



**Munene v Mithamo & another (Civil Appeal E092 of 2022)
[2025] KEHC 10299 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E092 OF 2022
EM MURIITHI, J
JULY 17, 2025**

BETWEEN

ROSE WANJIKU MUNENE APPELLANT

AND

PETER MURIUKI MITHAMO 1ST RESPONDENT

ANTHONY MURIITHI MITHAMO 2ND RESPONDENT

*(An appeal from the Judgment of Hon. G. W Kirugumi (P.M) in
Kerugoya Succession Cause No. 237 of 2019 delivered on 19/9/2022)*

JUDGMENT

1. On 20/2/2020, the Appellant and the Respondents petitioned for grant of letters of Administration intestate, in their capacity as children of the deceased, which was issued jointly to them on 13/9/2021. On 11/11/2021, the Appellant and the Respondents filed summons for confirmation of grant where, at paragraph 8 of the affidavit in support thereof, they proposed that L.R No.Inoi/Kamando/327 measuring approximately 6.50 Acres [henceforth called the estate property] be distributed equally among them.
2. On 15/12/2021, the 1st Respondent filed an affidavit of protest in opposition to the Appellant's mode of distribution contending that the deceased herein had subdivided the estate property into L.R No. Inoi/Kamando/3377, 3378 and 3379 during his lifetime. The deceased then bequeathed L.R No. Inoi/Kamando/3379 to him and L.R No. Inoi/Kamando/3377 to the 2nd Respondent. The deceased lived on L.R No. Inoi/Kamando/3378 measuring 0.20 Ha which he gave to the Appellant during his lifetime to cultivate. The deceased died before they could be issued with title deeds and all their efforts to trace the transfer forms the deceased had executed were futile, which explained why the estate property was still registered in the name of the deceased as at 31/7/2019. He urged the court to honour



the wishes of the deceased herein, by confirming the grant as proposed at paragraph 16 of his protest as follows;

“Peter Muriuki Mithamo - 1.215 Ha, Antony Muriuki Mithamo - 1.215 Ha, Rose Wanjiku Munene - 0.20 Ha.”

Statements

3. The Respondents filed their witness statements dated 14/12/2021 and 14/3/2022 in support of the protest.
4. Upon hearing of the case, the trial court distributed the estate property as proposed by the 1st Respondent in his protest.

The Appeal

5. On appeal, the Appellant filed her memorandum of appeal on 10/7/2023 raising 8 grounds as follows:
 1. The learned Magistrate erred in law and fact in delivering judgment against the weight of evidence adduced by the petitioner.
 2. The learned Magistrate erred in law and fact in holding that the deceased had subdivided his land parcel Inoi/Kamando/327 measuring 6.50 Hectares while no such evidence was adduced since nothing was produced to show that the land was not in existence and that there were other resultant portions after the alleged subDIVISION.
 3. The learned Magistrate erred in law and fact in holding that the deceased had attempted to subdivide his land while the mutation forms were never registered at the survey's office.
 4. The learned Magistrate erred in law and fact in not holding that the deceased died intestate and since he left behind 3 children and no wife, the law of intestacy under section 38 of the Law of Succession Act ought to apply.
 5. The learned Magistrate erred in law and fact in holding that the Respondents had been given 1.215 Hectares each out of the estate which comprises of land parcel Inoi/Kamando/327 as gift inter-vivos whereas no evidence was adduced to that effect.
 6. The learned Magistrate erred in law and fact by failing to hold that if the deceased's wishes were that the respondents get 1.215 Hectares each and the appellant gets 0.20 Hectares, his wishes were discriminatory and set them aside and therefore apply the Law of Succession Act.
 7. The learned Magistrate erred in law and fact in deciding the matter on extraneous evidence contrary to what had been adduced in court.
 8. The learned magistrate erred in law and fact by discriminating against the daughter by awarding bigger portions of the land to the sons.

Duty of the court

6. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. [See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123].



Oral Evidence

7. Protestor's Witness 1 Peter Muriuki and the 1st Respondent herein testified that, "The deceased Mithamo Gichoya is my father. I have other siblings. Anthony Mureithi and Rose Wanjiku Munene. Rose Wanjiku in her document has spoken about INOI/ KAMONDO/ 327. It is owned by Mithamo. It was subdivided into three titles by my father Mithamo Gichoya. The title does not exist. It was subdivided in 2008. It was 6 1/2 Acres, He subdivided it into three portions. 3377, 3378, 3379. 3377 is 3 Acres, 3378 is 1/2 Acres, 3379 is 3 Acres. 3 Acres were mine, 1/2 his and 3 Acres for my brother. We started each cultivating in their land. He attended Land Control Board. He went for 3377 and 3379. He was granted consent by the Land Control Board. Peter Muriuki Mithamo was granted the land. I produce the Land Control Board consent dated 16.10.2008 as protest exhibit 1 [a-e]. It is a bundle of documents being an extract in the minutes of the Land Control Board. The Application for the consent and consent itself. He divided in his lifetime. There were financial problems. Children were in school hence we were unable to proceed to transfer. My father died. I can't recall the exact date. He died one year after we went to Land Board."
8. On cross examination, he stated that, "I tried to search for six months I could not get the search. I was not given a reason why I could not get a search on 16.9.2021 and a search. I did a search. I have seen the search as annexure PMM2 of Affidavit of protest. I did not avail it in court. It is about INOI/ KAMONDO/ 327. I could not get a search. I don't understand where this search is from. I followed up. I did not get the answers over the history of the land. Witness referred to Application for Land Control Board. It was done on 16.10.2008. Consent issued by the board was on 16.10.2008. I don't know if you first book and seven days later you go to the Land Board meeting."
9. In re-examination, he stated that, "I searched for Inoi/Kamando/3377 I did not get a green card. I did not take the Application for consent. I had asked Macharia to do the work at the Land Control Board. I went for the Land Control Board. I was granted consent."
10. Protestor's Witness 2 Antony Mureithi Mithamo and the 2nd Respondent herein testified that, "Mithamo Gichoya is my father. He is deceased. I have a brother Peter Muriuki who is the eldest, my sister Rose Wanjiku Munene and myself. The initial land was 327. He had subdivided the land. I live on my own parcel. It is 3379. It was subdivided from 327. Land parcel 327 was 6 1/2 Acres. My father had subdivided it into three portions. 3377 3 acres, 3378, 1/2 and 3379 3 acres. I have been living in 3378. I live there to date. No one lives in 3379. 3379 is cultivated. There are maize, banana crops. I cultivate 3379. My father sent me to my sister. I went to her home at 4pm. I told her my father had summoned her to subdivide the land. She said she does not want a portion of land. She was to come on Saturday. My sister refused to come. My father had summoned elders. The elders wrote down some issues as a will. I took the written documents to my sister. We went for the board. We were referred to Embu for the pin. We went with my father and brother. My sister refused. The board transferred the land. We were summoned by the DO. We went. My sister had complained. The DO heard us. She was told the two board meetings were attended. We went home. The DO called my father. He went. He confirmed he distributed as he did since my sister refused to go to the meeting. We attended the Land Board meeting. We were issued with the consent on 16.10.2008. It is for 3379. My father gave me the Land consent, application and minutes as 1st protestor's exhibit 2 a, b, c. I have constructed on 3378. My brother has constructed on 3377. I told my brother we go for the title deed. He said since my father had sub divided we just leave it at that. My father had written a will. The 1/2 acre was to be inherited by me and my brother jointly since my sister refused. I was later summoned to court."



11. During cross examination, he stated that, “We went to the Land Board. We got consent. He did not sign the transfer form. I live in 3378 which is $\frac{1}{2}$ acre. I cultivate on 3379. My brother cultivates on 3377 and also 3378. I did not do a search for 3379. I have a search for Inoi/Kamando/327. The land is registered to my father. I did not avail the search. I have not supplied a green card. We have not had a case over the land. The consent is dated 16.10.2008. The application for consent was 15.10.2008. We got the consent the same day. A notice is issued when you apply. It is placed on the board. We found it already placed on the notice. The documents are genuine.”
12. In re-examination, he stated that, “We attended the Land Board with my father and brother. Someone took the documents for us to the Land Board. We signed the documents before the person took them on our behalf. The documents are genuine. We utilize all the three parcels. My father wrote. We utilize all of them.”
13. Protestor's Witness 3 Stephen Kinyua Gathanji testified that, “I come from Nduini Sub location Kamondo village. I am a farmer and a businessman. I trade in Livestock. I knew Mithamo Gichoya. He is deceased. He was my neighbour. He died in 2009. He had three children. Peter Muriuki, Rose Wanjiku and Antony Muriithi. I don't know the parcel number. It was 6.5 acres. He told me about it. My statement is dated 14.12.2021. Mithamo got land from Ugaciku clan. Peter Muriuki called me in 2008. He asked that I assist to mark boundaries of their land. I was present and other people. There was a Surveyor. I was present when the Surveyor was placing the boundary. It was divided into three 3 acres, $\frac{1}{2}$ acre and 3 acres. It was in the year 2008. I don't know why it was sub divided like that. They cultivate the land. Peter has his 3 acres. Anthony has his 3 acres. They cultivate. There was $\frac{1}{2}$ acre his father had left for himself. Rose was cultivating when her father was alive. I was free with his father. I am the area in charge. I was the village elder Kamondo unit. I started being the village elder last year. He had told me the $\frac{1}{2}$ was for his wife. He had constructed a house on it their father.”
14. During cross examination, he stated that, “We did not write down any minutes during the fixing of boundaries. I don't know if they were issued with title deeds. There was a Government Surveyor. We marked boundaries. I didn't follow up after that. They are cultivating each in the 3 acres. Before he died Rose Wanjiku would cultivate the $\frac{1}{2}$ acre. The $\frac{1}{2}$ had the deceased house.”
15. Protestor Witness 4 Josephat Ndege Ndaburu testified that, “I live in Gitwe in Koroma Location. I am a farmer. I knew Mithamo Gichoya. He is a clan member Ugaciku Mbari ya Ngemi clan. I can't recall his parcel number. It was about 6 acres. I visited as a clan member. He called me as a clan elder to point out how he sub-divided the land amongst his children. He divided between Peter and Anthony. He left a portion. It was for his daughter in case she disagreed with the husband. I don't know the size of the portions. Antony Mureithi's portion is in East. Peter Muriuki is on the west. Their father's portion is in between near Mureithi's. Peter Muriuki and Antony cultivate the land. Each is cultivating their portion. Antony Mureithi is cultivating the portion his father left for himself.”
16. During cross examination, he stated that, “I was alone with the now deceased when he pointed the land out. I don't know about titles. He never told me. I know his children. I know Rose Wanjiku. She is cultivating the land. The portion he left he said was for the married daughter and if she came home she would settle. He had already sub divided when he called me.”
17. In re-examination, he stated that, “I had gone to visit him. As a clan member he just showed me how he had sub divided. He just told me in the general conversation. He said you leave a portion in case your married daughter came home. He left a portion $\frac{1}{2}$.”
18. Petitioner's Witness 1 Rose Wanjiku Munene and the Appellant herein adopted her affidavit filed on 11/11/2021 as her evidence in chief. She testified that, “I live in Kangaita in Kirinyaga County. I am a



tea picker. I know the late Mithamo Gichoya. He was my father. I know Peter Muriuki and Anthony Muriithi. They are my brothers. I can identify this affidavit. I have just signed it in court. I filed those documents. My father's land was 327. I can't recall well. My father never sub-divided. I have seen the search availed by Petitioner annexure PMM 2. The land is registered to my father. It is 6 1/2 acres. It should be divided into 2 acres. The land should all be divided into three equal shares. My father never called me to divide the land.”

19. During cross examination, she stated that, “I live in Kangaita. I live in Munene's home. I am married. Munene has his land. We live in rental house. I have not leased out tea bushes I cultivate. Peter and Anthony are my brothers. I can't recall when my father died. My brother was not sent to me. I don't visit home. I only attended my father's funeral. Before my father died I was visiting him. After the land case I don't go home. After my father died I have not gone home. My brother's utilize the land. My father was ill. They have utilized the land for many years. My father had no portion. My brothers were feeding him. My mother died before. I was very young. I found my grandmother. She brought me up. I am now 59. My father had a mental illness. He was sick for a long time. I attended school. My father died in 2009. I used to assist my father. My father had mental illness since I was young. I was buying him food and clothes. He could not have capacity. He could walk bath himself. I don't know if he ever went to hospital. I was married and I lived far. He had no brothers or sisters. Before my father died they have planted coffee maize, beans. He had a house made using mud. After he died it was demolished. Anthony constructed a mud house there. My father never sub-divided. I used to visit when my father was alive. They were utilizing the land. Each was cultivating their portions. They are the ones who divided. There was no portion left. The land is 6 1/2 acres. My father never gave them each their portion. I don't know where Anthony has constructed on the land. When my father was alive there was a house. I was living with my grandmother. I never lived in my father's house. My grandmother was living on this land. She had her own house. She left it to my father after she died. I left at 15 years when I got married. My grandmother died a month after I left. I never met my grandfather. Peter Muriuki has constructed his house. Antony had not constructed when I got married. Antony Mureithi was living with my aunt when I got married. My father was an only child. The aunt was my mother's sister. She was living far off. I am older than Antony by one year. When I left, Muriuki alone was utilizing the land. Antony was young. He was with my aunt. My father was living alone. My father had no capacity to sub divide the land. He told me the acreage but had no capacity to sub divide. My father never sent my brother.”
20. In re-examination, she stated that, “I stopped visiting when I asked my brothers for my portion after the death of my father. They refused to give me a portion. We did not sit as a family after my father died. My brothers refused to give me land. I was never summoned by my father or brother over the land.”

Submissions

21. The Appellant urges that the alleged wishes of the deceased were discriminatory against the daughter, thus in violation of Article 27 of *the Constitution*, and cites Paul Kiruhi Nyingi & Another v Francis Wanjohi Nyingi [2009] eKLR. She urges that the spirit of part v of the *Law of Succession Act* is equal distribution of the estate amongst the beneficiaries of the deceased.
22. The Respondents did not file any submissions.

Analysis and Determination

23. From the grounds of appeal, the sole issue for determination is whether the deceased had distributed the estate property before his death.



24. Section 42 of the *Law of Succession Act* which provides that; “Where — [a] an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or [b] property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”
25. The significance of that section was encapsulated by the court [F. Gokonyo JJ] in re Estate of Marete Mbui alias M”Marete M’Mbui alias Justus Marete [Deceased] [2017] eKLR, as follows; “At this point I feel obliged to state- and I have stated in other cases- that section 42 of the *Law of Succession Act* serves two important purposes; one, it fends off selfish tendencies of human beings in seeking for double portions in the estate of the deceased; and two. It enables the court to attain equity in the sharing out of the estate property among the rightful beneficiaries. Thus, that is the law which I will apply in this case. Another thing; I must state that as a matter of *the Constitution* and the law, daughters of the deceased are as entitled to inherit their father’s estate in equality with the sons. I need not overemphasize this constitutional reality.”
26. The Respondents and their witnesses were unshaken even on thorough cross examination that the deceased had subdivided the estate properties into 3 portions. The deceased then gave L.R No.Inoi/Kamando/3379 and 3377 to the 1st and 2nd Respondents respectively while retaining L.R No.Inoi/Kamando/3378 but allowed the Appellant to cultivate on it.
27. The 1st Respondent testified that, “Rose Wanjiku in her document has spoken about Inoi/ Kamondo/ 327. It is owned by Mithamo. It was subdivided into three titles by my father Mithamo Gichoya. It was subdivided in 2008. He subdivided it into three portions. 3377, 3378, 3379. 3377 is 3 Acres, 3378 is $\frac{1}{2}$ Acres, 3379 is 3 Acres. 3 Acres were mine, $\frac{1}{2}$ his and 3 Acres for my brother. We started each cultivating in their land. He attended Land Control Board. He went for 3377 and 3379. He was granted consent by the Land Control Board. He divided in his lifetime.”
28. His testimony was corroborated by the 2nd Respondent who testified that, “I have a brother Peter Muriuki who is the eldest, my sister Rose Wanjiku Munene and myself. The initial land was 327. I live on my own parcel. It is 3379. My father had subdivided it into three portions. 3377 3 acres, 3378, $\frac{1}{2}$ and 3379 3 acres. I have been living in 3378. I live there to date. No one lives in 3379. 3379 is cultivated. There are maize, banana crops. I cultivate 3379. We attended the Land Board meeting. We were issued with the consent on 16.10.2008. It is for 3379. I told my brother we go for the title deed. He said since my father had sub divided we just leave it at that.”
29. Protestor's Witness 3 testified that, “Rose was cultivating when her father was alive.”
30. Protestor Witness 4 testified that, “I knew Mithamo Gichoya. He called me as a clan elder to point out how he sub-divided the land amongst his children. He divided between Peter and Anthony. He left a portion. It was for his daughter in case she disagreed with the husband. Each is cultivating their portion.” During cross examination, he stated that, “I know Rose Wanjiku. She is cultivating the land. The portion he left he said was for the married daughter and if she came home she would settle. He had already sub divided when he called me.”
31. This court takes cognizance of the applications for Land Control Board Consent duly executed by the deceased on 15/10/2008. The court further notes the Letters of Consent dated 16/10/2008 granting the deceased consent to transfer L.R No.Inoi/Kamando/3379 and 3377 to the 2nd and 1st Respondents respectively. The deceased subsequently died on 6/8/2009 before the said transfers could be effected in the names of the Respondents.



32. The Appellant alleged that the deceased suffered from a mental illness which impaired his capacity to validly execute the applications for Land Control Board Consent. However, no cogent evidence was adduced to establish that the deceased was of unsound mind at the material time, or at all to vitiate the transactions.
33. The court thus finds that the deceased had subdivided the estate property into L.R No.Inoi/Kamando/3377, 3378 and 3379 during his lifetime. He initiated the process to transfer L.R No.Inoi/Kamando/3377 and 3379 to the 1st and 2nd Respondents respectively during his lifetime, but he died before the resultant transfers could be effected.
34. In Re Estate of the Late Gedion Manthu Nzioka [deceased] [2015] eKLR, the court [P. Nyamweya J, as she then was] stated as follows:
- “In Law, gifts are of two types [gift inter-vivos and gifts made in contemplation of death [gifts Mortis Causa. For gifts inter-vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing, or by delivery, by a way of a declaration of a trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of a trust in writing. Gift’s inter- vivos must be complete for the same to be valid.”
35. comparatively in Re Estate of Godana Songoro Guyo [Deceased] [2020] eKLR, the court [R. Nyakundi J] espoused that;
- “When someone makes a gift to another with the intention of vesting it wholly on that other person and will not be expected to revert back to himself, then such disposition arising there to ought to be validated. Notwithstanding the evidence by the applicants attempt to persuade this Court to admit such evidence on gift intervivos or gift causa mortis there is no such gift over this disputed title in the legal sense.”
36. It is the finding of the court that the gifts inter-vivos by the deceased to the Respondents were valid.
37. Evidence has been led that the deceased retained L.R No.Inoi/Kamando/3378 where the Appellant cultivated during the lifetime of the deceased.
38. The court is satisfied that the trial court’s decision was supported by the evidence on record and grounded on law. There is therefore no basis for this court’s interference.

Orders

39. Accordingly, for the reasons set out above, the Court finds that the appeal is without merit and it is dismissed.
40. The Appellant shall pay to the costs of the appeal to the Respondent.
- Order accordingly.

DATED AND DELIVERED THIS 17TH DAY OF JULY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances

Ms. Waweru for the Appellant.



Mr. Kamuga for the Respondent.

