



**In re Estate of Muiruri Gachui (Deceased) (Probate & Administration Appeal
E001 of 2023) [2025] KEHC 14654 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
PROBATE & ADMINISTRATION APPEAL E001 OF 2023**

TW OUYA, J

OCTOBER 2, 2025

IN THE MATTER OF THE ESTATE OF MUIRURI GACHUI - (DECEASED)

BETWEEN

JOSEPH MWANGI MUIRURI APPELLANT

AND

NJOKI MUIRURI 1ST RESPONDENT

JENNIFER WANJIKU KIMANI 2ND RESPONDENT

MARGARET MUTHONI WACHIRA 3RD RESPONDENT

*(An Appeal from the Judgment of Hon. A. Okullo (RM) delivered on 21st
December, 2022 in Murang'a Chief Magistrate's Succession Cause No. 55 of 2018)*

JUDGMENT

1. The Appellant approached this Court through a Memorandum of Appeal dated 16th January, 2023 challenging the decision of the trial Court delivered on 21st December, 2022 in Murang'a Chief Magistrate's Succession Cause No. 55 of 2018 wherein the Appellant was the Petitioner while the 1st, 2nd and 3rd Respondents herein were the 1st, 2nd and 3rd Protestors respectively. No specific reliefs were craved by the Appellant in the appeal.
2. The 1st Respondent is the deceased's widow and first wife and was said to be about 100 years old at the time of the delivery of the impugned decision. The 2nd and 3rd Respondents are the deceased's daughters with the 1st Respondent while the Appellant is the deceased's son with his second wife, now deceased.
3. At the trial Court, the Petitioner (now Appellant) laid claim to land parcel number LOC.2/ KABATI/377 measuring approximately 4.8 Acres (the suit land), registered in the name of his father MUIRURI GACHUI (DECEASED). The Petitioner, relying on the provisions of the *Law of*



- Succession Act argued and submitted that the estate of his father who died intestate in 1974, ought to be distributed according to the Kikuyu Customary Law which does not allow the daughters who are married to inherit their late father's land.
4. The trial Court ruled in favour of the Protestors and found the mode of distributing the deceased's property proposed by the Petitioner to be discriminatory and having the effect of disinheriting the deceased's widow and daughters. The trial Court reasoned that every child has an equal right to inherit their parent's Estate regardless of gender.
 5. The Appeal is founded on the following six (6) grounds
 - i. That the trial Court erred in law and in fact when it applied the provisions of the Law of Succession Act and the Constitution 2010.
 - ii. That the trial Court erred in law when it failed to appreciate that the Constitution 2010 recognizes the applicability of custom Law which have not been declared repugnant to justice and morality.
 - iii. That the trial Court erred in law and in fact when it applied the provisions of the Law of Succession Act retrogressively.
 - iv. That the trial Court erred in law and in fact when it delivered a judgment when the parties has agreed on a common stance.
 - v. That the trial Court erred in law when it failed to consider the appellant's submissions and the submitted authorities.
 - vi. That the trial Court erred in law when it failed to hold that the deceased's estate was subject to customary law and his estate ought to have been distributed within the ambit of customary Law.
 6. The appeal was admitted under Section 79G of the Civil Procedure Act with directions that it be canvassed by way of written submissions.
 7. The Appellant filed written submissions dated 22nd November 2022 through his Counsel. He submitted that as the deceased died on 24th February 1974, predating the enactment of the Law of Succession Act which entered into force on 1st July 1981, the applicable law with respect to the deceased's estate is the Kikuyu Customary Law, pursuant to the provisions of Section 2(2) of the Law of Succession Act. Guidance was sought in the holding of the Court in the case of the Estate of Kamwethi Mwethi HC Succession Cause no.2825 of 1999 to anchor the preceding argument. Further reliance was placed in the decision of the Court in *Philis Mucembi v Wamai Muchembi* (2010) eKLR and in the learned commentary of Eugene Cotran in his text 'The Restatement of African Customary Law' volume 2 at page 8.
 8. The Appellant further relied on the decision of the Court in Civil Appeal No. 76 of 1998 *Mary Wanja Gichuru v Esther Watu Gichuhi* and in *Mwanthi v Mwanthi and another* (1995-98) 1 EA 229 to buttress the position that the Kikuyu Customary Law being patrilineal does not recognize the right of married daughters to inherit their deceased father.
 9. The Appellant faulted the trial Court for failing to appreciate that the Kikuyu Customary Law is not repugnant to justice and morality and is recognized under Section 3(2) of the Judicature Act. Reliance was placed on the reasoning of the Court in the case of *Rufus Kang'ethe Kamau v Grace Njeri Kamau* (2022) eKLR.



10. It was submitted that the 1st Respondent who died on 27th May, 2023 concurred with the Appellant that the suit land sub-divided amongst the deceased's sons which is also the common stance of the deceased's family.
11. The Respondents filed written submissions dated 30th January 2025 through their Counsel and refuted the Appellant's claims that the deceased's family held a meeting where it was resolved that the suit land be apportioned among the deceased's sons to the exclusion of the daughters. It was submitted that the Appellant failed to present any minutes or resolutions allegedly adopted by members of the deceased's family allocating the suit property to the deceased's sons to the exclusion of any other party.
12. The Respondents subscribed to the position that the evidence adduced by the 1st Respondent before the trial Court indicates that the suit property was divided equally between the deceased's two wives, with each wife receiving 2.4 Acres thereof. They further submitted that the Appellant admitted, on page 44 of the Record, that the suit property was purchased through the combined efforts of the deceased and the 1st Respondent who was the deceased's first wife.
13. It was submitted that that the Appellant and his brothers intentionally destabilized the boundary demarcating the suit land into two equal portions allotted to the deceased's two wives and caused the construction of a house in the portion designated for the 1st Respondent. In the event, it was argued, the Appellant is estopped from benefitting from his own wrongdoing pursuant to the doctrine of *Ex turpi causa non oritur actio*.
14. The Respondents accused the Appellant of seeking to introduce new evidence on appeal as the Appellant did not mention Kandara Succession Cause No. 178 of 2018 in the proceedings before the trial Court.
15. It was submitted that the Appellant was aged 14 years at the time of the deceased's death in 1974. Furthermore, the Appellant contradicted himself by alleging on the one hand that the suit land was sub-divided between himself and his brothers while, on the other hand, claiming that the subject property was shared out between the deceased's two wives.
16. The Respondents argued that the case-law relied upon by the Appellant predated the entry into force of *the Constitution* of Kenya 2010. Reliance was placed on the provisions of Article 2(4) of *the Constitution* of Kenya to anchor the proposition that any law, including customary law which contradicts *the Constitution* of Kenya is null and void. Further guidance was placed on Article 27(5) of *the Constitution* of Kenya in support of the argument that discrimination on grounds of sex is prohibited. Further reliance was placed in the reasoning of the Court in *Wanjiru & 4 Others v Kimani & 3 Others* (Civil Appeal No. 36 of 2014) [2021] KECA 362 (KLR), and in *Mwongera Mugambi Rinturi & Another v Josephine Kaarika & 2 others* (2015) eKLR to anchor the preceding proposition.
17. Having outlined the positions taken by the parties to the subject appeal, the Court identifies two issues for determination that is; What legal regime applies to the distribution of the deceased's Estate and; whether the appeal is merited.
18. It is not in contention that the deceased herein died on 24th February, 1974 leaving several beneficiaries including all the parties herein. The Appellant argued and submitted that the Kikuyu Customary Law is the applicable law with regard to the distribution of the deceased's Estate. The Respondents, for their part, subscribed to the position that *the Constitution* of Kenya and the *Law of Succession Act* ought to apply as opposed to the Kikuyu Customary Law which they described as discriminatory towards daughters in terms of inheriting their father's Estate.



19. The date of commencement of the *Law of Succession Act* is July 1, 1981. Section 2 (1) and (2) of the *Law of Succession Act* provides as follows:

- “(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.
- (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

20. In the case of *In Re Estate of Nduati Mbutia (Deceased)* [2015] KEHC 3984 (KLR), the Court appreciated the meaning and import of Section 2(2) of the *Law of Succession Act* as follows:

“The second part of Section 2(2) of the *Law of Succession Act* states that the administration of the estates of persons who died before 1st July 1981 should commence or proceed so far as possible in accordance with the provisions of the *Law of Succession Act*. In other words the procedure with respect to administration of estates of such persons is to be governed, not by the law as at the time of death, but by the procedures set out in the *Law of Succession Act*. The said provisions in the *Law of Succession Act* governing procedures and processes in administration of estates are to be found in Part VII. Part VII of the *Law of Succession Act* applies universally to the estates of persons dying either before or after the commencement of the Act.

It is not in dispute that the deceased person the subject of these proceedings died before the *Law of Succession Act* came into force. Consequently, the substantive law governing devolution to his estate is that stated in Section 2(2) of the *Law of Succession Act* that is the written laws and customs in force as at the time of his death in 1966.”

21. The foregoing position was underlined by the Court of Appeal in the case of *Kambo v Mwangi* (Civil Appeal 186 of 2017) [2022] KECA 524 (KLR) (28 April 2022) (Judgment) as hereunder:

“In light of the above provision, it is our position that Waweru having died way back in 1978, the trial Judge properly appreciated and arrived at the correct conclusion that the law governing the issues in controversy before the trial court was Kikuyu Customary Law.”

22. In the appeal before the Court, the deceased died intestate on 24th February, 1974. It is evident that the Kikuyu Customary Law is the applicable law with respect to the distribution of his Estate.

23. In challenging the impugned decision, the Appellant subscribed to the position that the Kikuyu Customary Law does not contemplate the apportioning of land to a deceased person’s married daughters as only sons and unmarried daughters are considered.



24. The position of the Kikuyu Customary Law concerning inheritance is beyond peradventure. It is not contested that the Kikuyu Customary Law is patrilineal. In his book, *Restatement of African Law: 2 The Law of Succession*, Eugene Cotran observed that:

“Daughters are normally excluded, but may also receive a share if they remain unmarried. In the absence of sons, the heirs are the nearest patrilineal relatives of the deceased, namely father, full-brothers, half-brothers and paternal uncles.”

25. In apportioning the suit land equally between the Appellant and the Respondents, the trial Court determined that discrimination on grounds of sex or gender is prohibited under Article 27(5) of *the Constitution* of Kenya. The net effect of the trial Court’s holding was to modify the position of the Kikuyu Customary Law as regards inheritance by the deceased’s married daughters, to conform with *the Constitution* of Kenya. Even prior to the promulgation of *the Constitution* of Kenya 2010 the discriminatory nature of the Kikuyu Customary Law of inheritance as regards inheritance by married daughters was noted by the Court in the case of *Re The Estate of Mugo Wandia (Deceased) (2009) eKLR*, as hereunder:

“The petitioner has a duty to adduce expert evidence on kikuyu customary law to establish that the applicant is not entitled to her father’s estate. In the absence of such evidence, I find the submissions that the applicant should be left out discriminatory and the existence of such custom and its requirement would not pass the threshold of the provisions of the *judicature Act*. Besides the *judicature Act*, there is *the constitution* of the Republic of Kenya. Under section 82 of *the constitution* out-laws discrimination on the basis of sex. Upholding and affording unsubstantiated custom that offers differential treatment to the petitioner is unconscionable.”

“It would also go against the reasonable expectation by the applicant that when she comes to a court of law she will be afforded equal treatment and access to justice. Kenya is amongst other countries under the United Nations and is a party to several human rights conventions and treaty which prohibit discrimination against women. Key amongst them is the universal declaration of human rights especially Article 1 and the convention on all forms of discrimination against women (CEDAW). It is for those reasons that at this day and age when the government has made a lot of effort to eradicate poverty and embrace equitable policies and programs of development a court of law cannot pronounce a judgment that goes against the spirit. The applicant is entitled to a share of her deceased father’s estate even if he died in 1976 and his properties were distributed in 2004.”

26. In the case of *Peter Karumbi Keingati & 4 others v Dr. Ann Nyokabi Nguithi & 3 others [2014] KEHC 3563 (KLR)*, where the Court adjudicated upon a claim founded on the Kikuyu Customary Law as in the subject cause, it was held as follows:

“This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of *the Constitution* 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women be buried in history.



In the premises therefore, this court finds no favour with the Applicants' application seeking to disinherit the Respondents. This court declares that the Respondents are dependants of the deceased in accordance with Section 29(a) of the Law of Succession Act. They are entitled to inherit the properties that comprise the estate of the deceased during distribution."

27. The suit property does not comprise the deceased's ancestral land. The Appellant admitted during cross-examination, as per page 43 and 44 of the Record of Appeal, that the 1st Respondent and the deceased "helped buy the [suit] land." In the circumstances, the Court hold and finds that it would result in an injustice if the entire property in contention were to devolve to the Appellant and his male siblings, to the exclusion of the 2nd and 3rd Respondents whose mother contributed financially towards the purchase of the suit land.
28. The trial Court directed that suit land comprising of 4.8 Acres be divided equally amongst nine units comprised of the deceased's first wife and her two children (the 2nd and 3rd Respondents herein) and the six children belonging to the deceased's second wife (the Appellant's mother). This Court is not minded to disturb the trial Court's holding regarding the equal distribution of the subject property among the deceased's nine beneficiaries.
29. The Respondents admitted that in 2020, a house was erected by their step-brother PAUL NGANGA on the 1st Respondent's portion of the suit land. The Court is persuaded that equal distribution as ordered by the trial Court cannot be undertaken without great disruption of the developments already undertaken. In the premises, the Court leans towards equitable distribution of the suit property to avoid unlawful enrichment which would be the result if the Respondents were allowed to assume ownership of the house erected on their mother's portion of the suit land by their step-brother PAUL NGANGA.
30. Accordingly, the Court hereby directs that:
 - i. The Respondents to cede and exchange that portion of the 1st Respondent's land occupied by their step-brother PAUL NGANGA's house to him; in turn, the Respondents will receive an equivalent portion of undeveloped land to be carved out of the 2.4 Acres belonging to the deceased's second wife (the Appellant's family).
 - ii. The Appellant and the Respondents shall bear the survey fees equally in carrying out the directions set out in paragraph i. above.
 - iii. This being a dispute between members of the same family, the Court directs each party to bear own costs.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 2ND OCTOBER, 2025.

HON. T. W. OUYA

JUDGE

