The appellant called a witness who said he had been renting the said plot from the deceased and his wife whom he paid rent until their demise. One of his daughters had been instructed by the deceased to collect rent on his behalf when he fell ill. After the death of the deceased, the appellant took over collection of the rent. This evidence in my view was not very helpful to the appellant because the asset is still in the name of the deceased and was available for distribution. The magistrate also found the evidence of the witness of the appellant contradictory in that the appellant had added to the development of the plot. The said evidence was found to be incredible and of little probative value under the Law of Succession, the fact that the appellant collects rent from it does not entitle him to inherit it solely.
18. The evidence of the respondent was supported by that of the other beneficiaries and it was found credible and the mode of distribution fair and equitable carried the day in the determination of the protest. A witness who was a neighbour to the deceased during his lifetime corroborated the evidence of the respondent. It also came into light that the deceased's children had contributed to the construction of the said plot. However, the property still belonged to the deceased and it is an asset that should benefit all the beneficiaries as provided for by the law in the absence of any will to the contrary.
19. The respondent being a daughter in-law of the deceased was married to his late son Anthony Nduiga Munyiri and was considered as a beneficiary to take her late husband's share on equal footing with the biological children of the deceased. The appellant was opposed to the protest on grounds that the respondent had no *locus standi*. It was held in the [\*Re-estate of the late M'Thigai Muchangi, deceased\*](#)(2020) eKLR that a daughter in-law enjoyed the same rights as the biological children of the deceased.
20. In my considered view, this is the correct position under the [\*Law of Succession Act\*](#). Just like the deceased's children, the respondent had a right to claim her late husband's share through filing the protest which was positively and rightly considered by the magistrate.
21. The respondent's evidence was that some of the children had settled on their portions of land as shown by the deceased. They had established homes and cultivated their portions or L.R Ruguru/Kiamariga/1031. It is only the appellant who was opposed to this proposal. The court in adopting the respondent's mode of distribution considered that the beneficiaries ought to retain their portions on the said land.



22. The deceased was not survived by his widow but by children. The law applicable in distribution of the deceased's estate Section 38 of the Act which puts all the surviving children on equal status as to inheritance. The learned magistrate applied this law as regards the direct and the indirect beneficiaries. The court also took into consideration the late son of deceased Bernard Munyiri's children who were entitled to their deceased father's share equally. The appellant had also opposed the protest in that married daughters ought not to inherit. Section 38 treats all children whether married or not, male or female equally.
23. The Court of Appeal in Peter Karumbi Keingati & 4 Others vs Dr. Ann Nyokabi Gotba & 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.”
24. Even before the promulgation of the Constitution in 2010, Makhandia J (as he then was) in Re Estate of Solomon Ngatia Kariuki (Deceased) (2008) eKLR made a very strong statement on the issue of discrimination against daughters generally in succession matters and he said:-
- “ The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to state a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu customary law. Like most other customary laws in this country, they are always biased against women and indeed, they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.”
25. On the contention by the appellant that the trial court misdirected itself in applying the principle of prior settlement. I have perused the trial court record and note that the trial court was also guided by Section 42 of the Law of Succession Act and found that some of the beneficiaries had been given share by deceased where some of them built and settled respectively. The trial court took this evidence into account and further distributed the Kiamariga land which is 2.7 acres amongst the two and the daughters of the deceased. The appellant himself did confirm on cross-examination that James and Munyi had settled on land parcel No. Ruguru/kiamariga/1031 whereas he and Munyiri had settled on land parcel No. Kirimukuyu/mbogoini/604.
26. I reach a conclusion that the learned magistrate took into consideration all the evidence before her and analysed it as required thereby arriving at the correct conclusion. In my considered view, the magistrate did not err in fact or in law and strictly followed the law.
27. All considered, the appellant has failed to establish any of his grounds of appeal and as such his appeal is deemed to fail.



28. I find no merit in this appeal and it is hereby dismissed.
29. Each party to meet their own costs of this appeal.
30. It is hereby so ordered.

**DATED AND SIGNED AT NYERI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022.**

**F. MUCHEMI**

**JUDGE**

**JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2022**

