



REPUBLIC OF KENYA



KENYA LAW
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**Macharia v Macharia (Civil Appeal 166 of 2018)
[2023] KECA 1415 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1415 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 166 OF 2018
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
NOVEMBER 24, 2023**

BETWEEN

CECIDA WAIRIMU MACHARIA APPELLANT

AND

JUSTUS NDUNGU MACHARIA RESPONDENT

(Being an appeal from the Judgment of the High Court at Nyeri (M. Mativo, J.) dated 18th February 2016 in Succession Cause No. 176 OF 2011)

JUDGMENT

1. The background to this appeal is that, the deceased Jeremiah Muchogo Macharia alias Nguchuga Macharia died intestate on 15th May 2010 in Nyeri. He left a widow, Cecilia Wamuyu Nguchuga, with whom he had the following nine (9) children:-
 - a. Joyce Mugure Ndiritu;
 - b. Beth Mugure Njau;
 - c. Mary Wangui Muthui;
 - d. Margaret Wamuchie Masaku;
 - e. Jane Nyambura Koigu;
 - f. Zipporah Wanjiru Muchogo;
 - g. Esther Watetu Muchogo;
 - h. Peter Macharia Muchogo; and
 - i. Zakayo Kahonge Muchogo.



2. The deceased had previously married a lady called Mumbi Wambugu and got two children with her. These were Joyce Mugure and John Macharia. When Cecilia Wamuyu Nguchuga was married Mumbi Wambugu was long deceased. Cecilia brought up Joyce Mugure and John Macharia. John Macharia later died, leaving a widow Cecida Wairimu Macharia (the appellant). Joyce Mugure also died. Cecilia's son Peter Macharia Muchogo died and left a son Justus Ndungu Macharia (the respondent).
3. The deceased's estate comprised land parcel No. Nyeri/ Endarasha/482 that measured about 9.8 Hectares, or about 26 acres.
4. Peter Macharia Muchogo petitioned the High Court at Nyeri for the grant of letters of administration intestate. A grant was issued to him on 19th July 2011. He died on 25th April 2012. Subsequent to that, a fresh joint grant was issued to the respondent and the appellant. Each separately applied for the confirmation of the grant. The appellant proposed that the estate of the deceased be shared equally between her (representing the house of Mumbi Wambugu) and Cecilia Wamuyu Nguchuga (representing the second house). Her case was that the deceased had died while being polygamous, having married Mumbi Wambugu and Cecilia Wamuyu Nguchuga. The respondent's proposal was that each of the children of the deceased was entitled to share equally in the estate, and that Cecilia Wamuyu Nguchuga would comprise a unit and also equally benefit from the estate. The High Court received oral evidence, the respondent's application for confirmation being treated as a protest.
5. Following the evidence and the submissions, the High Court on 18th February 2016 found that, although the deceased had married twice during his lifetime, he had not died a polygamous man. It was noted that all the children of the deceased had an equal claim to the estate of the deceased, notwithstanding that the daughters of Cecilia Wamuyu Nguchuga were all married and had not participated in the proceedings to indicate their preferred mode of distribution. Relying on sections 35 and 40 of the *Law of Succession Act* (Cap. 160), the court ordered that Cecilia Wamuyu Nguchuga, Peter Macharia Muchogo, Zakayo Kahonge Muchogo and the appellant each gets 5 acres. The balance of land from the deceased's parcel was to go to Joyce Mugure Ndiritu, Beth Mugure Njau, Mary Wangui Muthui, Margaret Wamuchie Masaku, Jane Nyambura Muchogo and Esther Watetu Machogo in equal shares.
6. The appellant was aggrieved by the judgment and decree and preferred this appeal. The grounds in the appeal were as follows:-
 - 1) The learned judge erred in law and in fact in failing to find that the larger portion of the land parcel No. Nyeri/Endarasha/482 which is about 30 acres goes to Cecilia Wamuyu Macharia while only 5 acres goes to the appellant.
 2. The learned judge erred in law and in fact in not finding that the respondent and Cecilia Wamuyu shall get almost twenty-five (25) acres; five times the size of the portion appellant shall get which is very unfair and unconstitutional.
 3. The learned judge erred in law and in fact in failing to consider that the remaining portion still went to the said Cecilia Wamuyu Nguchuga through her children thereby depriving the appellant the right of inheritance from the deceased.
 4. The learned judge erred in law and in fact in failing to be guided by law of natural justice and see that it is unfair for one family of Cecilia Wamuyu Nguchuga to get more than three quarters of the land through herself and her children disregarding the fact that the appellant also has children.



5. The learned judge erred in law and in fact in bringing some extraneous matters in succession law to support his findings.”

The appellant asked that the appeal be allowed, the matter be taken back to the High Court for retrial or that this Court grants any better or other orders.

7. During the hearing of the appeal the appellant did not attend, but had filed written submissions. The daughter Alice Wangari Macharia informed the Court that her mother was unwell but had asked her to inform the Court that she was relying on the written submissions. The respondent was present and orally addressed the Court on the appeal. The appellant’s case, according to her written submissions, was that the deceased was a polygamous man whose estate ought to have been shared between her, representing the first house, and the house of Cecilia Wamuyu Nguchuga in equal shares. Her further case was that the land in question had belonged to the deceased and his late son John Macharia, her late husband; that she and her late husband had contributed to the acquisition of the land. She faulted the High Court for having shared the estate in the manner it did.
8. The respondent opposed the appeal, arguing that the deceased was not polygamous as he had married her grandmother ten years after the death of the first wife. He further submitted that each child of the deceased was entitled to an equal share of the estate, and that included the appellant’s late husband.
9. Being the first appellate court, our mandate is to reconsider the entire evidence that was before the trial court, evaluate it and draw our own conclusions, while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses as they testified (*Selle –v- Associated Motor Boat Co. & Others* [1968]EA 123).
10. Considering the grounds of appeal and the written and oral submissions that we received from the parties, the two issues that we are called upon to determine are:-
 - a. whether the deceased was a polygamous man; and
 - b. whether the superior court’s distribution was fair and in accordance with the [Law of Succession Act](#).
11. We have reviewed the evidence before the trial court. The unchallenged evidence of Cecilia Wamuyu Nguchuga was that when she married the deceased in 1951 after his first wife Mumbi Wambugu had long died, leaving two children whom she brought up along with her children. It was therefore evident that there was no time the deceased had two wives at the same time. The deceased was not a polygamous man. He left one widow with her children, and two children from a previous marriage. The deceased therefore left a widow and children. This was the finding by the superior court, and we agree with it.
12. Regarding the distribution of the estate of the deceased to his beneficiaries, it was evident that the deceased had died intestate leaving the suit parcel of land as his property. The claim that the parcel of land was jointly bought by the deceased and the appellant’s husband, or that she had made a contribution to its acquisition, were not issues before the superior court, and cannot therefore be raised on appeal. No finding was made on the claims to form a basis for our re-evaluation as an appellate Court. Secondly, the said claims were not raised in the grounds of appeal. The complaint by the appellant is that if the distribution by the superior court is left to be, Cecilia Wamuyu Nguchuga’s house would get most of the deceased’s land to her detriment.
13. The trial Judge made reference to sections 35 and 40 of the Act, and observed that sections 35 would apply where the deceased had married only once and had left a child or children, in which case the widow would get a life interest over the land and the children would equally share the land; the life



interest hanging over the portion of each child until the widow had died. The learned Judge preferred section 40 which he opined would apply because the deceased had married more than once and had left children. In our own view, that would contradict the learned judge's earlier finding that the deceased was not polygamous. Section 40, to our mind, deals with a situation where the deceased died while being polygamous, in the sense that he left more than one widow.

14. We are also alive to the fact that the strict application of section 35, which in our view accords with the facts of this case, would unduly tie all the deceased's children, who come from different mothers, to the life of Cecilia Wamuyu Nguchuga. Such distribution would neither be fair nor just, in the circumstances. Each beneficiary should immediately get his or her unencumbered entitlement and be able to move on with life. It is for these reasons that we ultimately agree with the mode of distribution that the learned Judge adopted. We are cognizant of the fact that all the children of the deceased had each an equal claim to the estate, and therefore the appellant's complaint that the children of the late Mumbi Wambugu had been unfairly treated had no basis.
15. In conclusion, we find no merit in the appeal. This being a family matter involving siblings, we order that each party bears its own costs of the appeal.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF NOVEMBER 2023

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify this is a true copy of the original.

Signed

DEPUTY REGISTRAR

