

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT THIKA**

**FAMILY APPEAL NO. E033 OF 2024**

**IN THE MATTER OF THE ESTATE OF FREDRICK KIBOCHI**

**THUO (DECEASED)**

**RAPHAEL WAWERU  
KIBOCHI.....APPELLANT**

**VERSUS**

**FRANCIS THUO KIBOCHI.....1<sup>ST</sup>  
RESPONDENT**  
**JOE KINUTHIA KIBOCHI.....2<sup>ND</sup>  
RESPONDENT**  
**DAVID KARANJA KIBOCHI.....3<sup>RD</sup>  
RESPONDENT**  
**ESTHER WAITHIRA KIBOCHI.....4<sup>TH</sup>  
RESPONDENT**

**(Being an Appeal from the Judgement and Decree of Hon.  
R. N. Ng'ang'a(SRM) delivered on 7<sup>th</sup> November 2024 in  
Gatundu CM Succession Cause No. E0575 of 2021)**

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Gatundu Chief Magistrate in CM Succession Cause No. E0575 of 2021 whereas the court distributed the deceased's estate in its judgment delivered on 7<sup>th</sup> November 2024.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds of appeal summarized as follows:-

a) The learned trial magistrate erred in fact and law by delving into issues of distribution of assets yet it had not been called upon to make a determination at that point.

b) The learned trial magistrate erred in fact and in law in failing to consider the interests of the appellant during the hearing of the application for revocation therefore condemning them unheard.

c) The learned trial magistrate erred in law and in fact in misapplying the provisions of Section 29 which require one must prove dependency that he or she was being maintained by the deceased immediately prior to his demise.

d) The learned trial magistrate erred in law and in fact in ignoring the wishes of the deceased.

e) The magistrate court has no pecuniary jurisdiction to hear and determine the matter.

3. Parties put in written submissions.

### **Appellant's Submissions**

4. The appellant submits that the 4<sup>th</sup> respondent failed to establish dependency under **Section 29 of the Law of**

**Succession Act** by failing to show that her children were being maintained by the deceased immediately prior to his death. Further, the letter of the chief dated 18<sup>th</sup> October 2021 listed the beneficiaries of the deceased and notably, the children of the 4<sup>th</sup> respondent are missing. Prior to

her marriage to the deceased, the 4<sup>th</sup> respondent had three other children from a previous marriage all of whom save for the youngest were adults at the time. The respondent and deceased were married but the 4<sup>th</sup> respondent never moved to stay with the deceased's family. As such, they were not dependants of the deceased and could not benefit from his estate. The respondents were not dependent on the deceased prior to his death. Furthermore, the 4<sup>th</sup> respondent failed to make any reference to any of her children getting any share of the estate.

5. The appellant argues that there was no evidence adduced of any long term sustained support from the deceased nor any indication that the children of the 4<sup>th</sup> respondent were treated as children or dependants in a consistent manner. Relying on **Section 3(2) and 20 of the Law of Succession Act** and the cases of **Mbuthia Macharia vs Annah Mutua & Another [2017] eKLR**; **E.M.M vs I.G.M & Another [2014] eKLR** and **Beatrice Ciamutua Rugamba vs Fredrick Nkari Mutegi & 5 Others [2016] eKLR**, the appellant argues that the 4<sup>th</sup> respondent had to show a reasonable degree of permanency in the responsibility that the deceased is alleged to have

voluntarily assumed over as episodic support will not suffice.

6. The appellant further argues that the averment by the 4<sup>th</sup> respondent that the deceased had taken up and adopted them as his children does not hold any water and needed to be proved through an adoption order. That notwithstanding, the 4<sup>th</sup> respondent's children were adults and an adoption can only apply in case of children between the age of six weeks old and under 18 years. To

support his contentions, the appellant relies on **Section 107 and 108 of the Evidence Act** and the case of **Re M.B. (Child) Adoption Cause 48 of 2018 (2018) KEHC 933 KLR (26 July 2018)**.

7. The appellant refers to the cases of **Rono vs Rono [2005] eKLR 538**; **Rael Vulekami Musi vs Rachael Edagaye Akola [2016] eKLR** and **In the Estate of the late George Cheriru Chepkosiom [2017] eKLR** and submits that the deceased married the 4<sup>th</sup> respondent upon demise of their mother and as such, all the properties forming the estate of the deceased had been acquired before the 4<sup>th</sup> respondent came to the home of the deceased. The respondent did not make any contribution in the acquisition of the assets. The appellant submits that the property available for distribution was LR. No.s Ndarugu/Gacharage/167 and Ngenda/Githunguchu 980 and the court ought to have shared out the said parcels equally to the named beneficiaries as proposed by the three administrators. The appellant further argues that even if

the children of the respondent were to benefit, the court should have counted them as a single unit pursuant to Section 40 of the Law of Succession Act.

8. The appellant submits that the lower court lacked jurisdiction to handle the matter as the monetary value of the estate exceeded Kshs. 7 million. Relying on the cases of **Kenya Ports Authority vs Model Holding (EA) Limited** (no citation given) and **Adero & Another vs Ulinzi Sacco society Limited [2002] 1 KLR 577**, the appellant submits that the question of jurisdiction can be raised at any point even for the first time on appeal.

### **The Respondents' Submissions**

9. The respondents rely on the cases of **Rono vs Rono & Another [2005] eKLR**; **Re Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR** and **Re Estate of Mwaura Mutungi alias Mwaura Gichichio Mbura (Deceased) [2018] eKLR** and submit that a surviving spouse does not have to demonstrate that she was maintained by the deceased, as dependency is presumed by the marital relationship. The 4<sup>th</sup> respondent provided her marriage certificate to prove her position as a wife of the deceased and her three children provided their national identity cards which were obtained during the lifetime of the deceased and bore the name of the deceased as their surnames. The validity of the identity cards was not challenged during the trial.

10. The respondents argue that the beneficiaries all confirmed that the deceased had distributed part of his estate that is 9.4 acres out of land parcel NDARUGU/GACHARAGE/167 to the first family and part of NDARUGU/GACHARAGE/166 and three other small land parcels and shares, leaving 4.1 acres of Ndarugu/Gacharage/167 and Ngenda/Githunguchu/T.980. The respondents submit that the deceased had already left Ngenda/Githunguchu/T.980 to the 4<sup>th</sup> respondent which she developed until the deceased died. The court rightfully approved that the two said properties be given to the 4<sup>th</sup> respondent which decision was arrived at after the family undergoing a mediation process and the court hearing from the witnesses.

11. Relying on the cases of **Peter Ochara Anam vs CDFD Committee Nyando Constituency [2018] eKLR**; **Re Estate of George Kinyanjui (Deceased) [2021] eKLR** and **Re Estate of Gathungu (Deceased) [2016] eKLR**, the respondents argue that jurisdiction cannot be determined on speculation or assumption and a party alleging lack of jurisdiction must place tangible material before the court to support that contention. Further, the respondents argue that a party who fully participates in proceedings without protest cannot later approbate and reprobate by challenging the same court's jurisdiction on appeal. The appellate court's role is to review the record as it stands and it cannot receive new evidence or documents

such as a valuation report at the current stage unless specifically allowed under limited circumstances.

### **Issue for determination**

12. The main issue for determination is whether the appeal has merit.

### **The Law**

13. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

**“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it**

**appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”**

14. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-  
**An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled.**

**Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.**

15. Based on the foregoing cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

### **Whether the appeal has merit**

16. The appellant raises the issue of jurisdiction of the lower court based on the value of the estate said to be valued at more than Kshs. 7 million. It is argued that the

monetary jurisdiction of the Resident Magistrate is capped at Kshs. 7 million.

17. The law on the question of jurisdiction was enunciated in the case of **Owners of the Motor Vessel "Lilian S" vs Caltex Kenya Limited [1989] KLR 1** where the court held:-

**Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.**

18. On the source of jurisdiction, it was held in the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others (2012) eKLR** that:-

**A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law.**

**It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.**

19. The jurisdiction of the magistrate's court is provided for in **Section 7 of the Magistrate's Court Act** which outlines the pecuniary jurisdiction of a senior resident magistrate at Kshs. 7 million. In the instant case, the deceased died on 29<sup>th</sup> September 2009 and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents applied for grant of letters of administration intestate on 8<sup>th</sup> December 2021 giving the value of the estate as Kshs. 1 million. The appellant and all other beneficiaries participated in the cause without raising any objection. The issue of jurisdiction has been raised on appeal with no evidence of the value of the estate. The appellant cannot claim that the value of the estate was more than Kshs. 7 million based on speculation. It is evident that the appellant did not contest the value of the properties in the lower court or produce a valuation report showing a value higher than Kshs. 7 million. If the appellant was serious on the issue of jurisdiction he ought to have applied to have additional evidence adduced on appeal. Since no additional evidence has been adduced, I find no substance in this ground of appeal.

20. It is not in dispute that the deceased distributed some of his assets to his children during his lifetime. The only bone of contention is the distribution of the properties NDARUGU/GACHARAGE/167 and NGENDA/GITHUNGUCHU/T.980. The appellant argues that the properties ought to have been shared equally between the two houses of the deceased whereas the 4<sup>th</sup> respondent argues that

the magistrate was right to bequeath her said parcels for her benefit and that of her children. The lower court carved out one acre out of the 5.1 acres of LR No. NDARUGU/GACHARAGE/167 for the grave site and the dwelling house which the parties have not disputed. The remaining 4.1 acres of the said parcel of land is what remained for distribution. The first house with seven children was bequeathed with 9.4 acres out of LR. No. NDARUGU/GACHARAGE/167 with the beneficiaries getting between 1.5 acres to 1.9 acres of land. Additionally, the first family had benefited from land parcels NDARUGU/GACHARAGE/166, NDARUGU/NJAHIT.79, NDARUGU/NJAHIT.80 and NDARUGU/ITURAMIRO/T.142 all allocated to them by the deceased during his lifetime.

21. In distributing the 4.1 acres, the appellant argues that since the children of the 4<sup>th</sup> respondent are not children of the deceased, they ought not to have been considered as beneficiaries unless they proved dependency under Section 29 of the Law of Succession Act or a lawful adoption order from the court. I have perused the record and noted that PW2, Joe Kinuthia led evidence that the 4<sup>th</sup> respondent lived on land parcel NDARUGU/GACHARAGE/167 with her four children who were adopted by the deceased and that their national identity cards bore the name of the deceased. The witness further testified that the deceased gave the suit properties to the 4<sup>th</sup> respondent through a letter. PW3, the 4<sup>th</sup> respondent testified that she lived on the suit premises

with her three children but one of them died. She further testified that the deceased left the

suit properties to her vide a letter he wrote in 2004. The witness further stated that the children were registered as the deceased's children in the birth certificates. The evidence adduced by the 4<sup>th</sup> respondent was not convincing that the deceased gave the land L.R. NDARUGU/GACHARAGE/167 to the respondent. The court below did not deal with this issue of dependency though it was raised before the court.

22. The letter in question was never brought to the attention of the children of the deceased which creates doubt that the said letter was genuine. The 2<sup>nd</sup> respondent seemed to support the 4<sup>th</sup> respondent's allegation but was short of giving validity to the said letter. It is my considered view that the said letter was inadequate to prove that it was the wish of the deceased to give the two parcels of land to the respondent. The two parcels of land L.R. NDARUGU/GACHARAGE/167 & NGENDA/GITHUNGUCU/T.980 were assets available for distribution in the estate of the deceased.

23. I have perused the judgment of the lower court which in my view did not address the issue of dependency of the respondent's children on the deceased based on the absence of any adoption orders. It is not in dispute that the children of the respondent were not biological children of the deceased. The 4<sup>th</sup> respondent was married by the deceased after the death of his first wife with three adult

children. It is said that the couple was blessed with one child during the four (4) years of the marriage. It is important to note that the particulars of this child were not disclosed to the court during the hearing of this cause before the magistrate. However,

the children of the first house do not dispute that the deceased had one child with the 4<sup>th</sup> respondent.

24. Section 29 of the Succession Act required proof of dependency of children brought into the life of the deceased. None of the said adult children attended court to defend their interests. If any, in the case the 4<sup>th</sup> respondent did not give evidence on existence of adoption orders or dependency of her adult children in regard to the deceased. Failure to adduce such evidence knocks off the children from the list of beneficiaries of the deceased. The mere inclusion of the deceased's name on the birth certificates does not qualify the children as beneficiaries. It is therefore evident that except the youngest child whose particulars are unknown herein, the other three children of the 4<sup>th</sup> respondent are not beneficiaries of the deceased's estate. The magistrate erred by failing to deal with the issue of dependency in her judgment. However, it is noted that the court bequeathed the 4<sup>th</sup> respondent 4.1 acres together with her children in the judgment she was to hold the share for herself and in trust for her children.

25. The children of the deceased of the first house did not dispute the fact that the 4<sup>th</sup> respondent was the lawful wife

of their late father following the death of their mother. As such, she was a beneficiary of the estate and is entitled to inherit from the deceased.

26. In regard to the distribution, the magistrate acknowledged that the deceased had shared part of his land L.R. NDARUGU/GACHARAGE/167 to the children of the first house

and left a portion of 5.1 acres for himself. It was agreed that one (1) acre where the first family home sat was to be registered in the name of the administrators for use as the family home and graveyard. The family grave was to be on one (1) acre portion of the said share. This left 4.1 acres for distribution to the beneficiaries. Similarly, I find no reason to interfere with the distribution to the children of the deceased done during his lifetime. This one is based on Section 42 of the Law of Succession Act and was not opposed by the 4<sup>th</sup> respondent. The assets for distribution for purpose of this appeal are two namely 4.1 acres out of L.R. NDARUGU/GACHARAGE/167 and NGENDA/GITHUNGUCU/T.980. The distribution shall be as follows:-

A) NDARUGU/GACHARAGE/167

- a) First house 2 acres
- b) Graveyard/house 1 acre
- c) Esther Waithira Kibochi 2.1. Acres

B) NGENDA/GITHUNGUCHU/T.980 - Esther Waithira Kibochi

27.This appeal is partly allowed.

28.It is hereby so ordered

***JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED  
AT THIKA THIS 19<sup>TH</sup> DAY OF FEBRUARY 2026.***

**F. MUCHEMI  
JUDGE**