



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CIVIL APPEAL NO. 61 OF 2006**

**PHILIS MICHERE**  
**MUCEMBI.....APPELLANT**

**VERSUS**

**WAMAI**  
**MUCHEMBI.....RESPONDENT**

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

This Appeal arises out of the Judgment in Kerugoya Succession cause No. 257/04 which was rendered on 21.07.06. The parties herein are co-wives of the deceased one MUSEMBI MUTWE alias MUCHEMBI MITWE. THE Respondent herein filed an affidavit of protest on the mode of distribution of the deceased estate. The protest was heard by way of viva voce evidence after which the learned magistrate rendered the judgment in question.

In his judgment, the magistrate ordered that the land belonging to the deceased be distributed in accordance with **Section 40 of the law of Succession Act Cap 160 of the Laws of Kenya**. The Appellant had proposed that the same be distributed equally between the 2 houses in accordance with Kikuyu customary law. Being dissatisfied with the said judgment, the Appellant filed this Appeal. She has raised 5 grounds of Appeal in her amended memorandum of Appeal amended on 2.07.2010. The gravaman of the said grounds is that the learned trial magistrate failed to appreciate that the estate of the deceased was subject to Kikuyu customary law and he had died before the commencement of the law of Succession Act. The learned trial magistrate is therefore said to have erred in law in applying Section 40 of the Law of Succession Act instead of Kikuyu customary law as required by Section 2(2) of the law of Succession Act. There is also a ground (ground 3) to the effect that the learned trial magistrate erred in disregarding the wishes of the deceased to have the land sub-divided equally between the 2 houses. Evidence was adduced before the trial court with the Respondent herein in her very brief testimony saying that the land should be distributed equally among the children of the deceased. Her evidence on cross examination was very short and I will quote it for ease of reference

***“...Deceased had divided our land into 2 equal portions. We occupy the portions given to us. I am satisfied with my portion. Each son should get a share. The deceased wrote in a book that we share equally. According to Gikuyu customs land should be shared equally to the wives”.***

The petitioner/Appellant and her witness one Elias Muchiri Njagi testified to the effect that the land should be shared equally between the houses.

There is no dispute that the parties herein were both wives of the deceased under Kikuyu customary law. The only issue for determination which is actually the core of this Appeal is whether the law applicable is Kikuyu customary law or Section 40 of the Law of Succession Act. That is a point of law and not one of fact. It is not disputed that the deceased died prior to the enactment of the Law of Succession Act. Under Section 2(2) of the law of succession Act:-

***“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless, the administration of their estate shall commence or proceed so far as possible in accordance with this Act.”***

This provision clearly excludes the distribution of the estate of a person who died before 1.7.1981. Such property must be distributed in accordance to the law of succession that was in place before the law of Succession Act was enacted. There are many legal decisions to this effect.

On this point, I am persuaded by the decision of my late brother **KAMAU Ag. J in HCC Succession Cause No. 935 of 2003.**

**(In the matter of the Estate of the estate of Mwaura Mutungi alias Mwaura Gichigo Mbura (deceased))** where he said that where the deceased died prior to the commencement of the law of succession Act the distribution of his estate is strictly governed by the applicable customary law; however the provisions of the law of succession act as provided under Section 2(2) of Cap 160 govern the administration of the said estate. **Judge Rawal** was of the same view in **Nairobi High Court Civil Suit No. 2487/1996.**

In my considered view, the administration of an estate as envisaged under Section 2(2) does not include distribution of the estate. It only entails the management of the same. If the converse was correct, then the provision would not have differentiated between persons dying before the commencement of the Succession act and those dying later. It would simply have stated that the law of succession Act was to apply to all estates of deceased persons which had not been distributed as at the date of the law of succession Act was operationalized. Subjecting the estate of those who died prior to 1.07.1981 to customary law was not a superfluous provision. It was meant to apply in the distribution of the estate but the management of the estate was to comply with the new law.

It is my finding therefore that in applying section 40 of the law of Succession Act to the estate of the deceased herein, the learned trial magistrate misdirected himself. I also note from the evidence adduced before the trial court, that the deceased had already sub-divided his land to the 2 widows equally before he died and that must have been because that is what his customs mandated him to do. That arrangement was not against the law, nor was it repugnant to justice and morality. It ought to have been respected. In sum, I find this Appeal meritorious. I allow the same and set aside the judgment of the learned magistrate dated 21.07.07 and all subsequent orders arising therefrom and replace the same with orders that the land in question be shared equally between the 2 houses of the deceased. The certificate of confirmation issued by the subordinate court is hereby cancelled. Another certificate to issue in conformity to the orders given in this judgment.

Each party will bear its own costs. It is so ordered.

**W. KARANJA**

**JUDGE**

Delivered, dated and signed at Embu this 8<sup>th</sup> day of December 2010

**In presence of:- Ms. Kahara for Mr. Magee for Appellant.**