

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL APPEAL NO. 008 OF 2022

LUCY WANGUI MACHARIA.....
APPELLANT

VERSUS

ROSE MUTUNDU MAGONDU.....
RESPONDENT

(Appeal from the judgment and decree of the Principal Magistrate Hon. M Sudi delivered on 22nd June 2021 in Succession Cause no. 138 of 2017 in the matter of the Estate of Gilbert Macharia (deceased) at Kandara law courts)

JUDGEMENT

1. The Appellant and her son *Andrew Mwangi Macharia* lodged a Petition for letters of administration intestate following the demise of her husband, *Gilbert Macharia*, on 31st August 2017. In the Petition, it was alleged that the deceased was survived by a widow and three children all of whom had attained the age of majority. It was also claimed that the deceased's known assets at the time of death were valued at Kshs. 200,000 comprising LOC. 2 KANDERENDU/1546 and Barclays Bank Account Np. 0752226954 Moi Avenue Branch. The deceased, it was alleged, had no liabilities prior to his death.
2. On 22nd June 2021, the Respondent filed summons for revocation of grant on the basis that she was the first wife of the deceased and they were blessed with three children. Therefore, she had legitimate interest in the share of the deceased estate. In fact, the Respondent contended that she had petitioned the court for letters of administration intestate of the estate of *Gilbert Macharia* in Murang'a Succession Cause No. 43 of 2018 and was issued with letters of administration on 27th February 2019. She duly

served the Appellant with the papers but when the matter was listed for hearing, the court was informed that the estate had already been distributed as per the terms in the certificate of confirmation of grant dated 13th December 2018. Which grant was obtained fraudulently as the appellant failed to disclose the existence of the Respondent's family nor had the administrator made any provision for the Respondent.

3. Consequently, summons for confirmation of grant were issued to the Respondent on 28th September 2021. It was confirmed that the deceased was survived by eight dependants comprising two wives and six children. Notably, one of the issues, from the Respondent's family was already deceased. The assets of the deceased on the other hand comprised:

- i. Title No. LOC.2/KANDEREDU/1546
- ii. Standard Chartered Bank Account No. 0150142863700
- iii. Kajiado/Ololoitikoshi/ Kitengela/2239
- iv. 89 Factory shares in Makomboki tea factory share certificate No. BN000985
- v. 7 Shares in KTDA Farmers Share Certificate No. 379788
- vi. 76 shares in KTDA Farmers share certificate No. 102425
- vii. 76 shares in Rahimtulla Trust
- viii. 5 shares in Makomboki tea factory share certificate No. A01066
- ix. 6547 Shares in Makomboki tea factory share certificate no. B02461
- x. Pension money in treasury.

4. The Appellant protested to the grant issued to the Respondent contending that there had been no marriage between the deceased and the Respondent as the appellant had contracted a Christian marriage with the deceased on 14th August 1982. Therefore, any prior or subsequent marriage was illegal and untenable. It was further averred that Kajiado/Ololoitikoshi/ Kitengela/2239 did not form part of the estate of the deceased as it was registered in the name of Erastus Mwangi Kahacho as per the title deed dated 10/5/1990.
5. The trial court considered the application and the protest and noted that while the deceased had procured a Christian marriage with the appellant, he had sired children with the Respondent during the pendency of the said Christian marriage. The court therefore relying on *Hotensia Wanjiku Yaweh versus public trustee* presumed the existence of a marriage between the deceased and the respondent thus was entitled to the estate of the deceased. The court excluded Kajiado/ Ololoitikoshi/ Kitengela/ 2239 from the deceased estate as it was registered in the name of Erastus Mwangi Kahacho. Accordingly, the court determined that the remainder of the estate be distributed equally between the appellant and the Respondent except the matrimonial homes.
6. Aggrieved and dissatisfied with the judgement of the trial court, the appellant lodged the instant appeal on grounds that:
 - i. The learned trial magistrate erred in law and in fact when she deviated from the parties pleadings which had not raised any proof of marriage by cohabitation as between the deceased and the respondent herein ROSE MUTUNDU MAGONDU thereby arriving at an erroneous decision.

- ii. The trial magistrate erred in law and fact in finding that there was a valid marriage between the deceased and the respondent when no such evidence had been laid before her thereby arriving at an erroneous decision.
- iii. The learned trial magistrate erred in law and in fact by ignoring the dictates of Section 40 of the Law of Succession Act by ordering the distribution of the deceased estate as per the two houses instead of the number of children thereby deviating from the known principles of law thereby arriving at an erroneous decision.
- iv. The learned trial magistrate erred in law and in fact by failing to ascertain where the Respondent lived in Umoja Nairobi, the value of the premises and did not take it into account whilst distributing the estate of the deceased thereby arriving at an erroneous decision.
- v. The learned trial magistrate failed to take into account that one child of the Respondent namely FAITH WAMBUI was deceased and by ordering the estate be distributed equally between the appellant and the Respondent would give unfair advantage to the Respondent since the respondent has two surviving children and the appellant has three surviving children thereby unequally distributing the properties thereby arriving on a gravely erroneous decision.
- vi. The trial magistrate erred in law and in fact by failing to hold that since the Respondent had claimed to be married under Kikuyu customary law, the ingredients, were never fulfilled or proven thereby no such presumption of marriage could arise, without such evidence being led to the same thereby arriving at an erroneous decision.

- vii. The learned trial magistrate erred in law and in fact by holding that the estate of the deceased be shared equally between the appellant and the Respondent except the matrimonial homes without calling for the evidence of the so called matrimonial homes both by the appellant and the respondent since the appellant's matrimonial home is situated in LOC2/KANDERENDU/1546 therefore offering it for distribution to the appellant was in conflict with her decision thereby arriving at an erroneous decision.
7. Reason wherefore the appellant sought that the distribution of the properties as per the grant dated 28th September 2021 be dismissed. The appellant also sought a declaration that the Respondent is not a wife to the deceased for all intents and purposes. Further, the appellant required that the Respondent be compelled to disclose the value of the Umoja property and the estate of the deceased be distributed equally, in value to the proven true beneficiaries of the deceased. A grant was issued as per these terms.
 8. The court directed that the appeal be canvassed through written submissions.
 9. The Respondent submitted that the appellant's testimony before court was marred with deceit and misrepresentation of facts. She withheld crucial information from the court that would have been germane in determining the dispute before the court. Further, it was the Respondent's submission that the doctrine of presumption of marriage is applicable to the Respondent due to the long period of cohabitation between her and the deceased. Therefore, she was entitled to a share of the deceased estate. The Respondent maintained that the proposed mode of distribution was fair and ought to be confirmed by the court. Therefore, the Respondent urged that the appeal be dismissed and the decision of the trial court be upheld.
 10. I have considered the appeal and the rival arguments. The issue for determination is whether the learned magistrate erred in his interpretation and application of Section 40 of the **Law of Succession Act**. In other words, whether the

learned trial magistrate erred in the mode of distribution of the deceased's estate among the two houses.

11. In *The Law of Succession Justice William Musyoka* at Page 100, stated as follows:

“For the purpose of the rules of intestacy, a divorced spouse has no rights to the intestate’s estate; a judicially separated spouse is, however, entitled. This applies to all legal marriages whether contracted under statute or customary law. Customary law marriages include the woman-to-woman marriage arrangements. Under Section 3(1) of the, a separated wife is considered a wife for succession purposes. The divorced spouse may make a claim under the family provisions in Section 26 of the Law of Succession Act for reasonable provision from the estate. The definition in Section 29 of a dependant for the purpose of Section 26 includes a former wife or former wives recognized as such and protected under Section 3(5) of the Law of Succession Act.”

12. While the Appellant maintained that she contracted a Christian marriage with the deceased, the Respondent maintained that she was the first wife to the deceased and her existence was well known by the 2nd Respondent. In as much as the Respondent alleged that she was the deceased’s wife and had in fact bore three children with her, the existence of a Christian marriage between the deceased and the Appellant nullified any insinuation of a marriage between the Respondent and the deceased. As it was legally impossible for the deceased to have both a monogamous marriage and a potentially polygamous marriage simultaneously. Nevertheless, there was evidence that the Respondent was a dependent of the deceased as

she lived in his house and even had children with him during the pendency of the Christian marriage with the appellant.

13. The Appellant admitted that she knew the deceased was married to the Respondent when she contracted a Christian marriage with her. Therefore, pursuant to **Section 3 (5) of the Law of Succession Act**, is a spouse and is entitled to successfully petition for reasonable provision of the estate pursuant to **Section 29 of the Law of Succession Act**.
14. The principle under **Section 40 of the Law of Succession Act** is that it requires equal distribution to all dependents, calculated by adding the children from each house along with their surviving mother and then dividing equally. **Section 40 of the Law of Succession Act** provides as follows:

“(1)Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children

(2)The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

15. As noted by the Court of Appeal in **Francis Mwangi Thiongo & 4 Others vs. Joseph Mwangi Thiongo, Civil Appeal No.8 of 2015**, the intention of the legislature in enacting that Section was to lay down a two step-process of division of the personal and household effects together with the residue of the net intestate estate of a polygamous person by the number of houses in proportion to the number of children and each houses' portion as per the general rules of intestacy established under section 35 to 38 of the Act.
16. In **Scholastica Ndululu Suva vs. Agnes Thenya Suva, Civil Appeal No. 49 of 2017**, this Court cited with approval the earlier decision of the Court in **Mary Ronoh v. Jane Ronoh & Another [2005] eKLR** and expressed that:
- “It is therefore evident, that, although section 40 of the Law of Succession Act provides a general provision for the distribution of the estate of polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”*
17. Similarly, the Court of Appeal in **Koech & Another vs. Chemutai & 2 Others (Civil Appeal 438 of 2019) [2022] KECA 1309 (KLR)** stated that **section 40 of the Law of Succession Act** should be interpreted in a manner that promotes equality and non-discrimination, non-applicability of customary law repugnant to justice and morality, and the appropriate application of equitable principles. In the same vein, in **Munyole v Munyole (Civil Appeal 21 of 2017) [2022] KECA 373 (KLR)** the Court in reference to **Section 40** of the **Law of Succession Act** stated that:

“The law thus requires that the estate of a person who was polygamous and who died intestate should be divided among his houses according to the number of children in each house. The purpose of this provision is to ensure that there is equity in distribution of the estate without any form of discrimination amongst the surviving wives and children of the deceased.”

18. From the above legal principles, it is clear that the learned trial court erred in distributing the properties equally among the two houses instead of dividing the properties according to the number of children in each of the houses and adding each wife as an additional unit.

19. In the circumstances, I am inclined to disturb the impugned judgment of the trial court and substitute it with a decision that the deceased’s estate be distributed according to the children in each household and each of the wives be treated as an additional unit. The properties should therefore be valued to allow for equality in distribution of the deceased’s estate.

20. In upshot, the trial court judgement is hereby set aside and substituted as here below:

i. Distribution to be effected according to the children in each household and each of the wives be treated as an additional unit.

ii. The deceased’s properties be valued to allow for equality in distribution of the deceased’s estate.

iii. This being a family matter, I make no order as to costs.

Dated, signed and delivered virtually on this 9th day of April, 2026.

**HON. T. W. OUYA
JUDGE**

**For Appellant - Wachira holding brief for Kanyi
For Respondent - Mugo
Court Assistant - Nyabuto**

ORIGINAL