



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Cypriano Imanyara Imiru (Deceased) (Civil Appeal  
78 of 2016) [2022] KECA 1176 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1176 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 78 OF 2016  
DK MUSINGA, F SICHALE & S OLE KANTAI, JJA  
OCTOBER 21, 2022**

**BETWEEN**

**PETER M. MURUNGI ..... 1<sup>ST</sup> APPELLANT**

**EDITER NKUENE MANYARA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JANE GATUNE MWONGERA ..... 1<sup>ST</sup> RESPONDENT**

**GODFREY KIMATHI ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal against the Judgment of the High Court of Kenya at Chuka (A. Mabeya, J.) delivered on 1st September 2016 in H.C. Succ. Cause No. 343 of 2015)*

**JUDGMENT**

1. The central issue in this appeal is distribution of a parcel of land known as L.R No. Mwimbi/Chogoria/40 (“the suit land”) that belonged to the late Cypriano Imanyara Imiru, (deceased), who died on 17<sup>th</sup> January 1992. The deceased had seven children, three sons and four daughters. However, the eldest son, Teresio Mwongera Imanyara, predeceased his late father. Those who survived the deceased are Virginia Karimi Kirimi (daughter), Veronica Curubi Muthuri (daughter), Peter M. Murungi (son), Editer Nkuene Manyara (daughter), Catherine Kaari Josphat (daughter), John Kaburu Imanyara (son) and Jane Gatune Teresio (daughter in-law and widow of Teresio Mwongera Imanyara).
2. In December 2011, the appellants applied for grant of letters of administration of the deceased’s estate, which was duly issued on 16<sup>th</sup> April 2012.
3. On 7<sup>th</sup> October 2013, the 2<sup>nd</sup> appellant took out summons for confirmation of the grant. She proposed to distribute the suit land as follows:
  - a. Editer N. Manyara and Virginia K. Kirimi -1.01 Acres jointly



- b. Veronica C. Muthuri and Catherine K. Josphat- 1.01 Acres jointly
  - c. Jane G. Teresio - 1.01 Acres
  - d. John K. Imanyara - 1.01 Acres
  - e. Peter M. Murungi - 1.01 Acres
4. The proposed distribution was opposed by Jane Mwangera and Geoffrey Mwangera, who filed a protest. The dispute was resolved by way of affidavit evidence with cross examination of the deponents.
  5. During the hearing before the High Court M'Marete M'Meru, the deceased's brother, and one Peter Murungi testified that before his death the deceased had divided the suit land among his children; that the deceased had reserved 1.01 acres of the suit land for all his daughters, Peter Mwangi was given 1.60 acres, Teresio Mwangera 1.90 acres, John Kaburu 0.40 acres; that two of the deceased's daughters, Editer Nkuene and Catherine Josphat, who had separated from their respective husbands, were living on the suit land before the demise of their father, but the other two daughters were living with their respective husbands elsewhere, that John Kaburu was given only 0.40 acres because he had been given some other land measuring 3 acres at Timau; and that for nearly 17 years after the deceased's death his family members continued to occupy their respective portions as distributed by the deceased. That evidence was corroborated by one Kanampiu Karuku, the Chairman of Rukinga Clan, to which the deceased belonged.
  6. On the other hand, Editer Nkuene testified that she left her matrimonial home in 1975 and her father settled her on the suit land; that her sister Catherine left her matrimonial home in 1984 and went to live on her father's land; that the other two sisters were living with their respective husbands; that although the deceased had shown each of his sons where they were to establish their respective homes, he had not formally divided the suit land prior to his death; and that the distribution proposed by the 2<sup>nd</sup> appellant was unfair and unconstitutional as it was discriminatory to the deceased's daughters.
  7. Catherine supported the evidence of her sister, Editer, and added that upon the demise of their father, the Rukinga Clan subdivided the suit land equally amongst the deceased's children. The Chairman of the Chogoria unit of the Rukinga Clan since 2008, Benson Kinyua, told the trial court that the deceased had neither called the clan about the subdivision of his land; that in 2010 the clan divided the suit land into five equal portions; however, the wider clan under the Chairmanship of Kanampiu Karuku had decided that each child's portion be ascertained as had been bequeathed to them by the deceased during his lifetime.
  8. In his judgment, Mabeya, J. held that there was no evidence that the deceased gifted any of his children in contemplation of death; that however, the deceased had prior to his death shown each of his three sons where they were to settle; that Editer and Catherine had separated from their respective husbands and were living with the deceased on a portion of the suit land prior to his demise; and that the deceased had expressed the intention that all his four daughters be entitled to the portion of the suit land that he occupied.
  9. Consequently, the learned judge allowed the protest and ordered that the land be distributed as follows:
    - a. John Kaburu Manyara - 0.40 Acres
    - b. Editer Nkuene  
Catherine Josphat  
Virginia Karimi



Veronica Muthuri -1.10 Acres

- c. Peter Murungi - 1.60 Acres
  - d. Jane M. Teresio - 1.90 Acres
10. The learned judge further held that whereas under Article 27 of the Constitution as well as section 38 of the Law of Succession Act there cannot be any discrimination of the basis of gender, where a deceased person had informally distributed his estate amongst his children according to his wishes and for years they had lived on their allotted portions, it was improper for a beneficiary to claim later on that there should have been equality in the distribution of the estate; and that the deceased was not obliged to distribute the suit land equally amongst his children, as long as none of them was left out.
  11. Being aggrieved by that judgment, the appellants preferred this appeal. They stated, inter alia, that the learned judge erred in law by failing to find that; the daughters of the deceased were entitled to an equal share of the suit land as their brothers; and that the deceased died intestate and therefore the distribution of his estate was subject to strict application of sections 35 and 38 of the Law of Succession Act so that the suit land was distributed equally amongst all the beneficiaries. The appellants further faulted the learned judge for failing to have due regard to relevant evidence that would have guided him appropriately in his determination of the dispute.
  12. When the appeal came up for hearing, the 1<sup>st</sup> appellant sought leave to withdraw his appeal. None of the other parties objected to that oral application and therefore the 1<sup>st</sup> appellant's appeal was marked as withdrawn with no order as to costs.
  13. Mr. Ashaba, who held brief for Mr. Mutuma for the appellants and Mr. Mwangi for the respondents relied on their written submissions without any oral highlight of the same.
  14. We have perused the written submissions and the cited case law. The gravamen of this appeal is whether the distribution of the deceased's estate (the suit land) was in accordance with the provisions of Article 27 of the Constitution as read together with section 38 of the Law of Succession Act. Article 27 stipulates; inter alia, that every person is equal before the law and has the right to equal protection and equal benefit of the law. Under the 2010 constitutional dispensation, Courts have made firm pronouncements against any form of discrimination, including gender, even in distribution of property of deceased persons amongst their sons and daughters.
  15. In Mwongera Mugambi R'inturi & Another v Josephine Kaarika & 2 others [2015] eKLR, this Court stated as follows:

“This Court has long accepted that a child is a child none being lesser on account of gender or the circumstance of his or her birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it.”

See also Grace Wachuka v Jackson Njuguna Gathungu & Another [2014] eKLR.
  16. The deceased died intestate and did not leave behind any widow, only his children. Section 38 of the Law of Succession Act states as follows:

“38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”



17. In our view, as rightly held by the learned judge, the distribution of the deceased's estate was subject to the provisions of section 42 of the Act which reads as follows:

- “ 42. Previous benefits to be brought into account Where-
- a. an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
  - b. property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

This section recognizes that during one's lifetime, a person may give any part of his or her property to any of his child, grandchild or family member or settle them on any part of his or her land. Such a gift or settlement must be taken into account in distributing a deceased's estate under section 38. See this Court's decision in *Francis Mwai Karani v Robert Mwai Karani* [2012] eKLR.

18. In this case, the deceased settled his three sons on specific parts of the suit land and planted trees to mark their specific portions. There was a good explanation for giving John Kaburu a smaller portion of the suit land. That was because he had given him 3 acres at Timau.

19. As for his daughters, the deceased was living with two of them, Editer and Catherine, (whose marriages had failed), on the portion that he had not settled his sons. The deceased had also directed that the other two daughters who were living with their husbands were also entitled to a portion of the suit land. He had expressly reserved the part of the land where he had his homestead for all his daughters. Editer and Catherine had lived with the deceased since 1975 and 1984 respectively, when they returned to their father's home. Their father died in January 1992.

20. The acreage of the various portions of the suit land on which the deceased had settled his children before his demise was measured and it formed the basis of the learned judge's distribution of the deceased's estate. We agree with the learned judge that in his lifetime the deceased was not under any legal obligation to distribute his assets equally amongst his children.

21. Section 42 of the Act requires the Court to have regard to any part of a deceased's estate which he may have given or settled to, or for the benefit of a child or grandchild or house. As for any remainder thereof, under section 38, it is to be divided equally amongst the surviving children of the deceased, be they sons or daughters. In his lifetime, the deceased had not divided his land equally amongst his children. There was no evidence that during the lifetime of the deceased any of the deceased's children had expressed dissatisfaction with the manner in which their father had distributed the suit land. The deceased's wishes must be respected.

22. In our view therefore, the learned judge did not err in his interpretation of the law or appreciation of the evidence that was adduced before him. We find this appeal lacking in merit and dismiss it in its entirety. Each party shall bear its own costs of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OCTOBER, 2022.**

**D. K. MUSINGA (P)**

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**JUDGE OF APPEAL**

**F. SICHALE**

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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*

*Signed*

**DEPUTY REGISTRAR**

