



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Nchue v Nchue (Civil Appeal 9 of 2018) [2022] KECA 729 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KECA 729 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT KISUMU**  
**CIVIL APPEAL 9 OF 2018**  
**PO KIAGE, M NGUGI & F TUIYOTT, JJA**  
**APRIL 28, 2022**

**BETWEEN**

**NOONKOKUA ENE NCHUE ..... APPELLANT**

**AND**

**KEROTIANA ENOLE NCHUE ..... RESPONDENT**

*(Being an appeal from the ruling and order of the High Court of Kenya at Kisii (W.A. Okwany J.) dated 13th December, 2017 in High Court Succession Cause No. 315 of 2014)*

**JUDGMENT**

**JUDGMENT OF MUMBI NGUGI, J.A**

1. In her Memorandum of Appeal dated 18<sup>th</sup> January 2018, the appellant challenges the decision of the High Court of Kenya at Kisii (Okwany J) with regard to the mode of distribution of the estate of Tengeyio Ole Nchue (deceased). The crux of the appeal is that the trial court misapprehended the provisions of section 40(1) of the *Law of Succession Act*, Cap 160 of the Laws of Kenya. It therefore erred in finding that the estate of the deceased comprised 19 units, and in directing that the estate should be distributed between 19, as opposed to two units. The appellant also alleged bias on the part of the trial court in its evaluation of the evidence tendered by the parties.
2. The appellant asks this Court to set aside, vary or rescind the ruling dated 13<sup>th</sup> December 2017 with costs to her. It is her plea that the estate of the deceased should be distributed according to how and where each house occupied prior to the decision of the court.
3. The appellant and the respondent are widows of the deceased, who died intestate on 5<sup>th</sup> March, 2010 in Trans Mara. The respondent and the appellant were the 1<sup>st</sup> and 2<sup>nd</sup> wives of the deceased, respectively. The respondent had 10 children while the appellant had 7. The dependants of the deceased as they appear in the pleadings before the trial court were as follows:



### **1<sup>st</sup> House**

1. Kirotiana Enole Nchue - Widow
2. Charles Oloishuru Ole Nchue - son
3. Jackson Lemashon Pere - son
4. Peter Lepita Tengeiywo (deceased) - son
5. Samwel Ronkel Nchue - son
6. Julias Tenkei Pere - son
7. Daniel Tengeyio - son
8. Ereteti Nchue Ole Kononkoi - son
9. Cecilia Nchue Ole Kakai - daughter
10. Paranai Nchue Ole Nkosek - daughter
11. Tiile Nche Semeyioy - daughter

### **2<sup>nd</sup> House**

1. Noonkua Ene Nchue - widow
2. Susan Nchue Ole Kaloi - daughter
3. Lenkai Nchue - son
4. Nchue Ole Waigeyio -son
5. Shakini Nchue Ole Kuso - daughter
6. Dancan Ledama Nchue - daughter
7. Seenoi Nchue - daughter
8. Silvia Noonali Nchue -daughter
4. The estate of the deceased comprised land parcel number Transmara/Osinoni/103 measuring 59.63 hectares. Letters of administration intestate were issued to the two widows on 15<sup>th</sup> April, 2015.
5. However, a dispute arose with regard to the mode of distribution of the estate. The respondent averred that the deceased had, during his life time, sub-divided and settled each house on one half of the said land where he put up a homestead for each wife together with her children. She claimed that the appellant had, however, started intermeddling with the estate and had built temporary structures on the portion of the land on which the deceased had settled the respondent's house. She had moved her homestead from where the deceased had settled her to the portion earmarked for the respondent. The appellant was not willing to occupy the half of the suit land that was given to her house by the deceased and persisted in occupying the portion that belonged to the first house. The respondent asked the trial court to distribute the estate equally to the two houses as the deceased had shared out the land between them in his lifetime. However, in the event that the appellant rejected that mode of distribution, then the court should distribute the estate in accordance with the provisions of section 40 of the *Law of Succession Act*.



6. While the appellant did not accept the mode of distribution proposed by the respondent, she did not make a proposal on distribution before the trial court. She filed an affidavit of protest in which she challenged the filing of an Amended Affidavit by the respondent and complained about the omission of one of her daughters in the list of beneficiaries. She also failed to file submissions in support of her position before the trial court.
7. The trial court noted in its ruling that no amount of out of court talks with respect to the distribution of the estate of the deceased had moved the two widows to reach a settlement on distribution. It therefore proceeded to distribute the estate in accordance with the provisions of section 40 of the [Law of Succession Act](#) among the 19 beneficiaries of the estate of the deceased. The suit land measured 59.63 and therefore if it was shared equally among the 19 units, it translated to 3.14 Ha (7.85 acres) per unit. Going by this calculation and division, the respondent's house would get 34.43 Ha while the appellant's house would get 25.04 Ha. The trial court then directed each house to divide their share in accordance with the provisions of sections 35-38 of the [Law of Succession Act](#). The trial court then confirmed the letters of administration intestate issued to the parties on 15<sup>th</sup> April 2015 on the basis of the above mode of distribution and directed each party to bear its own costs.
8. The parties hereto filed written submissions in support of their respective cases on the appeal. In the written submissions dated 13<sup>th</sup> January, 2022, the appellant contends that the trial court did not consider the protest raised by the appellant regarding the respondent's amended affidavit of distribution. She avers that in the said affidavit, the respondent agrees that the deceased had distributed his land between his two widows.
9. The appellant further submits that the trial court had erred in distributing the estate amongst the parties without any basis as a result of which the appellant was given a lesser portion of the land. According to the appellant, both parties had agreed that each house, not the children, had been shown their respective portions on the ground where each party currently stays. The appellant submits that the trial court should have required the parties and their witnesses to testify so that the court could determine how the estate had been distributed by the deceased before his death. The appellant cited the case of [Rono vs Rono & Another](#) [2005] eKLR in support of her case.
10. In her submissions in reply dated 12<sup>th</sup> January, 2022, the respondent submits that the deceased was polygamous and died intestate. In such circumstances, where the dependants fail to agree on the mode of distribution, the court is called upon and is bound to follow the mandatory provisions of section 40 of the [Law of Succession Act](#). Like the appellant, the respondent refers this Court to the decision in [Rono vs Rono & Another](#) (supra) in which the Court held that section 40 of the [Law of Succession Act](#) is applicable in situations such as this. She submits that the trial court did not misapprehend the provision of the said section and the decision of the trial court should be upheld.
11. The sole issue for determination in this appeal is whether the trial court erred in applying the provisions of section 40 of the [Law of Succession Act](#) and in distributing the estate of the deceased among the 19 units which it found the deceased's estate comprised.
12. The essential facts leading to this appeal are not in dispute. The deceased was polygamous. The appellant and the respondent are his widows. In the language of the [Law of Succession Act](#), he had two houses, a house being defined in section 3(1) of the Act as being "a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife". The deceased died intestate leaving two widows and seventeen children, 10 from the respondent's house and 7 from the appellant's.
13. Section 40 of the [Law of Succession Act](#) provides as follows:



- (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 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.”
14. The trial court considered the provisions of section 40 in distributing the estate of the deceased. It noted that the 1<sup>st</sup> house of the deceased comprised 11 units, including the respondent and the widow and children of one of the sons of the respondent. The appellant’s house comprised 8 units, including the appellant.
15. The parties hereto were at liberty to agree on the mode of distribution of the estate of the deceased. I note from the proceedings that the court gave them every opportunity to pursue a settlement. However, the record indicates that on 18<sup>th</sup> May 2017, the appellant expressly informed the court that she was not ‘agreeable to the mode of distribution suggested,’ that mode being, as set out in the Amended Affidavit sworn by the respondent on 8<sup>th</sup> May 2017 that the estate be divided equally between the two houses, or that the provisions of section 40 are followed. At paragraph 5 and 6 of the ruling, the court observes that:
- “5. No amount of out of court talks has been able to make the 2 protagonists reach a settlement on distribution thereby necessitating this court’s determination on the mode of distribution of the deceased’s estate.
6. Where parties fail to agree on the mode of distribution, the court falls back and is guided by the provisions of Section 40 (1) of the *Law of Succession Act...*
  7. A “house” refers to a family unit composed of a wife, whether alive or dead at the time of the death of the husband and the children of that wife. Section 40 (1) of the *Law of Succession Act* provides for the consideration of the number of children in each house and does not require that the estate of a polygamous intestate be divided equally (See Rono Vs Rono & Another (2005) E.A 363).”
16. Having considered the decision of the trial court, the affidavit evidence that was before it and the provisions of the law, I am satisfied that the court fully understood its duty in the circumstances of the case. It gave the parties every opportunity to agree on the mode of distribution. Rather than take that opportunity, the appellant confined herself to challenging the Amended Affidavit sworn by the respondent. The appellant did not even file submissions before the trial court to support her position, such as it was, though it appears to have consisted mainly of a desire not to have the grant of letters of administration confirmed unless such confirmation conformed to her, unstated, wishes. In the absence of an agreement between the parties on the mode of distribution, the only recourse open to the trial court was section 40 of the *Law of Succession Act*. It cannot be faulted for following the applicable law.
17. Accordingly, I find no merit in this appeal, and I would dismiss it with costs to the respondent.

## **JUDGMENT OF KIAGE, J.A**

1. I have had the advantage of reading in draft the judgment of my learned sister Mumbi Ngugi, J.A, with which I am in full agreement.



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.
3. The appellant strongly contends that as the deceased had two houses, his estate should have been divided equally between them, notwithstanding that she had seven children so that together with herself her house had eight units, while the respondent had ten children with the effect that, including herself, her house had eleven units.
3. I think, with respect, that the equality of entitlement for houses *inter se* propounded by the appellant is illusory and not real. It is illusory because were it to be given effect, her 8-unit house would be given 50 percent of the 59.63 Ha estate leaving the respondent’s 11-unit house to share the remaining 50 percent.
4. The effect, naturally, would be that each unit for the house with fewer children will always get a larger share than the one with less children. In my way of thinking, this immediately debunks the myth of house-based equality as a better, fairer formula than the statutory unit-based formula.
5. To my mind, *Rono Vs. Rono & Anor [2005] E.A. 363* speaks to the equality of children not just in the oft-quoted “*male and female are equal*” postulate, but in the general sense that “*all children of a deceased polygamous man are equal in the eyes of the law.*” They are all, without distinction, equally his children, products of his loins, entitled to share equally in the estate that is the sweat of his brow.
6. In the premises, I agree that the appeal is for dismissal.
7. As Tuiyott, J.A, also agrees, the appeal is hereby dismissed in the terms proposed by Mumbi Ngugi, J.A.

**JUDGMENT OF TUIYOTT, J.A**

1. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA, with which I am in agreement and have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

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

*Signed*



**DEPUTY REGISTRAR**

