



**Mugiira v M’Mugwongo (Civil Appeal E098 of 2022)  
[2023] KEHC 20207 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20207 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E098 OF 2022  
EM MURIITHI, J  
JULY 13, 2023**

**BETWEEN**

**LEONARD MUGIIRA ..... APPELLANT**

**AND**

**M’MBUE M’MUGWONGO ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. E.W Ndegwa  
(SRM) in Githongo SPM Succ. cause No. 23 of 2019 delivered on 29/6/2022)*

**JUDGMENT**

1. On 19/3/2019, the appellant filed a petition for letters of administration intestate in respect of the estate of Muguongo Ngaruro (Deceased) in his capacity as a son to the deceased. The chief of Nduruma Location in his introductory letter dated 28/9/2018 listed Karambu Mugwongo wife (deceased), M’Mbue M’Mugwongo – son, Tarcision Kienjeu M’Mugwongo – son, Theophilus Mputhia – son, Felicita Mugure Marangu – daughter, Anjerina Muthoni Mugwongo wife (deceased), Cecilia Kaburo M’Mugwongo – daughter and Leonard Mugira – son. The appellant was issued with a grant of letters of administration intestate on 24/5/2019, and he proceeded to file summons for the confirmation of the said grant, where he completely left out the respondent. The respondent filed an affidavit of protest on 14/7/2021 protesting to the mode of distribution proposed by the appellant, and the matter was set down for hearing. Upon full hearing of the matter, the trial court distributed the estate properties equally among the beneficiaries of the deceased as proposed by the respondent in his protest.

**The Appeal**

2. The appellant filed his memorandum of appeal on 28/7/2022 raising 5 grounds as follows:
  1. The learned trial Magistrate erred in law and fact in dismissing the petitioner’s mode of distribution.



2. The learned trial court's judgment/decreed was wrong and made without considering the relevant facts and the law and was based on consideration of irrelevant and inapplicable facts and the law.
3. The learned trial court erred in law and fact in disregarding the cogent evidence tendered by the appellants who were the petitioners.
4. The learned trial court erred in law and fact by its decision which denied the intended beneficiaries their entitlement and disregarded the expressed wish or intention of the deceased and wrongly imposed an unacceptable and an inequitable distribution.
5. The learned trial court's judgment and decree is not on facts as per evidence tendered or the law and therefore wrong and need to be reversed.

### **Duty of the Court**

3. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

### **Evidence**

4. PW1 M'Mbue M'Muguongo, the respondent/protestor herein adopted his statement recorded on 21/7/2021 as his evidence in chief and produced the certificate of official search as exhibit. He testified that, "I know Leonard Mugira. He is my step brother. It is not true that I was gifted Abothuguchi/U-Kaongo/433 by my father because I purchased the same from M'ngugi. I bought the land in the year 1969. I do not remember very well the year. On 24/7/99 I got the title as per the official search. They have annexed. I bought the land in 1999. My father died in 1968. I bought the land after the death of my father. It is not true as alleged by Leonard Mugira that my father gave us his wishes as to how we would distribute the land. He only gave us his wishes as to distribution of cattle. My father never met with ndatho to give him his wishes on distribution of the land. My father did not state in his life time that I would inherit Abothuguchi/Kaongo/1160. Mugira already utilizes parcel No. 1160 Mugare is my sister. I gave her the land to cultivate. Rosemary Gatwiri Raimbo is not a child of Muguongo Ngaruro. I was not informed when Leonard sold the land to her. I was not given any proceeds of the sale of land."
5. On cross examination, he stated that, "I bought Abothuguchi/Kaongo/433. I bought the land in 1968 at Kshs.300/= (three hundred per acre). At that time we were not drafting sale agreement. At that time (1968) I was about 30 years old. I was splitting timber with a power saw. I was able to get money from that work. For I felt we were being paid Kshs. 30/=. I got the title in 1999 because at that time there was no processing of titles. It is not true that I inherited the land from my father and I am being greedy."
6. On re-examination, he stated that, "I was born in the year 1930. I do not remember when I bought parcel No. 433. It is not true that I was gifted the land by my father."
7. PW2 Ayub Kiambi Kinoti, adopted his witness statement recorded on 21/7/2021 as his evidence in chief. He went on to state that, "I knew Muguongo Ngarumo deceased. He is my neighbour. I know M'mbura (PW1). He is a neighbour as well."
8. The petitioner Leonard Mugiira, the appellant herein, testified as PW1 [PeW1] adopted his witness statement dated 11/8/2021 as his evidence in chief and produced the certificate of search for Abothuguchi/Kaongo/433 as exhibit.



9. On cross examination, he stated that, “M’Mbue M’Muguongo is my step brother. In the affidavit in support of summons for confirmation of grant. I did not give him anything in the proposed mode of distribution. I did not include Abothuguchi/U-kaongo/1160. It is true that parcel No. 1160 is still in my father’s name. Theophilus Mputhia is my step father. He is deceased. Taracisio Kienyeu is my step brother. He is deceased. He had a wife and children. I would like his share to go to his wife and children. I and the 2 brothers I have mentioned got a bigger share as per our father’s wishes. I have no documentation to show that those were his wishes. I have given Rosemary Gatwiri Raibu 0.05 Ha of Abothuguchi/U-kaongo/440. Rosemary Gatwiri is not a child of the deceased. She helped me get money for filing of the succession cause. I sold the land to her. I do not have the sale agreement in court. I have documentation to prove that she paid me but I do not have it in court. Abothuguchi/Kaongo/433 was given to M’Mbue Muguongo in the 1960’s. I do not have documentation to prove the same that he was given the land by my father. I do not have prove to show that my father was the original proprietor of Abothuguchi/Kaongo/433. I do not know when the first title deed for Abothuguchi/Kaongo/433 was issued. It is not true that M’Mbue M’Muguongo bought No. 433 after the death of my father. I do not have minutes to show that it was my father’s wishes for M’mbue M’Muguongo to inherit parcel No. Abothuguchi/U-kaongo/1160. Felistar Mugure currently utilizes 1160 she is my step sister.”
10. PW2 [peW2] Julius M’turuchiu M’Ndatho, adopted his witness statement as his evidence in chief. He went on to state that, “I know one M’mbue M’Muguongo. He is my neighbour. I know their father Muguongo Ngaruro (deceased).
11. On cross examination, he stated that, “Muguongo Ngaruro called a family meeting and leave no wishes on distribution of his land. It is a long time since I do not recall the date, month or year. I have no minutes or documentation as evidence of his wishes. He gave his wishes orally. Mugiira and M’mbae attended that meeting. He asked M’mbue if he wanted land he said he wants the parcel of land situate in Kaongo. I do not know the parcel number. He did not give his wishes about the other parcels of land.”

### **Submissions**

12. The appellant submitted that the mode of distribution in the trial court’s judgment will have the effect of giving the respondent an unfair advantage over his siblings. He prayed that the mode of distribution he proposed in the trial court be upheld as the judgment of this court.
13. The respondent urged that the trial court distributed the estate of the deceased in accordance with the evidence which was adduced and the applicable law. He applauded the trial court for correctly finding that the appellant did not give tangible evidence to prove that the deceased gave him land parcel No. Abothuguchi/U-Kaongo/433 as a gift inter vivos, and urged the court to dismiss the appeal with costs.

### **Analysis and determination**

14. The issue for determination is whether the trial court’s distribution of the estate properties was based on law and the evidence led.
15. Whereas the appellant maintained that the deceased has expressed his wishes of how he wanted his properties to be distributed, the respondent contended that the deceased only gave his wishes of how he wanted the cattle to be distributed. The appellant admitted in his testimony that in his proposed mode of distribution, he did not give anything to the respondent, who is his step brother. He further acknowledged that he did not include parcel No. Abothuguchi/U-Kaongo/1160 among the estate properties yet it is still registered in the name of the deceased. He admitted on cross examination that, “I have given Rosemary Gatwiri Raibu 0.05 Ha of Abothuguchi/U-Kaongo/440. Rosemary Gatwiri



is not a child of the deceased. She helped me get money for filing of the succession cause. I sold the land to her.”

16. On one hand, the appellant stated that the deceased gave the respondent parcel No. Abothuguchi/Kaongo/433 while on the other hand, the respondent stated that he bought the said land after the death of the deceased.
17. According to the official searches on record, the deceased was registered as the proprietor of Abothuguchi/U-Kaongo/1160 and Abothuguchi/U-Kaongo/440 on 23/6/1977 and Abothuguchi/Gaitu/229 on 30/3/1967. The court notes from the certificate of official search for Abothuguchi/U-Kaongo/433, that the respondent was registered as the proprietor thereof on 24/5/1999, long after the death of the deceased herein in 1968.
18. This court finds the appellant’s contention that the deceased had bequeathed the said land to the respondent during his lifetime to be manifestly unfounded, because the said land was never owned by the deceased at any given time. Having said that, this court is convinced that the respondent purchased the said parcel of land way after the deceased had died, and the same cannot possibly form part of the estate of the deceased herein.
19. The appellant testified that his step brother Theophilus Mputhia was deceased, but when he was tasked by the court to avail a death certificate in support thereof, he did not. The chief of Nduruma location wrote another letter on 19/1/2022 confirming that only Tarcisio Kienjeu, was deceased and he was survived by Charity Karee M’Ichichiu - wife, Stanley Munaikwa – son, Stella Kithira Kienjeu – daughter, Agnes Nthiori Kienjeu – daughter, Faith Muthoni Kienjeu – daughter, Purity Kagwiria – daughter, Dorcas Kathure – daughter and Jadiel Gatobu – son.
20. There is no dispute that the deceased had 2 wives, both of whom have since died, leaving behind a total of 6 children. The applicable law in this case is Section 38 of the Law of Succession Act which provides that, “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.”
21. This court is satisfied that the mode of distribution as proposed by the respondent in his protest, which is what the trial court adopted, encompassed the provisions of section 38 of the Law of Succession Act, as every beneficiary got an equal share of the estate properties. The mode of distribution was fair and equitable.

### **Orders**

22. Accordingly, for the reasons set out above, the court finds that the trial court’s decision was well founded on the law and the evidence on record and, consequently, the appeal is dismissed.
23. The appellant shall pay costs of the appeal to the respondent.  
Order accordingly.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF JULY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances

M/S. Bundi Muthamia & CO. Advocates for the Appellant.



Mr. J. G. Gitonga & CO. Advocates for Respondent.

