



In re Estate of Hassan Barasa Mubambe alias Barasa Mubamba (Deceased) (Succession Appeal 2 of 2020) [2024] KEHC 1229 (KLR) (26 January 2024) (Judgment)

Neutral citation: [2024] KEHC 1229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL 2 OF 2020**

PJO OTIENO, J

JANUARY 26, 2024

**IN THE MATTER OF THE ESTATE OF HASSAN BARASA
MUBAMBE ALIAS BARASA MUBAMBA (DECEASED)**

BETWEEN

MUSTAPHA AKHUNGU BARASA APPELLANT

AND

JACOB OMULAI BARASA RESPONDENT

*(Being an appeal against the Judgment and Decree of Hon. W. Cheruiyot (SRM)
in Mumias Succession Cause No. 77 of 2017 delivered on 12th June, 2020)*

JUDGMENT

Case Background

1. The matter herein relates to the estate of deceased Hassan Barasa Mubamba who died intestate on 1st June 1993 in the form of land parcel number North/Wanga/Matungu/324. The deceased was polygamous having been married to two wives and had five children from each house.

Plaintiff's Case

2. PW1, Jacob Omulai Barasa the Petitioner's brother and son to the deceased posit that the estate in contestation to be equally distributed between the two houses. On cross-examination examination, it was his position that the deceased had earlier subdivided the land among the two houses before he died in presence of all his spouses and settled each wife in her assigned portion.
3. PW2, the deceased brother affirmed that the said estate had been equally subdivided according to their Wanga customs between the two houses though his evidence contradicted that of PW1 in that to



him he alleged subdivision was conducted after the deceased death which he also affirmed on cross-examination.

4. PW3, the deceased's nephew testified to the Court that the said land parcel was subdivided after the deceased's death by clan members to the two families equally. The same position was affirmed by the PW4 who indicated the said land to have been distributed after the deceased had passed on.
5. The Objectors when put on defence, DW1; the Petitioner herein stated that the family has failed to reach an agreement on the mode of distribution, what led to the suit. He proposed the said land be distributed only among the sons of the deceased equally as their sisters are already married. His position on the mode of distribution was given effect by testimonies of DW2, DW3 as well as DW4.
6. The trial Court in giving its determination on the matter dismissed the defendant's position of division of the estate only among the deceased's sons reiterating that such thoughts are expurgated to justice and law and customs and as such have no place in the modern society. As a result, all the children of the deceased were adjudged to be entitled to equal share of the deceased estate and being the two houses had equal number of dependents, equal distribution of the estate between the two houses was found just and was given effect.
7. The Appellant felt dissatisfied and aggrieved with the trial Court's Judgment and lodged an appeal faulting the trial Court on five grounds of appeal all alleging that it misled itself and reached a wrong decision by considering irrelevant factors and thus awarding to strangers interests in the estate contrary to the Wanga customs which advocates for distribution of deceased's estate equally only among his sons.

Issues, Analysis and Determination

8. Upon careful perusal of the Petitioner's case, objections raised by the Respondents as well as the decision by the trial Court, I find the pivotal issue for determination in this appeal to be whether the trial Court correctly applied the relevant principles in reaching its Judgment.
9. The deceased whose estate is herein in question died intestate leaving behind two houses with five children each. The deceased's survivors' houses comprises of four sons and one daughter while in the second house there are four daughters and one son; the Respondent.
10. The Appellant faults the trial Court for misleading itself and reaching a wrong decision. He presents that the trial Court failed to consider the fact that the clan elders had subdivided the land according to the Wanga customs which advocates for distribution of deceased's estate equally only among his sons. The trial Court in its Judgment directed that the said land be distributed equally among all sons, that to imply equally between the houses being there are equal number of children in each house.
11. The Court finds that section 40 of the *Law of Succession Act* to no doubt be applicable in the distribution of the deceased's estate being the deceased died polygamous having left behind two wives with children each. The said provision dictates that 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.



12. The Court in interpreting the provisions of section 40 in Civil Appeal No. 66 of 2002 of *Mary Rono vs Jane Rono and William Rono [2005]* eKLR held that:-
- “... in a polygamous set up, each house is to benefit from an equal share of the deceased’s estate; in that the deceased’s estate must be distributed in such a way that they are shared out equally between or amongst the houses, depending on the number of the houses surviving the deceased.”
13. Further, section 38 of the Law of Succession provides that where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children. In this cause there were only children and no spouse. In coming to its decision, the trial Court no doubt observed the principle of equal distribution.
14. The trial Court correctly applied the relevant principles in line with requirements of Law of Succession in projecting the mode to which the deceased estate is to be shared in accordance with section 41 of the *Law of Succession Act*. The Court cannot be faulted on that determination. The Court adds that if there is a Wanga custom that disinherits girls on account of their gender, such have no place in the current Kenya.
15. The Court finds no justification to interfere with the decision of the trial Court which properly enunciates the accurate and true position of the law under the *Law of Succession Act* as espousing the right to equal treatment before the law under Article 27 (3) of *the Constitution*. Any practice, tradition or custom that discriminates between the male and female children of a deceased person is retrogressive and violates the said Constitution.
16. Consequently, the appeal is herein dismissed for lack of merit and the trial Court’s decision upheld. Being a family dispute, each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 26TH DAY OF JANUARY 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for Parties

Court Assistant: Polycap Mukabwa

