



REPUBLIC OF KENYA



KENYA LAW
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**Kiruja v Murithi & another (Family Appeal E008 of 2024)
[2025] KEHC 1286 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
FAMILY APPEAL E008 OF 2024
EM MURIITHI, J
FEBRUARY 27, 2025**

BETWEEN

MAGDALINE KAGWIRIA KIRUJA APPELLANT

AND

MORRIS MURITHI 1ST RESPONDENT

PURITY KAIMURI KIRUJA 2ND RESPONDENT

*(An appeal from the Ruling of Hon. John M. Njoroge (C.M) in
Meru Succession Cause No. 179 of 2021 delivered on 6/5/2024)*

JUDGMENT

1. The deceased herein, Celestino Kiruja Rinkanya died intestate on 2/1/2021. He was survived by his wife and 4 children namely Magdaline Kagwiria Kiruja, Moris Murithi Kiruja, Purity Kaimuri Kiruja, Eustus Kithinji Kiruja and Erick Muthomi Kiruja, as listed in the introductory letter of the chief of Kaaga Location dated 10/6/2021. The Appellant herein petitioned for grant of letters of administration Intestate on 26/7/2021, which was issued on 5/1/2022. On 14/4/2023, the Appellant filed amended summons for confirmation of grant proposing at paragraph 8 of the affidavit in support thereof how the estate properties were to be distributed. The Respondents filed their separate affidavits of protest on 17/5/2023 accusing the Appellant of deliberately omitting their mother and the 1st wife to the deceased herein, Lucy Mugito, from the schedule of distribution. They further accused the Appellant of taking the lion's share of the estate at the expense of their mother's house.
2. The Appellant herein, Eustus Kithinji Kiruja and Eric Muthomi Kiruja swore replying affidavits on 19/5/2023 in opposition to the protests.
3. The Respondents filed their witness statements on 29/5/2023 in support of their protests.



4. The protests were subsequently heard through viva voce evidence and in its impugned ruling dated 6/5/2024, the trial court said:
5. “In the current instance, the deceased’s status is TRICKY as he had separated with the protestors’ mother, who left the marriage and moved on. Though the deceased married the protestor, he retained a valid marriage certificate and there was no evidence to show that he had undertaken proceedings to nullify the marriage of the 1st wife. The borne of contention among the parties is Parcel No. Nyaki/Murathankari/1053 which is said to measure 0.4 Ha or thereabouts. The petitioner stated the same to be matrimonial property, that she contributed to its purchase and has sentimental attachment as she would like to settle and entertain her grandchildren as she watches them grow. The petitioner failed to produce evidence to support the part that the property was bought from a public auction conducted in 1985. She didn’t show the court any documents in support of the sale or from whom they purchased the property from or show proof of payment of Kshs.11,000/=. The land in question measures about 1 acre and the law as above cited envisages for equal as opposed to equitable distribution among the children/units. The law of Succession Act does not distinguish the properties of the deceased. Matrimonial property cannot therefore be separated from other properties that are owned by the deceased. The court observes that the deceased had other properties that she was jointly registered, and are not subject to the current proceedings, where in my view she and her two sons stand to benefit from. In the current cause to allocate the Parcel No. 1053 to the petitioner solely would be prejudicial to the protestors as this would move the property from their reach as the petitioner and later her two children would stand to benefit to the exclusion of the protestors. The court has considered the prayer to be awarded $\frac{1}{4}$ acre of the parcel. I do not find the said application to be unreasonable as the petitioner is left to inherit the bulk of the said parcel including the area which is developed. I shall therefore order that the protestors be allocated $\frac{1}{4}$ acre jointly out of 1053 with an option of the petitioner compensating them with a commensurate amount of money at the current market rates. There is the issue of Administration, the court has with respect detected bad blood relations that have accrued out of this dispute, coupled with suspicion. Therefore, to represent the interests of the protestors, I shall allow them to appoint one person to be a joint administrator together with the petitioner. The parties have largely agreed as to how the properties should be shared: - The deceased known properties shall accordingly be distributed as follows:-

“ 1) Land Parcel No. Nyaki/Thuura/2789/ Morris Murithi Kiruja

2) Land Parcel No. Nyaki/Giaki-Kiburine/492

To Share Equally

1. Madgaline Kagwiria Kiruja

2. Morris Murithi Kiruja

3. Purity Kaimuri Kiruja

4. Eustus Kithinji Kiruja

5. Erick Muthomi Kiruja

3) Land Parcel No. Nyaki/Chugu/412

1. Purity Kaimuri Kiruja $\frac{1}{4}$ Acres

2. Eustus Kithinji Kiruja 1 Acre



3. Erick Muthomi Kiruja 1 Acre
4. Magdaline Kagwiria Kiruja Balance
- 4) Land Parcel No. Nyaki/Murathankari/1053
 1. Magdaline Kagwiria Kiruja and
 2. Eustus Kithinji Kiruja ³/₄ Acre
 3. Erick Muthomi Kiruja,
 4. Morris Murithi Kiruja and
 5. Purity Kaimuri Kiruja ¹/₄ Acre or Cash Value
- 5) Motor Vehicle KAT 866K - Morris Murithi Kiruja
- 6) Motor Vehicle KXL 010 - Magdaline Kagwiria Kiruja
- 7) Kshs. 30,000/= Safaricom Shares - Magdaline Kagwiria Kiruja
- 8) Kshs. 30,000/= Safaricom Shares - Erick Muthomi Kiruja
- 9) Kengen Shares

In Equal shares

 1. Purity Kaimuri Kiruja
 2. Eustus Kithinji Kiruja ”
 3. Morris Murithi Kiruja

The Appeal

6. On appeal, the Appellant filed her memorandum of appeal on 24/5/2024 listing 7 grounds as follows:
 1. The learned trial Magistrate erred in law and in fact in failing to consider the evidence of the appellant and relying solely on the protestors evidence which was unsubstantiated and which was not supported by any documents.
 2. The learned trial magistrate erred in fact in holding that there were other properties which were jointly owned by the petitioner and the deceased which the appellant stood to benefit from when no such property existed and no evidence was adduced in support of the said allegation.
 3. The learned trial Magistrate erred in law and in fact in distributing land parcel No. Nyaki/Murathankari/1053 measuring I acre only among the children of the deceased knowing very well that this property contains the petitioner's matrimonial home and the deceased grave site.
 4. The learned trial magistrate erred in law and in fact in failing to consider the petitioners evidence that land parcel No. Nyaki/Murathankari/1053 was purchased 1985 by the deceased and the petitioner and that the petitioner had contributed both monetarily and non-monetarily and therefore this property ought not to have been distributed.



5. The learned trial Magistrate erred in law and fact in failing to consider the petitioners evidence that the motor vehicle registration No. KAT 866K was involved in the accident in which the deceased died had been declared a write off and a police abstract was adduced to that effect and therefore the said property was not available for distribution.
6. The learned trial Magistrate erred in law and fact in holding that the alleged piece of paper that the respondents alleged to be a marriage certificate between one Lucy Mugito and the deceased was valid yet the said document referred to a different person by the name Salesio Ndege and not the deceased.
7. The learned trial Magistrate erred in law and fact in not distributing the estate as per the appellant's proposed mode of distribution which was fair and realistic.

Duty of the court

7. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

The Evidence.

8. Protestor Witness 1 Morris Murithi Kiruja and the 1st Respondent herein adopted his statement dated 30/5/2023 and the affidavit of protest dated 17/5/2023 as his evidence in chief and produced a copy of the marriage certificate as P Exh No. 1. He went on to state that, "I stay at Mweru village and I am a farmer. The deceased is my father, my mother is Lucy Mugito, married to the deceased in 1976. This is on 21.1.1976. There is no divorce, they were married in a church wedding at KaNyakine parish."
9. On cross examination, he stated that, "My mother is at Nyeri. She is aware of succession case. I don't have her written mandate. I was born in 1974. My ID shows 9.7.1977. This was for employment sake. They stayed at Gaturi upon marriage at my grandfather's portion of land. My father is Salesio Ndege alias Celestine Kiruja Rinkanya. I was not aware of the succession cause. I signed the consent but didn't read the contents. In Nyaki/Mulathankari/1053 is the matrimonial home. The petitioner lives there. I have lived there with my step-mum and father when he was alive. The deceased is buried on that parcel. I have been given Nyaki/Thuura/2789 - 1 acre - 0.405 Hectares. In Nyaki/Giaki.Kiburine/492 (2.424 Hectares), I pray we each get 1 acre each. The petitioner didn't object. 1 acre shall be reserved for the consideration. In Nyaki/Chugu/412 (2 ½ acres) Both sides have agreed to be shared as per my proposal (petitioner agrees with the mode of distribution). In Nyaki/Mulathankari/1053 (0.4 Ha) clause). I pray for a small portion even ¼ of an acre. This should enable her to give to her sons who are beneficiaries. This is prime land. ¼ acre for me and my sister. On dividends, KAT 866K – salvage - The petitioner says it is personal property of the deceased, which should go to the widow. KXL 010 - I have no objection, it can be awarded to the petitioner. 30,000/= Safaricom shares - We agree it goes to the petitioner. 30,000/= shares to go to Eric Muthomi Kiruja. Safaricom shares that are not yet described/and unknown shall be equally shared in case of discovery. Kengen shares - The petitioner doesn't object. They are 1436 shares. In Umoja 1 estate Nairobi, there is a pending dispute. We have agreed to wait as it has a court case that is yet to be concluded."
10. Protestor Witness 2 Purity Kaimuri Kiruja and the 2nd Respondent herein adopted her statement dated 30/5/2023 and the affidavit of protest dated 17/5/2023 as her evidence in chief. She went on to state



- that, “I stay at Chogoria and I am a phamatech. I am a daughter to the deceased. The PW1 testified. I agreed with his evidence of the protestor (PW1).”
11. On cross examination, she stated that, “I agree with his evidence.”
 12. Petitioner 1 Magdaline Kagwiria Kiruja and the Appellant herein adopted her affidavit sworn on 13/4/2023 and the reply to the protest sworn on 19/5/2023 as her evidence in chief. She went further to state that, “I stay at Kaaga and businessman operating an agrovet. The deceased is my husband.”
 13. On cross examination, she stated that, “I know Maurice he is my son. Purity is the daughter of Calestine Kiruja. I have never seen their mother and I don't know her. I have never had of her. I had the evidence of Maurice. I was not told if she was married to my husband. My husband never told me that he was married before. We are not agreeing on distribution of one property where I live Nyaki/Murathankari/1053. I bought the land with my husband in 1985 through an auction. I don't have evidence to show that I participated in the purchase of the land. I contributed 11.000/= in the purchase of the land. The other children are older than my own children. I went for the children when they were grownups. I am not aware that Lucy was married to my husband in 1975. I never met Lucy in my ancestral home or ever before. My husband told me he had a son who stayed with my mother in-law. 1st September 1979 I was married to my husband. My marriage certificate is in the court file. My marriage was at the District Commissioner's office. I object to state that the property 1053 is not matrimonial property of Lucy. No one told me that Lucy was my husband's first wife. Nyaki Thuura 2087 I am aware of it. Nyaki Chugu 412 is in the name of the deceased. We have joint properties with the deceased which are not contested. The deceased and Eric Muthomi had joint shares. They have not told me that they are claiming $\frac{1}{4}$ acre of Nyaki/Murathankari/1053. I object to their claim of $\frac{1}{4}$ acre in 1053.”
 14. On re-examination, she stated that, “I do not know Lucy Mugito. The protestor's mother has no home. Husband to Lucy Mugiro was Salesio Ndege. I don't have any knowledge that Celestino Kiruja ever changed his name to Salesio Ndege. I went to his home 1977. We had resided in rental houses after marriage. Salesio told me that there was a son who I brought to stay at our home. When I went to pick the children, their mother was not there, the grandmother gave me the children. I gave my husband 11,000/= for the purchase of the land. During our time, property was written/registered in my husband's name. I have given all the children land equally. The 1 acre is where I have buried my husband and it is also my residential home. In future, I want my grandchildren are supposed to visit me in that land. I intend to stay with them there. I have not taken any land from Lucy's children. I have given them each land. Lucy Mugito has never come to that land and she never came to the burial of my husband.”
 15. PW2 Eustace Kiruja Kithinji adopted his replying affidavit as his evidence in chief. He went on to state that, “I know Magdaline Kagwiria, Purity Kaimuri. They are my siblings.”
 16. On cross examination, he stated that, “I know Maurice Kiruja. He is my brother. I also know Purity Kaimuri, she is my sister. My dad died on 2nd January, 2021. I was 39 years when dad died. I have been in speaking terms with Maina. He has never told me about his biological mother. Not specifically talked to my dad about Maurice. My dad has never told me about Maurice's mother. I was not of age when the land was bought. The land is registered in my father's name.”
 17. On re-examination, he stated that, “I did not know that my step siblings were my step siblings until this case. My father never told me. I am satisfied with the distribution of the land. Nyaki Mulathankari is where my father is buried.”



18. PW3 Eric Muthomi Kiruja adopted his stated dated 19/5/2023 as his evidence in chief. He went on to state that, “I stay at Mombasa and I am KRA officer. The deceased was my father. The protestors are step brothers and sister.”
19. On cross examination, he stated that, “Nyaki/Mulathankari/1053 is part of deceased's estate. I don't know the protester's mother cross examined by Ms. Maore.

Submissions

20. The Appellant faults the trial court for holding that there were other properties jointly registered in her name and that of the deceased. She further faults the trial court for failing to find that L.R No. Nyaki/Murathankari/1053 was not available for distribution because it was her matrimonial home where she had buried her husband, and cites *The Estate of Samuel Miriti (Deceased) M M'M v A I M* (2014) eKLR. She urges that Motor Vehicle Registration No. KAT 866 K was written off after the accident and thus it was not available to be distributed to the 1st Respondent.
21. The Respondents urge that they were entitled to a share of L.R No. Nyaki/Murathankari/1053 by virtue of being children of the deceased, and cite *Mary Rono v Jane Rono & another* [2005] eKLR, *Muriuki v Muriangi* (Civil Appeal E010 of 2022) [2023] KEHC 23458 (KLR) (12 October 2023) (Judgment) and *Re Estate of the Late Gedion Manthi Nzioka (Deceased)* (2015) eKLR. They urge that the 1st Respondent was by law entitled to the salvage from the accident motor vehicle.

Analysis and Determination

22. The sole issue for determination is whether the distribution of the estate properties was supported by the law and the evidence led.
23. The identity of the beneficiaries of the deceased is not seriously contested, save for the alleged marriage of the Respondent's mother to the deceased.
24. The court has thoroughly perused the record in search of the alleged marriage certificate between Lucy Mugito and the deceased herein in futility. That notwithstanding, the court has been prompted to evaluate other independent evidence to satisfy itself that the Respondents are indeed beneficiaries of the estate.
25. It is clear from the chief's introductory letter dated 10/6/2021 that the Respondents are children of the deceased, and therefore beneficiaries of his estate. Admittedly, the Appellant listed the Respondents as beneficiaries in both the affidavit in support of the petition for letters of administration intestate and the affidavit in support of the amended summons for confirmation of grant.
26. The 1st Respondent's testimony which was adopted by the 2nd Respondent was that; “The deceased is my father, my mother is Lucy Mugito, married to the deceased in 1976. This is on 21.1.1976. There is no divorce, they were married in a church wedding at KaNyakine parish.” On cross examination, he stated that, “My father is Salesio Ndege alias Celestine Kiruja Rinkanya.”
27. The Appellant restated on cross examination that; “I know Maurice he is my son. Purity is the daughter of Celestine Kiruja.” The Appellant's children Eric Muthomi and Eustus Kithinji affirmed in their respective testimonies that the Respondents were their step brother and sister.
28. The Respondents have explicitly clarified that their mother relinquished her right to share in the estate, and therefore the beneficiaries lawfully entitled to the estate are the 4 children of the deceased and the Appellant herein.



29. The parties herein had mutually agreed on how most of the properties were to be distributed. Those properties were distributed in accordance with the Appellant's mode of distribution as proposed at paragraph 8 of her affidavit in support of the amended summons for confirmation of grant.
30. The gravamen in this appeal is the distribution of L.R No Nyaki/Murathankari/1053 and Motor Vehicle Registration No. KAT 866 K. Whereas the Appellant contends that the said property should devolve solely to her because it is her matrimonial home and the deceased was buried there, the Respondents wanted a 0.25 acre share thereof. The Appellant contended that Motor Vehicle Registration No. KAT 866 K was written off after the accident in which the deceased died, without proposing who the settlement amount by the insurance company would be remitted to. The Respondents acknowledged the status quo of the motor vehicle but proposed that the salvage amount to go to Morris Murithi Kiruja.
31. The court finds that the Respondents' proposal on Motor Vehicle Registration No. KAT 866 K was equitable bearing in mind that the Appellant had entirely retained motor vehicle Registration No. KXL 010.
32. The question that then lingers is whether a matrimonial property is subject to distribution among the entitled heirs.
33. The 1st Respondent stated on cross examination that; "In Nyaki/Murathankari/1053 is the matrimonial home. The petitioner lives there. I have lived there with my step-mum and father when he was alive. The deceased is buried on that parcel. In Nyaki/Murathankari/1053 (0.4 Ha) clause). I pray for a small portion even $\frac{1}{4}$ of an acre. This should enable her to give to her sons who are beneficiaries. This is prime land. $\frac{1}{4}$ acre for me and my sister."
34. The Appellant maintained on cross examination that "We are not agreeing on distribution of one property where I live Nyaki/Murathankari/1053. I bought the land with my husband in 1985 through an auction. I don't have evidence to show that I participated in the purchase of the land. I contributed 11,000/= in the purchase of the land. I object to state that the property 1053 is not matrimonial property of Lucy. No one told me that Lucy was my husband's first wife. They have not told me that they are claiming $\frac{1}{4}$ acre of Nyaki/Murathankari/1053. I object to their claim of $\frac{1}{4}$ acre in 1053." She stated on re-examination that; "Salesio told me that there was a son who I brought to stay at our home. When I went to pick the children, their mother was not there, the grandmother gave me the children. I gave my husband 11,000/= for the purchase of the land. I have given all the children land equally. The 1 acre is where I have buried my husband and it is also my residential home. In future, I want my grandchildren are supposed to visit me in that land. I intend to stay with them there. I have not taken any land from Lucy's children. I have given them each land. Lucy Mugito has never come to that land and she never came to the burial of my husband."
35. The court notes the certificate of official search dated 18/6/2021 indicating that L.R No. Nyaki/Murathankari/1053 was registered in the name of the deceased herein, and therefore it forms part of his estate.
36. In Re the Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] eKLR, the court (Mumbi Ngugi J, as she then was) remarked as follows:
37. "33. To equate the widow to children, or the first widow to widows who enter the home decades later, who may be the age of the first widow's children and made no contribution to the acquisition of the estate registered in the name of the deceased, is to perpetrate an injustice against women that cannot be justified under any circumstances. For the courts to perpetuate the perpetration of the injustice on the



basis of section 40 of the *Law of Succession Act* is to abdicate their constitutional responsibility to do justice. The principle of equality and non-discrimination is at the core of the sovereign law of this land, *the Constitution*. For a court, therefore, to apply any law in a manner that is discriminatory on the basis of sex, or any of the prohibited grounds of discrimination, or to apply a provision of the law that is discriminatory, as section 40 admittedly is, or to consider itself bound by such discriminatory law, is to fail to meet the constitutional demands imposed on it. 34. However, there is yet another injustice that is manifest in the way the law treats women, and which is demonstrated in the decision of Kimondo J in the Estate of Githatu Waithaka case: The first widow had to jump through hoops, as it were, to prove her entitlement to a share of the estate on the basis that she contributed to its acquisition. She had to file an application by way of originating summons in the succession cause, and tender evidence, in order to prove that she had contributed to the purchase of the property that was acquired between 1968 and 1984, and was therefore entitled to half of it.”

38. The Appellant asserted that she contributed Ksh. 11,000 towards the acquisition of the said property, which evidence was not meaningfully challenged. The Respondents concede that it is the Appellant who resides on the contested property, where the deceased was buried. It is apparent from the record that the Respondent’s mother lives elsewhere and therefore she was not there during the acquisition of the said property. It would thus be against the tenets of the law on fairness and equality for the Respondents to get a share thereof, when it was the Appellant who took care of the deceased during his lifetime and buried him. The Appellant’s testimony that the Respondents’ mother never set her foot on the contested property or attended the burial of the deceased was not broached on cross examination. That is proof on a balance of probabilities that the Appellant is wholly entitled to the said property.
39. The Court, consequently, finds that the Appellant, proved by uncontroverted evidence that she contributed towards the purchase of the contested property, where the deceased and her put up their home. Apart from her share in succession to the deceased’s portion, she is entitled, by virtue of her contribution towards the acquisition thereof, to a share as a co-purchaser. She is therefore entitled to the said property in its entirety.

ORDERS

40. Accordingly, for the reasons set out above, the Court finds that the appeal has merit and it is allowed in the following terms:
1. L.R No. Nyaki/Murathankari/1053 shall devolve wholly to Madgaline Kagwiria Kiruja.
 2. The distribution of the other properties remains undisturbed.
41. There shall be no order as to costs.
Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Ms. Maore, Advocate for the Appellant.

Mr. P.M.Mutani, Advocate for the Respondent.

