



**Njoroge v Gitau & 3 others (Civil Appeal 407 of 2018)
[2023] KECA 417 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KECA 417 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 407 OF 2018
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
APRIL 14, 2023**

BETWEEN

PERIS WANJIRU NJOROGE APPELLANT

AND

RAPHAEL MAINA GITAU 1ST RESPONDENT

WAITHIRA NGUGI 2ND RESPONDENT

WANJIKU KIGOTHO 3RD RESPONDENT

WAMBUI NDIRANGU 4TH RESPONDENT

*(Being an appeal from the Judgment and decree of the High Court of Kenya at Nairobi
(William Musyoka, J.) dated 5th May, 2017 in Succession Cause No. 2270 of 2001)*

JUDGMENT

1. When a deceased is being escorted to the afterlife, it is common to hear the phrase: May he/she rest in peace. However, oftentimes, this marks the end of peace in many families. Court registries are full of files on endless succession legal battles that have raged on for years with the baton being passed from one generation to the other in the race to inherit the assets of the deceased. This is what has befallen the family of Njoroge Gitau, now deceased. Almost 40 years after his death, the court has to decide the rightful beneficiaries of his estate.
2. In order to contextualize the dispute, it is necessary for us to give the factual background of this appeal. Njoroge Gitau, was blessed with one wife, five daughters but had no son. From the record, that appears to be the only common ground between the parties. Even the date of death was in contention, with some claiming that he died in the 1950^s and others in the year 1980. At the time the summons for revocation of the grant was being heard in the High Court, the appellant claimed that her son, William Gitau Maina was the sole beneficiary of the deceased's estate by virtue of being the only child of an



- ‘unmarried daughter’ of the deceased. On the part of the respondents, the 1st respondent claimed that he was a nephew of the deceased while the 2nd, 3rd and 4th respondents claimed part of the estate as daughters of the deceased.
3. From the record before us, upon the death of Njoroge Gitau, a Succession Cause No RMCSC No 82 of 1984 was filed in Murang’a Magistrates Court on April 13, 1984 by the appellant in her capacity as a daughter of the deceased. She claimed that she was the sole beneficiary of the estate on the basis that the other four sisters were married. The grant was issued on August 20, 1997 and confirmed on March 19, 1999. The appellant, was cited as the sole beneficiary of the estate and her son, William Gitau Maina subsequently registered as the owner of all the three parcels of land that were the assets of the estate, namely land parcels number Loc 4/Gakui/828, Loc 4/Gakui/1085 and Loc 4/Gakui/1091.
 4. The proceedings show that the respondents filed summons for revocation of the grant. The 1st respondent filed summons dated September 19, 2001 seeking revocation of the grant made to the appellant on March 19, 1999 on the grounds that the grant was obtained fraudulently by concealment from the court of material facts, and that the grant was obtained by means of untrue allegations of facts. The respondents also claimed that Raphael Maina Gitau, a nephew of the deceased, was not disclosed in the application for the letters of administration and during the confirmation of the grant.
 5. The 2nd and 3rd respondents filed an affidavit sworn on May 12, 2008 asserting that the appellant obtained letters of administration on March 19, 1999 secretly without their knowledge, and that the alleged consents signed by the respondents in the confirmation of the grant were fraudulent.
 6. The 4th respondent filed summons dated October 2, 2007 seeking revocation on the grounds: that the grant was obtained fraudulently by concealment of material facts from the court; that the grant was obtained by means of untrue allegations of facts; and that the appellant did not disclose all the beneficiaries who included, Ausilia Waithera Ngugi, Regina Wangari, Wanjiku wa Njuguna, Boniface Ndirangu Gitau, Peter Ngechu Gitau, and Wambui Ndirangu.
 7. Regina Wangari Kibunyi, one of the five daughters of the deceased who is not a party to these proceedings, but testified in the matter before the High Court, swore an affidavit on December 18, 2008 and filed it on July 6, 2010. She deponed that the children of the deceased were all aware of the succession proceedings filed in Muranga RMCSC No 82 of 1984 by the appellant.
 8. The appellant’s response to the respondent’s averments was: that the 4th respondent in the application dated October 2, 2007 was at all times aware of the succession cause; that the 4th respondent and her other sisters executed a deed of renunciation of their rights to apply for the grant; that the 4th respondent was not a beneficiary of the estate as she had married, and lived on her husband’s land; and that Boniface Ndirangu Gitau and Peter Ngechu Gitau were not sons of the deceased.
 9. At the trial, each party adduced oral and documentary evidence. It was the appellant’s case that she was previously married, but returned home after the death of her husband, and that she was therefore unmarried at the time their father died; that her sisters, the respondents herein, were all aware of the succession proceedings that culminated in her getting the grant; that her 4 sisters had signed a renunciation waiving their rights to getting a share in the estate; that they signed the renunciation at the chief’s office; that she was not ready to share the land with her sisters as the land had been given to her by their mother during their mother’s lifetime; and that the deceased had called her uncle and informed him that he did not hold the property in trust for him.
 10. The appellant further testified that her mother requested her sisters, together with herself, to go to the Chief’s camp to sign the renunciation deed, which was done; that both the chief and the headman had since died; that when the deceased was sick, the deceased called people from the larger family and asked



- the appellant to provide a goat as she was the one to inherit his property; that they all ate together and the deceased told everyone that she was the one who had produced the goat; and that her siblings were not present at the ceremony, but her father, the deceased called them later.
11. It was the appellant's testimony that all the men who were present at that ceremony were dead; that the deceased had left her instructions on how she was to distribute the property; that she was not willing to give her sisters anything as they were interfering with the succession proceedings; that she bore her son during the time she was married; that it was after her husband died that she moved back to her parents' home as she had no one to live with; and that some of her sisters were present at the confirmation of the grant.
 12. On the part of the 1st respondent, his assertions were: that he was a nephew of the deceased; that his father - brother to the deceased - had bought the properties to wit Land reference number Loc 4/Gakui/1085 and Land reference number Loc 4/Gakui/1091, that were eventually registered in the name of the deceased; and that when the administrator moved the court for the succession of the deceased's estate, she did not disclose that the property was held by the deceased in trust for his father.
 13. The 2nd respondent testified as the 4th witness. She stated that her father had 5 daughters; that her parents owned 4 acres of land in Ithanju Gakui only; that the other piece of land they had measuring 3 acres was held in trust for their uncle; that their father had called them and told them that he was holding it in trust for their uncle; that all the 5 daughters were present when he gave them this information; that the uncle was not present; that he used to stay elsewhere; and that she did not relinquish her rights to her father's estate.
 14. The 3rd respondent testified that the deceased died in the year 1980; that she did not participate in the matter at the Tribunal No 245 of 2000; that she was aware that there was a dispute concerning the property her father held, and which belonged to her uncle; that she would want a share in her father's estate; that they did not hold a meeting to share out her father's estate; that two of the parcels do not belong to her father, but to her uncle; and that the parcel that belongs to her deceased father measured about 4 acres.
 15. The 4th respondent testified that she was the eldest child of the deceased and a cousin of Immanuel Maina Gitau; that her uncle had bought two parcels of land from Njoroge Kiruma and Kabogo Gitau; that there were three parcels registered in the name of the deceased on condition that the deceased would transfer it back to his brother, the 4th respondent's uncle; that the appellant knew that Land reference number Loc 4/Gakui/1085 and Land reference number Loc 4/Gakui/1091 belonged to the deceased's brother; that their mother would always tell them that those parcels belonged to their uncle, Gitau, but that the appellant did not inform them when she filed the succession cause; and that this was done secretly without the knowledge of all the beneficiaries.
 16. Upon hearing the parties, the learned Judge (W Musyoka, J) held as follows:
 - “30. In very plain language, the deed of renunciation has nothing to do with renunciation of a right to a share in the estate of the deceased, it amounts to nothing more than a renunciation or waiver of the signatories' right to apply for representation to the estate. The sisters of the administrator did not therefore waive their rights to a share in the deceased's estate. Their rights as such are alive and intact.
 31. Then there is the issue of the son of the administrator of the estate taking everything, while the deceased had been survived by children, who should have had a superior claim to the estate compared to that of the grandchild of



the deceased. That can only happen in case where the primary survivors have consented to devolution to secondary survivors. Clearly, from the record, there was no consent by the primary survivors to such devolution.

32. I am cognizant of the fact that the deceased died before the Act came into force, and the law to govern devolution to his estate ought to be the law that governed the intestate estate of an African at the time. The deceased and his family are Kikuyu by ethnicity. The law that ought to govern the estate ought to be Kikuyu customary law. That law envisages a patrilineal system of inheritance, where the estate devolves upon the male side of the family, to the sons basically. Where there are no sons then to the next male relatives: uncles, male cousins, nephews and so on. The female side of the family is not entitled, save where the surviving daughter of the deceased is unmarried.
33. That held sway then. We are in a new legal dispensation. The Constitution enjoins us to treat all equally before the law, and frowns upon discrimination based on gender or marital status. These principles would no doubt override the customary law position stated above, so that daughters of the deceased, whether married or not, would be entitled to inherit from their father's estate in equal measure with their male relatives. The Kikuyu customs on the matter should therefore not matter in this case. The estate of the deceased herein ought to be shared out equally between all the five daughters of the deceased.
34. In the end, I shall resolve the applications before me for revocation of grant in the following terms: -
 - a. That the said applications are allowed so that the grant made in Murang'a RMCSC No 82 of 1984 to Peris Wanjiru Njoroge on August 20, 1997 is hereby revoked;
 - b. That the orders made in Murang'a RMCSC No 82 of 1984 confirming the grant of August 20, 1997 are hereby set aside and the certificate of confirmation of grant extracted from the said orders on March 19, 1999 is hereby cancelled;
 - c. That I hereby direct the Land Registrar responsible for Murang'a County to cancel all transfers in respect of Loc 4/Gakui/828, 1085 and 1091 and revert the said properties to the name of the original proprietor, Njoroge Gitau pending fresh distribution of the estate;
 - d. That I hereby appoint Peris Wanjiru Njoroge, Raphael Maina Gitau and Esther Wambui Ndirangu administrators of the estate of the deceased;
 - e. That I hereby declare that the person entitles to a share in the estate of the deceased are Wanjiru Njoroge, Waithera Ngugi, Wanjiku Kigotho, Wangari Kibunyi, Wambui Ndirangu and Raphael Maina Gitau;
 - f. That I hereby declare that Loc 4/Gakui/828 shall be shared equally between Wanjiru Njoroge, Waithera Ngugi, Wanjiku Kigotho, Wangari Kibunyi, Wambui Ndirangu, while Loc 4/



Gakui/1085 and 1091 shall devolve upon Raphael Maina Gitau to hold on his own behalf and that of his brothers;

- g. That the matter herein originated from the Murang'a Chief Magistrate's Court, consequently I shall direct that the court file in Murang'a RMCSC No 82 of 1984 be returned to the said registry with directions that the said court issue a fresh grant of letters of administration intestate in terms of order (d) above;
- h. That the administrators appointed under order (d) shall move the court in Murang'a RMCSC No 82 of 1984 for confirmation of the grant made to them under order (g) above proposing to distribute the estate in terms of order (f) above;
- i. That the instant matter has been exhausted as it was limited to the disposal of the revocation applications, it shall accordingly be closed; and
- j. That as this is a family matter, there shall be no orders as to costs."

17. Aggrieved by the judgment, the appellant has raised 10 grounds of appeal which we take the liberty to summarize as follows, namely that the learned Judge erred: in entertaining the 1st respondent's claim, yet he lacked the capacity to bring the suit; in failing to note that the matter was *res judicata*; in finding that the 1st respondent was entitled to a share of the estate; in granting orders to persons who were not parties to the suit; in shifting the burden of proof to the appellant as regards the genuineness of the signatures appended on the deed of renunciation; in failing to find that the applicable law was Kikuyu customary law and not the *Law of Succession Act*, Cap 160 Laws of Kenya, and in awarding a share to Wangari Kibunyi who had allegedly conceded that she was not interested in the estate.
18. When the appeal came up for hearing, learned counsel for the appellant, Mr Ngugi, elected to rely on the written submission dated April 12, 2019, and which may be summarized as follows: that the trial court, being the Family Court Division of the High Court, did not have jurisdiction to deal with a claim of trust, as this was the preserve of the Environment and Land Court; that the matter was *res judicata* as it had already been determined by the Maragua District Land Disputes tribunal in Case No 245 of 2000, and in the subsequent appeal in Provincial Land Disputed Appeals Committee in Case No 11 of 2011; that the 1st respondent lacked the capacity to lay claim to the estate, as he did not obtain letters of administration to his father's estate. In support of her claim, the appellant cited the case of *Sheila Nkatha Muthee vs Alphonse Mwangemi Munga & Others & Another* (2016) eKLR.
19. The appellant further submitted that Wangari Kibunyi had, by her own affidavit sworn on December 18, 2008, renounced her claim to the estate, hence the learned Judge erred in granting her, a share of the estate; that the respondents had knowledge that she had filed for succession and obtained letters of administration on March 19, 1999, and had in fact executed a renunciation of their rights to the estate; that the learned Judge erred in law shifting the burden of proof to the appellant; and that the 1st respondent was not entitled to the two parcels as the 1st respondent and his siblings had not undertaken any activity on the same, which demonstrated that they had absolutely no interest in the parcels of land.
20. The respondents filed written submissions dated June 21, 2019 but did not appear when the appeal came up for hearing, although they were duly served with the hearing notice. The written submissions may be summarized as follows: that the learned Judge did not err in entertaining the 1st respondent's claim; that the 1st respondent had a right to be treated as a beneficiary and be involved in the succession



proceedings of his deceased's uncle, and to bring forth any claim; that the matter before the trial Court was not *res judicata* as Maragua District Land Disputes Case No 245 of 2000 dealt with a claim to occupy and work on the land, but had no jurisdiction to determine any claim on title or ownership, while Succession Cause No 2270 of 2001 dealt with revocation of the grant; that as regards legal capacity of the 1st respondent to sue on behalf of the estate, it was asserted that he joined the suit on his own behalf as a nephew to the deceased, and on behalf of his siblings, and not as a representative of his deceased father.

21. It was further submitted that the 2nd, 3rd and 4th respondents did not renounce their right to a share in the estate as they were illiterate; that the document was never read over and explained to them as admitted by the appellant during her testimony; and that the renunciation amounted to nothing more than a waiver of the signatories' right to apply for representation to the estate. On the genuineness of the signatures, they submitted that the learned Judge did not pronounce himself on this issue as the document was not presented to a document examiner to assess whether or not the signature on the document purported to be those of the daughters of the deceased were theirs; that the learned Judge did not award the 1st respondent a share of the estate herein on behalf of his father's estate but, rather, on his own behalf and that of his brother's; and that cultivating land or lack of thereof did not mean that the 1st respondent and his siblings had no interest in the land.
22. This being a first appeal, we are required to analyze the evidence afresh and reach our own conclusions, we should however warn ourselves that we did not have the advantage of seeing the witnesses and therefore make due allowance for that. In *Selle vs Associated Motor Boat Co* (1968) EA 123, the court's duty on first appeal was expressed as follows:

“An appeal to this Court from a trial by the High 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. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (see Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 EACA 270).”
23. From a careful perusal of the record of appeal, parties' submissions, and the authorities, the issues arising for determination may be discerned as: Whether the matter before the trial Court was *res judicata*; Who were the rightful beneficiaries to the deceased's estate; whether the 2nd to the 4th respondents forfeited/ renounced their claim to the estate; whether the appellant was also married, and whether her return home is a basis for her to claim the entire estate and subsequently to have her son registered as the sole beneficiary; and whether the Judge was right in holding that the 1st respondent and his brothers were rightful beneficiaries.
24. We first address the question as to whether the issues raised in the trial court were *res-judicata*. In her grounds of appeal and submissions, the appellant contends that the matter was *res-judicata* as it had already been determined by the Maragua District Land Disputes Tribunal in Case No 245 of 2000, and in the subsequent appeal to the Provincial Land Disputed Appeals Committee in Case No 11 of 2011. From the record, the learned Judge noted that the tribunal found in favour of the 1st respondent, but that on appeal, the appeals committee found that the property should devolve upon the grandson of the deceased. The learned Judge also noted that the decision by the appeals committee appeared to have been influenced by the orders made in Murang'a RMCSC No 82 of 1984 on confirmation of



the grant, thereby devolving the property to the grandson of the deceased. The question that arises is whether the learned Judge was right in holding that the issue was not *res-judicata*.

25. Section 7 of the [Civil Procedure Act](#) on *res judicata* reads as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

26. In that regard, this Court in the [Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others](#), (2017) eKLR) held that:

“For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised. (emphasis ours.”

27. The learned Judge noted that the land disputes tribunal exceeded the powers conferred upon it by the [Land Disputes Tribunal Act, 1990](#) as its’ jurisdiction was limited to determining a claimant’s right to occupy and work on the land in issue, but not ownership thereof. He further found that the property was registered, and that the tribunal and the appeals committee had no power to determine ownership of such property. Notably, the last element of the doctrine of *res judicata* to wit the competence of the court that formerly heard and determined the suit is questionable. We find and hold that the matter was not *res judicata* as both the Land Disputes Tribunal and the Provincial Land Disputes Appeals Committee did not have jurisdiction to deal with the legality or otherwise of title to land or issues that fall under the [Succession Act](#) and, therefore, the learned Judge was correct in holding that the issues in the succession cause were not *res judicata*.

28. With regard to the issue as to who were the rightful beneficiaries, the appellant made heavy weather of the argument that Kikuyu customary law should have been relied upon in determining the mode of distribution of the estate. To determine who the right beneficiaries of the estate were, the starting point is the [Law of Succession Act](#) (Cap 160). Section 2 provides as follows:

“2. Application of Act

1. Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of



deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

2. The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

29. It is therefore clear that the estate of any person who died before July 1, 1981, is subject to written laws and customs applying at the date of death, but with a rider that the administration of their estates shall commence or proceed, so far as possible, in accordance with the *Law of Succession Act*. Therefore, the learned Judge was not at fault in his holding that all the daughters of the deceased were dependants of the estate of the deceased, irrespective of their marital status.
30. The learned Judge, cognizant of and based on the principle of equality envisaged in the *Constitution of Kenya, 2010* gave orders for the administration of their estates to proceed as far as possible in accordance with the *Law of Succession Act*. Article 27 of the *Constitution* prohibits any form of discrimination on the basis of race, sex, marital status, or culture. Under Article 27, the people of Kenya did away with discriminatory practices such as those advanced by the appellant, that married daughters should not be considered in the distribution of the estate of a deceased person because they are married.
31. It is important to note that, in this appeal, we are not dealing with a dispute between daughters and sons. It is common ground that the deceased had no sons. This is a case where one daughter is claiming the entire estate to the exclusion of her sisters on the basis that she was unmarried. Such a claim has no basis in law or in fact. The appellant averred that she was not married. Even if that were true, it cannot give her rights to the estate of the deceased to the exclusion of her sisters. Such a customary practice, even if it was proven, has no place in the current legal dispensation as the learned Judge rightly observed.
32. In the instant case, the deceased died before the promulgation of the *Law of Succession Act*. However, the distribution of the estate should proceed so far as possible in accordance with the provisions of the Act, which defines a dependant in section 29 (a) as follows:

“For purposes of this part, “Dependant” means

- a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”

33. This section does not distinguish between children who are either sons or daughters, married or unmarried. Neither does it discriminate between children of the deceased on the basis of sex or marital status. It is discriminatory and unconstitutional to suggest that married daughters of a deceased have no right to get a share in their father’s estate. Such submission has no place in modern society. We find and hold that the learned Judge did not error and this ground of appeal fails.
34. On whether the appellant was entitled to be the sole beneficiary on the ground that she was married, and whether her return home is a basis of her claim over the entire estate and the subsequent registration of her son as the sole beneficiary, we think not. Evidence was adduced by the various witnesses to the effect that, indeed, the appellant was married at one point, but later returned. The appellant testified that her mother said that her father always said that she was the only heir to his estate because she was the only one who was not married. However, the 1st respondent testified that the appellant was married to one Mugo Maina with whom she lived in Kairi Coffee estate, and that they had one son, William Maina. The 2nd respondent testified that the appellant was once married in Kiambu,



and that she was present on the suit land as an unmarried daughter after she left her matrimonial home. The 3rd respondent also testified that the appellant had been married. The 4th respondent testified that the appellant was married and only came back home upon the death of their father. We find and hold that the appellant was at some point married, and that there was no proof of her having been divorced.

35. The appellant does not seem to be a plausible witness. Her assertion that she was not married among many other assertions were rebutted by all the witnesses. For instance, in her affidavit sworn on April 13, 1984, she deposed that the deceased died in 1952. The appellant is generally unreliable because her assertion that the deceased died in the year 1952 does not add up. The 1st respondent testified that the deceased died in the year 1980, and that the deceased's national identity card was issued on September 1, 1969; that consolidation of land took place and the parcels of land were registered in the name of the deceased in 1964, and that in 1972, the deceased called for the 1st respondent and his father with whom they went to meet the deceased. The 4th respondent corroborated the 1st respondent's testimony that, in 1964, her father was registered as the owner of the suit property to hold in trust for the 1st respondent's father. The 3rd respondent confirmed the other respondent's testimony by asserting that her father, the deceased, died in 1980.
36. The year the appellant's father died is so critical a date, and the allegation that it was in the year 1952 while the respondents testified of events where they met with the deceased up to the year 1972 leaves a lot to be desired. The same applies to her claim of never having been married. Her claims regarding her marital status were rebutted by the respondents, and it was upon the appellant to adduce evidence to prove that she never married, or that she was once married, but later divorced if she intended to rely on that assertion as her basis for being the sole beneficiary. It is old hat that he who alleges must prove. However, in the current dispensation, even if she did prove that she was not married, it would not elevate her to a different pedestal from her sisters as the law of succession provides for all children of the deceased person as dependants, despite of their marital status, to benefit from his or her estate.
37. In view of the foregoing, the learned Judge was correct in disregarding the appellant's return to her father's home and her claims of being unmarried as a basis for her to inherit the whole estate to the exclusion of her sisters, the 1st respondent and his brothers.
38. On whether the 2nd to the 4th respondents forfeited/ renounced their claim to the estate, the appellant submitted that the learned Judge erred in shifting the burden of proof to the appellant as regards the genuineness of the signatures appended on the deed of renunciation. Sections 109 and 112 of the Evidence Act leads to the conclusion that the learned Judge was not at fault in doing so. The sections read:
 - “ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
 -
 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
39. The appellant claimed that the 2nd, 3rd and 4th respondents signed the deed of renunciation. The appellant further claimed that in shifting the burden of proof to the appellant as regards the genuineness of the signatures appended on the deed of renunciation, the learned Judge erred. The



appellant seems to be in denial as the learned Judge actually held that he was convinced that the sisters did indeed sign that document.

40. The learned Judge went ahead and dissected the evidence on record and found the deed of renunciation relied on by the appellant to be insufficient as it had nothing to do with the renunciation of a right to a share in the estate of the deceased, but amounted to a renunciation or waiver of the signatories' right to apply for representation to the estate. It is noteworthy that, at the point, the respondents disowned that document and the signatures thereto, the burden automatically shifted back to the appellant, but which she failed to discharge.
41. According to Halsbury's Laws of England, 4th Edition, Volume 17, paragraph 13 and 14:
- “The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
- The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”
42. It is therefore old hat that the evidential burden initially rests on the party with the legal burden, but as the weight of evidence given by either party during the trial varies, so will the evidential burden shift to the party whose case would fail without adducing further evidence. In effect, when *prima facie* evidence is adduced by the respondent, as was in the instant case, then the evidential burden shifted to the appellant who was called upon to prove the contrary, but she chose not to.
43. On whether the Judge was right in holding that the 1st respondent and his brothers were rightful beneficiaries, the 4th respondent testified that she knew the 1st respondent, and that his father was one Gitau; that the deceased had 3 brothers and, of the 4, he was the youngest; that she was present during consolidation, and that she fenced the land for her father and her uncle; that she participated in taking the measurements for the parcels of land; that the land was registered in her father's name on condition that he would transfer it back to the 1st respondent's father; that the parcels were not in the same place but different villages; and that, in the year 1964, it was agreed that the deceased would be registered as the owner to hold in trust for her uncle. The 3rd respondent testified that her uncle trusted her deceased father with the property, and that two of those parcels belonged to the 1st respondent's father and not to the deceased. The 2nd respondent testified that the land in Ithanji Gakui measuring 4 acres was the only land they had; that, as for the other pieces of land, the deceased was holding in trust for the 1st respondent's father; and that the deceased had at one point called all the five daughters together and informed them that he held the property in trust for the 1st respondent's father. There was insurmountable evidence that, indeed, the deceased held the property in trust for the 1st respondent. Accordingly, we find no fault in the learned Judge's finding in this regard.
44. The appellant also raised the issue that the trial Court, being the Family Court, did not have jurisdiction to deal with a claim of trust. This Court pronounced itself on this issue in Zipporah Wanjiru Mwangi vs Zipporah Wanjiru Njoroge (2017) eKLR as follows:

“In succession proceedings where, as here, the existence of a trust is alleged in respect of land claimed to be family land, it is appropriate to the court to give directions as to the procedure to be followed. Such procedure cannot be discredited merely on account of the fact that



succession proceedings are designed to determine heirs and distribution of estate and not issues of trust.

...

Where, as here, the issue (of trust) arises in succession proceedings whether the land is family land and therefore is subject to trust or whether it is owned absolutely by the deceased and therefore is not subject to distribution, the court hearing the succession proceedings has jurisdiction to determine the issue and to give appropriate directions on the hearing. This is in line with the jurisdiction vested in the High Court by Article 165(3) (a) of the Constitution and Section 47 of the Law of Succession Act, Cap 160.”

45. If for a moment we agree with the appellant’s reasoning, it would mean that the issue of the distribution of her father’s estate would be determined in installments. This would also mean that the dispute between the appellant and her sisters would be heard in the succession cause and the issue between the appellant and the 1st respondent would be referred to the Environment and Land Court. This sort of legal argument is warped, as it creates the possibility of having clashing and conflicting court decisions and endless litigation.
46. The question that begs for an answer is why the parties would move from one court to give evidence on the ownership of the assets of a deceased person and then move to another court to testify on the distribution of the estate. The Judge in the succession proceedings is well placed to determine whether the land is family land owned absolutely by the deceased or is held in trust and give proper directions. This is a case involving relatives of the deceased and, therefore, the argument that the 1st respondent, a nephew of the deceased, was in the wrong court is fallacious. In view of the above, we find that the trial court was properly clothed with jurisdiction to give directions on the property held in trust for the 1st respondent and, accordingly, find no fault in the learned Judge’s holding in this regard.
47. Having found that the matter was not res – judicata and that the respondents had an equal right as beneficiaries in the estate of the deceased; that the deceased held the property in trust for the 1st respondent’s father; that the trial Court had jurisdiction to deal with a claim of trust; and that the 2nd to 4th respondents did not renounce their rights as to getting their share from the estate of the deceased, we reach the inescapable conclusion that all the grounds of appeal have no merit and thus fall by the wayside.
48. In view of the foregoing, and after a careful re-analysis and re-evaluation of the evidence, it is our finding that the appellant has failed to demonstrate that the learned Judge erred in law and in fact in coming up with the determination in the impugned judgment.
49. Accordingly, we hold that this appeal has no merit and it is hereby dismissed with costs to the respondents. Consequently, the judgment and decree of the High Court (William Musyoka, J) delivered on May 5, 2017 in Succession Cause No 2270 of 2001 is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

D. K. MUSINGA, (P).

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

