



**Githae v Njoka (Civil Appeal 9 of 2019)
[2024] KEHC 16343 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 9 OF 2019
RM MWONGO, J
DECEMBER 4, 2024**

BETWEEN

BUNICE WAMARWA GITHAE APPELLANT

AND

MARGARET KARIUKO NJOKA RESPONDENT

(Being and appeal against the judgment of G.K. Odhiambo (Resident Magistrate) delivered on 29th January, 2019 vide Gichbugu Succession Cause No. 272 of 2016.)

JUDGMENT

1. In the lower court, the appellant/petitioner obtained representation to the deceased's estate indicating she was the deceased's wife. The Respondent filed a protest on the grounds that she was the deceased's daughter. She also claimed that the deceased was survived by another son, Francis Murage and daughter Josephine Wanjiku. The respondent further asserted that the petitioner was not the deceased's widow.
2. Following a trial on the protest, it was determined that: the protest had merit; the petitioner was not the deceased's wife; and that the petitioner's children do not qualify to inherit the estate.
3. With regard to the deceased's property Kabare/Kiritine/545 measuring about 4.95 acres, the court distributed it as follows: the petitioner to get one (1) acre, and the balance to be shared out equally between Margaret Kariuko Njoka (respondent), Francis Githae and Josephine Wanjiku. The court ordered that the grant be confirmed on the terms so determined.
4. Dissatisfied with the trial court's decision, the appellant filed an appeal on the following grounds:
 1. That the learned magistrate erred in law and in fact in distributing the estate of the deceased disproportionately by disregarding the interest of the petitioner.



2. That the learned magistrate erred in law and in fact in distributing the estate of the deceased among persons who were not beneficiaries of the estate of the deceased and without having evidence that they were children of the deceased.
3. That the learned magistrate erred in law and in fact in disregarding the evidence of the petitioner and relying on extraneous evidence which was not adduced during the hearing to make a finding.
5. The parties filed submissions as directed by the court.

Appellant Submissions

6. The appellants submissions were based on each ground.

Distributing the deceased's estate disproportionately (Ground 1)

7. The appellant submitted that during the hearing the petitioner told the court that she was married to the deceased but never had children with him. The appellant told court that the deceased had wives being Wagichugu and another wife who went away.
8. Further, that the 2nd wife Wagichugu had only one child, Margaret, while the 1st wife had two children Wanjira and Murage. She told the court that she did not know the children that the deceased had with the 1st wife.
9. The appellant told court that she was entitled to share the property of the deceased, and that she still lives on the deceased's land with her children from a previous marriage.
10. It was submitted that none of the modes of distribution proposed by the appellant and the respondent was adopted by the court. The court further in distributing the estate of the deceased disregarded the children of the appellant whom although not borne of the deceased were brought up by the deceased. The court went on to disregard the interest of the appellant who was the 3rd wife of the deceased.
11. In addition, the appellant submitted that the trial court ought to have adopted the mode of distribution as proposed by the appellant.
12. In respect of ground 2 and 3 the appellant told the court that her children moved in with her and were being maintained by the deceased prior to his death. Dependency was therefore proved as provided for by section 29(b) of the [law of succession act](#) which states

“Children whom the deceased had taken into his family as his own as were being maintained by the deceased immediately prior to his death”
13. The appellant finally urges the court to find that the appeal by the appellant has merit, that the court should allow the same and redistribute the estate of the deceased as per the certificate of confirmation of grant that had been made by the appellant. Consequently, the titles resultant out of Land Parcel Number Kabare/Kiritine/545 should be cancelled forthwith.

Respondent's Submissions

14. The respondent's submissions were based on each ground of appeal.



Ground 1:

15. The respondent submit that this ground of appeal ought to fail since the trial court's record reflects otherwise. After hearing the parties, the trial court formulated three issues which it had to determine and the issue was whether the petitioner, Bunice Wamarwa was a wife of the deceased and if so, whether she was entitled to inherit his estate.
16. In his judgment, the learned trial magistrate belaboured the said issue. Upon considering the evidence adduced by the parties and their respective witnesses, that the court came to an informed finding that the petitioner was not a wife of the deceased person. As such she was not entitled to inherit the deceased person's estate.
17. Further to the foregoing, it was submitted that during trial, the petitioner admitted that she had been married by the deceased person's brother, one Kamutu; and that she only "moved in" with the deceased after the death of her husband, the said Kamutu. She further admitted during cross-examination that at the time of the said Kamutu's death. Her children were all adults except for one young boy

Ground 2

18. On this ground, the respondent submitted that the trial magistrate dealt with the issue of the rightful beneficiaries of the deceased persons in detail. It identified, from the parties' testimonies, the children and wives of the deceased.
19. In his judgment, the learned trial magistrate found that, as per the parties' testimonies, there was no dispute that the protestor was a child of the deceased. The petitioner also admitted that the first wife of the deceased had left with two children namely Wanjira and Murage, but she did not know their other names.
20. The appellant cannot therefore claim that the lower court distributed the estate of the deceased person to strangers whereas there was sufficient evidence including the chief's letter introducing the rightful beneficiaries.

Ground 3

21. On this ground the respondent submits that the court did not rely on any extraneous evidence in reaching its findings. All the trial court did was to analyse the said testimonies and the evidence adduced, including the chief's introductory letter, to reach its findings.
22. Further to the foregoing, the appellant has not indicated what extraneous evidence, in her view, the court relied on. It cannot be sufficient for an appellant to formulate and put forth a ground of appeal and to proceed to rely on the same without substantiating the said grounds.

Issues for Determination

23. This court considers that the sole issue for determination is whether the appellant has established the grounds of appeal for this court to intervene in the distribution of the estate.



Analysis and Determination

24. This being a first appeal, the court's role is on the principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:
- “.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
25. The appellant contends that the learned magistrate erred in law and in fact in distributing the estate of the deceased disproportionately by disregarding the interests of the petitioner. These interested, she told the court, included that she was entitled to share the property of the deceased. She pointed out that she still lives on the deceased's land with her children from a previous marriage.
26. In her summons for confirmation of grant the appellant had proposed that the grant be confirmed as follows;
- a. Bunice Wamarwa - 0.8 Acres
 - b. Mary Karii Gikunju - 0.8 Acres
 - c. Margaret Kariuko Njoka - 0.8 Acres
 - d. Margaret Kariuko Wamarwa - 0.8 Acres
 - e. Albert Kanyi Kathie - 0.8 Acres
27. It was clear from the evidence availed that save for Margaret Kariuko Njoka all the others are children of the appellant who were alleged brought up by the deceased after their own father passed on.
28. In her affidavit of protest, the respondent proposed that the deceased's estate be distributed as follows;
- a. Margaret Kariuko Njoka - 2 acres jointly Josephine Wanjiku
 - b. Francis Murage Kithae - 2 acres
 - c. Bunice Wamarwa Kithae - 1 acre to hold in trust for the children
29. During the hearing the petitioner/appellant told the court that she was married to the deceased but they never had children with him. She further told the court that the deceased had wives being Wagichugu and another wife who went away. In addition, the appellant told court that she was entitled to share the property of the deceased, and that she still lives on the deceased's land with her children from a previous marriage.
30. The respondent/protestor testified that the appellant was not a wife of the deceased. However, she did not deny that she, the appellants lived on the deceased's land. Further, and on the basis, she did not oppose the appellant inheriting 1 acre of the deceased's land.
31. During the hearing, the petitioner admitted that she had been married by the deceased person's brother, one Kamutu, and that she only “moved in” with the deceased after the death of her husband, the said Kamutu. She further admitted during cross-examination that at the time of the said Kamutu's death. Her children were all adults except for one who was aged 15 years.



32. DW2 Rose Wanjiku testified that her mother, Bunice Wamarwa, was married to the deceased after death of the deceased's brother, Kamutu. She was 15 years old at that time. Her other siblings are David Mugo, Mary Kariii, Margaret Kariuko and Albert Kanyi.
33. The Respondent has contested the averment that the Appellant's children were dependants of the Deceased. She testified that she was the only child of Wagichugu, the wife of the deceased.
34. Section 29 of the Law of Succession a dependant for purposes of provision is defined as follows:
- “For the purposes of this Part, "dependant" means—
- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”
35. In the case of *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & Others, Chuka Succ. Cause No. 12 of 2016*; It was stated on Section 29 as follows:
- “From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency.”(Emphasis added).
36. From the evidence adduced at trial, there is nothing to show that the deceased assumed the responsibility of the appellant's children.
37. On distribution of the estate, the appellant submitted that none of the modes of distribution proposed by the appellant and the respondent was adopted by the court. The appellant argued that the court in distributing the estate of the deceased disregarded the children of the appellant whom, although not borne of the deceased, were brought up by the deceased.
38. The respondent submitted that the petitioner admitted that the first wife of the deceased had left with two children namely Wanjira and Murage but she did not know their other names.
39. In its decision, the court relied on the evidence of the chief and the chief's letter dated 18/7/2017. In the said letter Francis Murage and Josephine Wanjiku are recognised as children of the deceased. The protestor confirmed that their mother was Wagichugu Githae. Further, that they had not renounced their interest in the deceased's estate.
40. In Re Estate of Grace Nguhi Michobo (Decesead) [2004] eKLR, it was held:
- “All the children of the deceased are treated equally unless the child has willingly renounced their interest, they cannot be left out or denied of their inheritance merely because of their marital status. It is most likely that even the male children are married but they are not being discriminated on that basis.”



Conclusions and Disposition

41. As indicated, from the evidence adduced at the trial, there is nothing to show that the deceased assumed responsibility for the appellant's children. In that respect they have no entitlement to the deceased's estate.
42. In light of all the foregoing this court is not persuaded that the trial court failed on some point to take into account the particular circumstances or probabilities that would materially alter its decision. As such there is no justification or basis to interfere with the trial court's judgment.
43. Accordingly, the appellant's appeal fails and is hereby dismissed in its entirety.
44. Given that this is a family matter, the court makes no order as to costs.
45. Orders accordingly.

DELIVERED AT KERUGOYA THIS 4TH DAY OF DECEMBER, 2024

R. MWONGO

JUDGE

Delivered in the present of:

Otieno holding brief for Makworo for Applicant/Appellant

Nyaga holding brief for Macharia for Respondent

Murage, Court Assistant

