In re Estate of Jacob M'amanja alias Jacob M' Amanja M'togaria (Deceased) (Civil Appeal E219 of 2023) [2025] KEHC 11581 (KLR) (29 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11581 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E219 OF 2023

HM NYAGA, J

JULY 29, 2025

IN THE MATTER OF THE ESTATE OF JACOB M'AMANJA ALIAS JACOB M' AMANJA M'TOGARIA

BETWEEN

GEDION KURUGURA M'AMANJA ..... 1ST APPELLANT

STEPHEN NTIRITU M'AMANIA ..... 2ND APPELLANT

SILAS MUTUNGI M'AMANIA ..... 3RD APPELLANT

ELIJAH KIRIMI MUTUA ..... 4TH APPELLANT

MARGARET NKANDAU ROBERT ..... 5TH APPELLANT

AND

HARRIET KANANA MUGAMBI ..... RESPONDENT

JUDGMENT

Background.

1. Jacob Amanja alias Jacob M'amanja M'togaria (the deceased) died intestate on 26th February 1979.
2. By a citation dated 8th March, 2021, Harriet Kananu (The petitioner) and Monicah Nyegere cited the following persons to accept or refuse letter of administration:
    a. Margaret Nkandau Robert
    b. Lydiah Mutua
    c. Silas Mutungi M'amanja
    d. Stephen Ntiritu M'amanja

e. Gedion Kurugura

3. Subsequently, the Petitioner, petitioned the Chief Magistrate Court for Letters of Administration Intestate. A grant was issued by the said court on 5th January, 2022.

4. On 17th June, 2022, the Petitioners filed summons for confirmation of grant dated 16th June, 2022. The appellant herein filed a protest to the said summons. The protest and summons for confirmation were heard by way of viva vorce evidence.

5. In a Judgment delivered on 19th May, 2023, the trial court ordered that the estate of the deceased comprising Land Parcel Kibirichia/Kibirichia/192 be shared equally among the following beneficiaries:-

   a. Robert Marete M'amanja

   b. Harrison Mutua M'amanja

   c. Harriet Kanan Mugambi

   d. Monicah Nyagera M'rimbera

   e. Silas Mutungi M'amanja

   f. Stephen NNturitu M'amanja

   g. Gedion Kirungura M'amanja

6. Aggrieved by the said Judgment, the appellants filed an appeal before this court.

The Appeal

7. The Memorandum of Appeal dated 8th December, 2023 set out the following grounds: -

   a. That the learned trial Magistrate erred in law and in fact in failing to consider during his lifetime the deceased had expressed his wishes on how his estate should be distributed.

   b. That the learned trial Magistrate erred in law and fact in failing to consider that the deceased who was served by 7 children among them 5 sons and two daughters wished that his estate comprised of Kibirichia/Kibirichia/192 measuring approximately 13 acres be distributed as follows:

      i. The five sons were left in occupation of 2½ acres each. The reason being that each of the deceased five sons had several children who were already in occupation of their parcels.

      ii. The 1" appellant has 9 children and he has already distributed his 2% acres among the 9 children and they have all taken possession and have constructed permanent houses on their respective parcels.

      iii. The 2nd appellant has five children and he has also distributed his share of the 230 acres among his five children and they have all taken possession and have constructed permanent houses on their respective parcels.

      iv. The 3rd appellant has 12 children at he has distributed his share of the 2½ acres among his 12 children and they have constructed permanent houses on the suit land.

      v. The 4th appellant also has 4 children and he has also distributed his share of the 2 ½ acres among his 4 children and they have constructed permanent houses on the suit land.

vi. The other son namely Robert Marete M'Amanja who is deceased was also given 2 ½ acres. He was survived by three children.

vii. The two daughters who were already married and living with their husbands were to share the remaining 1 acre equally.

c. That the learned trial Magistrate erred in law and fact in failing to consider that the applicants and their children have been in occupation of the land for over 50 years and have greatly developed their parts to wit, they have built permanent structures on the suit land.

d. That the learned trial magistrate erred in law and fact in failing to realize that the deceased had distributed his land according to the Meru Customary Law before the new Succession Act Cap 160 and gave bigger shares to the sons knowing that they would later distribute to their children.

e. That the learned trial Magistrate erred in law and fact by not realizing that the deceased had not disinherited the petitioner and the other daughter namely Monicah Nyegere M'rimberia from inheriting a share of the deceased estate as they were left with ½ an acre-each.

f. That the learned trial Magistrate erred in law and fact in not distributing the estate as per the appellants proposed mode of distribution which was in accordance to the deceased wishes.

8. The appellants sought that the appeal herein be allowed the Judgment of the lower court be set side and that the estate be distributed as per their proposal in the protest.

9. Directions were given that the appeal be canvassed by way of written submissions.

10. The appellants submitted that since the deceased died before the commencement of the *Law of Succession Act* in 1981, Section 2(2) of the Act is applicable, which provides as follows:-

2. Application of Act

(2) 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.

11. It was submitted that the law applicable herein was Meru Customary Law as tempered and moderated by *the constitution* and Section 3(2) of the *Judicature Act*, which provides as follows: -

3 (2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

12. To buttress their point, the applicants cited Re, Estate of Peter Gathogo (deceased) 2020 ekLR which in turn cited Re, Nduati Mbuthia (deceased) (2015)eKLR.

13. The appellants submitted that under Meru customary Law, only the sons of the deceased could inherit his land. That the said customary law, being patrilineal then the trial court erred when it failed to hold that the estate be distributed accordingly to that customary law.

14. It was also submitted that the deceased had expressed his wish to give each of his son 2 ½ acres of his land and that his daughters, who were married at the time would share the remaining one (1) acre between themselves if any of them was divorced, thus the respondent was not disinherited as alleged.

Respondent's Submissions

15. The respondent submitted that there were three (3) issues for determination namely:-

    a. Whether the deceased had expressed his wishes that his sons get 2 ½ acres each while his daughters get one (1) acre each.

    b. Whether the trial court considered that the respondents (sic) had lived on the suit land for more than 50 years and have built permanent structures thereon.

    c. Whether the appellants one entitled to the orders sought.

16. It was submitted that there was no evidence tendered before the trial court or this court showing what the deceased's wishes were. That the wishes of deceased are expressed either by a written or oral will. The respondent cited Section 9 of the Act on the definition of an oral will. It was argued that in the absence of evidence of an oral will, the appellants could not explain or prove that their father gave the land as they allege.

17. It was further submitted that the deceased had not sub-divided his land during his lifetime, and that the sub-divisions were actually done by the appellants after his death so as to disinherit the respondent and her sister. Thus, it is argued, discriminating the respondent on account of her gender and marital status, is contrary to the express provisions of *the Constitution* and the *Law of Succession Act*.

18. To buttress this point, the respondent cited Peter Karumbi Kingoli & 4 Others – Versus – Dr. Ann Nyakodi Nguthi & 3 Others (2014) eKLR.

19. It was further submitted that there was no evidence adduced to prove that there were permanent structures erected on the land and that the appellants opposed every opportunity to have the court visit the land in question. The respondent wondered where the one (1) acre that they proposed would come from if the respondents state that they had already settled on the land. That even if the appellants have settled on the land, the court ought to be guided by the findings in Re estate of Wangale (2022) eKLR.

20. It was further submitted that in a ruling dated 4th December, 2023, this court saw the intended appeal for what it was and pointed out that it could not grant orders that prompted discrimination among the children on the basis of their sex or marital status.

21. The respondent urged the court to dismiss the appeal with costs.

22. This being a first appeal, the duty of this court is to re-evaluate the evidence adduced and come up with its own determination. In Selle and Another vs Associated Motor Boat Co. Ltd and others (1968)EA 123 it was held as follows:-

> " 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 always bear in mind that it has neither seen nor heard the witnesses and 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.''

23. Having considered the matter, I find that the following issues come up for determination:-

    a. Whether the *law of Succession Act* is applicable in substance herein.

    b. Whether the application of Meru customary law as fronted by the appellants is discriminatory.

    c. How should the estate be distributed?

    d. Who bears the costs of the appeal?

24. From the evidence adduced and the court record the deceased died on 26th February, 1979, before the commencement of the Act. It is not in dispute that he had only one property, which is the subject matter herein. It is also not in dispute that the deceased had 5 sons and two daughters as enumerated hereinabove.

25. I have already set out the provisions of Section 2(2) of the Act. The long and short of that provision is that the substantive parts of the Act are not applicable to the estates of persons, who died prior to the commencement of the Act.

26. For any persons who died before 1st July, 1981, the substantive Law of succession is to be found in the written laws and customs that applied at the time of death of the deceased in question.

27. There is a depth of jurisprudence on the question of how to administer estates such as the one in question. For instance in Re- Estate of Peter Gathogo (Deceased) (Supra), cited by the appellants, the court was cognizant of the law applicable. However, the court had no difficulty in finding that all the children of the deceased ought to be treated equally. The court held as follows;

> " Thus, whereas this cause was filed under the *Law of Succession Act* and the procedure therein applies thereto, the distribution of the estate of the deceased herein is not governed by the *Law of Succession Act* of 1972 but by written laws and customs applying at the time of the death of the deceased. As observed by Musyoka J. in Re Nduati Mbuthia (Deceased) (2015) e KLR:
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> "Section 2(2) of the *Law of Succession Act* defines the application of the *Law of Succession Act* with respect to persons who died before the said Act commenced on 1st July 1981. The provision is categorical that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. The substantive provisions of the Act are those governing devolution or distribution of the estate of the dead person, whether such person died testate or intestate. These provisions are to be found in Parts II, III, IV, V and VI of the *Law of Succession Act*. The substantive law of Succession for estates of persons who died before 1st July 1981 is not found in Parts II, III, IV, V and VI of the *Law of Succession Act*, but in the written laws and customs that applied at the date of the death of the person in question."

The parties herein did not attempt prove the Kikuyu customary inheritance law but such is documented, and is notorious for the fact, in Eugene Cotran's Restatement of African law, Kenya Volume 2: The Law of Succession1969 (London, Sweet & Maxwell). The Kikuyu customary law of inheritance provided that only sons of the deceased person could inherit his land. However, if a daughter remained unmarried past the marriage age, the "Muramati", usually the eldest son of the deceased, could allocate a piece of land for her use during her lifetime. Thus, succession was based on the

patriarchal system and favoured male beneficiaries over females. This is patently discriminatory and, in a period, post the promulgation of the 2010 Constitution cannot be upheld. For Article 10(2)b) of *the Constitution* includes among national values and principles the values and principles of human dignity, equity, social justice, inclusivity, equality, human rights, protection of the marginalized and non-discrimination.

Under Article 27 discriminatory practices are outlawed as all persons are declared equal before the law. Both men and women are entitled to equal treatment and equal benefit of the law and their right to equal opportunities in political, economic cultural and social spheres is guaranteed. Indeed, any customary practice or law that is inconsistent with these provisions is void to the extent of the inconsistency, by dint of Article 2(4) of *the Constitution*.

28. A similar holding was made in Re Estate of Mutethia Thakan (Deceased) (2024) KEHC 4425 (KLR) where the court held as follows:-

> " The principle of equal distribution of the estate of the deceased to his children has now in upheld and entrenched in our jurisprudence. The court of Appeal in binding decisions has held that women should not be denied their rights to inheritance. In Douglas Njuguna Mungai –v- Joline Bosco Maina Kariuki & Another (2014) eKLR the Court of Appeal held that" That –fully under *the Constitution* of Kenya 2010 all these rights are enshrined and they cannot be derogated against, they are 'jus cogens'. The general rules of International Law also form part of the Law of Kenya. See Article 2(5) of *the Constitution*. The yoke and burden of discrimination should not be worn by female gender any more, *the Constitution* set it apart. Further the Court of Appeal referring to the decision of Rono-v- Rone on none discrimination on grounds of sex held as follows-It would appear from the totality of the submissions made before us and the stance adopted by appellants all through this protracted litigation that the kernel of their disenchantment lies in the fact that their sister Florence, a married daughter of the deceased, became not only a beneficiary but also an administratix of the estate. That much was clear from Mr. Kioga's resort to Meru Customary Law which stipulated as captured by Dr. E Contran in his Restatement of customary Law. Vol. 2 page 30. Daughters receive no share of the estate. In the absence of sons, the heirs are the nearest paternal relatives of the deceased namely father, full brothers, half-brothers and paternal uncles with greatest respect such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of and itself and its effects. It is anachronistic and misplaced not withstanding that it was the norm for a fact majority of Kenya's communities. This court has long accepted that a child is a child, none being lesser on account of gender or the circumstances of his or birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it. What Rono-v- Rono decided about the prohibition of discrimination of sex under the retired Constitution applies with yet another greater force under the current progressive Constitution. "See also Stephen Gitonga M'Murithi –v- Faith Murithi (2015) eKLR where the Court of Appeal held that failure to accord equal distribution of the estate (to sons, daughters and widows) is a violation of Section 38 of *the Constitution* by discriminating against the married daughters of the deceased. Guided by these binding decisions, it follows that distribution of administrator which discriminated against the daughters of the deceased should not be entertained by this court. There is no doubt that by dint of Section 2(2) of the *Law of Succession Act* the applicable Law is Meru Customary Law as the deceased died before the *Law of Succession Act* came into force. However, the court will shun the custom which discriminates women on account of gender and marital status and is inconsistent with any written law. The

administrator distributed 0.15 of an acre to the three married daughters while the sons got 1.8 acres each. This was no doubt discriminatory and total injustice."

29. I fully concur with the above decisions. I find that the application of Meru customary law that treats the daughters unfairly is discriminatory and cannot be upheld.

30. The appellants' other case is that during his lifetime, the deceased had already sub-divided his land among his sons, who had then proceeded to build their homes and had even given their children their respective portions from their land.

31. The respondent's case is that the alleged distribution was done after the death of the deceased and the appellants had excluded her and here sister.

32. The trial court was not apprised of the manner in which the deceased's land was occupied and the time such occupation took place.

33. It was upon the appellants to provide such evidence, so as to prove the intention of the deceased to settle the sons as alleged. In my view, there was need for the appellants to have shown the trial court that the deceased had manifested his intention by settling his sons on their respective portions of the land. This did not happen.

34. It is also my view that even if the deceased had manifested such intention the court would not uphold the same if the result was to discriminate against the female children. While the court is encouraged to apply customary Law, where applicable it is only to the extent that it is not repugnant to justice and morality (see Re- estate of Ngarumi Kirira (deceased) 2018 eKLR).

35. Having looked at the evidence adduced before the trial court, I find that there was no sufficient proof of the fact that the deceased had settled the sons as alleged, and that they had substantially developed their respective portions of the land.

36. I am also in agreement with the trial court that the proposal by the appellants was discriminatory against the respondent and her sister and cannot be upheld by the court.

37. In conclusion, I find that the appeal lacks merit and is dismissed.

38. Each party to bear their own costs.

39. While upholding the finding of the trial court, I find that it is important to ensure that there is minimal disturbance of the parties on the ground in the implementation of the grant. I therefore make the following orders:-

    i. The sub-division of the land shall be done in a manner that least affects the parties' settlement on the ground.

    ii. The proposal for sub-division to be done by the County Surveyor and to be filed in court for approval before any implementation is done.

    iii. Each party will meet their respective costs of the survey.

DATED, SIGNED AND DELIVERED AT MERU THIS 29TH DAY OF JULY, 2025.

H. M. NYAGA,

JUDGE.