



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. E100 OF 2022

SUSAN NGIGE NGURE.....1ST APPELLANT
JOEL MURAGE NGURE.....2ND APPELLANT
FLORENCE WAITHERA MUTHUMU.....3RD APPELLANT
BENSON WAWERU.....4TH APPELLANT

VERSUS

AURILIA WANGITHI NGURE.....RESPONDENT

(An appeal from the Ruling of Hon. S.M. Nyaga (S.R.M) in Gichugu Succession Cause No.
74 of 2018 delivered on 13/10/2022)

JUDGMENT

Introduction

- [1] On 21/5/2018, the 1st Appellant and the Respondent petitioned for grant of letters of Administration intestate, in their capacity as wives of the deceased, which was issued on 28/6/2021. On 17/1/2022, the Respondent filed summons for confirmation of grant where, at paragraph 8 of the affidavit in support thereof, she proposed that **L.R No. Mweru/Baricho/279 (hereinafter referred to as the estate property)** measuring approximately 4 Ha, be distributed equally between the 2 wives of the deceased.
- [2] The 1st Appellant swore an affidavit of protest on 25/4/2022 urging that the deceased herein had during his lifetime subdivided the estate property into 4 equal portions, in the presence of elders, and the family lived in peace on their respective portions. The deceased gave the Respondent, Joel Murage Ngure, Benson Waweru Ngure and Florence Waitthera Muthumu (wife to Moses Muthumu Ngure - deceased) 2 ½ acres each, while

she resided with Benson Waweru Ngure on his 2 ½ acres. She proposed that the grant be confirmed according to the wishes of the deceased.

[3] The Respondent swore a reply to the protest on 16/5/2022 beseeching the court to distribute the estate equally among the 14 beneficiaries of the deceased, in accordance with the provisions of section 40 of the Law of Succession Act.

[4] In its impugned Ruling, the trial court invoked the provisions of Section 40 of the Law of Succession Act in distributing the estate equally among 14 units of the estate, excluding any beneficiary wishing to exclude himself/herself in writing to the land Registrar.

The Appeal

[5] On appeal, the Appellants filed their memorandum of appeal on 14/11/2022 raising 6 grounds as follows:

1. *The Learned Magistrate erred in law and fact by not considering the weight of evidence given by the appellants.*
2. *The Learned Magistrate erred in law and fact where he gave a very shallow ruling without giving any credible reasons.*
3. *The Learned Magistrate erred in law and fact when he failed to consider that the deceased had shared out his Land to the defendants during his lifetime.*
4. *The Learned Magistrate erred in law and fact without considering the principle of gift intervivos which ought to have applied in this case as the deceased had shared and or gifted his Land during his lifetime.*
5. *The Learned Magistrate erred in law and fact when he failed to consider that the beneficiaries and especially the appellants had been in possession and occupation and had extensively developed their portions as was shown and gifted by the deceased.*
6. *The Learned Magistrate erred in law and fact by failing to consider the submissions and authorities tendered by the appellants.*

Duty of the court

[6] This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the

advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others [1968] E.A. 123*).

Oral Evidence

- [7] **Protestor's Witness 1 Susan Ngige**, and the 1st Appellant herein adopted her statement dated 25/4/2022 and her affidavit of protest as her evidence in chief. She testified that, *"The deceased was my husband Wangithi Aurilia was my co wife. I was first wife. I do not remember the year I was married. I am not educated. I had many children when he married Wangithi about five (5). We had 2 ½ acres each. My house hold had six (6) acres. Wangithi house hold has 2 ½ acres. That was the case before his demise. I cannot remember the year of his demise. I protest sharing estate in equal shares between the two households. I pray the deceased's wish be confirmed. That was not an issue during his life time. My six (6) acres is shared among three people - my 3 sons. I live with my son - Waweru. They have developed their parcels. Wangithi had no issues when they were building. She lives with her children. They have also built their houses. Wangithi got married already with four (4) children. She gave birth to four (4) more children. They had no problem with the deceased wish. He shared the land with their knowledge. There are boundaries. The demarcation was done in foresence of all beneficiaries. Everlene was content. We live in harmony I want status quo be maintained."*
- [8] On cross examination, she stated that, *"The land is in my name I want the land registered in my name. There is no will left behind. He had sub - divided the land. I have a sketch map. Titus Muriuki demarcated the land. He was an Agricultural Officer. He is now senile. The elders involved all are now late. There are no minutes. I have five (5) children. Aurellia has six (6) children. Her 2 children died. Joel Murage is my child. Moses Muthumu is my late child. Benson Waweru is my child. Each of my child has 2 ½ acres. All 7 acres Wangithi was given 2 ½ acres. That was my husband's wish. We do not have titles. I cannot remember the year of the subdivision. My children have built at their parcels. No evidence. Court may visit site and see it. I am not greedy. It is only my husband's wish that I seek enforced."*
- [9] In re-examination, she stated that, *"I want status quo maintained. He involved all the beneficiaries. No minutes. Silas Muriuki is now senile. He was Agricultural Officer."*

[10] **Protestor's Witness 2 Harrison Murage** adopted his statement recorded on 25/4/2022 as his evidence in chief. He testified that, *"The deceased was my uncle. He had 2 wives, Susan and Aurilia. 1st and 2nd wife respectively. They have 5 children – 1st wife. I cannot tell the number of children in the 2nd household. We are residents of same area. I was in a polytechnic when he shared his land. I found it done. He told me about it. They live harmoniously. There are boundaries. 1st household got 7 ½ acres and the other 2 ½. They lived peacefully I even wonder why now while they had lived harmoniously about 10 years ago since his demise. They have stone houses."*

[11] On cross examination, he stated that, *"I was not present during demarcation. I found it deceased informed me about it. I have no documentary evidence. I can not tell the year may be 30 years ago of the subdivision. He died 10-13 years ago. I think Aurilia has more children. I am conversant with family. Susan has Wairimu, Muthumu, Wambui, Waweru (not able to mention all the children in each house hold). I forgot their names I do not know of any will. No sketch plan. I have no minutes for the sub-division."*

[12] **Petitioner's Witness 1 Aurilia Wangithi**, and the Respondent herein adopted her replying affidavit to the protest as her evidence in chief. She testified that, *"Deceased is my late husband. PW1 - first wife. I was 2nd wife. She had four (4) children when I got married. She added one more. I was married with four (4) and the deceased took care of them. I added four (4) more. I want the land to be shared equally among the two household. He never sub - divided the land. No evidence of any subdivision. I do not know of any elders committee. He did not leave any will. He died in my house and he never told me of any sub division. I pray for the summons to be confirmed as made."*

[13] On cross examination, she stated that, *"I had 04 children. Deceased took care of item. She had 4 children - school going. When I got married. Susan has 05 children now. I was living with deceased at time of demise. He had built our house. Before we lived two wives in Susan's house. The deceased showed us the parts we conduct farming and also the places we built. My children have not built houses. I live with one son. Susan's children have built. Waweru has built a stone house. Joel has a stone house. Moses died. The wife Waithera Florence survived him. He has a stone house. They built before the deceased demise. They were shown sites by Susan it is deceased who showed them building sites. The modern houses are within parts shown. There are boundaries they built modern houses at place earlier shown. They have only fenced the compound around*

the houses. I utilise 2 ½ acres. I was shown by deceased. I was told it is 2 ½ acres by those who sub-divided the land Susan lives with Waweru. I hear it. We are neighbours. I see Susan on daily basis. All her children have separate parts where they conduct farming. They allocated the land themselves. We were farming in an haphazard manner. I protested when they were building since the land had not been sub divided. I have not entered their self allocated parts we do not fight.”

[14] In re-examination, he stated that, *“He died about 30 years ago. Most of the modern houses are recent. It is one parcel. The deceased did not sub divided our land. We were just shown parts to cultivate. They fenced only part around the house. They planted live fence. They planted on their own allocation. Our land is not sub divided.”*

Submissions

[15] The Appellants cite **Martha Wanjiku Waweru v Mary Wambui Waweru (2007) eKLR** in urging that the deceased had shared out the estate property during his lifetime, and the family members are all settled as such. They fault the trial court for failing to consider their submissions, and cite **Silas Ruguaru Mitambu v Gedion Mutwiri Mitambu (2017) eKLR**.

[16] The Respondent urges the court to dismiss the appeal with costs as the estate property was distributed fairly and equally, as decreed by the provisions of section 40 of the Law of Succession Act.

Analysis and Determination

[17] From the grounds of appeal, the sole issue for determination is whether the trial court erred in its distribution of the estate property.

[18] The deceased herein died intestate on 9/9/1996 survived by 2 wives namely Susan Ngige Ngure and Aurilia Wangithi Ngure, and 12 children namely Joel Murage Ngure, Jane Wairimu Gatei, Stella Wambui Maina, Benson Waweru, Florence Waitheera Muthumu, Dickson Wandu Mugo, Mercy Njoki Muriithi, Josphat Gicira Ngure, Peter Kiruguya Ngure, Faith Wakuthii Muthike, Purity Muringo Ngure and Charity Wanjiku Gakuru.

[19] In an ideal situation, the distribution of the estate of the deceased herein who was a polygamist, would have been in accordance with the children in each house, with the

surviving spouses being treated as additional units. Nonetheless, that distribution need not necessarily be equal among the number of children in each house, as was held by the Court of Appeal in **Rono v Rono** (2005) 1 EA 364, that:

“Under statutory law, the superior Court has discretion to take into account fairness in determining the distribution to dependants. This discretion must be exercised on sound factual and legal basis. The possibility of girls marrying is only one factor that may be considered. Equal treatment of the children by the deceased was another factor. However, in intestate succession, there was no principle of law that the houses of the deceased, or the children/beneficiaries, must inherit equally.”

[20] The 1st Appellant testified that, ***“The deceased was my husband Wangithi Aurilia was my co wife. I was first wife. I had many children when he married Wangithi about five (5). My house hold had six (6) acres. Wangithi house hold has 2 ½ acres. I pray the deceased’s wish be confirmed. My six (6) acres is shared among three people - my 3 sons. I live with my son - Waweru. They have developed their parcels. Wangithi had no issues when they were building. There are boundaries.”*** Even on thorough cross examination, she remained firm that, ***“He had sub - divided the land. I have a sketch map. Benson Waweru is my child. Each of my child has 2 ½ acres. All 7 acres Wangithi was given 2 ½ acres. That was my husband’s wish. My children have built at their parcels.”***

[21] Her testimony was corroborated by **Protestor’s Witness 2** who testified that, ***“The deceased was my uncle. He had 2 wives, Susan and Aurilia. 1st and 2nd wife respectively. I was in a polytechnic when he shared his land. He told me about it. 1st household got 7 ½ acres and the other 2 ½. They have stone houses.”***

[22] While the Respondent insisted that the deceased had not subdivided the estate property, she conceded on cross examination that, ***“The deceased showed us the parts we conduct farming and also the places we built. My children have not built houses. I live with one son. Susan’s children have built. Waweru has built a stone house. Joel has a stone house. Moses died. The wife Waithera Florence survived him. He has a stone house. They built before the deceased demise. They were shown sites by Susan it is deceased who showed them building sites. The modern houses are within parts shown. There are boundaries they built modern houses at place earlier shown. They have only***

fenced the compound around the houses. I utilise 2 ½ acres. I was shown by deceased. I was told it is 2 ½ acres by those who sub-divided the land Susan lives with Waweru. I see Susan on daily basis. All her children have separate parts where they conduct farming. I have not entered their self allocated parts. We do not fight.”

[23] The court finds that the Respondent’s admission that the deceased had settled each family on their respective shares is corroborative of the 1st Appellant’s testimony that the deceased had subdivided the estate property into 4 equal portions during his lifetime.

[24] In underscoring the import of a beneficiary’s residence or settlement by the deceased, the Court in *Re Joseph Sigilai Mutai, Maria Chepkemoi Lelei & Tapsabei Chepkemoi Lelei v Philip Kipyegon Lelei* [2006] eKLR, (Luka Kimaru J, as he then was) stated as follows;

“I am satisfied that the petitioners have established on a balance of probabilities that the deceased had settled his wives in their respective portions of land. The 1st wife was settled at Kericho while the three other wives of the deceased were settled at Transmara. The three wives and their children recognized this fact when they subdivided the Transmara parcel of land among themselves to the exclusion of the 1st wife and her children. I therefore hold that none of the children of the three wives who reside at Transmara, including the objector, are entitled to the parcel of land occupied by the 1st wife and her children at Kericho namely Kericho/Kapkatet/1226.”

[25] The court finds that the trial court’s decision was erroneous and against the weight of the evidence on record, and there is, therefore, a basis for this court’s interference.

ORDERS

[26] Accordingly, for the reasons set out above, the Court finds that the appeal is merited and it is allowed in the following terms:

- 1) **The trial court’s Ruling dated 13/10/2022 is hereby set aside.**
- 2) **L.R No. MWERUA/BARICHO/279 shall be distributed as proposed by the 1st Appellant at paragraph 7 of her affidavit of protest sworn on 25/4/2022 as follows:**
 - i. **Aurilia Wangithi Ngure 2 ½ acres**

- ii. **Joel Murage Ngure 2 ½ acres**
- iii. **Benson Waweru Ngure 2 ½ acres**
- iv. **Florence Waithera Muthumu 2 ½ acres**

[27] There shall be no order as to costs.

Orders accordingly.

DATED AND DELIVERED THIS 7TH DAY OF OCTOBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Igati Mwai for the Appellant.

Ms. Waweru for the Respondent.