



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njeru v Mwoga (Civil Appeal E002 of 2022)  
[2022] KEHC 14514 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14514 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E002 OF 2022  
LM NJUGUNA, J  
OCTOBER 26, 2022**

**BETWEEN**

**PATRICIA NJOKA NJERU ..... APPELLANT**

**AND**

**CECILIA MARIGU MWOGA ..... RESPONDENT**

**JUDGMENT**

1. The appeal herein was instituted vide a memorandum of appeal dated January 11, 2022. The appeal is challenging the decision of the trial court Hon Ouko SPM’S Court at Runyenjes in Succession Cause No 34 of 1995 and which ruling was delivered on November 25, 2021. The appellant raised the following grounds of appeal;-
  - i. The learned trial magistrate totally erred in law and fact in the manner that she analysed the application and made a finding that Jackson Kibe, Pauline Marigu and Josphat Ileri were beneficiaries of the estate
  - ii. The learned trial magistrate totally erred in law and fact in finding that Kibe Ileri was a beneficiary whereas a ruling had been delivered by Hon Mwenda on May 9, 2019 stating that Jackson Ileri was not a beneficiary of the estate and the same had not been appealed against.
  - iii. The learned trial magistrate totally erred in law and fact in the manner that she made a finding that Jackson Kibe, Pauline Marigu and Josphat Ileri were beneficiaries whereas in the replying affidavit by the respondent, no such averment had been made.
  - iv. The learned trial magistrate totally erred in law and fact in finding that Jackson Kibe, Pauline Marigu and Josphat Ileri were beneficiaries of the estate whereas no evidence had been tendered that they depended on the deceased.



- v. The learned trial magistrate failed to critically analyse the case, applicable law and the appellant's submissions.
2. The appellant therefore prayed that the appeal be allowed, the ruling delivered on November 25, 2021 be set aside and the court does distribute the share of the 4<sup>th</sup> house to the appellant. It was prayed that the court further issue orders and directions as it may deem fit in the interests of justice.
3. The appeal was canvassed by way of written submissions.
4. The appellant submitted that Jackson Kibe, Pauline Marigu and Josphat Ileri are not beneficiaries of the estate and therefore should not inherit. It was her case that the trial court vide a ruling delivered on May 9, 2019 found that Kibe Ileri was neither a beneficiary nor a dependent of the deceased and as such, he could not be expected to benefit from the estate herein and that no appeal has been preferred against the same ruling. It was submitted that Hon Ouko on the other hand, reached a contradicting finding that the said Kibe was a beneficiary and as such, should get a share of the deceased's estate. That the respondent did not in her summons for confirmation of grant name Jackson Kibe, Pauline Marigu and Josphat Ileri as beneficiaries of the estate. She further stated that the alleged beneficiaries never attended court or filed any pleadings claiming a share of the estate. That it was only a chief's letter purporting that they were beneficiaries. Further, the learned magistrate did not state her basis of finding that the trio were beneficiaries or dependents of the estate and erroneously relied on section 39 instead of section 29 of the LSA. In the end, the appellant reiterated that the trio are neither beneficiaries nor dependents and as such, urged this court to allow the appeal.
5. The respondent on the other hand submitted that it is not in dispute that the deceased had 5 houses to wit: Lydia Mwoga (1<sup>st</sup> house), Mvuko Mwoga (2<sup>nd</sup> house), Peninah Giciku Mwoga (4<sup>th</sup> house), Cecilia Mwoga (4<sup>th</sup> house) and Rudia Giciku Mwoga (5<sup>th</sup> house). It was her case that the only issue in contention is in regard to the 4<sup>th</sup> house which had two children (Fransesca Mwoga and Angelo Mwoga). That the appellant was married to Angelo Mwoga and that they lived their separate lives for over 26 years; that noteworthy, section 2 of the LSA recognizes wives, former wives of the deceased as being rightful beneficiaries.
6. It was submitted that Fransesca Mwoga who is the other beneficiary in regard to the 4<sup>th</sup> house later passed on leaving her daughter Catherine as the only surviving child who unfortunately predeceased the said Fransesca Mwoga. That Catherine left behind three children namely: Jackson Kibe Kamundu, Poline Marigu Nduma and Josphat Ileri Kamundu who were raised and maintained by their grandmother, Fransesca Mwoga. This court was urged that the applicable law in the scenario herein should be section 29 of the LSA. It was submitted that Cecilia Mwoga's share ought to have devolved to her children in equal shares in that the appellant herein survived Angelo Mwoga and whereas, Fransesca Mwoga is represented by the three great grandchildren who have survived her and therefore, the legally rightful beneficiaries of the estate of the deceased herein.
7. Further, the respondent submitted that the three surviving great grandchildren of Fransesca Mwoga deserve a share as dependents because they were raised and maintained by Fransesca Mwoga, the daughter of Cecilia Mwoga. It was brought to this court's attention that not only do the surviving beneficiaries of Fransesca Mwoga utilize their portion of land but they also live on the said parcel of land, a fact that was ruled upon and the appellant did not oppose. Therefore, this court was urged to uphold the ruling of the trial court.
8. I have considered and analysed the pleadings and the submissions in this appeal and it is my view that the main issue for determination is whether the trial magistrate erred in law and fact on how the estate herein ought to have devolved.



9. As it is now settled by the numerous authorities both by this court and the superior courts, the duty of this court as the first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion. Further, this court ought not to ordinarily interfere with the findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. [See *Mwanasokoni v Kenya Bus Service Ltd (1982-88) 1 KAR 278* and *Kiruga v Kiruga & Another (1988) KLR 348*].
10. In the instant case, the respondents' case before the trial court and as I have already noted was in relation to the persons entitled to inherit from the estate herein. The same is evident even in the appeal herein and as such, it is my considered view that the court is invited to determine the issue on how the estate of the beneficiary herein ought to devolve.
11. It is not in dispute that the deceased herein had five wives namely: Lydia Mwoga (1<sup>st</sup> house), Mvuko Mwoga (2<sup>nd</sup> house), Peninah Giciku Mwoga (4<sup>th</sup> house), Cecilia Mwoga (4<sup>th</sup> house) and Rudia Giciku Mwoga (5<sup>th</sup> house); further, it is not in dispute that the property in dispute is in relation to LR KYENI MUFU/1273.
12. Section 40 of the *Law of Succession Act* deals with the issue of polygamous families and stipulates as follows:-

Section 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.'

Section 40 (2):-

'The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38.'

13. The deceased had five houses and section 3 of the *Law of Succession Act*, defines the 'house' as a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife.
14. The effect of the above provisions is that the estate herein was supposed to be divided into five portions (as per the number of the houses). However, the said portions ought not to be equal as the law provides that the sub-division ought to take into account the number of children in each house but also adding any wife surviving him as an additional unit to the number of children. I am guided by the Court of Appeal decision in the case of *Mary Rono v Jane Rono & another [2005] eKLR*, Omollo, JA held that:-

' 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 there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.'



15. From the perusal of the entire record, it confirms the existence of the said number of wives and therefore, the specific houses would then proceed to distribute as amongst themselves in accordance with the rules set out in section 35 to 38. As I have already noted, some of the beneficiaries are deceased and in such circumstances, where there is a deceased beneficiary in any house, the distribution would be to the surviving spouse of such a beneficiary to hold in trust for the children.
16. It therefore translates to the fact that the wives herein were to share the estate of the deceased and houses 1, 2, 3 and 5 are at peace with their shares save for the 4<sup>th</sup> wife (house) wherein the appellant submits that the share of the said house should accrue to her and her children for the reason that the respondent did not in her summons for confirmation of grant name Jackson Kibe, Pauline Marigu and Josphat Ireri as beneficiaries of the estate.
17. As already noted, the genesis of this appeal started when the appellant sought for rectification and/or review of the grant given that according to her, the grant could not be registered as the beneficiaries indicated were deceased; it is this application that elicited the respondent to file a replying affidavit which brought about the ruling being appealed against for the reason that the trial court ordered that the appellant equally share the 4<sup>th</sup> house's share with Jackson Kibe, Pauline Marigu and Josphat Ireri.
18. It is trite that a child or children of a child of an intestate who predecease him is, or are entitled to the share which their parent would have taken had he not predeceased the intestate. The children of Simon are entitled to his share in the deceased's estate which he would have taken were he still alive. This is known as the principle of representation. The principle is set out in section 41 of the [Law of Succession Act](#) as follows:
- 'Where reference is made in this Act to the 'net intestate estate', or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.'
19. Further, Lessit J (as she then was) in the case of [Eliseus Mbura M'Thara v Harriet Ciambaka and Another \[2012\] eKLR](#) was of the view that:
- ' The [Law of Succession Act](#) does not discriminate between gender in matters of succession or inheritance. Under the [Law of Succession Act](#) and indeed under the [Constitution](#) a child is a child and every person has equal rights under the law irrespective of gender. The [Law of Succession Act](#) does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.'
- [Also see [Peter Karumbi Keingati & 4 Others v Dr Ann Nyokabi Nguithi \[2014\] eKLR](#)].
20. Having found that the daughter of the deceased is entitled to a share of the said estate, the next question to pose is whether Jackson Kibe, Pauline Marigu and Josphat Ireri, being grandchildren to Fransesca Mwoga are entitled to a share of the deceased's estate. This question was well answered in [Christine Wangari Gachenge v Elizabeth Wanjiru Evans & 11 Others \[2014\] eKLR](#) thus:
- ' Although section 35 and 38 of the [Law of Succession Act](#) is silent on the fate of surviving grandchildren whose parents predeceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation



is applicable. The law is on section 41. If a child of the intestate has predeceased the intestate then that child's issue alive or en ventre sa mere on that date of the intestate's death will take in equal share per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate take between them the share their parents would have taken had the parent been alive at the intestate's death.'

21. Similarly, in *Re Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR*, it was held that:

' Under part V, grandchildren have no right to inherit their grandparents who die intestate after July 1, 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.'

22. But of importance to note is the fact that the appellant submitted that the trial learned magistrate erred when she found that Jackson Kibe Ileri was a beneficiary while via a ruling dated May 9, 2019, Hon Mwenda had made a finding that he was not. In that regard, the appellant decried the fact that Hon Ouko pronounced herself over an issue that had been previously determined by a court of competent jurisdiction and yet, the same had not been appealed against or reviewed.

23. The Court of Appeal in case of *Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* observed that the court in an earlier application ruled that the application before it was *res judicata* as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the ruling by the High Court had not been appealed against. The court further emphasized that the same application having been finally determined 'thrice by the High Court and twice by the Court of Appeal', it could not be resuscitated by another application.

24. A decision of the court must be respected as fundamental to any civilized and just judicial system. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court.

25. A decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. These principles would be 'substantially undermined' if the court were to revisit them every time a party is dissatisfied with an order and goes back to the same court particularly when there is a change of a judicial officer in the court station. See *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR*.

26. Clearly therefore, the grandchildren (Pauline Marigu and Josphat Ileri ) are entitled to step into the shoes of their deceased mother and to receive a share of the estate along with appellant; not as a dependant within the ambit of section 29 of the *Law of Succession Act* or a beneficiary but based on the principle of representation aforementioned. It is therefore immaterial that Pauline Marigu and Josphat Ileri are currently residing on the said land; or even that they did not file any affidavit claiming a share of the estate of the deceased herein. Also see *In re Estate of Kimitei Cherop (Deceased) [2021] eKLR*.

27. Accordingly, it is hereby ordered that 0.6 acres out of the share given to the house of Cecilia Mwoga (4<sup>th</sup> house) be transmitted to the appellant herein and the remaining 0.6 acres be shared equally between Pauline Marigu and Josphat Ileri.



28. As for the costs of the appeal, each party to bear his or her own costs.

29. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

