

KENYA / JUDGMENT

In re Mugwika (Deceased)
[2026] KEHC 13092 (KLR)

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COURT

High Court

BEFORE

HM Nyaga

CASE / FILE NUMBER

Civil Appeal E106 of 2024

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HCCA NO. E106 OF 2024

IN THE MATTER OF THE ESTATE OF TABITHA MUTHONI MUGWIKI (DECEASED)

AGNES MWARI MARETE-----APPELLANT

VERSUS

MARGARET NAITORE MAGIRI-----1ST RESPONDENT

GEORGE MWIRUTHI-----2ND RESPONDENT

BENSON GITOBU MUGWIKI-----3RD RESPONDENT

NAOMI NCHEKEI KIUGU-----4TH RESPONDENT

(Being an Appeal against the ruling delivered by Hon. J.M. Njoroge (C.M.) on 18th July 2024 in Meru CM’S Succession Cause No. 194 of 2019)

JUDGMENT

1. Vide a Memorandum of appeal dated 6/8/2024, the appellant sought orders of this court to set aside the ruling delivered by the trial court on the 17/07/2024.
2. The appeal is anchored on the following grounds;
3. THAT the Learned trial Magistrate erred in Law and facts by finding that the deceased sold 2 Acres out of L.R. NO. NGUSISHI SETTLEMENT SCHEME/246 and shared out the purchase price to her daughters as their inheritance.

4. THAT the Learned Trial Magistrate erred in law by finding that the deceased expressed her desires on how she bequeathed her properties YET the trial magistrate in the same ruling found that the deceased died intestate without any written OR oral will.
5. The Learned trial Magistrate erred in law and facts by finding that the daughters of the deceased did not object to the distribution of her estate during her lifetime, which finding contradicts another finding by the trial court that the deceased never left any written will OR an oral will.
6. THAT the Learned trial Magistrate erred in law by finding that the deceased had bequeathed 3 % Acres to Benson Gitobu Mugwika and Estate of Samuel Mwiruthi M'Mugwika, during her lifetime.
7. THAT the Learned trial Magistrate erred in Law and facts by giving Benson Gitobu a share of the estate despite a clear affidavit sworn by the said Benson Gitobu on 8/9/2021 whereby he categorically stated that he was not interested in the Estate.
8. THAT the Ruling of the trial court is unconstitutional for disinheriting the daughters of the deceased.
9. THAT the ruling of the court is against the weight of evidence and the law placed before the trial court.
10. The Appellant prays for the following orders;
11. THAT the Appeal be allowed and the ruling delivered on 17/7/2024 be set aside.
12. THAT the deceased's estate be distributed as per the Appellant's summons for confirmation of grant dated 4/2/2021.
13. Costs of the Appeal.
14. A brief history of the matter is as follows.
15. The appellant who was the petitioner in the lower court, petitioned for grant of letters of administration (intestate). She later filed summons for confirmation of grant dated 4/2/2021 in which she sought that the deceased's estate being **LR NO. NGUSISHI SETTLEMENT SCHEME/246** (the suit property) be distributed as follows;
16. **TELEGINA MUITI NKONGE - 2 ACRES**
17. **EUNICE KATHURE MUGWIKI**
18. **LYDIA KAINDA M'MUGWIKI**
19. **BENSON GITOBU MUGWIKI 3 ½ ACRES TO BE SHARED EQUALLY**
20. **AGNES MWARI MARETE**
21. **SAMUEL MWIRUTHU M'MUGWIKI**

22. NAOMI NCEKEI KIUGU
23. The appellant's summons for confirmation were opposed by the 1st Respondent vide an affidavit of protest dated 5/05/2021.
24. The 1st Respondent contended that the late Tabitha Muthoni Mugwika together with Eunice Kathure Mugwika, Lydia Kainda M'mugwika and Agnes Mwari Marete sold 2 acres from the suit property, and that the proceeds were shared between themselves, and for that reason they were not entitled to claim anything from the remaining portion of the suit property.
25. Further, the 1st respondent contended that the deceased left an oral will which was made on diverse dates in June 1998, to the effect that the remaining portion of the suit land was to be taken over by the family of Samuel Mwiruthi M'mugwika. She stated that the said oral will was made in the presence of the following persons;
26. JOHN BAIRIRUA
27. HELLEN MWARI
28. DAVID KATHURIMA
29. KIOGORA MARETE
30. The 1st respondent further contended that the deceased appointed her brother-in-law Benson Gitobu Mugwika as the person to take the necessary steps to ensure that the purchaser one Telegina Muiti Nkonge got her 2 acres and give the remaining portion of the suit land to the family of Samuel Mwiruthi M'mugwika.
31. In support of her protest, the 1st respondent contended that the deceased settled her family in the suit land from the year 1985, where all her children were born and brought up and that she has carried out extensive developments on the land including but not limited to planting trees, installing water, building rental rooms, keeping animals and building a residential home.
32. In addition to the foregoing, it was the 1st respondent's contention that the suit land was under Settlement Fund Trustee and that the deceased was required to pay the loan of 5287/- to the government to enable her get the title. That it was her husband, Samuel Mwiruthi, who paid the said loan.
33. The protest was heard by viva voce evidence.
34. In its ruling the trial court ordered that out of the suit land, Telegina Muiti Nkonge - to get 2 acres and the Estates of the late Samuel Mwiruthi M'mugwika and Benson Gitobu Mugwika to share 3 ½ acres equally.
35. This appeal was canvassed through written submissions.
36. The appellant framed the following issues for determination;

37. Whether Learned Trial Magistrate erred in law and facts by finding that the deceased sold 2 Acres out of L.R NO. NGUSISHI SETTLEMENT SCHEME/246 and shared the purchase price among her daughters as their inheritance?
38. Whether the Learned Trial Magistrate erred in law by finding that the deceased expressed her desires on how she bequeathed her properties yet the trial magistrate in the same ruling found that the deceased died intestate without written or oral will?
39. Whether the Learned Trial Magistrate erred in law by finding that the deceased has bequeathed 3½ Acres to Benson Gitobu Mugwika and Estate of Samuel Mwiruthi M'mugwika, even when Benson Gitobu clearly stated that he was not interested in the estate?
40. Whether the Ruling of the trial court is unconstitutional for disinheriting the daughters of the deceased and ignored all the evidence placed before the trial court?
41. The appellant faulted the said ruling by the trial court for the reasons that the deceased sold the said 2 acres in her own volition and for her own usage. That the sale agreement dated 15/11/1990 clearly proves her sentiments that it was the deceased who sold 2 acres of her land then and utilized the benefits for her own benefits. That no mention was given that the same was part of the inheritance. That disinheriting the daughters from a share from their late mother's inheritance is totally unfair and that the Appellant and other siblings ought to be included as beneficiaries in the estate of the deceased.
42. It was further submitted that if the Learned Trial Magistrate had ruled at first that there was no oral will left by the deceased, then the theory that the deceased had sold 2 Acres of L.R NO. NGUSISHI SETTLEMENT SCHEME/246 and divided the proceed to her daughters as part of inheritance ought to have not been considered.
43. It was further submitted that it was clear from the evidence adduced before the trial court that no oral will left by the deceased as was alleged by the Respondents.
44. On what constitutes an oral will, the appellant cited **Re Estate of Mwaura Gachinga (Deceased) Succession Appeal No. E004 of 2022 (2025) eKLR** and **Re Estate of the Evanson Mbugua Thong'ote (Deceased) (2016) eKLR**.
45. It was further submitted that the Learned Trial Magistrate erred in making a finding that the deceased had given a share of her land during her lifetime when there is no evidence adduced that proved the said assertions. That the trial court disregarded the evidence that was produced before it then, being an affidavit sworn by the said Benson Gitobu on 8/9/2021 showing his lack of interest in the said parcel of land.

46. It was further argued that Section 42 of the Law of Succession Act provides for all ingredients that must be fulfilled for gift inter vivos to pass. As to what constitutes a gift inter vivos the appellant referred to **HCCA 4A OF 2017, Nijiraini Ngugi vrs Njambi Ndung'u Mukuria(2025)** and **Micheni Aphaxard Nyagaa & 2 Others vs Robert Njue & 2 Others (2021) eKLR**.
47. It was the appellant's further submission that the Learned Trial Magistrate disinherited the Appellant and her sister from having a share in their late mother's estate, and that the same amounts to discrimination.
48. For the respondent, it was submitted that the Learned Magistrate was right in arriving at the finding, because there was evidence from the protestors to that effect. That the said evidence came from the second protestor Benson Mugwika a son of the deceased who witnessed the writing of the agreement, which sold the two acres to Telegina for purposes of sharing the proceeds to his sisters. That the 4th protestor confirmed that the money from the proceeds of the two acres was shared among the 4 daughters.
49. It was further submitted that the son of the deceased Samuel Mwiruthi is the one who resided on the said parcel with his wives and children and is buried there. That one of his wives is also buried there and he and his second wife whom the protestors acknowledged are the ones who reside there.
50. It was also submitted that the appellant and her sisters have never made claim to the land save in this succession cause. That Lydia Kainda, upon cross examination admitted that the deceased, who is her mother gave land to the boys /men. That in re-examination by her advocate she admitted that the deceased said that the daughters would not inherit the NGUSISHI land.
51. It was further submitted that the fact that the deceased was buried at Nthimbiri and not at Ngusishi is more evidence of her wishes and intentions that the land at Ngusishi be inherited by Benson and Samuel Mwiruthi who is also buried there together with his first wife Kinya. That the said Benson, being the eldest of them all was in a better position to know the affairs of the family and that he witnessed the written of the agreement that sold the two acres that was meant to be the share of the daughters.
52. It was also submitted that if the court adopts the mode of distribution as proposed by the appellant, it would mean that they inherit twice, in addition to the share the daughters got when a portion of the was sold by the deceased when she was alive.
53. It was further submitted that the ruling of the court is not unconstitutional, but is backed by evidence especially that of Benson, Naomi and the sister to the appellant, Lydia Kainda who admitted upon reexamination by her advocate that the land at Ngusishi was the inheritance of Benson Mugwika and Samuel Mwiruthi. That the evidence of his burial and that of his wife on the suit land, the developments therein are all proof that the balance of the 3 ½ acres was to be inherited by the said Benson and the late Samuel who had extensively

developed the same.

54. In support of their submissions the respondents relied on the following cases;
1. **Meru High Court Succession Cause No 110 of 1999 In the Matter of The Estate of Mwirichia Nderi David Murerwa M'mwirichia Vs Nanis Munyange Mworio and Caroline Murerwa and 2 Others.**
 2. **In The Matter of The Estate of Mutuerandu M'itunga [2019] eKLR.**
55. The duty of this court, as an appellate court was as was set out in **Peters vs Sunday Post Ltd [1958] EA 424** where it was held as follows;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or had plainly gone wrong, the appellate court will not hesitate so to decide.”

1. Similarly, in **Abok James Odera t/a Odera & Associates vs John Patrick Machira t/a Machira & co. Advocates [2018] eKLR**, the court reminded itself of its primary role as a first appellate court namely; to re-evaluate, re-assess and reanalyze 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.
2. Having examined the matter carefully I find that the following issues arise for determination;
3. Whether there existed an oral will and if so, whether it is valid or not;
4. Was there a gift to the daughters during the deceased's lifetime?
5. How should the estate be distributed?

Whether there existed an oral will and its validity

1. The protestor contends that on diverse dates and/or in June 1998, the deceased made an oral will and expressed her wishes in so far as the distribution of the suit property is concerned.
2. In this regard, the protestor contended that the deceased's wish was that the remainder of the suit property subsequent to the sale of 2 acres to one Telegina Muiti Nkonge, to devolve to the family of Samuel Mwirutu M'mugwika (the protestor's late husband).
3. Section 9 of the Law of Succession Act outlines the conditions that must be met for an oral will to be considered as valid. It provides as follows;

No oral will shall be valid unless—

(a)it is made before two or more competent witnesses; and

(b)the testator dies within a period of three months from the date of making the will:

1. Section 10 of the said Act then provides for evidence on proof of an oral will by stating as follows;

“If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.”

1. In the case of **In the Estate of Evanson Mbugua Thong’ote (Deceased) [2016] KEHC 1261 (KLR)** made the following definition of an oral will;

“An oral will is made simply by the making of utterances orally relating to disposal of property. In asserting whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will. The other consideration is that the utterance ought to be made in the presence of two or more persons.”

1. The petitioner commenced the cause in the lower court by a petition for grant of letters of administration intestate. It suffices to state that the petitioner did not disclose any will that was left by the deceased prior to her death. This issue only came to be after summons for confirmation of grant were filed.
2. It is contended that the oral will was made in the presence of the following individuals;
3. JOHN BAIRIRUA
4. HELLEN MWARI
5. DAVID KATHURIMA
6. KIOGORA MARETE
7. This court notes that none of the persons alleged to have been present during the deceased’s oral testament testified to confirm the existence and/or the validity of the deceased’s testamentary dispositions.
8. This court resonates with the Court of Appeal in the case of **Grace Njeri Mbugua v Hannah Wanjiku Thong’ote [2017] KECA 157 (KLR)**, where the court emphasized that the alleged oral will was said to have been witnessed by two specific persons, namely the advocate and Samuel Wakahia. The Court held that because one of those alleged witnesses did not provide evidence supporting the making of the oral will, and had in fact denied being a witness, there was no conclusive evidence that the oral will had been made before two competent witnesses as required by section 9 of the Law of Succession Act. The Court therefore rejected the oral will.
9. In the absence of the evidence of the attesting witnesses, this court finds that the oral will was not proven.

10. This court also notes that the protestor was not precise on the date the alleged oral will was made. This raises an eyebrow on whether or not the alleged oral will met the condition set under Section 9 (b) of the Law of Succession Act.
11. Altogether, this court finds no sufficient evidence was adduced to prove the existence and/or validity of the deceased's alleged oral will. As such the estate is to be treated as an intestate one.

Whether there was, and the import of the alleged disposal of 2 acres and sharing of the proceeds between the deceased and her daughters

1. Before I deal with that issue, I need to look at the claim by Telegina Nkionge. She is said to have purchased 2 acres from the deceased during her lifetime.
2. A purchaser who dies before the deceased transfers property to him/her becomes a creditor to the estate. If he/she is duly acknowledged by the administrator and beneficiaries of the estate, then she may get her share directly during the distribution of the estate.
3. If her claim is disputed then he/she ought to obtain a decree from the appropriate court, in respect to the said land.
4. In the latter case, the land is dispute is excluded from the distribution until the appropriate court deals with the matter.
5. In this case, there is really no dispute among the parties that 2 acres of the suit land were sold by the deceased to one Telegina Mui Nkonge at a consideration of Kshs. 60,000/=. A sale agreement was tendered before the trial court. It shows that the deceased only acknowledged receipt of Ksh. 30,000/=. The balance of Ksh. 30,000/= was to be paid before the end of January 1990. It is not clear if that balance was ever paid. The said Telegina did not testify.
6. The petitioner in her proposed schedule for distribution of property indeed acknowledged the sale and proposed that the said 2 acres be distributed to the said Telegina as a beneficiary. The protestor and her witnesses did not dispute that. Their concern was the remaining 3½ acres left.
7. That said, and in view that all the parties are in agreement, the 2 acres shall be set aside for the benefit of the said Telegina.
8. The next task is to make a determination on the 2 acres alleged sold by the deceased, and determine the beneficiaries of the remaining portion, being 3 ½ Acres.
9. This court duly notes that it is only the petitioner and one Lydia Kainda M'mugwika who signed the proposed schedule for distribution of property. The protestors did not append their signatures for obvious reasons.

10. The protestors who adopted their witness statements as their evidence in chief told the trial court that subsequent to the sale of 2 acres of the suit land to Telegina, the proceeds of the sale were shared between the 4 daughters of the deceased to the exclusion of the 2 sons.
11. One daughter, Naomi Nchekei Mbaabu, who is the 4th respondent, told the trial court that she was aware of the sale and that the other daughters, including the appellant, who were also aware and duly consented to the sale and received their share.
12. Further, Naomi stated that she was not interested in the remaining portion for the reason that she had already sold her share. Her position was that the same ought to devolve to the 2 sons of the deceased.
13. Benson Gitobu Mugwika, the 3rd respondent herein, who is one of the sons of the deceased also testified that he is not interested in the suit land for the reason that he settled elsewhere and the portion should now devolve to the family of his late brother Samuel Mwiruthi M'mugwika, herein represented by his wife Margaret Naitore Magiri (the 1st Respondent herein).
14. The appellant vehemently denied having received any proceeds from the sale of the 2 acres to Telegina. One other daughter, Lydia Kainda, also denied receipt of any proceeds.
15. Having scrutinized the evidence, I am of the considered view that the evidence of Naomi is credible. She stood to benefit from the proposal by the appellant but opted to forfeit her claim, for the reason that she had already benefitted from the 2 acres sold by the deceased.
16. From the foregoing, I am in agreement with the testimonies by the protestors that subsequent to the sale of the 2 acres, the proceeds were shared between the 4 daughters of the deceased to the exclusion of the 2 sons. The exact portions of what each daughter got was not made clear. Since the deceased moved to another parcel of land, it would be safe to presume that the 4 daughters got a share equivalent to $\frac{1}{2}$ an acre each.
17. Section 42 of the [Law of Succession Act](<https://new.kenyalaw.org/akn/ke/act/1972/14>) provides for what in law is termed as gifts inter-vivos. It provides as follows:

“Where an intestate has during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or Property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35, the property shall be taken into account in determining the share of the net intestate finally accruing to the child, grandchild or house.”

1. The concept of a gift inter vivos is made clearer and more comprehensible in [Halsbury's Laws of England](<https://www.goodreads.com/book/show/42202515-halsburys-laws-of-england-vol-44>) 4th Edition Volume 20 (1) at para 67 which states as follows:

“Where a gift rests merely in a promise, whether written or and, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him to complete and perfect it except in circumstances where the donor's subsequent

conduct gives the donee a right to enforce the promise. A promise made by deed is however binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do so.”

1. P. Nyamweya J (as she then was) in the case of **Re Estate of the Late Gedion Manthi Nzioka (Deceased)** [2015] eKLR, dealt with the nature and effect of a gift inter vivos, where she stated as follows:

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:

...For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”

1. It is evident from these provisions that any gift of a share of the deceased's assets to a beneficiary must be made during the deceased's lifetime. The effect of such a gift is to reduce the residual net estate available for distribution to the other beneficiaries. In other words, for purposes of calculating the free estate of the deceased, the gifted share, if complete, is excluded from the estate, but is taken into account as part of the overall distribution. A beneficiary who has received a gift inter vivos has to have that share taken into account when distributing the rest of estate.
2. It is important to add that the receipt of a gift inter vivos does not automatically disqualify the recipient thereof from benefitting from the remainder of the estate. If the gift surpasses the value that the other beneficiaries get from the estate, then the recipient of such gift cannot expect to get a share of the remainder of the estate. If the gift is less, then such a recipient is entitled to a share that would make his final entitlement equal to that of the other beneficiaries.
3. The reasoning behind this provision in law is to ensure equality or equity when it comes to distribution of an intestate estate.
4. Since the daughters of the deceased got shares of the suit land while the deceased was still alive they cannot claim equal beneficiaries of the remaining 3 ½ acres. If that happens then they will have benefitted more than the sons who never got any share from the proceeds.

5. As for the protestor, she cannot be heard to claim the entire 3½ on behalf of her husband. That would make him get a larger share of the estate, contrary to the principle of equality in an intestate estate. It is settled law that all children, male, female, married or not, are entitled to equal beneficiary entitlement.
6. So how is the 3 ½ acres to be shared?
7. I must admit that this question is not easy to answer, given the fact that the parties appear to have settled on the suit land for decades. The late Samuel and his first wife are buried on the said land. The children of Samuel also appear to have settled on the land and developed it.
8. Having said that this does not prevent the court from doing what is right, just and fair. I believe that granting an equitable share to the entitled daughters would be the right thing.
9. It is noted that Naomi Nchekei, the 4th respondent renounced her entitlement to the estate on oath. As such she will not be considered in the distribution.
10. It is also clear that Benson Gatobu, the 3rd respondent also renounced his claim. He proposed that the remaining land go to his brother, the Late Samuel Mwiruthi. The trial court ought to have noted his sentiments and excluded him from the estate.
11. Having considered the matter at length, I am of the view that the appellant and her other sisters, save for Naomi, are entitled to a share of the balance of the estate. Distributing 3 ½ acres to one son and leaving them with only half an acre is not fair. It will be deemed as discriminatory against them.
12. Noting that the 4 daughters already have an equivalent of ½ an acre each, I find that an extra ¾ of an acre would be appropriate for them to share, bringing their total benefit to ¾ of an acre for each of them, after taking account of the ½ acre each is deemed to have received.
13. Therefore, I set aside the ruling of the lower court and substitute it with orders that the estate shall be distributed as follows;
14. **Telegina Muiti Nkonge 2 acres.**
15. **Agnes Mwari Marete.**
16. **Lydia Kainda M'Mugwika.**
17. **Eunice Kathure Mugwika.....jointly to share ¾ of an acre.**
18. **The estate of Samuel Mwiruthi 2 ¾ acres.**
19. It is further ordered that the parties shall cede proportional land to make way for any access roads to their respective parcels of land.
20. To avoid a situation where there may be a breach of the peace, I direct that the proposed subdivision be carried out by the County Surveyor Meru County and the same be presented to court for approval before any implementation can be done on the ground.

21. The parties are to share the cost of the survey proportionally.
22. Each party is to bear its costs on this appeal.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF AUGUST 2026.

H. M. NYAGA

JUDGE

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