



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CIVIL APPEAL NO. E046 OF 2022**

**DAVID GACHOKI N. SAMUEL.....**

.....**APPELLANT**

**VERSUS**

**JANE WAGUAMA NJUI.....**

.....**RESPONDENT**

**(Being an appeal from the judgment delivered by Hon. L. W. Kabaria (P.M) on 6/5/2022 at Gichugu Succession Cause No. 151 of 2018)**

**JUDGMENT**

[1] By Summons dated 4/6/2016, the Appellant applied for confirmation of the grant issued to him on 29/10/2015, where he proposed at paragraphs 10, 11 and 12 of the affidavit in support thereof how **L.R No. BARAGWE/THUMAITA/17 (*hereinafter referred to as the estate property*)** ought to be distributed.

[2] The Appellant swore a further affidavit on 18/11/2019 in support of his proposed mode of distribution.

[3] On 1/9/2016, the Respondent filed an affidavit of protest in opposition to the proposed mode of distribution. She stated that the deceased had during his lifetime expressed his wish to subdivide the estate property equally among his children.

[4] Josephat Mugo Kanene and Lawrence Gitari Kiura filed statements dated 10/9/2019 in support of the protest.

[5] In its impugned judgment, the trial court ruled:

***“I find no evidence that supports the petitioner’s assertion that the same is a benefit from the deceased. The testimonies of the witnesses were consistent the land was given to the late Nelson then an adult by the clan not his father. There is no evidence to support the proposal that the deceased passed on the land intended for him to the late Nelson! I am not persuaded at all that the parcel No. BARAGWE/THUMAITA/16 is a benefit the late Nelson received from his***

*father in his lifetime. I so find. 12. Having found as such I find then Section 38 of the Succession Act applicable herein, the protest succeeds to that extent. The parcel No. BARAGWE/THUMAITA/17 shall be equally divided among the children of the deceased, or those who survive them that is to say equally between Isabella Waruguru Njogu, Pheris Wacuka Muriukt David Gachoki N. Samuel, Peter Gatenjagwa and the protestor Jane Waguama Njui. Now the parties are in agreement that the children of the deceased have constructed on various portions of the parcel No.BARAGWE/THUMAITA/17 this was done while he was living, let the developments of each beneficiary be a consideration at the time of the subdivision. The Grant is hereby confirmed on the terms as ordered.”*

### **The Appeal**

[6] On appeal, the Appellant filed his memorandum of appeal on 3/6/2022 raising 6 grounds as follows:

1. *The Learned Magistrate erred in law and fact by basing her decision under section 38 of the Law of Succession Act.*
2. *The Learned Magistrate erred in law and fact by distributing the estate of the deceased equally amongst the beneficiaries including those who were not interested and had not laid any claim over the estate.*
3. *The Learned Magistrate erred in law and fact by not considering that L.R NO.BARAGWE/THUMAITA/16 was not acquired through the efforts of the deceased therein.*
4. *The Learned Magistrate erred in law and fact by failing to consider that Land Parcels NO.BARAGWE/THUMAITA/16 and 17 were acquired through the efforts of the deceased and ought to have been considered as the estate of the deceased during distribution.*
5. *The Learned Magistrate erred in law and fact by failing to consider the mode of distribution proposed by the petitioner.*
6. *The Learned Magistrate erred in law and fact by not considering that the respondent has her own land being the widow of one NELSON (Deceased) son of the deceased in the parcel NO. BARAGWE/THUMAITA/16 which was acquired through the effort of the registered in the names of his deceased son.*

### **Duty of the Court**

- [7] 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**).

### **Evidence**

- [8] **Protestor's Witness 1 Jane Waguama Njui**, the Respondent herein, testified that, *"I live in Thumaita. Muriuki Njui was my father. He was my father in-law. My husband is deceased. My husband and I we lived in Kariki in our father's land Samuel's land. Yes, I filed a protest. When David Gachoki filed the succession cause he did not inform me. Samuel had said I be given 2 acres of land. He showed me where to cultivate and construct. I was shown a place to construct not to cultivate. I want the court to help me I was told I be given 2 acres. I don't know the side of the land."*
- [9] On cross examination, she stated that, *"Yes, I was married to Nelson Njui who is a son of Samuel Muriuki. Yes, both are deceased. Samuel Muriuki's wife was called Eunice Muthoni she is also deceased. They had five children together, the first is Nelson Njui, the second is Peter Muriuki then Isabel Waruguru, Phyllis Wacuka and David Gacoki. Yes, of the five children only my husband is deceased. Peter Muriuki is also deceased. Samuel was of the ogaciku clan. Yes, he was given land by the clan Baragwe/Thumaita. Yes, my husband was given land by the clan. I don't know the size. Yes, my father in law gave me land to build. Yes, that is where I live to date. I have constructed a permanent house on it. Yes, two of my children have constructed on the land. It is Muriuki and Steven and Chomba who have also constructed their houses on the land. I have fenced off the area. Yes, I fenced off when the deceased was still alive. Yes Peter Muriuki has also constructed on it and fenced off his area. David Gachoki has also built and fenced off his area, Phyllis Wacuka as well. Yes, our father who showed everyone where to construct. Yes, we have living like that since. Yes, Peter David and Wacuka have been farming there tea, coffee, bananas and tea leaves. Yes, I have been farming my husbands land that he was given by the clan. I have been farming. Yes, I farm tea on my husband's land but I want an inheritance from my father. I sell my tea at Thumaita tea factory it is my daughter who goes to*

*sell it. I also take my coffee to Nyanja tea factory. I planted tea in 1959. Where I live is where I have raised my children, it is where I live to date.”*

[10] In re-examination, she stated that, *“When our mother was alive I was cultivating the land where I live a small portion. I had planted tea bushes where I live the tea I sell. I used to cultivate Samuel’s land. The land has not been subdivided that is the reason we want it subdivided.”*

[11] **Protestor’s Witness 2 Josphat Mugo Kanene** testified that, *“I live in Kariki in Thumaita. I know Jane Waguama. I am about seventy years old now. I knew Samuel Muriuki Njue. I know he was allocated the parcel BARAGWE/THUMAITA/17. Jane and her late husband were living on this land when Samuel was alive and this is where she lives to date. Samuel had given them land to till and construct, it is about 2 acres. Before Samuel died they used to cultivate a small portion they farm a small portion where there were tea bushes. The rest of the family till the rest of the land. I recorded a statement. I wish to rely on it (referring to one dated the 10<sup>th</sup> September 2019).”*

[12] On cross examination, he stated that, *“I am kikuyu by tribe. I am of the ogaciku clan. I am seventy years old. I was born in 1951. Yes, during the land demarcation, I was a young boy. No, I could not have sat in the board of those adjudicating. It is my father who were given land. Samuel was given Baragwe/Thumaita 17. Yes, and Nelson got No. 16 they border each other. I don’t know their acreages. Nelson Njui’s family have constructed on the portion they were left in on number 17. It is a small portion. Yes, I have been there. Peter cultivates that land David Gachoki and also Phyllis and Jane after the passing on of her husband. No one has fenced of the land. I have been to Janes house, she has put up a fence (referring to annexure DGN 7a and b in the affidavit sworn on the 18<sup>th</sup> November 2020 by David Gachoki Samuel) the rest of it is not fenced. No one has a permanent, gate. There is nowhere where there is a gate (Referred to annexure DGN 5a and b in the affidavit sworn on the 18<sup>th</sup> November 2020 by David Gachoki Samuel). Yes, that is David’s gate. Yes, he has fenced off his land. I don’t recall when Samuel died. Yes, even before he died everyone was living where they are living now. The only problem was (interrupted) Yes, they have lived there to date. Jane has only constructed on her ¼ acre land she does not farm it the rest have farmed theirs there are bananas tea, coffee. They take their tea to Kareki tea collecting factory for coffee they take to Nyanja. Yes, Jane farms no 16 she has farmed there since before her husband died,*

*they take their tea to Thumaita and coffee to Nyanja. Yes, they have done since before Samuel died.”*

[13] In re-examination, she stated that, *“There is nowhere Jane was farming in Samuel’s land. David has only fenced off where his house is not the entire land.”*

[14] **Protestor’s Witness 3 Lawrence Gitari Kiura** testified that, *“I live in Thumaita. Yes, there is a statement I recorded. I wish to rely on it (referring to that dated 10<sup>th</sup> September 2019).”*

[15] On cross examination, he stated that, *“Yes, I am kikuyu. I belong to the Agaciku clan. I am 57 years old. I was not born when the clan land was subdivided in 1958. I knew Samuel for over thirty years. I know his land Baragwe/Thumaita/17. It is around 11 acres. No. 16 I know it belongs to Nelson Njui. It is approximately 5-6 acres in size. Yes, it could be about 3 acres. I know Jane Waguama. I knew her husband Nelson Njui he died about 14 years ago. I know his brother Peter he died. Isabela and Phyllis and David I know they are all alive. Samuel died like 1990 yes. Before Samuel died he showed Nelson where to construct. Yes, he constructed on it. The homestead is like 1 ¼ acre and then where she has planted tea is about 2 acres in size. No, she has not constructed on ¼ acre it is bigger. She farms on No. 17. She has tea leaves, nappier grass, she has cows and chicken. She lives on a 2-acre piece of land. I go there regularly I was there last week. She lives on more than an acre of land. (shown a photograph - annexure DGN7a and b of the affidavit of David Gacoki sworn on the 18<sup>th</sup> November 2020). This is Jane’s gate, this one looks lie for David Gachoki. I confirm that Peter, David, Phyllis and Jane everyone has constructed theirs. Yes Samuel showed them where to construct, they are all mixed up now. Where Jane was left by Samuel she is there, David as well, Phyllis and Peter they were left together in one place they have spread out now. They each have a portion according to how they live now. They don’t have somewhere to construct officially, they construct in a mixed-up manner, there are those in the area of other. Samuel left them like that, they are like that to date. The tea we take to Thumaita and coffee to Nyanja coffee factory. On no. 16 Jane has added coffee and tea, yes, she takes them to Nyanja coffee factory and Thumaita tea factory. Before he died Nelson was farming there. Yes Jane is tilling it without interference.”*

[16] In re-examination, he stated that, *“Samuel died over thirty years ago. Officially he had not subdivided, he had shown all his children their portion. They were constructing and tilling. Jane had planted tea and nappier grass on No. 17 the*

land belonging to her father. The way they are now mixed up it is like they want to remove her because the area is not the same as she was shown by her father.”

[17] **Petitioner’s Witness 1 David Gachoki Samuel**, the Appellant herein testified that, “I live in Thumaita village. Yes there are documents I filed in court (referring to the summons dated 4<sup>th</sup> July 2016 and affidavit filed with it and further affidavit filed on 23<sup>rd</sup> November 2020 sworn on 18<sup>th</sup> November 2020) yes I filed documents filed with my papers (Referring to the annexures in the two affidavits produced as Exh 1-3 as appear in the first affidavit and P. Exh 4-9 as appear in the second affidavit). (Referred to paragraph 12 in the further affidavit of 18/11/2020) yes, I have sated there how I want the estate distributed. I pray the court looks at my affidavits and documents.”

[18] On cross examination, he stated that, “I was born in the year 1949. My fathers land is Baragwe/Thumaita/17. He was given the land when lands were being demarcated. I don’t know the year. Samuel was my father, Nelson Njui was my brother. Jane is his wife. They had been given land. Since I have known her she has lived on my father’s land No. 17. Today she has come from the same land No. 17. My father died in the year 1990. Nelson died in the year 2008. I don’t recall the year I first went to get letters from the chief. Nelson was still alive. Yes, I informed the chief that Nelson was alive. His name was not written in the chief’s letter because Nelson had his own land No. 16 his name was not left out deliberately it is the truth. Yes, Nelson had another land no. 16. Samuel had two sons, the elder one asked the elders to give him land that is how he got no. 16. I was they but I was young, I don’t recall the year I was still a young man. When land was demarcated Nelson was also given land no. 16 he was given by dint of respect his father. It is the clan that gave him the land, Samuel was given no. 17 by the same elders. Yes, I have seen how I have proposed to distribute the land the remaining ones are the ones getting land. I saw the formula I have written for subdivision that formula is as divided by our father so that everyone lives on their portion. The scheme plan I found it. I don’t know what a scheme plan is. I distributed the land as per the Grant confirmed before the Embu court. Yes, I am the one who signed the plan drawn by the surveyor.”

[19] In re-examination, he stated that, “The land no. 17 was my fathers No. 16 is in the name of Nelson. He is the husband of the protestor Jane Waguama. Nelson was helped by our father to get land from the oguciku clan. It is the clan that also gave my father his land no. 17 (referred to annexure DNG2) He was given the land in 1958.

Yes, I have stated how I want the land distributed. My father died in 1990, before his death he had distributed the land. What I mean is that Jane Waguama because my father loved them they stay there with his family. Yes, our father showed everyone where to build and cultivate. I have brought photographs of how we stay as exhibits. Nelson died in 2008 he had been shown by our father where to live. Where he has constructed a house is like on a ¼ acre of land, Jane has lived there to date. She has put up a fence. No one objected to the distribution. We have lived like that peacefully.”

### **Submissions**

[20] The Appellant faults the trial court for failing to consider the provisions of section 42 of the Law of Succession Act in distributing the estate property. He urges that the beneficiaries had settled and developed their respective portions as shown by the deceased, which wishes the trial court disregarded. He urges that L.R No. Baragwe/Thumaita/16, which was registered in the name of the Respondent’s husband, was acquired through the efforts of the deceased, and was thus available for distribution.

[21] The Respondent cites ***Peter Kariuki v Attorney General (2014) eKLR***, on the duty of the first appellate court. She urges that L.R No. Baragwe/Thumaita/16 did not form part of the free property of the deceased, and cites ***In the Matter of the Estate of Job Ndunda Muthike (2018) eKLR, Mpatanga Ole Kamuve v Melivo Tipango & 2 Others (2017) eKLR, Motex Knitwear Limited v Gopitex Knitwear Mills Limited [2009] KEHC 4017 (KLR), Trust Bank Limited v Paramount Universal Bank Limited & 2 Others [2009] KEHC 4030 (KLR), Janet Kaphiphe Ouma & Another v Marie International (Kenya) Kisumu HCCC No. 68 of 2007, Central Bank of Kenya v Uhuru Highway Development Ltd v 3 Others [1998] KECA 109 (KLR), Britestone Pte Ltd v Smith & Associates Far East Ltd (2007) 4 SLR (R) 855 and In the Matter of the Estate of Sophia Watore Gachigua – Deceased (2016) eKLR***. She urges that the distribution of the estate property was proper in view of the fact that none of the beneficiaries had relinquished their rights to inherit.

### **Analysis and Determination**

[22] From the grounds of appeal, the issue for determination is whether the distribution of the estate property accords with the evidence adduced before the court.

[23] Before delving into the merits of the appeal, there is a preliminary question whether L.R No. Baragwe/Thumaita/16 constituted a gift *inter vivos* to the Respondent's husband, as urged by the Appellant.

[24] Whilst the Appellant asserted that the said parcel of land was bequeathed to the Respondent's husband by the deceased herein during his lifetime, he candidly admitted in his testimony, that, ***“When land was demarcated Nelson was also given land no. 16 he was given by dint of respect his father. It is the clan that gave him the land.”***

[25] The Respondent stated on cross examination, that, ***“Yes, I was married to Nelson Njui who is a son of Samuel Muriuki. Yes, he was given land by the clan Baragwe/Thumaita. Yes, my husband was given land by the clan.”***

[26] This court therefore finds that the said property was not a *gift intervivos* within the meaning of section 42 of the Law of Succession Act, as it was solely acquired by the Respondent's husband from the Clan.

[27] On the merits, there is no dispute that the deceased died intestate survived by his children namely Peter Gatenjagwa Muriuki, Jane Waguama Njui, Isabella Waruguru Njogu, Pheris Wacuka Muriuki and David Gachoki N. Samuel.

[28] The Respondent herein, testified that, ***“Samuel had said I be given 2 acres of land. He showed me where to cultivate and construct. I was shown a place to construct not to cultivate. I want the court to help me I was told I be given 2 acres.”***

[29] On cross examination, she stated that, ***“Yes, my husband was given land by the clan. Yes, my father in law gave me land to build. Yes, that is where I live to date. I have constructed a permanent house on it. Yes, two of my children have constructed on the land. I have fenced off the area. Yes, I fenced off when the deceased was still alive. Yes Peter Muriuki has also constructed on it and fenced off his area. David Gachoki has also built and fenced off his area, Phyllis Wacuka as well. Yes, our father who showed everyone where to construct. Yes, we have living like that since.”***

[30] Her sentiments were reiterated by her witnesses in their respective testimonies. **Protestor's Witness 2** stated cross examination, that, ***“Nelson Njui's family have constructed on the portion they were left in on number 17. It is a small portion. Yes, I have been there. Peter cultivates that land David Gachoki and also Phyllis and Jane after the passing on of her husband. I don't recall when Samuel died. Yes, even before he died everyone was living where they are living now.”***

[31] Protestor's Witness 3 stated on cross examination that, ***"I confirm that Peter, David, Phyllis and Jane everyone has constructed theirs. Yes Samuel showed them where to construct, they are all mixed up now. Where Jane was left by Samuel she is there, David as well, Phyllis and Peter they were left together in one place they have spread out now. They each have a portion according to how they live now."***

[32] The Appellant affirmed on cross examination, that, ***"My fathers land is Baragwe/Thumaita/17. He was given the land when lands were being demarcated. Samuel was my father, Nelson Njui was my brother. Jane is his wife. They had been given land. Since I have known her she has lived on my father's land No. 17."*** In re-examination, he stated that, ***"Yes, our father showed everyone where to build and cultivate. I have brought photographs of how we stay as exhibits. Nelson died in 2008 he had been shown by our father where to live. Where he has constructed a house is like on a ¼ acre of land, Jane has lived there to date. She has put up a fence. We have lived like that peacefully."***

[33] The parties are in concurrence that all the beneficiaries, save for Isabella Waruguru Njogu, reside on the estate property, having erected permanent dwelling houses thereon.

[34] Section 38 of the Law of Succession Act provides that, ***"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."***

[35] This court is satisfied that the mode of distribution proposed by the Respondent in her Protest, and which the trial court ultimately adopted, was in tandem with section 38 of the Law of Succession Act, in that every beneficiary got an equal share of the estate property. The said mode of distribution was, therefore, fair, just, and equitable.

[36] The Appellant's proposal was predicated on a misconception that L.R No. Baragwe/Thumaita/16 was a bequest to the Respondent's husband.

[37] In any event, there was no evidence to demonstrate that Isabella Waruguru Njogu had expressly renounced her entitlement to inherit. The mere fact that she does not reside on the property does not disentitle her from benefitting from her father's property, any more than her siblings who are in occupation thereon.

[38] The court is satisfied that the trial court's decision was grounded on law and the evidence adduced, and there is no basis to warrant this court's interference with its findings.

**ORDERS**

[39] Accordingly, for the reasons set out above, the Court finds that the appeal is without merit and it is dismissed.

[40] There shall be no orders as to Costs.

*Order accordingly.*

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF FEBRUARY 2026.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

Mr. Nyaga Gitari for the Appellant.

Mr. Igati Mwai for the Respondent.