



**Nyidha v Nyidha & another (Succession Appeal E012 of 2023)
[2024] KEHC 8314 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION APPEAL E012 OF 2023**

RE ABURILI, J

JULY 5, 2024

BETWEEN

DICKENS OLUOCH NYIDHA APPELLANT

AND

JOHNSTONE JAGOLA NYIDHA 1ST RESPONDENT

PAUL ODERO NYIDHA 2ND RESPONDENT

(Being an appeal from the Ruling of the Honourable Gloriah Barasah, SRM delivered on the 2nd October 2023 in the Chief Magistrates Court at Kisumu in Succession Cause No. 188 of 2020)

JUDGMENT

1. The parties herein are siblings and beneficiaries of the deceased's estate of the deceased Silvanus Nyidha Oromo. They filed Summons for Confirmation of grant and also proposed the mode of distribution of the estate dated 10.8.2021. The beneficiaries agreed on the mode of distribution of the estate comprising parcel of land namely Kisumu/Muhoroni/986 but could not agree on the distribution of land parcel No. Kisumu/Muhoroni/287.
2. The appellant being one of the beneficiaries filed a protest to confirmation proceedings dated 11th October 2021 challenging the proposed mode of distribution agreed on by the other parties on the grounds that the grant may have been fraudulently obtained by withholding material information from the Honourable Court.
3. The objection proceedings were heard by way of viva voce evidence. The appellant testified as OW1 stating that he did not have any interest, that his deceased father had two wives, his mother Truphena Agero and Risper Olwenyi who had since died without leaving any dependants. It was his testimony that the late Risper Olwenyi's home was on Kisumu/Muhoroni/287 and that prior to her death, she had given the land to him as he was the one who took care of her when she was sick.



4. The appellant maintained his stance that he was only interested in this parcel. In cross-examination, the appellant admitted that Kisumu/Muhoroni/287 was still registered in the name of his late father, whose estate is subject of the succession proceedings and this appeal. It was his testimony that he wanted to get $\frac{3}{4}$ share of the said parcel while his brother gets $\frac{1}{4}$ share. In re-examination, he testified that he had one sister who was alive and that he was the one to remain in the homestead. His testimony was corroborated and supported by OW2, Pamela Owiti Owino.
5. The petitioner, who is also the second respondent, Paul Odera testified as PW1 stating that Risper, his stepmother had no children prior to her death and further that the problem in the distribution of the deceased's estate arose as the appellant wanted to occupy the space where the late Risper used to stay. It was his testimony that they had to consider their sisters in the distribution of the deceased's estate having done the same in parcel number Kisumu/Muhoroni/287 in which the appellant also had a bigger portion.
6. In cross-examination, PW1 testified that initially, they had excluded their sister from the distribution but after the appellant started agitating for a bigger share of the deceased's estate, they decided to include their sister in the distribution of the deceased's estate.
7. In her ruling, the trial magistrate found that there was no injustice in the mode of distribution on record as the same had been agreed by a majority and so she proceeded to dismiss the appellant's objection with no orders as to costs.
8. Aggrieved by the said ruling, the appellant filed his memorandum of appeal dated 8th November 2023 raising the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and in fact by failing to appreciate that application by the respondents for the confirmation and distribution of the estate was contradictory and offered no clear and distinguishable distribution.
 - b. That the learned magistrate erred in law by failing to consider and weigh the evidence before the court before making a decision.
 - c. That the learned magistrate erred in law by failing to give any cogent reason for dismissing the objection before the court.
 - d. That the learned magistrate erred in law and fact when she failed to notice that the testimony of the respondents in court contradicted the documents that they had used to support their application for confirmation and distribution of the estate and the two were not in tandem.
 - e. That the learned magistrate erred in law and fact by not analyzing and realizing that the respondent application for confirmation and distribution as it stood lacked coherence and could not possibly have distributed the estate with any finality as anticipated by the relevant act.
9. The parties filed written submissions to canvass the appeal.

The Appellant's Submissions

10. It was submitted that had the learned trial magistrate given due consideration to the evidence, she would have made a finding that the distribution of the estate as per the mode proposed by the respondents would be in breach of section 45 of the *Law of Succession Act*.
11. It was further submitted that the deceased widow only had a life interest in the said land and that in any event, a grant had not been obtained thus her actions amounted to intermeddling and thus to allow



distribution in the manner proposed by the petitioners would be contrary to the provisions of the [Law of Succession Act](#).

The Respondent's Submissions

12. It was submitted that the assets in the estate were all registered in the name of the deceased and that therefore it was only the deceased that was entitled to subdivide and transfer the assets to his beneficiaries during his lifetime failure of which the estate devolved equally to his children as per the provisions of sections 35, 37 and 38 of the [Law of Succession Act](#), as was held in the case of [Edda Wangu & Another v Sacilia Magwi Kivuti \(deceased\) substituted with Rigeta Ngai](#). Embu HCCA No. 14 of 2020.
13. The respondents submitted that all the children of the deceased were entitled to an equal share of their father's estate whether they were sons or daughter as was held in [In the Matter of the Estate of Esther Njoki Muhwanga \(Deceased\) Anthony Muhwanga Wambui v Joseph Maina Muhwanga & Another](#), Kiambu HCCA No. 32 of 2018
14. It was submitted that the estate of the deceased ought to devolve in accordance with section 40 (1) of the [Law of Succession Act](#) i.e. equally among the surviving children.
15. The respondent proposed distribution as follows:
 - Kisumu/ Muhoroni 287
 - Johnstone Jagolo 0.48Ha
 - Dorcas Elizabeth Ou, uor
 - (the daughter of Esther Owuor (deceased) 0.34Ha
 - Dickens Aluoch Nyidha 1.54Ha
 - Kisumui Muhoroni/986
 - Johnstone Jagola Nyidha 0.96Ha
 - Paul Odero Nyidha 1.03Ha
 - Victor Okinyi Opany and
 - Evans Odhiambo Opany
 - (both being the children of Jack Opany Deceased) 1.34Ha
 - Benson Oluoch (son of Rose Achieng Deceased) 0.65Ha
 - Fiona Atieno (purchaser's interest) 0.03Ha
 - Kenya Pipeline (way Leave) 0.23 Ha
 - Evans Odhiambo Opanv
 - (both being the children of Jack Opany Deceased) 0.06 Ha
16. It was submitted that the respondents only wished to divide the deceased's estate to accommodate the ones who had been sold a portion of the deceased's land by the deceased's widow.



Analysis and Determination

17. This being a first appeal, the duty of this Court is to analyze and re-evaluate the evidence adduced in the lower court and draw its own conclusions -see *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
18. The appellant herein objected against the mode of distribution of the estate of the deceased on the basis that the grant may have been fraudulently obtained by withholding material information from the Honourable Court. The appellant pleaded and testified that he only objected to the mode of distribution over Kisumu/Muhoroni/287 in which he wanted a bigger portion, of $\frac{3}{4}$ while his brother was to get $\frac{1}{4}$.
19. The allegedly withheld information was that he took care of his step-mother Risper Olwenyi who occupied Kisumu/Muhoroni/287 prior to her death and that she wanted him to have the said property.
20. On their part, the respondents argued that the deceased's estate should be divided equally among the deceased's children who were the only survivors of the deceased including the daughters but also taking into account the share of those who bought portions of the deceased's property from the deceased's widows. This particularly included one Fiona Atieno who acquired 0.03Ha in Kisumu/Muhoroni/Muhoroni/986.
21. I have considered the opposing positions. The only issue for determination is whether the appeal has merit. The commencement point would be to note that at all material times, both Kisumu/Muhoroni/287 and Kisumu Muhoroni/986 were registered in the name of the deceased Silvanus Nyidha Oromo. Accordingly, all transactions undertaken in the deceased's estate prior to confirmation of grant amounted to intermeddling and were in effect, a violation of section 45 of the Succession Act and thus void ab initio. I say so because section 45 of the [Law of Succession Act](#) specifically bars any intermeddling with the estate of the deceased. Intermeddling includes selling or transferring property in the state of the deceased before confirmation of the grant. In this case, there were no succession proceedings in place to give authority to any widow to sell property belonging to the deceased. that land parcel No. Kisumu/ Muhoroni/287 was registered in the name of the deceased and not his widow and therefore his widow could not sell without authority of the court or the certificate of confirmation conferring on her the beneficial ownership thereof.
22. The deceased was survived by children, two of his spouses having died as well. One of the spouses had no child while the beneficiaries are all from one house. That being the case, this cannot be said to be succession involving a polygamous intestate. Where that scenario arises, section 38 of the [Law of Succession Act](#) applies, so that the estate is distributed equally amongst the children of the deceased. Section 41 of the Act is also relevant, to address the situation where some of the children of the deceased are dead but they are themselves survived by their own children. Section 41 provides that in that event, the children of the dead children of the deceased step into the shoes of their dead parent, to take the share that ought to have gone to such dead parent. Section 38 provides as follows:
 - “ 38. 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.”



23. Under section 41:
- “ 41. Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”
24. Section 38 of the [Law of Succession Act](#) provides for equal distribution of the estate amongst the children of the deceased. The language of section 38 is gender neutral. It does not classify children into male and female, nor sons and daughters, nor men and women. There is no discrimination nor differentiation nor classification nor categorization along gender lines. That would mean that sons and daughters of a dead person are entitled on equal basis to a share in the estate of their dead parent. Section 38 of the Act does not make marriage a factor in the distribution of the estate of a dead parent. Gender and marital status are factors under customary law, but not under the [Law of Succession Act](#). That said, any custom that goes afoul Article 27 of the [Constitution](#) is unconstitutional and therefore null and void.
25. Section 38 of the [Law of Succession Act](#) must be read together with Article 27 of the [Constitution](#), which outlaws all forms of discrimination on the basis of gender or marital status. It declares that men and women have a right to equal treatment in all spheres of life.
26. In this case, the parties agreed on the mode of distribution of the estate except the Land Parcel No. Kisumu/Muhoroni/287. This court would not interfere with the distribution of the estate as agreed between the beneficiaries/ dependants of the deceased. In addition, as the other widow died without any child, it is fallacious for the appellant to claim that because he took care of her, then he is entitled to a share of the land that she occupied prior to her death. In this case, all the children on the deceased being to one house hence there is nothing like two houses and hence, section 40 of the [Law of Succession Act](#) does not apply.
27. However, as the parties herein have failed to agree on the mode of distribution of Land Parcel No. Kisumu/Muhoroni/ 287, this court in the exercise of its inherent powers under Rule 73 of the Probate and Administration Rules, I hereby order that the land parcel No. Kisumu//Muhoroni/287 shall be shared equally between all the deceased’s children as it forms part of the deceased’s estate and not the property of the deceased widow. I find no evidence of alleged withheld material as the appellant taking care of the deceased widow does not confer on him any right to inherit land occupied by that widow to the exclusion of his other siblings, noting that the land was not registered in her name but in the name of the deceased Silvanus Nyidha Oromo.
28. Accordingly, I find that the appeal herein lacks merit. It is hereby dismissed.
29. As parties are siblings, I order that each party shall bear their own costs of this appeal.
30. The lower court file to be returned with a copy of this judgment for confirmation of the grant in the manner proposed by the petitioners and for avoidance of doubt, the land Parcel No. Kisumu/ Muhoroni//287 shall be shared equally among all the children of the deceased.
31. This file is closed.
32. I so order.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 5TH DAY OF JULY, 2024

R.E. ABURILI

JUDGE

