



REPUBLIC OF KENYA



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**Mwirichia v Kathure & another (Civil Appeal E071 of 2021)
[2025] KEHC 5843 (KLR) (7 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5843 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E071 OF 2021
SM GITHINJI, J
MAY 7, 2025**

BETWEEN

NAOMI MWIRICHIA APPELLANT

AND

ASENATH KATHURE 1ST RESPONDENT

GEOFFREY KIRIMI 2ND RESPONDENT

*(An appeal from the Judgment of Hon. E. W Ndegwa (R.M) in
Githongo Succession Cause No. 11 of 2016 delivered on 19/5/2021)*

JUDGMENT

1. This Appeal arises from the judgment of the learned Resident Magistrate Hon. E. W Ndegwa delivered on 19.05.2021 in Githongo Succession Cause No. 11 of 2016.
2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 10th June, 2021;
 1. The learned trial Magistrate erred in law and fact by finding the petitioner as a widow of the deceased was only entitled to a life interest of some part of the estate but not to an absolute share of the estate for her survival thus misdirecting itself on the appellant's interest in the estate.
 2. The learned trial Magistrate erred in law and fact by finding that some of the children of the deceased are entitled to an absolute share of the estate while the petitioner's children with the deceased are only entitled to their absolute share upon the demise of the petitioner.
 3. The learned trial Magistrate erred in law and fact by disregarding the subdivisions done by the deceased in land parcel LR No. Nkuene/Uruku/xxx and xxxx during his lifetime in her findings on distribution of the estate.



4. The learned trial Magistrate erred in law and fact by disregarding how the beneficiaries to the deceased estate had occupied and developed the estate before distributing the same which will occasion some of the beneficiaries to move to different parcels of land in the estate and bring down their developments.
5. The learned trial Magistrate erred in law and fact by disregarding the deceased wishes and actions during his life time on how he had planned his estate to be distributed.
6. The learned trial Magistrate erred in law and fact by disregarding the subdivisions done by the deceased in land parcel LR No. Nkuene/Uruku/xxx and xxxx in her findings on distribution of the estate.
7. The learned trial Magistrate erred in law and fact by failing to adopt the appellant proposed mode of distribution which was per the wishes of the deceased.
8. The learned trial Magistrate finding is bad in law and against the weight of the evidence tendered.

Evidence at Trial

3. Pw 1 Asenath Kathure Kailichia, the 1st Respondent herein and the 1st Protestor in the trial court told the court that, the Appellant was her step mother, the 2nd Respondent was her step brother and the deceased herein was her father. The deceased herein had 3 wives namely HB (now deceased), HN (deceased) and Naomi Nkirote M’Mwirichia, the Appellant herein. She accused the Appellant of distributing some of the estate properties to grand children of the deceased and omitting others from the schedule of distribution. She denied the contention that the deceased had subdivided the estate properties during his lifetime. The deceased gave her land at Timau to farm and she prayed for the estate properties together with the money in the Bank accounts to be shared equally among all of them.
4. Pw 2 Geoffrey Mungania, a neighbor and friend to the deceased told the court that he neither heard of any disputes in the family nor saw any surveyor on the land. He saw Pw1’s brother living on the land and the Appellant left home and went to live with her daughter elsewhere.
5. Pw 3 Nicholas Mutuma, the area chief of Uruku Location produced the introductory letter dated 30/5/2016 as exhibit 1. He told the court that he was unaware whether the deceased attended the land board for subdivision. He knew some of the children of the deceased but others were unknown to him, especially those who had married long time ago.
6. Petitioner’s witness 1 Joseph Magaju M’Itunga, adopted his witness statement recorded on 7/9/2018 as his evidence in chief. He told the court that the deceased was his uncle and he knew all his children. The deceased had 2 wives namely HN and Naomi Mwirichia, although H was customarily divorced from the deceased herein.
7. Petitioner’s witness 2 M’rinera Samwel Gitonga, a neighbor to the deceased herein adopted his witness statement dated 7/9/2018 as his evidence in chief. He witnessed the land at Kiangombe Tea Buying Center, which borders his, being subdivided by the deceased in the presence of his 3 sons namely Muriungi, Gituma, Kathurima and Thurania, the surveyor. After the deceased had subdivided the land into 9 portions, he put beacons thereon and said the portions were for his children and grandchildren. According to him, the deceased did not want his daughters to inherit his estate.
8. Petitioner’s witness 3 Naomi M’mwirichia, the Appellant herein and the wife to the deceased adopted her 2 affidavits sworn on 11/10/2017 and 1/3/2018 as her evidence in chief together with the list of documents dated 2/7/2019. She told the court that the deceased had 4 letters clearly indicating his



wishes on distribution of the estate and she was present when those letters were written. When she married the deceased, he had separated with his other wife, HN. The deceased subdivided his pieces of land and the surveyor drew the sketch maps of the subdivided parcels. The deceased had written a will at an advocate's office, which she did not have.

9. Petitioner's witness 4 Peter Kimani, the County Surveyor told the court that parcel No. xxxx was subdivided into 9 portions, which are all in the name of the deceased. As for Nkuene/Uruku/xxx, it was subdivided into xxxx and xxxx and new numbers issued on 3/3/2015.
10. Petitioner's witness 5 Rimiri Thurania Meshack, the land Surveyor under the National Government told the court that he was requested by the deceased to subdivide Nkuene/Uruku/xxx and xxxx. After the land control board consent was obtained, he personally visited the 2 parcels of land and carried out the subdivision in the presence of the deceased, the Appellant and a few of their children. L.R No. Nkuene/Uruku/xxx was subdivided into 2 portions of 2.47 Ha and 2.43 Ha while Nkuene/Uruku/xxxx was subdivided into portions of 1.3 Ha, 0.51 Ha, 0.51 Ha, 0.44 Ha, 0.44 Ha, 0.44 Ha, 0.44 Ha and 1.54 Ha. The deceased did not in any way indicate to whom the parcels would go to and he could not confirm if the land was still in the name of the deceased since he was no longer in that office.

Submissions

11. The Appellant through the firm of Kithinji Kirigiah & Co. Advocates filed submissions dated 4/11/2024. Counsel submitted that the deceased had shared his properties during his lifetime and prayed for the Appellant's summons for confirmation of grant to be allowed. Counsel relied on Estate of Ishmael Juma Chelanga (deceased) (2002) eKLR to buttress those submissions.
12. The Respondents did not file any submissions.

Analysis and Determination

13. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.
14. In *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA, the court held 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 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 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."
15. I have considered the appeal herein, the trial court's judgment which is the subject of this appeal as well as the submissions by counsel.
16. From the grounds of appeal, the issue for determination is whether the trial court erred in distributing the estate properties in the manner that it did.
17. What has come out clearly from the evidence tendered in court is that the deceased herein, a polygamist, died intestate survived by one spouse, the Appellant herein and 10 children, namely Geoffrey Kirimi Mwirichia, the 2nd Respondent herein, Samuel Mwirigi Kairichia, Terah Kathurima Kairichia, Philip Gituma, Hellen Karwirwa, Ruth Gakii, Lilian Kiende Kairichia, Tabitha Nkirote, Judith Nyoroka and Asenath Kathure Mwirichia, the 1st Respondent herein. The Appellant testified that the deceased died testate, but without any evidence of a will, I find that the deceased died intestate, and the provisions of the [Law of Succession Act](#) come into play.



18. The estate of the deceased comprised of L.R No. Nkuene/Uruku/xxxx measuring 6.28 Ha, L.R No. Nkuene/Uruku/xxx measuring 5.46 Ha and L.R No. Nkuene/Uruku/xxx measuring 2.02 Ha (hereinafter referred to as the estate properties).
19. The general rule is that, where a deceased was polygamous, his estate is to be distributed in accordance with section 40 of the *Law of Succession Act*, which provides that; “(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.”
20. In its impugned judgment dated 19/5/2021, the trial court misapprehended the law when it relied on the provisions of section 35 of the *Law of Succession Act*, which only apply to monogamous unions. The trial court was mandated by the provisions of Section 40 of the *Law of Succession Act* to distribute the estate properties according to the number of children in each house, with the Appellant being treated as an additional unit. That distribution does not necessarily need to be equal among the number of children in each house, as was held by the Court of Appeal in *Rono v Rono* (2005) 1 EA 364, that; “Under statutory law, the superior Court has discretion to take into account fairness in determining the distribution to dependants. This discretion must be exercised on sound factual and legal basis. The possibility of girls marrying is only one factor that may be considered. Equal treatment of the children by the deceased was another factor. However, in intestate succession, there was no principle of law that the houses of the deceased, or the children/beneficiaries, must inherit equally.”
21. I find that the estate properties ought to have been distributed equally among the 10 children of the deceased with the Appellant, as an additional unit, also getting a distinct share thereof.
22. The trial court fell into error when it denied the Appellant an absolute share of the estate properties, which deprived her of her entitlement thus rendering her destitute and impoverished. The trial court further erred when it pegged the outright entitlement of the Appellant’s children on the termination of a life interest, which did not exist.
23. The Court of Appeal in *Stephen Gitonga M’murithi v Faith Ngira Murithi* [2015] KECA 347 (KLR) held that; “As for the issue of the widow having been given an outright tangible shareholding in the net intestate estate of the deceased as opposed to a life interest, we find nothing in section 40 of the Laws of Succession Act that can prevent a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or temper with it in the interests of justice to all the affected parties. In the circumstances of this case having found that the principle in section 38 was the appropriate applicable principle, ordering a life interest would have occasioned injustice to all the dependants as opting for such an option would have only bestowed upon the widow Naomi a hovering interest over the individual interests of all the other beneficiaries thereby making it impossible for all the beneficiaries to enjoy freely the resulting benefits from the deceased’s estate. We find it was prudent for the learned trial Judge to accord a direct unencumbered benefit to the widow Naomi as opposed to a life interest.”
24. I find that the trial court misapplied the provisions of section 35 of the *Law of Succession Act* as opposed to section 40 of the Act, thus arriving at an erroneous decision.
25. For the foregoing reasons, I find the appeal to be merited and it is allowed. Consequently, the estate properties will be distributed equally among the 11 beneficiaries of the deceased, the 10 children and



the Appellant, as an additional unit, in accordance with the provisions of section 40 of the *Law of Succession Act*.

26. The shares held at Kenya Commercial Bank Account No. 1102xxxx22 and Standard Chartered Bank Account No. 00xxxx8 were shared equally among the 11 beneficiaries in strict compliance with the law.
27. Ultimately, it is expected that the subsequent subdivision of the estate properties as decreed hereinabove will take into account the developments and occupation on the ground, in order to ensure that no house is unreasonably demolished or a beneficiary unnecessarily evicted.
28. Parties to bear own costs of the appeal.

DATED, SIGNED AND DELIVERED THIS 7th DAY OF MAY, 2025.

S. M. GITHINJI

JUDGE

Appearances:

Mr. Mutwiri Advocate for the Respondent.

