



Kamau & 5 others v Muiruri (As personal representative of the Estate of Leah Muikari Kamau) (Probate & Administration Appeal 8 of 2019) [2024] KEHC 12363 (KLR) (15 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
PROBATE & ADMINISTRATION APPEAL 8 OF 2019**

J WAKIAGA, J

OCTOBER 15, 2024

BETWEEN

**RUGURU KAMAU 1ST APPELLANT
NDUNGU KAMAU 2ND APPELLANT
IRUNGU KAMAU 3RD APPELLANT
LIBERATA MUIKARI KAMAU 4TH APPELLANT
DAVID NDUNGU KAMAU 5TH APPELLANT
BONOFACE GITGANGA KAMAU 6TH APPELLANT**

AND

ESTHER WAIRIMU MUIRURI (AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LEAH MUIKARI KAMAU) RESPONDENT

(being an appeal from the Ruling of the Principal Magistrates Court at Kandara Hon. M.W. Kinyanjui PM dated 29th August 2019 in Succession Cause No 130 of 1977)

JUDGMENT

1. By an application dated 11th March 2019 the Respondent moved the Court for an order that the Court revoke and or annul the grant issued on 16th August 1977 and subsequently be pleased to revoke all subdivisions and subsequent transfers made pursuant to the said order.
2. By a Ruling dated 29th August 2019, the Court found for the Respondent and held that the estate of the deceased be shared equally among all the beneficiaries that is all the children of the deceased and surviving spouses and proceeded to revoke the grant and cancel the division of LOC.5/Kabati/901-913



- be cancelled and land revert back to the deceased and estate divided equally in line with Section 38 of the Succession Act.
3. Being aggrieved by the said Ruling, the Appellants filed this appeal and raised the following grounds of appeal:
- a) The trial Court erred in applying the provision of the Law of Succession Act in respect of the estate of the deceased.
 - b) The Court erred in failing to appreciate that the law applicable to the distribution of the estate was the Kikuyu Customary Law which was applicable as at the time of his demise.
 - c) The Court erred in adjudicating on a matter that was *res judicata* in view of Thika CMCC No 237 of 1989 and allowing the Respondent to file the application after a period of forty years after the estate had been distributed.
 - d) The Court erred in presiding over a matter without pecuniary jurisdiction.
 - e) The learned Magistrate erred in law and fact in allowing an application filed over forty years after the estate of the deceased had been distributed.
 - e) The magistrate erred in law and fact by faulting the process through which the deceased property had been distributed and ordering that the deceased property be divided equally amongst the beneficiaries of the estate before a new Succession is carried out and the beneficiaries identified.
4. The Respondent did not file any documents in opposing the appeal.

Submissions

5. Directions were issued on the disposal of the appeal by way of written submissions and at the time of this judgement, it is only the Appellant who had filed written submissions, wherein it was contended that the law of Succession came into force on the 1st July 1981 long after the deceased had died and therefore his estate was subject to African Customary Laws under Section 120 of the Registered Land Act under which his estate was divided.
6. In support of this proposition, reference was placed on the case of Philip Michere Mucembi v Wamai Mucembi Embu Civil Appeal No 61 of 2006 [2010] eKLR in which the Court held that in applying Section 40 of the Law of Succession Act to the estate of the deceased, the trial fell into error and that the deceased having subdivided his land amongst the wives was not against the law. In the matter of the Estate of David Maziwe Muranga High Court Succession Cause No 8 of 2017 [2018] eKLR where the Court held that no evidence was tendered to suggest that the Kikuyu Customary law was repugnant to morality or justice.
7. It was further contended that the matter appealed from was *res judicata* in view of the decision of the Court in Thika CMCC No 237 of 1989 wherein the Court confirmed Succession Cause No 130 of 1977 against the Respondent and therefore it was not open to the trial Court to make a contrary finding.
8. It was further contended that the trial Court had a pecuniary jurisdiction of ten million while the value of the property was Kshs 355,000,000 and therefore the suit should have been transferred to the High Court as was held in the case of Family Bank Limited v Shamsa Nassoro Hamdu [2012] eKLR where the Court held that if a suit is filed without jurisdiction, the only remedy is to withdraw it and to file a compliant one in the Court seized of jurisdiction.



9. It was the Appellants contention the application appealed from was filed about 42 years after the certificate of Succession was issued and the Appellants settled on their respective parcels of land and that the Court should have considered the delay in filing the application as was held in *The Matter of the Estate of Stanley Kimani Karanja* [2015] eKLR where the Court held that equity aides the vigilant and not the indolent the estate having been distributed according to the customary law of the deceased.
10. This being a first appeal, the Court is under a duty to re-evaluate the proceedings before the lower Court to come to its own decision thereon. For the purposes of this appeal the litigation history by the parties is necessary.
11. The Succession Cause in respect of the estate was filed in Kandara as Succession Cause No 130 of 1977 and on 2nd March 1989 the Respondent took out chamber summons in which he sought that an inhibition Order do issue restraining the Land Registrar Muranga from dealing or entering or registering any dealings against the sub divisions herein until further orders of the Court and that the judgment thereon be set aside and or reviewed.
12. The application was allowed and the suit set down for hearing and by Ruling thereon the Court found that the clan decided on a mode of distribution which was unjust and discriminatory as it did not recognize the Respondent who was a female child of the deceased and proceeded to revoke the grant and order for equal distribution of the suit property equally amongst all the beneficiaries in line with Section 38 of the *Law of Succession Act*.
13. It is not in dispute that the Respondent is a child of the deceased who was divorced as at the time of the said distribution of the deceased estate by the clan and that she was not taken care of during the said distribution.
14. That whereas as at the time of the said distribution, the applicable law was the Personal Law of the deceased, the said law must be read in conformity with the principles set out in the *Constitution* of Kenya 2010 and having found as a fact that the Respondent was discriminated against during the said distribution, I find no fault with the Ruling thereon, the fact that the Appellants had settled in their respective parcels of land notwithstanding.
15. I therefore find no merit on the appeal herein which hereby dismiss with no order as to cost the same being a family dispute. And it is ordered.

SIGNED DATED AND DELIVERED AT MURANGA THIS 15th DAY OF OCTOBER 2024

J. WAKIAGA JUDGE

In the presence of:

Kamwaro for Applicant

Ms Waiyeyo for Mbiyu for the Respondent

Jackline – Court Assistant

