



REPUBLIC OF KENYA



KENYA LAW
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**Mugo & another v Mugo (Civil Appeal 159 of 2019)
[2025] KECA 1514 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1514 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 159 OF 2019
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
SEPTEMBER 19, 2025**

BETWEEN

JOHN CHOMBA MUGO 1ST APPELLANT

STEPHEN NJIRU MUGO 2ND APPELLANT

AND

JAMES MUNENE MUGO RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Embu
(F. Muchemi, J.) dated 12th July, 2016 in H. C. C. No. 2 of 2007)*

JUDGMENT

1. This appeal revolves around the administration and distribution of the estate of one Justus Mugo Chomba (deceased) who died intestate on 19th January, 1994. The respondent, James Munene Mugo (James), petitioned the High Court for grant of letters of administration intestate to the estate of the deceased vide Succession Cause No. 2 of 2007. The only asset identified in the said petition was land parcel No. Gichugu Settlement Scheme/278. After gazettelement, a Grant of Letters of Administration Intestate (the grant) was issued on 19th November 2007.
2. However, by a ruling dated 25th February 2015 the grant was revoked under Section 76 of the Succession Act for having been obtained through concealment of facts and fraud. In the ruling the High Court (F. Muchemi, J.) ordered that a fresh grant be issued in the joint names of John Chomba Mugo (John), Stephen Njiru Mugo (Stephen) and James. The learned Judge also ordered that the said administrators file an application for confirmation of grant.
3. Consequently, John, Stephen and James filed summons for confirmation of grant dated 8th April 2015. However, the same was opposed through a protest filed by James who filed his own mode of distribution. The trial Judge directed that the protest proceed by way of viva voce evidence.



4. James's case was that the deceased was his father and that he had eight children. That the deceased's five daughters were married and currently stay with their husbands. He testified that he is not agreeable to his two brothers inheriting five acres each while giving him only one acre. He said that some of his sisters have also been given a bigger share than him. He stated that their mother is also deceased and he was currently cultivating a portion of the deceased's estate measuring two acres. James asked that the land be shared equally among the three sons of the deceased.
5. In opposition John who testified as DW1, told the court that he was a child of the deceased and was the 1st born and that the deceased had seven children. He testified that James, the protestor, was not their biological brother but was taken into the family of the deceased where he was brought up. He stated that the mode of distribution in the affidavit for confirmation of grant was agreed upon by the entire family except James and hence the same should be adopted by the court.
6. Stephen testified as DW2, and told the court that he was one of the administrators and a son to the deceased. He testified that he supported the mode of distribution proposed by his brother John.
7. Ruth Wanjiru Mugo testified as DW3, she stated that she was a daughter to the deceased. She stated that James's mother was their mother's step sister and that he was adopted by her parents. She stated that the proposed mode of distribution granted James one acre as he is adopted and grants the other sons of the deceased 5 acres each. She stated that James's parents were still alive but she did not say who they are and where they lived.
8. Mary Mukami Ephantus testified as DW4, she stated that she was a daughter to the deceased. She told the court that James was adopted by their parents when he was still young and stated that he cannot get 3½ acres as he is not the biological son of the deceased.
9. Vide a judgment dated 12th July 2017, the learned Judge held that James was a child of the deceased by virtue of Section 3(2) of the *Law of Succession Act* and further went on to distribute the estate under section 38 of the Act which states that all children of the deceased whether married or not are entitled to inherit the deceased's estate equally. Further, the trial Judge stated that the court would not disturb the proposed mode for the 5 daughters of the deceased because they did not oppose the shares given to them by John and Stephen. She noted that two of them testified and did not raise any issue on their shares.
10. The learned Judge stated that it was not explained why one of them Ruth Mugo was given 2½ acres while the rest got one acre. She stated that the court would give her one acre like her sisters to maintain equality among the one gender.
11. Finally, the Judge held that as for the sons who have never agreed on their shares, section 38 would be applied to give them equal shares out of the twelve and half (12½) acres left after removing the daughters' shares. Each will get 4.13 acres. She thus distributed the estate as herein under:
 - i. John Chomba Mugo - 4.13 acres
 - ii. Stephen Njiru Mugo - 4.13 acres
 - iii. James Munene Mugo - 4.13 acres
 - iv. Mary Mukami Ephantus - 1 acre
 - v. Margaret Wanjiku Ndambiri - 1 acre
 - vi. Jane Wawira Thitu - 1 acre



- vii. Sarah Wakabari Njagi - 1 acre
- viii. Ruth Wanjiru Mugo - 1 acre
12. Dissatisfied with the above mode of distribution, the appellants preferred this appeal. They contended that the learned Judge erred in law and in fact by, inter alia: entering judgment contrary to the weight of the evidence presented before her; in distribution of the deceased's estate by distributing it unequally among the 8 children of the deceased; in giving the daughters lesser acreage of land to their brothers contrary to section 38 of the *Law of Succession Act* and in basing her decision on extraneous factors.
13. At the plenary hearing of the appeal, learned counsel Mr. Makura appeared for the appellants while Mr. Ombachi appeared for the respondent. Both counsel relied on his written submissions.
14. In his submissions, counsel for the appellants urged that all the children of the deceased should be treated equally for purposes of distribution of the estate. Reliance was placed on Stephen Gitonga Muriithi -vs- Faith Ngira Muriithi [2015] eKLR for the proposition that a son will not have priority over a daughter of the deceased simply because he is male and that male and female siblings are equal before the law and are entitled to equal protection of the law.
15. On ground 3, it was submitted that the trial court erred in contradicting Article 27 of the *Constitution*. It was submitted that nowhere during the court proceedings did any specific daughter of the deceased state that she does not want any share and that they were unequivocal on their preferred mode of distribution and that the court is not bound to accept any mode of distribution based on open discrimination of the deceased's daughters. It was stated that doing so would be to allow the perpetuation of discrimination, disinheriting the daughters or distributing a lesser share than that of the sons.
16. In regard to ground 5 which assailed the trial Judge for basing her decision on extraneous factors, it was submitted that the holding in Mwanasokoni -vs- Kenya Bus Limited [1982-83] 1KLR 278 and Kiruga -vs- Kiruga & Another [1988] KLR 348 are instructive for the holding that the appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were based on no evidence at all or on a misapprehension of it or that the court is shown demonstrably to have acted on the wrong principles in reaching its findings.
17. In conclusion it was submitted that this Court would be failing in its constitutional mandate if it upholds a disputed mode of distribution that is based on open discrimination on grounds of gender, sex and status. We are urged to allow the appeal.
18. In rebuttal the respondent submitted that the appellants made a proposal for distribution which was not giving all the beneficiaries an equal share. It was stated that the main intention of the appellants is to make sure that the respondent gets the least share possible.
19. It was submitted that the daughters never raised any objection to the proposals made in court on the mode of distribution by the appellants and as such the appellants are estopped from pointing a finger at the trial court for distributing the estate unequally.
20. Further, that the appellants' proposal was not even and it favoured them as they were to get 5 acres each unlike the daughters and the respondent who were to get 1 acre each, save for Grace Wanjiru Mugo who was to get 2 ½ acres for reasons well known to the appellants.
21. Finally, it was submitted that the appellants are estopped from contesting the judgement having made a proposal before the court on the mode of distribution. We are urged to dismiss the appeal.



22. A first appellate court is empowered to subject the whole of the evidence adduced before the trial court to fresh and exhaustive scrutiny and make its own conclusions, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. See *Selle & Another -vs- Associated Motor Boat Co.Ltd & Others* [1968] EA 123.
23. We have carefully perused the record of appeal; the rival submissions of counsel for the parties and considered the relevant law. The issues for determination in this appeal are: whether the respondent is a child of the deceased for purposes of the law of succession and whether he was entitled to get an equal share of the deceased's estate in equal share with the other children of the deceased pursuant to Section 38 of the [*Law of Succession Act*](#).
24. In determining the first issue, the starting point is the definition of 'child' or 'children' under the [*Law of Succession Act*](#). Section 3(2) of the said Act stipulates as follows:
- “(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”
25. It is common ground that the deceased and his wife took in the respondent, who was his wife's step sister's son into his home when he was a young child and raised him as one of their children, a fact admitted by the appellants and their witnesses who were the appellants' sisters. When the respondent became of age, the deceased gave him a portion of land, said to be 2 acres where he settled him and he remained on that portion until the demise of the deceased.
26. The learned Judge opined that it is easy under the Act, to determine whether a person is a child of a deceased person. At paragraph 10 and 11 of the impugned judgement, she stated thus:
- “ 10. In the instant case, it is not in dispute that the deceased and his wife adopted the protestor as their own and raised him. The deceased's involvement in the informal adoption has also not been disputed. In view of this, the protestor qualifies to be a child of the deceased by virtue of section 3(2) of the [*Law of Succession Act*](#).
11. I wish to restate that the court had ruled on this issue before that protestor in its ruling delivered on 25th February 2015 when the grant issued to the protestor was revoked. In the same breath the three sons of the deceased including the protestor were appointed by the court as joint administrators. The issue of whether the protestor is a child of the deceased was decided by a court of competent jurisdiction and it is therefore res judicata. The applicants did not appeal against the ruling. The only issue for determination is of distribution of the estate of the deceased among the heirs”
27. Our view of the matter, however, is that in the African traditional context, unlike under common law or under the Children's Act adoption is not that straightforward. There is, like in this case, no silver line between the question whether the respondent was a dependant or an adopted child of the deceased. We say so because it was not disputed that the respondent's mother was still alive and she maintained close contact with the respondent and the deceased. Although the deceased expressly recognized and



accepted James as his child and voluntarily assumed responsibility over him and treated him as a son, he still remained his nephew. In some cases, the line between a “child” and a “dependant” is quite blurred. This is because section 29(b) of the *Law of Succession Act* also refers to children taken in by the deceased and raised as his own as dependants.

28. Section 29 of the *Law of Succession Act* provides as hereunder.

“29. Meaning of dependant:

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 ...” [Emphasis ours].

The respondent could have fitted the above definition also.

29. However, as acknowledged by the learned Judge, the High Court in its ruling dated 25th February 2015 made a definitive finding that the respondent was a child of the deceased. There was no challenge to that ruling, and we cannot make any contrary findings in that regard in this judgment.

30. The mode of distribution as at the conclusion of the trial was in favour of the land being divided equally among all the children of the deceased irrespective of their gender or marital status. However, the trial court noted that the deceased’s daughters had signed the proposed mode of distribution filed by the appellants and were not opposed to them getting an acre each as proposed.

31. We agree with the learned Judge that the daughters voluntarily signed the said mode of distribution, and even though they testified in court, none of them even suggested that they were unhappy with the mode of distribution they had endorsed. We note, further, that the said daughters did not file any appeal against the learned Judges mode of distribution as drawn by the learned Judge.

32. We note, however, that the appellants and their sisters had agreed to give two and a half acres to Ruth Mugo, as contained in the appellants’ proposed mode of distribution. The learned Judge proceeded to change that allocation suo moto and reduced it to one acre on grounds that there had to be equality among the daughters (but not among the sons). Therefore, in saying that the daughters could not get more than they had signed for, the learned Judge applied different standards to similar circumstances, and this actually amounted to discrimination. The learned Judge had not been invited to amend the stated share. There must have been good reasons why the appellants and their sisters unanimously agreed that Ruth should get the 2.5 acres. We must in the circumstances interfere with that distribution and restore to Ruth Mugo what her siblings thought she was entitled to.

33. The appellants’ complaint against the mode of distribution is that it failed to take into account the clear principles of law enshrined in section 38 of the *Law of Succession Act*. Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and marital status.



34. On the other hand, the respondent's disenchantment with the above mode of distribution is that the daughters would thereafter give their portions to their brothers leaving him with a smaller portion. That is, nonetheless, neither here nor there. In any event, the respondent has not filed a counter-appeal and his concerns lack legitimacy.
35. From the foregoing, it is clear that there is sufficient reason for us to interfere with the findings by the trial court. This appeal succeeds in part. We, therefore, allow the appeal and set aside the mode of distribution adopted by the learned Judge and substitute therefor the mode of distribution to the effect that Land Parcel L.R No. Ngariama/Gichugu/278 be distributed as follows:-
- i. John Chomba Mugo - 4.65 acres
 - ii. Stephen Njiru Mugo - 4.65 acres
 - iii. James Munene Mugo - 2.0 acres
 - iv. Mary Mukami Ephantus - 1 acre
 - v. Margaret Wanjiku Ndambiri - 1 acre
 - vi. Jane Wawira Thitu - 1 acre
 - vii. Sarah Wakabari Njagi - 1 acre
 - viii. Ruth Wanjiru Mugo - 2.5 acres
36. This being a family matter, we order that each party bears its own costs of the appeal.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF SEPTEMBER 2025.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

