



**Gatua v Gatua & another (Civil Appeal E005 of 2024)
[2024] KEHC 16178 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E005 OF 2024
LM NJUGUNA, J
DECEMBER 19, 2024
IN THE MATTER OF THE ESTATE OF HARUN GATUANYAKI
M'TETU (DECEASED)**

BETWEEN

JOHN BOSCO NJIRU GATUA APPELLANT

AND

JOHNSON LENSON MBOGO GATUA 1ST RESPONDENT

PASQUALINA MUTHONI GATUA 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. J.W. Gichimu in Runyenjes
Succession Cause No. 185 of 2013 delivered on 22nd September 2022)*

JUDGMENT

1. The appellant filed a memorandum of appeal dated 04th March 2024 seeking for orders that the judgment of the trial court be set aside. The appeal is premised on grounds that:
 1. The learned Senior Principal Magistrate erred in law and fact by finding that the Respondents are children of the deceased and therefore entitled to a share of his estate yet they were the nephew and niece of the deceased respectively;
 2. The learned Senior Principal Magistrate erred in law and in fact by disregarding the testimony of the Appellant and his witnesses to the effect that the Respondents were not children of the deceased or dependants of his estate;
 3. The Learned Senior Principal Magistrate erred in law and fact and seriously misdirected himself when he concluded that the 2nd Respondent was a biological daughter of the deceased



when there was no evidence to support the same and considering that she moved to live and be supported by the deceased when she was 5 years old;

4. The Learned senior Principal Magistrate erred in law and fact and seriously misdirected himself when he failed to consider and or ignored the evidence of the Appellant and his witnesses to the effect that the 1st Respondent inherited parcel of land number Kyeni/Mufu/5332 from his grandfather being the share of his mother who was a sister to the deceased herein;
 5. The Learned Senior Principal Magistrate erred in law and fact and seriously misdirected himself when he failed to consider and or ignored the evidence of the Appellant and his witnesses to the effect that the 2nd Respondent inherited part of parcel of land Number Gatari/Githimu/7141 belonging to the estate of her late father Jacob Ngari;
 6. The Learned Senior Principal Magistrate erred in law and fact and seriously misdirected himself when he failed to realize that by the time the deceased herein died, the Respondents were not dependants of his estate as unlike the Appellant they had moved away and settled in their rightful parcels of land;
 7. The learned Senior Principal Magistrate erred in law and in fact and seriously misdirected himself by finding that the Respondents had proved their case on a balance of probabilities despite overwhelming evidence to the contrary thereby arriving at the wrong decision that the Respondents are children of the deceased;
 8. The Learned Senior Principal magistrate erred in law and facts in allowing the protest by the Respondents against the law and weight of evidence; and
 9. The judgment of the learned Senior Principal Magistrate was against the weight of the evidence and that the Respondents should not be allowed to inherit from their biological parents and from their uncle the deceased herein who had only come in to assist them when they were in dire need out of his good will and Samaritan spirit as their parents were incapacitated financially.
2. A grant of letters of administration was issued to the appellant, who is a son of the deceased, on 14th March 2014. He filed summons for confirmation of grant and in the supporting affidavit thereof, he deposed that he is the only beneficiary of the estate of the deceased which consists of land parcel number Kyeni/Mufu/1915. He proposed that he should inherit the whole of that land as the only beneficiary. The 1st respondent filed an affidavit of protest against this distribution, stating that he is also a son of the deceased and that he was entitled to a share of the estate. That the appellant instituted succession proceedings without involving the rest of the family of the deceased.
 3. In response to the protest, the appellant deposed that the 1st respondent is his paternal cousin who was raised by the deceased while the 2nd respondent is his maternal aunt. He stated that both of them did not have any right to the estate of the deceased. The protest was heard by the trial court and at the hearing thereof, PW1 was the 1st respondent who stated that the deceased had 3 other children besides the appellant, namely himself, Johnson Cisoro and the 2nd respondent. He stated that he has documents showing that he was a biological son of the deceased and he produced them as evidence.
 4. PW2 was the 2nd respondent who stated that her birth certificate shows that the deceased is her biological father. She produced her birth certificate, national ID and other documents showing that she is a daughter of the deceased and she bears his name. She urged that the estate of the deceased should be distributed equally amongst all the children of the deceased.



5. PW3 was Douglas Johana who knew the deceased and he stated that the appellant and the respondents are all children of the deceased. That the 3 children stayed peaceably together with the deceased until his death. That a meeting was held at the chief's office and that it is not true that they decided that the appellant was the only son of the deceased.
6. PW4 was Lucy Warue who stated that her biological mother is Consolata Kanini but she was raised by Illuminata Weveti who is the appellant's mother and the deceased. That during her dowry negotiations, Illuminata had died in 1988 and so her biological mother took the dowry to Ngari, whom she did not know. She stated that she is a daughter of the deceased and that she bears his surname. That the deceased died in 2013 and by that time, the appellant was the one taking care of him at home.
7. DW1 was the appellant who stated that the 1st respondent is his cousin and that the deceased and the 1st respondent's mother were siblings. That his mother and the 2nd respondent's mother are sisters. That the deceased used to sometimes educate the respondents and they stayed at the deceased's home sometimes. He produced photographs of the respondents and their mother and he also produced the deceased's marriage certificate and other documents as evidence. On cross-examination, he stated that the respondents' mother was still alive and could be called to give her evidence in court. That the respondents left the deceased's home after they married.
8. DW2 was Lucy Warue Jacob who stated that she grew up with the 2nd respondent until she was 5 years old when she went to visit the deceased but she did not return. That the 2nd respondent's mother is a sister of the deceased's wife and that it would have been against culture for the deceased to marry his wife's sister
9. DW3 was Leaky Mithanyango the area assistant chief who stated that the deceased had one son who is the appellant. That the respondents are the nephew and niece of the deceased but they stayed with him and left before the deceased died. That the 1st respondent was given land by the deceased's father and that his mother is called Esther.
10. He stated that he had a meeting with the family of the deceased to determine the rightful beneficiaries to the estate and the respondents were present in that meeting. That it was resolved that the appellant was the only heir of the estate of the deceased but he was advised to consider the respondents. He produced minutes of the meeting and a letter he wrote dated 02nd July 2014. He stated that he had known the family of the deceased for over 30 years. On cross-examination, he stated that the deceased used to support the respondents who are his niece and nephew. That at the meeting, the brothers of the deceased confirmed that he only had one son that is the appellant.
11. DW4 was Johnson Njiru Muruatetu who stated that the appellant is a son of the deceased. That the 1st respondent's mother is Esther Gichuku and the respondents are cousins of the appellant. That the respondents stayed with the deceased who educated them until they were employed. That the appellant's sister died and the respondents are cousins of the appellants, not his siblings. That the 2nd respondent's dowry was not given to the deceased but to her father.
12. DW5 was Elijah Ndwiga John who stated that the 1st respondent's mother is his sister while the 2nd respondent's mother is the deceased's wife's sister. That the deceased brought up and educated the respondents but they are not his children. That the 1st respondent was given land by the clan because his mother was not married and DW2 is her sister.
13. The trial court found that the respondents were children of the deceased and that they were eligible to benefit from the estate of the deceased. He distributed the estate of the deceased amongst the 3 children in equal shares according to section 38 of the [Law of Succession Act](#).



14. The appellant submitted that the trial court failed in not determining whether the respondents were dependants or children of the deceased. It was his case that there was sufficient evidence to prove that they were not children of the deceased but the trial magistrate held them as such. That no proof was tendered to the effect that the 2nd respondent was sired by the deceased, in as much as this was stated. That the deceased already gave the 1st respondent parcel number Kyeni/Mufu/5332 while the 2nd respondent got a portion of parcel number Gaturi/Githimu/7141, and, in light of this, they are not eligible to inherit from the estate of the deceased. That the fact that the deceased educated the respondents does not give them an automatic right to share in his estate as his children. He urged the court to reconsider the evidence and allow the appeal.
15. The respondents submitted that the 2nd respondent's mother, Consolata Kanini, is the appellant's mother's sister and she was sent away from her husband's home and she moved to the home of the deceased. That it was during her stay that she gave birth to the 2nd respondent, who was sired by the deceased. That this was before the appellant was born. That the deceased adopted the 1st respondent as his son also before the appellant was born. They stated that the deceased adopted the 1st respondent who had been abandoned by his mother. That after a while when the 2nd respondent's mother returned to her husband, John Ngari, her husband said that the 2nd respondent should be returned to her father, the deceased. That is when she was returned to the home of the deceased and he raised both respondents as his own children. They relied on section 29 of the *Law of Succession Act* and stated that they are dependants of the deceased by every right. That all along as they grew up, they knew the deceased to be their father and his wife Illuminata to be their mother.
16. The issues for determination are:
 1. Whether the respondents are children of the deceased for purposes of succession;
 2. How should the estate of the deceased be distributed?
17. In an appeal, the first appellate court is required to re-examine all the evidence to reach its own conclusion. This was echoed in the case of Williamson Diamonds Ltd and another v Brown [1970] EA 1, where the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”
18. As to whether the respondents are children of the deceased, the parties tendered evidence in support of their cases. This evidence was considered by the trial court in the process of determining a protest filed by the 1st respondent. It was the respondents' evidence, considered in totality, that the 1st respondent was taken in by the deceased after his mother, the deceased's sister, left him at his grandparent's home. That the deceased took up the responsibility of raising the child because his parents were aging and they couldn't do it. Consequently, the 1st respondent was given the deceased's name as adoptive father and he lived under his care all his life. According to the 1st respondent, he did not know that the deceased was not his biological father or that the deceased's wife was not his biological mother until much later in life when he was an adult.
19. He stated that he lived with the deceased who paid for his education and he left his home when he was marrying. The evidence also shows that the deceased's father gave the 1st respondent land parcel number Kyeni/Mufu/5332. In the case of the 2nd respondent, the totality of the evidence adduced stated that



she is a daughter of the deceased's wife's sister, Consolata Kanini. That Consolata was married to John Ngari and at some point in time, her husband chased her away.

20. During this time, she sought refuge at the deceased's home, where her sister was married. It was stated that during Consolata's stay at the home of the deceased, she got pregnant by the deceased and she bore the 2nd respondent. At the time, the deceased had not sired any children with his wife and so the appellant was not yet born. Also, at the same time, the 1st respondent had already been adopted by the deceased.
21. Eventually, Consolata returned to her husband John Ngari, who said that Consolata should return the 2nd respondent to her father. That is how the 2nd respondent ended up being raised by the deceased. Lucy Warue, the 2nd respondent's step-sister stated that she lived with the 2nd respondent and when she was 5 years, she left and went to live with the deceased.
22. The deceased died on 26th September 2013. The 2nd respondent produced a copy of her birth certificate which shows that she was born on 22nd February 1975 and the birth was registered on 20th May 2014, after the death of the deceased. The birth certificate shows that the deceased is her father. The [Births and Deaths Registration Act](#) commenced on 09th June 1928 and section 12 thereof was amended through an Act of Parliament no. 7 of 1990 to provide thus:

“No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom”.

23. At the time of registration of the birth of the 2nd respondent, it was a legal requirement that the parents of the child be married for the father's name to be inserted in the document. I find it questionable that the 2nd respondent's birth was registered after the death of the deceased. From the documentary evidence adduced, the names of the 2nd respondent are all similar and she bears the deceased's name 'Gatua' as a surname. In the case of *Ngengi Muigai & Josephat Mathia v Peter Nyoike Muigai, Elizabeth Mumbi Muigai, Eunice Wanjiku Muturi, Beatrice Wambui Muturi & Peter Mugo Muigai* [2018] KECA 475 (KLR), the Court of Appeal held that the name of the father on a birth certificate registered long after the marriage of parents ceased to exist, is not proof in light of section 12 of the [Births and Deaths Registration Act](#).
24. In my view, the fact that she bore the deceased's name did not automatically mean that she was his biological child. The same can be said of the first respondent who was adopted by the deceased. Seemingly, the deceased gave the respondent's his surname but that did not prove that they should be held as children of the deceased.
25. Section 29 of the [Law of Succession Act](#) provides:

“For the purposes of this Part, "dependant" means-

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and



(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

26. Even though there is no satisfactory evidence, on a balance of probabilities that the respondents are the children of the deceased, there is sufficient proof the deceased maintained them prior to his death. He raised them and paid for their education expenses. All the testimonies in support of the opposing parties shows that the appellant and the respondents all lived with the deceased and he took care of them all at the same time. That when the deceased died, the respondents had already married and left his home but the appellant stayed and continued taking care of the property.

27. In my view, the respondents are to be held as dependants of the deceased within the meaning of section 29 of the Law of Succession Act. In determining the first issue herein, I find that the appellant is the only child of the deceased while the respondents are his dependants.

28. On the second issue, it has been proved through the evidence that the respondents had already received land gifts before the death of the deceased. They have not openly testified to this but the matter was alluded to. It is, therefore, my view that the estate of the deceased be distributed according to section 38 of the Law of Succession Act which provides:

“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 shall be equally divided among the surviving children.”

29. This provision is subject to section 42 of the same Act which provides that in distributing the net estate of the deceased, the gifts given during the lifetime of the deceased are to be taken into account. Additionally, section 66(b) of the Act gives preference to the children of the deceased in the absence of a spouse according to Part V of the Act. Meaning that the dependants can only benefit once the child/children of the deceased have benefited from the estate. Here, my view is that since the respondents got gifts before the death of the deceased, those properties should be considered when distributing the estate of the deceased. The net estate of the deceased in this case is land parcel number Kyeni/Mufu/1915, whose whole share should be inherited by the only son of the deceased.

30. For these reasons, having considered the evidence adduced and the relevant laws, I find that the appeal has merit and it is hereby allowed. For the avoidance of doubt, the appellant is hereby apportioned the whole of parcel number Kyeni/Mufu/1915 as the only son and beneficiary of the estate of the deceased. It is hereby ordered that a certificate of confirmation be issued reflecting this finding.

31. There shall be no order as to costs.

32. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF DECEMBER, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

