



Karinga v Nyaga (Civil Appeal 43 of 2019) [2024] KEHC 5584 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5584 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 43 OF 2019
RM MWONGO, J
MAY 6, 2024**

BETWEEN

JAMES MWANGI KARINGA APPELLANT

AND

ONESMAS NJIRU NYAGA RESPONDENT

(Being an appeal against the judgement of Hon. G.K. Odhiambo (RM) dated 31st May 2019 in Gichugu Principal Magistrate’s Court Succession Cause No.151 of 2016)

JUDGMENT

1. The appellant’s appeal in this matter is premised on the following grounds:
The Learned Magistrate erred in law and fact by failing to properly consider evidence/documents/agreement /schedules attendant to equitable distribution of the property LR No. Kabare/Ngiroche/17 amongst the beneficiaries /children of the Late Agnes Kagondu Nyaga.
 1. The Learned Magistrate failed to seek authentication of documents, exhibits produced by the respondent and thus took into consideration erroneous and irrelevant information and thereby derived an inappropriate and inequitable distribution of the Estate of the Late Agnes Kagondu Nyaga.
 2. The Learned Honourable Magistrate offended substantive justice by suppressing and failing to take into consideration evidence and or documents tendered in court by the appellant herein leading to erroneous conclusion and unjust award of the respondent and other claimants to the Estate in disregard of the fact and factor that some sons had obtained their share from the parents long before the demise of the Late Agnes Kagondu Nyaga.
 3. The Learned Magistrate in his judgment failed to incorporate the evidence tendered by the appellant and other beneficiaries and thus reached an erroneous/arbitrary distribution formula



to the disadvantage of the Appellant and other beneficiaries to the Estate of the Late Agnes Kagondu Nyaga in breach of the rules and contemplations of the Succession Act.

4. The Learned Magistrate took into consideration, unauthenticated/ unverified narratives and evidence of the Respondent and thus derived an erroneous finding on distribution.
5. The Judgment of the Honourable Magistrate is incongruous with the evidence on record and incompatible with the law.
2. On a first appeal, this court is required to re-evaluate the evidence on record and come to its conclusion, noting that it did not itself hear the evidence of observe the demeanour of the witnesses.
3. The evidence on record in the trial court was as follows.

The Protestors Case

4. PW1- James Mwangi testified that he is a farmer and the Protestor. That his deceased mother Agnes Kagondu Nyaga was survived by Obed Thitu, Onesmas Njiru, Josphat Shadrack also deceased) James Mwangi and Emily Ruth Wanjiru. He stated that the deceased left behind land parcel Kabare/ Ngiroche/17. She got the property through a Succession Cause No. 21/1971 of his deceased father and that all of them benefited from their father's estate. He was given 3.5 acres from land parcel Kabare/ Gacige/386. He narrated that when this parcel of land was being subdivided Josphat got 6.2 acres and he got 3.5 acres. He testified that the family agreed that since he got a smaller share of his father's estate, he would inherit his mother's land and it was further agreed that if her sisters were chased away by their husbands, then he would give them land.
5. Further, he stated that the deceased bought land for Obed using money left by their deceased father, while Onesmus Njiru was given land Kabare/Ngiroche/28 measuring about 4 acres from the father's succession cause. He testified that he is holding 2.7 acres of land in trust for his two twin sisters being Ruth Wanjira and Milkah Kimotho. However, he reiterated that the petitioner should not inherit her mother's land and he averred that the consent filed in court on 6/9/2016 had a signature of Josphat Shadrack who was by then deceased.
6. PW1 testified in cross-examination that there was a family meeting that agreed on the mode of distribution of the estate. However, the resolution was not reduced into writing. He admitted that he was not taken before the land board by his deceased mother. He proposed that Emily should get land but that Onesmus, the Respondent, wanted more land than anyone else. In further testimony, he produced a Death Certificate for Shadrack indicating that he died on 11.4.2014, yet he is alleged to have signed a consent on 14.9.2016.
7. PW2- Ruth Wanjira testified that she is the daughter to the deceased herein. She denied signing the consent dated 6/9/2016 she further averred that the petitioner is not giving her land and she therefore supported the protest herein. She confirmed that Joseph Shadrack died in 2014. She asserted that she is entitled to a share in her mother's estate.
8. In cross-examination, she testified that some money was in his father's account and the sums were withdrawn by their deceased mother to purchase land. She admitted that she did not produce bank statements to support her allegations.
9. PW3 Joseph Thitu Muciri testified that the deceased Agnes Kagondu is his aunt, that he was concerned with the affairs of the deceased estate. He stated that Obed Thitu bought land with the money from his father's account and that is why he was not given anything from the succession cause that was filed in 1971. He supported the mode of distribution as proposed by the protestor.



10. In cross-examination, PW3 testified that he witnessed the sale agreement for the purchase of Obed's land. He did not sign the agreement or produce the same in court. He explained that the money for it was withdrawn from the bank and given to the purchaser and that the amount withdrawn was Kshs. 8,000/=.

The Petitioner's Case

11. DW1 Onesmus Njiru Nyaga testified that the deceased's estate is Kabare/Ngiroche/17 which measures about 3 acres. He testified that the deceased had 8 children being 4 sons and 4 daughters. The children who are now alive are 3 sons and 2 daughters. He testified that Obed Thitu bought land parcel Ngiroche/207 using his own money and further that Obed did not inherit his father's estate. He testified that Obed should inherit his mother's land.
12. In cross-examination, he testified that 5 children of the deceased survived her including Obed Thitu, James Mwangi, Emily, Milkah Josphat (deceased in 2014) and Onesmus. He testified that Josphat Shadrack signed the consent dated 6/9/2016. With regard to Succession Cause 21/1971 Onesmus testified that he was given 4 acres of land, whilst James Mwangi and Josphat were given 9 acres. He stated that the land given to James Mwangi and Josphat was subdivided and titles issued to them. He denied the fact that it was agreed that James Mwangi will get a smaller share of his father's land so that he can get a larger portion of his mother's land.
13. DW2- Obed Thitu testified that the deceased had 8 children being 4 sons and 4 daughters. The 5 children that survived the deceased are James Mwangi, Obed Thitu, Milkah Wangithi, Onesmus Njiru and Ruth Mwaniki. He testified that he bought land parcel 297 and that their family did not purchase that land for him.
14. DW2 testified in cross-examination that Josphat Mureithi drew the sketch plan that he had produced in court. He denied being given money from their father's estate to purchase land parcel 297. He further stated that he cultivates on land parcel Kabare/Ngiroche/17 and the area he cultivates is about 3/4 of an acre. He testified that the land was subdivided into 3/4 of an acre each for the 4 beneficiaries while their sisters were given 1/4 of an acre to share. He stated that the rationale for giving their sisters a small portion of land is that they were married and they would inherit their husbands land.
15. The parties filed written submissions as directed.

Parties Submissions

16. The Appellant submitted that the Learned Magistrate relied on and considered irrelevant information leading to perilous and inequitable distribution of the property LR No.Kabare/Ngiroche/17 amongst the beneficiaries. At pages 75-82 of the Record of Appeal the other beneficiaries including the Appellant were categorical that the Respondent had received his share in abundance in advance and that by claiming part of LR No.Kabare/Ngiroche/17 he was seeking a comparatively greater benefit at the expense of the rest of the family.
17. The Protestor brought out salient information which required thorough and deep interrogation by the Learned Magistrate in the interest of fair distribution of the estate of the Late Agnes Kagondu Nyaga. He stated that the documents and exhibits produced by the respondent in the lower court were given undeserved attention and advanced inequitable distribution of the Estate of the late Agnes Kagondu Nyaga contrary to the contemplation of Section 38 of the Succession Act. The fact that some sons had obtained their share from the parents long before the demise of the Late Agnes Kagondu Nyaga was



overlooked or suppressed by the Learned Magistrate leading to unfair distribution of the Estate of the Late Agnes Kagonde Nyaga.

18. The Appellant submits that the Learned Magistrate failed to incorporate into his finding the evidence tendered by the appellant and other beneficiaries, leading to an erroneous and arbitrary distribution formula to the disadvantage of the Appellant and other beneficiaries to the Estate of the Late Agnes Kagonde Nyaga. As such, the said judgment was in flagrant breach of the rules and outside the contemplation of the Succession Act.
19. The Appellant relied on the case of *in Re Estate of Francis Mwangi Mbaria* [2018] eKLR where it was held:

“It is the position of the petitioners, based on the proceeding before the assistant chief, their sisters have waived their right to inherit any more than one acre from their parents. However, they are not unequivocal. Nowhere in those proceedings has any specific sister stated that she does not want anything. Neither did any of them testify during the hearing to say they did not want anything. The petitioners and their witness’s position is that for sisters who are married to inherit from their parents is unfair to their brothers. The court is not bound to accept the mode of distribution based on open discrimination of the sisters because inheriting from their parents would be ‘disturbing their brothers’, or unfair to their brothers, by simply stating that property will be share among ‘only the sons ‘or ‘men only’ without any justification. To do so would be to allow the perpetuation of discrimination against women for simply being women or girls or daughters. It would be to allow the desecration of the constitutional rejection of such acts, it would be an abdication to protect and defend a very key constitutional principle; on-discrimination.”
20. The appellant also cited Section 38 *Law of Succession Act*, CAP 160 which states that:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children”. (Emphasis added).
21. He argued that he stands to lose his entitlement and right to the property as a beneficiary of his mother’s estate. The Appellant and all other beneficiaries of the estate of Late Agnes Kagonde have an equal entitlement under Section 38 *Law of Succession Act*.
22. In the instant Appeal, he asserts that the Appellant has demonstrated that the Learned Magistrate was casual in failing to appreciate the tenor, scope and gravity of Section 38 of the Law of Succession as read with Articles 27& 28 of *the Constitution* of Kenya, 2010. He submitted that if the Estate is distributed within the parameters of the impugned judgment of the Lower Court, the Appellant and his sisters will lose their respective rightful shares and legitimate expectations in the estate of their late mother.
23. The Respondent submits that the genesis of the appeal is a judgment dated 31/5/2019 in which the honourable magistrate dismissed the appellants protest and ordered the estate of the late Agnes Kagonde comprised in L.R No. Kabare/Ngiroche/17 to be shared equally amongst her 6 children. The appellant being dissatisfied with his share filed this instant suit.
24. He argues that the instant suit was about the sharing of the estate of the late Agnes Kagonde where the mode of distribution by the appellant was proposed, to the effect that he ought to get a bigger share because of the following: -



- i. Obed Thitu a fellow sibling should not get a share.
 - ii. Alleged that there was a family agreement that he would inherit the whole share.
 - iii. That it was the deceased's wish he shares the whole land.
 - iv. That he got a lesser share from his late father's estate and therefore should be compensated.
25. The trial court in its judgment dismissed the protest as unsubstantiated and unproved and saw through the greed of the appellant hereto, and correctly applied the provisions of Sections 35, 38 & 4 of the *Law of Succession Act*.
 26. The trial court also in an act of balancing the judgment dismissed the 3 modes of distribution proposed by the respondent herewith as contradicting and used the law properly to dismiss the suit.
 27. The respondent urged the honourable court to dismiss the current appeal with costs to the respondent and confirm the learned magistrate's judgment.
 28. The question in issue is whether the appeal should be allowed.

Analysis and Determination

29. The proceedings in this case relate to the estate of Agnes Kagondu who died intestate on the 20th day of March 1999. According to the letter from the Chief of Kabare Location dated 29/8/2012, the deceased was survived by the following beneficiaries:
 - a) Onesmas Njiru Nyaga(son)
 - b) Obed Thitu shadrack(son)
 - c) Josphat Shadrack Mureithi(son)
 - d) James Mwangi Karingi(son)

The above is not in dispute.
30. As already stated the appeal arises from a judgment dated 31/5/2019 in which the honourable magistrate dismissed the appellants protest and ordered the estate of the late Agnes Kagondu comprised in L.R No.Kabare/Ngiroche/17 be shared equally amongst her 6 children. The appellant being dissatisfied with the decision filed this instant appeal.
31. It is not disputed that the deceased died intestate. Section 38 *Law of Succession Act*, Cap 160 states;

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children”.
32. The protestor submit that Obed Thitu benefited from financial proceeds from his father's estate to purchase land parcel Kabare/Ngiroche/297. He further indicated that he was to share land parcel Kabare/Gacigi/386 equally with his brother Josphat Muriithi however when the said land was being subdivided, they realized that it measured 3.89 Ha. When the land was being portioned, the protestor alleged that he ended up having a small share. He further averred that the family agreed that he would inherit Kabare/Ngiroche/17, which he is ready to share with Emily Ruth, and Sophia Wainoi.
33. PW1 James Mwangi testified that during the 1971 Succession cause his brothers Obed Thitu and Josphat Shadrack Muriithi got a bigger share of his father's estate. The family agreed that since he got



a smaller share of his father's estate, he would inherit his mother's land and it was further agreed that if her sisters were chased away from their husbands then he would give them land.

34. PW2 denied signing the consent dated 6/9/2016. She further averred that the petitioner was not giving her land she therefore supported the protest herein. On his part, PW3 Joseph Muciri corroborated the testimony of the protestor.
35. The protestor's attempt to show that money was withdrawn from the estate of the late Shadrack Nyaga's estate to purchase land for Obed Thitu was not supported by an agreement for sale, bank slip or receipt. However, Obed Thitu produced documents showing that he bought the land using his own income. Further, there are no minutes of the alleged family meeting where the family agreed to give the suit land to the protestor solely.
36. Evidence was provided by the petitioner and his witness that proved that Obed Thitu bought land parcel Kabare/Ngiroche/ 297 using his own income. A sale agreement between him and Richard Gachoki dated 2/9/1969 was exhibited.
37. In cross-examination, DW1- Onesmus Njiru Nyaga he testified that 5 children of the deceased survived her, including Obed Thitu, James Mwangi, Emily, Milkah Josphat (deceased in 2014) and Onesmus. He testified that Josphat Shadrack signed the consent dated 6/9/2016.
38. The testimony of DW2- Obed Thitu was that he cultivates land parcel Kabare/Ngiroche/17 which is about 3/4 of an acre. He testified that the land was subdivided into 3/4 of an acre each for the 4 beneficiaries while their sisters were given 1/4 of an acre to share. He stated that the rationale for giving their sisters small portion of land is that they were married and they would inherit their husbands land.

Distribution of land parcel Kabare/Ngiroche/17

39. Clearly, the protestor has not proved that the deceased bequeathed to him the suit land. The succession cause in this matter relates to the estate of Agnes Kagondu. It is not tied to the mode of distribution used in the estate of the late Shadrack Nyaga in Succession Cause No. 21/1971.
40. The applicable law in this specific matter, is Section 38 of the *Law of Succession Act*. That provision should be invoked to distribute the suit land. Applying that provision, the estate of Agnes Kagondu should be divided equally among the surviving children of the deceased.
41. In the case of *Re Estate of John Musambayi Katumanga (Deceased)* [2014] eKLR it was stated:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”
42. In my view, the trial court in its judgment correctly applied Section 38 of the *Law of Succession Act* in distributing the deceased's estate. It held that the estate should be shared equally among the children of the deceased. They are: James Mwangi, Josphat Shadrack Mureithi, Obed Thitu, Milkah Wangithi, Onesmus Njiru and Ruth Mwaniki. Josphat Shadrack being deceased his share, should go to his wife and children.



43. There is no place in the Law of Succession to support the notion that the deceased's two married daughters should inherit lesser land from the estate. This goes entirely against the letter and spirit of Section 38 of the *Law of succession Act*.

44. In *Stephen Gitonga M'murithi v Faith Ngira Murithi* [2015] eKLR it was stated:

“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.”

45. Accordingly, there is no basis to impugn the trial court's decision, which is hereby upheld.

46. The appeal is therefore dismissed with no order as to costs this being a family matter.

47. Orders accordingly.

DATED AT KERUGOYA THIS 6TH DAY OF MAY, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

1. Ms. Kwamboka - holding brief for Mose Nyambega for Applicant
2. Asimwe - holding brief for Chomba for Respondent
3. Court Assistant - Murage

