



**Kanji v Gathigi (Civil Appeal 179 of 2018)
[2021] KECA 26 (KLR) (23 September 2021) (Judgment)**

Neutral citation: [2021] KECA 26 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 179 OF 2018
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA
SEPTEMBER 23, 2021**

BETWEEN

EVANSON KIMONJO KANJI APPELLANT

AND

SUSAN NYAMBURA GATHIGI RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Murang'a
(Kimondo, J.) dated 31st July, 2018 in Succession Cause No. 1183 of 2013)*

JUDGMENT

1 This is a first appeal from the Judgment of Kanyi Kimondo, J. delivered on 31st October, 2018 where the learned Judge found that the respondent Susan Nyambura Gathigi and her sister Violet Wambui Maina were the only children of their mother (the deceased – Njeri Wanjohi) and were entitled to equal shares in the parcel of land known as LOC.15/Gakuyu/789. Being a first appeal it is our duty to re-appraise evidence and draw our own inferences of fact – See Rule 29 of the [Court of Appeal Rules, 2010](#) It was held in the case of *Selle & Another v Associated Motor Boat Company Limited & Others* [1968] EA 123 on the duty and mandate of a first appellate Court:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”



- 2 The case before the High Court of Kenya at Muranga pitted the respondent (Susan Nyambura Gathigi) against her step-grandson (the appellant – Evans Kimonjo Kanyi). It was not in dispute that the land Loc. 15/Gakuyu/789 was registered in the name of the deceased who died intestate on 20th January, 1981. The deceased was married in a polygamous family and had two children, Susan Nyambura Gathigi (the respondent) and Violet Wambui Maina. The deceased was the second wife of Gathioni Wanjohi who had pre-deceased her and had bequeathed her the said parcel of land which was registered in her name.
- 3 The appellant’s case was essentially that because the deceased had no male children, he, as step-grandson, and the other protestors to the grant of letters of administration, were entitled to inherit the parcel of land because the respondent was a woman who was married and had other land in her matrimonial home in Meru.
- 4 In a Further Supplementary Affidavit sworn at Muranga on 30th October, 2014 the respondent deponed in material part:
- “3. THAT the deceased died intestate leaving only two surviving daughters, Violet Wambui and I.
4. THAT my Sister and I are the only dependants and survivors of the deceased noting the objectors are not children of the deceased but rather they are step-grand children of the deceased and the deceased did not at any moment maintain them.
5. THAT the objectors being step grandsons of the deceased, they do not have priority and in fact they have separate pieces of land. annexed herein and marked as SN1 is a bunch of official searches.
6. THAT Objectors are grandsons and daughters of a certain Wanjiku wa Wanjohi who was the co-wife to the deceased and that family had its separate pieces of land as indicated herein above.
7. THAT the patriarch of the family the late Wanjohi Githione had two wives, namely Wanjiku and the deceased.
8. THAT Wanjohi Githione had three farms leaving the first wife Wanjiku 2 farms and the deceased 1 farm-subject matter of this suit.
9. THAT the objectors being grandsons to Wanjiku became beneficiaries to the 2 farms left to her while the petitioner and her sister never benefited from the said 2 farms.
10. THAT what all we are asking for is to succeed our late mother in the 1 farm left to her and registered in her name.
11. THAT by objecting to the petition the Objectors are actually attempting to disinherit the (sic) my sister and I and also discriminate against us.
12. THAT this cross petition by the objectors is therefore mischievous and malicious against the rightful heirs of the deceased.”
- 5 In testimony before the Judge the appellant stated that he was a son of Muthoni Githioni and that the deceased was his step-grandmother and that the land in dispute had been given to him by his father. He had lived on the land and occupied half of it, the other half being occupied by his brother. Relatives including his parents were buried on the land and why should the respondent, a woman married in Meru, lay claim to the land?



6 Both parties filed written submissions and when the appeal came up for hearing on 7th June, 2021 on a virtual platform due to the COVID-19 pandemic Mr. Kirubi Mwangi, learned counsel for the appellant, and Mr. Amutallah learned counsel who held brief for Mr. Kanyoko for the respondent fully relied on written submissions and did not find it necessary to highlight the same at all. We have perused those submissions and are grateful to the parties for the industry employed to urge and oppose the appeal. We particularly note with appreciation the “The Chart Showing The Family Tree in Question” in the respondent’s written submissions. It shows amongst other things that the patriarch of the family Githioni Wanjohi, married two wives Wanjiku Wanjohi (she was first wife) and Njeri Wanjohi (second wife). Njeri Wanjohi begat Susan Nyambura (respondent) and her sister Violet Wambui. The appellant Evanson Kanji Kimonji is a son of Githiona Kanji who was a son of Wanjiku Wanjohi who, as we have seen, was the first wife of the patriarch of the family.

7 The Judge examined the material placed before him and upon consideration held that the respondent and her sister Violet Maina were the only children of the deceased and they ranked first in priority to inherit the suit land.

8 Section 38 of the *Law of Succession Act* on “where intestate has left a surviving child or children but no spouse” provides that:

“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.”

9 The appellant admitted that he was a grand step-son of Njeri Wanjohi.

Consanguinity in law is the relationship of persons of the same blood or origin and a useful definition is in *Black’s Law Dictionary 10th Edition* by Bryan A. Gardner who informs:

“In the mode of computing the degrees of consanguinity, the civil law ... begins with the intestate, and descends from the ancestor to the next heir, reckoning for each person, as well in the ascending or descending lines. According to this rule of computation, the father of the intestate stands in the first degree, his brother in the second, and his brother’s children in the third. Or, the grandfather stands in the second degree, the uncle in the third, the cousins in the fourth, and so on in a series of genealogical order. In the common law, which is also the rule of the common law, in tracing title by descent, the common ancestor is the terminus a quo. The several degrees of kinship are deduced from him.

By this method, the brother of A is related to him in the first degree instead of being in the second for he is but one degree removed from the common ancestor. The uncle is related to A in the second degree, for through the uncle but one degree from the common ancestor, yet A is removed two degrees from the grandfather, who is the common ancestor.”

4 James Kent, Commentaries on American Law 412-13 (George Comstock ed. 11th ed. 1866).

10 In the case of *Stephen Gitonga M’Murithi v Faith Ngira Muriithi* [2015] eKLR this Court held that:

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married or comfortable in their marriage or unmarried.”

11 The Judge found that the respondent and her sister had established that they were the only children of the deceased and that they ranked first in priority to inherit the land of the deceased. On our own



re-evaluation of the evidence and the material placed before the Judge we could not agree more. The appellant's argument that the respondent, a woman, was not entitled to inherit the property purely because the deceased did not beget male children had no standing in law at all. The respondent and her sister were the only children surviving the deceased and ranked first on the issue of inheriting property left by the deceased. We agree with the Judge in the findings that he made and that being the position this appeal has no merit and we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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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

