



REPUBLIC OF KENYA



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**In re Estate of M’ikiungu Kibwaa (Deceased) (Succession Appeal
E004 of 2024) [2025] KEHC 11521 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11521 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION APPEAL E004 OF 2024
HM NYAGA, J
JULY 29, 2025**

IN THE MATTER OF ESTATE OF M’IKIUNGU KIBWAA- DECEASED

BETWEEN

**ROMANO KIGUNDA 1ST APPELLANT
SAVERIO MURIIRA KIUGU 2ND APPELLANT
MONICA NYOROKA 3RD APPELLANT
FRANCIS KIREMA 4TH APPELLANT**

AND

ROSALIA KARIANKI RESPONDENT

*(Being an Appeal from the Judgement of Hon. Temba A. Sitati, SRM
delivered on 12th March, 2024 in Githongo Succession Cause No. 43 of 2020)*

JUDGMENT

1. Following the demise of the deceased, M’ikiungu Kibwaa, on 4th May, 2018, the 1st and 3rd Appellants, petitioned for letters of administration intestate in respect of his estate in their respective capacities as the son and daughter of the deceased. On 12th January, 2021 the said letters were issued to them.
2. Vide summons dated 28th February 2021, the 1st and 3rd Appellants applied for confirmation of the grant of letters of administration intestate. In the application, they indicated that the deceased was survived by the following beneficiaries;
 - a. Magdaline Kanario- 1st wife- Deceased
 - b. Rosalia Karianki- Daughter- 64 years
 - c. Monica Nyoroka- Daughter- 62 years



- d. Romano Kigunda- Son- 61 years
 - e. Francis Kirema- Son- 59 years
 - f. Saberio Miriira- Son- 58 years
 - g. Agnes Mugure- Daughter- Deceased
 - h. Marcella Mukuba- 2nd Wife- 83 years
 - i. Rebecca Kathina- Daughter- 60 years
 - j. Zipporah Kithira- Daughter- Deceased
 - k. Lucy Ngugi- Daughter- 50 years.
3. They also proposed that the following properties be distributed as follows:
 - a. Land Parcel Title No. Abothuguchi/Gaitu/1396 measuring 0.81 ha – to be inherited wholly by Romano Kigunda.
 - b. Land Parcel Title No. Abothuguchi/Gaitu/1402 measuring 4.04 ha – to be distributed equally among the beneficiaries i.e Rosalia Karianki, Monica Nyoroka, Romano Kigunda, Francis Kirema, Saberio Miriira, Marcella Mukuba, Rebecca Kathina, Lucy Ngugi & Stephen Kironco each receiving 0.449 ha.
 4. Subsequently, the Respondent herein filed an affidavit of protest to the aforesaid summons for confirmation of grant. Her main contention was that Land Parcel No. Abothuguchi/Gaitu/1396 did not form part of the deceased's estate, as the same had been gifted to her by the deceased prior to his demise, and she had since registered it in her name. In support of her averment, she annexed a certificate of official search and a copy of the title deed.
 5. In a further affidavit sworn by the 3rd Appellant herein on 25th November 2022, she concurred with the Respondent's position, specifically stating that Land Parcel No. Abothuguchi/Gaitu/1396 did not form part of the deceased's estate and had been inadvertently included in the affidavit in support of the summons for confirmation of grant.
 6. On 20th September, 2022, the 1st, 2nd and 4th Appellants also filed an affidavit of protest dated 24th September, 2022 in opposition to the said summons for confirmation of grant. They deponed that prior to the deceased's demise, he had subdivided his property and given each of his children 2 acres to develop themselves.
 7. They further deponed that all the parcels had been transferred to the respective beneficiaries, save for Abothuguchi/Gaitu/ 1396 and Abothuguchi/Gaitu/1392, in which they proposed that these parcels be distributed wholly to Romano Kigunda and Rosalia Karianki, respectively.
 8. It was their deposition that the deceased retained Land Parcel No. Abothuguchi/Gaitu/1402, measuring approximately 10 acres, and expressly directed that it be shared among his sons and widow upon his demise. Accordingly, they proposed that 1 acre be allocated to the surviving widow, Marcella Mukuba, and the remaining 9 acres be distributed equally amongst them, with each receiving 3 acres.
 9. The matter proceeded by way of viva voce evidence. Upon conclusion of the trial, the court in its judgement dated 12th March, 2024 found as follows; Land Parcel No. Abothuguchi/Gaitu/1396 had been gifted to Rosalia Karianki and was registered in her name. As such, it ceased to form part of the deceased's estate. Land Parcel No. Abothuguchi/Gaitu/1392, had been gifted to the 1st Appellant, but



he refused to accept it. Instead, he forcefully took possession of Parcel No. 1396, which belonged to Rosalia Karianki. Consequently, the court ordered the 1st Appellant to vacate Parcel No. 1396 within 30 days, failing which he was to be forcefully evicted through the necessary legal procedures. Land Parcel No. Abothuguchi/Gaitu/1402 should be shared equally among all the surviving beneficiaries. Namely: Marcella Mukuba, Rosalia Karianki, Monica Nyoroka, Romano Kigunda, Francis Kirema, Saberio Muriira, Rebecca Kathina, Lucy Ngugi, and Stephen Kirongo

10. Aggrieved by the trial court's judgement, the appellants filed the instant appeal dated 9th April, 2024 in which they raised the following grounds of appeal: -
 - a. The Learned Magistrate failed to appreciate the fact that the deceased had sub-divided and distributed part of his estate to the beneficiaries despite glaring evidence before him.
 - b. The Honourable Magistrate failed to appreciate the fact that Land Parcel Nos. Abothuguchi/Gaitu/1402 was reserved for the sons and widow despite the evidence before him and went ahead to distribute the same.
 - c. The Honourable Magistrate erred in law by ordering the 1st Appellant Romano Kigunda out of the Land Parcel No. Abothuguchi/Gaitu/1396 within 30 days despite the evidence to the contrary before him.
 - d. The Honourable Magistrate misapprehended facts and misapplied the law contrary to the provision of the Law of Succession Act and hence arrived at an unjust decision.
 - e. The Honourable Magistrate's decision was wrong and unjust in all circumstances.
11. The Appellants therefore prayed that the appeal be allowed, the judgment of the lower court delivered on 12th March, 2024 be set aside, and that this Honourable Court orders distribution of the estate in accordance with the evidence on record and the provisions of the Law of Succession Act, Cap 160, Laws of Kenya.
12. The Appeal was canvassed by way of written Submissions. Both parties duly filed their respective submissions.

Appellants' Submissions

13. On whether the deceased had sub-divided and distributed his estate during his lifetime, the Appellants submitted in the affirmative. They argued that the evidence of the 1st petitioner, 3rd and 4th protestors confirmed that the deceased intentions was to have his sons inherit Land Parcel No. Abothuguchi/Gaitu/1402. To buttress their submissions, the Appellants cited the case in re Estate of the Late Siwanyang Ngilotochi (Deceased) [2021] KEHC 5918 (KLR) for the proposition that the intentions of the deceased concerning the distribution of his estate should be respected.
14. With respect to whether the magistrate departed from envisaged distribution, the appellants equally submitted in the affirmative. It was their position that the protestors' evidence demonstrated that the deceased's intention was to have his sons inherit Land Parcel No. Abothuguchi/Gaitu/1402.
15. With regard to whether the protestors' proposed mode of distribution amounted to discrimination, the Appellants submitted that the mode of distribution adopted by the protestors was fair, as it acknowledged that the daughters were equally entitled to inheritance just like their male siblings.
16. Regarding whether Land Parcel No. Abothuguchi/Gaitu/1396 formed part of the deceased's estate, the Appellants referring to the evidence of the 3rd protestor, Saverio Muriira, the Respondent, Rosalia Karianki, and the 1st Appellant/ Petitioner, Romano Kigunda M'ikiungu submitted that the



ownership of the said parcel was in dispute, and therefore, the magistrate ought to have exercised his inherent jurisdiction and referred the matter to the Environment and Land's Court.

17. In conclusion, the Appellants urged this Honourable Court to order distribution of the estate in accordance with the evidence on record and to refer the issue of ownership of Land Parcel No. Abothuguchi/Gaitu/1396 to the Environment and Land's Court for determination.

Respondent's Submissions

18. The respondent submitted that the deceased during his lifetime had gifted each of the beneficiaries their respective portion of land.
19. She contended that there was no evidence to show that the deceased intended to reserve the remainder of the estate exclusively for his sons.
20. With regard to Land Parcel No. Abothuguchi/Gaitu/1396, she submitted that it did not form part of the deceased's estate, as it had been gifted to her by the deceased prior to his death. She further submitted that the parcel was registered in her name in 2009 and a title deed to that effect was produced before the trial court. She urged this Honourable Court to uphold that position. In support of her submissions, she relied on the cases of *Re Estate of SBS (2014) eKLR* and in *re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR*.
21. The Respondent urged this Honourable Court to note that the 1st Appellant had been gifted Land Parcel No. Abothuguchi/Gaitu/1392 by the deceased, but he rejected the same and instead illegally entered and developed Land Parcel No. Abothuguchi/Gaitu/1396 which belongs her.
22. The Respondent submitted that the only land available for distribution was Land Parcel No. Abothuguchi/Gaitu/1402 and that pursuant to Section 40 of the *Law of Succession Act*, it ought to be distributed equally among all the beneficiaries.
23. In sum, the Respondent urged this court to uphold the judgment of the lower court.

Analysis and determination

24. This being a first appeal, this Court has a duty to re-evaluate, re-assess and re-analyze the evidence and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. See the Court of Appeal case of *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*, where the Court pronounced itself as follows: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority versus Kustron (Kenya) Limited 2000 2EA 212* wherein the Court of Appeal held, inter alia, that: - ‘On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.’”

25. Having considered the appeal and the submissions, I find that the Issues which emerge for determination are as follows;



- a. Whether Land Parcel No. Abothuguchi/Gaitu/1396 had been gifted to the Respondent by the deceased prior to his demise.
- b. Whether there was evidence to show that the deceased intended Land Parcel No. Abothuguchi/Gaitu/1402 to be reserved for his sons.
- c. Whether the trial magistrate erred in ordering equal distribution of Land Parcel No. Abothuguchi/Gaitu/ 1402 to all the beneficiaries.

Issue No.1

26. The respondent adopted her statement dated 27th April, 2023 as her evidence in chief. In that statement, she stated that Land Parcel No. Abothuguchi/Gaitu/1396 was gifted to her by the deceased prior to his demise and therefore did not form part of the estate. She added that the 1st Appellant had been gifted Land Parcel No. Abothuguchi/Gaitu/1392 but failed to take possession or transfer it to himself. In support, she relied on a certificate of official search and a title deed registered in her name to confirm ownership.
27. On cross-examination, she stated that the 1st Appellant built on the said parcel in 2022 after the deceased's death and that he sued her, but she defended herself.
28. The Respondent's testimony was corroborated by the 3rd Appellant and the surviving widow, Marcella Mukuba, in their respective statements dated 8th June 2023, which were adopted as evidence.
29. The 1st Appellant adopted the affidavit of protest dated 24th September 2022 as his evidence, in which he deponed that the suit parcel had not been distributed by the deceased and prayed that the parcel be wholly allocated to him. During cross-examination, he acknowledged that the parcel is registered in the Respondent's name and that this registration occurred prior to the deceased's demise. He testified that he had constructed structures on the land and had buried his children there. He further stated that the deceased had allocated 2 acres of land to each of his children and issued title deeds to save for him as he was away at the time. He added that the Respondent had previously sued him over the suit property at Nkubu Law Courts but lost the case as well as the subsequent appeal at Nyeri. He, however, conceded that neither the trial court nor the appellate court awarded him ownership of the parcel in question.
30. The 2nd Appellant adopted his statement dated 7th July, 2023 as his evidence in chief. In that statement he stated that the deceased had allocated the subject parcel of land to the 1st Appellant and land parcel no. 1392 to the respondent. The 4th Appellant concurred with this position during his testimony before the lower court. The 2nd and 4th Appellants further concurred that the parcel in issue was registered in the name of the Respondent prior to the deceased's demise.
31. I also note that the testimonies of the 2nd and 4th Appellants were inconsistent with their averments in the affidavit of protest, particularly the claim that the subject parcel had not been distributed.
32. Notably, the 1st Appellant did not dispute that the land had been gifted to the Respondent. His assertion was that he has been in occupation of the parcel and had buried some of his children there. Additionally, the 1st Appellant did not challenge the Respondent's title prior to the deceased's demise and did not adduce any evidence before Court showing that he has questioned the validity of that title.
33. From the foregoing, it is evident that the subject parcel was gifted to the Respondent by the deceased during his lifetime and was duly transferred to her. Her title has not been challenged and therefore the said land does not form part of the deceased's estate.



Issue No.2

34. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

35. In *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that: -

As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

36. The 1st, 2nd and 4th appellants asserted before the trial court that land parcel No. 1402 had been reserved by the deceased exclusively for his sons. Notwithstanding this claim, they failed to adduce minutes of the alleged meeting with the deceased to substantiate their contention regarding the subdivision of the property following his death.

37. PW4, Mr. Peter Mungania, testified that the deceased convened a meeting with several local elders. Namely Solomon Ntonyiri, Mr. Kirugu (both now deceased), and Mr. Samuel Mugambi at which he expressed his intention to distribute the said parcel among all his children. Notably, PW4 affirmed that no family members were present during this meeting.

38. PW5 who was the area manager testified that in 2017 the deceased summoned him to a meeting attended by the 1st and 4th appellants, George Kinoti, and Julius Gitangi and the deceased daughters, Lucy and Rebecca. He stated that the deceased intended to reserve 10 acres for himself and upon his demise have the same shared between his wife and sons. However, this account was contradicted by the testimony of the 4th appellant who maintained that only the deceased's sons were summoned to the meeting and none of the daughters attended. In totality, the appellants failed to present credible evidence establishing that the deceased had clearly articulated a wish that the land be apportioned solely among his sons and widow.

Issue No.3

39. The deceased was a polygamous man.

40. Section 40 applies where the deceased died a polygamist, like in this case, it spells out how the estate is to be shared out between the houses. It provides as follows;

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate, shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

41. It is not in dispute that all the children of the deceased are adults. The deceased never discriminated against any of them. The trial court therefore acted correctly in ordering an equal distribution of the estate among all the beneficiaries.

42. In the upshot, I find that the appeal is devoid of merit. The same is hereby dismissed.



43. This being a family matter, I make no order on costs.
44. The 1st Appellant is hereby directed to vacate Land Parcel No. Abothuguchi/Gaitu/1396 within ninety (90) days from the date of this judgment, failing which lawful eviction shall ensue.

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

H. M. NYAGA,

JUDGE.

