



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 35 OF 2014**

*(An appeal from the Judgment of the Ag. Senior Resident Magistrate, Runyenjes in Succession Cause No. 199 of 2013 dated 8/10/2014)*

**JOSECK NJIRU JOSPETER.....APPELLANT**

**VERSUS**

**RAHEL GATOTO WANGARI.....RESPONDENT**

**J U D G M E N T**

1. This is an appeal against the decision of Acting Senior Resident Magistrate Runyenjes delivered on the 8/10/2014 in Succession Cause No. 199 of 2013. The grounds of appeal are that the magistrate erred in law and in fact by confirming the grant in contravention of the law and misdirected himself on the issue of distribution causing miscarriage of justice. The appeal was canvassed by way of written submissions.

2. The appellant was the petitioner in the succession cause. He submitted that the magistrate contravened the provisions of Section 40 of the Law of Succession Act in distributing the estate. The magistrate disregarded the law and distributed the estate as proposed by the petitioner. He stated that there was no evidence by the protestor to prove that the estate was valued at three million shillings.

3. The respondent submitted that the court was right in distributing the estate per child and not per house. It was not in dispute that the deceased died intestate. One of the beneficiaries Nahashon Njagi had already inherited four acres from the clan which was used to disinherit him. The respondent cited the cases of **RONO VS RONO AND ANOTHER [2005] 1 EA 363** and **ESTATE OF JOHN MUSAMBAYI KATUMANGA (DECEASED) [2014] eKLR**.

4. The duty of the 1<sup>st</sup> appellate court was explained in the case of **SELLE AND ANOTHER VS ASSOCIATED MOTOR BOAT COMPANY LIMITED & 2 OTHERS [1968] EA 123**:

*“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this Court is not bound necessarily to allow the trial Judge’s findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probability materially to estimate the evidence or if the impression based on the demeanor of the witness is inconsistent with the evidence in the case generally”*

5. The appellant was the protestor in the suit and testified in support of PW1's case. He told the court that the deceased's only property was Kagaari/Kigaa/276 which he had expressed the wish that it be divided

equally between the two houses. The 1<sup>st</sup> house had six children while the second house had eleven. The appellant argues that the land should have been divided equally between the two houses as the deceased had wished. Nahason a child of the 1<sup>st</sup> house was excluded from the distribution which was unfair. His children stay in a parcel of land that was given to him by the clan.

6. The respondent was the petitioner (DW1) and widow of the deceased. She testified that the estate should be distributed such that each child gets a share of the estate. The deceased owned land which was given to him by the clan. The land measured four (4) acres and was bequeathed to the protester Nahashon during the lifetime of the deceased.

7. The witness of the respondent DW2 testified that the land should be distributed among the children of the deceased as opposed to the houses so as to achieve fairness since one house had more children.

8. The law applicable in this case is Section 40 and 42 of the Law of Succession Act.

Section 40 is applicable herein and provides:-

*(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.*

9. In the case of **MUSA IMBIAKHA KATIMBA VS BELIA KHAYANGA IMBIAKHA [2015] eKLR** the court held that the Judge correctly applied Section 40(1) of the Law of Succession Act, which provides that:

*The learned Judge took into account that there are ten children from the first house, and fourteen children from the second house with the respondent making up the fifteenth unit in the second house, and divided the total acreage of the estate land available comprising approximately 72 acres into 25 units which resulted in the distribution as indicated above. The distribution of the deceased's estate by the court therefore accorded strictly with the law and we have no basis for interfering with it.*

10. Section 42 deals with property distributed during the lifetime of the deceased. It provides:-

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.*

11. In the case of **SAMUEL MAINA MWANGI & 2 OTHERS VS MUTHONI KAGIRI [2013] eKLR** the court explained the provisions of Section 42 as it held:-

*We are of the considered view that the said registrations in favour of the 1st and 2nd appellants were tantamount to gifts given by the deceased during his life time.*

12. According to the letter from the Chief of Runyenjes West Location dated 14/11/2013, the first house comprised of the widow who was by then deceased and her six children one of whom was deceased namely Nahashon Njagi. From the evidence, it is clear that the said Nahashon was given land measuring 4 acres by the deceased during his lifetime. The 2<sup>nd</sup> house comprised of the widow and eleven children.

13. The affidavit in support for summons for confirmation of grant by the petitioner proposed that the estate be distributed among ten beneficiaries. The magistrate noted that the other beneficiaries did not object to the mode of distribution and proceeded to distribute the land L.R. Kagaari/Kigaa/276 among ten beneficiaries with each getting 0.24 Ha. The magistrate rightfully excluded Nahashon from the distribution as he had already inherited from the deceased.

14. The appellant argued that the land given to Nahashon was clan and should not be taken as inheritance from the deceased. However, the appellant adduced no evidence to prove this allegation.

15. From the evidence adduced by the parties, it was not in dispute that the deceased had given his son Nahashon land measuring four acres. The appellant belongs to the first house which had six children. The respondent is the second widow of the deceased and had eleven children. Nahashon was the brother of the appellant in the first house.

16. By dividing the land among the two houses, the appellant stood to benefit greatly since he was the only surviving son. This explains his preferred mode of distribution.

17. The learned magistrate strictly complied with the law when he distributed the deceased's estate among the children of the deceased. In taking into consideration the late Nahashon's land of four acres in the distribution, the magistrate applied the provisions of Section 42 of the Act. The distribution was fair and just to all the beneficiaries.

18. I find no merit in this appeal and it is hereby dismissed with costs to the respondent. The judgment of the trial magistrate is hereby upheld.

19. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF SEPTEMBER, 2016.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Muriuki for Ithiga for Respondents**

**Mr. Okwaro for Munene Muriuki for Appellants.**