



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gesora v Gesora (Civil Appeal 32 of 2017)  
[2022] KECA 109 (KLR) (11 February 2022) (Judgment)**

Neutral citation: [2022] KECA 109 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 32 OF 2017  
PO KIAGE, J MOHAMMED & M NGUGI, JJA  
FEBRUARY 11, 2022**

**BETWEEN**

**CHARLES BARAKE GESORA ..... APPELLANT**

**AND**

**JOSEPHINE KERUBO GESORA ..... RESPONDENT**

*(An appeal from the Ruling of the High Court of Kenya at Kisii  
(Okwany, J.) dated 25th October, 2016 in Succession Cause No. 9 of 2012)*

**JUDGMENT**

1. Methusela Gesora Barake (deceased) died on 21<sup>st</sup> October 2008. The deceased had two wives; the first was Prisca Moraa Gesora who is also deceased and the second, Josephine Kerubo Gesora, the respondent. The deceased had a total of 22 children with his wives. Charles Barake Gesora, the appellant, being the first born of the first wife.
2. Upon the demise of his father, the appellant petitioned for letters of administration at the Kisii High Court via Succession Cause No. 9 of 2012. The respondent as one of the persons entitled to share in the estate, refused to take part in the proceedings. This prompted the appellant to institute citation proceedings against her dated 3<sup>rd</sup> February 2012. In response, the respondent filed a replying affidavit stating that she would only sign the petition if the family came together and agreed on the mode of distribution of the estate. On 7<sup>th</sup> December 2012, Sitati, J., gave the appellant the green light to take out the administration letters.
3. Subsequently, on 24<sup>th</sup> December 2012, the appellant was granted letters of administration and by an application dated 11<sup>th</sup> March 2013, he sought the confirmation of the grant. The application was supported by an affidavit where he listed all the beneficiaries and gave a detailed proposed mode of distribution of the estate amongst all the beneficiaries. He deposed that the distribution was in accordance to the wishes of the deceased as was documented in the minutes of a meeting held on 21<sup>st</sup>



January 2003 prior to his death, together with another meeting held by the family subsequent to his death on 31<sup>st</sup> October 2010. In this mode, he stood to inherit a total of 17 acres against the respondent's 3 acres.

4. In opposition, the respondent filed objection proceedings and filed a list of what she claimed was a full inventory of the deceased's estate which included some items and properties that were not listed by the appellant. In her motion dated 1<sup>st</sup> December 2014, she sought for a valuation report of the entire estate and details of the ancestral land that was held by the deceased's first wife prior to her death.
5. Additionally, the respondent filed a protest dated 18<sup>th</sup> February 2015 against the confirmation of grant. She opposed the mode of distribution as proposed by the appellant as it gave him the lion's share of the estate. She listed a total of 27 items which included parcels of land, shares in various institutions and a motor vehicle in addition to what was tabled before the court by the appellant. According to her, the estate was to be divided equally among the two houses. She deposed that the appellant did not consult with anyone on the mode of distribution of the estate. Further, the purported minutes did not reflect what transpired in the meeting. Neither were they the true wishes of the deceased.
6. During the hearing of the objection application, the parties recorded a consent in court on 19<sup>th</sup> June 2015 as follows;

“1. The land LR KINENI/28 to be shared as follows

- a) 6Ha – CHARLES BARAKE GESORA
- b) 6Ha – SABLON BARAKE OCHUNGO
- c) 30Ha – TO THE FIRST HOUSE OF THE DECEASED
- d) 28Ha – TO THE SECOND HOUSE OF THE OBJECTOR

2. The remaining 30Ha to be distributed upon further orders of the court.

3. BONYAATUTA/821 to be distributed upon further orders the court.”

7. Upon the conclusion of the hearing, Okwany, J. delivered a ruling on 25<sup>th</sup> October 2016 as follows;
  - 1) A joint certificate of confirmation is hereby issued to Josephine Kerubo Gesora as widow of the deceased as administratrix and administrator respectively so as to ensure that both houses of the deceased are represented by an administrator.
  - 2) All household goods, chattels and personal effects belonging to the deceased to be shared equally between the deceased two houses and the objector to be given absolute ownership of her house's share of the said personal effects as the only surviving widow.
  - 3) The motor vehicle registration No. KLL 742 to be sold and the proceeds therefrom be shared equally between the two houses.
  - 4) The first house to get the initial 30 acres of land LR. NO. Isoge/Kineni/28 as per deceased directive and in line with the consent order dated 19<sup>th</sup> June 2015.
  - 5) The second house to get the initial 28 acres of land parcel no. Isoge/Kineni/28 as per deceased directive and in line with the consent order dated 19<sup>th</sup> June 2015.
  - 6) The twenty (20) acres of land delineated as “Emonga” forming part of Isoge/Kineni/28 be shared equally between the two houses.



- 7) The seven (7) Acres of land at Isoge/Kineni/28 that the deceased left for himself to be shared equally between the two houses.
  - 8) LR. No. West Mugirango/Bonyamatuta/82 which is 2.8Ha to be shared equally between the two houses.
  - 9) The plot at Kineni market measuring 50ft by 100ft be shared equally between the two houses.
  - 10) Shares in NIC Bank, Standard Chartered Bank, KCB Ltd, Kenya Reinsurance, ICDC, Centum and Nyagah Stock Brokers be shared equally between the two houses.
  - 11) Zablon Barake Ochungo to get 6 (six) Acres of land from Isoge/Kineni/28 as purchaser.
  - 12) Charles Barake Gesora to get 6 (six) Acres of land from Isoge/Kineni/28 as per deceased directive.
  - 13) As for costs, since this is a family dispute, each party to bear his/her own costs.
8. It is against that ruling that the appellant has appealed to us, on eleven grounds, condensed as, the learned Judge erred in law and fact by;
- a) Holding that LR. NO. WEST MUGIRANGO/BONYAMATUTA/821 and part of LR NO. ISOGE/KINENI/28 be equally distributed between the two houses.
  - b) Failing to honour all the wishes of the deceased concerning the distribution of the estate.
  - c) Failing to provide for the grandchildren of the deceased who were listed as beneficiaries of the estate.
  - d) Distributing the plot at Kieni measuring 50ft by 100ft as part of the estate yet the same was the appellant's personal property.
9. The firm of M/s Oguttu, Ochwangi, Ochwal & Company Advocates are on record for the appellant, while the firm of Momanyi Aunga & Company Advocates are on record for the respondent. Both parties filed and relied on their written submissions which I shall briefly summarize.
10. The appellant submitted that the learned Judge failed to appreciate the provision of Section 40 of the *Law of Succession Act* (Act) in the distribution of the estate, hence inappropriately applied it and deprived members of the first house of their rightful share of the estate with regard to LR NO. ISOGE/KINENE/28. Since the first house had 13 beneficiaries and the 2<sup>nd</sup> house 11, the learned Judge ought to have distributed the remaining part of it on a ratio of 13:11. This would translate to the first house getting 16.25 Acres and the second 13.75 Acres. The Judge was also faulted for only distributing 97 Acres out of the 100 Acres available hence leaving out 3 Acres undistributed.
11. The appellant complained that the learned Judge did not heed the wishes of the deceased as to the distribution of LR. NO. BONYAMATUTA/821 as contained in the minutes of the meeting held on 21<sup>st</sup> January 2003. It indicated that since the parcel was too small for subdivision, it should be inherited by an individual. In the alternative, the same ought to have been distributed on a ratio of 13:11 which would have resulted in the first house inheriting 1.52 Ha and the second house, 1.28 Ha.
12. He faulted the learned Judge for distributing the plot in Kineni Market without evidence of its existence. The said order was thus given in vain and ought to be expunged. He termed the failure by the learned Judge to award him costs as a miscarriage of justice and besought us to remedy the same. He urged us to allow his appeal.



13. In response, it was submitted that the learned Judge did not contravene the provisions of Section 40 of the Act. In regard to LR. NO. ISOGE/KINENI/28, the parties consented to the partial distribution of the property and subjected the rest of the distribution to the directive of the Court. That said, the remaining part of it is known as 'Emonga' and according to Gusii customs it is to be shared equally among the two houses as the learned Judge correctly ordered.
14. The learned Judge's decision to equally distribute parcel number BONYAMATUTA/821 was supported. It was contended that Section 40 of the Act does not envision grandchildren as forming part of a 'house' in a polygamous setting. On the plot in Kineni Market, it was submitted that the appellant failed to object to its inclusion as part of the estate at the High Court while he had the opportunity. In the end, it was settled that the trial Judge judiciously exercised her discretion in the distribution of the estate and in the denial of costs to any party as this is a family matter. This Court was urged to dismiss this appeal with costs.
15. I have carefully considered the submissions and the entire record of appeal whilst being cognisant of our role as a first appellate Court, which is to re-evaluate and re-assess the evidence and arrive at our own independent conclusions. See *Selle vs. Associated Motor Boat Co. Ltd & Others [1968] E.A 123*.
16. The core issue for consideration surrounds the distribution of the estate by the learned Judge and whether in doing so; she disinherited some of the beneficiaries; divided a property that did not exist and left part of the estate undistributed.
17. This being a polygamous household where the deceased died intestate, the governing section of the Act on the mode of distribution is Section 40 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) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

17. The partial distribution of LR. NO. ISOGE/KINENI/28 according to the consent entered into by the parties on 19<sup>th</sup> June 2015 is not dispute. The appellant is disputing the distribution of the remaining part of the estate. According to him, the learned Judge ought to have heeded the wishes of the deceased which were that Edward Gesora, a beneficiary from the first house, inherits LR. NO. WEST MUGIRANGO/BONYAMATUTA/821 solely, as he was already residing on it. In the alternative, the same ought to have been distributed on a ratio of 13:11, which ratio ought to have applied to the remaining portion of LR. NO. ISOGE/KINENI/28.
18. In examining the mode of distribution as ordered by the learned Judge, I bear in mind the pronouncement of this Court in *Scolastica Ndululu Suva Vs. Agnes Nthenya Suva [2019] eKLR*;

“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.” Emphasis



19. In arriving at the equal distribution of the remaining part of the estate, the learned Judge held that the children of Helen Gesora, who is deceased, were entitled to inherit her share of the property being one unit. This debunks the appellant's claim that she failed to provide for the children of Helen Gesora. In her judgment, she opined that the equal distribution of an estate of a deceased was not without its challenges as she noted that there was a minor in the second house whose needs were not similar to those of the adult beneficiaries. The minor whilst still fully dependant on the deceased cannot be considered equal to the adult who has settled in life and is not directly dependent on the deceased for their daily needs.
20. In the same breath, the fortunes of each child cannot be foretold but will surely have a bearing on their quality of life in future as others will flourish in life more than others yet they may have inherited equal portions of the estate. I am in sympathy with the dilemma as enunciated by the learned Judge and recall the dicta of Omollo, J. in *Mary Rono Vs. Jane Rono & Another [2005] eKLR*.

My understanding of that section (Sec 40(1) of the Act) 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 a discretion to take into account or consider the number of children in each house. If 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.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act does not provide for that kind of equality." Emphasis

21. The appellant further complained that the learned Judge distributed the plot in Kineni without proof of its existence. My view is that as he failed to address this issue at the High Court, he cannot canvass raise it at the appeal level. He also contended that there is 3 Acres of the estate that was left undistributed. The portion not factored in the distribution if it exist on the ground, can be remedied by the form of an amendment of the order at the High Court. This Court need set aside any portion of the order in order to cure that omission.
22. The appellant finally sought costs both at the High Court and in this appeal which the respondent also sought. Costs lie within the court's discretionary power and I concur with the learned Judge that this being a family matter, it is just for each party to bear its own costs.
23. On the whole, I find that the learned Judge exercised her discretion correctly, took into consideration relevant issues and distributed the estate equitably. To me, the appeal lacks merit and I would dismiss it in totality with each party to this family matter bearing its own costs.
24. As J. Mohammed and Mumbi Ngugi, JJ.A. are agreed, it is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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



SIGNED

**DEPUTY REGISTRAR**

**JUDGMENT OF J. MOHAMMED, J.A**

1. I have had the benefit of reading in draft, the judgment of my Brother, P. O. Kiage, JA. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

SIGNED

**DEPUTY REGISTRAR**

**JUDGMENT OF MUMBI NGUGI**

1. I have had the benefit of reading in draft, the judgment of my brother, P. O. Kiage. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add,

**DATED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

SIGNED

**DEPUTY REGISTRAR**

