



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njau v Njau (Civil Appeal 192 of 2016) [2024] KEHC 16739 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 16739 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU**

**CIVIL APPEAL 192 OF 2016**

**NIO ADAGI, J**

**JULY 25, 2024**

**BETWEEN**

**SIMON MBURU NJAU ..... APPELLANT**

**AND**

**MURIU NJAU ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. B. J Bartoo, RM in  
Thika CMC Succession Cause No. 122 of 2011 delivered on 29/01/2016)*

**JUDGMENT**

1. Patrick Njau Ngiri (Deceased) passed away on 6<sup>th</sup> June 2000 and a joint Petition was presented before the Lower Court by both the Appellant Simon Mburu Njau (now deceased and substituted by Esther Wanjiku Mburu) and the Respondent herein in their capacities as the sons of the deceased. On 18<sup>th</sup> October 2011, a Grant of Letters of Administration Intestate was issued jointly to the said Petitioners.
2. By summons dated 3<sup>rd</sup> October 2014 supported by an affidavit sworn by the Respondent, he sought to have the grant confirmed in which he proposed that Land parcel No. Loc.1/Mugumoini/50 be shared equally amongst the deceased's four sons being Joseph Nganga Njau, Pius Wanyoike Njau, Muriu Njau and Joseph Karanja Njau. Simon Mburu Njau (Appellant) was to solely get Land Reference No. Loc.1/Mugumoini/767.
3. That proposal was however objected to vide an affidavit of protest by the Appellant herein sworn on 25<sup>th</sup> June 2014. According to the Appellant, the deceased had during his lifetime distributed part of his estate to his beneficiaries and wished that Land Reference No.Loc.1/Mugumoini/50 be subdivided equally into 5 portions amongst the following sons himself, Joseph Nganga Njau, Pius Wanyoike Njau, Muriu Njau and Joseph Karanja Njau. That Land Reference No. Loc.1/Mugumoini/767 was to be held in trust by all the sons on behalf of the step sisters Gakenia Njau and Wairimu Njau such that in case their marriages break down and they had nowhere to go then they would come back and they would be given the said parcel of land. I will pause here to ask the question, what if the step sisters'



marriages did not break or if they broke but they had somewhere else to go than to the stated parcel of land? This question shall be considered later in this judgment.

4. The Appellant protested the confirmation of the grant to have Land Reference No. Loc.1/Mugumoini/767 registered either in the names of all the beneficiaries or the names of the Administrators who would hold the same in trust on behalf of the two step sisters.
5. The Summons and the Protest were disposed of by way of viva voce evidence. The Respondent Muriu Njau PW1 testified that the deceased was his father and the beneficiaries included the 5 sons mentioned above. That the Estate of the deceased comprised of property Loc.1/Mugumoini/50 and Loc.1/Mugumoini/767 and sought that the property be divided as the deceased had wished. That the deceased had given one Joseph land at Ithanga and also given Kamau a parcel of land. Kamau is not a Party to this case. He urged the court to have the remaining listed two parcels divided amongst the beneficiaries. PW1's testimony was corroborated by that of PW2 – PW4 and one Pius to the effect that the Protestor/Appellant had been given land parcel No. 767.
6. The Appellant/Protestor testified as DW1 and called 4 other witnesses who all confirmed that the Appellant had been shown land where to build by the deceased. The Appellant /Protestor proposed that parcel of land No. 50 be divided among all the five sons including him whereas parcel No. 767 be held in trust for the step sisters from the second house.
7. The trial court evaluated the testimonies of the witnesses and arrived at a conclusion that there was nothing showing the deceased had left an order of how the land in question ought to be divided. It was also noted that all the children in the family stated that already before the demise of the deceased he had given the Appellant parcel No. 767. It is only that the Appellant refutes that claim. The trial court proceeded to find that the Appellant was not entitled to a share in parcel Loc.1/Mugumoini/50 and directed the Estate to be distributed as per the proposal on the mode of the distribution set out in the schedule in the Summons dated 3<sup>rd</sup> October 2014.
8. A Certificate of confirmation of Grant was issued on 23<sup>rd</sup> March 2016 in which it was proposed that Land parcel No. Loc.1/Mugumoini/50 be shared equally amongst the deceased's four sons being Joseph Nganga Njau, Pius Wanyoike Njau, Muriu Njau and Joseph Karanja Njau. Simon Mburu Njau (Appellant) was to solely get Land Reference No. Loc.1/Mugumoini/767.
9. Being dissatisfied by the judgment and order of the trial court on the mode of distribution, the Appellant lodged this appeal raising five grounds of appeal as set out in the face of the Memorandum of Appeal.
10. Two main issues that emerge from the grounds of appeal and which will form the basis for determination of the appeal is whether the two step sisters were disinherited and whether the trial magistrate erred in law and in fact in finding that the Appellant/Protestor who is the first-born son and beneficiary of the Estate of the late Patrick Njau Ngiri (deceased) was not entitled to a distribution of land parcel No. Loc.1/ Loc.1/Mugumoini/50 and or whether the Appellant was disinherited.
11. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* and in *Peters v Sunday Post Limited* {1968} EA 123. {1958} E.A. page 424.



12. In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that: -
13. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.
14. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
15. I have perused the Record of Appeal, considered and weighed the rival submissions on the appeal and also taken into consideration the judicial decisions cited.
16. On the first issue, the two step sisters are said to be Gakenia Njau and Wairimu Njau. It is unfortunate that none of the two was listed as a beneficiary of the deceased or is a party to these proceedings although one of them PW4 testified that she supported the mode of distribution proposed by the Respondent. Earlier, I had raised a question on the Appellant's contention that in case the marriages of the two sisters break down and they had nowhere to go then they would come back and they would be given the said parcel of land. What if the above doesn't happen? To me this is an ambiguous and indefinite expectation that is left hanging in the air and with no foundation to stand on. From the evidence, it is clear that the two step sisters were well aware of the matter and opted not to claim anything from the Estate of the deceased. The daughters were not given any property and it appears they had no problem with the said distribution.
17. The two sisters would have been expected to move the court as dependants under Section 26 of the *Law of Succession Act* which gives courts discretion to make reasonable provision to a dependant out of the Estate of the deceased. The court does not act suo moto, rather the Appellant ought to have with the written authority or consent of the said step sisters sought the same by an application brought under this section.
18. Normal preference of dependants is not grounds to interfere with the wishes of the deceased as the same is for the deceased's own goodness and in support of this position reliance was placed on the decision of Musyoka, J in *Re Estate of Lihasi Bidali (Deceased)* (2019) eKLR. It was therefore submitted that the requirements of section 26 have not been met and the same cannot be entertained by this Honourable Court. The Court was urged to be guided by the provisions of Section 28, the evidence and circumstance of the case in determining the issue.
19. The Appellant's allegations of discrimination against the two sisters in the circumstances of this matter is therefore misplaced and has no basis at all.
20. Secondly, I will consider whether the trial magistrate erred in law and in fact in finding that the Appellant/Protestor who is the first born son and beneficiary of the Estate of the late Patrick Njau



Ngiri (deceased) was not entitled to a distribution of land parcel No. Loc.1/Mugumoini/50 and or whether the Appellant was disinherited.

21. From the evidence, I find that each of the sons had been settled on the property on the portions occupied by them as shown to them by the deceased. The witnesses called to give evidence on behalf of the deceased were well-known to the deceased and the Parties herein and their evidence was thus credible.
22. I also find that based on the evidence adduced by all parties, the deceased had, in his lifetime, given land parcel No. Loc.1/Mugumoini/50 to the four identified sons and Loc.1/Mugumoini/767 to the Appellant and that there was no complaint during his lifetime about the manner in which he had settled his sons.
23. The Appellant testified that when he wanted to build, he asked his father to show him where he could build and so as a first-born son, he gave his father a goat and alcohol as expected of Kikuyu customs and he was shown where to build his house. This was confirmed by DW2.
24. Section 28 of the *Law of Succession Act* provides for Circumstances to be taken into account by court in making order:-
25. In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—
  - (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime”
26. Section 42 of the *Law of Succession Act* provides for previous benefits to be brought into account. It provides that:-

Where:-

  - a. An intestate has during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate.

That property shall be taken into account in determining the share of the set intestate finally, accruing to the child, grandchild or house.
27. The Appellant already has land given to him by the deceased during his life time and on which he has built a home. Him wanting to get more from the Estate’s land No.50 and declining to take land No. 767 given to him is a clear display of his intentions to ignore the arrangement the deceased made in his lifetime and to frustrate the smooth division of the Estate.
28. The provisions of Sections 28 and 42 of the *law of Succession Act* embraces the elegant principles of equity, equality and fairness in the distribution of the Estate of the deceased to beneficiaries. It prevents double-portion syndrome and reigns on greedy of beneficiaries.
29. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do. From the foregoing, it can be concluded that the distribution that was allegedly done by the Deceased prior to his death, if at all, can only be taken to be incomplete gifts to the Respondents and his other four siblings, at best. The Deceased must have understood that a gift was only completed upon him having done everything necessary to be done by him in order to transfer the properties and this is so because the Respondent has indicated that indeed the property known as Loc.1/Mugumoini/50 was not transferred to the beneficiaries by the Deceased, during his lifetime



and this is the reason why he moved the court to have the Appellant execute the transfer documents respecting the subject land.

30. In conclusion, I find no reason to interfere with the decision of the Learned Trial Magistrate, a decision which I find to be legally and factually sound in the circumstances.

31. Accordingly, I make the following orders:-

1. The appeal is dismissed.
2. The Appellant to execute all the necessary transfer documents with regard to land parcel No. Loc.1/Loc.1/Mugumoini/50 within Thirty (30) days from the date of this judgment failure to which the Executive Officer of this honourable court be and is hereby authorized to execute all the necessary transfer documents on behalf of the Appellant to enable transfer by transmission of the deceased's Estate as prayed in the application dated 13<sup>th</sup> May 2016.
3. There shall be no orders as to costs taking into account nature of the matter and the relationship between the parties herein.

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY at MACHAKOS this 25<sup>TH</sup> day of JULY 2024**

**NOEL I. ADAGI**

**JUDGE**

