



REPUBLIC OF KENYA



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**In re Estate of Theuri Wahome Ndigii (Deceased) (Probate & Administration Appeal E004 of 2024) [2025] KEHC 9795 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9795 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
PROBATE & ADMINISTRATION APPEAL E004 OF 2024**

**MA ODERO, J**

**JULY 4, 2025**

**IN THE MATTER OF THE ESTATE OF THEURI WAHOME NDIGII (DECEASED)**

**BETWEEN**

**JAMES GICHUKI THEURI ..... APPELLANT**

**AND**

**JERIOETH WACEKE THEURI ..... RESPONDENT**

**JUDGMENT**

1. Before this court is the Memorandum of Appeal dated 11<sup>th</sup> March 2024 by which the Appellant James Gichuki Theuri seeks the following orders:-
  - “(a) That the Appeal be allowed in its entirety.
  - (b) That the judgment of Hon. N. W. Wanja Resident Magistrate delivered on 28<sup>th</sup> February 2024 in Othaya Succession Cause No. 94 of 2019, be set aside and/or varied.
  - (c) That the Honourable Court grants any/further reliefs as it may deem necessary.
  - (d) That costs of this Appeal be provided for.”
2. The respondent Jerioeth Wacheke Theuri opposed the appeal.
3. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 22<sup>nd</sup> November 2023 whilst the Respondent relied on their written submissions dated 3<sup>rd</sup> March 2025.



## Background

4. This succession cause relates to the estate of the late Theuri Wahome Ndigii (hereinafter ‘the Deceased’) who died on 15<sup>th</sup> January 2012. A copy of the Death Certificate Serial No. 191512 is annexed to the Petition for Grant of Probate dated 20<sup>th</sup> June 2019. The Deceased died testate having left a written will dated 4<sup>th</sup> November 2011.
5. The matter commenced as a testate succession with written will. A petition for Grant with written will was filed by Jerioth Waceke Theuri. The petitioner later filed summons for confirmation of Grant dated 14<sup>th</sup> February 2022. The summons identified the two widows of the Deceased namely Jerioth Waceke Theuri and Ruth Wanjiru Theuri and their children as beneficiaries to the estate.
6. The summons for confirmation of Grant claimed that the deceased had bequeathed LR No. Bellevue/Haraka/Settlement Scheme/71 to Regina Wanjiru Theuri whilst LR No. Mahiga/Kamoko/1199 had been bequeathed to Jerioth Waceke Theuri.
7. Thereafter following protests filed by Ruth Wanjiru Theuri, James Gichuki Theuri and Joseph Kahuma Theuri, the written will was apparently abandoned and the matter proceeded as an intestate cause.
8. One of the beneficiaries James Gichuki Theuri filed an Originating Summons in the Magistrates Environment and Land Court seeking the following orders;-

“A declaration that Title Number Mahiga/Kamoko/1199 registered in the name of Theuri Wahome Ndigii (Deceased) held in trust for the Plaintiff.”
9. This Summons was heard vide Othaya Succession Case No. E005 of 2022. In a Judgment delivered on 30<sup>th</sup> June 2023 by Hon. M. N. Munyendo - Principal Magistrate the court allowed the Summons and issued a declaration that Title No. Mahiga/Karioko/1199 registered in the name of the Deceased was in fact held by Deceased in trust for the 1<sup>st</sup> House.
10. The protest was then heard vide Othaya Succession No. 94 of 2019. Vide a judgment delivered on 28<sup>th</sup> February 2024 by Hon. N. W. Wanja Resident Magistrate the Court directed that the estate be distributed in the following manner;-

“LR Bellevue/Haraka/Settlement/71 measuring 0.85 hectares and LR Mahiga/Kamoko/1199 measuring 3.0 hectares shall each be divided in the ratio of 9:3 between the two houses that is, the house-hold belonging to Regina Wanjiru Theuri [and] Jerioth Waceke Theuri taking each child as a unit.”
11. Being aggrieved by the judgment dated 28<sup>th</sup> February 2024 the Appellant filed this appeal in which he raised the following grounds of Appeal:-
  - “1. That the learned Trial Magistrate erred in law and fact by dis-regarding the findings in the judgment in Othaya MPCELC 005/2022 (OS) which held that land parcel no. Mahiga/Kamomo/1199 was trust land held by the deceased on behalf of the 1<sup>st</sup> house thereby occasioning a gross miscarriage of justice.



2. That the learned Trial Magistrate erred in law and fact by adopting a wrong mode of distribution of the estate of the deceased thereby occasioning a gross miscarriage of justice.
3. That the learned Trial Magistrate failed to address her mind to the pleadings on record and the evidence by the parties, thereby occasioning a gross miscarriage of justice.
4. That the learned Trial Magistrate erred in law and fact in failing to evaluate the entire evidence as well as submissions as presented by the Appellant, thereby occasioning a gross miscarriage of justice.”

### **Analysis and Determination**

12. I have carefully considered this appeal together with the Record filed on 8<sup>th</sup> May 2024 and the written submissions filed by both sides. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see Peters -vs- Sunday Post Limited [1958] E.A 424]
13. In *Selle and Another -vs- Associated Motor Boat Company Ltd & Others* [1968] 1 E.A 123 it was stated as follows:-

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”
14. Likewise in *Gitobu Imanyara & 2 Others -vs- Attorney General* [2016] eKLR, the court of Appeal stated thus;-

“An appeal to this court is by way of a 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. It is quite obvious that the bone of contention in this matter revolves around the mode of distribution of the estate as set out in the Summons for confirmation of Grant dated 14<sup>th</sup> February 2022.
16. In the trial before the lower court the Respondent maintained that the Deceased had indicated how he wanted his property to be divided through the written will dated 4<sup>th</sup> November 2011. She stated that the Deceased had in this will bequeathed LR Bellevue/Haraka/Settlement Scheme/71 to the 1<sup>st</sup> house and LR Mahiga/Kamoko 1199 was to go to the 2<sup>nd</sup> House.
17. The Respondent proposed that the ‘Mahiga Land’ be shared equally between the 2 houses in line with Section 40 of the Law of Succession Act with the 1<sup>st</sup> House getting allocated 1.575 acres and the 2<sup>nd</sup> House receiving 0.525 acres.



18. Regarding the Bellevue Property the Respondent had proposed that in line with Section 40 the 1<sup>st</sup> House should get 5.559 acres whilst the 2<sup>nd</sup> House would receive 7.413 acres.
19. The Appellant (who was the Protestor in the lower court) however objected to any distribution in accordance with the will as he contended that due to prolonged ill health the Deceased lacked the requisite testamentary capacity to make a will.
20. The Appellant insisted that the 'Mahiga Land' was ancestral land which could not be disposed of through a will. That the same was in any event held by the Deceased 'in trust' for the 1<sup>st</sup> House. The Appellant relied on the ruling delivered on 30<sup>th</sup> June 2023 in Othaya Succession No 005/2022. He proposed that this Mahiga land, be divided to each house in accordance with the number of children each house had.
21. According to the Appellant the Mahiga Property was encumbered by a trust and as such was not available for distribution. That the only asset which was available for distribution was the Bellevue Property. The Appellant proposed that each house be allocated the portion of land which they currently, occupy and utilize. Thus the 1<sup>st</sup> House would retain the Mahiga Property whilst the 2<sup>nd</sup> House would be allocated the Bellevue Property.
22. The names and identities of the beneficiaries to this estate are not in any doubt. It is not disputed that the Deceased was a polygamous man who was survived by two wives and several children. The main issue for determination in this appeal is whether the property known as LR Mahiga/Kamoko/1199 forms part of the estate of the Deceased and is therefore available for distribution to the two Houses.
23. The protestor submitted that the Deceased did not have the legal capacity to make the written will dated 14<sup>th</sup> November 2011. However the question of the validity or otherwise of the said written will is not a matter for determination in this appeal. The trial court in its judgment noted that the parties appear to have abandoned the issue of the written will and they proceeded with the matter as an intestate cause.
24. It is a common ground that a court of competent jurisdiction found and held vide the judgment delivered on 30<sup>th</sup> June 2023 that Title Number Mahiga/Kamoko/1199, which was registered in the name of the Deceased was actually held 'in trust' for the 1<sup>st</sup> House. The court proceeded to issue a declaration to this effect. That judgment has not been set aside through an appeal nor has the same been reviewed, therefore that judgment remains valid and enforceable.
25. In the circumstances therefore this 'Mahiga' Property, having been Found to be held by the Deceased on trust for others cannot be deemed to form part of the estate of the Deceased and is not available for distribution to the other beneficiaries.
26. The trial court noted and recognized the declaration in Othaya PM ELC No. 005/2022, which held that LR No. Mahiga/Kamoko/1199 was land held by the Deceased in trust for the first house. However the learned trial magistrate still proceeded to treat the Mahiga Property as part of the estate of the Deceased which was available to distribution. The court then went ahead to consider distribution of both parcels of land in line with Section 40 of the *Law of Succession Act* which deals with the distribution of the estate of a Deceased who was polygamous.
27. In my view this was an error because the Declaration of a trust by the ELC court was binding on the Probate court. As stated earlier that decision was not (and has not even to date) been set aside by way of appeal or even reviewed. It remains a legally binding declaration issued by a court of competent jurisdiction. The correct position is that upon Regina Wanjiru became the the demise of the Deceased,



his first wife continuing trustee in respect of the Mahiga Property which the Deceased had held in trust for the first family.

28. This is in line with the decision in the case of *Re: Estate Of Julius Wachira (Deceased)* [2022] eKLR in which Hon. Justice Musyoka stated as follows:-

“The applicants (the Respondent herein) claim existence of a trust in their favour. It could very well be that such a trust does not exist. However, it is not for this court to declare it. None has been demonstrated by way of declaration by a court of competent jurisdiction. Ideally, the applicants ought to have moved a civil or land court to make a declaration of trust in their favour which they would then seek to enforce against the estate.....” .....As such, the Probate Court has no jurisdiction in Succession Cause to make a pronouncement regarding the ownership of the suit land as rightly held by Justice Musyoka.” [Own emphasis]

29. Similarly the case of *Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR, the court held as follows on the issue of trusts:

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the *Law of Succession Act* is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the *Law of Succession Act* and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court. Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust. In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.” [own emphasis]

30. Therefore the issue of the declaration of trust being the exclusive mandate of the ELC and the Mahiga Property having been declared to be trust property, by a court with the legal mandate to issue such declarations the Probate court cannot then effectively override the ELC court by distributing said assets as part of the estate of the deceased. The Mahiga Property belongs to the 1<sup>st</sup> House and cannot be deemed to form part of the personal estate of the Deceased.

31. Based on the foregoing I find that the mode of distribution as set out in the judgment dated 28<sup>th</sup> February 2024 was erroneous. The same is hereby set aside.

32. In considering the mode of distribution of the estate of a polygamous man the courts are guided by Section 40 of the Law of Succession Act.

33. In the case of *Douglas Njuguna Muigai -vs- John Bosco Maina Kariuki & Another* .....the court stated as follows:-

“It is therefore evident that, although section 40 *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]



34. The court notes the submissions of the Appellant where he indicated that each House has occupied its 'own' portion of land without any problem or dispute and/or interference. The 1<sup>st</sup> House has occupied LR No. Mahiga/Kamoko/1199 whilst the 2<sup>nd</sup> House has occupied LR Bellevue/Haraka/Settlement Scheme/71.
35. In order to ensure equitable distribution and taking into account that the 1<sup>st</sup> House have rights sole to the Mahiga Property, it is my view that each House be allocated the portion of land which they now occupy.
36. Finally this appeal succeeds. The judgment of 28<sup>th</sup> February 2024 and orders contained the said judgment are hereby set aside. In its place this court makes the following orders:-
- i. The property known as LR No. Mahiga/Kamoko/1199 comprising 2.1 acres to be allocated to the 1<sup>st</sup> House.
  - ii. The property known as LR Bellevue/Haraka/Settlement Scheme/71 comprising 7.413 acres to be allocated to the 2<sup>nd</sup> House.
  - iii. This being a family matter each side will meet their own costs.

**DATED IN NYERI THIS 4<sup>TH</sup> DAY OF JULY 2025.**

.....

**MAUREEN A. ODERO**

**JUDGE**

