



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. E002 OF 2022

IN THE MATTER OF THE ESTATE OF KARIUKI KIARAGO (DECEASED)

1. SIMON GICHOHI KARIUKI
2. ANTONY MURIMI KARIUKI
3. JOHN GACHOKI KARIUKI
4. WILLIAM MURIITHI.....APPELLANTS

VERSUS

MARY **MUTHONI**
NAFTALY.....RESPONDENT

**(An appeal from the Judgment of Hon. L.W Kabaria (P.M) in Gichugu Succession Cause
No. 317 of 2016 delivered on 10/12/2021)**

JUDGMENT

- [1] The 1st and 2nd Appellants and the Respondent herein petitioned for grant of letters of Administration intestate, in their capacities sons and a wife of the deceased, respectively which was issued on 2/10/2017.
- [2] On 15/3/2021, the Respondent filed amended summons for confirmation of grant where, at paragraph 5 of the affidavit in support thereof, she proposed how **L.R Nos. NGARIAMA/KABARE/737, 738, 739 and 740 (hereinafter referred to as the estate properties)** ought to be distributed.
- [3] The Respondent swore a further affidavit on 10/8/2018 in support of her proposed mode of distribution.
- [4] The 1st Appellant swore an affidavit of protest on 20/6/2018 urging that the deceased herein had during his lifetime subdivided the estate property into 5 portions, sold L.R No. Ngariama/Kabare/741 to Sarah Njoki and distributed the rest, as proposed at paragraph 6

thereof. Although the deceased died before he could effect transfer to each beneficiary, they have settled on their respective portions and embarked on serious developments thereon.

- [5] The 1st Appellant swore a further affidavit on 6/9/2018 in support of his proposed mode of distribution.
- [6] The Respondent filed her witness statement on 18/6/2021 in support of her summons for confirmation of grant.
- [7] In its impugned Ruling, the trial court, in distributing the estate properties as proposed by the Respondent rendered thus;

“The mode of distribution proposed by the petitioner I note takes into account the beneficiaries already on the respective parcels of land Mary Njeri on 737, Simon Gichobi remains on 738 the applicant remains on 739 while Anthony Murimi and John Gachoki remain on 740, each beneficiary in the end inherits land equal to 0.1535 ha which is in conformity with Section 38 of the Act. The protestors on the other hand tell the court the deceased distributed his estate but at the same time two of the four protestors are co-petitioners herein! The three (petitioner and 1st and 2nd protestor) sought for and were granted letters of administration intestate! Regarding the meeting said to have been held on the 25th May 2018 two things emerge, the first is that this was long after the death of Mr. Kariuki and was only attended by part of the beneficiaries indeed if the deceased has distributed his estate. Why was the meeting necessary? More importantly the mode of distribution proposed by the protestors leaves out twelve of the beneficiaries of the estate for no reason told to this court. Examining the protest, I find the same running afoul the provisions of law of Succession Act the protest is dismissed.”

The Appeal

- [8] On appeal, the Appellants filed their memorandum of appeal dated 4/1/2022 raising 2 grounds as follows:
1. *The Learned Principal Magistrate erred and misdirected herself in her analysis and conclusions on evidence adduced before her and thereby made a judgement*

that was against the weight of the evidence as delivered by the appellants and as against the respondents.

2. *The Learned Principal magistrate erred and misdirected herself in law in making a judgement that was contrary to; against and disrespectful to the express and implemented wishes of the deceased in the distribution of the deceased's estate in the divisions and distribution of the deceased's estate.*

Duty of the court

- [9] 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

- [10] **Protestor's Witness 1 Simon Gichohi Kariuki**, the 1st Appellant herein, testified that, *"Kariuki Kiarago is my father; he passed on in the year 1987. Yes, we were given Letters of Administration three of us. Our father had three wives, the first wife died so we were left myself my brother and two sisters. We were given Letters of Administration three of us representing each house. We have agreed how to distribute. We agreed that each of us the way we were given land the three of us. We were given land and we started to farm and we were given title deeds all of them in our father's name before he could transfer to us he passed on. Yes. I swore an affidavit of the way we want to distribute (referred to an affidavit of protest filed on the 18th May 2021 I want the court to look at all the affidavits I have filed. We were given land and we have been tilling it without a problem. There is a valuer who came to the land to see how we live; yes, we brought the documents in court. We want the court to order that we stay the way we are living now we have lived like that since before our father's death. Mary Muthoni has her own portion that she was shown by our father. I saw Mary's affidavit, she wants to distribute differently from what our father wanted and the land is not hers it was our fathers I am completely opposed. Antony, John and William also oppose (the bundle filed on the 18th May 2021 produced as P. Exh. 1, valuation report P. Exh. 2)."*

[11] On cross examination, he stated that, *“The land was subdivided by our father in 1987. I have written in my documents the way he had subdivided. No one was given a transfer he said we bring money so that he can change the names but he died before he could do it otherwise everyone would be having their own title deed. Everyone is living on the portion they were shown. Our father left behind many children, four children of the first wife, two sons and two daughters, six children of the second wife all of them daughters the third wife three sons and two daughters one son died. The land was big. The children are more than sixteen. Mary Muthoni was given land with her children. My sisters were adults and married when our father was subdividing the land they said since the land is small we be given the three of us and it was divided like that. We did not have a meeting in 2018. The meeting was of how many people (Shown minutes in his bundle) in this meeting we called the girls they refused to come. We reached an agreement but they refused.”*

[12] In re-examination, he stated that, *“Our father divided his land per the children and houses. The first wife he gave to two children he did not give daughters; the second house was given to one son. The daughters were told to stay like that since they were married. He distributed as per the houses. By the time he died there was no land left unoccupied. (Referred to P. Exh. 2 valuation report) Yes the photographs have the number of the parcels and they show what one has on the land and what they farm. This is Ngariama/Kabare/737 its Mary Njeri, 738 is mine, 739 is the petitioners, 740 is the one he remained for himself, it is now Antony’s and John Gachoki. When our father dies he left each of us on the land. I cannot distribute the land otherwise than our father already did.”*

[13] **Petitioner’s Witness 1 Mary Muthoni Naftaly**, the Respondent herein, testified that, *“I live on my husband’s land in Kabare. Kariuki Kiarago is my husband. He left behind fifteen children. The children are fourteen and myself the fifteenth. I don’t remember which year he passed on. When he died he had not distributed the land, he had shown everyone where to farm but he did not distribute it. Yes, there are affidavits I filed in court (referred to her witness statement dated 14th June 2021) Yes I want the court to consider It as my evidence. I am asking the court that the land of my husband be distributed amongst all his children, yes the fourteen children.”*

[14] On cross examination, she stated that, “My husband only took an acre and sold the rest he left behind. (Referred to her statement at page 2) the suggested mode of distribution is as per wishes of the deceased....’ My husband did not show anyone where to only where to farm. I live on the land. The protestors live on the land four of them, they have constructed on the land (referred to the valuation report - photographs) this house is on the land it is mine, this house is for one of the sons of Gachoki this one is Simon’s, this one is Antony Murimi’s and the other is Antony Gachoki’s. I only have one house on the land, this one belongs to grandchild, it is my husband who showed the child where to construct. If the only distribute the land the four of them the other ten children when will they go? There is no land my husband distributed. Yes, I was there when my husband showed them where to farm. Yes, I saw him show them where to construct. I could not show my husband how to divide the land because the land was his and the children are his. He showed me where to live and that is where I live.”

[15] In re-examination, she stated that, “It is four children who live on the land presently, I am the fifth. Ten children of the deceased have not been given land. It is only one acre that he sold.”

Submissions

[16] The Appellants complains that the trial court disregarded the wishes of the deceased, and urge the court to allow the appeal.

[17] The Respondent urges the court to dismiss the appeal with costs as there was no proof that the deceased had distributed the estate during his lifetime, and cites **Grace Chebet Sisimwe and 4 Others v Everlyne Cherukut Sisimwe & Another (2019) eKLR Lucia Karimi Mwamba v Chomba Mwamba [2020] KEHC 8308 (KLR) and Gitau & Another v Dame (Civil Appeal E483 of 2021) [2024] KEHC 7084 (KLR).**

Analysis and Determination

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

[19] Whereas the Appellants contend that the deceased had distributed the estate properties during his lifetime, the Respondent prays for the distribution thereof to be done in accordance with the law.

[20] The 1st Appellant herein, testified that, ***“Our father had three wives, the first wife died so we were left myself my brother and two sisters. We have agreed how to distribute. We agreed that each of us the way we were given land the three of us. We were given land and we started to farm and we were given title deeds all of them in our father’s name before he could transfer to us he passed on. We want the court to order that we stay the way we are living now we have lived like that since before our father’s death. Mary Muthoni has her own portion that she was shown by our father.”***

[21] He reiterated on cross examination, that, ***“Everyone is living on the portion they were shown. Mary Muthoni was given land with her children. My sisters were adults and married when our father was subdividing the land they said since the land is small we be given the three of us and it was divided like that.”*** In re-examination, he stated that, ***“Our father divided his land per the children and houses. The first wife he gave to two children he did not give daughters; the second house was given to one son. He distributed as per the houses. By the time he died there was no land left unoccupied. Yes the photographs have the number of the parcels and they show what one has on the land and what they farm. This is Ngariama/Kabare/737 its Mary Njeri, 738 is mine, 739 is the petitioners, 740 is the one he remained for himself, it is now Antony’s and John Gachoki. When our father dies he left each of us on the land.”***

[22] The Respondent herein corroborated the 1st Appellant’s testimony when she restated on cross examination, saying:

“I live on the land. The protestors live on the land four of them, they have constructed on the land. This house is on the land it is mine, this house is for one of the sons of Gachoki this one is Simon’s, this one is Antony Murimi’s and the other is Antony Gachoki’s. I only have one house on the land, this one belongs to grandchild, it is my husband who showed the child where to construct. Yes, I was there when my husband showed them where to farm. Yes, I saw him show them where to construct. He showed me where to live and that is where I live.”

[23] 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.”

[24] The Court finds that the Respondent’s admission that the deceased had settled the beneficiaries on their respective shares is corroborative of the 1st Appellant’s testimony that the deceased had distributed the estate properties to his beneficiaries during his lifetime.

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

[26] Similarly in ***Joseph Wairuga Migwi v Mikielina Ngina Munga [2016] KEHC 6110 (KLR)***, the court (*John M. Mativo J, as he then was*) said:

“With respect, I think Section 40 (1) cited above cannot apply where the deceased expressed his wishes and intention in a very clear manner as in this case and took steps to ensure his preferred wishes are effected. The deceased in this case not only expressed his wishes but took crucial steps which left no

doubts as to what his intentions were and long before he died he not only divided his land as stated above, but he also settled each wife in their respective portions. As observed above, such clear wishes are to be protected, respected and preserved as provided for under section 42 cited above. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honoured and effected.”

[27] In Paul Kiruhi Nyingi & Another v Francis Wanjohi Nyingi [2009] KEHC 2555 (KLR), the court, (M. S. A. Makhandia, J, as he then was) said that;

“I would agree with Mr. Karweru’s submissions that the deceased was a man of wisdom who foresaw the current mess that the beneficiaries are now mired in. In a bid to obviate such eventuality he decided well in advance and in his lifetime to settle all the beneficiaries including their mothers in different parcels of land he owned and which were scattered all over. The evidence is clear that none of the houses share such parcels of land with each other. The intentions of the deceased were captured by DW3 in the black book. DW3 himself testified as to how over a period of time, the deceased used to visit and ask him to reduce in writing his wishes as to how his estate upon his death should devolve. This evidence was never seriously challenged by the Protester. Though cross-examined by the Protester, the witness did not exhibit anything that will lead me to conclude that he was not the author of the black book or was not a witness of truth. The witness stated that the deceased signed and stamped against the contents of the black book that he had recorded in his presence. There was a feeble attempt by the Protester to challenge the black book on the basis that the handwriting, name and stamp were not the deceased’s. Of course the black book fails short of a will for want of proper execution. To my mind however the black book remains an uncontroverted expression of the deceased wishes. I do not think that the black book was tendered in evidence as a will. Nay, it was to show that the deceased had intentions on the way his estate should be distributed. Unless it can be demonstrated that those wishes of the deceased as captured in the black book were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view. Nothing has been brought to my attention that remotely suggests that the

deceased was biased, unfair and or discriminatory against any of the beneficiaries in the manner he wanted his estate shared out on his demise. In any event, it would appear that some of the beneficiaries were aware of the contents of the black book during the deceased's lifetime. If they were disenchanted with the distribution they should have taken it up with him. Arising from all the foregoing I would answer issue 1 in the affirmative."

[28] The Court is, therefore, satisfied that the trial court's decision was erroneous and against the weight of the evidence on record, and there is, consequently, a basis for this court's interference.

ORDERS

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

1. **The trial court's Ruling dated 10/12/2021 is hereby set aside.**
2. **The 1st Appellant's protest dated 20/6/2018 is hereby allowed.**
3. **The estate properties will thus be distributed as proposed at paragraph 6 of the 1st Appellant's affidavit of protest.**

[30] There shall be no orders as to costs.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF NOVEMBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Ms. Chepkorir for Mr. Morris Njagi for the Appellant.

Ms. Otieno for Mrs Makworo for the Respondent.