



**Wekunda v Murunga & another (Civil Appeal 142 of 2017)
[2022] KECA 435 (KLR) (11 March 2022) (Judgment)**

Neutral citation: [2022] KECA 435 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 142 OF 2017
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MARCH 11, 2022**

BETWEEN

WILLIAM WAMALWA WEKUNDA APPELLANT

AND

JABAN MURUNGA 1ST RESPONDENT

HERMAN MURUNGA 2ND RESPONDENT

((An appeal from the Judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J.) dated 5th October, 2017 in SUCCESSION CAUSE NO. 64 OF 1998))

JUDGMENT

1. JUDGMENT OF KIAGE, JA.

This appeal is a challenge by the appellant, William Wamalwa Wekunda against the judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J.) by which it distributed the Estate of Sikunyili Lusike Mulia (Deceased) among the biological sons of the deceased, Laban and Herman; and Stephen, a nephew, as follows; Jaban Wafula - 40.4 acres, Herman Okumu - 40 acres and Stephen Wekunda - 20 acres

2. The appellant, a son to Stephen (deceased) was aggrieved by that decision and filed the instant appeal containing 7 grounds, which, condensed, are that the learned judge erred in;

Finding that land was subdivided in the year 2000 after the demise of the deceased Lusike Murunga Shikunyili by the sons when on the contrary the land was subdivided in the year 1985 by the deceased. Finding that Herman O Murunga was in attendance when the surveyor visited the site on 17th April, 2015 when he had already died in 1994. Not finding that the titles were created by the year 2000. Directing that the estate be distributed afresh and leaving out 10.6 acres as the total acreage was 111 acres.



3. In the end the appellant prayed that the appeal be allowed and orders be made to the extent that he had been properly settled by the deceased during his lifetime.
4. During the hearing of the appeal there was no appearance for the appellant although his advocates on record, M/S C. K. Areba & Company Advocates had filed submissions dated 11th November, 2021. Learned Counsel Mr. Anwar appeared for the 1st respondent, and although he indicated reliance on his submissions, the same are not on record. Counsel also pointed out that the appellant had not sought leave to appeal.
5. The submissions made on behalf of the appellant are that he had been properly settled by the deceased during his lifetime and the decision to order fresh distribution of land parcel No. EAST BUKUSU/WEST SANG'ALO/681 was unwarranted, disruptive, improper in law and untimely. It was argued that section 42 of the Law of Succession Act provides that property distributed by a deceased person during his lifetime does not form part of the estate subject to distribution. Further, subdivision of the suit land was done in the year 1985 by the deceased and not in the year 2000 as held by the learned Judge. The subdivision apportioned title numbers: EAST BUKUSU/WEST SANG'ALO/1498, 1499 and 1500 to the beneficiaries herein. This assertion is supported by the surveyor's report dated 17th April, 2015 and its attachments, and a letter from the Chief of East Bukusu Location dated 5th April, 2002. It was contended that the decision of the learned Judge to distribute the land in the proportions of 40.4 acres, 40 acres and 20 acres to Jaban, Herman and Stephen respectively, left out 10.6 acres unallocated because the suit land was approximately 111.2 acres. In the end we were urged to re-evaluate the entire evidence on record and make our own finding on the facts in issue. We were also urged to allow the appeal and order that the appellant had been properly settled by the deceased during his lifetime.
6. I have carefully considered the appellant's written submissions and the totality of the record of appeal. In a first appeal this Court respects findings of the court below unless satisfied that the court misapprehended the facts; or misdirected itself in law; or that it took into account matters which it should not have; or failed to take into account considerations which it should have; or that its decision was plainly wrong. See *Shah -vs- Mbogo & Another* [1967] EA 1116.
7. The appellant proposed the issues for determination to be; whether the appellant had been properly settled by the deceased during his lifetime, and whether the decision by the trial court ought to be set aside. I think the primary issue that falls for determination in this matter is, whether the learned Judge properly exercised her discretion in distributing the suit property in the proportions she did. The appellant contends that his father, Stephen Wekunda Mulia, a nephew of the deceased, was apportioned land parcel EAST BUKUSU/WEST SANG'ALO/1498 measuring approximately 10.2 hectares (25.2 acres) by the deceased before his death. As such, he claims, he is entitled to that piece of land and challenges the learned Judge's distribution of the property afresh.
8. I note that the learned Judge in distributing the estate of the deceased observed that subdivisions of the suit property had been annulled. Indeed, the record bears a consent order dated 7th June, 2004, recorded before the deputy Registrar of the High Court in Bungoma, which the parties herein consented that;

“Title Numbers East Bukusu/West Sangalo/1498, 1499 and 1500 be and are hereby cancelled to revert to the original title No. EAST BUKUSU/WEST SANGALO/681”
9. Further, according to the High Court proceedings of 12th March, 2015, and pursuant to a court order by the learned Judge on the same date, parties agreed to engage the Bungoma District Surveyor to compile the acreage of the suit property. The report of the Bungoma County Surveyor dated 17th April, 2015 indicates that the parties herein were present during the survey, and that the total acreage of the



suit property is approximately 40.6ha or 100.4 acres. On 11th June, 2015, the learned Judge confirmed that the Surveyor's report was on record and ordered that parties agree on the mode of distribution and file separate proposals. Upon considering the proposals, the acreage of the suit property, and the law, and using her discretion, the learned Judge divided the suit property; among the three beneficiaries in the stated proportions. I am satisfied that the learned Judge addressed herself properly on the law and took into account all relevant factors in exercising her discretion. I find no reason to interfere with the exercise of that discretion in the matter which appears to me to have been sound and correct.

10. Ultimately this appeal is devoid of merit and I would dismiss it with costs.

As Mumbi Ngugi and Tuiyott, JJA agree, it is so ordered.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH, 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 MUMBI NGUGI, JA

1. I have had the benefit of reading in draft the judgment of Kiage, JA. I agree with the findings and conclusions reached therein and have nothing further to add.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

JUDGMENT OF TUIYOTT, JA

1. I have had the benefit of reading in draft the judgment of Kiage, JA. I agree with the findings and conclusions reached therein and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

