



**Ncekei & another v Kamundi (Family Appeal E024 of 2023)
[2025] KEHC 7015 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7015 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
FAMILY APPEAL E024 OF 2023
SM GITHINJI, J
MAY 27, 2025**

BETWEEN

ROSEMARY NCEKEI 1ST APPELLANT

GAUKU M'MUGAMBI 2ND APPELLANT

AND

JANET KABITI KAMUNDI RESPONDENT

*(An appeal from the Ruling of Hon. T. A. Sitati (S.P.M) in
Githongo Succession Cause No. E023 of 2021 delivered on 1/12/2023)*

JUDGMENT

1. This Appeal arises from the judgment of the learned Senior Principal Magistrate Hon. T.A. Sitati delivered on 1.12.2023 in Githongo Succession Cause No. E023 of 2021.
2. Aggrieved by the said Judgment, the Appellants set forth the following grounds in the Memorandum of appeal dated 19th December, 2023;
 1. The Learned Trial Magistrate erred in law and fact in disregarding the express provisions of Article 10 (2) (b) and 27 of the Constitution of the Republic of Kenya 2010, and thereby expressly discriminated against the appellants while distributing the estate of the deceased.
 2. The Learned Trial Magistrate erred in law and fact in misapprehending the express provisions of Section 2 (2) of the Law of Succession Act and therefore arriving at a wrong conclusion and determination.
 3. The Learned Trial Magistrate erred in law and fact in failing to hold that the Meru Customary Law relating to administration of estates of deceased persons was repugnant to justice and



morality and was inconsistent with written substantive law in as far as it discriminated against women in favour of men.

4. The findings of the Learned Trial Magistrate are against the weight of evidence.

Evidence at Trial

3. Janet Kabiti Kamundi, the Respondent herein and the Protestor in the trial court testified that the Appellants were sisters to her husband, Kamundi Samwel (now deceased). Although the deceased herein had prior to his demise told her husband how to share the land, he died before his son married her. She did not attend any meeting called by the deceased where he spoke about land distribution, and therefore there was no written will distributing the land. She wanted 2 acres while the Appellants to get ½ acre each, because the Appellants, who were married, would get land from their husbands.
4. Rosemary Ncekei, the 1st Appellant herein, and the 1st Petitioner in the trial court adopted her witness statement dated 24/3/2023 as her evidence in chief. She proposed equal sharing of the land amongst herself, Gauku M'Mugambi and Janet Kabiti, as children of the deceased. Although she lived on the land, the Respondent's son namely Muchai had deliberately constructed on her portion in order to dispossess her.
5. Her testimony was echoed by Gauku M'Mugambi, the 2nd Appellant herein and the 2nd Petitioner in the trial court.

Submissions

6. The Appellants through the firm of Basilio Gitonga, Muriithi & Associates filed submissions dated 2/10/2024. Counsel faulted the trial court for relying on archaic African Customary Law, which had been replaced by modern jurisprudence and subsequent written laws. The trial court was further faulted for discriminating against the Appellants on the basis of their gender, which was expressly prohibited by Article 27 of the *Constitution* and the Convention on the Elimination of all forms of Discrimination Against Women. It was submitted that section 2 (2) of the *Law of Succession Act* was inconsistent with the *Constitution* since it purported to entrench discrimination against women and gave precedence over customary law practices that were repugnant to justice and morality. Counsel prayed for equal distribution of the estate property and relied on *Re Estate of Peter Gathogo (Deceased)* [2020] eKLR, *Mary Rono v Jane Rono & Another* (2005) eKLR, *Re Estate of Seth Namiba Ashuma (deceased)* [2020] eKLR and *Daniel Mwongera M'Iringo v Lucy Karambu M'Ikiao* [2017] eKLR.
7. The Respondent through the firm of Mungai J.K Advocates filed submissions dated 5/2/2025 insisting the trial court rubberstamped the distribution of the estate property as earlier on done by the deceased during his lifetime, and cited *Re Estate of Nzolove Kisuke alias Daudi Nzolove Kisuke (Deceased)* [2021] eKLR.

Analysis and Determination

8. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.
9. In *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA, the court held as follows: "This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."



10. I have considered the appeal herein, the trial court's judgment which is the subject of this appeal as well as the submissions by counsel.
11. From the grounds of appeal, the issue for determination is whether the trial court's judgment was grounded on law and supported by the evidence on record.
12. The deceased herein died on 20/7/1973 before the commencement of the [Law of Succession Act](#) on 1/7/1981. Section 2 (2) of the [Law of Succession Act](#) provides that; "The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."
13. Section 3(2) of the [Judicature Act](#) provides that African customary law is only applicable to the extent that it is not repugnant to justice and morality or inconsistent with any written law.
14. In Re The Estate of Mugo Wandia (Deceased)(2009) eKLR, the court (M Koome J as she then was) stated that; "The petitioner had a duty to adduce expert evidence on Kikuyu customary law to establish that the applicant is not entitled to her father's estate. In the absence of such evidence I find the submissions that the applicant should be left out discriminatory and the existence of such custom and its requirement would not pass the threshold of the provisions of the [Judicature Act](#). Besides the [Judicature Act](#) there is the [Constitution](#) of the Republic of Kenya. Under section 82 of the [Constitution](#) discrimination on the basis of sex is prohibited. Upholding and affording unsubstantiated custom that offers differential treatment to the petitioner is unconscionable. It would also go against the reasonable expectation by the applicant that when she comes to a court of law she will be afforded equal treatment and access to justice. Kenya amongst other countries under the United Nations is party to several human rights conventions and treaty which prohibit discrimination against women. Key among them is the Universal Declaration of Human Rights especially Article 1 and the Convention on the elimination of all forms of discrimination against women (CEDAW). It is for those reasons that at this day and age when the Government has made a lot of efforts to eradicate poverty and embrace equitable policies and programmes of development a court of law cannot pronounce a judgment that goes against that spirit. The applicant is entitled to a share of her deceased father's estate even if he died in 1976 and his property was distributed in the year 2004."
15. Whereas the Respondent contends that the Appellants should only get ½ an acre of the estate property because they will also get land from their husbands, the Appellants feel discriminated against solely on the basis of their gender and marital status.
16. The trial court relied on the evidence of the Respondent to find that the deceased had distributed his estate to his children during his lifetime. However on cross examination, the Respondent self-contradicted herself when she told the court that; "The deceased Mathiu Karonga told his son how to share the land prior to his demise. I was not yet married to Samwel when this directions was made...I admit I did not attend any meeting called by Mathiu Karonga where he spoke about land distribution. He died before his son married me."
17. If the Respondent herein was not married to the son of the deceased when the wishes of the distribution of the estate were allegedly made, how then could she purport to have known how the deceased had distributed his property?
18. I find that the trial court misapprehended the evidence on record when it directed the estate property to be distributed as proposed by the Respondent, in her protest, and thus fell into error.



19. I further find that the trial court out rightly discriminated against the Appellants, solely on the basis of being married daughters of the deceased, when it gave them a paltry ½ acre each of their deceased father’s estate while the Respondent retained the lion’s share of 2.60 acres, without any justification and/or sound legal basis. Such discrimination is retrogressive and is explicitly outlawed by the provisions of Article 27 of the Constitution and CEDAW.
20. In the absence of any evidence to support the proposition that the deceased had indeed distributed his estate to his son and 2 daughters before his death, I find that the same ought to be distributed equally among the 3 beneficiaries, in accordance with the provisions of section 38 of the Law of Succession Act. In many situations, what is fair is also just.
21. For the foregoing reasons, I find that the appeal is merited and it is hereby allowed in the following terms:
 1. The trial’s court judgment is hereby set aside and substituted with an order distributing L.R No. Abothuguchi/Katheri/1274 measuring 3.6 Acres amongst Rosemary Ncekei, Gauku M’Mugambi and Janet Kabiti Kamundi, in equal shares.
 2. Each party to bear own costs of the appeal.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF MAY, 2025.

S. M. GITHINJI

JUDGE

Appearances:

Mr. Basilio Gitonga for the Appellant.

Mr. Mungai for the Respondent (Absent).

