



REPUBLIC OF KENYA



KENYA LAW
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**Gatimu v Gatimu (Civil Appeal E052 of 2023)
[2025] KEHC 12407 (KLR) (3 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E052 OF 2023
EM MURIITHI, J
SEPTEMBER 3, 2025**

BETWEEN

PERIS MUTHONI GATIMU APPELLANT

AND

JECINTA WAITHIMU GATIMU RESPONDENT

*(An appeal from the Ruling of Hon. Cheruto C. Kipkorir (P.M) in
Kerugoya Succession Cause No. E233 of 2021 delivered on 29/6/2023)*

JUDGMENT

1. On 4/5/2021, the Appellant petitioned for the grant of letters of administration intestate, in her capacity as a wife to the deceased, which was issued on 1/12/2021.
2. On 20/9/2022, she filed Summons for Confirmation of Grant, where in paragraph 4 of the affidavit in support thereof, she proposed that L.R. No. Inoi/Kimandi/128 (hereinafter referred to as the estate property) be distributed equally among Peris Muthoni Gatimu, Jecinta Waithimu Gatimu, Rose Wangechi Gatimu, Benson Murage Gatimu, Josphat Muriithi Gatimu, Teresia Wathimu Gatimu, Beth Nyawira Gatimu, Jane Wangu Mwangi, Rosemary Njeri Gatimu, John Muchira Gatimu, Elizabeth Wangui Gatimu, Bonface Gitari Gatimu and Bernard Karimi Gatimu in equal shares.
3. The Appellant swore a further supporting affidavit on 21/3/2023, urging that her proposed mode of distribution was as per the wishes of the deceased.
4. All the children of the deceased, save for Jane Wangu Njeru, who is said to be missing and the Respondent herein, swore an affidavit on 6/4/2023 in support of the Appellant's mode of distribution.
5. The Respondent filed her affidavit of protest on 30/3/2023, urging that the deceased had given the protestor's house and the petitioner's house 1 acre each of the estate property, which they had developed by planting coffee bushes and building semi-permanent houses. The deceased retained 1



acre of the estate property, which should now be shared equally between the 2 houses. She proposed that the estate property, which measures 3 acres, should thus be shared equally between the 2 houses, so that each house gets 1½ acres.

6. In its impugned judgment, the trial court rendered thus;

“The deceased settled each wife on a portion of the land they have known and used as did their children. That arrangement should be honored. I will add that the 1 acre that remains which was utilized by the deceased, should be distributed equally to both wives. I understand the argument presented by the petitioner, but it may not be practically possible to have the three acres registered in the name of the children as indicated. The implementation of the same may be difficult. There were already undertones in this case of obvious disagreement which is not uncommon in polygamous families. An order that would be in conflict from what the children of the deceased knew and understood when they grew up is a recipe for disaster. The mode of distribution does not discriminate, each house will get an equal share. The only issue that would arise is if one house has more children than the other. Even in that case, the children can only be entitled to what their mothers should have inherited, as they rank in priority as beneficiaries to the children. The wives would each be entitled to an equal share; the children can only get what was due to their mother. 8. I will allow the protest. The land Inoi/ Kimandi/128 will be divided into two. Peris Muthoni Gatimu and her children will get 1½ acres. The family of the late Joyce Gatimu and her children with also get 1½ acres.”

The Appeal

7. On appeal, the Appellant filed her memorandum of appeal on 12/7/2023 raising 6 grounds as follows:

1. The learned trial Magistrate erred in law and fact by completely disregarding the clear provisions Section 40 of the *Law of Succession Act* (Cap 160 Laws of Kenya) which were applicable in the succession cause before it thereby arriving at the wrong decision.
2. The learned trial Magistrate erred in law and fact by holding the deceased had settled each of his wives on one acre of land parcel No: Inoi/Kimandi/128 in the total absence of evidence in support of the same thereby arriving at the wrong decision.
3. The learned trial Magistrate erred in fact and law by distributing one acre of land parcel No: Inoi/Kimandi/128 equally to both wives of the deceased which in effect was discriminatory for the children of the deceased.
4. The learned trial magistrate erred in law and fact by holding that the wives of the deceased were each entitled to an equal share of the estate of the deceased and the children were only entitled to what was due to their mother, a decision that is manifestly discriminative to the children of the deceased and without any basis in law.
5. The learned Magistrate erred in fact and law by distributing the estate of the deceased between the two wives of the deceased without establishing the number of children for the respective wives thereby arriving at the wrong decision.
6. The Learned Magistrate erred in law and facts by allowing the Respondent's Protest which was composed of mere averments without evidence in their support hence delivering a Ruling against both the law and weight of evidence.



Duty of the court

8. 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).
9. The parties relied on their respective pleadings.

Submissions on Appeal

10. The Appellant faulted the trial court for disregarding the provisions of section 40 of the *Law of Succession Act* in distributing the estate property. She faulted the trial court for distributing the estate property discriminatively without regard for the number of children in each house, and cited *Re Estate of Kimitei Cherop (Deceased)* [2021] eKLR.
11. The Respondent urged that the deceased had subdivided the estate property into 3 equal portions and settled the 2 houses in their respective portions.

Analysis and Determination

12. From the grounds of appeal, the singular issue for determination is whether the trial court's decision was grounded in law.
13. The undisputed evidence on record is that the deceased was a polygamist who died intestate, survived by 1 spouse, the Appellant herein and 13 children. The provisions of section 40 of the *Law of Succession Act* come into play, which stipulate that; "(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. (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."
14. While it is urged that the deceased had settled his 2 houses in their respective portions during his lifetime, there is no evidence to support that contention. Besides, 11 out of the 13 children of the deceased seemingly conceded to the mode of distribution proposed by the Appellant, without any indication of any prior settlements allegedly made by the deceased during his lifetime.
15. The trial court was enjoined by the provisions of section 40 of the *Law of Succession Act* to distribute the estate property in accordance with the children in each house, with the surviving spouse being treated as an additional unit. Nonetheless, that distribution need not necessarily be equal among the number of children in each house, as was held by the Court of Appeal in *Rono v Rono* [2005] 1 EA 364, that;

"Under statutory law, the superior Court has discretion to take into account fairness in determining the distribution to dependants. This discretion must be exercised on sound factual and legal basis. The possibility of girls marrying is only one factor that may be considered. Equal treatment of the children by the deceased was another factor. However, in intestate succession, there was no principle of law that the houses of the deceased, or the children/beneficiaries, must inherit equally."
16. Admittedly, the Appellant has 9 children while the Respondent's mother, namely Joyce Muthoni Gatimu (now deceased), had only 4. Evidently, an equal distribution of the estate property among



the number of children in each house would occasion great prejudice to the Appellant, and unduly disadvantage her and her children. It is reasonably expected that the house with more children would justifiably get proportionately a larger share.

17. The number of children in each house is undoubtedly a material consideration, as was espoused in *Mary Rono v Jane Rono & another* [2005] KECA 326 (KLR) by Omollo JA as follows:

“My understanding of that section is that while the net intestate estate is to be distributed according to houses each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that they must be equality between houses they would have been no need to provide in the section that the number of children in each house be taken into account. Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work injustice particularly in the case of a young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.”

18. The court is satisfied that the trial court misapprehended the evidence on record and the applicable law in distributing the estate property.

19. Clearly, there is a basis to warrant this court’s interference. See *Peters v Sunday Post Limited* that

Orders

20. Accordingly, for the reasons set out above, the appeal is merited and it is hereby allowed in the following terms:

1. The Ruling of the trial court dated 29/6/2023 is hereby set aside.
2. L.R No. Inoi/Kimandi/128 measuring 3 acres shall be distributed among Peris Muthoni Gatimu, Jecinta Waithimu Gatimu, Rose Wangechi Gatimu, Benson Murage Gatimu, Josphat Muriithi Gatimu, Teresia Wathimu Gatimu, Beth Nyawira Gatimu, Jane Wangu Mwangi, Rosemary Njeri Gatimu, John Muchira Gatimu, Elizabeth Wangui Gatimu, Bonface Gitari Gatimu and Bernard Karimi Gatimu in equal shares.
3. Regard shall be had to any occupation and/or developments of any beneficiary on the ground.

Order accordingly

DATED AND DELIVERED THIS 3RD DAY OF SEPTEMBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Heyi for the Appellant.

Ms. Jacinta Waithimu Gatimu in person.

