



REPUBLIC OF KENYA



KENYA LAW
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**Nyambane v Nyambane (Civil Appeal 22 of 2019)
[2023] KECA 788 (KLR) (23 June 2023) (Judgment)**

Neutral citation: [2023] KECA 788 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 22 OF 2019
PO KIIAGE, M NGUGI & F TUIYOTT, JJA
JUNE 23, 2023**

BETWEEN

ROBERT OMAE NYAMBANE APPELLANT

AND

PERIS NYABATE NYAMBANE RESPONDENT

*(An appeal from the Ruling of the High Court of Kenya at Kisii
(Majanja, J.) dated 11th October 2018 in Succession Cause No. 4 of 2015)*

JUDGMENT

Judgment of P.O.Kiage, J.A

1. The appellant challenges the decision of the High Court at Kisii (Majanja, J.) made on October 11, 2013 respecting the estate of John Nyambane Kinara (deceased) as follows;

- “1. Both plots 3304 and 1585 Nyaribari Chace must now be distributed in terms of section 40 of the *Law of Succession Act*.
2. When confirming the grant, the court is required to identify every beneficiary and the share the person is entitled to.
3. The proviso to section 71 of the *Law of Succession Act* states that:-

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.



4. I now direct that the parties to agree on a list of beneficiaries including those of the deceased's children who are now deceased and have left behind beneficiaries and their respective share before I confirm the grant".
2. That decision emanated from the ruling of Karanja, J. dated February 7, 2017 in which he held;

“Moving forward, the petitioner ought to amend her summons for confirmation of grant to exclude the property unavailable for distribution and to apply the mode of distribution which is proportional as prescribed by s. 40 of the *Law of Succession Act* with regards to the property available for distribution i.e Plots No. 1585 and No. 3304. Thereafter, the Petitioner may re-apply for confirmation of grant.”
3. Following the ruling of Karanja, J. the respondent, who was the second wife of the deceased and the petitioner in the succession cause, lodged summons for confirmation of grant. The appellant, a son to the deceased's first wife, however filed an affidavit of protest and a further affidavit dated May 8, 2017 and September 22, 2017, respectively, complaining that the respondent had left out other beneficiaries in the confirmation of grant. He also claimed that the deceased had, prior to his death, allocated Plot No. 3304 to the respondent and Plot No. 1585 to the 1st house, save for a portion of it that was occupied by the respondent.
4. Majanja, J. took evidence from the appellant (PW1) and the deceased's brother (PW2) to the effect that the deceased had two wives, the first being deceased. Both families lived on Plot No. 1585 but the second family cultivated Plot No. 3304. It was contended that before his demise, the deceased had allotted each family its share of land. The first house was given Plot No. 1585 while the second house was allocated Plot 3304. Accordingly, it was argued, distribution of the deceased's property should be in such manner.
5. In objection to those averments, the respondent (DW2) and the Chief, Nyamira Location (DW1) testified, asserting that both pieces of land should be divided amongst the two families equally.
6. Upon considering the competing positions, the learned judge held that since the deceased died intestate, the two plots should be distributed in terms of section 40 of the *Law of Succession Act* (LSA).
7. Dissatisfied with that decision, the appellant filed the instant appeal raising 3 grounds, later summarised in the written submissions as one issue;

Whether or not the court erred in deciding that the deceased's estate ought to be distributed in accordance with section 40 of the *Law of Succession Act*.
8. During the hearing of the appeal, Mr. Indimuli appeared for the appellant, while Mr. Nyambati appeared for the respondent and highlighted their written submissions.
9. Mr. Indimuli submitted that the deceased had directed how his property should be shared out among his two houses, despite the fact that there was no official or formal will. He faulted the learned judge for ordering that the two parcels of land be distributed in accordance with section 40 of the LSA. Counsel insisted that the deceased's wishes ought to be respected by applying section 42 of the LSA. The section provides that where, during his lifetime or by will, an intestate gives a child or one of his houses property, that share shall be taken into account in determining the portion of the net intestate estate that finally accrues to the child or house. Mr. Indimuli further asserted that section 40 does not take away the discretion of the court to take into consideration the factual circumstances of each case, which he urged us to do.



10. We probed counsel as to why he had a problem with the distribution of the property pursuant to section 40 of the LSA, to which counsel responded that the appellant had already settled on his portion of land being Plot No. 1585. When we asked for evidence of the deceased's intention that his property should be distributed in the manner suggested by the appellant, and whether there were any effective transfers of the two portions of land to the two houses, counsel's answer, was the inevitable negative. In the end counsel conceded, as he had to, that the learned judge did not err in applying section 40 of the LSA since the deceased had died intestate.
11. In a short reply to those submissions, Mr. Nyambati pointed out that prior to the impugned ruling, Karanja, J. had made a similar ruling touching on section 40 of the LSA and that ruling was never appealed against. According to counsel therefore, the orders made therein were final and the instant appeal is an abuse of process. As the appellant did not challenge the first ruling, he was estopped from raising a complaint over the second ruling, to the same effect, on another objection filed before the High Court. Counsel urged us to dismiss the appeal with costs to the respondent.
12. I have carefully considered those rival submissions cognizant of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See rule 31(1)(a) of the [Court of Appeal Rules 2022](#); *Selle Vs. Associated Motor Boat Co.* [1968] EA 123).
13. As rightly framed by counsel for the appellant, the single issue for determination in this appeal is whether the learned judge erred in decreeing that the deceased's estate be distributed in accordance with section 40 of the LSA, which provides;
 - “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
 - (2) ...”
14. It is not in dispute that the deceased, a polygamous man, died intestate leaving behind two families/houses. Consequently, the applicable law with regard to distribution of his estate was section 40. Indeed, upon a bit of nudging by the Court during the hearing, the appellant's counsel conceded as much. Just like the learned Judge, I observe that if at all the deceased expressed how he wished his families to live, there was nothing in the evidence to show when he did so. There is also no indication that he directed how such decision, if made, be implemented. To my mind, section 40 of the LSA remains the most just and equitable way of dividing an intestate's estate in a polygamous situation. As I reasoned in my concurring judgment in [Nchue Vs. Nchue](#) (Civil Appeal 9 of 2018) [2022] KECA 729 (KLR) (28 April 2022) (Judgment);
 - “2. It seems clear to me that Section 40 of the [Law of Succession Act](#) was the proper law to be applied to the dispute before the learned W. Okwany, J. and she did well to apply it, erring not. I also think that the provision has the effect of ensuring equity and equality between the children of an intestate polygamous deceased person, even though it seems to grant the houses that survive him disparate portions – unless the various houses have the exact number of children with their respective mothers either both or all alive, or both or all deceased.



Being so minded, I see no reason for faulting the learned Judge.

15. Ultimately I find this appeal devoid of merit and I would dismiss it, but with no order as to costs this being a family dispute which calls for a de-escalation of the dispute.

16. As Mumbi Ngugi and Tuiyott, JJ.A are of the same view, it is so ordered.

Judgment of Mumbi Ngugi J.A

17. I have read in draft the judgment of Kiage, JA with which I agree fully and have nothing to add.

Judgment of Tuiyott, J.A

18. I have had the advantage of reading in draft the judgment of Kiage, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JUNE, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

