

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**(CORAM: R. MWONGO, J.)**

**SUCCESSION APPEAL NO. E013 OF 2025**

**IN THE MATTER OF THE ESTATE OF SAMUEL IRERI KAMAKIA (DECEASED)**

JOHN MURIUKI.....APPELLANT

**-VERSUS-**

JUDY MUTHONI JEREMIAH.....RESPONDENT

*An appeal from the decision of Hon. M.N. Kinyua delivered on 11<sup>th</sup> February 2025 in  
Embu MC Succession Cause No. 586 of 2017*

**JUDGMENT**

**The Appeal**

1. Through a memorandum of appeal dated 14<sup>th</sup> February 2025, the appellant seeks that the appeal be allowed and the judgment of the trial court and other consequential orders be reversed, reviewed and/or set aside.
2. The appeal is premised on the following grounds:
  - 1) That the Learned Magistrate erred both in law and fact in holding that land parcel no. Ngandori/Ngovio/1203 forms part of the estate of the deceased and therefore liable for distribution;
  - 2) That the Learned Magistrate erred both in law and fact in failing to find that the deceased had already distributed the estate known as Ngandori/Ngovio/1203 to the Appellant;
  - 3) That the Learned Magistrate erred in law and fact in finding that the distribution proposed by the Petitioners was reasonable;
  - 4) That the Learned Magistrate erred in law when she failed to consider all the evidence and submissions for and on behalf of the appellant in respect to the suit before her; and
  - 5) That the Learned Magistrate erred in law when she failed to consider *viva voce* evidence, choosing instead to rely on the parties' unsubstantiated and unsupported submissions, which had no evidential value.

**Background**

3. Following the death of the deceased on 09<sup>th</sup> January 2005, a grant of letters of administration was issued in his estate on 28<sup>th</sup> March 2018 to his daughter Judy

Muthoni Jeremiah, the respondent herein. The administrator filed summons for confirmation of grant dated 17<sup>th</sup> September, 2018, in which she stated that the estate of the deceased comprised of land parcel numbers Ngandori/Kiriari/734 and Ngandori/Ngovio/1203.

4. She named the 7 children of the deceased as: herself, John Muriuki, Jeremiah Kamau, James Njue Gacaga, Joseph Njeru, Hellen Njura and Leonard Mukundi. She also named the deceased's dependants as Paul Njue, John Njue, Murimi Njogu, Sarah Njue, Gacaga Njue and Comba Njue.
5. The administrator proposed that the estate be distributed as follows:
  - 1) Land parcel number Ngandori/Kiriari/734 to be inherited as follows:
    - i. 0.30Ha of it to be jointly held by Judy Muthoni Jeremiah and Hellen Njura.
    - ii. 0.30Ha to be held by John Muriuki.
    - iii. 0.30Ha to be held jointly by Paul Njue, John Njue, Comba Njue, Sarah Njue and Gacaga Njue.
    - iv. James Njue Gacaga, Jeremiah Kamau, Joseph Njeru, Leonard Mukundi and Murimi Njogu to each hold 0.30Ha.
  - 2) Land parcel number Ngandori/Ngovio1203 to be inherited as follows:

i. Patrick Njue-	0.20Ha
ii. John Muriuki-	0.10Ha
iii. Judy Muthoni Jeremiah-	0.05Ha
iv. Jeremiah Kamau-	0.05Ha
v. James Njues Gacaga-	0.05Ha
vi. Joseph Njeru-	0.05Ha
vii. Leonard Mukundi-	0.05Ha
viii. Hellen Njura-	0.05Ha
6. The appellant opposed this mode of distribution of Ngandori/Ngovio1203. He stated that the deceased had purchased the named land from one Mzee Ng'achi in the 1960's. Around 1987, the deceased was sued by one Telesio Munyi in Civil Suit No. 63 of 1987. The plaintiff therein claimed that the land belonged to his father, one Elias Nguo alias Muthiora Njeru. The appellant deposed that the deceased requested assistance to pay legal fees from his children but none offered to help except him. In 1989, the appellant offered to pay the legal fees and the purchase price for purchase of the land on behalf of the deceased.
7. Allegedly, this agreement was reached in the presence of 3 witnesses and he settled the amount owing to the vendor of the land, Mzee Ng'achi. The appellant

deposed that after this, the deceased allowed him to settle upon the land and he did so openly and in sight of his siblings. He stated that the mode of distribution adopted regarding that property completely disregards the wishes of the deceased. He urged the court to give him the whole of that property.

### **The evidence before the trial court**

8. The Protest was heard *viva voce*.
9. PW1 was John Muriuki Gacara, the protestor, who relied on the affidavit of protest as his evidence-in-chief. He stated that his father, the deceased herein, had purchased Ngandori/Ngovio1203 from Mzee Ngachi in the 1960's but he did not complete paying the purchase price. This is the reason why, in 1987, Telesio Munyi sued him for the balance of the purchase price. The witness stated that he stepped up and helped his father to pay for the land. In cross-examination, he stated that he did not have any receipts to prove that he paid for the land. That the case ended in 1997. On re-examination, he stated that the property was co-owed and that is why it was never signed over to him. He also did not sign the agreement but it was signed by 3 witnesses.
10. PW2 was Bishop Njorori Mbue, a friend of the deceased and his family. He stated that he was present when the deceased was purchasing both his properties, Ngandori/Kiriari/734 and Ngandori/Ngovio1203. He stated that for the latter, the purchase price was Kshs.164,000/=. That since the deceased was not able to raise the full amount, he asked one Nderi Nyaga to join him in paying for the land so that he could pay only half (Kshs.82,000/=) of the amount and they would become joint owners. The deceased was sued at some point for non-payment of his part of the purchase price and so he asked his sons for help to pay the amount.
11. He stated that the appellant is the only who helped by paying the Kshs.82,000/= which settled the matter. Thereafter, the deceased and Nderi Nyaga went to the Land Control Board and the land was registered in their joint names. Later in time, he called his children and told them that he is giving Ngandori/Ngovio/1203 to the appellant because he singlehandedly paid for it. He told his children to divide Ngandori/Kiriari/734 equally amongst themselves. He stated that when the deceased pronounced himself as such, the appellant started living on the land until the time the deceased died.
12. He was surprised to hear that the children of the deceased were disagreeing with these wishes. In cross-examination, he stated that the agreement was drawn by

the protestor's son and it was not signed by the deceased and the protestor, but it was signed by 3 witnesses, including him. That the deceased was sued over purchase of the named property and that only the protestor helped to pay the purchase price. The meeting where the deceased addressed his children was convened at the home of the deceased.

13. PW3 was Thomas Njagi who stated that he knew the deceased for more than 20 years. He also signed the agreement as a witness. He stated that when the deceased was purchasing land parcel number Ngandori/Kiriari/1203, the protestor is the one who gave the money to pay for it and so he resolved that the land would belong to the protestor. He stated that after sometime, he wanted the deceased to give him a piece of land to build a church but the deceased referred him to the protestor who was the owner of the land. The protestor told him that the land was too small because it was owned by 2 people and that he only owned half of the 3 acres.
14. He stated that the protestor had been living on that land since the 1980's, long before his father died. In cross-examination, he stated that the deceased called him and the other witnesses to a meeting held at the protestor's house where the witnesses signed an agreement. That the children of the deceased were all called to the meeting where the deceased told them all how the properties were going to be divided and they are all aware of the deceased's position on that property. That the protestor has been living on the land since his father gave it to him.
15. RW1 was Judy Muthoni Jeremiah who stated that Ngandori/Ngovio/1203 was the subject of a civil suit which the court determined holding that the joint owners be given 1.5 acres each. That their late brother, Patrick Njue was the only child of the deceased who had financial means at the time and he helped the deceased to pay for the expenses of the suit. That after the suit was determined, the deceased called all his children and directed that the late Patrick Njue subdivides his half of the land Ngandori/Ngovio/1203 equally amongst all his siblings. The process of subdivision began in 2005 but it remained pending after Patrick Njue passed on in 2009.
16. After the passing of Patrick, she took over to lead the family in dividing the land equally amongst all the siblings and several meetings were held in 2016 and 2017 to discuss this agenda. The protestor began making the allegations that he had purchased the land and the local administration got involved. He could not provide proof that he paid for this land. The protestor forcefully occupied the land even before the deceased died. She proposed that 0.5Acre of

Ngandori/Ngovio/1203 should be given to the family of the late Patrick Njue since he financed purchase of the land and then the remaining 1 acre should be held jointly by the remaining children of the deceased.

17. She stated that it would be unfair to give the whole of the deceased's portion of Ngandori/Ngovio/1203 to the protestor yet he also got a part of Ngandori/Kiriari/734. She denied that the protestor gave any money towards purchase of the property, and that the property was given to the protestor by the deceased. In cross-examination, she stated that she was not sure if the protestor paid any money towards the civil suit against their father. That the protestor moved into the piece of land to occupy in before the deceased died but the deceased did not take any steps to remove him from it even though she was the one farming on it. She stated that before his death, the deceased subdivided parcel number Ngandori/Kiriari/734, but that Ngandori/Ngovio/1203 is still in his name.

18. RW2 was Jeremiah Kamau Ileri whose witness statement was exactly the same as the one drawn by RW1. He stated that regarding Ngandori/Ngovio/1203, there is an agreement but it is not signed by the deceased or the protestor. On cross-examination, he stated that when the civil suit over the named property was ongoing, RW1 was using the land but the protestor moved into it forcefully. He stated that the late Patrick Njue was the one helping the deceased with purchasing the land and the deceased charged him with subdividing the land and distributing it amongst all his children equally.

### **Decision of the Trial Court**

19. The trial court considered the meaning of 'gift *inter vivos*' according to the Black's Law Dictionary. It relied on section 42 of the Law of Succession Act and the cases of **In re Estate of The Late Gedion Manthi Nzioka (Deceased) [2015] KEHC 944 (KLR)** and **In re Estate of Phylis Muthoni M'inoti (Deceased) [2019] KEHC 1934 (KLR)** and determined that Ngandori/Ngovio/1203 was not passed to the protestor by the deceased before his death. That the conditions precedent to make the land a gift *inter vivos* were not met.

20. The trial court also noted that the agreement produced as evidence and dated 21<sup>st</sup> February 1989 was not executed by the protestor or the deceased or any of the beneficiaries who were purportedly present at the meeting. The Magistrate found it inconceivable that for the 16-year period between 1989 when the

deceased allegedly gave his portion of the land to the protestor in a family meeting, and 2005 when the deceased died, the property was not voluntarily transferred to the protestor to perfect the purported gift *inter vivos*.

21. In considering the agreement produced as evidence, the trial Court noted that the deceased intended that the property would pass to the protestor if the civil suit against him would be determined in his favour. It relied on the case of **In re Estate of Godana Songoro Guyo (Deceased) [2020] KEHC 3970 (KLR)** and stated that any gift by the deceased before his death should not be conditional in any way. The trial Court determined that parcel number Ngandori/Ngovio/1203 formed part of the estate and it was divided amongst the beneficiaries; the estate of Patrick Njue taking 0.5 acres while the remaining 8 beneficiaries taking the remaining 1 acre in equal shares.

### **Parties' Submission on Appeal**

22. The appeal herein was canvassed by way of written submissions.

23. The appellant relied on the agreement dated 21<sup>st</sup> February 1989 which was produced as evidence and submitted that Ngandori/Ngovio/1203 was a gift *inter vivos* to him by the deceased within the meaning of section 42 of the Law of Succession Act. He also relied on the case of **In re Estate of Nahason Arimba Ndiira (Deceased) [2019] KEHC 9956 (KLR)**, **Nkirote & 2 others v M'Arimba [2024] KECA 1062 (KLR)**, **Martha Wanjiku Waweru v Mary Wambui Waweru [2007] KEHC 1655 (KLR)**, **High Court Succession Cause No. 15 of 2015 In the Estate of The Late Gichunge M'itwerandu alias Githungu M'Nthiiri and Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others [2021] KEHC 5182 (KLR)**. He argued that in the same way the beneficiaries followed the wishes of the deceased in distributing Ngandori/Kiriari/734, they should also follow the same intentions for Ngandori/Ngovio/1203.

24. The respondent submitted that whatever gift was given to the appellant was incomplete. She relied on the case of **In re Estate of Godana Songoro Guyo (Deceased) (supra)** where the court discussed the meaning of gifts *inter vivos*. That the protestor did not prove that he paid for the deceased's portion of parcel number Ngandori/Ngovio/1203 or that the deceased gave it to him as a gift during his lifetime.

### **Issue for Determination**

25. The issue for determination is whether the appeal should succeed.

## Analysis and Determination

26. The appellate court makes its decision based on the evidence on record in the trial court. The case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**, held as follows on the role of the Court on Appeal:

***“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”***

27. The protestor contends that the deceased gave him parcel number Ngandori/Ngovio/1203 because he paid the purchase price for it on his behalf. The succession court is only tasked with examining the evidence to ascertain if the property was a gift, and if it was, whether it should be considered before distributing the estate of the deceased. The trial court took up this task and examined the evidence before it.

28. The arguments brought expose the thin line between the process of acquiring the land parcel number Ngandori/Ngovio/1203 and its passing on as a gift in succession before the death of the deceased. PW1, the protestor, stated that after he took it upon himself to help his father to pay for the property, his father told him that he would take the land as his own. He produced an unsigned translated agreement between him and the deceased dated 21<sup>st</sup> February 1989, also purportedly signed by 3 witnesses. The contents of the agreement are as follows:

***“AGREEMENT BETWEEN IRERI KAMAKIA ID/NO.6452129 AND JOHN MURIUKI GACAGA***

***I IRERI KAMAKIA ID/NO. 6452129 wish to state that due to my financial problems, I have requested my son John Muriuki Gacaga to provide funds to pay for the legal fees in Civil Case No.63 of 1987 Embu where my Land Parcel No. NGANDORI/NGUVIU/1203 was the subject matter.***

*I therefore state that in the event, this suit is determined in my favor, the said land will be John Muriuki Gacaga's wholly. I state this on the 21<sup>st</sup> day of February, 1989 before these witnesses:-*

*(1) Bishop Njururi ID/NO. 3758191 SIGNED*

*(2) G. Nyaga ID/NO. 3758844 SIGNED*

*(3) Thomas Njagi Rundire ID/NO. 3821133 SIGNED*

*CERTIFICATE OF TRANSLATION*

*I WAIRIMU MUBARI, an Advocate of High Court of Kenya do hereby certify that the above agreement is directly translated from Kiambu language to English Language and confirm that I am conversant with both languages.*

.....

*WAIRIMU MUBARI ADVOCATE"*

29. PW1 stated that when the civil suit against the deceased was determined, he paid Kshs.85,000/= for the land, being the amount owed by the deceased for his half of the land. PW2 and PW3 are 2 of the witnesses who purportedly signed the agreement. They stated that the deceased entered into the said agreement and he intended to give his half of the land to the protestor.

30. On the other hand, RW1 stated that indeed the deceased was owing money for the land but he was helped by the late Patrick Njue, his son, who was working for KenGen at the time. According to her, it is the family of Patrick Njue that should get 0.5 acres of the land and the rest of the children of the deceased should hold the remaining 1 acre in equal shares. She also did not provide any proof of payment of the money by Patrick Njue. In essence, none of the protagonists proved paying for and owning the land.

31. The question of who paid for and properly owns Ngandori/Ngovio/1203 falls within the jurisdiction of the Environment and Land Court as it speaks to acquisition of the rights to the land. Whether or not a determination of this issue will affect distribution of the estate is debatable. Before the succession court, the parties have presented a certificate of official search to the land which indicates that the land Ngandori/Ngovio/1203 is owned by the deceased and another person, each holding half share. This is the only consideration that matters in succession.

32. When a deceased dies without a will, his "estate" under the Law of Succession Act constitutes all that property of which he could, prima facie, freely dispose. Section 3 of the Law of Succession Act provides that:

***“ ‘estate’ means the free property of the deceased” and are “free property’ in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his life time, and in respect of which his interest has not been terminated by his death.”***

33. Further, the role of an administrator is clearly spelt out under section 83 of the Law of Succession Act. By and large, this role involves identifying the estate of the deceased and overseeing its administration to the *bona fide* beneficiaries. This was clearly done in this case because his properties including the half share of the deceased in Ngandori /Ngovio/1203 was identified to the court. Besides that, the process of acquisition of that half share of the property by the deceased is a question to be determined before a different forum and not this court. Moreover, even if the succession court was to consider this question to influence its decision on distribution of the estate, that would still amount to overreach, unless the issue is considered from the point of a gift under the Law of Succession Act.

34. In the case of **Ngugi v Mukuria [2025] KEHC 11395 (KLR)**, the court stated as follows regarding gifts under the Law of Succession Act:

***“It is a cardinal rule in our jurisprudence that the right to dispose of property by will or gift is exacting in its requirement as observed by Nyamweya J. (as she then was) in Re: Estate of the Late Gedion Manthu Nzioka (deceased) [2015] eKLR where she stated as follows:***

***“In Law, gifts are of two types (gift inter-vivos and gifts made in contemplation of death (gifts Mortis Causa). For gifts inter-vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing, or by delivery, by a way of a declaration of a trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of a trust in writing. Gift’s inter- vivos must be complete for the same to be valid.”***

35. Section 42 of the Law of Succession Act provides for gifts *inter vivos* as follows:

***“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; or***

***(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.***

36. For a gift *inter vivos* to be acknowledged as such by a court, the gift must be perfected. In this case, if it were considered that the protestor was given the deceased's half of Ngandori/Ngovio/1203 as a gift by deceased before his death, there should have been clear unmitigated evidence of its formal transfer to him by the time the deceased died. In any event, the alleged gift was allegedly given through the 1989 agreement which none of the makers thereof signed. The deceased died sixteen years later in 2005.

37. One might wonder whether it was, potentially, a gift *mortis causa*, which did not have the condition of perfection. In this case, Ngandori/Ngovio/1203 could not have been a gift *mortis causa* as it was not given in contemplation of death under the conditions specified in section 31 of the Law of Succession Act.

38. The trial court correctly noted that the protestor had a great many years to perfect the gift but he did not do so. In his evidence, PW1 stated that he failed to have the property registered to him because it was in the names of 2 people. That is not a valid reason given that there were over fifteen years prior to the deceased's death, to sort out that issue.

39. RW1, on the other hand, stated that after the deceased secured his half of the land through the funds provided by his late son Patrick Njue, he directed that the land be subdivided so that his children get equal shares. That while in the process of subdividing the land, Patrick Njue died in 2009 before the process was completed. In any event, the half share of Ngandori/Ngovio/1203 remains in the name of the deceased, and it must now be subjected to the provisions of the Law of Succession Act on distribution.

40. Section 38 of the Law of Succession Act provides:

***"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."***

41. On the above basis, the trial court gave the family of the late Patrick Njue 0.5 acres of Ngandori/Ngovio/1203 while the remaining 1 acre was left to be held jointly by the remaining 8 beneficiaries. In my view, there is no basis for doing this because the reason for granting the family of the late Patrick Njue the 0.5 acres

the is something that only the Environment and Land Court has power to pronounce; that is, acquisition and ownership of the land. In this regard, it is fair that the property be distributed according to Section 38 of the Law of Succession Act.

### **Disposition**

42. In the result, I find that the appeal must partially succeed, and I would determine and order as follows:

- a) that the deceased's half share in Ngandori/Ngovio/1203 constitutes part of his intestate estate and;
- b) that the said half share be distributed amongst all the deceased's beneficiaries in equal shares. For clarity, these beneficiaries are Judy Muthoni Jeremiah, John Muriuki, Jeremiah Kamau, James Njue Gacaga, Joseph Njeru, Hellen Njura, Leonard Mukundi, Patrick Njue (deceased), Josphat Njogu (deceased) and Joyce Wanjovi (deceased).

43. Orders accordingly.

**Delivered, dated and signed at Embu High Court this 22<sup>nd</sup> day of April, 2026.**

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**R. MWONGO  
JUDGE**

**Delivered in the presence of:**

1. Okwaro for Respondents
2. Ombongi holding brief for Rugaita for Appellant
3. Stella Kithinji - Court Assistant