



**Muriuki v Muriangi (Civil Appeal E010 of 2022)
[2023] KEHC 23458 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E010 OF 2022
LW GITARI, J
OCTOBER 12, 2023**

BETWEEN

MUTEMBEI GERRALD MURIUKI APPELLANT

AND

ELIUD MURIUNGI MURIANKI RESPONDENT

JUDGMENT

Background:

1. This is an appeal from a ruling delivered in the Chief Magistrate's Court at Chuka Succession Cause No. E080/2020 in the matter of the estate of Muriangi Gakiri (deceased) who died intestate on 15/6/1999.

A grant of letters of Administration Intestate was issued to Mutembei Muriangi on 9/3/2021. The dependants failed to agree on the mode of distribution of the estate.
2. A protest was filed by Eliudi Murungi Muriangi and Harold Mugo Gerald. The court directed that the protest be heard by way of written submissions after which the learned trial magistrate delivered her ruling on 26/5/2022, and distributed the estate of the deceased. The appellant was dissatisfied with the Ruling and preferred this appeal.
3. The deceased was polygamous and survived by the following from the two households.
 - a. First House
 - i. Edwin Miriti Muriangi (deceased)
 - ii. Ruth Nkinga Gerald (deceased)
 - iii. Eliud Murungi Muriangi



- iv. Zipporah Nkari Gerrald (deceased)
 - v. Jemmima Kanyua Gerrald
 - vi. Herold Mugo Gerrald
 - b. Second House
 - i. Geoffrey Jevi Gerrald (Deceased)
 - ii. Mutembei Gerrald
 - iii. Kagendo Gerrald (Deceased)
 - iv. Ruth Karende Gerrald
 - v. Mwandiki Gerrald
 - vi. Murithi Gerrald
 - vii. Derrick Mwenda Murianki
 - viii. Regina Kainyu Murianki
4. The deceased's estate comprised of the following properties:
 - a. LR No. Mwimbi/Mugumango/442 measuring approximately 2.02 Ha
 - b. LR No. Mwimbi/Mugumango/811 measuring approximately 1.41 Ha
5. The Appellant herein petitioned for letters of administration intestate and vide a ruling delivered on 26th May, 2022 in CM Succession Cause No. E080 (Chuka), the lower court held that the best mode of distribution of the subject estate is as follows:
 - a. LR No. Mwimbi/Mugumango/442 measuring approximately 2.02 Ha
 - i. Eliud Murungi Murianki – 0.81 Ha
 - ii. Herold Mugo Gerrald – 0.81 Ha
 - iii. Jemmima Kanyua Gerrald – 0.405 Ha
 - b. LR No. Mwimbi/Mugumango/811 measuring approximately 1.41 Ha
 - i. Esther Muthoni Gerrald – 0.282 Ha to hold in trust for herself and her daughters Ruth Karende Gerrald and Regina Kainyu Murianki
 - ii. Mutembei Gerrald Murianki – 0.282 Ha
 - iii. Murithi Gerrald – 0.282 Ha
 - iv. Mwandiki Gerrald – 0.282 Ha
 - v. Mwenda Gerrald – 0.282 Ha
6. Dissatisfied by the said ruling, the Appellant filed the instant appeal raising the following 7 (seven) grounds of appeal:
 - a. That the learned trial magistrate erred in law and fact in the manner in which she distributed the estate by failing to include all the daughters of the deceased.



- b. That the learned trial magistrate erred in law and fact in distributing the estate of the deceased in a manner that is skewed in favour of the Respondent failing to take into account the submissions made by the appellant.
 - c. That the learned trial magistrate erred in law and fact in failing to put into consideration the mode of distribution proposed by the appellant.
 - d. That the learned trial magistrate erred in law and fact in disinheriting absolutely the children of the late Edwin Miriti who was a son to the deceased.
 - e. That the learned trial magistrate erred in law and in fact in failing to follow the law vide Section 40 of the Law of Succession, resulting in unequal distribution of the estate between the two houses of the deceased.
 - f. That the learned trial magistrate erred in law and fact in distributing the estate in a discriminatory manner where one house of the deceased got the lion share of the estate while the other house was virtually left out of the distribution of the estate of the deceased.
 - g. That the learned trial magistrate erred in law and fact in holding that the children of Edqin Miriti could inherit the estate of the deceased since their parents were deceased but proceeded not to grant them any share of the estate of the deceased.
7. The Appellant thus prayed for the appeal to be allowed, the impugned ruling be set aside and for the re-distribution of the subject estate by this Court in accordance with the law.
 8. The appeal was canvassed by way of written submissions.

Appellant's Submissions

9. In his submissions, the appellant submitted that the mode of distribution done by the trial magistrate was factually flawed as the same is unequal and against the law. It was further submitted by the Appellant that without giving any reasons, the learned magistrate left Ruth Karendi and Regina Kainyu Muriianki, who are daughters of the deceased. That it is only one daughter of the deceased, Jemmima Kanyua Gerrald, who was considered in the distribution by being allocated 0.405 Ha while the other beneficiaries got only 0.282 Ha. For these reasons, the Appellant submitted that the distribution of the estate by the trial magistrate was made to favour the house of the Respondent at the expense of the second house. Finally, the Appellant submitted that the late Edwin Murithi Muriianki survived the deceased and as such, his share of the estate ought to have been passed to his children.

Respondent's Submissions

10. On his part, the Respondent submitted that it is common grounds that the deceased died intestate and had two wives namely Esther Ukima Muriianki (the first wife and now deceased), and Esther Muthoni Gerald, the second wife. The Respondent maintained that the distribution of the deceased's estate was premised on the ground that the two widows of the deceased and their children have overtime settled on their respective parcels of land. That the Appellant proceeded secretly and filed succession CM Succession Cause No. E080 (Chuka) and obtained a temporary grant. Further, that the Appellant was in the process of confirming the said grant when the Respondent got wind of the same and filed an affidavit of protest challenging the process.
11. According to the Respondent, the mode of distribution proposed by the Appellant in the lower court included strangers who were not direct beneficiaries of the deceased's estate, was riddled with greed, and went against the wishes of the deceased who had already settled his two wives and their children during



his life time. The Respondent thus submitted that the principle of equality and non-discrimination were not applicable where the deceased had settled the beneficiaries prior to his demise. That the appeal should be dismissed with cost as disrupting the distribution thereof will result in chaos and disunity in the family.

Issues for Determination

12. I have considered the pleadings, the grounds of appeals and the submissions by the parties. The main issues that arise for determination are:
 - a. Who are the beneficiaries to the estate of the deceased?
 - b. What is the best mode of distribution of the subject estate?

Analysis

The Beneficiaries

13. From the onset, I note that the deceased was polygamous and left behind two (2) widows: Esther Ukima Murianki and Esther Muthoni Gerald.

There is no dispute on the persons who are the lawful beneficiaries. There is also no dispute on the properties forming the estate of the deceased. The protestor Eliud Murungi Murianki had proposed that the estate of the deceased be distributed as follows:-

1st House:

Mrs Esther Ukima Murianki

LR. Mwimbi/Mugumango/442 - (5 Hectares)

1. Eliud Muriungi Murianki - 1 Hactare
2. Herold Mugo Gerald - 1 Hactare

The remaining 3 Hectares to be given to Eliud Murungi Murianki as per the late mother and father's Will.

LR Mwimbi/Mugumango/811 measuring four (4) Hectares

1. Esther Muthoni Gerrald - 0.50 Ha
2. Mutembie Gerald - 0.875 Ha
3. Miriti Gerald - 0.875 Ha
4. Mwandiki Gerald - 0.875 Ha
5. Mwenda Gerald - 0.875 Ha

14. I have considered this proposed mode of distribution and find it was not equitable for the reason that it does not propose equal distribution and has not catered for some of the dependants. The appellant had cited the decision of the Court of Appeal decision in the matter of the Estate of M'Ikungi M'Mwirichia)deceased where the Court of Appeal stated that the guiding provisions of law in relation to the distribution of estate of the deceased who was polygamous is Section 40 *Law of Succession Act*. The trial magistrate in her ruling held that three members of the 2nd house should get Land Parcel No. Mwimbi/Mugumango/442 measuring 2.02 hectares. While those of first house would get Mwimbi/



Mugumango/811 measuring 1.41 hectares. Though the learned trial magistrate correctly found that the application law was Section 40 of Law of Succession Act she did not distribute the estate as provided under the section.

15. In a case of this nature where the deceased died intestate and was a polygamous man survived by two widows and children, the anchor on distribution of his estate is Section 40 of the Law of Succession Act which primarily provides as follows;

- “(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 estate, shall, in the first instance, be divided among 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 interest within each house shall then be in accordance with the rules set out in sections 35 to 38”

16. In Re Estate of John Musambayi Katumanga – deceased [2014] eKLR W. Musyoka J, held that:-

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

The Court of Appeal in the case of *Rono v Rono* Civil Appeal No.66 of 2002, Court of Appeal, Justice Waki stated inter-alia that-

“More importantly Section 40 of the Act which applies to the Estate makes provision for the distribution of the net estate to the “houses according to the number of children in each house but also adding any wife surviving the deceased as an additional unit to the number of children.”

A ‘house’ in a polygamous setting is defined under Section 3 of the Act as a “family unit comprising a wife and children of that wife.”

Thus, in determining the distribution of the estate of the deceased, who was polygamous, the court considers the total number of children of the deceased and if there be a wife or wives surviving the deceased the wife, or wives are treated as an additional unit. That is to say that if there are ten children and one wife, the court will consider eleven units and distribute the estate amongst them equally. The Act recognizes ‘children’ which includes the daughters. As such daughters should not be discriminated by being left out during the distribution of the estate.

The distribution of the estate of a deceased man who was polygamous has been held in various authorities that it has to be done in accordance with Section 40 of the Law of Succession Act. The emphasis is that the net estate should be distributed equally as provided under the section.



I find that Section 40 of the *Law of Succession Act* applies in the circumstances of this case and the estate should therefore be distributed in accordance with the number of children in each house and adding the surviving widow as one unit.

17. As per the introductory letter of the area chief dated 9th November, 2020, the deceased's first household comprised of the deceased's first wife who is since deceased and six children, three of whom have since passed away. On the other hand, the second household comprised of the deceased's second wife and her eight children, two of whom have since passed away. According to the Appellant, Edwin Murithi Muriangi survived the deceased and as such, his share ought to have been passed to his children. In line with the provisions of Section 40 of the *Law of Succession Act*, it follows that the first household of the deceased comprised of 4 units whereas the second household is made up of 7 units. Therefore, the deceased left behind a total of 11 units that are entitled to inherit equally from his estate. Given that the total acreage of the deceased's estate is 3.43 Ha, it follows that each of the surviving units are entitled to 0.31 Ha. The children of Edwin Muriithi Muriangi a son of deceased who is deceased are entitled 0.31 Ha which is the share of their father.
18. I find that the appeal has merits as the mode of distribution by the trial magistrate was in conflict with Section 40 of the *Law of Succession Act*.

I order that the ruling of the trial magistrate dated 26/5/2022 is hereby set aside.

Conclusion

19. The upshot of the foregoing, in my view, is that the estate of the deceased should be distributed as had been proposed by the Appellant follows:
- a. LR No. Mwimbi/Mugumango/442 measuring approximately 2.02 Ha
 - i. Estate of the late Edwin Miriti Muriangi – 0.31 Ha
 - ii. Eliud Murungi Muriangi – 0.31 Ha
 - iii. Herold Mugo Gerrald – 0.31 Ha
 - iv. Jemmima Kanyua Gerrald – 0.31 Ha
 - v. Esther Muthoni Gerrald – 0.31 Ha
 - vi. Derrick Mwenda Muriangi – 0.31 Ha
 - vii. Murithi Gerrald – 0.16 Ha
 - b. LR No. Mwimbi/Mugumango/811 measuring approximately 1.41 Ha
 - i. Murithi Gerrald – 0.15 Ha
 - ii. Mutembei Gerrald – 0.31 Ha
 - iii. Ruth Karende Gerrald – 0.31 Ha
 - iv. Mwandiki Gerrald – 0.31 Ha
 - v. Regina Kainyu Muriangi -0.31 Ha
20. On costs of the appeal, I opine that each party should bear its own costs noting that the claim herein is a Succession Cause involving members of one family.



DATED, SIGNED AND DELIVERED AT CHUKA THIS 12TH DAY OF OCTOBER 2023.

L.W. GITARI

JUDGE

