



**Muriungi v Mwongera & another (Civil Appeal 68 of 2019)  
[2024] KECA 1709 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1709 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 68 OF 2019  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
NOVEMBER 22, 2024**

**BETWEEN**

**JULIUS MURIUNGI ..... APPELLANT**

**AND**

**MARY NTIBUKA MWONGERA ..... 1<sup>ST</sup> RESPONDENT**

**JOYCE KINANU MARAI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling and Order of the High Court of Kenya at Meru (A. Ong'injo, J.) dated 28th February 2019 in Meru Succession Cause No. 321 of 1996)*

**JUDGMENT**

**Background**

1. Julius Muriungi, the appellant, filed the appeal herein against Joyce Kinanu Marai and Mary Ntibuka Mwongera, the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively seeking for redistribution of the estate of their father, the late M'Ikiara Kimiri (deceased). The appellant and the respondents are siblings. The respondents equally filed a cross appeal seeking for the same orders of redistribution of the estate.
2. In context, on 9<sup>th</sup> December 1996, the appellant, together with David Mbijiwe and Fanuel Riungu, in their capacity as sons of M'Ikiara Kimiri (deceased), filed a petition for letters of administration for the estate of their father who died on 18<sup>th</sup> July 1996. A grant of letters of administration intestate was issued and confirmed to the late David Mbijiwe on 23<sup>rd</sup> September 1998. The three brothers shared the entire estate of the deceased as per the confirmed grant. The respondents joined the Petition before the trial court and sought revocation of the grant and for a fresh grant to be issued to them alongside the appellant for various reasons among them concealment of material facts and that David Mbijiwe (the first administrator) and Fanuel Riungu were deceased. Mary Karuru Riungu, a wife to Fanuel Riungu also sought to be made an administratrix of the estate in the interest of her deceased husband. As per



the letter of the Area Chief, Kithurine Location, dated 13<sup>th</sup> August 1996, the deceased M'Ikiara Kimiri was survived by 3 widows, 3 sons and 6 daughters as follows:

- i. Esther M'Ikiara – widow
  - ii. Gladys M'Ikiara – widow
  - iii. Hellen M'Ikiara – widow (deceased) iv. David M'Mbijiwe – son (deceased)
  - v. Fanuel Riungu – son (deceased) vi. Julius Muriungi – son
  - vii. Gladys M'Ikiara – daughter (deceased)
  - viii. Elizabeth Njiru Kiugu – daughter (deceased)
  - ix. Rael Mwariumwe Mwiti – daughter (deceased)
  - x. Grace Ngautani Kamundi - daughter
  - xi. Mary Ntibuka Mwongera – daughter
  - xii. Joyce Kinamu Marai - daughter
3. The estate of the deceased before distribution by the first administrator was said to consist of the following properties:
- i. Ngobit/Supuko Block/11/150 and 516 (South Imenti),
  - ii. Abothuguchi/Kithirune/318,
  - iii. Abothuguchi/Kithurune/159,
  - iv. Abothuguchi/Kithurine/1255,
  - v. Abothuguchi/Kithurune/917,
  - vi. Abothuguchi/Kithurune/1349,
  - vii. Plot No. 18 Kithirune,
  - viii. Motor Vehicles KAG 677 Lorry, KZN 403 and KXA 119,
  - ix. Plots No.s 209/136/122, 209/230/8, 209/118/54 Nairobi,
  - x. Meru Municipality Plots 11/150 and T/683,
  - xi. Municipal Council of Nanyuki Plot No. J144974 and
  - xii. L.R 8285/597 Nairobi.
4. In the application for the confirmation of grant, the trial court noted that all the beneficiaries of the estate of the deceased as per the Chief's letter were listed. However, distribution was made to the 3 sons of the deceased thus excluding the widows and daughters of the deceased.
5. After considering the application for revocation by the respondents (interested party), the High Court found it merited for reasons that the daughters and widows of the deceased were excluded in the distribution of the estate and that other properties forming the estate were concealed and unleashed where it was convenient for the administrators.



6. By a ruling dated 10<sup>th</sup> May 2018, the High Court held that the administrators of the estate acted in contravention to the provisions of sections 29 and 76 of the Law of Succession Act as well as Rule 7(7) (a)(b) and (c) of the Probate and Administration Rules. Consequently, the trial court revoked the grant and issued a fresh grant in the name of the appellant and the respondents together with Mary Karuru Riungu as joint administrators of the estate of the deceased. The trial court directed the joint administrators to file a full inventory of the properties forming part of the estate and make a fresh application for confirmation and mode of distribution within 21 days from the date of the ruling. The trial court went further to nullify all the transactions made by virtue of the initial grant issued to the late David Mbijiwe (the 1<sup>st</sup> administrator) and ordered that the properties revert to the name of the deceased pending proper redistribution of the estate.
7. In compliance with the above orders of the High Court made on 18<sup>th</sup> May, 2018, the respondents, the appellant and Mary Karuru Riungu filed separate proposals for distribution of the estate dated 26<sup>th</sup> July, 2018, 31<sup>st</sup> October, 2018 and 27<sup>th</sup> November, 2018 respectively. The High Court (A. Ong’ino, J.) considered the proposal for distribution and views of the parties. It was also noted by the High Court that the appellant alleged that the 1<sup>st</sup> respondent was not a daughter of the deceased and therefore not a beneficiary of the estate. The High Court found that there was no evidence in support of the appellant’s aforesaid allegation. Consequently, under the guidance of Section 40 of the Law of Succession Act and citing the High Court decision in Re Estate of John Musambayi Katumanga (deceased) [2014] eKLR, the High Court exercised its discretion and adopted the respondents’ proposed mode of distribution of the estate. The High Court relied on the ground that the majority of the beneficiaries were in support of the same mode of distribution. Thus, by a ruling dated 28<sup>th</sup> February, 2019, the High Court distributed the estate of the deceased as follows:
  - I. Abothuguchi/ Kithirune/1255 to be shared equally among:
    - i. Estate of David Mbijiwe (to be held in trust by wife for Mbijiwe Elazabeth Kariki for herself and children in equal shares)
    - ii. Julius Muriungi
    - iii. Mary Karuru Riungu – to hold in trust for self and children of Fanuel Riungu in equal shares
  - II. Abothuguchi/ Kithirune/1349 to be shared equally among:
    - i. Estate of David Mbijiwe (to be held in trust by wife for Mbijiwe Elazabeth Kariki for herself and children in equal shares)
    - ii. Julius Muriungi
    - iii. Mary Karuru Riungu – (to hold in trust for self and children of Fanuel Riungu in equal shares)
  - III. Abothuguchi/ Kithirune/917 to be shared equally among:
    - i. Estate of David Mbijiwe (to be held in trust by wife for Mbijiwe Elazabeth Kariki for herself and children in equal shares)
    - ii. Julius Muriungi
    - iii. Mary Karuru Riungu – (to hold in trust for self and children of Fanuel Riungu in equal shares)



- IV. Abothuguchi/ Kithirune/159
- i. Mary Ntibuka – 1 acre
  - ii. Estate of David Mbijiwe (to be held in trust by wife for Mbijiwe Elizabeth Kariki for herself and children in equal shares)
  - iii. Julius Muriungi
- V. Abothuguchi/ Kithirune/318
- i. Gladys M’ikiara -2 acres
  - ii. Esther M’ikiara – 2 acres
  - iii. Julius Muriungi – 4 acres
  - iv. Mary Karuru Riungu – 4 acres (to hold in trust for self and children of Fanuel Riungu in equal shares)
- VI. Plot No. 18 Kithirune Market – Gladys M’ikiara
- VII. Plot No. 209/136/122 - Julius Muriungi
- VIII. Plot No. 209/230/8 - Estate of David Mbijiwe (to be held in trust by wife for Mbijiwe Elizabeth Kariki for herself and children in equal shares)
- IX. Plot No. 209/118/54 - Mary Karuru Riungu – to hold in trust for self and children of Fanuel Riungu in equal shares
- X. Plot 8285/597 – Julius Muriungi
- XI. Plot T.683 Meru Municipality to be shared equally among (Gakoromone)
- i. Estate of Gladys Karuta M’Ikira
  - ii. Estate of Elizabeth Njiru M’Marete
  - iii. Grace Nguantani Julius
  - iv. Estate of Rael Mwariumwe Mwiti
  - v. Mary Ntibuka Mwongera
  - vi. Joyce Kinanu M’ikiara
- XII. Plot No. 11/50 Meru Municipality
- In consideration that sons of the deceased have  $\frac{1}{4}$  shares of the deceased properties in Nairobi, the daughters of the deceased are also entitled to benefit from income generating property. In that regard, proceeds of rent to be shared equally amongst the widows, daughters and sons of the deceased. The administrators to ensure rent collected, water and electricity paid and the property kept in good condition and the balance shared.
- XIII.  $\frac{1}{2}$  share of plot No. S144974 Nanyuki to be shared equally among:
- i. Estate of Gladys Karuta M’Ikira
  - ii. Estate of Elizabeth Njiru M’Marete



- iii. Grace Nguantani Julius
- iv. Estate of Rael Mwariumwe Mwiti
- v. Mary Ntibuka Mwongera
- vi. Joyce Kinanu M'ikiara
- vii. Estate of David Mbijiwe (to be held in trust by wife for Mbijiwe Elazabeth Kariki for herself and children in equal shares)
- viii. Mary Karuru Riungu – to hold in trust for self and children of Fanuel Riungu in equal shares

XIV. Ngobit/Supuko/516

- i. Estate of Gladys Karuta M'Ikira
- ii. Estate of Elizabeth Njiru M'Marete
- iii. Grace Nguantani Julius
- iv. Estate of Rael Mwariumwe Mwiti
- v. Mary Ntibuka Mwongera
- vi. Joyce Kinanu M'ikiara
- vii. Estate of David Mbijiwe (to be held in trust by wife for Mbijiwe Elazabeth Kariki for herself and children in equal shares)
- viii. Julius Muriungi
- ix. Mary Karuru Riungu – to hold in trust for self and children of Fanuel Riungu in equal shares

XV. Ngobit/Supuko/11/150

- i. Estate of Gladys Karuta M'Ikira
- ii. Estate of Elizabeth Njiru M'Marete
- iii. Grace Nguantani Julius
- iv. Estate of Rael Mwariumwe Mwiti
- v. Mary Ntibuka Mwongera
- vi. Joyce Kinanu M'ikiara
- vii. Estate of David Mbijiwe (to be held in trust by wife for Mbijiwe Elazabeth Kariki for herself and children in equal shares)
- viii. Julius Muriungi
- ix. Mary Karuru Riungu – to hold in trust for self and children of Fanuel Riungu in equal shares

XVI. KAG 677P Lorry



To be sold by administrator and shares to go to beneficiaries and/or survivors of beneficiaries in equal shares

XVII. Motor Vehicle

KXA 119 Julius Muriungi KZN 403 – Julius Muriungi } Costs of the cause to be borne by each party.

8. It is these orders and ruling of the High Court that provoked the instant appeal. The appellant filed a Notice of Appeal dated 6<sup>th</sup> March, 2019 against the said Orders and the impugned ruling. The appellant, in his memorandum of appeal sought for the appeal to be allowed, the ruling of the High Court set aside and the estate of the deceased M'Ikiara Kimiri be redistributed.
9. The appellant's grounds of appeal as set out in the memorandum of appeal are that the High Court erred in law and in fact by:-
  - i. Ignoring the proposal of the appellant and wholly admitted that of the interested parties/respondents without giving any reason for doing so;
  - ii. Distributing parts of the estate of the deceased to unidentified beneficiaries of other estate whose existence had not been established by any evidence before the court;
  - iii. Distributing parts of the estate of the deceased to an estate and estates of persons whose beneficiaries were not identifiable and the said others estates are unknown to the law;
  - iv. On the burden of proof as to the paternity of the interested party, Joyce Kinanu Marai by shifting the burden of proof on a technical issue to the appellant while not allowing the taking of a DNA test;
  - v. Placing and distributing parcel of number Meru/Municipality Block 11/150 to all the members of a family and introduced instability in a family that had otherwise been stable thus exposing the property to endless dispute;
  - vi. Distributing the property without ascertaining whether such property existed after twenty years of the death of the deceased owner and the 1<sup>st</sup> administrator of the estate of David Mbijiwe M'ikiara;
  - vii. Failed to consider the fact that some of the persons to whom she distributed the estate had renounced their rights to the estate and others had died without having made any intimation as to whether they were interested in the estate particularly considering the fact that the deceased had greatly assisted the persons who had made no claim;
  - viii. Considering extraneous matters that a child/granddaughter of the deceased had been jailed through the influence of the appellant a matter based on no evidence and its truth not ascertained or proved;
  - ix. Failed to consider the value of the parcels in Meru Municipality along with the facts that the appellant had put huge sums of money in redeveloping one of the properties and there was an approved plan rendered in court;
  - x. Distributing movables after twenty-two years and thus failed to consider whether such properties existed or not by the time the respondents' proposal was made, contradicting her own orders as to the inventory;





Mwirigi Kaburu & Co Advocates represented Mary Karuru Riungu, the Administratrix who was representing the estate of her husband, Fanuel Riungu. All counsel had filed their written

**submissions.**

14. Learned counsel for the appellant, Mr. Muthaura submitted that the cross appeal is partial as it relates to only properties in Meru County. Counsel reiterated that the deceased had 3 wives and the estate had initially been distributed about 15 years earlier. That, at the time the orders of the High Court on distribution were made, it was 22 years after the death of the deceased. Counsel asserted that as such, the parties ought to agree on the inventory of the estate prior to distribution. Counsel further asserted that the assets comprising the estate of the deceased were not valued or ascertained noting that the parties gave different inventories. Further, that some movable assets listed by the respondents such as motor vehicles no longer existed and others were utilized by the then administrators to cover costs of administration.
15. Counsel submitted further that some beneficiaries and dependants of the deceased were omitted in the distribution while other persons who were not well identified or could not be ascertained as interested persons were allocated shares making it difficult to enforce the orders of the High Court.
16. Counsel emphasized that there was no evidence to support the High Court's position that the majority of the beneficiaries had agreed to the respondents' mode of distribution. Counsel asserted that the principle for distribution was not based on majority views but on equality as rightly stated by the High Court. Counsel emphasized that the appellant's inventory did not include motor vehicles and seven (7) plots in Nturukuma as these assets were not available for distribution. Counsel assailed the High Court's distribution of the estate of the deceased to other estates such as the estate of David Mbijiwe submitting that an estate cannot receive and hold property. Counsel further asserted that the distribution of parcel no. Meru Municipality Block 11/150 to all the family members introduced instability to the family. Counsel emphasized that the number of beneficiaries was not identified, many children of the deceased had passed on and names of their children were not brought forward for identification.
17. Counsel further submitted that the evidence on record showed that Grace Ngautani and Esther M'Ikiara had renounced their interest in the estate yet the High Court awarded shares of the estate to them in the final distribution. Counsel further submitted that one wife of the late David Mbijiwe namely Charity Ntimi Mbijiwe was not included as the High Court referred to only one wife, Elizabeth Karoki Mbijiwe. Counsel asserted that the earlier distribution had stood the test of time and the application that led to the second distribution after 22 years from the death of the deceased was an afterthought. Counsel further submitted that the vesting of properties to Elizabeth Karoki and Mary Karuru Riungu to hold in trust for themselves and their children without disclosing the identities of the children was erroneous. While abandoning ground 4 of the appeal on paternity of the 1<sup>st</sup> respondent, the appellant called for redistribution of the estate; transfer of the suit back to the High Court for redistribution by a Judge other than the A. Ong'injo, J.; valuation of the estate excluding motor vehicle KAG 677P, Lorry KZA 119 and KZN 463 and 7 plots in Nanyuki Nturukuma from distribution for reasons that they were no longer available.
18. Learned counsel for the respondents, Mr. Mwirigi Kaburu submitted that the appellant was awarded more properties than other beneficiaries without any justification when the law under section 40 of the Law of Succession Act called for equal shares. Counsel further submitted that the appellant was solely given Nairobi Plot No. 8285/597 and was also included in the sharing of Meru/Municipality Block 11/150. Counsel submitted that no valuation was done to aid the High Court in the distribution of the estate. The respondents thus called for equality in distribution of the estate.



19. Learned counsel for the administratrix, Mary Karuru Riungu submitted that Section 40 of the [Law of Succession Act](#) did not oust the discretion of the court in distributing the estate of a deceased person who was polygamous. Reliance was placed in the case of *Kyoya Ndewa vs Patrick Mulyungi Ndewa & Another* (2022) eKLR where the High Court held as follows regarding section 40 of the [Law of Succession Act](#):

“... The provision of section 35 of the Law of Succession as cited are not to be construed in isolation because the provision are subjected to the provision of section 40 which deals with distribution of a deceased person who was polygamous. That means that before subjecting the distribution to the respective beneficiaries, in the first instance, the estate should be divided equally between the numbers of houses of course the provision is not cast in stone. The courts have held that applying the section strictly in some instances can lead to serious injustice.”

20. Counsel further cited the case of *Mary Rono vs Jane Rono & Another* (2005) eKLR on interpretation of Section 40 of the [Law of Succession Act](#) where this Court (R.S.C Omolo, JA.) held that:

“My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the judge doing the distribution still has discretion to take into account or consider the number of children in each house. If the parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.”

Conclusively, counsel called for redistribution of only one property: Meru Municipality Block/11/150.

### **Determination**

21. This is first appeal. The Court reminds itself of its mandate as the first Appellate Court to re-evaluate the evidence, assess it and reach its own a conclusion bearing in mind that it neither saw nor heard the witnesses and make due allowance for that. See Rule 31 (1) of the Court of Appeal Rules 2022 and this Court’s decision in *Gitobu Manyara & 2 others v Attorney General* [2016] eKLR. See also *Selle & Another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123.
22. We have considered the record of appeal, the submissions, the authorities cited and the law. We discern that the issue for determination before this Court is whether the estate of M’Ikiara Kimiru (deceased) was properly distributed by the High Court, and, if not, what, orders should issue.
23. From the memorandum of appeal and the notice of cross appeal filed, it is clear that both parties were not satisfied with the distribution as ordered by the High Court. As a common ground both parties call for setting aside of the trial court’s order on distribution and for an order redistributing the estate. As such we are inclined to set aside the High Court’s order for distribution of the estate. Having done so, it is our responsibility to point out areas of concern regarding the impugned distribution, and to indicate what the trial court will consider while distributing the estate.
24. It is not in doubt that the deceased M’Ikaira Kimiru was polygamous. The parties are in agreement that the deceased was survived by 3 widows and 9 children (3 sons and 6 daughters) being the beneficiaries of his estate. From the record, some of the beneficiaries of the estate passed on before the distribution of the estate by the High Court.



25. The appellant, the respondents and Mary Riungu) were ordered by the High Court to file full inventory of the assets forming the estate of the deceased resulting in three different inventories being filed. As such there was no consensus of the parties as to what constituted the estate as at the time of the trial court's order of distribution of the estate. Further, both parties agree that no valuation was undertaken to ascertain the value of the estate. Moreover, it is noted that the grant of letters of administration was first confirmed in the name of the late David Mbijiwe on 23<sup>rd</sup> September, 1998 paving way for distribution of the estate. This grant was revoked and all transactions relating to the said grant were nullified by an order of the High Court made on 10<sup>th</sup> May, 2018.

26. The distribution of the estate of a polygamous person is guided by Section 40 of the Law of Succession Act which provides that:-

“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 next 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.”

27. In interpreting the above provision of the law bearing in mind the discretion of the court in distribution of estates, this Court in the case of *Scolastica Ndululu Suva vs. Agnes Nthenya Suva* [2019] eKLR held:

“(15) In *Mary Rono vs Jane Rono & another* (supra), Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased's estate but that the discretion must be exercised judicially on sound legal and factual basis.

...

(17) 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 a 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.”

28. From the above provision of the law, we find that the estate of the M'Ikiara Kimiru (deceased) ought to be distributed among the three widows and nine children making a total of 12 units (beneficiaries). The distribution should take into account any factual circumstances of the case if they exist for purposes of ensuring equitable and fair distribution of the estate. We have noted from the submissions by counsel that the estate of the deceased was not valued. As such the value of the share that each beneficiary was allocated by the High Court cannot be ascertained. Further, there are allegations of renunciation of shares by 2 beneficiaries, namely Grace Ngautani (daughter) and Gladys Karegi M'Ikiara (widow) of the deceased. There were two filed written statements, which were drawn by the firm of advocates representing the appellant. From the statement of Grace Ngautani dated 8<sup>th</sup> November, 2018 she stated in part:

.. we had a family meeting. All my brother, sisters and respective mothers were there. It was agreed that all the property should be left in the hands of our 3 brothers.

...

The property was shared out and we were all informed we always knew our mothers would represent our interests and they represented us as agreed.



I am now surprised the children of Krauta, Njiru, Mwariume and mine are now making claims in the assets of the estate. They know how the property was shared. My son Kimaita should not make any claim on the assets. It is me who can do that and I am not doing so. If any of the persons now staking claims were genuine they would agree to a meeting of all us. ...

29. The statement of Gladys Karegi M'Ikiara dated 8<sup>th</sup> November, 2018 stated that:

... I know and agreed as to how the estate should be shared. All my co-wives and children agreed on distribution.

...

On the day we were in court we represented all the children who were not in court.

30. During hearing of the matter before the High Court, Grace Ngautani testified on 3<sup>rd</sup> December 2018 as one of the appellant's witness (PW2). The testimony during cross examination reads in part:

"I am a farmer and don't wish to claim any share of my father's estate.

...

If there is property the children of my deceased sisters should be provided with a share of the estate that is due to their mothers

I need to be given a share in a transparent way."

31. The Court distributing the estate will determine whether the said two beneficiaries renounced their share in the estate. Further, the appellant and the respondents in their cross-appeal have urged this Court to redistribute the estate. In our view, this will entail, in some respects, taking evidence, which unfortunately is not before us. In the circumstances, we are compelled, under Rule 31 of this Court's Rules to remit this matter to the High Court for the redistribution of the estate. Further, the estate properties should be valued so that any distribution may be fair and equitable.

32. The upshot is that the appeal and cross-appeal succeed. Accordingly, this matter is remitted to the High Court for re-distribution of the estate by a Judge other than A. Ong'injo, J. We direct the High Court to take evidence and determine inter alia the beneficiaries of the estate of the deceased and whether Esther and Grace renounced their interest as beneficiaries of the estate of the deceased.

33. We direct that this matter be mentioned before the Presiding Judge, Family Division of the High Court, within fifteen (15) days from the date of this judgment for the necessary directions on priority hearing and determination.

34. This being a family matter, the order that commends itself to us is that each party will bear their own costs of the appeal.

**DATED AND DELIVERED AT NYERI THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**



**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

