Muiruri & 5 others v Muiruri (Civil Appeal 295 of 2018) [2024] KECA 879 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KECA 879 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 295 OF 2018

SG KAIRU, F TUIYOTT & JW LESSIT, JJA

JULY 31, 2024

BETWEEN

GEOFFREY KINYANJUI MUIRURI .... 1ST APPELLANT

JAMES KIAGO MUIRURI .... 2ND APPELLANT

PETER NJOROGE .... 3RD APPELLANT

GERALD KIMANI MUIRURI .... 4TH APPELLANT

JOHN MWAURA MUIRURI .... 5TH APPELLANT

FREDRICK KITHUKU MUIRURI .... 6TH APPELLANT

AND

RAPHAEL NJOROGE MUIRURI .... RESPONDENT

(Being an appeal from the Judgment and /or Order of the High Court of Kenya at Nairobi (Musyoka, J.) delivered on 14th June 2018 in Succession Cause No. 2397 of 1997.)

JUDGMENT

1. Before this Court is an appeal against the judgment of the High Court of Kenya at Nairobi (Musyoka, J.) delivered on 14th June 2018 in Succession Cause 2397 of 1997; In the matter of the estate of Joseph Njoroge Muiruri (deceased).

2. Brief background of the matter is that the deceased herein died on 22nd January 1975. The deceased was polygamous, he had three wives; Phyllis Nyambura Muiruri (Phyllis) (1st wife - deceased), Eunice Wangari Muiruri (Eunice) (2nd wife), and Jane Wanjiru Muiruri (Jane) (3rd wife- deceased) each with whom he had children.

3. Samuel Njoroge Muiruri, Joseph Gitau Muiruri and William Mwaura Muiruri filed for letters administration intestate in their capacities as the surviving sons to the deceased. In the application they listed only two properties; Sigona L.R. No. 631/215 and Sigona Plot No. 50/286/33 as the assets of the deceased. The grant was made to them on 22nd December 1997 and confirmed on 11th June 1999 in an application dated 24th March 1999 where the two properties were to be distributed equally amongst themselves.

4. Shortly thereafter, an application dated 22nd July 1999 was filed at the request of Fredrick Kithuku Muiruri, the 6th appellant for its cancellation or revocation on grounds, inter alia, that the same had been obtained fraudulently by making false statement; and that the administrators had concealed certain facts, to wit that the deceased had been survived by other persons apart from themselves and consent was not sought from them when applying for the letters of administration. The administrators did not oppose the application and by the orders issued by Githinji, J. on 27th September 1999 the grant given on 22nd December 1997 was revoked, confirmation orders of 11th June 1999 were set aside and a certificate of confirmation of grant issued to them annulled. Peter Njoroge, hereinafter the 3rd appellant, Raphael Njoroge Muiruri, hereinafter the respondent, and one Samuel Njoroge Muiruri were appointed as new administrators of the estate of the deceased.

5. The matter that the Superior Court below was called to determine and which is the subject matter of this appeal is an application dated 2nd June 2004, filed at the instance of the 3rd appellant, one of the administrators' of the deceased estate, which sought for confirmation of letters of administration issued on 27th September 1999. In his affidavit sworn on even date, the 3rd appellant averred that the deceased was survived by three wives. However, he did not list the survivors of the deceased from each of the three houses. He also did not list the assets that he proposed to be distributed, although he had attached a schedule of the proposed distribution which included the distribution of Plot No. 215 at Kericho town, Plot 5 at Kericho Swahili, Plot at Kipkellion town, 9 acre farm at Mangu Nakuru, 16 acre farm at Sigona, and Plot No. 74 Sigona, equally between himself, the respondent and one unnamed person.

6. One, Joseph Gikaru Muiruri (Joseph) a beneficiary of the deceased estate and son of the deceased widow, Eunice, filed an affidavit in protest sworn on 22nd April 2009. He swore the affidavit on behalf of the members in that house (2nd house) and that of Phyllis (1st house).

7. He averred that prior to 1960 the entire family of the deceased was living in Kericho Parcel No. 41 Kericho which he had always known to be Plot No. 05 Swahili Village Kericho. He further stated that later on the deceased allocated Plot No. 50/286/33, Sigona and Plot No. 74 (Sigona Kiambu) to Eunice and that she and her children moved from Kericho to the said plots. In 1975 he allocated Parcel No. 631/215 Kericho to the deceased Phyllis and together with her children they moved there and lastly that in the same year the deceased allocated Parcel Number 41 (05 Swahili Village) Kericho to his children from the house of his deceased widow Jane. Further, he averred that during the 1990's tribal clashes three of Jane's children: one Jared Kimani Muiruri, one Githuku Muiruri and the 3rd appellant, sought shelter in the land of the 2nd house, at Sigona 33, leaving behind on their land their brother John Mwaura Muiruri, the 5th appellant herein. He averred that after the clashes ended, the three later declined to leave Sigona 33 for their land. In conclusion he averred that each house should inherit the land which had been allocated to them by the deceased.

8. In a further affidavit sworn by Joseph on 12th May 2009 he detailed the survivors of the deceased from the three houses. In yet a further affidavit sworn on 21st September 2010 regarding the mode of distribution of the deceased estate, Joseph averred that his late father died intestate in 1975 thus under section 2(2) of the LSA, the applicable law on the distribution of his estate is Kikuyu Customary

Law. He averred that the Kikuyu Customary Law provided that in a polygamous family, division of deceased's properties should be done equally between the wives as households, but that the deceased was entitled to divide and allocate his properties during his lifetime or through oral will. In conclusion he averred that each house should be contented with what their father allocated them in accordance with the Customary Law since after the deaths of Phyllis and Jane, their late father's widows were buried in their respective lands at Mau Summit.

9. Various affidavits were filled by various parties and included those filed by the 3rd appellant sworn on 8th September 2010; Jackson Kairori Njoroge sworn on 8th November 2010; Grace Wangui Muiruri sworn on 8th November 2010; Eunice Wangari Muiruri sworn on 13th July 2012; the respondent sworn on 12th August 2014; and, William Mwaura Muiruri sworn on 10th March 2016.

10. The 3rd appellant stated in his affidavit that his mother passed away in 1973 leaving behind five (5) daughters and four (4) sons who were then aged between 17 years and 2 years. He averred that the deceased died intestate in 1975 while in the house of his deceased 3rd wife and that he left behind movable and immovable assets in the hands of the 1st and 2nd wives. It was his averment that the 1st and 2nd wives together with their children neglected them and denied them basic needs and access to the deceased's estate.

11. He further stated that in 1991 after the Rift Valley tribal clashes, he, together with his other siblings, went to Kikuyu, Sigona to the 2nd house to seek to know whether their deceased father had left anything for them and that is when one Samuel Njoroge Muiruri (deceased), son of the 2nd house, told them that he was waiting for them to grown–up so that he could distribute all the properties left by their deceased father to all the family members. It was his averment that they continued to live in poverty thus forced to report the matter to the area chief who summoned the children of the 1st and 2nd wives and they promised to take care of them.

12. In detailing the issue of issuance of grant, revocation of the same and thereafter issuance of grant to fresh administrators, the 3rd appellant stated that on 24th May 1999 the children of the 1st and 2nd houses went to where the 3rd house had built at Sigona Land 33 with hooligans and destroyed their houses claiming that the deceased had not left them anything. He stated that the said land is 16 acres and occupies both the 2nd and 3rd houses and added that the 1st and 2nd houses have joined hands to make sure that they do not get any share of the deceased's properties. He therefore pleaded with the Court to do justice and see that the children of the deceased, the 3rd house, had an equal share of all his properties.

13. The same averments were rehashed in the affidavit of Grace Wangui Muiruri, sister to the 3rd appellant and also a child of the 3rd house.

14. Jackson Kairori Njoroge, step brother of the deceased, in his affidavit confirmed that the deceased had three (3) wives and that he died intestate leaving a vast estate. He stated that he was conversant with Kikuyu Customary Law relating to distribution of property in polygamous family and indicated that he knew for a fact that the deceased had not distributed his properties to his children, houses or wives during his lifetime.

15. The respondent in his affidavit stated that the beneficiaries of the 1st house were not contented with the mode of distribution of the estate of the deceased by the beneficiaries of the 2nd house. Further, that he was not aware that the 2nd house had taken Plot No. 631/215 situated in Kericho and that to his knowledge, he knew that the estate of his deceased father was still intact pending distribution by the court.

16. Eunice, the 2nd wife of the deceased, in her affidavit stated that the deceased had settled his family before his demise. She stated that the 1st wife; Phyllis, and her children were settled at Plot No. 631/215 in Kericho which was a commercial property. Further, her children were bought property at Mau Summit. Eunice stated that on her part as the 2nd wife she was settled in Sigona/33. She averred that the deceased bought the land on loan from Settlement Fund Trustees (SFT) and directed her and her family to relocate there. It was her averment that the deceased was unable to repay the loan whereby SFT issued reminder letters and threatened to repossess the land. She stated that the deceased directed their son, Samuel Njoroge, and his wife Jemimah Njeri who were then employed as teachers to take up and repay the loan on the understanding that the land belonged to her and her children with them having a bigger share therein. Eunice further stated that her son and his wife proceeded to repay the said loan until the same was fully repaid long after the demise of the deceased.

17. Eunice stated that together with her children they put up permanent houses, and that Samuel and his wife put up a primary and secondary school known as Muguga Group of schools, on the said land. She indicated that they have been in exclusive possession of the said land since 1960, in the full knowledge of the children of the other two families. Lastly, she stated that Jane, the 3rd wife and her family were settled at Kericho Plot No. 5 Swahili village which was a commercial property and were also given land at Njoro in Nakuru and had been residing therein since 1960 exclusively. She added that following the tribal clashes she allowed some of Jane's children to reside on her parcel Sigona 33 and after the clashes were over, the children refused to vacate. At the end she stated that each house should inherit the land allocated to them prior to the deceased death and which they have exclusively occupied since the 1960s, and emphasized that parcel Sigona/33 was the share given to her and her children, as the 2nd house.

18. The averments by Eunice were reiterated in the affidavit of William Mwaura Muiruri, last born son of the deceased and from the 2nd house.

19. One Ruth Njoroge testified that she was a co-wife of Jemimah Njeri, both wives of a deceased son of the deceased, one Samuel Njoroge Muiruri. She testified that only Eunice, the second wife of the deceased, lived in Sigona property and that it was only the 2nd house that had developed the Sigona property.

20. The matter proceeded by way of viva voce evidence, with all the above mentioned persons testifying. The learned Judge of the Superior Court, W. Musyoka, J. identified the main issue for determination as being whether the deceased had distributed his property during his lifetime according to the Kikuyu Customary Law. Secondly whether the 2nd house paid the debt of the SFT over the property Sigona 33.

21. By the judgment dated 14th June 2018, the learned Judge found that the deceased had settled his family in accordance with the customs of his community by the time he died in 1975, so that the 1st house occupied and lived on 631/215, the 2nd house occupied and lived on Sigona 33, and the 3rd house occupied and lived on Plot No. 5, Swahili Village, Kericho. He further added that the action the Court could undertake at that stage was to merely confirm what the deceased had done, for to do otherwise would be to fundamentally disrupt the lives of the members of all the three houses.

22. The learned Judge issued the following final orders;

> "(a) That I hereby confirm the administrators appointed by the Court on 27th September 1999;
>
> b. That the estate of the deceased shall be distributed as follows-

i. To the 1st house, of Phyllis Nyambura MuiruriPlot No. 631/215 Kericho – to be shared equally amongst all the sons and unmarried daughters in that house;

ii. To the 2nd house, of Eunice Wangari MuiruriLR No. 50/286/33 and 74 Sigona, Muguga – to be shared equally amongst all the sons and unmarried daughters in that house; and

iii. To the 3rd house, of Jane Wanjiru Muiruri – Plot No. 41 (also known as Plot No. 5) Swahili Village, Kericho – to be shared equally amongst all the sons and unmarried daughters in that house;

c. That actual distribution on the ground shall take into account the developments if any made by the persons entitled in each case;

d. That a certificate of confirmation of grant to issue accordingly;

e. That each party shall bear their own costs; and

f. That any party aggrieved by the orders made in this judgment shall be at liberty to challenge the same at the Court of Appeal within twenty-eight (28) days hereof."

23. Aggrieved and dissatisfied with the said judgment the appellants preferred an appeal to this Court. In their memorandum of appeal dated 20th August 2018 the appellants faulted the learned Judge on seven (7) grounds:

i. that the learned Judge erred in law and in fact by inter alia misguiding himself on the process of inheriting property under Kikuyu Customary Law thus arrived at a wrong conclusion that the deceased had settled his family in accordance with the customs of his community which was not the case;

ii. by heavily relying on the contents of letter from the District Commissioner, Kericho in support of his judgment yet the communication between the Public Trustee and the District Commissioner did not show consensus concerning inheritance under Kikuyu Customary Law prior to the enactment of the *Law of Succession Act*;

iii. in concluding that the deceased had settled his family in accordance with the customs of his community which was not the case;

iv. by overlooking crucial material evidence placed before it confirming that the deceased had not distributed his properties inter vivos which promoted unequal distribution of property among his male children;

v. by basing his decision on presumptions rather than the facts and evidence adduced by the parties;

vi. by heavily relying on the contents of the letter from the District Commissioner, Kericho in support of his judgment yet the communication between the Public trustee and the District Commissioner did not show consensus concerning inheritance under Kikuyu customary law prior to the enactment of the *Law of Succession Act*;

vii. by failing to take into account and/or evaluate the appellants' evidence as well as submissions.

24. We heard this appeal through this Court's virtual platform on the 7th November 2023. Learned counsel Mr. Ntogaiti held brief for Ms. Machio for the appellants, while learned counsel Mr. Njuguna was present for the respondent. Both counsel relied on their written submissions dated 6th March 2019 and 4th November 2019 respectively, which they highlighted briefly. Learned counsel Mr. Gitau indicated that he was representing one party from the 2nd house and that he had not filed any submissions but was associating himself with the submissions of Mr. Njuguna for the respondent. Learned counsel Mr. Ndegwa filed his written submissions dated 22nd March 2019.

25. Mr. Ntogaiti condensed the appellants' seven (7) grounds of appeal to a single issue whether or not the deceased distributed his property during his lifetime or whether his property was distributed after his demise according to the Kikuyu Customary Law.

26. Mr. Ntogaiti gave a synopsis of the nature of the deceased family. He urged that the deceased was polygamous and had three (3) wives all whom are deceased. It was noted that the deceased had eight (8) children with the first wife Phylis Nyambura, they had seven (7) children with his second wife Eunice Wangari, and nine (9) children with his third wife Jane Wanjiru,

27. He argued that the learned trial Judge erred in holding that the deceased had distributed his property among his three (3) wives and settled them. He relied on the book by Eugene Gotran- Reinstatement of African Law, an article by Dr. Patricia Kameri-Mbote in The Law of Succession in Kenya: Gender Perspectives in Property Management and Control and urged that the same position was also adopted in the case of Karanja Kariuki vs. Kariuki Civil Appeal No. 54 of 1981. The position being that distribution of the estate in intestacy among the Kikuyu community was determined by whether the family was polygamous or monogamous. That in polygamous situations, the household was divided into "nyumba" or houses. That a house comprised a wife and her children. The house of each wife got an equal share of property irrespective of the number of children it had.

28. That the position of succession of property according to the Kikuyus, a person known as the Muramati was appointed who stood as the administrator of the estate, or in the alternative, the sons of a deceased were allocated property which can be taken to be distribution of property inter vivos unless the same is recalled during the life time of the deceased.

29. Counsel urged that it is their submission that the 2nd to 6th appellants who are sons from the 3rd house, at the time of the demise of the deceased on 22nd January 1975, none of them had capacity to marry, all of them being minors. It was further argued that at the time of the death of the deceased, the 6th appellant was two (2) years old and therefore, if the learned Judge had considered that the property had been distributed according to Kikuyu Customary Law, there was no point in time where it would be said that either of the 4th to 6th appellants had been granted properties in accordance with the Kikuyu Customary Law. That their mother died in 1973 predeceasing the deceased, forcing the deceased to move to Plot 41 in Swahili village to take care of the minors and that is where he stayed until his demise. In addition, counsel submitted that Swahili village was not ancestral property as the 6th appellant had confirmed that their mother was buried in a public cemetery.

30. Mr. Ntogaiti submitted that the property at Sigona Limuru is substantially big thus the reason why the appellants were interested in the property. It was further argued that the learned Judge erred when he formed an opinion that the 2nd house had cleared the debts in respect to the Limuru Sigona property hence giving them an entitlement to it, whereas, in the actual sense, there was no debt owed by the deceased. And that from the wording of the eviction notice the deceased was not in debt but, there was cautionary notice that in the event that he was, he should pay and if that was not the case, he should ignore the notice.

31. Lastly, counsel vehemently emphasized that the deceased did not, during his lifetime distribute any of his property to either family according to the manner proposed in the various documents and it was the appellants' position that the same could be distributed at the very least equally or in line with the Kikuyu Customary Law by virtue of the fact the deceased died in 1975 prior to the commencement of the *Law of Succession Act*.

32. Mr. Njuguna on his part relied on the respondent's written submissions dated 4th November 2019 and submitted that the Judge of the superior court properly held that the deceased had distributed his properties among his three (3) wives and settled them in 1960s and that even after his death in 1975, his families continued living as such until in 1992 when some of the children of the 3rd house, who are the appellants, sought refuge in the premises held by the 2nd house in Sigona, because of tribal clashes and after the clashes refused to vacate the land.

33. Counsel contended that in a letter dated 22nd February 1980, 19 years before any claim was laid over Sigona property, the District Commissioner Kericho had clearly pointed out that the deceased had settled his three (3) wives separately. Counsel urged that the1st house was settled in the commercial property at Kericho Township being Plot No. 631/215; the 2nd house settled at Sigona, Muguga; and the 3rd house settled on Plot No. 5 Swahili village and that since 1960 the Sigona property, before the demise of the deceased, was in sole occupation of the 2nd house.

34. With regards to the repayment of loan towards the purchase of Sigona property, counsel submitted that the 3rd house did not contribute at all to its repayment. Mr. Njuguna argued that it was confirmed in evidence that by 1997 the 3rd house had not put forward any claim on Sigona property. Secondly, that the 1st and 3rd houses have occupied their respective properties and made developments on them without consulting each other or members of the 2nd house.

35. Counsel urged that it was argued that by reference to the demands of the Settlement Fund Trustees way back in 1989, demanding payments of arrears of the loan, it was evident from the statements that the 2nd house was the one that settled the entire loan without any contribution from the 1st and 3rd houses, and that the same was admitted by the two houses. Counsel further submitted that the 3rd house had not laid any claim on Sigona as they were satisfied with the plot they had been given at Kericho. In conclusion Mr. Njuguna emphasized that it was clear that the deceased had separately settled the three (3) houses from 1960. Further, that all the families have since developed their respective properties without consultation with the other families and therefore it would be highly unjust to disrupt the distribution which had been done by the deceased during his lifetime.

36. The respondent in his written submissions relied on the case of Moses Karanja Kariuki vs. Naomi Njeri Kariuki & 4 Others [1983] eKLR for the proposition that for the Kikuyu tribe, the custom was that a father has to distribute his land among his heirs during his lifetime if possible, and usually did so. That the distribution happened when a son married and that such gift counted as that son's share if his father did not revoke this gift to him before he died.

37. Learned counsel Mr. Gitau indicated that he aligned himself with the submissions by Mr. Njuguna counsel for the respondent in their entirety.

38. Mr. Ndegwa on his part relied on his written submissions dated 22nd March 2019. He adopted the submissions of Mr. Njuguna. Counsel relied on the affidavit of the only surviving widow of the deceased at the time of trial, one Eunice Wangari, sworn in support of the 2nd house, which she adduced as evidence. He urged that it was her evidence in Court, that by the time the deceased died in 1975 he had already settled his family way back in the 1960 and that the families lived as such even after

the demise of the deceased. He urged that the evidence was corroborated by other witnesses. He also relied on letters written by the District Commissioner, Kericho in 1980 confirming that the deceased distributed his properties to his three wives before he died.

39. Counsel relied on the case of *Moses Karania Kariuki vs. Naomi Nieri Kariuki & 4 Others* l983] eKLR where Madan, Potter and Kneller, JJ.A. held that:

> " Property of a Kikuyu man could be distributed during lifetime to his children, or he could give directions on the administration and distribution of his property shortly before his death."

40. Although Mr. Ndegwa drew our attention to an affidavit of the deceased Rapheal Njoroge who was an administrator of the estate of the deceased, the appellants counsel objected to it on grounds the affidavit was not part of the record of the appeal, and more importantly, it was sworn on 14th June 2018, which was after the impugned judgment was delivered. We uphold the objection for the simple reason that what Mr. Ndegwa should have done is to file the document he intended to rely on in this appeal in the manner prescribed under Rule 94 (1) & (2) of the Court of Appeal Rules, which provides:

> " 94. Preparation and service of supplementary record
>
> 1. If a respondent is of the opinion that the record of appeal is defective or insufficient for the purposes of the respondent's case, he or she may lodge in the appropriate registry four copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his or her opinion, required for the proper determination of the appeal.
> 2. The respondent shall, as soon as practicable after lodging a supplementary record of appeal, serve copies of it on the appellant and each other ***respondent who has complied with the requirements of rule 81."***

41. We think that, even then, compliance with the above Rule would not have assisted Mr. Ndegwa's client to have the affidavit admitted at this stage. This is a first appellate Court and our mandate under Rule 31 of the Court of Appeal Rules is to re- appraise the evidence adduced in the superior court and draw inferences of fact. The Court cannot deal with new issues or new evidence that had neither been raised nor considered at the trial save in instances where it has allowed taking of additional evidence. See Mary Kitsao Ngowa & 36 Others vs. Krystalline Limited [2015] eKLR.

42. Mr. Ntogaiti in rejoinder to the submissions by counsel, relying on the case of Eliud Maina Mwangi vs. Margaret Wanjiru Gachangi [2013] eKLR submitted that if a party relied on Customary Law, then they had to call in evidence to demonstrate that the process had taken place. Counsel restated the appellants' position that the issue of the deceased settling wives or rather houses does not form part of customary process of distribution of the estate of the deceased. Lastly, he ruled out that the children of the 3rd house went to Sigona because of tribal clashes, but rather they were following up on their father's estate.

43. This is a first appeal and as such our mandate as a first appellate court, it behooves us to re-evaluate, re-assess and reanalyze the evidence on record and determine whether the conclusions reached by the

learned trial Judge should hold. In the case of Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212 this Court espoused that mandate or duty as follows:

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

44. We are also mindful that we can only depart from the findings by the trial court if they were not based on the evidence on record; where the said court is shown to have acted on wrong principles of law as held in Jabane vs. Olenja [1986] KLR 661; or if its discretion was exercised injudiciously as held in Mbogo & Another vs. Shah [1968] E.A.

45. We have considered the evidence that was adduced before the trial court, and the rival arguments of counsels to the parties. We have also subjected the evidence to a fresh evaluation, examination and analysis, while bearing in mind our limitation, having neither seen nor heard the witnesses, and giving the due allowance. Having done so, we find that there is only one issue for determination in this appeal, which is whether the deceased distributed his property to his three wives and or households during his life time.

46. There are facts which are not in dispute. We find that there is no dispute that the deceased was from the tribe of the Kikuyu, and that the applicable law is the Kikuyu Customary Law. There is no dispute that the deceased was polygamous, married to three wives and had 24 children between the three wives. There is no dispute that apart from the second wife, the first and third wives predeceased the deceased.

47. It is disputed by the appellants that even though the three households were living in separate properties from the 1960s up to the time the deceased died, that that did not constitute distribution of the deceased estate during his life time under Kikuyu Customary Law.

48. The appellants' position is that the deceased did not distribute his property before he died for three reasons. One that the 2nd to 6th appellants were minors with no capacity to marry by the time of his demise, therefore they could not have been given property at time of marriage; two, that Swahili village where the 3rd house was living was not ancestral property and that it was the reason their mother who predeceased their father, was buried in a public cemetery, and, the property at Sigona Limuru is substantially big thus the reason why the appellants (or respondents?) were interested in the property.

49. The respondent's position was; one, that the deceased had distributed his properties among his three (3) wives and settled them in 1960s, and that even after his death in 1975, his families continued living on the properties the deceased settled them in until 1992 when some of the children of the 3rd house, who are the appellants, sought refuge in the due to tribal clashes; and three, with regards to the repayment of loan towards the purchase of Sigona property, counsel submitted that the 3rd house did not contribute at all to its repayment and so cannot lay any claim to that property.

50. The appellants and the respondent both relied on the book by Eugene Cotran: Reinstatement of African Law and the case of Karanja Kariuki vs. Kariuki Civil Appeal No. 54 of 1981 on what constitutes distribution of the estate of a Kikuyu man inter vivos. The learned trial Judge himself relying on the texts and the cited case, considered the issue whether a person could dispose of his property during his life time, and concluded that he could. The learned Judge was right that a Kikuyu man could dispose of his property through distribution to his wives and children during his lifetime. The issue is whether the deceased in this case distributed his property during his life time.

51. We have examined the appellants' argument on this point. The first one was that the 2nd to 6th appellants were minors with no capacity to marry by the time of his demise, therefore they could not have been given property as there was no time they could have married before their father's demise. This argument presupposes that distribution of an estate during the lifetime of a deceased could only be done through sons of the deceased upon their marriage. That argument defeats the authorities that Mr. Ntogaiti relied upon, and cannot be correct as the authorities clearly gave two scenarios of distribution. That in polygamous situations, the household was divided into houses which comprised a wife and her children; and that the house of each wife got an equal share of property irrespective of the number of children she had. In this case, it did not matter that the sons of the household were married or not, for distribution was not based on marriage but on household. It is this option that the respondent and the members of the 2nd house said the deceased applied.

52. There was an alternative form of distribution where the sons of a deceased were allocated property upon marriage, which was taken to be distribution of property inter vivos unless the property was recalled during the life time of the deceased.

53. We have considered the entire evidence adduced before the learned trial Judge and find no evidence or even allegation that the deceased gave any sons(s) property during his lifetime. The appellants' position was that they were too young to marry, being the children of the youngest wife to their father. They called their key witness, Jackson Kairori Njoroge, a step brother of the deceased. His evidence was that the deceased had three wives, several children and a vast estate. He testified that he was conversant with Kikuyu Customary Law relating to distribution of property in a polygamous family, and that he knew for a fact that the deceased had not distributed his property before he died. The appellants had the burden under section 107(2) of the *Evidence Act* to adduce evidence to establish the allegation. However, the person they called did not substantiate the allegation that no distribution ever took place. Section 107 (2) of the *Evidence Act* prescribes thus:

> " 107. Burden of proof.
>
> (1) ...
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

54. The appellants second argument was that the Swahili village where the 3rd house was living was not an ancestral property and that it was the reason their mother who predeceased their father, was buried in a public cemetery.

55. We have examined the evidence of the parties and find that apart from the 3rd appellant there is no evidence to the effect that the late Jane, the 3rd wife of the deceased was buried in a public cemetery.

56. There was direct evidence from Eunice, the second wife of the deceased who testified in this case before she died. Her evidence was that Jane, the 3rd wife and her family were settled at Kericho Plot No. 5 Swahili village which was a commercial property and were also given land at Njoro in Nakuru and that they resided therein since 1960 exclusively, and continued living there even after the deceased died. She also testified that the first house was given a commercial plot in Kericho and land in Mau Narok.

57. There was also the evidence of Joseph Gikaru Muiruri (Joseph) son of the deceased widow, Eunice that filed an affidavit sworn on 12th May 2009 and averred, after outlining the property shared between the deceased wives as evidenced by Eunice, that each house should be contented with what their late father

allocated them in accordance with the Customary Law. He also averred that after the deaths of Phyllis and Jane their late father's widows, they were buried in their respective lands at Mau Summit.

58. Apart from the parties and their witnesses, there was the evidence of the District Commissioner Kericho, in the documents adduced as evidence in the case. There are two letters from the District Commissioner Kericho to The Public Trustee dated 22nd February 1980 and 29th August 1980; and the letter from The Public Trustee to the District Commissioner, Kericho dated 4th February 1981. The discussion in the letters was in regard with whether the deceased had distributed his property to his family before he died, and if not, the Public Trustee would take over to administer the estate until distribution is done. It was resolved that the deceased had settled each of his wives and their children in separate properties and that there was need to interfere.

59. We also noted the application for confirmation of grant dated 2nd June 2004 and filed by the 3rd appellant, the respondent and one William, which matter formed part of the issue before the trial Court. The affidavit attached a list of properties proposed to be distributed equally between them, which included Plot No. 215 at Kericho town, Plot 5 at Kericho Swahili, Plot at Kipkellion town, 9 acre farm at Mangu Nakuru, 16 acre farm at Sigona, and Plot No. 74 Sigona. From this affidavit it is evident the estate of the deceased comprised of other properties other than the three identified by the learned trial Judge, as set out by the parties. Apparently, the estate was 'vast' as the deceased's half-brother Jackson stated, and the families got more than what was disclosed and made an issue in this case. More importantly, they are not raising issues concerning the distribution of the rest of the estate. From this evidence it is abundantly clear that what the appellants put forward as proof that no distribution took place does not assist their case.

60. The appellants contested the respondent's position that there had been distribution of the estate by the deceased inter vivos, and challenged them to show the evidence they had to prove it. There is evidence to show that the deceased settled each wife and her children in specific and separate pieces of land as long ago as between 1960 and 1962. This is according to the only surviving widow at the time of the trial, Eunice. That evidence was supported by Joseph her son; Ruth Njoroge, the widow of her deceased son Samuel. Also supporting that position was

Raphael Njoroge the son of the 1st house who said that the deceased distributed his estate to his three households before he died. He was 71 years old when he testified in this case.

61. The 3rd appellant in his evidence stated that when he and his sibling went to seek refuge at Sigona, Samuel Njoroge Muiruri, son of the 2nd house told him that their father had not distributed his estate and that he was waiting for them to grow up so that he could do the distribution. Unfortunately, Samuel is deceased and he did not file any affidavit or even statement stating the alleged facts. That declaration by Samuel cannot aid the appellants.

62. On the appellants' side they maintain no distribution took place during the life time of the deceased. Among those that said so were the step brother of the deceased on the basis that he did not witness such distribution. The others are the children of the 3rd house. They were between 17 years and 2 years at the time the deceased died in 1975. The distribution was done in 1960 to 1962 before almost all of them were born. While the children of the other houses, and the 2nd widow had first-hand information, the appellants depend on what they were told without evidence from those they allege gave them that information.

63. The appellants third argument was that the property at Sigona Limuru is substantially big thus the reason why the appellants were interested in the property. Was that the reason that the

appellants are claiming it, that it was a big parcel of land? We note that the appellants had no issues and were content with the distribution of the estate until the 1990's. The 3rd and 6th appellants in their witness statements averred that the tribal clashes in the 1990's was the reason they went to Sigona the home of the 2nd house to seek refuge. However, in their evidence in Court they changed their story and said that they were following their father's property. The families respected the settlement even after the deceased death in 1975. The issue is what changed in the 1990's, 31 years after the settlement?

64. On the other hand the 2nd house position was that the Sigona 33 property had a debt with the Settlement Fund Trustee (SFT) in the 1960's when the deceased allocated the land to them. The proof was evidence by Demand Notices and threats of evictions which they placed before the trial Court. Among the notices, most are dated in the 1980's long after the deceased died. There was also evidence that two sons of the 2nd house paid off the debt, and proof of payment was also placed before the trial Court. What this means is that the 2nd house paid for their inheritance and did not get it for free as the other houses did.

65. Going back to the question we posed, what happened in the 1990's? We can put it no better than the learned trial Judge did in his judgment, where he delivered himself thus:

> " The 3rd house appears to me to be taking two different positions on exactly what happened in the 1990s leading to a section of that house moving into the Sigona property occupied by the second
>
> house. According to the applicant, in respect of the confirmation application, Peter Njoroge Muiruri, their move to Sigona was occasioned by the tribal clashes in Kericho in 1990 /1991. He says so in his affidavit of 8th November 2010. However, when he took the witness stand, he appeared to change his position, insisting that they did not take that step because of the disturbances at Kericho, they were actually following up on their father's property. On her part, Grace Wangui Muiruri, in her affidavit of 8th November 2010, takes the position that the move was intended by the 3rd house to stake their claim to the Sigona property. I am persuaded that the 3rd house moved into the Sigona property at the height of the political troubles at Kericho in the 1990s and sought refuge with the 2nd house, who accommodated them. I note too that since then they have been living in temporary structures."

66. The learned then concluded thus:

> " From the material before me, it is not disputed that the three families lived separately as at the date of the deceased death. When Fredrick Kithuka Muiruri and Grace Wangari Kariuki from the 3rd house and Raphael Njoroge from the 1st house testified they confirmed as much. The 1st house was on Plot No. 631/215 Kericho, the 2nd house at Sigona, Muguga and the 3rd house on Plot 5 Swahili Village Kericho, with the deceased and her family, and after her demise in 1973, the deceased continued to live there with her children until his demise in 1975. Even after the deceased's death, the 3rd house continued to live there until a section thereof moved to Sigona in the 1990s due to politically instigated violence. Looking at the totality of the testimonies and the content of the letters from the DC it is clear to my mind that the deceased had already settled his three families in a particular plot each. They continued to live as such even after his death, with the situation only changing in the 1990s."

67. We agree with the learned trial Judge's finding that the deceased settled his three families in separate plots in the 1960s, in accordance with the customs of his community. We agree with the trial Judge that there is no reason to interfere with the settlement.

68. The only order that commends itself to us to make is:

    1. The appellants appeal lacks in merit and is dismissed in its entirety.

    2. We uphold the judgment dated 14th June 2018.

    3. As the case is between family members, we make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2024

S. GATEMBU KAIRU, FCIArb.,

....

JUDGE OF APPEAL

F. TUIYOTT

....

JUDGE OF APPEAL

J. LESIIT

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR