



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mukila & another v M'Mulika & another (Family Appeal E018 of 2023)  
[2024] KEHC 15847 (KLR) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15847 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
FAMILY APPEAL E018 OF 2023  
CJ KENDAGOR, J  
DECEMBER 13, 2024**

**BETWEEN**

**CATHERINE KAWIRA MUKILA ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH KAUME M'MUKILA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOHN KILIKILU M'MULIKA ..... 1<sup>ST</sup> RESPONDENT**

**TITUS MEEME MUKILA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Deceased, Batholomeio M'Mukila M'Kirika alias Batholomew M'Mukila M'Kirika, died intestate in 2008. The Respondents were issued with a Grant of Letters of Administration on 5<sup>th</sup> October, 2022. On 16<sup>th</sup> February, 2023, the Respondents filed for Confirmation of Grant and proposed a mode of distribution of parcel Akachiu/Auki/911 amongst 6 beneficiaries in the following manner; Titus Meeme M'Mukila - 0.05 Acres, John Kilukili M'Mukila - 0.14 Acres, David Mwenda Mukila - 0.19 Acres, Catherine Kawira Mukila - 0.10 Acres, Stanley Kimathi M'Mukila - 0.10 Acres, and Julius Njiru Nderi - 0.045 Acres.
2. The 1<sup>st</sup> Appellant protested against the confirmation and filed a Notice of Objection dated 20<sup>th</sup> February, 2023 and an affidavit dated the same day in which she stated that the mode of distribution was unfair. She also stated that the inclusion of Julius Njiru Njeri in the proceedings was illegal and termed him a stranger for he was not a member of the family. She stated that the Respondents had allocated 0.45 Acres to one Julius Njiru Nderi without her consent and that of family members.
3. The 1<sup>st</sup> Appellant filed a second affidavit dated 8<sup>th</sup> June, 2023 in protest of the confirmation in which she termed the proposed mode of distribution unjust and inequitable. She also stated that the



- administrators had not involved the 2<sup>nd</sup> Appellant and one Fridah Makena, who is her late sister's daughter. Lastly, she stated that the mode of distribution should include one Eliud Murithi Murungi, whom she said had bought 0.20 Acres of the parcel from the deceased during the deceased's lifetime.
4. She argued that, after deducting Eliud Murithi's share, the balance of the parcel should be shared in equal shares among 7 beneficiaries, namely, John Kilukili M'Mukila, David Mwenda Mukila, Catherine Kawira Mukila, Titus Meeme M'Mukila, Stanley Kimathi M'Mukila, Joseph Kaume M'Mukila, and Fridah Makena.
  5. The 1<sup>st</sup> Respondent filed a Replying Affidavit dated 12<sup>th</sup> July, 2023, in which he responded to the issues raised by the 1<sup>st</sup> Appellant. He explained that Joseph Kaume M'Mukila and Fridah Makena were not entitled to a share of the suit property because they had received their respective shares from the deceased during the deceased's lifetime. He also explained the circumstances under which Julius Njiru Nderi got into the beneficiaries' list. Lastly, he denied that Eliud Murithi Murungi had bought 0.20 Acres from the deceased.
  6. The Court delivered a Ruling on 31<sup>st</sup> August, 2023 in which it dismissed the 1<sup>st</sup> Appellant's objection to the Confirmation of the Grant and confirmed the grant. It held that the 1<sup>st</sup> Respondent's explanation was reasonable and that mode of distribution underscored the principle of equitability.
  7. The Appellants were dissatisfied with the Ruling and appealed to this Court vide a Memorandum of Appeal dated 6<sup>th</sup> September, 2023. They listed the following grounds of Appeal;
    1. The learned Chief Magistrate erred in law and fact in upholding the application for summons for confirmation of grant dated 14<sup>th</sup> October, 2022 and in dismissing the Appellants' protest without considering all the issues raised by the Appellants in their affidavit of protest.
    2. The learned Chief Magistrate erred in law and fact by dismissing the Appellants' protest based on presumptions without taking into consideration the factual evidence.
    3. The learned Chief Magistrate erred in law and fact by failing and/or omitting to identify the lawful beneficiaries to the estate of the Deceased and proceeded to distribute the estate without considering all the beneficiaries in a manner that was unfair, inequitable, illegal, and unconstitutional contrary to all sense of justice.
    4. The learned Chief Magistrate erred in law and fact by effecting distribution to a stranger in the proceedings while the entirety of the evidence did not reveal any degree of consanguinity whatsoever between Julius Njiru Nderi and the deceased.
    5. The learned Chief Magistrate erred in law and fact in failing to address their mind to the fact that Julius Njiru Nderi being a stranger cannot inherit from the deceased's estate.
    6. The learned Chief Magistrate erred in law and fact in agreeing with the Respondent's allegations that the stranger had settled debts on behalf of the deceased's Estate whereas there was no documentary evidence to come to such conclusion.
    7. The learned Chief Magistrate erred in law and fact in distributing the Estate without taking into consideration the interests of the alleged purchasers and/or ascertaining liabilities of the estate of the Deceased alleged to have been settled by a stranger.
    8. The learned Chief Magistrate erred in law and fact in entirely relying on the Replying affidavit in response to the Appellants' affidavit of protest and completely ignored the issues raised in the affidavit of protest by the Appellants.



9. The learned Chief Magistrate erred in law and fact in not considering and/or ignoring that the proposed mode of distribution by the Appellants was the most equitable.
  10. The learned Chief Magistrate erred in law and fact in basing the whole of his ruling on presumptions as opposed to evidence presented before court.
  11. The learned Chief Magistrate decision and ruling is against the law and the weight of evidence (affidavits) tendered in court.
8. The Appellants asked the Court to allow the appeal and set aside the ruling of the learned Chief Magistrate in Maua Chief Magistrate's Court Succession Cause No. E134 of 2021 delivered on 31<sup>st</sup> August, 2023. They also asked the Court to distribute the deceased's estate equally to all lawful beneficiaries.
9. The Appeal was canvassed by way of written submissions.

### **Appellants Written Submissions**

10. The Appellants submitted that the confirmation of the grant was wrongful because the 2<sup>nd</sup> Appellant and her late sister's daughter Fridah Makena had not been considered in the proposed mode of distribution. They argued that the Respondents had not adduced any evidence to show that the 2<sup>nd</sup> Appellant and Fridah Makena had been given any property by the deceased during his lifetime. They argued that the two were beneficiaries of the estate and ought to have been considered in the distribution of the property. They argued that the mode of distribution was wrongful on grounds that it had disinherited the 2<sup>nd</sup> Appellant and Fridah Makena.
11. They also submitted that Julius Njiru Nderi should not have been allocated any share of the estate. They argued that the Respondents had not adduced evidence to prove that Julius had helped them by financing the filing of the succession cause and settling of estate debts. For these reasons, they argued that the share allocated to Julius should be taken back to the estate for distribution to the lawful beneficiaries. They maintained that the suit property should be shared equally among the beneficiaries of the Estate.

### **The Respondent's Written Submissions**

12. The Respondents submitted that the lower Court's Ruling was sound in form and substance and should be upheld. They argued that the 2<sup>nd</sup> Appellant should not be given a share in the estate because he was given his share by the deceased during his lifetime. They argued that Fridah Makena should also not get a share of the suit property because the deceased gave her 0.05 Acres during his lifetime. Lastly, they maintained that Julius Njiru Nderi was genuinely entitled to the share allocated as per the mode of distribution because he had financed the succession cause and settlement of other bills. They argued that, if anything, the share allocated to Julius had been deducted from the Respondents' shares.

### **Issues for Determination**

13. I have considered the grounds of appeal and submissions by both counsels for the parties and I am of the view that the issues for determination are;
  - a. Whether the 2<sup>nd</sup> Appellant and Fridah Makena were disinherited.
  - b. Whether Julius Njiru Nderi was rightly included in the Mode of Distribution.
  - c. Whether the Lower Court's Ruling was Fair and Reasonable.



## The Duty of the Court

14. It is trite law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 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 account of particular circumstances or probabilities materially to estimate the evidence ...”

## Whether the 2<sup>nd</sup> Appellant and Fridah Makena were disinherited

15. I have relooked at the evidence placed before the lower Court to determine whether the 2<sup>nd</sup> Appellant and Fridah Makena were disinherited as claimed by the Appellants. I shall begin with the 2<sup>nd</sup> Appellant, Joseph Kaume M’Mukila. The Appellants argued that the Respondents had not adduced any evidence to show that Joseph Kaume M’Mukila had been given any property by the Deceased during his lifetime.

16. I do not think that this Court can revisit this issue because the same was adequately canvassed by the lower court and a ruling was issued on 12<sup>th</sup> May, 2022. In the Ruling, one of the issues was whether Joseph Kaume M’Mukila had received his share of inheritance during the Deceased’s lifetime. The Court held as follows; “It has been demonstrated that Joseph Kaume had already received his inheritance during the life time of the Deceased and this position has not been controverted. He even got a transfer.” The said Ruling was never appealed.

17. Section 68 of the *Civil Procedure Act* which states that:

“Where any party aggrieved by a preliminary decree does not appeal from that decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.”

18. Similarly, in *Otieno v Equity Bank Limited* [2024] KECA 811 eKLR, the Court of Appeal held that;

“From the above it is apparent that the learned Judge revisited the issue of the jurisdiction of the trial court, and came to a different conclusion from the one that had been arrived at by the Chief Magistrate in the preliminary objection. With due respect, the learned Judge erred in revisiting the issue of the jurisdiction of the trial court to hear the appellant’s suit. This was a matter that had already been determined in the Ruling in the preliminary objection. Since no appeal was preferred against the Ruling, section 68 of the *Civil Procedure Act* was applicable, and both the High Court and the Bank were bound by that Ruling. The issue was not therefore open for determination by the learned Judge”.

19. Based on the above very recent authority of the Court of Appeal, I find that the issue of whether Joseph Kaume M’Mukila had received his share of inheritance during the lifetime of the deceased is not open for this Court to determine. Since no appeal was preferred against the ruling, this court is bound by the Ruling delivered on 12<sup>th</sup> May, 2022 and cannot reopen the issue.



20. Next, I now turn to Fridah Makena. I have also relooked at the evidence before the trial Court to determine whether she was disinherited as claimed by the Appellants. In the 1<sup>st</sup> Respondents' Replying affidavit dated 12<sup>th</sup> July, 2023, the 1<sup>st</sup> Respondent claimed that the Deceased gave Fridah Makena a parcel measuring 0.40 Acres which was excised from Akachiu/Auki/911. The affidavit also stated that Fridah Makena sold the parcel to and used the proceeds to finance litigation involving other properties owned by her late mother.
21. The trial Court did not make a finding on whether Fridah Makena had been disinherited as it had been pleaded by the 1<sup>st</sup> Appellant. The Court ought to have addressed this issue given that the 1<sup>st</sup> Appellant had raised it in the Affidavit dated 8<sup>th</sup> June, 2023.
22. While as it is evident that Fridah Makena did not get a share of Akachiu/Auki/911 as per the mode of distribution, the Appellants did not adduce evidence to prove that she had been disinherited. One such piece of evidence would have been an affidavit sworn by Fridah Makena, confirming whether the Deceased had given her a parcel of land during his lifetime. She was the most appropriate person who could shed light on this issue.
23. I also note that she did not personally register her discontentment, if any. Instead, the 1<sup>st</sup> Appellant took it upon herself to speak on her behalf, without producing any documentary evidence to show that Fridah Makena had given her the authority to represent her interests in the proceedings. In the affidavit, she did not disclose that she was swearing the affidavit on behalf of Fridah Makena. If Fridah Makena intended to object to the mode of distribution, she would have filed an objection to the court raising her disapproval.
24. For these reasons, the Respondents' explanation on why Fridah Makena should not get a share of Akachiu/Auki/911 remained uncontroverted. In the absence of any other contrary evidence, I find the explanation reasonable and sufficient to warrant her exclusion from the mode of distribution.

#### **Whether Julius Njiru Nderi was rightly included in the Mode of Distribution**

25. Lastly, the Court has been invited to reevaluate the evidence and determine whether Julius Njiru Nderi was rightly included in the Mode of Distribution. The trial Court considered the issue and held as follows; "the explanation given is that the said Julius Njiru Nderi only got contributions from 3 brothers because he helped to finance the Succession Cause and settle other debts and therefore he gets his dues back. The explanation is reasonable and is accepted."
26. I have relooked at the 1<sup>st</sup> Appellant's affidavit dated 20<sup>th</sup> February, 2023 and the other one dated 8<sup>th</sup> June, 2023. I have also read the 1<sup>st</sup> Respondent's Replying Affidavit dated 12<sup>th</sup> July, 2023. I am persuaded that Julius Njiru Nderi was rightly included in the Mode of Distribution and find no reason to disturb the lower Court's finding on that issue.

#### **Whether the Lower Court's Ruling was Fair and Reasonable**

27. Lastly, the Appellants argued that the Mode of Distribution was unjust and equitable. They argued that, the parcel should be shared equally between the beneficiaries. The lower Court considered the issue and held that the mode of distribution is appropriate and was based on the principle of equitability as opposed to equalness.



28. Courts have on special occasions shunned equal distribution for equitable distribution. In the case of *Jairo Kinuthia Kanyoria v Zipporah Wanjiku & 7 Others* [2017] eKLR, the Court held as follows;

21. As can be seen from the foregoing, distribution of the estate herein is hardly an exercise of clear cut precision due to several factors, including the absence of valuations and the nature of property itself. The court's aim is not to achieve a mathematical equality between the beneficiaries but to do equity, considering the unique facts in each case (see *Rono –Vs- Rono*).

29. Courts have a special duty to ensure equitable distribution of property in Polygamous units. In *re Estate of Kaga Kimaru Gathua (Deceased) (Succession Cause 42 of 2015)* [2024] KEHC 2750 (KLR), the Court held as follows;

“In *re Late Morogo A Mugun (Deceased)* [2019] eKLR and the case of *Douglas Njuguna Muigai v John Bosco Maina Kariuki & Another* the court noted the absurdity of a blind application of this provision of law and held that:

(17) it is therefore evident, that, although section 40 of the *Law of Succession Act* provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”

30. Courts have a duty to exercise discretion judiciously after looking at all factors and must ensure an equitable and fair distribution of the estate. This rule was restated by the Court of Appeal in *Scolastica Ndululu Suva v Agnes Nthenya Suva* [2019] eKLR, where the Court held as follows;

“Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased's estate but that, the discretion must be exercised judicially on sound legal and factual basis....It is therefore evident, that, although section 40 of the *Law of Succession Act* provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”

31. In the end, I find that the mode of distribution was equitable and fair. The same is upheld. The Appeal is dismissed. No order as to costs.

32. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 13<sup>TH</sup> DAY OF DECEMBER, 2024.**

.....

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Berylnt;

