



REPUBLIC OF KENYA



**Mathila aka Dorries Mwende Juma v Kilonzo (Family Appeal  
E026 of 2024) [2025] KEHC 4015 (KLR) (15 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 4015 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E026 OF 2024**

**G MUTAI, J**

**JANUARY 15, 2025**

**BETWEEN**

**MWENDE MATHILA AKA DORRIES MWENDE JUMA ..... APPELLANT**

**AND**

**PURITY BETH KILONZO ..... RESPONDENT**

**JUDGMENT**

1. The respondent herein petitioned the trial court for letters of administration as a widow to the deceased vide petition dated 8<sup>th</sup> May 2019. In her affidavit in support of the petition, in paragraph 6, she stated that they lived with the deceased in Changamwe and together were blessed with three children, namely, Benson Kilonzo Kasanga, Esther Kamwaki Kasanga and Sasha Munyiva Juma. She further stated that the deceased was the sole breadwinner as she was a housewife.
2. In paragraph 8 of her affidavit, she listed the following as the dependants of the deceased;
  - a. Teresia Musavai Kasanga-Mother;
  - b. Dorothy Mwende Mathila -1<sup>st</sup> Wife;
  - c. Rose Musenya Kasanga – Daughter -1<sup>st</sup> Wife;
  - d. Anthony Kasanga Juma –Son 1<sup>st</sup> House;
  - e. Stellah Kavemba Kasanga –Daughter-1<sup>st</sup> House;
  - f. Purity Beth Kilonzo-2<sup>nd</sup> Wife;
  - g. Benson Kilonzo Kasanga-Son-2<sup>nd</sup> House;
  - h. Esther Kamwaki Kasanga-Daughter-2<sup>nd</sup> House; and
  - i. Sasha Munyiva Juma-Daughter -2<sup>nd</sup> House.



3. She cited the 1<sup>st</sup> wife and her 1<sup>st</sup> and 2<sup>nd</sup> children vide citations dated 8<sup>th</sup> May 2019. The petition was gazetted on 13<sup>th</sup> May 2019 vide Gazette Notice No. 11086. A grant of letters of administration intestate was issued to the appellant on 24<sup>th</sup> January 2020 in her capacity as wife to the deceased. She then filed a summons for confirmation dated 28<sup>th</sup> August 2020. The appellant herein moved the court via summons for revocation of the grant via summons dated 25<sup>th</sup> November 2020, seeking, inter alia, revocation of the grant issued to the appellant. The same was on the grounds that:-
  - a. the proceedings leading to the issuance of the grant were utterly defective and grossly unprocedural;
  - b. that the grant was obtained fraudulently as the appellant was never married to the deceased and thus not a beneficiary of the deceased, nor did she have the capacity to file the proceedings herein; and
  - c. the grant was obtained through false statements and concealment of material facts from the honourable court.
4. The summons for revocation were canvassed by way of viva voce evidence;
5. PW1 Musabai Kasanga, mother to the deceased, told the court that the deceased had two wives, Mwende and Mbete, and six children. The deceased married the 2<sup>nd</sup> wife, Mbete, after separation from the 1<sup>st</sup> wife, Mwende, and built her a house at home. They were in the process of organizing the traditional ceremony for the 2<sup>nd</sup> wife when the deceased fell ill and passed away before he could pay dowry for her. She stated that dowry can be paid even after the death of a party under Kamba customs, and they were planning the same for the 2<sup>nd</sup> wife.
6. During cross-examination she stated that in Kamba customs, there are steps taken once a woman starts living with a man being:-
  - a. the relatives of the man must first go to the parents of the woman and inform them that their daughter is with their son;
  - b. Secondly, they visit the parents of the woman to develop a friendship;
  - c. Thirdly a meeting is organized for a dowry negotiation. The first is “nzero”. She confirmed that the said steps were taken for the first wife, who still lives at home, and that the deceased is buried next to her house. She was not aware of any divorce ceremony under Kamba’s custom in respect of the 1<sup>st</sup> wife, Mwende.
7. It was her testimony that the ceremony of nzero is essential to the marriage ceremony, and where it is not done, the marriage is not complete. During the ceremony, three goats are taken, two females and one male. The male goat is slaughtered, and its blood is mixed with traditional brew and given to the elders. After that, both families eat together. The brew mixed with blood from the goat is given to the bride’s father. The bride’s father must drink, and whatever remains is then poured onto the ground in salutation to the ancestors. The goat’s meat must be eaten, and another should be left. If nzero is not done and a woman dies, then she is taken back to her parent’s home for burial.
8. She told the court that the 2<sup>nd</sup> wife, Mbete, had two children before she married the deceased, and they were blessed with one child with the deceased. When asked about the alleged fact that the petitioner had been married elsewhere by two different men, she stated that she was unaware of it. According to her nzero cannot be done twice in respect of the same woman. She testified that she never accompanied the deceased to see the appellant’s parents, nor did the deceased visit them. She went with other women to see Mbete’s parents.



9. It was her evidence that the 1<sup>st</sup> wife has the right to inherit part of the deceased's estate; however, in this case, she stated the 1<sup>st</sup> wife was uncooperative. She stated that it was the first wife, Mwendu, who ought to be in charge of the deceased's estate and that under Kamba customary law, the legal wife of the deceased and her children and the deceased parents are the heirs of his estate.
10. PW2 Mwendu Mathila, aka Doris Mwendu Juma, told the court that she got married to the deceased on 18th June 1992 and was blessed with three children: Rose Juma, Antony Kasanga Juma and Stella Juma. They went through all customary rites in 1998.
11. She stated that when she went to Kenya Ports Authority, she was shown the grant herein. She stated that had she been involved in the succession process, she would have had no worries about the respondent being an administrator because of how she lived with the deceased. She testified that the deceased never visited the respondent's home despite the fact that they lived in her house in 2016 and 2017. She moved to the countryside in 2016 since the deceased, and the respondent lived in her house. Her evidence was that without the customary rites being performed, the respondent could not inherit the deceased's property.
12. She stated that they both took care of the deceased when he was hospitalized, and when he died, he was buried in the land they purchased together. She said she was the bona fide administrator and urged the court to revoke the grant.
13. In cross-examination, she stated that she got to know the respondent through her children. The respondent was given Kes.7,000,000/- by the Kenya Ports Authority and almost Kes.900,000/- from the Port SACCO, and that she has a house on her mother's land.
14. In re-examination, she told the court that the respondent's two children's birth certificates were not genuine and that she should not inherit the deceased's estate as they do not belong to the deceased. It was her evidence they both get an equal share of the monthly pension of Kes.37,000/-, and the same ought not to be shared equally since she has three children while the respondent had one child with the deceased.
15. PW3 Koki Muli told the court that the deceased was a cousin to her husband. She stated that the respondent was married to the deceased but not under the Kamba customs. She stated that the appellant herein was the deceased's wife and was never divorced under the Kamba customs.
16. She stated that the respondent was jobless and that the deceased had constructed a house for her. It was also her evidence that the respondent had one child with the deceased.
17. PW4 Stephen Mbuvi Mulu testified that the deceased was his nephew and his 1<sup>st</sup> wife was the appellant herein, and they were blessed with three children: Rose, Tony and Stella.
18. He explained the nzeo process and stated that if the process is not done and the woman dies they cannot bury the woman or her kids. He stated that upon separation of couples /divorce, the husband gives a goat to the girl's parents, which marks the end of the marriage.
19. It was his evidence that the respondent herein had one child with the deceased and that a house had been constructed for her on her father-in-law's land. The deceased was buried on the appellant's land.
20. He told the court that the nzeo process was not done for the respondent, and according to the Kamba customary law, the appellant herein was the legal wife and the only person entitled to inherit the deceased's estate. It was his evidence that the respondent obtained the grant wrongly.



21. In cross-examination, he stated that the appellant herein had two children before her life with the deceased. That she had not gone through Nzeo and a woman who has not gone through the said process cannot be a wife. He testified that the respondent did not inform the family of the succession process.
22. RW1, the respondent herein, testified that she got married to the deceased in 2013, and his family recognised her as his wife. Among those that were recognised included the deceased's mother, Teresia, and his brother, Alfred Mutua, as well as the area Assistant Chief, Changamwe Chief, Deputy County Commissioner and the deceased's workmates at the Kenya Ports Authority, who also gave her the deceased's burial money. She testified that she receives a pension from KPA of Kes.27,597/- per month.
23. She stated that she had one child with the deceased and that she was not in communication with the fathers of the other two kids. They live in Kitui and also in town, in the house that the deceased used to live with the appellant before the deceased constructed her house.
24. It was her evidence that she informed the appellant and her mother-in-law of the succession process, but they didn't cooperate. The same was gazetted, and no objection was raised.
25. She stated that she had received Kes.977,925 from Port Sacco and Kes. 6,881,400 from the Kenya Ports Authority, and the same is in the joint account of the two advocates, a total of Kes.7,856,949/-. She uses the money to pay for school fees, food and business.
26. In cross-examination by the court, she told the court that the pension is utilized by herself and her children only.
27. RW2, Julia Likhulungu, Assistant Chief, told the court that the respondent was the deceased's 2<sup>nd</sup> wife and that the 1<sup>st</sup> wife was known to her.
28. RW3, Isaac Siengo, retired Chief Changamwe stated that he didn't know the deceased or anyone in the letter. He got to know the respondent when she went for the letter. The six kids and two wives' information was written by the Assistant Chief of Mousa.
29. RW4, Daip Abdi Haifhar, the Deputy County Commissioner, Kisasi Sub-County, told the court that he never knew the deceased and the letter was to identify the truth of the deceased's estate and that he was not stationed at Kisasi when the letter was written.
30. RW5, Patrick Sila, the Civil Registration Officer Kitui, Civil Registry, told the court the Birth Certificates for Esther and Benson were obtained in 2018 on application and presentation of documents. They relied on the Assistant Chief to verify the information when the application was made.
31. He told the court that if the parents met in 2014 then the children's health cards were not genuine as they were opened on 27<sup>th</sup> March 2007 and 17<sup>th</sup> May 2011.
32. The court, in its ruling of 28th March 2024, stated that the respondent herein did not produce any evidence that the customary rights were done or rather included, she had any marriage certificate under any statute as required under the Marriage Act 2014, which was operational as at the time she started living with the deceased.
33. The court went ahead to interrogate whether there was a presumption of marriage and stated that the only evidence that was available was the chief's letter and the fact that she had built a home with the deceased's parents. The court, in its findings, stated that the union between the respondent and the deceased was not that of a husband and wife.



34. The court also termed the respondent not a dependant of the deceased on the ground that she was not clear on her previous relationships, giving rise to the children she had before her life with the deceased. That there was a likelihood of her benefitting from the previous fathers to her two elder children.
35. On the children, the trial court stated:-
- “ Although the court notes that the birth certificates by the respondent were obtained after the death of the deceased, and this would best be dealt with through an investigation with any criminal activity that may have been committed, Section 29 of the Law of Succession Act provides for dependants; they include those all the deceased was maintaining this case, the children and step-children. Such maintenance should be at least 2 years from the deceased death.
- The respondent lived with the deceased but did not come out clear on how or if she was maintained by him although she was jobless.”
36. The trial court then revoked the grant issued to the respondent and substituted the same with that in the appellant’s name. It directed that the respondent be an administrator together with one other adult other than the appellant (the respondent herein) for purposes of the children who were still minors. The court directed administrators to file an application for confirmation of the grant within 45 days after collecting the deceased’s estate.
37. Aggrieved, the appellant appealed to this court seeking to have the appeal be allowed and the ruling of the trial court of 28<sup>th</sup> March 2024 regarding Benson Kilonzo and Esther Kamwaki, as beneficiaries of the estate of the deceased be set aside entirely; the court to find and hold that Benson Kilonzo and Esther Kamwaki are not beneficiaries of the estate of the deceased and thus not entitled to any benefit therefrom; and, the appellant be awarded the costs of the proceedings in the subordinate court.
38. The appeal is based on the following grounds:
- a. That the honourable learned magistrate erred in law and, in fact, held that Benson Kilonzo and Esther Kamwaki were beneficiaries of the estate of Juma Kasanga Ngio, despite the fact that they were not children of the deceased, a fact admitted by the respondent;
  - b. That the learned magistrate erred in law and in fact, by failing to rely on the fact that the certificates of birth for Benson Kilonzo and Esther Kamwaki were obtained after the death of the deceased, that the deceased never participated in the processing of the said certificate of birth, and in thus failing to find and hold that the said certificates of birth were obtained illegally, unlawfully and/or fraudulently, thus disentiing the said Benson Kilonzo and Esther Kamwaki to any inheritance to the estate of the deceased;
  - c. That the learned magistrate erred in law and, in fact, in relying on a letter from the school as the basis of holding Benson Kilonzo and Esther Kamwaki were being maintained by the deceased, which finding had no basis in law;
  - d. That the learned magistrate erred misdirected herself by failing to hold that on the basis of the evidence on record, the biological fathers of Benson Kilonzo and Esther Kamwaki were known and alive, and thus the respondent can only seek the maintenance for her said children from their respective fathers and not the deceased herein;
  - e. That having found that the respondent had no known lawful relationship with the deceased, the learned magistrate erred law in fact, proceeding to find that her said children, who had no relationship whatsoever with the deceased, were beneficiaries of his estate;



- f. That learned magistrate erred in law and, in fact, by making a decision that was not supported by the evidence on record;
  - g. That the learned magistrate misdirected herself by taking a partisan position, which effectively made her arrive at a decision which was unbalanced and bad in law ab initio.
  - h. That the learned magistrate erred in law and, in fact, in failing to award costs of the matter before her to the appellant.
39. The appeal was canvassed by way of written submissions. the appellant, through her advocates Tindika & Company Advocates, filed written submissions dated 24<sup>th</sup> September 2024. Counsel submitted on three issues, namely:-
- a. whether the respondent’s children, Benson Kilonzo and Esther Kamwaki, were being maintained by the deceased and, consequently whether they were beneficiaries of the estate herein;
  - b. whether a child or children whose father(s) is/are known should be beneficiaries of the estate of a person who is not his/her/their father; and,
  - c. whether documents obtained illegally, unlawfully and/or fraudulently can be the basis of establishing maintenance and/or dependency or be of any legal benefit to the person who procured them and/or was procured for.
40. On the first issue, counsel submitted that he who alleges must prove. He urged that the record was full of clandestine and even illegal actions, which the respondent used to push for her two children, Benson and Esther, to be included and benefit from the deceased's estate. Further, the letter from the school cannot be evidence at all that the deceased maintained the respondent’s said elder children.
41. Counsel further submitted that the respondent did not tender any evidence that the said children at any point lived with the deceased nor were being maintained by the deceased. Therefore, the children were not qualified to be beneficiaries of the deceased's estate. The responsibility to maintain and provide for the two children was and still is on the shoulders of the respondent and the said children’s respective biological fathers, not on the deceased nor his estate. Therefore, the learned magistrate erred by finding the two children were beneficiaries of the estate of the deceased.
42. On the 3<sup>rd</sup> issue, counsel submitted that there is sufficient evidence that the respondent obtained the certificates of birth for her first two children illegally, unlawfully and fraudulently after the demise of the deceased. Counsel urged the court to peruse the evidence of Patrick Sila, Registrar of Births and Deaths, Kitui. Counsel submitted that the respondent’s actions her actions were meant to disinherit the lawful beneficiaries a big chunk of the estate, and the same should not be allowed.
43. In conclusion, counsel urged the court to allow the appeal.
44. On the other hand, the respondent, through her advocates, Muriithi & Masore Law, filed written submissions dated 8th July 2024.
45. Counsel submitted that the fact that the two children were not biological children of the deceased is not disputed, as well as the fact that they continuously lived with the deceased 5 years prior to his death. The same was confirmed by the deceased’s mother.
46. counsel relied on Section 3(2) as read with Section 29(b) of the *Law of Succession Act* and submitted that it recognises children not biologically sired by the deceased as beneficiaries in so long as the deceased “expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed



- permanent responsibility”. Counsel submitted that the appellant admitted that the deceased was the sole provider and took parental responsibility over the children.
47. Counsel further submitted that the school correspondence disclosed that the deceased was captured in the minor pupils’ database as the minors’ father.
48. On the birth certificates, counsel submitted that nothing turns on them in so long as it is demonstrated that the deceased took care of them and provided for them as his family.
49. In conclusion, counsel urged the court to dismiss the appeal.
50. When the matter came up for highlighting of submissions on 4<sup>th</sup> October 2024, Mr Tindika, counsel for the appellant, reiterated their position in their submissions and submitted that Section 29 of the [Law of Succession Act](#) provides for priority on dependency and that there must be proof of dependency. The relationship between the deceased and the dependant has to be established. The respondent never tendered any evidence to show that the children were dependent on the deceased and that they were his children. The school records did not show dependency.
51. Counsel urged the court to allow the appeal and set aside the orders of the court below, and allow costs in the appeal and also in the court below.
52. Mr. Masore, counsel for the respondent, also reiterated the position in their submissions and submitted that all three children, Benson, Esther and Sasha, were educated by the deceased equally in the same school.
53. Counsel submitted that the appeal lacks merit and urged the court to dismiss the same with costs.
54. The duty of the first appellate Court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of *Selle & another Vs Associated Motor Boat Company and others* [1968]EA 123, where they stated as follows:-
- “.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
55. Further, in the case of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows: -
- “It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different.”
56. Guided by the above decisions I will look at this matter and consider if the appeal has merits.
57. It is evident from the school records that Benson Kilonzo and Esther Kamwaki were recognised by the deceased as his children and that he accepted them as such. I have not seen any evidence showing his assumption of responsibility was involuntary.



58. Section 3(2) of the Law of Succession Act is instructive. It provides that:-

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

59. It is clear from the foregoing that non-biological children recognised or accepted by a person who has assumed permanent responsibility have a right to inherit the estate of a deceased person.

60. I am guided by the decision of the Court of Appeal in the case of *Obilo v ROO & another* [2024] KECA 40 (KLR) where it was held that:-

“We agree with the learned Judge that the evidence was uncontroverted that Mary went to live with Isaya together with the respondents after she left Zedekiah’s homestead; and that Isaya took them in and provided for them as his family. Indeed, the appellant and his witness seemed to deploy much of their ammunition to demonstrate that the respondents were not the biological children of Isaya. That, however, was never at issue. What was at issue was whether the respondents fitted within the definition of dependents in section 29 of the Law of Succession Act. They clearly did.”

61. The above decision is on all fours with this matter. In this appeal, too, the appellant’s counsel submitted at length on the issue of paternity. That was never at issue in this case as well as the respondent conceded that point.

62. In view the court below was right to hold that the deceased took care of the two children and that he considered them as his children. I cannot fault the trial magistrate for the said finding. It was consistent with the evidence.

63. It is evident that the deceased was indicated as the parent of the two children and that he paid for their school fees, as admitted by the appellant on page 372 of the Record of Appeal.

64. There are other examples in the proceedings/documents that show this.

65. Although the birth certificate may not have been obtained properly, nothing turns on them. Firstly, even if they were obtained fraudulently, the children cannot be blamed. Secondly, having found that the 2 are children under Section 3(2) of the Law of Succession Act as read with Section 29 of the said Act, the point is moot.

66. I find and hold that the appeal has no merit. The same is dismissed. Parties to bear their own costs of this appeal.

67. Orders accordingly.

**DATED AND SIGNED IN MOMBASA THIS 15<sup>TH</sup> DAY OF JANUARY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-



Mr Masore, for the Respondent;  
Mr Tindika, for the Appellant; and  
Arthur – Court Assistant.

