



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Kamau & 3 others (Civil Appeal 9 of 2019)
[2025] KEHC 1723 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 9 OF 2019
MA ODERO, J
FEBRUARY 21, 2025**

BETWEEN

MARY WAKONYU MWANGI APPELLANT

AND

WILSON MWAMBA KAMAU 1ST RESPONDENT

RICHARD MAINA KAMAU 2ND RESPONDENT

CATHERINE MUGOIRI KAMAU 3RD RESPONDENT

ROBERT GITHINJI KABUCHO 4TH RESPONDENT

*(Being an appeal against the Ruling of Honourable BM Ochoi (SPM) In
Mukurweini SPM SUCC Cause 49 of 2018 delivered on 5th February 2019)*

JUDGMENT

1. Before this court for determination is the Memorandum of Appeal dated 19th June 2019 by which the Appellant Mary Wakonyu Mwangi seeks that the judgment delivered on 5th February 2019 by Hon B M Ochoi Senior Principal Magistrate be set aside.
2. The Respondent's Wilson Mwamba Kamau, Richard Maina Kamau, Catherine Mugoiri Kamau And Herbert Githinji Kabucho opposed the appeal.
3. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 9th September 2024, whilst the Respondent relied upon their submissions dated 25th September 2024.



Background

4. This Succession Cause relates to the estate of the late KABUCHO KARANJA (hereinafter the Deceased) who died on 17th March 1995. A copy of the Death Certificate Serial Number 329578 is in the file
5. The Deceased who died intestate was a polygamous man who had three (3) wives and several children. That the Deceased was survived by the following three Houses:-
 - i. Wanjiku Wakonyo - 1st wife.
 - ii. Mary Wakonyu - Daughter
 - iii. Wamuyu Kabucho - 2nd Wife - no children
 - iv. Gladys Wanjiku - 3rd wife
Wilson Mwamba - Son
Richard Maina - Son
Catherine Mugoiri - Daughter
Robert Githinji - Son
Charity Wakonyu - Daughter
Mary Murugi - Daughter
6. The estate of the Deceased comprised of only one asset being the parcel of land known as L.R Number Githu/Muthambi/318 measuring 2.5 acres.
7. Following the demise of the Deceased his daughter Mary Wakonyu Mwangi (the Appellant herein) obtained a Grant of letters of Administration intestate issued on 11th July 2012 in Succession Cause No. 148 of 2012.
8. The Appellant then filed a Summons for confirmation of Grant dated 23rd April 2013 in which she proposed that the land left behind by the Deceased be divided into three equal portions (representing each House) and distributed accordingly. The Appellant further proposed that the portion allocated to the 2nd widow Wamuyu Kabucho (who was deceased) be allocated to herself as she had taken care of the said 2nd widow during her old age.
9. At this point the Respondents filed a joint Affidavit of Protest dated 8th October 2013, challenging the proposed mode of distribution of the sole asset comprising the estate. The protestors proposed that the suit land be subdivided equally amongst all the surviving children of the Deceased. They argue that prior to his demise the Deceased had shown each child where they were to settle and that they had all occupied their respective portions of the land.
10. The protest was heard in the lower court and vide a judgment delivered on 5th February 2019, the learned trial magistrate directed that the 2.5 acres of land be distributed to the three Houses left behind by the Deceased as follows;
 - a. 1st House - 0.5 acres
 - b. 3rd House - 2 acres



- c. The 2nd House comprising of a widow Wanjiku Kabucho who had died in the year 2018 and who had no children, was not allocated any share of the estate.
11. The Appellant who had argued that the share due to the 2nd House be allocated to her, as she had cared for the 2nd Widow during her old age, was aggrieved by the judgment of the trial court. She proceeded to file this Memorandum of Appeal which was premised upon the following grounds
1. That the learned trial magistrate erred in law and fact misinterpreting and misapplying Section 40 of the *law of succession act* cap 160 laws of Kenya.
 2. The learned trial magistrate erred in law and fact by failing to rely on section 33 of the *law of succession Act* in making his finding.
 3. The learned trial magistrate erred in law and fact by choosing to rely on section 35B and misinterpreting and or misapplying the same in his finding.
 4. The learned trial magistrate erred in law and fact by distributing the suit land parcel number GITHI/MUTHAMBI/318 IN units according to the number of children in all houses in the ratio of 4 to 1 thereby denying the Appellant the rightful share of his deceased mother's house.
 5. The learned trial magistrate erred in law and fact by failing to distribute the deceased's estate in accordance to the number of houses.
 6. The learned trial magistrate erred in law and fact by failing to consider the wishes of the deceased's childless deceased wife Wamuyu Kabucho as per her will dated 8th October 2017.
 7. The learned trial magistrate erred in law and fact by failing to distribute land parcel number GITHI/MUTHAMBI/318 as per the Appellants summons for confirmation of grant dated 23rd April 2013.”
12. As stated earlier the appeal was opposed.

Analysis And Determination

13. I have carefully considered this appeal, the record of proceedings before the trial court as well as the written submission filed by both parties.
14. This being a first appeal, the High Court is obliged to re-examine and reconsider the evidence adduced before the trial court and to draw its own conclusion on the same.
15. In *Selle & Another -vs- Associated Motor Boat Company Ltd & Others* [1968] E.A 123 the court stated as follows:
- “.....this court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this court is by way of retrial and the principles upon which this [Appeal] court acts are well settled. Briefly put they are that 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 allowances in this respect.....”
16. It is common ground that the Deceased was a polygamous man who had three wives. The 1st wife had one child (the Appellant herein) the 2nd wife had no children whilst the third wife bore six (6) children. It is also common ground that following the demise of the Deceased a Grant of letters of Administration Intestate was on 11th July 2012 made to the Appellant who was a daughter of the Deceased from the 1st House.



17. The Deceased estate consisted of only one asset of parcel of land measuring 2.5 acres. The Appellant (Administrator) filed a Summons for Confirmation of Grant in which she proposed that the suit land be divided into three portions to be distributed amongst the three Houses.
18. The Protestors (the Respondents) objected to this and proposed that the suit land be distributed equally amongst all the children of the Deceased since all the three wives of the Deceased had also passed on.
19. The issue which arises for determination in this appeal is how the estate of the Deceased should be distributed.
20. The Appellant supported the distribution of the suit land equally according to the Houses not number of children left behind by the Deceased. The Appellant further proposed that the portion due to the 2nd House be allocated to herself as she had been the one taking care of the 2nd wife during her old age.
21. The Appellant further claimed that the 2nd wife ‘Wamuyu’ had left behind a written will in which she had bequeathed her (Wamuyu’s) share of the Deceased’s estate to the Appellant.
22. Firstly this Succession Cause relates to the estate of Kabucho Karanja NOT the estate of Wamuyu Kabucho. The court therefore cannot within this succession Cause delve into the question of the distribution of the estate of ‘Wamuyu’
23. Secondly the subject property being LR NO. Githi/Muthambi/318 was registered in the name of the Deceased Kabucho Karanja NOT in the name of ‘Wamuyu’ As such ‘Wamuyu’ could not by way of a will or otherwise purport to distribute property that was not registered in her name and therefore did not belong to her.
24. Finally on this point the Appellant produced before the trial court a document written in Gikuyu vernacular which she purported to be the last written Will of ‘Wamuyu Kabucho’ dated 8th October 2017. In the said written will ‘Wamuyu’ bequeathed her land where she had been farming to the Appellant.
25. As stated earlier the fact that Wamuyu had been farming on a portion of the suit land did not give her any proprietary rights over said portion. In the judgment the learned trial magistrate in referring to this purported written will observed as follows;

“As regards the will purportedly left by Wamuyu Kabucho it is my finding that the same does not meet the threshold of a valid will for purposes of this cause as it does not disclose the property being willed away. Secondly the dispute in this cause relates to the Estate of Kabucho Karanja and not Wamuyu Kabucho. The claim by Mary Wakonyu for the share of Wamuyu Kabucho is dismissed.
26. I am entirely in agreement with the above finding and conclusion. The Document produced by the Appellant as the last will of Wamuyu Kabucho merely made reference to “my land and where I farm.” The property being distributed is not described by way of LR Number or indeed in any other way. I find that this purported will is vague, non-descriptive and cannot be given effect.
27. I agree that the document does not meet the legal threshold of a written will. Accordingly I dismiss the Appellant’s claim to the 2nd widow’s share of the estate.
28. Back to the proper mode of distribution of the estate. Section 35 of the *Law of Succession Act*, Cap 160 Laws of Kenya provides for the mode of distribution of an intestate estate where the Deceased has left one surviving spouse and children.



29. The mode of distribution of an intestate estate where the Deceased was polygamous is provided for by Section 40 of the [Law of Succession Act](#) as follows;-

“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.” [own emphasis]

30. In this case the Deceased died in the year 1995. He was survived by all three widows. In line with Section 35 of the Act the three widows would have been entitled to a life interest in the estate. However all the three (3) widows have now passed away. The 1st wife Wanjiku Kabucho died on 30th September 2007 (a copy of the Death Certificate Serial Number 65778 is in the file). The 2nd widow Wanjiku Kabucho died in the year 2018 whilst the 3rd widow Gladys Wanjiku Kabucho died on 11th September 2008 (a copy of the Death Certificate Serial Number 048916 is also in the file).

31. Given the demise of all 3 widows and there being no person who stood to inherit a life interest in the estate I find that the distribution of the estate ought to be guided by Section 40 which gives priority to distribution according to the number of ‘houses’

32. In [RONO-VS- RONO](#) [2002] eKLR Hon Justice Waki (Retired) stated as follows

“More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife and children of that wife.”

33. Likewise in the Matter of [Re Estate of Benson Ndirangu Mathenge \(deceased\)](#) Nakuru HCSC No. 231 of 1998 (Ondeyo J), the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The court stated that the first house was comprised of five units while second had seven units. The two houses of the deceased combined and looked at in terms of units made up of twelve units. The court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the court into twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children.

34. Therefore although Section 40 takes into account the number of ‘Houses’ left by the Deceased, the law also contemplates the number of children in each House. The duty of the Court is to ensure that there is a fair and equitable distribution of the estate.

35. In [Scolastica Ndululu Suva vs Agnes Nthenya Suva](#) [2019] eKLR the Court of Appeal in discussing the applicability of Section 40 of the [Law of Succession Act](#) stated:

“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..... 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.” [Own emphasis]

36. This is a case where the 1st house has one child (the Appellant) and the 2nd House has no children. The 3rd House has six (6) children.

All children constitute a unit and all are equal under the law.

37. At the time of his demise the Deceased was survived by his three (3) widows. However all the three (3) widows have now also died. In any event as per Section 35(1) (b) of the Law of Succession Act the widows would only have been entitled to a life interest in the suit property. That life interest expired upon their demise.

38. In the mode of distribution proposed by the Appellant she would stand to receive almost two thirds of the estate i.e the share for both the 1st and 2nd House leaving the six (6) children of the 3rd House to share one third of the estate. This is neither fair nor equitable.

39. Section 38 of the Law of Succession Act provides as follows:-

“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 shall be equally divided among the surviving children..” [emphasis my own]

40. The trial court decided on the distribution of the estate as follows:-

“I will therefore distribute the estate of the deceased in the ratio of/unit representing the 1st House, to 4 units representing the 3rd House making a total of five units against 2.5 acres. The 1st House gets 0.5 acres and the 3rd House 2 acres. The 3rd House shall then share equally against its beneficiaries in equal shares.”

41. Given that the 2nd widow died intestate leaving behind no children, the 2nd House was not included in the distribution of the estate. So far no person has come forward to claim the share due to the 2nd House.

42. I find that the above mode of distribution was fair and equitable and took into account the circumstances of this particular case.

43. Finally I find no merit in this appeal. The same is dismissed in its entirety. This being a family matter I make no orders on costs.

DATED IN NYERI THIS 21ST DAY OF FEBRUARY, 2025

.....

MAUREEN A. ODERO

JUDGE

