



REPUBLIC OF KENYA



**Kinyanjui v Muchiri & 2 others (Civil Appeal E054 of 2021)  
[2023] KEHC 1590 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1590 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL E054 OF 2021**

**J WAKIAGA, J**

**MARCH 7, 2023**

**BETWEEN**

**NATHALINA NYAMBURA KINYANJUI ..... APPELLANT**

**AND**

**CONSOLATA WANJIKU S. MUCHIRI ..... 1<sup>ST</sup> RESPONDENT**

**MUTHONI GITAU ..... 2<sup>ND</sup> RESPONDENT**

**JOHN MUTURI KURIA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling /Order of Hon. E.M Nyagah  
(SPM) delivered on 28th September 2021 in Succession Cause No  
49 of 2009 (in the matter of Estate of Bianjo Weru - Deceased)*

**JUDGMENT**

1. The Appellant together with Margaret Muthoni Gitau, and Charity Wambui Gicaru applied for Grant of letters of Administration in respect of the estate of the deceased at the lower Court which was granted on 5<sup>th</sup> February 2020 and by an Application dated 8<sup>th</sup> of July 2020 applied for the confirmation of the said Grant, which Application was supported by the annexed affidavit of Charity Wambui Gicaru in which she proposed that the estate known as Parcel No. Loc. 20/ MIRIRA/39 be shared equally amongst the beneficiary identified as follows:
  - a) John Muturi Kuria
  - b) Consolata Wanjiku S. Muchiri
  - c) Charity Wambui Gicaru
  - d) Nathalina Nyambura Kinyanjui



- e) Margatet Muthoni Gitau
2. In response to the said Application Margaret Muttons and Consolata Wanjiku filed an affidavit of protest in which they proposed that the estate be shared as follows:
    - a) Consolata Wanjiku S. Muchiri..... 2.8 acres
    - b) Margaret Muthoni Gitau ..... 2. 8 acres
    - c) John Mutuiri Kuria .....2.6 acres
    - d) Charity Nyambura Gicharu .....2. 6 acres
  3. On the 21<sup>st</sup> day of September 2020 the protestors through Ms Mwaniki Warima & Co Advocates made an Application that the protest be heard by way of oral evidence and on 29<sup>th</sup> the Appellant filed Grounds of Opposition to the said Application on the Grounds that the protestors were trying to disinherit her being a daughter of the deceased and that there was nothing complex to the Application which required oral evidence.
  4. The said Application was heard by way of Written Submissions and by a Ruling there on the same was allowed setting the ground for the protest to be heard by way of Oral evidence and by a Ruling thereon dated 28<sup>th</sup> September 2021, the Court allowed the protest and ordered the distribution as proposed by the protestors on the grounds that the deceased died in the year 1970 and therefore the estate was subject to Kikuyu Customary Law, the Appellant having been married at the time of his death.
  5. Being aggrieved by the said Ruling the Appellant filed this Appeal and raised the following Grounds of Appeal:
    - a) That the Magistrate erred both in law and fact by referring to the Appellant as a Protestor/ Applicant whereas the same was a Co-administrator thereby arriving at a wrong conclusion.
    - b) The Court applied laws which were repugnant to justice and morality by locking the Appellant out of inheritance from her deceased father.
    - c) The Court erred in not applying *the constitution* and law of succession in the distribution of the estate
    - d) The Court failed to consider the submissions by the Appellant in reaching the determination thereby disinheriting the same.
    - e) The Appellant therefore sought that the Appeal be allowed and the property subdivided equally amongst the five dependants of the estate.

### Submissions

6. Directions were given for the filing of Written Submissions which were duly complied with. On behalf of the Appellant it was submitted that the Appellant was left out by the Court in distributing the estate of the deceased despite the fact that she was a rightful beneficiary of the estate. It was submitted that the applicable law was Succession Act under Section 2(1) thereof as read with Article 27 of *the Constitution* and in support of this hypothesis reference was made to the cases of in Re Estate of Evans Ngugi wanjau (deceased) [2020] e KLR and in Re Estate of Solomon Ngatia Kariuki (deceased) [2008] eKLR.
7. It was submitted further that in applying the Customary Law in the distribution of the estate the Appellant was discriminated upon in support of which the which the following case were tendered: Matters of the Estate of M'ngarithi M'miriti alias Paul M'ngarothi M'mriti [2017] eKLR and in



Thomas Toto Nyachawo V Judith Akinyi Ndege [2016]e KLR in which it were held that the cultural form under Article 11 of *the Constitution* were the positive form .

8. It was contended that the trial Court erred in failing to acknowledged the fact that the Appellant had not renounced her right to inherit the estate and was therefore entitled to an equal share of the estate despite the fact that she was married as was stated in Peter Karumbi Keingati & others V Dr Ann Nyakabi Nguthi.
9. It was finally submitted that the Court applied the Law of Succession retrogressively and that the parties did not attempt to prove the Kikuyu Customary law in support of which the cases of in Re Estate of Peter Gathongo [2020] eKLR and in Re The Estate of Mugo Wandia [2009] eKLR were tendered.
10. On behalf of the Respondent it was submitted that the applicable law in regard to this estate was the Kikuyu Customary Law as the deceased died before the enactment of the Law of Succession in support of which reference was made to the cases of Estate of Kamwethi Mwethi and Mary Wanja Gichuru V Esther Watu Gichuhi.
11. This being a first Appeal, the Court is required to re-evaluate the evidence tendered at the trial and to determine whether the conclusion reached by the Court are to stand or give way as was stated in Abok James Odera t/a A.J. Odera & Co Advocates V John Patrick Machira t/a Machira & Co Advocates [2013] eKLR.
12. In this matter the parties relied in their written statements and in finding against the Appellant the trial Court had this to say “the evidence adduced herein is that during his life time the deceased had given Celistine Kuria, the father of John Muturi land parcel number Loc. 11/MARAGIA /1328 and Paul Ngugi husband to Charity Wambui Gicharu land Parcel number LOC 11/ MARAGI /213 where she resides with her family. It is also established that Nathalina Nyambura Kinyanjui was married at the time her father passed on ..... the deceased died in 1970 and in my view the estate should be administered in accordance with Kikuyu customs and his wishes “.

### **Determination**

13. From the submissions and the proceedings herein, I have identified the following issues for determination in this Appeal;
  - a. What was the applicable law in respect of the estate herein?
  - b. Whether the deceased had distributed his estate in his life time.
  - c. Whether the Appellant was entitled to a share of the estate.
14. From the proceedings it was not disputed that the deceased died intestate on 2<sup>nd</sup> December 1970 before the enactment of the *Law of Succession Act* and therefore the said estate was subject to the provision of Section 2(2) of the Act which provides that the estate of a person dyeing before the enactment of the Act is subject to written laws and customs applying at the date of death.
15. The trial Court can therefore not be faulted in his holding that the applicable law in respect of the estate herein was the Kikuyu Customary Law subjected to Section 3(2) of the *Judicature Act* in as far as the same is not in conflict with any written law and not repugnant to justice and morality. I therefore find no merit on the submission by the Appellant that the Court erred in applying the Kikuyu Customary law in the distribution of the estate and accordingly dismiss the same.



16. On whether the deceased had distributed his estate before his death, this was a finding of fact based on the statement by Consolata Wanjiku S. Muchiri to the effect that the subject property had been given to Paul Ngugi the husband of the 2<sup>nd</sup> Respondent and as corroborated by all the respondent's witnesses, which the Appellant did not controvert in her statement.
17. An appellate Court will only interfere with the trial Courts finding of facts as stated in the case of Rufus Kangethe Kamau V Grace Njeri Kamau [2022] eKLR where the Court quoted with approval Mkube v Nyamuro [1983] KLR thus " Court on appeal will not normally interfere with the finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion "
18. This being a finding of fact based on the evidence tendered before the Court, I therefore find no fault with the said holding and having so found there as nothing remaining to be distributed save for the Administrators to effect what the deceased had done in his life time.
19. Whereas the Appellant as a married daughter would be entitled to a share of the estate of her father as supported by the authorities submitted by the same, the Court having found as a fact that the deceased had distributed his estate in his life time, the Court cannot be faulted in distributing the estate as proposed by the Respondent. Of interest to the Court is the silence on the part of the Appellant to justify her claim to the estate wherein the Respondents as per the evidence tendered before the Court had settled peaceful as at the time of the death of the deceased in the year 1970.
20. In the final analysis I find no merit on the appeal herein which I dismiss.
21. On cost, this being a family dispute where the parties will continue being relatives despite the judgement herein, each party shall bear their own cost and it is ordered.

**DATED SIGNED AND ELIVERED AT MURANGA THIS 7<sup>th</sup> DAY OF MARCH 2023**

**J. WAKIAGA**

**JUDGE**

**In the presence of:**

Ms Caroline Mutahi – Court Assistant

