



REPUBLIC OF KENYA



KENYA LAW
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**Kamenyi & 2 others v Karoki & another (Civil Appeal
E114 of 2022) [2025] KEHC 9617 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E114 OF 2022**

JK NG'ARNG'AR, J

JULY 3, 2025

BETWEEN

MICHAEL KIMANI KAMENYI 1ST APPELLANT

GEORGE WACHIRA KAMENYI 2ND APPELLANT

BEATRICE WANGARI NJIRAINI 3RD APPELLANT

AND

ROSE WANGARI KAROKI 1ST RESPONDENT

MOSES MITHAMO KAMENYI 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. A. K. Ithuku CM in
Kerugoya CMCC Succession Cause No. 213 of 2017 delivered on 8/11/2022)*

JUDGMENT

1. This is an appeal against the judgment of Hon. A.K. Ithuku delivered on 8/11/2022 relating to the estate of Geoffrey Kamenyi Kabutu alias Kamenyi Kabuti (deceased), whereby the Court varied the proposed distribution in the deceased's will dated 15/5/1994 to include the respondents wherein they would get an equal share from the estate of the deceased.
2. Though the matter had a previous historical background as it begun as a citation, all previous issues were settled and the impugned judgment was in relation to the protest to the summons for confirmation of grant with will annexed dated 17/6/2022. The protest was orally heard on 6/9/2022 and the trial court delivered the abovementioned judgment.
3. The appellants were dissatisfied with that finding and they filed the instant appeal vide the memorandum of appeal dated 6/12/2022 on seven grounds being that the trial court erred in law and fact by; finding that the respondents were entitled to share the deceased's estate equally, finding that



the respondents were dependents of the estate yet no application for reasonable provision was made, finding that dependents had an automatic right to share deceased's estate regardless of the deceased's will, finding that there was evidence that the 2nd respondent was a child of the deceased despite contest, failing to enforce the deceased's wishes contained in the will, rendered the deceased's wills nugatory; and made a finding contrary to public policy.

4. The appeal was canvassed by way of written submissions. The appellant's were dated 19/3/2024 whereas the respondents were dated 4/4/2024. I have considered those submissions alongside the entire court record. The main issue arising from the appeal is whether the trial magistrate erred in finding that the respondents deserved an equal share in the deceased's estate, and in extension, whether the 2nd respondent was a child of the deceased.

5. This being a first appeal, our duty was well stated in *Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where this Court held: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

6. Guided by the foregoing principles, the record of appeal as well as submissions by parties to the appeal, this Court is called upon to re-evaluate the evidence tendered before the trial court and determine whether the learned magistrate erred in varying the deceased's will as far as distribution was concerned.

7. It is trite that the law recognizes a testator's freedom and power to distribute his property as he or she deems fit. Section 5 of the *Law of Succession Act* grants any adult of sound mind power to dispose any or all of his or her free property by will. A court of law is only allowed to interfere with the said testamentary freedom, if a testator fails to make reasonable provision for his or her dependents in accordance with the *Law of Succession Act*.

8. Section 26 of the *Law of Succession Act* provides as follows: -

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”

9. The Court in *Erastus Maina Gikunu & Another v Godfrey Gichuhi Gikunu & Another* [2016] eKLR observed as follows: -

“...it is important to say here that, although there is this freedom, Section 26 of the Act enjoins the testator to make reasonable provision for his dependants. The court is permitted, on application and where it is satisfied that the testator has not done so to intervene by making what it deems reasonable provision. The desire of society to protect the family of a testator is the main reason for, not only allowing testamentary freedom, but also imposing certain limitations and protection against disinheritance.”



10. This limitation of a testator's testamentary freedom was also discussed by the Court in *Kamene Ndolo v George Matata Ndolo* [1996] eKLR. The Court had this to say: -

“This Court must, however, recognize and accept the position that under the provisions of Section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by Section 26 of the Act...”

11. It then follows that where testamentary freedom has not been exercised responsibly, the Court has power to step in and interfere with the said freedom, by making reasonable provision for any disinherited beneficiaries, upon application by such dependent.
12. It was not denied that the 1st respondent was a daughter of the deceased. The same was also admitted in the appellant's submissions. As far as the 1st respondent is concerned, I do find that the deceased ought to have made reasonable provision for her. Noting that the deceased only had one piece of land, I do agree with the trial magistrate's finding that the 1st respondent would be disinherited if the court did not intervene and make provision for her. I find it imperative to add that the fact that the 1st respondent is married cannot be used as a justification to disinherit her.
13. The law of the Succession Act and *the Constitution* does not discriminate against female children of the deceased. In this case the 1st respondent is entitled to a share of the estate. In *Re-Estate of Solomon Nagatia Kariuki (deceased)* (2008) eKLR Makhandia J. (as he then was) stated that: -

“The *Law of Succession Act* does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of the husband's side of the family.”

14. As regards the 2nd respondent, the appellants maintained that he was not a son of the deceased.
15. During the hearing, the 2nd respondent testified that he was the deceased's son and that the appellants were his brothers, whereas the 1st respondent was his sister. He testified that he was the 1st born whereas the 1st respondent was the fourth born. The 1st respondent however testified that she was the first-born child of the deceased and that her brothers came with her mother. The 2nd respondent also testified that him and his two brothers were born before their mother was married and that only the 1st respondent and 1st appellant were biological children of the deceased.
16. The court record also reflects that the 1st appellant testified in court that the 2nd respondent was his brother. It then follows that though the deceased married his wife with three children, they got two more children. However, the deceased considered all of them as his children as evidenced in the will.



It then follows that the 2nd respondent was a dependent of the deceased, and just as his other children, whether biological or note, he too deserved an equal share to the deceased's estate.

17. Children who a deceased take into his family as his own are dependants according to Section 29 of the Act which provides: -

- “ a. the wife or wives, or former wife, or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- b. such of the deceased's parents, step-parents, grandchildren, step-grandchildren, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

18. It then follows that the trial court correctly found that the 2nd respondent similarly deserved an equal share to the estate alongside his siblings.

19. I do find that although the deceased had the freedom to dispose of his estate as he pleased, he was not entitled to leave out his children without any reasonable provision. Even if the impugned Will is valid, the mode of distribution therein was so skewed so as to render the respondents disinherited. The impugned Will failed to meet the guidelines set out under Section 28, leaving some beneficiaries wholly disinherited. Since all the appellants and respondents are all children of the deceased, it is only fair that the share the estate equally.

20. The upshot is that this Court lacks any justification to interfere with the decision of the learned magistrate and the same is upheld.

21. The appeal is devoid of merit and the same is hereby dismissed with no orders as to costs given that the parties to the appeal are family members.

22. Leave to appeal is allowed

23. Stay for 30 days granted

It is so ordered

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF JULY, 2025.

HON. J. NG'ARNG'AR

JUDGE

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In the presence of;

L.W. Muchiri for the Appellants

Mureithi for the Respondents

Siele /Mark (Court Assistants)

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