



**Kahiro v Mburu & 2 others (Civil Appeal Suit 43 of 2018)
[2022] KECA 650 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KECA 650 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL SUIT 43 OF 2018
AK MURGOR, J MOHAMMED & S OLE KANTAI, JJA
MAY 13, 2022**

**BEING AN APPEAL AGAINST THE JUDGMENT OF THE HIGH
COURT IN AT NAIROBI (R. OUGO, J.) DELIVERED ON 2ND
AUGUST 2017 IN SUCCESSION CAUSE NO. 2083 OF 2007**

BETWEEN

LUCY WAMBUI KAHIRO APPELLANT

AND

TERESIAH WANJIRU MBURU 1ST RESPONDENT

HANNAH WANGUI MBURU 2ND RESPONDENT

ANTHONY NJOGU MBURU 3RD RESPONDENT

(Being an appeal against the judgment of the High Court in at Nairobi (R. Ougo, J.) delivered on 2nd August 2017 in Succession Cause No. 2083 of 2007)

JUDGMENT

1. The appellant, Lucy Wambui Kahiro (Lucy) is aggrieved by the judgment of High Court and the mode of distribution of the Estate of Late Peter Mburu Mungai (deceased) between her family and the family of the 1st respondent, Teresiah Wanjiru Mburu, (Teresiah).
2. The appeal is in respect of the estate of the deceased who died on November 28, 2003. The deceased was polygamous, and upon his demise he left two widows, Lucy and Teresiah. The deceased and Lucy were allegedly blessed with 3 children, and Teresiah and the deceased were blessed with 6 children.
3. Following the deceased's demise, the two widows were unable to agree on jointly filing for letters of administration of the deceased's estate, with the result that on August 6, 2008, Teresiah, together with her son, Anthony Njogu Mburu and daughter, Hannah Wangui Mburu obtained letters of



administration intestate for the deceased's estate in Kajiado in Succession Cause No. 47 of 2007. On July 30, 2009, she was issued with a certificate of grant of confirmation.

4. Subsequently thereto, Lucy filed for and obtained a grant of letters of administration on December 14, 2009, the personal representatives were specified as herself and her son Michael Muguru Mburu. The grant was confirmed on February 14, 2012, and the assets were distributed as follows; Land parcel No. Kajiado/Olchoro Onyore/xxxx (Kajiado xxxx) to Lucy, Caroline, Michael, Francis and Patrick in equal shares and Land Parcel No. Kajiado/Olchoro Onyore/xxxx (Kajiado xxxx) to Teresiah, Mary Nduta Mburu, Patrick Mungai Mburu, George Kungu Mburu, Peris Njoki Mburu, Lucy Wangari Mburu, Anthony Njogu Mburu, and Hannah Wangui Mburu. It was her case that, when she attempted to have the land parcels transferred, to her surprise she found that Teresiah had already transferred the Kajiado xxxx and Kajiado xxxx into her name. It was on these premises that she sought to have Teresiah's grant of letters of administration cancelled.
5. By an application dated July 17, 2012, Lucy filed for cancellation of Teresiah's grant of letters of administration in Succession Cause No. 47 of 2007. And after appreciating that 2 succession causes existed in respect of the intestate estate of one and the same individual, and that there was a conflict in the mode of distribution of the deceased's assets, the trial court (Makau, J.) cancelled both certificates of confirmation of grant in both succession causes, and revoked any subsequent transactions. The court appointed Teresiah, Lucy, Michael Muguru Mburu and Hannah Wangui Mburu as administrators of the estate and ordered that the parties proceed to file for confirmation of the grant of the estate in Succession Cause No. 2083 of 2007.
6. In a summons for confirmation dated March 10, 2014, Lucy sought to have the grant of letters of administration confirmed to herself and her son, with Kajiado xxxx and Plot No. xxxx Oloosirkon T. Centre being distributed to them. Conversely, she proposed that Teresiah get Kajiado 258 and Plot No. xxxx Oloosirkon T. Centre to hold in trust for her children.

Teresiah on the other hand proposed that the deceased property be distributed as follows; Lucy's household, Plot No. xxxx Oloosirkon T. Centre and 1 ¼ acre to be extracted from LR North East Thika (the Thika Kabati plot) and that her household remain with Kajiado xxxx, Kajiado xxxx and Plot No. xxxx Oloosirkon T. Centre.
7. After considering the parties' pleadings, affidavits, testimonies and submissions, the trial court set out 4 issues for determination; i) whether Lucy was a wife of the deceased; ii) who were Lucy and the deceased's legitimate beneficiaries; iii) whether the wishes of the deceased were as Lucy alleged and; and iv) how the estate of the deceased should be distributed.
8. As to whether Lucy was a wife of the deceased, the trial judge found that the issue had already been determined in a ruling dated January 31, 2014 where the court had found that she was a wife to the deceased. With respect to which, Lucy's children were beneficiaries of the deceased, the trial judge found that since the relationship between the deceased and Lucy had led to the birth of a child, he was a rightful beneficiary and entitled to a share in the deceased's estate.
9. Thereafter, the court went on to consider the assets that constituted a part of the estate, and after analysing the evidence, and the proposals presented by both parties, the trial judge was satisfied that the deceased's assets comprised Plot No. xxxx Oloosirkon T. Centre, Plot No. xxx Oloosirkon T. Centre, Kajiado xxxx, Kajiado xxxx, and the Thika Kabati plot.
10. After so finding, the court determined that Teresiah's household would inherit and hold in trust for her children, Kajiado xxx, Kajiado xxxx and Plot No. xxxx Oloosirkon T. Centre. The household of



Lucy would inherit and hold in trust Plot No. xxxx Oloosirkon T. Centre and 1 ¼ acre of the Thika Kabati plot.

11. Lucy was aggrieved by the decision and filed an appeal on the grounds that the learned judge wrongly distributed a portion of the Thika Kabati plot to her, despite being aware that it did not belong to the deceased's estate; that the learned judge wrongly disregarded the distribution arrangement that the deceased had made during his lifetime, where each family was exclusively provided for on certain parcels of land, that the learned Judge also failed to find that her (Lucy's) distribution proposal was equitable to all beneficiaries, and so doing, discriminated against Lucy and her children in the distribution of the estate. That the learned judge addressed issues that were not raised, and failed to properly evaluate the evidence thereby reaching the wrong decision.
12. The parties filed written submissions. Learned counsel Mr. Gakaria representing Lucy stated that he would rely on his written submissions in their entirety. It was submitted that the Thika Kabati plot was only introduced in the proceedings after it was proposed for distribution by Teresiah, yet it was clearly pointed out that it did not belong to the deceased at the time of his death, but rather, it was family land and as such did not form part of the deceased's estate. It was submitted that it did not amount to free property of the deceased as defined by section 3 (1) of the *Law of Succession Act*, and therefore, the learned judge ought not to have condemned Lucy to inherit property that was not available for distribution.
13. On the distribution of the deceased's estate, counsel argued that, Lucy sought to distribute the deceased's assets in accordance with his wishes which had been made known to Lucy and Muhia Nguku DW3; that the learned judge should have taken his wishes into account when distributing his estate. It was next argued that the mode of distribution of the estate adopted by the learned judge was inequitable and unfair, that the learned judge favoured the respondents over Lucy by awarding her Plot No. xxxx Oloosirkon T. Centre, and 1¼ acres of the Thika Kabati plot, the net effect of which was discriminatory, and disinherited Lucy and her children.
14. Arguing that the learned judge took into account extraneous issues that were not pleaded, counsel asserted that no evidence was led to show the deceased's entitlement to a portion of the Thika Kabati plot; that on the contrary, the available evidence was that it was family land; that the portion could not therefore become an asset for distribution simply because the 1st respondent proposed it in her affidavit.
15. While highlighting their submissions, Mr. D. Kirimi, learned counsel for the respondents submitted that the appeal was opposed. With regard to the existence of the 1 ¼ acre of the Thika Kabati Plot, as part of the deceased's estate, it was contended that Lucy and her witnesses acknowledged its existence, and that though it was family land, the deceased was part of the family and poised to benefit from a portion; and that Lucy also confirmed that it was available for distribution.
16. On the existence of an oral will, counsel stated that the learned judge was right in finding that an oral will was not at any time contemplated by the parties. Turning to the mode of distribution, counsel submitted that section 40 of the *Law of Succession* was applicable to the circumstances of the case; that the 1st respondents' house comprised of eight units and the appellant's house comprised of only 2 units; that the mode of distribution by the learned judge was fair and equitable as it took into account that the 1st respondent's household was larger than the appellant's household.
17. Regarding whether Lucy's other children were beneficiaries of the deceased's estate, counsel stated that there was no evidence tendered to support their dependency, and since the children did not claim dependency or file their own affidavits, nothing was supportive of the existence of such dependency.



18. In reply, counsel conceded that the issue in contention was not whether an oral will existed; that the issue was whether the trial court ought to have taken into account the deceased's wishes in determining the mode of distribution of the estate.

We have considered the grounds of appeal and the parties' submissions and are of the view that the following issues are for determination; whether the trial court wrongly disregarded the settlement arrangements made by the deceased when distributing the estate; whether the learned judge was wrong in distributing 1 ¼ acre of the Thika, Kabati plot to Lucy, whether all Lucy's children were to be considered as beneficiaries and whether the trial court failed to properly evaluate the evidence.

19. As can be discerned from the grounds raised, central to the appeal is the mode of distribution of the deceased's assets by the trial judge between the deceased's two families. Lucy's case is that, the trial court failed to properly evaluate the evidence, which had resulted in an unfair distribution of the estate. With this in mind, it becomes incumbent upon us to re-evaluate the evidence so as to arrive at our own independent conclusion.

20. Together with the distribution proposals presented to the court, Lucy testified together with 2 witnesses, and Teresiah testified and also called 2 witnesses.

Lucy was PW 1. When she testified on the deceased's assets, she stated that she resided at the Thika Kabati plot, together with the deceased; that following her husband's demise, she continued to reside in Thika; that the land belonged to her husband's parents; that the deceased's other properties included Kajiado xxxx comprising 4 acres which she had proposed to keep, and Kajiado xxxx comprising 2 acres which she had proposed be distributed to Teresiah and her 6 children, together with one of the township plots.

On cross examination, she stated that the land on which she resided had not been subdivided, but she cultivated one and a half acres of the 6 acres; it belonged to 10 people. She went on to state that she had been living there since 1997, and that Teresiah lived in Kiserian in Kajiado where the deceased is buried.

21. Njogu Mututo (PW2), is a brother of the deceased. He stated that the deceased was residing in Thika with his wife Lucy, while Teresiah resided in the Kajiado area. He stated that the Thika property belonged to the family and that it would be shared amongst a number of them.

22. Muhia Nguku (PW3), a friend of the deceased stated that he resides in Thika. He confirmed that the deceased was married to Teresiah and Lucy and that he had moved from Kiserian, Kajiado to live with Lucy in Thika; that the land they resided on was bought with the deceased's mother and his brothers and that therefore it was a family land; that Teresiah lived in Kiserian, Kajiado on another piece of land. He was aware that a portion of the Thika Kabati plot was to go to Lucy after it was subdivided.

23. Teresiah testified as (DWI), she confirmed that she was the 1st wife of the deceased and that together they had purchased the two plots, that is, Kajiado xxxx and Kajiado xxxx in Kiserian; that Lucy was not apportioned any of the two plots. She further stated that when the deceased married Lucy, they went to live in Thika where she farmed, and that she has been residing there ever since.

Also called in support of her case were Nelly Mumbi (DW2), the deceased's sister and Virginia DW3 a friend and neighbour of Teresiah. Their evidence did not have any probative value on the manner of distribution of the deceased's estate.

24. Having set out the evidence in so far as it relates to the distribution of the deceased's estate, we now return to consider the issues raised.



25. It is Lucy's case that the trial judge disregarded the settlement arrangements made by the deceased during his lifetime, where each family was exclusively provided for on distinct parcels of land.
26. In arriving at a mode of distributing the estate, the learned judge had this to say;
- “The respondent has argued that the party property known as Kajiado/Olchoro Onyore/xxxx measuring 4 acres and Kajiado/Olchoro Onyore/xxxx measuring 2 acres were acquired in the years 1989 and 1982 respectively and that is the time she and the deceased constructed the matrimonial home... on Kajiado/Olchoro Onyore/xxxx the same having been acquired before the applicant came into the picture. The applicant on her part argues that the deceased wished that the respondent retained her plot of land Kajiado/Olchoro Onyore/xxxx while she retains Kajiado/Olchoro Onyore/xxxx. The applicant does not deny that the said parcels of land were acquired long before she and the deceased started their relationship...”
27. An analysis of the evidence discloses that the deceased was polygamous and had two families which meant that the distribution of the estate would require to be in terms of section 40 of the Law of Succession Act. The provision specifies that, where a deceased is polygamous, his estate shall “...be divided among the houses according to the number of children in each house, also adding any wife surviving him as an additional unit to the number of children”. As to whether the deceased's settlement arrangements were adopted by the court in the mode of distribution, the evidence is clear that prior to his demise, the deceased made definitive arrangements in the apportionment of his properties among the two families. We say so because, Lucy's evidence confirmed that she resided with the deceased in Thika, and that Teresiah resided in Kiserian, Kajiado. Lucy's witnesses, Njogu Mututo and Muhia Nguku also corroborated this evidence. Further support of these arrangements is to be found in Teresiah's evidence, which was that the two Kajiado plots were purchased prior to the deceased's marriage to her; that after he married Lucy, they moved away from Kiserian, Kajiado to live in Thika, where she farmed a portion of the Thika Kabati plot; and that she had continued to reside there even after the deceased's demise.
28. From this evidence, it can be discerned that the deceased intended for Teresiah to reside in Kiserian, Kajiado and for Lucy to reside in Thika. Whilst distributing the deceased's estate, there is no question that the trial judge maintained the arrangement prevailing when the deceased was alive and following his demise, to the extent that the Kiserian, Kajiado plots remained with Teresiah and the Thika Kabati plot, with Lucy. By distributing the properties in the extant manner, it cannot be said that the learned judge disregarded the deceased's settlement arrangements.
29. Lucy has also argued that the trial judge ignored the deceased's wishes regarding Lucy's inheritance of Kajiado xxxx. In answer to this, the learned judge stated;
- “The said wishes appear to be only known to her and the same cannot qualify to be termed as an oral will as the same do not meet the requirements of section 9 of the Law of Succession Act and as such, the same cannot be relied upon”.
30. We agree. Nothing in the evidence points to the deceased having expressed any wishes by way of an oral will or otherwise to the effect that Lucy would inherit Kajiado 1494. In point of fact, settlement arrangements and the witness evidence all points to the contrary.
31. Lucy's next complaint was that the trial court distributed 1 ¼ acres of the Thika Kabati plot to her which land did not exist. But an analysis of the evidence shows that all the witnesses testified that Lucy and the deceased resided on and farmed a portion of the Thika Kabati plot. Njogu Mututo and



Muhia Nguku stated that it was purchased by the deceased and his brothers and that each was entitled to a portion. Lucy confirmed that she resided on and farmed a portion of the plot, and continues to reside there. It was uncontroverted that a distinct portion of land was earmarked for the benefit of the deceased, and much as it was yet to be subdivided, it was evident that the portion upon which the deceased had resided and farmed belonged to him, and ultimately comprised a part of his estate. The portion is well known to the family and friends, but more importantly, to Lucy. It was argued that the Thika Kabati plot was not included amongst the list of assets or in the pleadings, and therefore the learned judge ought not to have considered it a part of the deceased assets.

Section 3 (1) of the *Law of Succession Act* defines free property as, property of which the deceased was “...legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death”. There is nothing in the evidence that would be supportive of the notion that the deceased could not have disposed of his portion in the Thika Kabati plot during his lifetime. There is also evidence showing that the property once subdivided could be apportioned to the different owners including the deceased.

32. It is on this basis that the learned judge properly found it to be a part of the deceased’s estate, and after so finding, rightly distributed it to Lucy.
 33. Finally, regarding the complaint that the learned judge was wrong in finding that the trial court wrongly excluded Lucy’s other children as beneficiaries. Since there is insufficient evidence on the record as to their dependency, we find nothing that would point to their having been dependants of the deceased, as to be considered as beneficiaries.
 34. In sum, we find that the trial judge properly evaluated the evidence, and rightly concluded the manner in which the deceased’s property was to be distributed amongst the beneficiaries.
 35. Accordingly, the appeal lacks merit and is therefore dismissed with costs to the respondents.
- It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

A.K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

