



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Elijah Musili Kikuyu (Deceased) (Succession Cause
88 of 2016) [2025] KEHC 17545 (KLR) (28 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
SUCCESSION CAUSE 88 OF 2016
M THANDE, J
NOVEMBER 28, 2025
IN THE MATTER OF THE ESTATE OF ESTATE OF ELIJAH MUSILI KIKUYU
(DECEASED)**

RULING

1. The proceedings herein relate to the estate of Elijah Musili Kikuyu (the deceased) who died intestate on 9.7.12 in Hindi Lamu. The record shows that the deceased was survived by his 1st wife Tamala Ndinda Musili (Tamala) and her 2 children Josephat and David as well as his 2nd wife Mariam Elija Kikuyu (Mariam) and her sons Jimmy and Rashid. A grant of representation was issued to Jimmy in Lamu Succession Cause No. 3 of 2012 on 17.6.13 and confirmed on 6.8.13. The matter ended up in this Court vide a summons for revocation of grant dated 16.5.16 filed by Tamala, Josephat and David. By consent of parties the grant was on 1.7.16 revoked and a fresh grant was to be issued to Tamala and Mariam, the 2 widows of the deceased. A summons for confirmation of grant was filed thereafter.
2. After hearing arguments at the hearing of the summons for confirmation of grant, this Court in a judgment delivered on 26.7.18 held that the estate of the deceased comprised of:
 - Lamu/Hindi/360.
 - Plots Mutonguni/Kaimu/1663, 1664, 1687 and Plot Mutonguni/Kauwi/2322 (Kitui properties)
 - Cash in KCB Bank Account No. 11172898553, Lamu Branch (Lamu bank account)
 - Cash in KCB Bank Account No. 1131771443, Moi Avenue Branch (Moi Avenue bank account)
3. The Court went on to find that Lamu/Hindi/360 was acquired by the deceased but held by Mariam in trust for him and that Tamala made no contribution towards to the property. The Court further found Mariam had made substantial contribution to Lamu/Hindi/360 and was entitled to half of the same. The property had been subdivided and Mariam had sold 13 plots. She was thus entitled to 4



- more plots and 16 were left for distribution. The Court also found that Mariam was entitled to the cash in the Lamu bank account which comprised of proceeds of sale of the Lamu plots.
4. The Court then directed that the funds in the Moi Avenue bank account being the deceased's pension, the remaining 17 Lamu plots and the Kitui plots be distributed equally amongst all the beneficiaries of the estate of the deceased pursuant to the provisions of Section 40(1) of the *Law of Succession Act* (LSA). The Court further directed that to ensure fairness, each house would appoint a valuer to conduct a joint valuation of the properties and file a valuation report in Court within 75 days. Parties would then agree on the mode of distribution to be adopted by the Court.
 5. Being aggrieved by the decision of the Court, Josephat, Tamala and David (the first family) appealed to the Court of Appeal. They faulted this Court's for:
 - i. finding that Mariam was entitled to 17 of the Lamu plots owing to her contribution, but failed to apply the same principles in respect of the Kitui properties.
 - ii. finding that the funds in the Lamu bank account belonged to Mariam without any evidence to support the finding.
 - iii. finding that the 2nd family was entitled to shares in the Kitui properties.
 - iv. failing to find that Tamala had exclusive right over half of the Kitui properties
 6. The Court of Appeal found that the properties in contention were the Kitui properties, Lamu properties and funds in the Lamu bank account amounting to Kshs. 7,000,000/=. In its judgment dated 5.11.21, the Court of Appeal upheld this Court's decision with regard to the Lamu properties and the funds in the Lamu bank account. The order for joint valuation of the Kitui and Lamu properties and all orders consequential thereto was set aside. The matter was remitted to this Court differently constituted for determination of Tamala's contribution and consequently the free estate of the deceased in respect of the Kitui properties, which this Court had failed to do. Each party was to bear own costs.
 7. It is the court of Appeal's order relating to the Kitui properties that is the subject of this ruling.
 8. Directions were given for the filing of submissions on the issue in contention. However, only the 1st family complied. In spite of numerous opportunities being given to the 2nd family, no submissions were filed.
 9. The first family submitted that in line with the principle adopted by this Court regarding the Lamu properties, the Kitui properties ought to be divided equally between the deceased and Tamala before distribution. As such, 2 properties should go to Tamala as her contribution and 2 be distributed as part of the deceased's estate. Further that since there was no evidence of the contribution by the deceased and Tamala in the acquisition of the properties, the same should be divided on 50:50 basis.
 10. The undisputed facts are that Tamala was the 1st wife of the deceased and that the Kitui properties were acquired during the subsistence of their marriage and before the deceased married Mariam.
 11. In its decision, the court of Appeal stated that this Court ought to have determined Tamala's entitlement to the Kitui properties as the first wife of the deceased, before invoking the provisions of Section 40 of the LSA which provides:
 1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first



instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

2. ...
12. In determining Tamala's entitlement, the Court will be guided by Section 8(1) of the Matrimonial Property Act which makes provision for property rights in polygamous marriages as follows:
- (1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the—
- (a) matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife;
13. The law provides that where a polygamous marriage is dissolved by divorce or by any other means the property acquired by the man and first wife shall be retained equally by the man and first wife only.
14. As indicated, no evidence was led as to the contribution of the deceased or Tamala in the acquisition of the Kitui properties.
15. In cases where contribution of parties cannot be ascertained from the evidence, as in the present case, our courts have divided matrimonial property equally. In the case of Peter Mburu Echaria V Priscilla Njeri Echaria [2007] eKLR the Court of Appeal stated:

However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim "Equality is equity" while heeding the caution by Lord Pearson in *Gissing vs. Gissing* (supra) at page 788 paragraph c that:

"No doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing".

16. Duly guided, and given the circumstances herein, this is a proper case where it is equitable to apply the maxim "equality is equity." I accordingly find that Tamala is entitled to 50% of the Kitui properties. The other 50% is available for distribution as part of the estate of the deceased.
17. Having so found, I direct that each of the Administrators shall by 28.1.26 file an affidavit setting out the proposed distribution of the estate of the deceased in line with the finding herein and the judgment of this Court of 26.7.18 as upheld by the Court of Appeal in its decision of 5.11.21.
18. This matter shall be mentioned on 2.2.26 for compliance.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 28TH DAY OF NOVEMBER 2025

** _____ **

M. THANDE
JUDGE

