



REPUBLIC OF KENYA



**In re Estate of Mishati Mutonyi Vunuka (Deceased) (Succession Appeal
E007 of 2023) [2024] KEHC 6228 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E007 OF 2023**

PJO OTIENO, J

MAY 24, 2024

IN THE MATTER OF THE ESTATE OF MISHATI MUTONYI VUNUKA (DECEASED)

BETWEEN

BARASA ASIDE MISHATI APPELLANT

AND

JORAM BARASA ASIDE 1ST RESPONDENT

AGNESS KHACHITI MISHATI 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. R. S. Kipng'eno (PM) in
Butali PM's Court Succession Cause No. 358 of 2018 dated 4th April, 2023)*

JUDGMENT

1. The Appeal challenges the Judgment of the trial court delivered on the 4.4.2023 by which the court distributed the estate equally among all the children of the deceased, both male and female.
2. The Appellant faults the Judgment for failure to respect the deceased wishes by which he had shared his land to the children who had settled on respective portions given and for failure to give consideration to the Appellant's proposed mode of distribution.
3. For those reasons the Appellant prays that the Judgment be set aside and in its place substituted a Judgment that the estate be distributed in accordance with the wishes of the deceased.
4. The Appeal was directed to be canvassed by way of written Submissions and both parties have so filed Submissions.
5. Being a first appeal, proceeding by way of a retrial, the court is duty bound to not only re-appraise the entire record and to come up with its own conclusions.



6. The matter before the trial court was a protest to the application for confirmation of grant which was heard by way of viva voce evidence.
7. At trial, PW1, the 1st administrator and the Appellant herein relied on his Affidavit of Protest which was adopted as his evidence in chief. In that Affidavit it was revealed that the protest was on his own behalf and on behalf of Peter Mishati, James Berry Mishati, Francis Bundi Mishati, Charles Mishati and Grace Shilako Mishati. It then disclosed that the deceased died a polygamist and left behind seven (7) children from the first household, eight (8) children from the 2nd house and five (5) from the 3rd house. The Protestor then revealed that other than the parcel of land, North Kabras/Kivaywa/261 the deceased also left behind Korokocho – 2, cows and bulls 45 and cash Kshs. 68,000 for one Laban. Not much was said about the Korokocho and the money due from Laban.
8. It was then contended that prior to his death the deceased had shared out his land to the twelve (12) sons and planted sisal plants as demarcations. It was equally contended that the deceased had given to each of his three wives an acre each and demarcated such portions as the homestead.
9. He opposed the equal distribution proposed by the administrator and urged that the apportionment and demarcation by the deceased be respected and enforced save that what was due to each of the wives to the deceased would go to their respective households.
10. On being cross-examined, the Protestor told the court that with the three wives, with only one surviving at the date of giving evidence, the deceased had twenty (20) children of which four (4) were deceased on the date he gave evidence although he could not recall their dates of death. He then said that the family meeting he did not attend agreed that the property be shared equally with each of the sixteen (16) beneficiaries each getting 1.22 acres.
11. For the Respondent, the case was disclosed, in the Summons for Confirmation of grant as supported by the Affidavit in support sworn by the administrators. Their mainstay position was that the mode of distribution had been agreed upon by the family and exhibited a consent which evidently not signed by all the beneficiaries listed. The Summons was also supported by an Affidavit sworn by Counsel for the Applicants, Morisio Luchivya giving details of the attempts made at bringing parties to an agreement on distribution. The details show that a meeting between the family members alone, one with the assistant of the area Chief did not manage to bring the children from the first house to the negotiating table save for one daughter called Catherine Namweya Muyekho. It however reiterates the fact that the family members comprising children from the 2nd and 3rd house and one out of 7, from the 1st house, agreed on the mode of distribution.
12. Therefore, when it was time for the Applicants to give evidence, Joram Barasa Mishati took the stand, adopted the contents of the Affidavit in support of the Summons and confirmed that there was a consent on distribution reached at a meeting attended by 16 of the beneficiaries which proposed that the estate property be shared with each of the 21 beneficiaries getting 1.12 acres. He denied knowledge of the alleged Kshs. 68,000 claimed to belong to the estate. He then opposed the mode proposed by the first administrator on the basis, among other, that it made provision for two deceased heirs.
13. On being cross-examined, the 2nd administrator told the court that the deceased had in fact shown to the 12 sons their respective portions of the land and reserved 3 acres for the widows. As he gave evidence he confirmed that there were sisal plants on the land which he proposed would be removed to achieve equal distribution. He asked the court to disregard the wishes of the deceased for the sake of equal distribution. In re-examination, he turned around and denied there being sisal boundaries planted by the deceased.



14. The last witness to give evidence was Agnes Mishati whose evidence was that each of the 21 children of the deceased get a share in the estate, whether male or female because all are children. She did not disclose what each would get.
15. In the Judgment giving rise to this Appeal, the court said at the determinative paragraphs of the Judgment: -
 - “ 4. I have read and considered the proceedings and the material placed before the court. The central issue in dispute is the distribution of the deceased person’s estate comprised in the suit property between the parties. The deceased had 3 households each with varying number of children being both male and female. The parties are agreed that the estate be distributed either as per the alleged wishes of the deceased or equally among all the children. The issue of distribution among households appears to be out of the question.
 5. Section 29 of the *Law of Succession Act* sets out the dependants of a deceased person to include his children. The Application has given a proposed mode of distribution in equal shares among all the children of the deceased including both sons and daughters. It is said that equality is equity. From the material placed before the court, I find that the proposed mode of distribution be adopted as a fair means of distributing the land comprised in the deceased person’s estate.
 6. In conclusion, I therefore allow the Application in terms of the Summons for the Confirmation of Grant dated 30/11/22.”
16. Being a first appellate court, the duty is re-appraise and re-examine the evidence afresh and come to own conclusion¹ with the caution being administered that the appellate court is disadvantaged in not having seen and heard the witnesses testify so as to observe their demeanor.
17. Having read the Affidavits filed in support and protest to the Summons for Confirmation, it is clear to the court that the Applicants sought to have equal distribution as the best and straight jacket formula, assigned portions to each of the beneficiaries, albeit without having carried out a survey to confirm whether or not all the proposed portions would be available on implementation. On the other hand, the Protestors took the position that the wishes of the deceased be respected.
18. The court thus holds that it was the duty of the trial court to analyse the evidence led and if indeed the deceased had expressed a wish on how his estate would be shared and if the same was enforceable or not. On that task the court failed. In such failure the Judgment calls for interference by this appellate court.
19. Instead of dealing with the pivotal question, the trial court having appreciated that the deceased was polygamous, ruled out the distribution of the estate among the three households. For that finding, no reason was proffered. A decision by the court based on no facts and evidence falls short of passing the test of being judicious, and cannot be left to stand. It must be set aside for the said reasons that it flies on the face of section 40 of the *Act* which governs distribution in a polygamous set up. The law obligated the court to share out the estate in accordance with the number of the households with the widows if alive being considered a unit within the household. In so far as the court applied section 26 in isolation from the direct application provisions under section 40 of the *Act*, the Judgment demonstrates a glaring error in the exposition of the law.

¹ **Gitobu Imanyara -vs- The Attorney General [2016] eKLR**



20. Having set aside the Judgment on the two foregoing grounds, the court proceeding by way of a re-hearing must now determine the question of distribution of the estate.
21. The stringent position of the law is now settled that there must be equality between the heirs, blind of the gender, marital or social status. One may say even the relationship between the deceased and the heirs is not a consideration towards achieving that equality. However, equality in sharing a deceased estate must not be mathematical equality. It just needs to be substantive, allowing for acceptable mathematical figures.
22. But it must also be born in mind that the law also recognizes and ordain that the deceased wishes be respected and obeyed.
23. In this matter, both sides agree that each of the 12 sons were given a portion of the estate as an inheritance, however the portions were never surveyed and determined quantitatively.
24. In such circumstances, this court takes the position that the deceased unequivocally gifted definite portions of the estate to the twelve (12) boys and that requires and demands respect when like here, the heirs took possession and remain in such possession. There is even compelling reason to respect the wishes.
25. However, for the wishes to be respected in a manner that is implementable, there must be survey to determine what quantum of land each possesses, occupies and uses.
26. It is to this court important that the wishes of the deceased be put on the scale and test of fairness and equality. That can only be done by survey of the entire land.
27. To this court, it is self defeating in many cases for the court to distribute the estate with precision in units of measure while relying solely on the registration details. It is self defeating to the norm of expeditious disposal of court disputes because in majority of the cases, the registration details, disclosing the quantum of land, is based on general survey and approximate figures hence never accurate. In addition, where a parcel of land is to be sub-divided into several pieces, like in this case, a significant portion would be surrendered for roads of access and thus each beneficiary may not get what the court has ordered.
28. In other instances, the land ends up being larger or smaller than the registration particulars and the parties have to come back to court, either after survey or at the point of registration when the Registrar becomes unable to implement the grant.
29. For this court, therefore, every application for confirmation of grant should be supported by a recent survey report that satisfies the court to be able to have the resultant Certificate of Confirmation of grant implementable.
30. The court's experience in this area is that grants confirmed pre-survey always have come back with requests for rectification which then defeats the norm on expeditious disposal of cases and thus unduly and mistakenly delays the matter. It is also important to note that the registration of land in Kenya has adopted the metric measures of hectares and not acres. Therefore, anytime parties opt to share the estate in acres, it becomes difficult to implement. It is thus the direction of the court to the lower courts that the units of measure be retained as hectares in every Certificate of Confirmation of grant.
31. Having done so, the court finds that it is bound by law to distribute the estate between the three household while respecting the wishes of the deceased.
32. For that reason, it is ordered that the County Surveyor visits the land within ninety (90) days and conducts survey to determine:



- a) The actual total size in hectares of that property known as N.Kabras/Kivaywa/261 registered in the deceased's name.
 - b) The area each of the 12 sons occupy on the land as shown by any demarcations on the land.
 - c) What area is occupied by the homestead occupied by the only surviving widow.
33. For the preservation of public order, it is directed that the area Chief and the OCS shall be at the site during the survey. The date be set by the Surveyor.
 34. The court shall then make its final orders on distribution after the report is filed and parties get the chance to address the court on the report.
 35. Matter stood over to 17.10.2024 for further orders.
 36. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF MAY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Athunga for the Appellant

Mr. Ondego for the Respondents

Court Assistant: Polycap

