

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

PROBATE AND ADMINISTRATION APPEAL NO. E006 OF 2023

IN THE MATTER OF THE ESTATE OF MURIITHI NGUMBA-

.....DECEASED

JOSEPH MWANGI MURIITHI.....
.....APPELLANT

VERSUS

JOSPHAT MWANGI MURIITHI.....1ST
RESPONDENT

MARY WAMBURA MWANGI.....2ND
RESPONDENT

JOSEPH KIRINGU MURIITHI.....3RD
RESPONDENT

GRACE MUTHONI MURIITHI.....4TH
RESPONDENT

WINNIE WANJA MURIITHI.....5TH
RESPONDENT

JUDGEMENT

1. This matter was initiated by the respondents who moved the lower court by way of an application dated 7th December, 2020, seeking the revocation of the grant of letters of administration intestate issued to the appellant on 29th November 1984, on grounds that the appellant did not disclose to the court that the respondents were minors as at the time the grant was confirmed, and also on grounds that the appellant had violated the provisions of the Law of Succession Act. The said application was duly opposed by the appellant.

2. Upon hearing the application, the learned trial magistrate, in a ruling delivered on 11th April, 2023, found that the deceased had only one property, which the appellant had distributed to himself, thereby disinheriting the respondents. Notwithstanding this finding, the court proceeded to hold that the application did not meet the threshold for revocation of grant and consequently dismissed it.
3. However, on 13th April, 2023, the learned trial magistrate, suo moto, reviewed the ruling of 11th April, 2023, on the basis that it did not reflect the true intention of the court. The court stated that its intention had been to find that the respondents' application dated 7th December, 2020, had met the threshold for revocation of the grant and to allow the same.
4. The appellant, being aggrieved by the trial court's decision to review its earlier ruling suo moto, proffered the present appeal. In his Memorandum of Appeal dated 28th April, 2023, the appellant advanced a total of five (5) grounds of appeal, faulting the learned trial magistrate for sitting on appeal on her own ruling, for not realizing that after the ruling dated 11th April, 2023, she was functus officio and she should have therefore waited to be moved in review or the aggrieved parties to proceed on appeal; and for invoking rule 73 of the probate and administration rules instead of Order 45 (1) of the Civil Procedure Rules.
5. The appellant further faulted the learned trial magistrate for failing to appreciate that the applicable substantive law prior to the enactment of the Law of Succession Act was Kikuyu customary law, under which, property in a polygamous household was distributed according to houses, irrespective of the number of children in each house.

6. On the above grounds, the appellant urged this court to allow his appeal, set aside the review orders dated 13th April, 2023, and restore the order granted on 11th April, 2023, dismissing the application by the respondents dated 7th December, 2020.
7. The appeal was canvassed by way of written submissions. In his submissions dated 17th December, 2024, the appellant contended that upon delivery of the ruling on 11th April, 2023, the trial court became functus officio and therefore lacked jurisdiction to reverse its decision either under rule 73 of the Probate and Administration Rules or Order 45 of the Civil Procedure Rules. The appellant argued that once the ruling was delivered, the court was obliged to await an application for review by an aggrieved party or the filing of an appeal.
8. The appellant further submitted that by altering the court's order from one dismissing the application to one allowing it, the learned trial magistrate exceeded the scope of review jurisdiction and, in effect, sat on appeal over his own decision by concluding that his analysis of the matter warranted a different conclusion.
9. The respondents, on the other hand, submitted that the learned trial magistrate properly invoked rule 73 of the Probate and Administration Rules in reviewing its ruling, as that is the applicable law.
10. The respondents further submitted that the grant which was revoked by the trial court was made under the provisions of the Law of Succession Act, as such, the appellant cannot allege that the applicable law was the Kikuyu customary law, having himself sought the said grant under the law of succession act.

11. Having carefully considered the grounds of appeal, the rival written submissions by both parties as well as the rulings by the trial court dated 11th and 13th of April respectively, I find that the main issue for determination is whether the present appeal is merited.
12. The appellant in his written submissions, argued that upon delivery of the ruling on 11th April, 2023, the trial court became functus officio and therefore lacked the jurisdiction to reverse its decision either under rule 73 of the Probate and Administration Rules or Order 45 of the Civil Procedure Rules. The appellant argued that once the ruling was delivered, the court was obligated to await an application for review by an aggrieved party or the filing of an appeal.
13. The respondent on the other hand was of the view that the learned trial magistrate was right to rely on rule 73 of the probate and administration rules when reviewing its earlier ruling, as that is the applicable law.
14. I have read the ruling by the learned trial magistrate dated 11th April, 2023 and it is apparent from his analysis of the evidence adduced before him, that his intention was to allow the application dated 7th December, 2020, given that he had found that the said application had met the threshold for revocation of a grant.
15. I say so because, after his analysis of the evidence that had been adduced by both parties in the matter, the learned trial magistrate found that the deceased in this case had left behind one property, which property had been distributed to the appellant, who was the only adult beneficiary at the time, thereby disinheriting the respondents. It is therefore evident that the learned trial magistrate made an accidental slip in his ruling, as the ruling delivered on 11th April, 2023, did not reflect the true intentions of the court.

16. After the slip up in his ruling, the learned trial magistrate then relied on *rule 73* of the probate and administration rules, to *suo moto* review his earlier ruling, so as to reflect the courts true intentions, which was to allow the respondents application dated 7th December, 2020.
17. That said, whereas the Civil Procedure Act, under Section 99 allows a court either on its own motion or on application of any party to correct clerical or arithmetical mistakes in judgments, decrees or orders, or any errors therein arising from any accidental slip or omission, the Law of Succession Act does have such a provision, that expressly allows a probate court on its own motion or on application by any party to correct its judgement or ruling to reflect its correct position.
18. *Section 99* of the Civil Procedure Act states as follows:
“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”
19. Being that as it may, *Rule 73* of the Probate and Administration Rules, allows a probate court to use its inherent powers to make such orders as maybe necessary for the ends of justice or to prevent an abuse of the court’s process. The said provision of law stipulates as follows:
“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
20. In my considered view, rule 73 of the probate and administration rule grants a probate court wide and unfettered discretion to grant any relief to ensure that the

ends of justice are met, as such the learned trial magistrate was not wrong in relying on the same so as to correct its ruling dated 11th April, 2023, to reflect its true intention.

21. The court in **Moses Saytanga v Peter Ndabi Rebo [2016] KEHC 5154 (KLR)** stated that:

“Under Rule 73, this court has the power to recall its judgement, ruling or order and make orders as may be necessary for achieving the ends of justice. In doing so, the court is not limited to Rule 73 of the Probate and Administration Rules. The court can apply the slip rule under Section 99 of the Civil Procedure Act 2010, “to correct error, clerical, mistakes in judgement, decrees or orders arising therein from any accidental slip or omission may at any time be corrected by the court either by its own motion or by an application by a party”. This principle was clearly elucidated in the decision of LAKHAMSHI BROTHERS LTD Vs. R. RAJA & SONS [1966] EA 313 on page 314 where Sir Charles Newbold P stated: “Indeed there has been a multitude of decisions by this Court on what is known generally as the slip rule, in which the inherent Jurisdiction of the Court to recall a Judgment in order to give effect to its manifest intention has been held to exist. The circumstances however, of the exercise of any such Jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to Judgment to give effect to the intention of the Court when it gave its Judgment or to give effect to what clearly would have been the intention of the Court had the matter not inadvertently been omitted. I would here refer to the words of this Court given in the Rainga case (2) [1965] E.A. at P. 703) as follows: “A Court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the Court at the time when Judgment was given or, in the case of a matter which was overlooked, where

*it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention.” These are the circumstances in which this Court will exercise its Jurisdiction and recall its Judgment, that is, only in order to give effect to its intention or to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter…….” **The rule extends to matters overlooked such as specifying a date for compliance with an order, or where the judge has misunderstood the evidence or counsels’ submissions. This is a principle of the greatest importance in the administration of justice for the judge to make corrections to an order, judgement or ruling to carry into effect the actual intention of the judge.”***

22. From the above case law, it is evident that a probate court can also rely **on Rule 73 of the Probate and Administration Rules**, to correct any accidental slip up or omission in its rulings or judgements, as such the learned trial magistrate was not wrong in relying on the said provision of the probate and administration rules, so as to correct the slip up in its ruling delivered on 11th April, 2023, as that provision of law grants a probate court the power to recall its ruling and make orders that maybe necessary for the ends of justice to be met. This ground of appeal therefore fails.
23. The appellant has in his Memorandum of Appeal also faulted the learned trial magistrate for failing to appreciate that the applicable law at the time of the distribution of the deceased property was Kikuyu customary law and not the Law of Succession Act.
24. It is not in dispute that the deceased herein died on 30th November, 1980, prior to the commencement of the **Law of Succession Act**, which law, came into operation on 1st July, 1981. It is also not in dispute that the appellant applied for

grant of letters of administration intestate in the year 1984. Given that the deceased passed on before the **Law of Succession Act** came into operation, the distribution of his estate to his beneficiaries was to be in accordance with the **Kikuyu Customary Law**, the administration of his estate was however to be in accordance to the **Law of Succession Act**.

25. This is as per **Section 2 (2) of the Law of Succession Act**, which provides that:

“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.”

26. The court in **Philis Michere Mucembi versus Wamai Muchembi [2010] KEHC 357 (KLR)** stated as follows regarding the distribution of the estate of a person who died prior to the commencement of the Law of Succession Act:

“It is not disputed that the deceased died prior to the enactment of the Law of Succession Act. Under Section 2(2) of the Law of Succession Act: “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 estate shall commence or proceed so far as possible in accordance with this Act.” This provision clearly excludes the distribution of the estate of a person who died before 1.7.1981. Such property must be distributed in accordance to the law of succession that was in place before the law of Succession Act was enacted. There are many legal decisions to this effect. On this point, I am persuaded by the decision of my late brother

KAMAU Ag. J in HCC Succession Cause No. 935 of 2003, (In the matter of the Estate of the estate of Mwaura Mutungi alias Mwaura Gichigo Mbura (deceased) where he said that where the deceased died prior to the commencement of the law of succession Act the distribution of his estate is strictly governed by the applicable customary law; however, the provisions of the law of succession act as provided under Section 2(2) of Cap 160 govern the administration of the said estate.

27. In the instant case, the evidence on record, was that the deceased, *Muriithi Ngumba* had in his life time, married two wives. The 1st wife was *Wairimu wa Muriithi* and the 2nd wife was *Wanjeri wa Muriithi*. It was also clear from the evidence on record that the 1st wife had only one child, *Joseph Mwangi Muriithi*, the appellant herein, while the 2nd wife, had seven children, including the respondents herein.

28. It is also clear from the evidence adduced by both parties that the during the land demarcation process, the deceased herein obtained two parcels of land. The said parcels of land are Forthall Loc 13 Karunge 1615, and Loc 13 Karunge 99. It has also not been disputed by the parties that the deceased, during his lifetime distributed Forthall Loc 13 Karunge 1615, to *Maina Muriithi*, his son from his 2nd wife, who was to hold the said parcel of land in customary trust for the 2nd house hold, consisting of his 2nd wife, *Wanjeri wa Muriithi* and her children.

29. As regards the land parcel Loc 13 Karunge 99, the same was still in the name of the deceased at the time of his death. However, the 1st respondent, *Josphat Mwangi Muriithi*, had in his evidence before the trial court admitted that Loc 13 Karunge 99 was being utilized by the first house. He also admitted that the children of the 2nd house had built in Forthall

Loc 13 Karunge 1615, and that the deceased was also buried in the said parcel of land. This is the same parcel of land that the deceased had distributed to the 2nd house, and caused it to be registered in the name of *Maina Muriithi* to hold in trust for the 2nd household.

30. From the evidence on record, it follows therefore that the deceased had during his lifetime distributed his two parcels of land in accordance to the Kikuyu Customary law, which provides that, where the deceased was polygamous, his estate must be divided equally between his households, regardless of the number of children each house had.

31. This position is reiterated in a number of case laws. In **re Estate of Mwangi Machanga (Deceased) [2018] KEHC 3309 (KLR)**, The court stated as follows:

“The deceased herein died intestate. The law that governed the intestate estate of a deceased Kikuyu at the time of his death was Kikuyu Customary Law. The substance of Kikuyu customary intestate succession is notorious, having been documented in various several treatises and texts, among them being Jomo Kenyatta’s Facing Mount Kenya and Eugene Cotran’s Restatements on Customary Law. There is also wealth of case law thereon. I will only cite two, Kanyi v Muthiora [1984] KLR 712 and Koinange and thirteen others v Koinange [1986], KLR 23, where it was stated that under Kikuyu Customary Law of inheritance, observance of equality amongst the different households of the deceased is the cardinal principle. The property is shared equally amongst the houses of the deceased regardless of the number of children in each house.”

32. In *re Estate of Mucira Rurii alias Muchira Rurie (Deceased)* [2025] KEHC 18298 (KLR); the court stated as follows:

“...under Kikuyu Customary Law of inheritance, observance of equality amongst the different households of the deceased is the cardinal principle. The property is shared equally amongst the houses of the deceased regardless of the number of children in each house. Chesoni Ag JA put the issue thus: “It was immaterial whether the suit land was inherited by Mathiora from his father or purchased by him. Upon his death whatever land, he owned had to be inherited in accordance with the Kikuyu customary law unless he had disposed of it by a will before his death which he did not. It is settled Kikuyu customary law that the estate of a deceased intestate polygamous man is inherited according to the houses. Each house gets an equal share and a house is constituted by each wife. The children of each house then share their portion equally.”

33. It was therefore not by mistake that the deceased caused one of the two parcels of land he owned, namely Forthall Loc. 13 Karunge 1615, to be registered in the name of *Maina Muriithi*, one of the sons of the second wife, to hold in customary trust for that household. While the other parcel of land, Loc. 13 Karunge 99, was, at the time, being utilised by the first house, as admitted by the 1st respondent in his evidence before the trial court, notwithstanding that the said parcel remained registered in the name of the deceased at the time of his death.

34. It also appears from the record, that there were discussions and deliberations between the appellant and the representatives of the 2nd household, being *Wanjeri wa Muriithi*, the 2nd wife of the deceased and *Maina Muriithi*, the

son of the 2nd wife with the deceased, regarding how Loc 13 Karunge 99, was to be distributed, prior to the appellant filing the succession cause.

35. As per the evidence on record, *Serah Wanjeri Muriithi, alias Wanjeri wa Muriithi* and *Julius Maina Muriithi, alias Maina Muriithi*, had both renounced all their rights and title regarding the letters of administration that were being taken out by the appellant. In fact, *Serah Wanjeri Muriithi* renounced her rights on the 28th of March, 1984, in the presence of the District Magistrate Murang'a while *Maina Muriithi* renounced his rights on 30th March, 1984 in the presence of the Chief of Gitugi Location.

36. This therefore supports the appellants assertions, that it was agreed, as per the Kikuyu customs, that the 1st household, comprising of the 1st wife of the deceased, Wairimu wa Muriithi, who is also deceased, was to inherit the Loc 13 Karunge 99, while the 2nd wife of the deceased inherited Forthall Loc 13 Karunge 1615, after the deceased distributed the same to that household in his lifetime.

37. Having said that, it is evident that the learned trial magistrate misdirected herself in concluding that the deceased owned only one property at the time of his death and revoking the appellant's title on that basis. This is notwithstanding the court's own finding that the undisputed oral evidence tendered by both parties demonstrated that the deceased owned two parcels of land, and not one.

38. The learned magistrate further misdirected herself in holding that the appellant had concealed from the trial court the fact that some of the children of the deceased were minors at the time that the appellant petitioned for letters of administration. On the contrary, in the affidavit in support of the petition for grant of letters of administration intestate dated 28th March,

1984, the appellant expressly disclosed, at paragraph 4 thereof, the number of children the deceased had and identified those who were minors at the time.

39. Based on the above, it is evident that the appellant did not conceal any material facts from the trial court, and the court had no basis whatsoever to revoke the grant of letters of administration that had been issued to him on 29th of November, 1984 and confirmed on 31st October, 1985.

40. As regards land parcel Forthall Loc 13 Karunge 1615, seeing that *Maina Muriithi* was most probably the eldest son in the 2nd household, it would make sense why the deceased would register the said parcel of land in his name to hold in customary trust for the beneficiaries of the 2nd house hold. This is so because it is evident that his role was that of a *Muramati*. And it is probably why he did not come out to dispute the distribution of Loc 13 Karunge 99 to the appellant as the rest of his siblings have done.

41. The concept of *Muramati*, was elaborated by the court of appeal in the case of **Joseph Gitau Githongo versus Victoria Mwihaki Munya (Civil Appeal no. 227 of 2005)** as follows:

“The office or concept of “Muramati” under Kikuyu Customary Law, particularly his duties, responsibilities and obligations, was considered by this court in NJUGUNA VS. NJUGUNA, (2008) 1 KLR 889. The Court held, inter alia, that the eldest son inherits land as a “Muramati” to hold it in trust for himself and the other heirs; that the “Muramati” has a duty to distribute the shares to the heirs in accordance with the wishes of the deceased or in accordance with the rules of intestacy; and that the “Muramati” is not entitled to any remuneration for his services because his duty is a

moral obligation. In this appeal, the appellant and the respondent were from one of the houses of Githongo. One of their sisters was long dead and the other was married, leaving the appellant and the respondent as the beneficiaries from that house. The appellant was the first-born son from their house. In these circumstances, we are satisfied that the learned Judge did not err by holding that the appellant was a “Muramati” who held the suit property in trust for the respondent. In light of the applicable rules of intestacy under Kikuyu customary law, the appellant was obliged to distribute to the respondent her share, which we take to be the portion of the suit property that she has been in occupation of. Ultimately therefore, we find that upon registration of the appellant as the proprietor of the suit property, he held the portion of the suit property occupied by the respondent in trust for her.”

42. Flowing from the foregoing, it is evident that the appellant did not conceal any material facts from the court when applying for grant of letters of administration intestate, neither did he disinherit the beneficiaries of the 2nd household, as it is evident that the deceased had for his own reasons distributed to them one of his parcels of land, being Forthall Loc 13 Karunge 1615, which *Maina Muriithi* the ‘*Muramati*’, is to distribute equally to all the children of the deceased in that house hold, as per the customs of the Kikuyu. Furthermore, the only way that the appellant would have Loc 13 Karunge 99 registered in his name is if he obtained grant of letters of administration in the estate of the deceased, so as to have that parcel of land registered in his name.

43. The children of the 2nd household were never disinherited, as they would like this court to believe, considering that their mother, as per the Kikuyu customary law, already had her

share of parcel of land distributed to her, through her son Maina Muriithi, and it is this parcel of land that is to be distributed to them equally.

44. In my considered view, the issue here, though not stated by the parties, seems to be that the appellant is the only child in the first household, however as stated herein above, the kikuyu customary law which applies in this case, demands that the property of a deceased who died intestate and polygamous is to be distributed as per the household of the deceased, and the house hold here being wives, regardless of the number of children that each wife had.

45. Furthermore, it has not been shown in this case that the Kikuyu customary law is repugnant to justice and morality. It would therefore be unjust and unfair to reopen the matter and distribute the property of the deceased afresh so as to redo a distribution that had been done in accordance with the law of succession that prevailed then. The said distribution was acknowledged and agreed to by the 2nd wife of the deceased and *Maina Muriithi*, the son of the 2nd wife.

46. Furthermore, it is evident that the appellant obtained the confirmed grant of letters of administration in the proper way and as such there was no basis for the trial court to revoke the said grant. Based on the above, I find that the appellant's appeal succeeds, to the extent that the ruling by the learned trial magistrate dated 11th April, 2023, allowing the respondents application dated 7th December, 2020, was improper and the same is hereby set aside.

47. *The grant of letters of administration issued to the appellant on 29th November, 1984 and confirmed on 31st October, 1985 is hereby reinstated. As regards costs, this being a family matter, and to avoid any*

further animosity between the parties, each party shall bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MARCH, 2026.

**HON. T. W. Ouya
JUDGE**

**For Appellant.....Ndonga HB Mr Mbuthia
For Respondent.....No Appearance
COURT ASSISTANT.....Brian**

ORIGINAL