

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
FAMILY APPEAL NO. E 028 OF 2023

FORMERLY KIAMBU FAMILY APPEAL NO. E057 OF 2022

IN THE MATTER OF THE ESTATE OF JOHN NDUNGU KAING'WA
(DECEASED)

PATRICK OLIVER KAING'WA **APPELLANT**
VERSUS
STEPHEN NJARAMBA KAING'WA **RESPONDENT**

(Being an Appeal from the Ruling of Hon M. W. Wanjala, Senior Resident Magistrate delivered on 22 March 2022 in Thika Succession Cause No. 399 of 2015)

JUDGEMENT

1. This appeal invites this Court to traverse the delicate and often contentious intersection between the statutory regime of the Law of Succession Act, the equitable doctrines of customary and constructive trusts, and the historical adjudications of the now-defunct Land Disputes Tribunals. The Appellant seeks to overturn a decision by the trial Court which, in his view, erroneously disinherited the estate of his late father, John Ndung'u Kaing'wa (the Deceased), from the estate of the family matriarch, Wanjiku Kaigwa (the Deceased's mother). The Respondent is the brother of the Deceased and the uncle of the Appellant.

2. The gravamen of this dispute lies in the distribution of Land Parcel No. Loc. 1/Mukarara/586 (hereinafter "the suit property"). The trial court, in its Ruling dated 22 March 2022, distributed the property in a manner that effectively excluded the Deceased's branch of the family from inheriting the portion of the land attributed to the matriarch, seemingly on the premise that the Deceased had already acquired a separate portion of the land during his lifetime. This reasoning raises fundamental questions regarding the interpretation of Section 42 of the Law of Succession Act, the indefeasibility of title under the land registration regime versus beneficial interests, and the mandatory provisions of Section 38 and Section 41 regarding the rights of surviving children and the doctrine of representation.
3. As a first appellate court, the jurisdiction of this Court is not merely supervisory but involves a rehearing of the dispute on both law and fact. It is the duty of this Court to re-evaluate the evidence on record, construe the applicable statutes, and arrive at its own independent conclusion, as established in the *locus classicus* case of ***Selle & Another vs. Associated Motor Boat Company Ltd EA 123***. The primary objective is to ascertain whether the trial magistrate misdirected herself on the law or the evidence to such an extent that the resultant decision occasioned a miscarriage of justice.
4. In adjudicating this matter, this Court is cognizant of the overriding objective of the Law of Succession Act, which is to ensure the orderly and equitable transmission of property rights from the dead to the living, protecting dependants and preventing the unjust enrichment of one beneficiary at the expense of others. The tension here is between a surviving brother (Respondent) who claims the mother's share entirely for himself, and the children of a deceased brother (Appellant) who claim their father's entitlement to that same share.

Brief Background

5. The dispute revolves around the estate of John Ndung'u Kaing'wa, who died intestate on 13 November 2013. The Deceased was a son of Wanjiku Kaigwa (the Matriarch). The Respondent is the Deceased's brother and surviving son of the Matriarch. The Appellant, Patrick Oliver Kaing'wa, is the son of the Deceased.
6. The Deceased was survived by the following children, who are the primary beneficiaries of his estate:
 - (i) Patrick Oliver Kaing'wa - Appellant/Son
 - (ii) Dorcas Ng'endo Ndung'u - Daughter
 - (iii) Elias Maina Ndung'u - Son
 - (iv) Andrew Njuguna Ndung'u - Son
 - (v) Martha Njeri Ndung'u - Daughter
7. The suit property is registered in the name of the Deceased, John Ndung'u Kaing'wa. However, the history of its acquisition and consolidation is critical. The record indicates that during the lifetime of Wanjiku Kaigwa, a dispute arose regarding this land, which was adjudicated by the Kandara Division Land Disputes Tribunal.
8. The Land Disputes Tribunal, in its award, made specific findings of fact regarding the composition of the suit property. These findings are uncontested by the parties in this appeal and form the bedrock of their respective arguments. The Tribunal established that the total acreage of 6.6 acres was a consolidation of two distinct interests:
 - (a) Wanjiku Kaigwa's Portion: A share measuring 4.1 acres which belonged to the mother.
 - (b) John Ndung'u Kaing'wa's Portion: A share measuring 2.5 acres which the Deceased had bought independently.

9. Crucially, the Land Disputes Tribunal proceedings record the Respondent stating that he *"does not mind waiting to get his share from his mother"*. This statement is an evidentiary gem; it functions as an admission against interest, acknowledging that his entitlement lay in the mother's 4.1 acres, and arguably recognizing the distinct nature of the Deceased's 2.5 acres.
10. In the succession cause for the estate of John Ndung'u Kaing'wa (Thika C.M. Succession Cause No. 399 of 2015), the Appellant sought to have the land distributed such that the Deceased's estate retained the 2.5 acres (self-acquired) plus half of the mother's 4.1 acres (2.05 acres), totalling 4.55 acres. The Respondent claimed the entire 4.1 acres of the mother.
11. The trial court, in the Ruling delivered on 22 March 2022, sided with the Respondent. The court ordered that the entire 4.1 acres be given to the Respondent, leaving only the 2.5 acres for the Deceased's children. The learned Magistrate's reasoning appears to have been grounded in a desire to balance the land holding, presumably operating under the belief that since the Deceased held the title and had 2.5 acres of his own, justice required giving the bulk of the remaining land to the brother who had nothing registered in his name.
12. Aggrieved by its Ruling, the Appellant lodged this appeal raising the following grounds:
 - (i) The learned Magistrate erred in law and in fact by his failure to make a determination that the Respondent and that the Deceased were blood brothers and had equal rights under section 38 of the Law of Succession Act, their deceased mother Wanjiku Kaigwa share of 4.1 acres out of land Parcel No. Loc.1/Mukarara/586;
 - (ii) The learned Magistrate erred in law and fact in misinterpretation of the decision in Kandara Land Disputes D.O case No. 25 of 1984 and the

award made thereto giving Wanjiku Kaigwa 4.1 acres out of the land parcel No. Loc.1/Mukarara/586 which ought to have been shared equally between the Respondent and the Appellant's father the deceased in Thika CM Succession Cause No. 399 of 2015 with each getting 2.05 acres;

- (iii) The learned trial Magistrate erred in law and fact by giving the Respondent the whole of remainder of 4.1 acres belonging to his deceased mother instead of making an order for the said 4.1 acres being shared equally between him and his deceased brother John Ndungu Kaigwa alias Ndungu Kaing'wa thus wholly disinheriting the latter's estate his rightful inheritance from his mother;
 - (iv) The learned trial Magistrate erred in law in totally disinheriting the Appellant Affidavit of Protest without any cogent lawful reason thus disinheriting the family of the deceased comprising of the Appellant and his four siblings their father's entitlement of 2.05 acres out of land parcel Loc.1/Mukarara/586;
13. The first jurisprudential hurdle is determining the weight the Probate Court should attach to the findings of the Land Disputes Tribunal. The Respondent argues that the Tribunal award is final and binding. The Appellant relies on the Tribunal award to define the source of the land but challenges the learned Magistrate's distribution based on it.
14. The Land Disputes Tribunals Act (No. 18 of 1990) was enacted to provide a forum for resolving disputes regarding boundaries, trespass, and beneficial ownership of land using customary law principles. Although the Act was repealed by the Environment and Land Court Act, 2011 and the Land Act 2012, the jurisprudence regarding the validity of their awards remains relevant for awards issued during their tenure.

15. Courts have consistently held that while Land Disputes Tribunals had jurisdiction to determine issues of possession, occupation, and boundaries, they often acted *ultra vires* when purporting to determine title or distribute estates of deceased persons. In ***REPUBLIC v CHAIRMAN NANDI HILLS DIVISION LAND DISPUTES TRIBUNAL & 3 others EX-PARTE ERNEST K. A. KIRIONGI [2006] KEHC 2478 (KLR)***, the Court quashed a decision where the Tribunal purported to revoke a title deed, a power reserved for the High Court. Hon. M. K. Ibrahim, J (as he then was) stated thus:

“The effect of the decision is that the Tribunal would have adjudicated on a dispute touching on registered land and ownership thereof. This it cannot do. The Law on this issue is clear, that the Land Disputed Tribunals have no jurisdiction to decide on matters of title and ownership to land. The claim of the interested parties herein is based on a claim of trust. This can only be litigated in the civil courts with appropriate jurisdiction.”

16. Further, questions of estate distribution are the exclusive preserve of the Succession Court under the Law of Succession Act.
17. However, there is a nuance. While a Land Disputes Tribunal could not validly distribute an estate, its findings regarding the provenance of land—i.e., identifying that a registered proprietor holds land in trust for a family—are admissible and highly persuasive evidentiary facts in a subsequent succession cause.
18. In the present appeal, the Land Disputes Tribunal’s finding that 2.5 acres were bought by the Deceased and 4.1 acres belonged to the mother is a finding of fact regarding the acquisition of the asset. It is not a distribution order. The Probate Court was, therefore, correct to accept these facts but

erred in assuming that the Land Disputes Tribunal award mandated the disinheritance of the Deceased from the mother's portion. The Tribunal did not decree that the Deceased shall take 2.5 acres in full satisfaction of his inheritance. It merely stated that Deceased owned 2.5 acres by purchase and the Matriarch owned 4.1 acres. The distribution of the Matriarch's 4.1 acres is a matter of pure succession law, not the Tribunal award.

Customary and Constructive Trusts

19. The central legal issue in this case is the registration of the entire 6.6 acres in the name of the Deceased. On the face of the title, John Ndung'u Kaing'wa was the absolute owner of the whole. However, the Respondent claims the 4.1 acres. For the Respondent to succeed in claiming land registered in another's name, he must invoke the equitable doctrine of trusts.
20. Kenyan land law has long struggled with the tension between the sanctity of the Torrens system of registration, which confers indefeasibility of title, and the reality of customary land tenure where a representative holds land for the family. This tension was largely resolved by the landmark Court of Appeal decision in *Mbui v Mbui eKLR* (Civil Appeal No. 268 of 2001). In that case, the Court held that registration of land under the Registered Land Act (now repealed but applicable to titles issued under it) does not extinguish customary rights of occupation and use, which are treated as trusts.
21. The Supreme Court of Kenya cemented this position in *Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari & Another [2018] KESC 22 (KLR)* affirming that customary trusts are overriding interests under Section 28 of the Land Registration Act. A registered proprietor who obtains title to family land holds it subject to the beneficial interests of those family members entitled to it under customary law.
22. The Deceased was the registered owner of the suit property. However, the uncontroverted evidence establishes that 4.1 acres of this land were the

property of his mother, Wanjiku. Therefore, a customary trust arose by operation of law. The Deceased held the 4.1 acres in trust for Wanjiku Kaigwa. Upon Wanjiku's death, that beneficial interest (the 4.1 acres) became her estate, to be distributed to her heirs. The Deceased retained the beneficial interest only in the 2.5 acres that he purchased.

23. A critical error that was made by trial court was commingling trust property with the free estate of the deceased administrator. As articulated by **Musyoka, J.** in ***In re Estate of Alice Mumbua Mutua (Deceased) [2017] KEHC 8289 (KLR)***, property held by a deceased person as a trustee does not form part of their free estate available for distribution to their own beneficiaries, except to the extent of the deceased's own beneficial share in that trust property.
24. This distinction is vital. The 4.1 acres was not the Deceased's free property to be distributed solely to his children unless he inherited it. It was Wanjiku's estate. The Probate Court in the Deceased's cause was effectively distributing two estates: John's personal estate (2.5 acres) and the unadministered estate of Wanjiku (4.1 acres) which was "trapped" in John's title. The court had to first apply the rules of intestacy to Wanjiku's estate to determine who gets the 4.1 acres, and then apply the rules of intestacy to John's estate.
25. The Respondent's case rests on the equitable notion that the Deceased already had 2.5 acres and thus should not take from the Matriarch's portion. This argument invokes Section 42 of the Law of Succession Act, which codifies the doctrine of hotchpot.
26. Section 42 states:
- Where— (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house... that property shall be taken into account*

in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

27. The operative words are paid, given or settled. This section targets gifts—*inter vivos* transfers made by a parent to a child to set them up in life. It ensures that a child who received their inheritance in advance while the parent was alive does not double-dip at the expense of siblings who received nothing.
28. A fundamental principle of succession law, recognized across common law jurisdictions and specifically in Kenya, is that self-acquired property is distinct from ancestral or family property. A child's own industry cannot be penalized. If a son works hard, buys land, and registers it, that land is his private property. It is not a gift from the parent, even if it is adjacent to the parent's land or consolidated with it for convenience.
29. The Tribunal specifically found that the Deceased bought the 2.5 acres. A purchase is a transaction for value. It is the antithesis of a gift. Therefore, the 2.5 acres cannot be brought into hotchpot under Section 42. It is not an advancement from the Matriarch's estate. It is the Deceased's separate property.
30. To hold otherwise, as the trial court essentially did, is to rule that a child who buys property forfeits their right to inherit from their parents. This is logically unsound and legally unsupportable. It amounts to the expropriation of the Appellant's father's private property to subsidize the Respondent's inheritance.
31. Having established that the 4.1 acres represents the estate of Wanjiku Kaigwa, the Court must apply the Law of Succession Act to distribute this specific portion. Wanjiku died intestate. She was survived by two lines of descendants:

Stephen Njaramba Kaing'wa (Son/Respondent) and John Ndung'u Kaing'wa (Son/Deceased).

32. Section 38 of the Act mandates that where an intestate leaves children but no spouse, the estate shall be equally divided among the surviving children.
33. In a scenario involving two sons, the starting point is a 50:50 split. There is no provision in the Act that allows a court to deviate from equality based on the relative wealth of the siblings. The fact that the Deceased had his own 2.5 acres is irrelevant to his entitlement to share in his mother's 4.1 acres.
34. The Respondent might argue that since the Deceased is dead, he cannot inherit. This is cured by Section 41 of the Act, which provides for substitution or representation.

"Where reference is made in this Act to the "net intestate estate"... devolving upon a child or children... the property comprised therein shall be held in trust... for all or any of the issue of any child of the intestate who predeceases him... in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate."

35. This section implies that the children of a deceased child step into the shoes of their parent. Therefore, the Appellant and his siblings are legally entitled to the Deceased's 50% share of Wanjiku's estate. Their father's death does not extinguish this right; it merely devolves it to them.
36. The trial court's distribution awarded the entire 4.1 acres to the Respondent. This implies that the Deceased's line received 0% of the mother's estate. This is a violation of Section 38 and Section 41 of the Act.

37. The correct distribution of the 4.1 acres should be:

Stephen Njaramba (Respondent): 50% of 4.1 acres = 2.05 acres.

Estate of John Ndung'u (Deceased): 50% of 4.1 acres = 2.05 acres.

38. When we add the Deceased's self-acquired property, which is 2.5 acres, to his inherited share (2.05 acres), the total land available for the Deceased's children is 4.55 acres. The Respondent is entitled to his inherited share of 2.05 acres.

39. The rights to property and equality are enshrined in Articles 40 and 27 of the Constitution. Article 40 protects the right to acquire and own property. The Deceased acquired the 2.5 acres lawfully. To effectively confiscate this property by counting it as his inheritance violates the constitutional protection of his private property.

40. Article 27 prohibits discrimination. The lower court's ruling effectively discriminated against the children of the Deceased brother in favour of the living uncle. In

In Re The Estate of Lerionka Ole Ntutu (Deceased) [2008] KEHC 3913 (KLR), the Court emphasized that customary practices cannot override written law or constitutional principles of equality. The balancing act attempted by the learned Magistrate, while perhaps rooted in a traditional notion of equity, violates the statutory command of the Law of Succession Act which dictates precise rules of intestacy.

41. The courts must be vigilant against disinheritance by stealth, where valid property rights are eroded by conflating distinct estates. The Respondent's claim to the whole 4.1 acres is an attempt to unjustly enrich himself. He admitted at the Tribunal that he was waiting for his share. In law and logic, a share is a part, not the whole. By claiming the whole, he seeks to disinherit his nephews and nieces from their grandmother's legacy.

Disposition

42. The appeal is meritorious. The trial court erred in law by failing to distinguish between the self-acquired property of the Deceased and the ancestral property held in trust, thereby occasioning a miscarriage of justice to the Appellant and the beneficiaries of the Deceased's estate.
43. Accordingly, I make the following orders:
- (i) The Ruling and Orders of the Subordinate Court in Thika C.M. Succession Cause No. 399 of 2015 delivered on 22 March 2022 are hereby set aside and vacated in so far as they relate to the mode of distribution of Loc. 1/Mukarara/586.
 - (ii) It is hereby declared that land parcel Loc. 1/Mukarara/586, measuring approximately 6.6 acres, comprises two beneficial estates:
 - a) 2.5 acres being the self-acquired property of the Deceased, John Ndung'u Kaing'wa.
 - b) 4.1 acres being the estate of the Deceased's mother, Wanjiku Kaigwa, held in trust by the Deceased.
 - (iii) The land parcel Loc. 1/Mukarara/586 shall be distributed as follows:
 - a) To the Respondent: A portion measuring 2.05 acres (being his 50% share of the mother's 4.1 acres).
 - b) To the Estate of John Ndung'u Kaing'wa (Deceased): A portion measuring 4.55 acres (being the sum of his self-acquired 2.5 acres and his 50% share of the mother's 4.1 acres).
 - (iv) The 4.55 acres devolving to the Estate of John Ndung'u Kaing'wa shall be shared equally among his surviving children as listed in the Grant of Letters of Administration, namely:

- i. Patrick Oliver Kaing'wa
- ii. Dorcas Ng'endo Ndung'u
- iii. Elias Maina Ndung'u
- iv. Andrew Njuguna Ndung'u
- v. Martha Njeri Ndung'u.

- (v) The parties are directed to co-operate in the execution of all necessary documents to effect this transmission. In default, the Deputy Registrar of this Court is authorized to execute the said documents on behalf of any defaulting party pursuant to Rule 44 of the Probate and Administration Rules.
- (vi) In the interest of family harmony, each party shall bear their own costs of this appeal.

Dated and Delivered at THIKA this 16 day of JANUARY 2026.

**HELENE R. NAMISI
JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For the Appellant: N/A
For the Respondent: N/A
Court Assistant: Lucy Mwangi