



REPUBLIC OF KENYA



**In re Estate of Kinyua Mwai (Deceased) (Succession Cause  
678 of 2010) [2023] KEHC 340 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 340 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 678 OF 2010  
FN MUCHEMI, J  
JANUARY 26, 2023**

**BETWEEN**

**GITIA CHRISTOPHER KINYUA ..... PETITIONER**

**AND**

**PETERSON KARUGU KINYUA ..... RESPONDENT**

**JUDGMENT**

**Brief Facts**

1. This is a judgement on the protest dated February 8, 2012 against the Summons for confirmation of grant dated 21<sup>st</sup> July which was heard by way of viva voce evidence.

**The protestors' case**

2. The protestor's evidence is that the deceased and the late Phoebe Wamucii Kinyua were married in the early 1950s under Kikuyu Customary Law and were blessed with four children, born between 1951 and 1964, namely:-
  - a. Ainsworth Mwai Kinyua
  - b. Job Thamaini Kinyua
  - c. Perpetual Wanjiru Kinyua – deceased
  - d. Peterson Karugu Kinyua
3. The protestor sated that the deceased later married another wife and were blessed with ten (10) children with the petitioner herein being the 4<sup>th</sup> born.
4. The protestor avers that he and his siblings are dependants of their father's estate pursuant to Section 29 (a) of the *Law of Succession Act*. He further avers that land parcel number Magutu/Gathehu/935



which the petitioner seeks to be the sole beneficiary, is ancestral land and is duly registered in the name of the deceased to which they are entitled a share.

5. The protestor also disputes that the petitioner is the sole administrator of the deceased's estate. He urges the court to grant him letters of administration intestate alongside the petitioner, and proceed to distribute the suit property equally between the two houses.

### **The petitioner's case**

6. The petitioner states that he is not aware that the protestor is a son of the deceased. He further states that the protestor and his siblings have never been a part of the deceased's life during his lifetime. The petitioner avers that the protestor has never resided on land parcel Magutu/Gathehu/935 and neither has the protestor and his siblings been dependants of the deceased as they were all adults at the time of the deceased's demise. The petitioner further states that the deceased died of cancer and the protestor and his siblings have never assisted the deceased with medication for over ten years of his illness.
7. The petitioner further avers that his grandmother expressed an interest to the suit property and the deceased allowed it but stated that it was to revert back to the deceased's wife and their children.
8. The petitioner states that the protestor did not feature anywhere in the death announcement or the eulogy of the deceased.
9. The petitioner further states that the suit property was carved out of Land Parcel No. Magutu/Gathehu/468 which was charged to AFC by the deceased in 1980. He further avers that he paid Kshs 52,000/- ,the AFC loan, on 3/11/2004 together with Michael Muriuki Mwai, Karugu Mwai and Stanley Kihoto and it was witnessed by the Chief, James Karinga Weru of Karatina location. As such, the petitioner states that he redeemed the suit property and there is nothing the protestor can claim.
10. A Further Affidavit in support of the protest was filed by Ainsworth Mwai dated April 27, 2022 and he annexed a written statement. He avers that he is the eldest child of the deceased and that the petitioner's family knew of them. He annexed a written statement by Joseph Karugu Mwai, who is a step brother of the deceased confirming that the protestor and the petitioner are step brothers. The witness further deposes that the petitioner has dishonestly failed to disclose his own siblings, Patrick Karugu and Peterson Murimi who have been named in the death announcement and the obituary.
11. Mwai further stated that the land L.R Magutu/Gathehu/935 measuring 0.546Ha is the only asset of the deceased comprising of a tea plantation containing slightly over 1000 tea bushes. He further avers that the land has been and remains unoccupied to date.
12. The petitioner filed a Further Affidavit dated July 22, 2022 stating that the marriage between the deceased and his mother was statutory and registered and therefore the deceased could not have married another wife.
13. The petitioner further avers that the brothers to the deceased Michael Muriuki and James Karugu Mwai agreed to vacate the land before the Chief James Karinga Weru on November 3, 2004. The petitioner reiterates that he paid Kshs 52,000/- to his uncles for the land and the tea bushes before the area chief in the year 2004. Unfortunately, all the parties involved have since passed on. The petitioner further states that the land was approved for sub division on October 28, 1997 and the parties who signed for the transaction did not include the protestor. The petitioner further states that the chief of Magutu location G. M. Macharia signed and affirmed the family agreement on 6/10/1998 and if the protestor was part of the family, the chief would have summoned him. The petitioner further states that his mother was buried on the suit property and the protestor never appeared or laid any claim to the land at that time.



14. The petitioner states that the protestor has failed to show any proof that his mother was married to the deceased or that his siblings and himself were dependants of the deceased.
15. The protestor filed a 2<sup>nd</sup> Further Affidavit dated November 21, 2022 and avers that his mother got word of the planned wedding between the deceased and the petitioner's mother at Kabete Church which was conducted for rom the home church of St Philips ACK Jericho and objected against it and also reported the matter to the Registrar of Marriages.
16. The protestor further states that in 1980 a church minister from the home ACK church came to their house and confirmed their names and that their mother was the deceased's wife. The protestor argues that the act of the ACK church minister was an indication that the Reverend who conducted and registered the Christian marriage did so without verifying the deceased's marital status and thus the marriage is null and void. He further avers that the Registrar of Marriages has informed their advocates that the said certificate does not exist in their records.
17. The protestor further states that when his mother died, her funeral committee was chaired by the petitioner's elder brother, Maxwell Mwai which indicates that the families were aware of each other's existence.
18. The protest was disposed of by way of written submissions.

#### **The protestor's submissions**

19. The protestor submits that he and his siblings are children and hence dependants of the deceased as evidenced by the chief's letter dated January 26, 2012, the witness statement by Joseph Karugu Mwai, a step brother to the deceased and the protestor's birth certificate. To support his contentions, the protestor relies on Section 29 (a) of the [Law of Succession Act](#) and the case of [Re Estate of Bernard Muboro Wandaka \(Deceased\)](#) [2022] eKLR.
20. The protestor submits that the document annexed and marked "GCK 1" by the administrator does not amount to a will because it has been translated by the administrator's advocate. Neither can the document be passed off as gifting the subject property exclusively to the administrator's mother and her children. The protestor contends that the said document was presumably written and signed by the deceased at an unknown date in the year 2000, it is not witnessed and it was never produced by the administrator during the mediation process. Moreover the protestor relies on the cases of [Re Estate of Chesimbili Sindani \(Deceased\)](#) [2021] eKLR; [Re Estate of Gideon Mantibi Nzioka \(Deceased\)](#) [2015] eKLR and [Re Estate of Nyachieo Osindi \(Deceased\)](#) [2019] eKLR and submit that the said document does not amount to a gift inter vivos. The said property was issued to the deceased on February 6, 2001 and the deceased passed away on May 23, 2005. Thus there were no efforts made to perfect the gift over five years.
21. The protestor submits that the petitioner has left out his siblings, Patrick Karugu and Peterson Murimi as having survived the deceased contrary to what Section 51(2)(g) of the [Law of Succession Act](#) and Rules 26(1) of the [Probate and Administration Rules](#) provide. The protestor further submits that the petitioner's conduct constitutes an offence under Section 52 of the [Act](#) and is punishable by a fine of Kshs 10,000/- or a term of 1 year imprisonment and urges the court to punish the petitioner. Moreover, the protestor submits that the petitioner ought to be excluded as an administrator and each house appoint a fresh administrator.
22. The protestor further submits that the fact that his mother made an objection to the marriage of the petitioner's mother and the deceased and thereafter personnel from the said church visiting them to



verify her claim as well as the fact that the marriage certificate produced by the petitioner does not exist in the registrar's records is evidence of cancellation of the same and that it has no legal effect.

23. The protestor reiterates that the petitioner's elder brother Maxwell Mwai Kinyua chaired the funeral committee of the protestor's mother in 2004 which depicts that there is a connection between them.

#### **The petitioner's submissions.**

24. The petitioner submits that the deceased married his mother under statutory law as shown in their marriage certificate pre dated June 1953 and their marriage was celebrated at St. Mary's Church Kabete. Thus there did not exist any marriage between the deceased and the protestor's mother. Further, there is no proof of existence of any customary marriage and at no time did the deceased make it known to them that he was in a customary marriage. The petitioner further submits that in a document written by the deceased, he expressly stated that his land belonged to the petitioner's mother and her children.
25. The petitioner relies on Section 43 and 59 of the *Marriage Act* and the cases of *Gituanja v Gituanja* (1983) KLR; *Rebecca Muthoni Kamau v Tabitha Muthoni Kamau* [2021] eKLR and submits that the existence of a customary marriage is a matter of fact which has to be proved. The cases of *Priscilla Waruguru Gathigo v Virginia Kanugu Kathigo* (2004) eKLR; *Hortensia Wanjiku Yawe v The Public Trustee* Court of Appeal Civil Appeal No. 13 of 1976; *Re Estate of Francis Kibara Mwiandi (Deceased)* [2019] eKLR and Eugene Cotran's Casebook on Kenya Customary Law provide the conditions that must be met before a valid Kikuyu customary law marriage can be pronounced namely; capacity to marry, consent by both parties' families, slaughter of a sheep otherwise known as ngurario, payment of dowry (ruracio) and the commencement of cohabitation. The petitioner submits that the protestor has not proved any of those requirements and therefore his late mother should not be considered a wife for purposes of inheritance.
26. The petitioner further contends that the protestor and his siblings were born when a valid statutory marriage existed between the deceased and the petitioner's mother. The petitioner further argues that the protestor has not tendered sufficient evidence to prove that he and his siblings are children of the deceased. He further argued that he who alleges must prove and the protestor by producing birth certificates is not conclusive evidence of paternity. To support his contentions, the petitioner relies on the case of *NEO v HWK* [2018] eKLR.
27. The petitioner relies on Section 3(2) of the *Law of Succession Act* and the cases of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* (2014) eKLR; *Re Estate of George Musau Matheka (Deceased)* (2010) eKLR and *Sarah Kanini Thigunku v Elizabeth Njuki Thigunku* (2016) eKLR and submits that the onus lies on the protestor to prove paternity and further the protestor ought to prove that he and his siblings were dependants of the deceased to be entitled to a share of his estate. The protestor needs to show that the deceased acquired permanent responsibility over them. The petitioner further submits that the letter from the chief dated 23/7/2010 named the children of the deceased and that the protestor's name and those of his brothers were not included.
28. It was not until 2012 when the chief wrote a letter dated 26/1/2012 alleging that the protestor and his siblings were the sons of the first house and had been omitted as beneficiaries. The petitioner argues that that is a confirmation that the protestor and his siblings were not known or recognized by anyone as children of the deceased and therefore they cannot claim to be dependants.
29. The petitioner reiterates that he paid his uncles for the suit land and the tea bushes and they agreed to vacate the suit land and also signed an agreement. The petitioner argues that by paying Kshs 52,000/- amounted to repurchasing the land and therefore he is entitled to the land as the sole beneficiary. He



relies on the case of *John Gitata Mwangi & 3 Others v Jonathan Njuguna Mwangi & 4 Others* [1999] eKLR to support his contentions.

30. The petitioner refers to Section 11 of the *Law of Succession Act* and the cases of *Beth Wambui & Another v Gathoni Gikonyo & 3 Others* [1988] eKLR; *Re Rufus Ngethe Munyua (Deceased) Public Trustee v Wambui* [1977] KLR 137; *Re Estate of Wilfred Koinange Gathiomi (Deceased)* [2020] eKLR and *Re Estate of Lusila Wairu Waweru (Deceased)* [2020] eKLR and submits that the deceased expressed his wishes of bequeathing the suit property to the petitioner's mother and her children and the document was signed by the deceased in his right mind thus making a valid will.
31. The petitioner submits that the other lawful beneficiaries have consented to the confirmation of the grant dated 6/9/2021 and thus the court ought to confirm the grant making him the sole beneficiary to the estate because he paid Kshs 52,000/- to redeem the suit land to pay the AFC loan the deceased had taken.

### **Issues for determination**

32. The main issues for determination are:
  - a. Whether the protestor and his siblings are children of the deceased.
  - b. Whether the deceased left a written will;
  - c. Identification of heirs and assets.
  - d. The mode of distribution.

### **Analysis and determination**

#### **i) Whether the protestor has proved his case on a balance of probability**

33. The protestor argues that his mother, Phoebe Wamucii was married to the deceased under kikuyu customary law before he married the petitioner's mother under statutory law. It is trite law that there are some conditions that have to be satisfied to prove the existence of a valid kikuyu customary law wedding. These conditions have been outlined by Eugene Cotran in his Casebook on Kenya Customary Law at page 30 as follows:-
  - a. Capacity: the parties must have capacity to marry and also the capacity to marry each other
  - b. Consent: the parties to the marriage and their respective families must consent to the union
  - c. Ngurario: no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered
  - d. Ruracio: there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.
34. The protestor did not call any independent witnesses to demonstrate that the above requirements of a customary marriage were complied with. The protestor has not given any account of a single of any of the said ceremonies. Neither has he attempted to tender any such evidence. The law requires that he who alleges must prove and the protestor has failed to prove that there existed any customary marriage between his late mother and the deceased. Even if the court were to assume that there existed a presumption of marriage between the deceased and the late Phoebe Wamucii, it is my considered opinion that the protestor did not even mention the length of the cohabitation, if any between the deceased and his late mother. The law on presumption of marriage is settled in the case of *Hortensia*



Wanjiku Yawe v Public Trustee Court of Appeal Civil Appeal No. 13 of 1976 where Mustafa JJA stated:-

By general repute and in fact the parties had cohabited as man and wife for 9 years before the deceased died....and during that time, the appellant bore him 4 children....long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant, only cogent evidence to the contrary can rebut such a presumption.

35. I therefore reach a conclusion that the protestor has failed to prove that his late mother was a wife of the deceased and that he and his siblings were children of the deceased.

36. I now proceed to determine whether the protestor and his siblings were dependants of the deceased. Section 29 of the Law of Succession Act provides that:-

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.

37. Section 3(2) of the Law of Succession Act describes a child to:-

Include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, any child whom he expressly recognized or in fact accepted as a child of his own or of whom he has voluntarily assumed permanent responsibility.

38. Thus the protestor is required to demonstrate that he and his siblings were dependants of the deceased during his lifetime and thus entitled to a share of his estate.

39. The standard and burden of proof provided by the Evidence Act ought to be discharged; he who alleges must prove. Section 107 of the Evidence Act places the burden of proof on the party that alleges. In Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others (2014) eKLR the Supreme Court held *inter alia*:

The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.

40. It is thus incumbent that the protestor prove on a balance of probabilities that he and his siblings were the biological children or that they were dependants of the deceased. See Re Estate of George Musau Matbeka (Deceased) [2010] eKLR where the court held that on proving dependency, the onus lies on the claimant to also prove paternity by the deceased in relation to him.



41. It is the protestor's case that he and his siblings are children of the deceased. His brother swore an affidavit stating that he was the eldest child of the deceased. In support of his contentions, he annexed a handwritten letter by one Joseph Karugu Mwai, a step brother to the deceased to show that he is a child of the deceased. The protestor argues that he is a child of the deceased and has annexed a certificate of birth which he has used to prove paternity. It is trite law that a certificate of birth is not conclusive evidence of paternity as was held in the case of *Re Estate of Philis Wairuri Maina (Deceased)* [2021] eKLR where the court relied on the case of *NEO v HWK* [2018] eKLR. The claimant must adduce further evidence to corroborate the documentary evidence.
42. The protestor is tasked to show prove of permanent responsibility by the deceased over them as his children or dependants. This has been provided in Section 3(2) of the *Law of Succession Act* and the case of *EMM v IGM & Another* [2014] eKLR where the court observed:-
- Additionally, the definition of a 'child' in Section 3(2) of the *Law of Succession Act* includes a child whom the deceased has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. We agree with the respondent that the appellant has to show a reasonable degree of permanency in the responsibility that the deceased is alleged to have voluntarily assumed over the appellant. Episodic support, as is the case here will not suffice.
43. The protestor has not given any accounts of his relations with the deceased such as living in the deceased home, the deceased paying their school fees or providing for them financially in their childhood or youth. The protestor only annexed his birth certificate and submitted that he was a child of the deceased. Furthermore, his elder brother gave an account of how the deceased took him to Lenana School from 1965 to 1966 but annexed no document any or other evidence to support the contention.. These encounters however do not demonstrate any permanency of responsibility and are therefore not sufficient to prove any dependency. As such, it is my considered view that the protestor has not proved on a balance of probabilities that he and his siblings were the biological children or dependants of the deceased for the purposes of the law of succession.

**ii) Whether the deceased left a written will.**

44. Section 11 of the *Law of Succession Act* provides the formal requirements of a valid will. It states:-
- No written will shall be valid unless:-
- i. The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
  - ii. The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended to give effect to the writing as a will;
  - iii. The Will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.
45. The petitioner argues that the document annexed as GCK 1 amounts to a will. I have perused the said document and noted that it does not bear the endorsement of two independent witnesses as required by the law. All that the note indicates is that the land of the deceased belongs to his wife



and children. The said wife or children are not named in the document. Furthermore the document does not describe the land by its reference number nor does it state the mode of distribution amongst the family members of the deceased. Essentially, the document is vague and does not give any specific details. Further, the document has been translated to English language from Kikuyu by the petitioner's advocate. In light of the foregoing, I am of the view that the said document does not meet the requirements of Section 11 of the Act. Furthermore, the petitioner introduced this document a bit late in the day through his replying affidavit which raises doubt as to the authenticity of the document. The petitioner filed for letters of administration intestate which clearly indicates that the alleged will is an afterthought. Had the deceased left a will as the petitioner wants the court to believe, he would have applied for grant of probate and annexed the will. It is therefore my considered view that the document marked GCK 1 does not constitute a valid will.

46. The law governing distribution of property in an intestate estate where the deceased has left children but no spouse is 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 Section 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

### **iii) Identification of Beneficiaries**

47. The petitioner argues that he ought to be the sole beneficiary of the deceased's estate as he redeemed the suit property by paying off the loan. The record shows that the deceased left seven (7) surviving children including the petitioner and six of them have signed the consent to confirmation of grant dated July 21, 2011. However, the petitioner annexed another Consent to Confirmation of grant dated 6<sup>th</sup> September 2021 listing six children. He omitted the name of Pauline Wacheke Kinyua a daughter of the deceased listed in the chief's letter and in the petition. The burial programme produced by the petitioner shows that the deceased was survived by ten (10) children and the obituary confirms the said fact. Although ten children have been listed, the petitioner has only listed six children as the surviving dependants. One of the children is said to be deceased. The petitioner is duty bound to notify all the beneficiaries of the estate on this cause to attend court on denounce their rights of inheritance, if that be the case. This is a requirement of the law that must be complied with.
48. The protestor having failed to prove his case that he and his siblings are children of the deceased, it follows that the Petitioner and his siblings named in the petition are the beneficiaries of the deceased's estate unless the contrary is proved.

### **iv) Identification of the deceased's assets**

49. The only asset for the deceased available for distribution is L.R Magutu/Gathehu/935. This is not in dispute between the parties.

### **iv) The mode of distribution**

50. As noted earlier in this ruling, the deceased has ten (10) children according to the record but the petitioner appeared in court alone. It is not known whether, the petitioner informed his siblings about this case. For that reason, the court will hold on the distribution of the estate until all the living children of the deceased attend court to either claim their shares or to denounce their inheritance.
51. It is my finding that the protest has not been proved to the standards required and as such, it must fail.
52. Consequently, this court makes the following orders:-



- a. That all the beneficiaries named in the petition be served to attend court to explain their position on the alleged denunciation of their inheritance rights.
- b. That the grant will be confirmed at a later date after the petitioner has complied with order (a)
- c. That the protest is hereby dismissed.
- d. That each party to meet their own costs.

53. It is hereby so ordered.

**DATED AND SIGNED AT NYERI THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**F. MUCHEMI**

**JUDGE**

**JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

