



REPUBLIC OF KENYA



In re Estate of Wanduru Kahando (Deceased) (Probate & Administration Appeal E018 of 2022) [2024] KEHC 12499 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PROBATE & ADMINISTRATION APPEAL E018 OF 2022**

MA ODERO, J

OCTOBER 11, 2024

IN THE MATTER OF THE ESTATE OF WANDURU KAHANDO (DECEASED)

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 29th November 2022 by which the Appellants Simon Karumba and Stephen Wamai Ngatia pray that:

‘the appeal be allowed, the judgement of the lower court be set aside with costs and an order that the suit land be shared equally among the three (3) parties in this matter.

2. The Respondent Gladys Wairimu Kamweti opposed the appeal.
3. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 12th July, 2024 whilst the Respondent relied upon her written submissions dated 15th July, 2024.

Background

4. This appeal arises from the judgment delivered by Hon. E. Kanyiri Principal Magistrate on 7th November 2022 in Karatina Succession Cause No 16 of 2013. That Succession Cause related to the estate of the late Wanduro Kahando alias Wanduro who died intestate in the early 1960’S. Her death was not registered.
5. Following the demise of the Deceased Peter Mbaiku Kamweti and Geoffrey Maina Gatu the Grandson and Great Grandson of the Deceased petitioned the court for Grant of letters of Administration Intestate. The 1st Petitioner Peter Mbaiku subsequently died and was substituted by his daughter Gladys Wairimu Kamweti.
6. A grant was duly issued to the Petitioners on 16th March 2014. They later sought confirmation of said Grant in which they sought to have the only asset of the estate being a parcel of land LR No. Ruguru/ Kiamariga/423 distributed to themselves and Stephen Wamai equally (1 acre each). The Objectors Simon Karumba and Stephen Wamai filed an Affidavit of Protest dated 11th February 2015 opposing



the mode of distribution of the estate and claiming that the petitioners had no right to a share of the estate.

7. That protest was heard by way of Vive Voce evidence and on 7th November 2022, the learned trial magistrate directed that the estate devolve in its entirety to the Respondent Gladys Wairimu Kamweti.
8. Being aggrieved by this decision the Objectors filed this appeal which was premised upon the following grounds;-
 1. That the learned trial court erred in failing to note and find that the 1st Appellant and the Respondent were first cousins and rank at per in line and degree of consanguinity.
 2. That the learned trial magistrate erred in law and fact by failing to find that the 2nd appellant represented the 3rd share of the deceased's estate by virtue of being a grandson of one of the deceased's daughters in this matter.
 3. That the learned trial magistrate erred in law and fact by failing to consider that each of three parties in this matter represented the families of the three deceased daughters of their deceased mother Wanduru Kahando to whom this succession belongs to.
 4. That the learned trial magistrate erred in law and fact by supposing that the Respondent ranked higher in the degree of consanguinity than the appellants.
 5. That the learned trial magistrate failed to consider that the suit land parcel number Ruguru/ Kiamagira/423 is in possession of all the three families of the deceased daughters of the deceased in this matter, Wanduru Kahando.
 6. That the learned trial magistrate erred in law and fact by assuming that Peter Mbaiku Kamweti was a son of the deceased in this matter and ranked in the 1st degree of consanguinity and that the Appellants ranked in the 2nd and 3rd degree of consanguinity respectively.
 7. That the learned trial magistrate erred in law and fact by failing to consider that if the 3 deceased daughters of the deceased in this matter were alive the suit land would have been shared out equally into three equal portions representing the three parties herein.

Analysis and Determination

9. I have carefully considered this appeal as well as the written submissions filed by the parties.
10. This is a first appeal, thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and to draw its own conclusions on the same. In *Selle & Another -vs- Associated Motor Boat Company Limited & Others* [1968] E.A 123, the court of Appeal held that;-

“An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
11. The Deceased in this matter was not survived by any spouse. She had three (3) daughters namely;-
 - (i) Nyanjunga Wanduru



- (ii) Muthoni Wanduru
 - (iii) Wambui Wanduru
12. None of the three daughters was alive when the Deceased passed away as they had all pre-deceased her.
13. Peter Mbaiku and Gladys Wairimu were the children of Nyanjungu Wanduru. Thus the two were grandchildren of the Deceased.
14. The 1st Appellant Simon Karumba is the son of Wambui Wanduru and therefore is also grandson to the Deceased.
15. The 2nd Appellant Stephen Wamai Ngatia is a grandchild of Muthoni Wanduru. He is therefore a great grandson to the Deceased.
- Therefore in summary. The Appellants, are the grandson and great grandson of the Deceased whilst the Respondent is a granddaughter of the Deceased.
16. Section 66 of the *Law of Succession Act* Cap 160, Laws of Kenya provides as follows:-

“When a deceased dies intestate, the court shall save as otherwise expressly provided, have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference -

- a. Surviving spouse or spouses, with or without association of other beneficiaries;
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c. The Public Trustee; and
- d. Creditors:”

17. In a case such as the present one where the Deceased is not survived by a spouse or children Section 39 of the *Law of Succession Act* provides as follows:-

“(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority –

- a. Father; or if dead
- b. Mother; or if dead
- c. Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none.
- d. Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none.
- e. The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”

18. In order to determine who ranks in priority regarding the estate of the



Deceased the court must consider the level of consanguinity which each party has to the Deceased.

19. Blacks Law Dictionary defined 'consanguinity' as

“The relationship of persons of the same blood or origin.”

21. The law requires that generations be counted from the intestate beginning with the parent up to the common ancestor and then down to the particular relation. Therefore, if a person is claiming to be a next-of-kin he/she must show the level of relationship in equal degrees derived from each difference level of common ancestors.

20. In other words, the term “next of kin.” for intestate succession purposes only, is understood in the primary sense of those nearest to the intestate by blood. Thus this dispute can only be determined by examining the degree of consanguinity and affinity so as to determine who between the parties is nearest by blood to the deceased. An examination of the consanguinity and affinity chart below will help in determining this issue.



| | |
|--|--|
| <p>4th degree Great Great Grandparents</p> <p>Great Aunt/Uncle</p> <p>First Cousin</p> <p>Grand Niece/Nephew</p> | |
| <p>3rd degree Great Grandparent</p> <p>Aunt/Uncle</p> <p>Niece/Nephew</p> <p>Great Grandchild</p> | |
| <p>2nd degree Grandparent</p> <p>Brother/Sister</p> <p>Grandchild</p> | |
| <p>1st degree Parent</p> <p>Child</p> | |
| <p>Ego</p> <p>1st degree Spouse</p> <p>2nd degree Parent-in-law</p> <p>Daughter/Son-in-law</p> | |
| <p>3rd degree Grandparent-in-law</p> <p>Brother/Sister-in-law</p> <p>Grandchild-in-law</p> | |
| <p>4th degree Great Grandparent-in-law</p> <p>Aunt/Uncle-in-law</p> <p>First Cousin-in-law</p> <p>Niece/Nephew-in-law</p> | |



21. Both the Respondent and the 1st Appellant are the grandchildren of the Deceased as they are both children of the daughters of the Deceased.

As such both the Respondent and the 1st Appellant are in the 2nd degree of consanguinity. They rank equally as beneficiaries to the estate,

22. In *Cleopa Amutala Namayi v Judith Were Succession Cause 457 of 2005* [2015] eKLR Hon. Mrima, J. observed that:-

“Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents.... The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit from their grandparents indirectly through their own parents.... The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead..... [own emphasis]

23. Based on the above I find that given that the Respondent and the 1st Appellant are first cousins, the trial court erred in awarding the estate to the Respondent alone and ignoring the 1st Appellant who is of equal rank.

24. The Deceased third daughter Muthoni had a son named ‘Ngatia’ who is also deceased. The 2nd Appellant being the son of this ‘Ngatia’ is a great grandchild of the Deceased. The 2nd Appellant therefore ranks at the 3rd degree of consanguinity.

25. If the 2nd Appellant wished to step into the shoes of his father then he must demonstrate that he has legal authority to represent that estate through a Grant. The 2nd Appellant did not produce in court any Grant authorizing him to represent the estate of his late father. I therefore find that the 2nd Appellant has no legal authority to represent the estate of his late father.

26. Finally I find merit in this Appeal. In the *Christine Wangari Gachege Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR, the Court held as follows:-

“Although Section 35 and 38 of the *Law of Succession Act* is silent on the fate of surviving grand children whose parents predeceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law is section 41. If a child of the intestate has pre-deceased, the intestate then that child’s issue alive or in Centre as mere on that date of the intestate’s death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate take between them the share their parents would have taken had the parent been alive at the intestate’s death.” [own emphasis]

27. I find that the 1st Appellant and the Respondent rank in equal priority as beneficiaries of the estate of the Deceased. I therefore set aside the decision of the trial Court and substitute it with the order that the estate of the Deceased comprising of the parcel of land known as LR Number Ruguru/Kamariga/423 shall be divided equally between Simon Karumba and Gladys Wairimu Kamweti. This being a family matter each side will bear their own costs.

DATED IN NYERI THIS 11TH DAY OF OCTOBER, 2024



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MAUREEN A. ODERO
JUDGE

