

**REPUBLIC OF KENYA**

**AT THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Rawal DCJ & VP; Tunoi, Ibrahim, Ojwang & Wanjala, SCJJ.)*

**PETITION NO. 31 OF 2014**

**– BETWEEN –**

**GLADYS WANJIRU MUNYI.....PETITIONER**

**– AND –**

**DIANA WANJIRU MUNYI.....RESPONDENT**

*(Being a petition from the Judgment of the Court of Appeal sitting at Nairobi in Civil Appeal No. 229 of 2004 (Gatembu, M'Inoti and Mohammed JJ.A) dated 18<sup>th</sup> July, 2014*

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**RULING**

**A. INTRODUCTION**

**[1]** This appeal challenges the division of an estate by the Court of Appeal, and it is averred that it raises an issue involving the interpretation and application of the Constitution, in terms of Article 163(4)(a) of the Constitution.

**[2]** The respondent raised a preliminary objection, that the petitioner's appeal does not meet the jurisdictional threshold, as it involves neither the interpretation nor the application of the Constitution.

**B. BACKGROUND**

**[3]** The suitors are co-administratrixes of the estate of the late Mr. Julius Munyi Kaare. They were both married to the deceased, and lay claim to a

house on L.R. No 150065/4 in Karen, which is the main asset in dispute in these proceedings. The petitioner was married to the deceased for almost 30 years before they became estranged and separate, keeping in contact only intermittently thereafter; and during this period, the deceased married the respondent, who made a contribution towards the establishment of matrimonial homes in Karen and Mwea. At the trial Court, the respondent established by evidence, that she had contributed to the construction and maintenance of the Karen house.

**[4]** According to the record, the petitioner and respondent held a meeting met with their community elders, in relation to the deceased's estate, following the death of the deceased. The decision arrived at, with the consent of the petitioner, was that the respondent would keep the Karen house, and the petitioner would keep the property in Mwea, in accordance to the wishes of the deceased. The petitioner objected to this position at the High Court, during the proceedings filed by the respondent for confirmation of grant; she maintained that she was also entitled to the Karen house, since it formed part of the estate of the deceased.

**[5]** The trial Court (*Mulwa, J*) determined that the respondent was exclusively entitled to the Karen house on the basis of her equal contributory portions with the deceased. The High Court held that it was only fair that the respondent should hold the Karen house in trust for her children, while the petitioner get the Mwea property in trust for her children Dissatisfied with

this decision, the petitioner appealed to the Court of Appeal on the grounds that —

- (i) *the High Court erred in failing to apply the Succession Act, and in deciding the case by applying Section 17 of the Married Women's Property Act, instead;*
- (ii) *the High Court erred in fact and in law, in failing to treat the Karen house as property of the estate;*
- (iii) *the High Court erred by ignoring the Succession Act (Cap 160), in determining the distribution of the property which formed part of the estate of the deceased, to the survivors and children of the deceased;*
- (iv) *the High Court erred in making findings against undisputed facts, and against the weight of the evidence.*

**[6]** The Court of Appeal considered the question whether the Karen house formed part of the estate of the deceased and was, therefore, available for distribution; and the question whether 50% of the suit property belonged to the respondent, by virtue of her contribution to its acquisition.

**[7]** Dismissing the appeal, the Court determined that the High Court had not departed from the provisions of the Law of Succession Act (Cap 160), in its determination. In the Appellate Court's findings, the High Court had duly

considered the evidence, the law, and the circumstances of the case, in arriving at its determination.

**[8]** The petitioner appealed to this Court, on the basis that she and her children suffered discrimination, occasioned by the High Court's decision which was upheld by the Court of Appeal – allocating the Karen house to the respondent. It was her stand that the High Court should have first established the entire value of the estate, and then allocated the properties equally, instead of proceeding randomly to effect a distribution. She asked that the Orders of the High Court and Court of Appeal be set aside, and substituted with an Order directing that the value of the entire estate be ascertained, before vision between the suitors is effected.

**[9]** Before the commencement of the hearing, the respondent raised a preliminary objection, contesting the jurisdiction of this Court to hear the appeal. Learned counsel Mr. Munyalo, for the respondent, submitted that the determination of the distribution of an estate, in a succession cause, fell outside this Court's jurisdiction. Counsel submitted that the only issue which had arisen at the High Court, was the distribution of one of the properties forming part of the deceased's estate. He urged that the Notice of Appeal lodged in this Court, raised no constitutional issues capable of invoking the Court's jurisdiction under Article 163(4)(a) of the Constitution.

**[10]** Learned counsel Mr. Kabue, for the petitioner, on the other hand, urged that the respondent's preliminary objection was not well-founded in

law: for the Karen house which had been awarded to the respondent, carried greater value, than the Mwea house which had been given to the petitioner. Counsel urged that this differentiated value-allocation, amounted to a constitutional transgression calling for this Court's intervention.

### C. ANALYSIS

[11] Article 163(4)(a) of the Constitution provides that appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the *interpretation and application of the Constitution*. This Court has, in earlier cases, set out the parameters of this jurisdiction and has signalled that the constitutional issue in question will be those that have been canvassed before the superior Courts. In this case, ***In the Matter of the Interim Electoral Commission***, Sup. Ct. Constitutional Application 2 of 2011, it was thus held:

*“...The High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High court an exclusive jurisdiction; for **by the appellate process**, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, **certainly in respect of matters resolved at first instance by the High Court**....Only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect*

*that interpretation of the Constitution by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages*”[emphasis supplied].

[12] In ***Peter Ngoge v. Francis Ole Kaparo & 5 Others***, Sup. Ct. Petition No. 2 of 2012 [2012] eKLR, we signalled the guiding principle that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, do indeed have the competence to resolve all matters turning on the technical complexities of the law, and that only *cardinal issues of law*, or of *jurisprudential moment*, deserve the further input of the Supreme Court. This principle was further underlined in ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board*** Sup Ct. Petition No. 5 of 2012; [2012] eKLR as follows:

***“... a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained.”***

[13] The petitioner holds out “violation of the right to fair trial”, one of the premises of her appeal. The appeal was occasioned by the respondent’s application for confirmation of grant, in *Probate and Administration Cause No. 1934 of 1995*, to which the petitioner objected. Both parties were

adequately heard by the trial Court as well as the Court of Appeal, before final Orders were issued.

[14] The contention in this cause, and which was considered by the High Court and the Court of Appeal, was solely, *the distribution of the Karen property*. The Law of Succession Act makes clear provisions, regarding the distribution of property in succession cause, and the Courts, over the years, have pursued a consistent line of precedent in such matters. A relevant precedent in this regard, is ***Rono v. Rono*** [2005] 1 E.A 263, which was referred to by the Court of Appeal. This decision reaffirmed the pertinence of Court discretion, in determining the distribution of property, depending on the special circumstances of the particular case. Such authorities remain good-law, a state of affairs that is not under contest, in this instance.

[15] The petitioner also avers that the decisions of the superior Courts have compromised her constitutional right to equality, and freedom from discrimination. Equality in law, and by the Constitution, is guaranteed under Article 27 of the Constitution. This right envisages certain categories of inequality, such as the attribution of privilege or disadvantage on the basis of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

**[16]** The petitioner’s complaint stems from the mode of distribution decreed by the Court, in a civil matter. Her claim of inequality would not, in our opinion, fall distinctly under the foregoing categories, which are founded on issues of broad social outlook – as the foundation of the mischief contemplated by the Constitution. What she typifies as “lack of equality” or “discrimination”, is no more than highly restricted matter of fact and circumstance which the trial Court, by virtue of its duly-conferred mandate, is the proper constitutional determiner of. Not only is the trial Court’s capacity in that regard, strengthened by the conventional mode of receiving, testing and verifying evidence, but its sense of discretion, and its equitable disposition, enable it to reach the best outcome.

**[17]** It is plain to us that the gravamen of the petitioner’s claim is by no means a question of constitutional interpretation or application, and that not one of the four grounds of appeal at the Appellate Court touched on any issue of constitutional application or interpretation. Consequently, this matter fails the threshold-test laid out in the Constitution, and elaborated in numbers of precedents of this Court.

**[18]** As neither “inequality” nor “discrimination” – both being subsumed under the broad category of social malaises – belongs to the evidentiary material duly considered by the trial Court, there is no basis in law for the Supreme Court to be moved to exercise its appellate jurisdiction. The guiding principle is to be found in ***Gatirau Peter Munya v. Dickson***



**Mwenda Kithinji & Others**, S.C. Petition No. 2B of 2014; [2014] eKLR [Munya 2B case], in which this Court held thus:

***“...the lower Court’s determination of an issue appealed against must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court; [and] an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy ...”***

[19] Upon applying the guiding principle, we find that no issues of constitutional significance directly linked to the main cause arise in this case. This Court has in the past, underlined the necessity of a meritorious theme involving constitutional application or interpretation (**Naomi Wangechi Gitonga & 3 Others v IEBC & 4 Others**, Supreme Court Civil Application No. 2 of 2014; [2014] eKLR and **Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd. & Another**, Supreme Court Petition No. 3 of 2012; [2012] eKLR), as the basis of an appeal such as the instant one. Just the bare claim that a question of constitutional interpretation or application is involved, without more, cannot bring an appeal within the ambit of Article 163(4)(a) of the Constitution.

#### **D. ORDERS**

[20] The foregoing evaluation of merits leads to Orders in the following terms:

***(i) The preliminary objection is upheld, and the appeal disallowed for want of jurisdiction.***

***(ii) Each party shall bear her own costs.***

**DATED and DELIVERED at NAIROBI this 27<sup>th</sup> day of May 2015.**

.....  
**K.H. RAWAL**  
**DEPUTY CHIEF JUSTICE/VICE**  
**PRESIDENT OF THE SUPREME COURT**

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**P. K. TUNOI**  
**JUSTICE OF THE SUPREME COURT**

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**M K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**J.B. OJWANG**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy  
of the original

**REGISTRAR**  
**SUPREME COURT OF KENYA**