



REPUBLIC OF KENYA



KENYA LAW
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**Kimunye v Kimunye (Succession Appeal E037 of 2022)
[2025] KEHC 7902 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION APPEAL E037 OF 2022
JK NG'ARNG'AR, J
JUNE 5, 2025**

BETWEEN

MUTHONI KIMUNYE APPELLANT

AND

DANIEL MURIUKI KIMUNYE RESPONDENT

*(Being an appeal against the Ruling of Hon. E.O Wambo. PM in Kerugoya
Chief Magistrate Succession Cause No. 94 of 2017 delivered on 30th April 2020)*

JUDGMENT

1. The petitioner Juliana Muthoni Kamunye alias Muthoni Kimunye petitioned for grant of letters of Administration intestate of the estate of the deceased herein Kimunye Maina who died on 7th August 2016. She listed the following as beneficiaries: -

1st House

- i. Lucy Wangithi Kimunye
- ii. Daniel Muriuki Kimunye
- iii. Peter Mugo Kimunye
- iv. Elizabeth Wawira Maringa
- v. Mary Wambui Muriuki
- vi. Margaret Wangu Kimunye
- vii. Jane Wanjiru Kimunye
- viii. Joseph Wakabi Munene



2nd House

- i. Juliana Muthoni Kimunye
 - ii. Janet Waruguru Kimunye
 - iii. Joseph Gakono Kimunye
 - iv. Margaret Wamiru Mugweru
 - v. Patrick Karui Kimunye
 - vi. Jane Wairimu Muthee
 - vii. Charles Mwangi Kimunye
 - viii. Isaac Kagoto Kimunye
 - ix. Julius Muriithi Kimunye
 - x. Regina Thigutu Kimunye
2. The petitioner was issued with grant of letters of administration of the estate of the deceased herein on 18/6/2018. She later filed summons for confirmation of letters of administration dated 8/2/2019. She averred that the deceased had made his intention known on how the estate being Land parcel No. Inoi/Mbeti/1X0 measuring 5.83 Ha should have been distributed. That the deceased had applied to the land board for the sub-division of the land parcel into three portions of 3.45 Ha, 0.56Ha and 1.8Ha. The application and consent to subdivide were attached as JMK 1 & 2.
3. She further contended that the deceased intended to transfer 3.45 Ha to the 2nd house, 1.83 Ha to the 1st house and 0.56 Ha to himself.
4. She thus proposed that the estate be distributed as per the deceased's wishes as follows: -
- a. The family of the 1st wife to get 1.82 Ha jointly out of L.R.Inoi/Mbeti/1X0.
 - b. A portion of 3.45 Ha be registered in the names of the 2nd house.
 - c. The other remaining portion measuring 0.56 Ha be shared equally between the two houses each getting 0.28Ha.
5. Following filing of summons for confirmation Daniel Muriuki Kimunye swore an affidavit of protest filed on 17/6/2019 opposing the mode of distribution proposed by the petitioner.
6. The protestor averred that the deceased died intestate with two wives thus the mode of distribution was governed by Section 40 of the Law of Succession Act (herein The Act). He proposed that the 1st house should have gotten 8/18 share out of the parcel of the deceased's land whereas the 2nd house should have gotten 10/18 of the said parcel.
7. The court directed that the matter to proceed through viva voce evidence. Both the protestor and the petitioner called one witness each.

Protestor's Evidence.

8. The protestor Daniel Muriuki Kimunye adopted his affidavit of protest dated 17/6/2018. He further testified that the deceased was his father who had two wives; Lucy Wangithi Kimunye and Juliana Muthoni Kimunye. On cross-examination, he testified that they never had a sit down with their



deceased father and there were no witnesses. He also added that he was never showed where he would build.

Petitioner's Evidence.

9. The petitioner Juliana Muthoni Kimunye adopted her affidavit dated 8/2/2019. She testified that she could not remember when the deceased died. That the deceased was her husband and he had two wives. She added that they held a meeting but the 1st family left and each family was living on their respective land. That the sub-division never took place. She further stated that the 1st house was entitled but they ought to have respected the deceased's wishes. She however admitted that there was nothing showing what the deceased's wishes were though he kept saying them in the presence of his brothers who were not in court.
10. Vide judgment dated 30/4/2020, the trial court divided the estate of the deceased equally amongst the two houses with emphasis that the distribution was equally among all the beneficiaries per household and that attempts to be made such that everyone inherits where their development were situated.
11. Being dissatisfied with that decision, the appellant (petitioner) filed the instant appeal vide the memorandum of appeal filed on 19/5/2022 on four grounds. It was pleaded that the trial court erred in distributing the estate equally among the two houses, erred in dismissing the wishes of the deceased on the sharing of his estate, erred in failing to distribute the estate as per Section 40 of The Act, and that the trial court erred in failing to consider the pleadings and oral evidence thus arrived at an erroneous decision.
12. The appeal was canvassed by way of submissions wherein the appellant filed hers dated 25/7/2024 whereas the respondent's were dated 22/7/2024. I have considered those submissions alongside the entire record.

Analysis and Determination.

13. I have considered evidence adduced and submissions filed. There is no dispute that the deceased left behind two wives and 16 children. There is also no dispute that the deceased left behind one parcels of land being Inoi/Mbeti/1X0 (the parcel).
14. What I consider to be in issue is the mode of distribution of the deceased's property. The protestor's proposal is for the first house to inherit 8/18 shares out of the property whereas the 2nd house inherits 10/18 shares on the basis of Section 40 of The Act. The respondent on the other hand prayed that the wishes of the deceased be upheld and the parcel be inherited as follows; The family of the 1st wife to get 1.82 Ha jointly out of L.R.Inoi/Mbeti/1X0, a portion of 3.45 Ha be registered in the names of the 2nd house, the other remaining portion measuring 0.56 Ha be shared equally between the two houses each getting 0.28Ha. This was on the basis that the deceased had in his lifetime initiated sub-division in that manner but died before it could go through.
15. Section 40 of the Law Succession Act deals with the distribution of the estate of a polygamous family and provide as follows: -
 - " a. 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 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.



- b. 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.”
16. From the above provision, property in a polygamous marriage ought to be divided among houses according to the number of children in each house. It is not disputed that there are 16 children left behind by the deceased with two widows. The first house is made up of therefore made up of eight units while the second house is made up of 10 units.
17. There is no doubt that the property herein was in the name of the deceased at the time he died. Though the petitioner/appellant based her proposed distribution on the deceased’s wishes, there was nothing on the record to show that such wishes existed. The application for consent to subdivide the portion of land did not indicate the person to whom the parcel was to be transferred to so as to ascertain the proposed mode of distribution was based on the deceased’s wished. Noting that the transfer never went through, the parcel of land remained in the deceased name at the time of his death and no instruments of transfer was executed.
18. Though the objector testified that the deceased made his wishes known in the presence of his brothers, none of them were called to testify. The protestor denied that any family meeting was ever held and he denied that he was ever shown where to build. In the circumstances, I am not convinced that the trial court could have acted on baseless wishes to allow the mode of distribution as proposed by the petitioner. The trial court correctly fell back to Section 40 of The Act to determine distribution.
19. In my view, the trial court’s finding on distribution was fair noting that the difference in units between the two houses was only two. The decision to distribution the parcel of land equally between the two houses was thus sound. I find no justification in disturbing that finding. In *John Maina Gakuo & Another v Veronica Wanjiku Gakuo (2020) eKLR* the court rendered itself as follows: -
- “Thus, the notion of equality of shares amongst the houses or the children, is not the decisive factor in the distribution of a net intestate estate in a polygamous family set-up; rather, it is equity, fairness and, ultimately the discretion of the court that count; exercise of that discretion in any particular way will, of course, take into account those factors that have been expressly specified in section 40(1) as necessary and, no doubt, the peculiar circumstances of each particular case. It does not, therefore, always follow that the house with the largest number of children will, as a matter of course, be entitled to the lion’s share of the estate.”
20. I must add here that as correctly found by the trial court, it may be impossible to distribute the estate property with a scientific or mathematical precision. What the court should strive to achieve is a fair and equitable distribution of the estate property. The court has to consider, for example, whether it is fair, just and equitable to have the beneficiaries uprooted from one part of the estate and settled elsewhere on the same estate under the guise of equal distribution of the estate.
21. In the end, I find that the instant appeal is unmerited and the same is dismissed.
22. Each party to bear its own costs.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF JUNE 2025.

J. NG’ARNG’AR

JUDGE

Lumumbe holding brief for the Appellants



Natocho holding brief for the Respondents
Siele /Mark (Court Assistants)

