



REPUBLIC OF KENYA



Mbiu v Mbiyu (Civil Appeal 38 of 2019) [2023] KEHC 3110 (KLR) (13 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3110 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 38 OF 2019**

J WAKIAGA, J

APRIL 13, 2023

BETWEEN

ERASTUS NJOROGE MBIU APPELLANT

AND

STEPHEN KIMANI MBIYU RESPONDENT

*(An appeal from the ruling of Hon. M. Kinyanjui PM delivered
on 22nd August 2018 in the Succession Cause NO 125 of 2017)*

JUDGMENT

1. The Appellant and the Respondent were on the February 20, 2018, issued with the Grant of letters of Administration in respect to the estate of the deceased Mbui Mbogo. By summons for confirmation dated August 2, 2018, the Respondent applied for the confirmation and proposed mode of distribution of the estate of the deceased known as Loc 1/ Thuita /95 as follows:
 - A. Regina Wanjiku Mbui 1.05 acres
 - B. Erastus Njoroge Mbui..... 1.05 acres
 - C. Stephen Kimani Mbui1.05 acres
 - D. Stephen Kimani Mbogo }
 - E. Josephat Njuguna Mbogo} 1.05 acres jointly
 - F. Peter Gitau Mbui1.05 acres
 - G. Stephen Kinani Mbiyu 1.05 acres to hold in trust for the children John kiragu Mbiyu (deceased) Antony Mbiu Kiragu, Kelvin Wainanina Kiragu , Caroline Wanjiru Kiragu and4R Mary Wangui Kiragu.
2. The said Grant was confirmed on December 6, 2018 and by an application dated December 9, 2019, the Respondent moved Court for an order that the Appellant be compelled to produce copies of



his National identity card, Pin and passport photographs to the Respondent and that the Court do authorize the Executive officer to sign all the necessary documents to effect transfer and subdivision of the estate, which application was supported by an affidavit in which it was deposed that the Appellant had failed to provide the said documents.

3. In response the Appellant contended that he did not agree to the proposed mode of distribution which was against the wishes of the deceased and from the record of the proceedings, it is apparent that the Court converted the said reply into a protest which was heard by way of oral evidence.
4. By a Ruling thereon and the subject matter of this appeal the trial Court found that the land had not been subdivided by the deceased in his life time and proceeded to subdivide the land equally amongst the children of the deceased and not as per the houses.
5. Being dissatisfied by the said ruling the Appellant applied for stay of execution pending the hearing and determination of this appeal and in response thereto the Respondent filed a notice of preliminary objection on the ground that the same was resjudicata.
6. By a memorandum of appeal dated September 19, 2019, the Appellant raised the following grounds of Appeal:
 - a) That the trial Court erred in holding that the deceased died intestate.
 - b) The Magistrate erred in law and in fact in failing to consider that the deceased had subdivided the property Loc 1 Thuita /95 in his life time which was supported by documentation, attested by his two wives, clan members and actualized on the ground.
 - c) The Court erred in finding that the land had been subdivided for purposes of convenience
 - d) The Court erred in not finding that the property should be distributed as per the wishes of the deceased despite the evidence thereon
 - e) The Court failed to appreciate how the parties were living on the ground in accordance with the wishes of the deceased

Submissions

7. On behalf of the Appellant, it was submitted that the deceased was survived by two houses, the first Mary Wanjiru Mbiu with four children Stephen Kimani (Respondent) Simon Mbogo Peter Gitau and Kiragu Mbogo while the second house Regina Wanjiku Mbui had only one son Erastus Mbui (the Appellant) and that during his life time, the deceased has subdivided the land into two with each house getting 3 acres each. This was supported by the evidence tendered which the Court failed to consider in support of which the case of *Paul Kiruki Nyingi & another v Francis Wanjohi Nyingi* [2009] e KLR in which the Court held that black book remains an uncontroverted expression of the wishes of the deceased and should not have been ignored by the Court.
8. It was finally submitted that the trail Court failed to consider the weighty evidence in law as regards to the settlement of the parties to the subject property, which the Respondent confirmed in cross examination. It was contended that the Respondents proposed mode of distribution would cause disruption on the actual occupation, which the Court did not take into account.
9. On behalf of the Respondent, it was submitted that the deceased wishes did not conform to Section 11 of the *Law of Succession* as regards wills and that the deceased was only putting his house in order having two wives who needed to know where to settle with their children and where to farm. It was contended that having found that the will did not meet the threshold, section 40 of the law of succession was



applicable as regards the distribution of the estate where the estate is divided amongst the children plus the widow as units as was stated in the cases *Estate of Ainea Masinde Walubengo* [2017]eKLR

10. It was submitted that the Appellant was the only child while the Respondents mother had seven children and that the rules of natural justice and equal distribution demands that the beneficiary should not settle as the deceased left them as there are deceased grand children who ought to benefit and therefore the appeal should be dismissed

Determination

11. In this appeal there are only two issues for determination: whether the deceased had left a Written Will and whether the same had distributed his estate in his life time?
12. It is not disputed that the deceased was a polygamous man with two wives and left only one parcel of land measuring 6.3 acres. It is also not in dispute that at the time of his death the two wives of the deceased had been settled by the same in two distinct parts in what the trial Court called convenient in a polygamous family. It is also not in dispute that the same had expressed his wishes in writing on June 9, 1976 where it was clearly expressed that the land be subdivided into three until when the deceased is unable to farm when the same will be subdivided into two with each wife getting 3.15 acres.
13. Having been reduced into writing and witnessed by two witnesses it is my understand and I hold that the deceased had left a valid will in respect of his estate and the trial Court fell into error in dismissing the same. The issue which was before the trial Court was the intention of the deceased at the time when the agreement herein was made which was to subdivide his land to his two wives who then retained the exclusive use of the said portions.
14. From the evidence tendered before the trial Court, it is clear that the deceased subdivided his land in his life time amongst his two wives but retained a portion for himself until such a time when he becomes unable to farm. I therefore find fault with the trial Courts finding that the wishes of the deceased can be termed as biased and favouring one house, his role was to find out the intention of the deceased and not to interpret the same.
15. I am not persuaded that section 40 of the succession was applicable to this cause having found as a fact that the deceased had expressed his wishes and executed the same and therefore the children of the deceased can only inherit through their mothers to whom the deceased had given land in his life time and therefore the authorities submitted by the Respondent are distinguishable.
16. Having said what is stated herein, it follows that the appeal has merit which I hereby allow. The distribution of the estate to be as per the wishes of the deceased as evidence in the agreement entered into and produced before the trial Court.
17. This being a family dispute, each party shall bear their own cost
18. And it is ordered.

DATED SIGNED AND DELIVERED AT MURANGA THIS 13TH DAY OF APRIL 2023

J. WAKIAGA

JUDGE

In the presence of:

Dr. Kimotho for Mr. Mbugua for Appellant

No Appearance for Respondent



Court Assistant – Ms Carol Mutahi

