Njau & another v Mugo & another (Civil Appeal 41 of 2018)
[2023] KEHC 22437 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22437 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 41 OF 2018

FROO OLEL, J

SEPTEMBER 22, 2023

BETWEEN

SUSAN WAIRIMU NJAU ..... 1ST APPELLANT

MARY WANJIRU GITHINJI ..... 2ND APPELLANT

AND

NDEGWA MUGO ..... 1ST RESPONDENT

NDERI MUGO ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. S.M.S SOITA (CM) delivered on 3rd July 2018 in Kerugoya Chief Magistrate Court Succession case no.139 of 2016 Estate of Mugo Mutuangure-Deceased)

JUDGMENT

Introduction

1. The appellant seeks to overturn the judgment/decision of Hon. S.M.S Soita (CM) rendered on 3rd July 2018 where he dismissed the protest filed by the appellants and further allowed the petitioner's/ Respondent's application for confirmation of grant.

The duty of a first appellant court.

2. A first appellant court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent conclusion on whether or not to allow the appeal of first appellant court is empowered to subject the whole of the evidence to a fresh and exhaustive evaluation/ scrutiny and make conclusion about it, bearing in mind that it did not have the opportunity of seeing

or hearing the witness (see Selle and Another versus Associated motorboat Co. ltd and others). It was also held by the court of appeal of East Africa in Peters versus Sunday Port Ltd.

> " It is a strong thing for the appellant court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellant court has indeed, jurisdiction to review the evidence. In order to determine whether the conclusion originally reach upon that evidence should stand. But this is a jurisdiction which should be exercised with caution, it is not enough that the appellant court might itself have come to a different conclusion."

3. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.

The Pleadings

4. The respondents did file an application for confirmation of grant dated 15th December 2017 and proposed that they share the estate property known as L.R. No Inoi/Thaita/95 (hereinafter referred to as the suit property) as between themselves. The appellants who are step sisters of the respondents, filed an affidavit of protest dated 16th January 2018 where they opposed the proposed mode of distribution and submitted that the said estate property be shared equally between the two houses of the deceased.

5. The respondents herein filed a further replying affidavit to the protest dated 12th March 2018, where they stated that their brother James Kigundo Mugo was deceased and during his lifetime their father, the deceased herein had given him his property being L.R. NO INOI/THAITA/83. Their father had passed away immediately after demarcation of the suit parcel of land and they could not find his death certificate hence they sought for orders of presumption of death to enable them commence the proceedings herein.

6. The deceased herein had died before commencement of the succession Act, and therefore the law applicable for distributing the estate would be Kikuyu customary law. The appellants had been married in 1962 and 1969 respectively and therefore were not entitled to inherit the property of their father as kikuyu customary law prohibited the same.

7. Direction on how to hear the protest was taken and parties agreed to proceed by way of viva voce evidence.

Brief Facts

8. PW1 Mary Wanjiru Githinji testified that she stays in Nanyuki and the deceased herein was her late father, who died in 1958. The deceased had two wives known as wakabari Mugo and Wamutira Mugo. The deceased children were ;

    i. Ndegwa Mugo.....1st House

    ii. James Kigundu Mugo..... 1st House

    iii. Nderi Mugo.....1st House

iv. Charity wambui Munene ..... 1st House

v. Susan Wanjiru Mutabi.....1st House

vi. Susan Wanjiru Njau.....2nd House

vii. Mary Wanjiru Githinji

Alias Ngima Kimu.....2nd House

9. PW1 further stated that the estate had only one property known as L.R Inoi/Thaita/95 measuring 5.5 acres and since the deceased was polygamous the same should be shared equally amongst the two houses with each house getting 2.75 acres jointly. In cross examination PW1 stated that their mother Wakabari Mugo was the first wife of the deceased and that their father died in 1958. She got married in 1962, before her sister got married. They had not carried out any development on the suit parcel and it is the respondents who were cultivating the said suit parcel.

10. Further she confirmed that both her and her sister were blessed with children and had land which they were cultivating where they were married, but were entitled to share their fathers land though they were claiming the same over 50 years later and had not used the land ever since they were married. Before her mother died, she had been cultivating a portion of the suit parcel, and upon her death left the said portion to be cultivated by the respondent's.

11. She confirmed that as adults they had never stayed on the suit parcel of land. In re-examination, PW1 stated that they were entitled to getting a share of their father's parcel of land and that by the time their father died, he had not demarcated any portion of the suit parcel to the respondent's.

12. The appellant did not call any other witness and the respondent Ndegwa Mugo (DW1) did testify and stated that he was the petitioner and had proposed to share the suit parcel with his brother the 2nd respondent. Their father had died in 1958 and that their step sisters (the appellants) had never resided on the suit parcel of land. The 1st appellant was married in 1969, while the 2nd appellant had been married in 1962. All along the appellants had never demanded a share of the suit parcel, which they exclusively utilized to plant coffee and tea.

13. DW1 further stated that he had a bother known as James Kigundu Mugo (deceased), who had been given his own separate parcel of land and was not claiming any share of the suit parcel and that is why he want the suit parcel shared between him and his brother. In cross examination, the 1st respondent confirmed that the appellants were daughter of the deceased and he had delayed to start the succession process due to the fact that he did not want his brother Nderi Mugo to sell his portion,

14. Further he had planted over 2800 bushes of tea, and 68 coffee stems. He would sell the tea to Kangaita Tea factory and was earning from such sales. It was not correct for the appellants to allege that he was intermeddling with the estate as he had earned from the suit parcel for over 50 years. When he went to the area chief to get a letter to start the succession process, he had included the sister's names, but they were not entitled to inherit a portion of the estate as they were all married.

15. In re-examination, he stated that he had included all his sisters in the letter of the chief but reiterated that all of them were married. He had petitioned court to take up letter for administration and was not cited by the appellants to start the process. Further he was the one who planted tea and coffee within the suit parcel and it was not necessary for him to include his earnings in the succession suit. He prayed that the confirmation be effected as he had proposed in his affidavit in support of the confirmation of grant.

16. Upon considering the evidence present and submission filed at the trial magistrate did dismiss the protest and confirmed the grant as presented by the petitioner. The appellants being aggrieved by the said judgment filed this appeal raising seven (7) grounds of appeal that;

    a. The learned Honourable chief magistrate erred in law and fact by not fully considering the evidence tendered by the appellants and their written submissions in support of their protest hence delivered a non-considered judgment.

    b. That the learned Honourable chief magistrate erred in law and fact by holding that the deceased herein died in 1958 whereas no admissible evidence was tendered to prove the same and in total disregard of the order of presumption of death issued on 9.2.2011 vide Kerugoya Misc Application No 65 of 2010.

    c. That the Honourable chief magistrate erred in law and in fact by holding that the appellants are not entitled to inherit the estate of their deceased father comprised on L.R. INOI/ THAITA/95 measuring 5.5 acres together with the respondent's by virtue of being married daughters which holding is against the relevant provisions of the Kenyan constitution 2010 which is against any form of discrimination on grounds of gender , religion or unlawful status in matters of inheritance.

    d. That the Honourable chief magistrate erred in law and fact by holding that the deceased's estate is to be governed by kikuyu customary law by dint of section 3 of the *Judicature Act* but failed to appreciate that the applicability of the section on issues of customary law is subject to other written laws and does not supersede *the constitution* of Kenya 2010.

    e. That the Honourable chief magistrate erred in law and fact by not being properly guided the relevant provisions of the law and the decided case law as submitted by the appellants and hence failed to deliver a legally sound judgment.

    f. That the Honourable chief magistrate erred in law and fact by disinheriting the appellants from their father's estate without sound or justifiable cause.

    g. The Honourable chief Magistrate erred in law and fact by delivering a judgment based on extraneous reasons against the weight of evidence tendered by the appellants.

Submissions

17. The appellants filed their submissions on 3RD June 2022 and stated that the undisputed facts were that;

    a. The estate of the deceased is comprised of Inoi/Thaita/95 measuring 5.5 acres.

    b. The deceased Mugo Mutuangure was polygamous in that he had two wives and each had children. The 1st house had five children whereas the 2nd house had two children.

    c. The respondents belong to the 2nd house, while the appellants belong to the 1st house.

    d. The deceased was presumed dead vide a court order dated 09.02.2011 issued vide Kerugoya Pmcc Misc App No 65 Of 2010.

18. The appellants submitted that, the deceased was presumed dead on 09.02.2011, when the order of presumption of death was issued by court and subsequently the 1st respondent was issued with a grant of letters of administration intestate on 18.01.2016. The parties did not adduce any evidence as to the date of death of their father and the court wrongly held that Mugo Mutuangure died in 1958 contrary to the evidence adduced and in total disregard of the order of presumption of death.

19. The appellants further submitted that provisions of kikuyu customary law could not oust *the constitution* of Kenya and the courts had to leave behind restrictive interpretation of *the constitution*. Reliance was placed Re Estate of Peter Gitonga Kioma (Deceased)(2020) eKLR & Re: Estate of Lerionka Ole Ntutu (deceased) (2008) eKLR.

20. The appellants stated Kikuyu customary law was inapplicable as it was unconstitutional for being discriminatory as against women. They were the only daughters of the 1st house and regardless of whether they were married or not they were entitled to share of the estate their father based on the provisions of Section 40(1) and (2) of the *law of succession Act*. The respondent's mode of distribution was unfair and discriminatory and should not have been upheld. Reliance was place on decision of Re; Estate of Solomon Ngatia Kariuki (Deceased)(2008) eKLR

Respondent's submissions

21. The respondent's filed their submissions on 4th November 2022 and stated that the trial magistrate was correct to hold that the deceased estate was governed by kikuyu customary law, which was applicable as at the time of death of Mugo Mutuangure in 1958. The appellants got married in 1962 and 1968 respectively and had never utilized the suit parcel at any point. It was quite clear that the law of succession had not come into force by the time the deceased herein died and thus the learned magistrate correctly applied Kikuyu customary law, which the parties herein were subject to.

22. Further the learned magistrate was right to hold that the appellants had been married for 50 years and never asserted any right for all that period of time. This implied that they knew of the customs applicable and recognized the same. The law of succession came into force in 1981 and such was not applicable in this case. The respondents had been in peaceful occupation of the suit parcel for over 50 years without any interference by the appellants and that should not be changed.

23. The respondents also submitted that the appellants were driven by greed and wanted to come back home they had left decades ago to claim what was not rightfully theirs. Reliance was placed on Embu HCC No 140 Of 2007 Susan Wakera Karimi & 3 Others Vrs Peter Miano Itugu & ANOTHER

Issues for determination

a. Whether the decease died in 1958 or should the order dated 09.02.2011 issued by court for presumption of death be presumed as the date of death.

b. Whether the *law of succession Act* is applicable in the circumstances herein or was the trial court right to use Kikuyu customary law in distributing the deceased Estate.

c. Whether the estate property should be distributed as per provisions of section 40(1) and (2) of the *law of succession Act*.

d. What should be the cost of this appeal.

A. Whether the decease died in 1958 or should the order dated 09.02.2011 issued by court for presumption of death be presumed as the date of death.

24. Both the 1st appellant and the 1st respondent testified before the trial court and both were categorical that their father Mugo Mutuangare died in the year 1958. The appellant further stated that she was married in 1963 and by then must have been of teen age and therefore old enough to be certain about the period when their father died. This fact was therefore proved in evidence and the date or year of death was not in contention. The appellants submission that the same was not proved is therefore

baseless and the date when the order of presumption of death was issued cannot be used to presume that he died on 9th February 2011.

Whether the *law of succession Act* is applicable in the circumstances herein or was the trial court right to use Kikuyu customary law in distributing the deceased Estate.

25. The first issue to determine in this case is if the *Law of Succession Act* (LSA) was applicable to this case. It is not in contention that the deceased herein died in 1958 leaving behind seven children. The appellants were two (2) from the first house and the second house had five (5) children. The date of commencement of the *Law of succession Act* is 1st July 1981. Section 2 (1) and (2) of the Act provides as follows;

    (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

    (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

26. The interpretation of this section was done by Musyoka J. in In Re Estate of Nduati Mbuthia (Deceased) [2015] eKLR where he stated as follows;

> The effect of Section 2(1) of the *Law of Succession Act* is that the provisions of the said Act are to apply to the estates of all persons dying after the commencement of the Act on 1st July 1981, subject of course to the exceptions created by the Act. The Act applies both as the substantive law as well as the procedural law to the estates affected.
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> Section 2(2) of the *Law of Succession Act* defines the application of the *Law of Succession Act* with respect to persons who died before the said Act commenced on 1st July 1981. The provision is categorical that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. The substantive provisions of the Act are those governing devolution or distribution of the estate of the dead person, whether such person died testate or intestate. These provisions are to be found in Parts II, III, IV, V and VI of the *Law of Succession Act*. The substantive law of succession for estates of the persons who died before 1st July 1981 is not to be found in Parts II, III, IV, V and VI of the *Law of Succession Act*, but in the written laws and customs that applied at the date of the death of the person in question.
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> The second part of Section 2(2) of the *Law of Succession Act* states that the administration of the estates of persons who died before 1st July 1981 should commence or proceed so far as possible in accordance with the provisions of the *Law of Succession Act*. In other words the procedure with respect to administration of estates of such persons is to be governed, not by the law as at the time of death, but by the procedures set out in the *Law of Succession Act*. The said provisions in the *Law of Succession Act* governing procedures and processes in administration of estates are to be found in Part VII. Part VII of the *Law of Succession Act* applies universally to the estates of persons dying either before or after the commencement of the Act.
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> It is not in dispute that the deceased person the subject of these proceedings died before the *Law of Succession Act* came into force. Consequently, the substantive law governing

devolution to his estate is that stated in Section 2(2) of the *Law of Succession Act* that is the written laws and customs in force as at the time of his death in 1966.

The Kikuyu customary law of intestate succession is notorious. It is well documented in such treatises as Eugene Cotran?s Restatement of African Law: Kenya II the Law of Succession, and Jomo Kenyatta?s Facing Mount Kenya: The Tribal Life of the Gikuyu, among others. It has also been restated in several judicial pronouncements, such as in Kanyi vs. Muthiora (1984)KLR 712. I am though conscious of the dynamism of African Customary Law and alive to the caution sounded by the Court of Appeal in Atemo vs. Imujaro (2003)KLR 435 that the position as stated in the treatises may not be true today.

Under the Kikuyu Customary Law of intestacy, succession is patrilineal. Devolution is in favour of the male relatives of the deceased.....Daughters are not entitled to inherit, they play their part in the family or clan in which they married, but it is permissible for daughters who attain the age of marriage but never marry to inherit from their parents. Where the deceased person has daughters only and the said daughters are all married, the property will pass to his brothers or their sons, with the widow having life interest.

The position stated in paragraph 24 here above is no doubt discriminatory in favour of men and against women. This was however sanctioned by Section 82(4) of the old Constitution. Section 82(1) of the said Constitution states that no law shall make any provision that is discriminatory either of itself or in its effect. Section 82(4) of the said Constitution made a number of exceptions to Section 82(1); it states that: Subsection (1) shall not apply to any law so far as that law makes provision (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law."

27. This court is persuaded by the above authority. Further in Re The Estate of Mugo Wandia (Deceased) (2009) eKLR Justice M.Koome (as she was then) stated that;

> " The petitioner has a duty to adduce expert evidence on kikuyu customary law to establish that the applicant is not entitled to her father's estate. In the absence of such evidence I find the submissions that the applicant should be left out discriminatory and the existence of such custom and its requirement would not pass the threshold of the provisions of the *judicature Act*. Besides the *judicature Act*, there is *the constitution* of the Republic of Kenya. Under section 82 of *the constitution* out-laws discrimination on the basis of sex. Upholding and affording unsubstantiated custom that offers differential treatment to the petitioner is unconscionable."
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> "It would also go against the reasonable expectation by the applicant that when she comes to a court of law she will be afforded equal treatment and access to justice. Kenya is amongst other countries under the United Nations and is a party to several human rights conventions and treaty which prohibit discrimination against women. Key amongst them is the universal declaration of human rights especially Article 1 and the convention on all forms of discrimination against women (CEWDA). It is for those reasons that at this day and age when the government has made a lot of effort to eradicate poverty and embrace equitable policies and programs of development a court of law cannot pronounce a judgment that goes against the spirit. The applicant is entitled to a share of her deceased fathers estate even if he died in 1976 and his properties where distributed in 2004."

28. The respondent's position is that the law applicable is determining the estate of the deceased herein was Kikuyu customary law. As stated in Cotran on Restatement of customary law vol 2 by Eugene contran,

Kikuyu customary law did not allow women/ girl child to inherit the properties of their father, and if she was unmarried and had male children the said children could be considered. This custom was to be considered and applied as long as it did not fall foul of provision's the *Judicature Act*. Section 3(2) of the *Judicature Act* that provides as follows;

> " The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

29. The 1st respondent herein further did testify that the appellants were married and had been away from home for over 60 years. They stated in General terms that under Kikuyu customary law, married women were not entitled to inherit their father's land. The 1st appellant had been married by 1969, while the 2nd appellant was married in 1962. At no time had the appellants come back to claim any portion of the suit parcel. The respondents had exclusively use and possession of the suit parcel for over 50 years and therefore the trial court correctly determined that they were the ones entitled to inherit the same. The respondent placed reliance on Cotran on Restatement of customary law vol 2 by Eugene contran to support their contention.

30. As rightly pointed out in Re The Estate of Mugo wandia (deceased), it was the duty of the petitioner/ respondent to adduce evidence that Kikuyu customary law did not entitle the appellants to inherit part of their father's estate. In absence of such evidence, it would be discriminatory to hold that married daughters were not entitled to inherit part of their father's estate. Further such custom would not pass the test/threshold as provided under the *judicature Act*.

31. Also in the case of Wambugi w/o Gatimu v Stephen Nyaga Kimani {1992} 2 KAR 292 , Kwach J.A discussed extensively the application of customary law vis a vis Section 3(2) of the *Judicature Act* stated as follows:-

> " The former Court of Appeal for East Africa in the case of Kimani vs Gikanga {1965} EA 735 held that where African Customary Law is neither notorious nor documented, it must be established for the court's guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases, the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinions adduced by the parties".

32. The Respondents contention that married woman are not allowed to inherit their father's property under Kikuyu Customary, may hold accurate and is proved by the book, Restatement of customary law vol 2 by Eugene contran, the said custom as it stands is discriminatory and falls foul of the provision of section 82(1) of the pervious constitution, and Article 27 of the current constitution of Kenya 2010, which prohibited discrimination based on sex.

33. Based on the foregoing it is thus the finding of this court that Kikuyu customary law cannot be used to distribute the estate of the deceased herein.

C. Whether the estate property should be distributed as per provisions of section 40(1) and (2) of the *law of succession Act*.

34. Section 40 of the *law of succession Act* deals with, where intestate was polygamous

> 1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided amongst the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
>
> 2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Section 35 to 38.

35. From the evidence adduced before the trial court, it is common ground that the deceased died intestate and was married to two wives, namely Wakabari Mugo & Wamutira Mugo . The 1st wife was blessed with two (2) children, who are the appellants herein, while the 2nd wife was blessed with five (5) children, the two respondents being amongst the said children. The appellants therefore submitted that the court ought to have applied the provisions of Section 40(1) and (2) Of the Succession, Cap 160 to distribute the estate.

36. The respondent on the other hand submitted that the trial court rightly locked out the appellants from getting a share of the estate, as they were married elsewhere and had been away from home for a period of over fifty (50) years. During this period, the appellants had never claimed any portion of the suit parcel, even after their mother had died.

37. The 1st appellant stated that he had extensively developed the suit parcel which had over 2800 tea bushed and 68 coffee stems. They both resided thereon and he had stopped the 2nd respondent from selling his portion to a third party. The trial court thus only rightly found that the said property be bequeathed to the respondents.

38. While section 40 provides for the personal and household effects and the residue of the net estate shall in the first instance, be divided amongst the houses according to the number of children in each house and adding any wife surviving him as an additional unit to the number of children. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Section 35 to 38

39. Be that as it may, even as equal distribution of the estate property to the children of the estate is affected, sight should not be lost of the fact that equitable distribution of the estate does not always work justice to the case as it ignores the peculiar circumstances of each case.

40. In Re Estate of John Musambayi Katumanga-Deceased (2014) Eklr Judge W Musyoka stated that

> "The inequality in the distribution principle has often caused disquiet. In Rono v Rono and another (2005)1 EA 363, Omolo JA remarked that, " Equal division works injustice especially in the case of a young child who still has to be maintained and educated and generally seen through life. The appeal judge took the view that section section 40 of the Act did not provide that each child must receive the same or equal portion. That was the opinion of the higher bench. Section 40 of the Act is not independent of section 35 and 38 of the Act.....The plight of minors is no doubt precarious in this scenario."

41. Further in the said citation of Re Estate of John Musambayi Katumanga-Deceased (2014) Eklr

> "Equal distribution does not always work justice, especially in polygamous situations, where the youngest child of the deceased maybe one (1) year old, while the eldest maybe over fifty (50) years of age. The infant no doubt would have far greater needs that the fifty-year-old, who would generally have received education and has probably been settled in life by the deceased. There cannot be justice in equal distribution in such case..... The law as currently framed does not do justice in the circumstances. Ideally, equal distribution should be the principal, with some discretion left to the court to consider the circumstances of each case."

42. The appellants by their own evidence did confirm that, they were married in the 1960's and have never utilized any portion of the suit property for over 50 years. They further confirmed that, before their mother died, she was cultivating a portion of the suit parcel, but the same was surrendered to the respondents upon her death. The respondents and their families therefore had exclusive use and possession of the suit property and the other portions had tea and coffee plantations.

43. The Respondents has had uninterrupted possession of the suit for over fifty (50) years and they have obviously settled their children and their families thereon. In the special circumstances of this case equitable distribution of the suit property would be more appropriate than equal distribution which cannot be undertaken without great disruption of the developments already undertaken and further litigation by affected parties.

44. In the proceeding before the trial court, the parties did not offer further evidence on use and possession of the land and relied on the positions as submitted on the affidavits filed in protest and reply to the protest. The evidence is scanty and this court cannot make a determination on what is equitable and can be appropriately bequeathed to the appellants as their share of the estate.

Disposition

45. This appeal partially succeeds, the judgment of the trial magistrate Honourable S.M.S SOITA (CM) dated 3rd July 2018 is wholly set aside.

46. In the circumstance of this case I do direct that this matter be referred back to the chief magistrate court at Kerugoya for purpose of allowing the parties to adduce further evidence as to what equitable share of the suit parcel shall be hived off and given to the appellants as their rightful share of their father's estate.

47. That each party shall bear their own costs of this Appeal.

48. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 22nd day of September, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant