In re Estate of Wamai Kibee alias Wamai s/o Kabaiku (Deceased) (Probate & Administration Appeal E006 of 2024) [2025] KEHC 11766 (KLR) (1 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11766 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

PROBATE & ADMINISTRATION APPEAL E006 OF 2024

MA ODERO, J

JULY 1, 2025

IN THE MATTER OF THE ESTATE OF WAMAI KIBEBE ALIAS WAMAI S/O KABAIKU (DECEASED)

BETWEEN

CHARLES KAMBO WAMAI .... 1ST APPELLANT

PATRICIA WANGUI KABAIKU .... 2ND APPELLANT

AND

MARY GATHIGIA WAMAI .... 1ST RESPONDENT

MARGARET MUMBI WAMAI .... 2ND RESPONDENT

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 25th March 2024 filed by the Appellants Charles Kambo Wamai and Patricia Wangui Kabaiku.

2. The Respondents Mary Gathigia Wamai and Margaret Mumbi Wamai opposed the appeal. The appeal was canvassed by way of written submissions. The Appellants filed the written submissions dated 28th February 2025, whilst the Respondents relied upon their written submissions dated 18th April 2025.

BACKGROUND

3. This succession cause relates to the estate of the late Wamai Kibebe alias Wamai S/o Kabaiku [hereinafter 'the Deceased'] who died intestate on 3rd March 1999. A copy of the Death certificate Serial Number 542113 was filed in court.

4. The Deceased was survived by the following persons;-

    [a] Mary Gathigia Wamai - Daughter

[b] Margaret Mumbi Wamai - Daughter

[c] Jane Njoki Wamai - Daughter

[d] Charles Kambo Wamai - Son

[e] Lydia Wanjiru Wamai - Daughter

[f] Francis Mathenge Wamai - Son

[g] Patricia Wangui Kabaiku - Daughter-in-law

5. The estate of the Deceased comprised the following;-

   [i] Parcel of land - LR Iriani/Chehe/123

   [ii] Parcel of land - LR Ruguru/Sagana/151

   [iii] Kenya Tea Development Growers No. RG 0070042 Ragati 1209.

6. Following the demise of the Deceased a petition for Grant intestate was made by the two Administrators in Karatina Succession No. 352 of 2018 Grant of Letters of Administration Intestate was on 29th August 2019 issued to Mary Githigia Wamai and Margaret Mumbi Wamai.

7. The Administrators/Respondents then filed the Summons for Confirmation of Grant dated 10th February 2020 in which they proposed that the estate be distributed equally between all the beneficiaries as follows;-

   [a] Plot No. Iriani/Chehe/123 - Equally among

   Mary Githigia Wamai

   Margaret Mumbi Wamai

   Jane Njoki Wamai

   Lydia Wanjiru Wamai

   Charles Kambo Wamai

   Francis Mathenge Wamai

   Patricia Wangui Kabaiuku

   [b] Plot No. Ruguru/Sagana/151 - Equally among

   Mary Githigia Wamai

   Margaret Mumbi Wamai

   Jane Njoki Wamai

   Lydia Wanjiru Wamai

   Charles Kambo Wamai

   Francis Mathenge Wamai

   Patricia Wangui Kabaiku

   [c] KTDA Growers no. Reg 0070042 - Equally among

   Ragati 1209

Mary Githigia Wamai

Margaret Mumbi Wamai

Jane Njoki Wamai

Lydia Wanjiru Wamai

Charles Kambo Wamai

Francis Mathenge Wamai

Patricia Wangui Kabaiku

8. The Protestor then filed an Affidavit of Protest dated 9th October 2020. The Protestor objected to the mode of distribution as proposed by the Respondents. He alleged that the Deceased had made an oral will dictating how his estate was to be distributed. The Protestor also claimed that some of the assets left behind by the Deceased had been omitted from the list of Assets.

9. The protestor on his part proposed that in keeping with the wishes of the Deceased the estate ought to be distributed as follows;-

" [a] Plot No. Iriani/Chehe/123

Charles Kambo Wamai - 2 acres

Francis Mathenge Wamai - 2 acres

Patricia Wangui Kabaiuku - 2 acres

[b] Plot No. Ruguru/Sagana/151

Daughters to share 1½ acres equally.

Mary Githigia Wamai

Margaret Mumbi Wamai

Jane Njoki Wamai

Lydia Wanjiru Wamai

Charles Kambo Wamai - 1½ acres

Francis Mathenge Wamai - 1½ acres

Patricia Wangui Kabaiku - 1½ acres

[c] KTDA Growers no. Reg 0070042 Ragati 1209

To share equally

Mary Githigia Wamai

Margaret Mumbi Wamai

Jane Njoki Wamai

Lydia Wanjiru Wamai

Charles Kambo Wamai

Francis Mathenge Wamai

Patricia Wangui Kabaiku"

10. The protest was heard by way of Vive Voce evidence at the Karatina Magistrates Court. On 12th March 2024 Hon. Kanyiri Principal Magistrate delivered a judgment in which she dismissed the Protest. The trial court proceeded to confirm the Grant issued to the Respondents and directed that the estate be distributed as was proposed by the Administrators.

11. Being aggrieved by this judgment Charles Kambo Wamai the Appellant [protestor] filed this Memorandum of Appeal which is premised on the following grounds;-

> " [a] The learned magistrate erred in fact and in law in making Orders without appreciating that equity does not act in vain.
>
> [b] The learned magistrate erred in fact and in law in disregarding and/or failing to consider the affidavit in protest filed by the Appellants.
>
> [c] The learned magistrate erred in fact and in law in allowing the application for confirmation without due background check of the estate.
>
> [d] The learned magistrate erred in fact and in law in granting the confirmation orders without evaluating the evidence on record to establish whether the threshold set for grant of such orders was met.
>
> [e] The learned magistrate erred in fact and in law in failing to recognize the fact that the deceased left an oral will witnessed by several people who could testify on the same if called upon.
>
> [f] The learned magistrate erred in fact and in law in failing to put into consideration the wishes of the deceased and share the estate as per the deceased's wishes."

ANALYSIS AND DETERMINATION

12. I have carefully considered this memorandum of appeal as well as the record of Appeal filed in this matter.

13. 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 v Sunday Post Limited [1958] E.A 424]

14. In Selle and Another v Associated Motor Boat Company Ltd & Others [1968] 1 E.A 123 it was stated as

> "....................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."

15. Likewise in Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR, the Court of Appeal stated as follows;-

> " 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."

16. Therefore the appropriate standard of review in cases of appeal can be summarized in the following principles;-

    [1] On first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.

    [2] In reconsidering and re-evaluating the evidence the first appeal court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses.

    [3] It is not open to the first appellate court to review the findings of a trial court simply on the basis that it would have reached a different conclusion had it been hearing the matter for the first time.

17. It is common ground that the Deceased herein passed away on 3rd March 1999. There is no dispute regarding the number and identities of the beneficiaries to the estate. Notwithstanding the fact that this cause was filed as an intestate matter, the Protestor now claims that the Deceased died testate having made an oral will.

18. It is trite law that he who alleges must prove. In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the *Evidence Act* Cap 80 Laws of Kenya provide as follows;-

> " Burden of proof
>
> 107 [1] whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> [2] When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

19. In the case of Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR, it was held that:-

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of law and substantially asserts the affirmative of the issue. That is the purport of Section 107[1] of the *Evidence Act* Chapter 80, Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of the law of proof of that fact shall lie on any particular person....." [Own emphasis]

20. Therefore the burden lay on the Appellant to satisfy the court that the Deceased did in fact make an oral will before he died.

21. This being a civil matter the standard of proof required is 'on a balance of probability'

> " In Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] EKLR, the judges of Appeal held as follows:-
>
> " Denning J. in Miller v Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say;-
>
> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties.....are equally [un] convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained." [Own emphasis]

22. In his protest the Protestor averred that after the Deceased [who was ailing] came home from the hospital he called the Protestor, the local chief and other witnesses named by the protestor as Michael Kabia, Maina Mwangi, Mwarari Mwaniki and Christopher Wachira.

23. The Protestor further averred that the Deceased told these persons that he wished the church to move out of Iriani/Chehe/151 so that his son who was mentally challenged would have a piece of land to settle on. That the Deceased went on to state that the property known as Iriani/Chehe/123 was to be occupied by his three [3] sons as he had already made provision for his daughters on the parcel of land known as Iriani/Chehe/151. One of the sons William Kabaiku having passed away would be represented by his widow Patricia Wangui Kabaiku. It is on the basis of these oral instructions allegedly issued by the Deceased that the protestor opposes the mode of distribution proposed by the Administrator.

24. Firstly this matter was filed in September 2018. The cause has been active all along at the Karatina Law Courts and the Protestor has actively participated in the suit by filing several applications which were heard and determined by the lower court.

25. The Protestor has all along been aware that this matter was proceeding as an intestate cause. If he truly believed that the Deceased had made an oral will, why on earth did the Protestor not raise the issue sooner. The Protestors action of waiting almost six [6] years after the succession cause had been filed to claim that the Deceased died testate raises serious doubt regarding the veracity of this claim.

26. Secondly the court needs to consider whether sufficient evidence was adduced by the Protestor to prove this claim that an oral will had been made.

27. The law in Kenya vide Section 8 *Law of Succession Act* recognizes both a written and an oral will - both if found to be valid will be given effect by the courts. Section 9[1] of the Act provides for the validity of oral wills in the following terms:-

> " 9[1] No oral will shall be valid unless -
>
> a. It is made before two or more competent witnesses;
>
> and

b. The testator dies within a period of three months from the date of making the will"

28. In discussing the above requirements of a valid oral will, Hon. Justice William Musyoka in Re Estate Of Evanson Mbugua Thong'ote [Deceased] [2016] eKLR stated as follows;-

> " An oral will is made simply by the making of utterances orally relating to disposal of property. In assessing whether the deceased has made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will.................. The other consideration is that the utterance ought to be made in the presence of two or more persons."

29. The question therefore is whether the Deceased made any utterances indicative of how he wished his estate to be distributed. The Protestor did not tell the court the date when this oral will was made. Therefore the court is not able to determine whether the alleged oral will was made three [3] months before the death of the Deceased, as stipulated by Section 9 [1] [b].

30. Be that as it may the Protestor has claimed that the Deceased made the alleged utterances in the presence of himself and four [4] other witnesses. The protestor did not call any of the said witnesses to confirm his allegations. The protestor named in his Affidavit of protest the persons who were present and witnessed the making of the oral will by the Deceased. One of these witnesses Michael Kabia is now Deceased. However the protestor failed to call any of the other three [3] witnesses to confirm that the Deceased made an oral will.

31. The protestor claimed that the witnesses were bribed and declined to come to court to testify. Who bribed them? The protestor does not say. The Appellant named Lawrence Gakere as one of the witnesses who was bribed and declined to testify in court. However I note that this Lawrence Gakere did testify as PW1. This witness categorically denied that the Deceased had stated how he wanted his land to be distributed. Under cross-examination PW1 stated;-

> " He [the Deceased] did not tell me how he wanted his land subdivided. He simply said church to move......when deceased before he died did not tell how he wanted land subdivided....."

32. Bribery or corruption is a criminal offence yet by his own admission the Protestor made no report to the police or to any other authority regarding this claim of bribery. He did not ask the court to summon the said witnesses to testify.

33. DW1 was the Senior Chief of Chehe Location. He confirmed that he wrote the introduction letter which the Administrators presented in court. This witness made no mention of having heard the Deceased make an oral will. Indeed the chief stated that he had no evidence relating to the distribution or subdivision of the property of the Deceased.

34. The other witnesses called by the Protestor were PW3 Jane Njoki and PW4 Elizabeth Wanjira. None of these witnesses stated that they had heard the Deceased uttering words to indicate how his wished estate to be divided after his demise. The witnesses stated that all they heard from the Deceased was his desire that the church move out of Plot 151 to give way for his mentally challenged son.

35. Finally the Appellant appeared to have faulted the trial court for failing to summon to court the persons who allegedly were present when the Deceased made his oral will.

36. It must be remembered that the legal system in Kenya is adversarial. Therefore it behooves each party to adduce evidence and call witnesses in support of their case. It is not the duty of the court to summon witnesses as this would be tantamount to descending into the arena of dispute.

37. This position was reiterated in the case of Dakianga Distributors [K] Ltd v Kenya Seed Company Limited [2015] eKLR where the court held as follows;-

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial."

38. The Appellant cannot shift to the court the evidential burden imposed upon him by Sections 107, 108 and 109 of the *Evidence Act*, Cap 80, Laws of Kenya.

39. In his written submissions the protestor alleged that the trial court had erred by overlooking the question of whether the Deceased made an oral will. Nothing could be further from the truth. I have carefully perused the judgment of the lower court. In my view the magistrate wrote a very lucid, and well considered judgment in which she addressed all pertinent issues.

40. Specifically this question of the existence an oral will was analysed by the magistrate who considered the relevant provisions of law and concluded thus:-

> ".......The Protestors did not call any witness to the alleged oral will. In their own evidence they were not present when the deceased made the alleged will. The protestors did not manage to prove that there was any oral will. I find on a balance of probabilities the protestors have not proven that there was an oral will."

41. Similarly I do find that the Appellant failed to prove the existence of an oral will made by the Deceased. In the circumstances I find that the Deceased died intestate and his estate was subject to distribution as such.

42. The Appellant had proposed that Plot 123 be distributed only amongst the three [3] sons of the Deceased because as he claimed the Deceased had made provision for his daughters out of Plot 151.

43. The theory that the Deceased made an oral will has been debunked by this court. There is no evidence to show that the Deceased during his lifetime gifted and/or transferred any part of Plot 151 to his daughters. This allegation by the Appellant has not been proved.

44. It is not disputed that the Deceased was survived by seven [7] children, being four [4] daughters and three [3] sons. The *Law of Succession Act* does not discriminate between male or female children or between married or unmarried daughters. This is in line with Article 27[3] of *the Constitution* of Kenya, 2010.

45. In Re Estate Of Godana Songoro Guyo [deceased] eKLR the court held thus:-

> "*The Constitution* of Kenya 2010 as well as the *Law of Succession Act* frowns upon the discrimination of women as far as their entitlements are concerned in inheritance matters. I also find useful guidance from the work of W. M. Musyoka," Law of succession" at page 118 in relation to reference to children in the *Law of Succession Act* that:-

‘Non-discrimination of daughters’ reference to children does not distinguish between sons and daughters, neither is there distinction between married and unmarried daughters’

Apart from the foregoing, I’m inclined to cite Article “27[3] of” *the Constitution* which “specifically provides that:”

“Women and men have the right to equal treatment,including the right to equal opportunities in political,economic, cultural and social spheres.”

46. Likewise in the case of Stephen Gitonga M’murithi v Faith Ngiramurithi [2015] eKLR the Court of Appeal held that:-

> “ Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried....” Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all male and female siblings are equal before the law and are entitled to equal protection of the law. See article 27 of the Constitution. [Own emphasis]

47. The mode of distribution of the estate of a person who died ‘intestate’ is provided for by Sections 66 and 39 of the *Law of Succession Act* as follows:-

Section 66 of the Law of Succession provides that:-

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the following order of preference –

a. surviving spouse or spouses, with or without association of other beneficiaries;

b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

c. the Public Trustee; and

d. creditors

Provided that, where there is partial intestacy, letters of administration in respect of the intestate shall be granted to any executor or executors who prove the will.

48. Section 39 of the Act provides:

1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority -

    [a] Father; or if dead

    [b] Mother; or if dead

    [c] Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none.

    [d] Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none.

[e] The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

2. Failing survival by any of the persons mentioned in paragraphs [a] to [e] of subsection [1], the net intestate estate shall devolve upon the state, and be paid into the Consolidated Fund.

49. As stated earlier the Deceased in this matter was survived by seven [7] children. The seven are all considered as dependants of the Deceased in line with Section 29 of the *Law of Succession Act* and all seven [7] have equal rights to inheritance under the law.

50. The proposal by the Appellant discriminated against the daughters of the Deceased by giving a larger share of the estate to the sons without any justification.

51. I do agree with the finding of the learned trial magistrate that the mode of distribution proposed by the Respondent was more equitable as it allowed each child an equal share in the estate left behind by their father.

52. The upshot is that I find no merit in the present appeal. The same is hereby dismissed in its entirety. This being a family matter each side is directed to meet their own costs.

DATED IN NYERI THIS 1ST DAY OF AUGUST 2025.

MAUREEN A. ODERO

JUDGE