



REPUBLIC OF KENYA



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**In re Estate of James Njeru Mbungu (Deceased) (Succession Cause  
72 of 2012) [2025] KEHC 2060 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2060 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
SUCCESSION CAUSE 72 OF 2012  
RM MWONGO, J  
FEBRUARY 20, 2025**

**IN THE MATTER OF THE ESTATE OF JAMES NJERU MBUNGU (DECEASED)**

**BETWEEN**

**ELIZABETH WAWIRA NJAGI ..... ADMINISTRATOR**

**AND**

**LEAH WAMBUI NJERU ..... 1<sup>ST</sup> RESPONDENT**

**LYDIA WAMBURA NJERU ..... 2<sup>ND</sup> RESPONDENT**

**GRACE KATHUNGU NJERU ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Background and Application**

1. The deceased died on 20<sup>th</sup> January 2012. A grant of letters of administration to the deceased's estate was issued jointly to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> administrators on 07<sup>th</sup> December 2012. The Petition indicated the 3<sup>rd</sup> Respondent and 1<sup>st</sup> Administrator as his 1<sup>st</sup> and 2<sup>nd</sup> wives respectively. The 2<sup>nd</sup> and 3<sup>rd</sup> administrators are the deceased's daughters.
2. By a summons dated 06<sup>th</sup> September 2013, the 3<sup>rd</sup> respondent moved the court seeking orders that reasonable provision be made for her during distribution of the estate. She proposed that she be allocated half of all the properties making up the net estate of the deceased, namely: Plot No. 43 Njukiini Market, land Parcel Number Ngariama/ Ngiriambu/3632 and Ngariama/ Ngiriambu/ 3633.
3. She deposed in her supporting affidavit that she was married to the deceased under Kikuyu Customary laws in 1964 and the union was solemnised in 1972 through a church wedding under the African Christian Marriage and Divorce Act. That during the subsistence of their marriage, they acquired Plot No. 43 Njukiini Market in 1990 and it was registered in both their names as owners in equal shares. They developed the property which is occupied by tenants. She deposed that they also bought land



parcel number Ngariama/Ngiriambu/827 in 1966, and that she planted 1,800 coffee stems and other types of trees thereon in 1973.

4. She asserted that they also established their matrimonial home on the same land. She stated that her marriage to the deceased was dissolved in 2003 through court proceedings and she subsequently filed originating summons seeking distribution of matrimonial property. The deceased died untimely in 2012 before the court distributed the matrimonial property. Before his death, the deceased had sub-divided parcel number Ngariama/Ngiriambu/827 into 3 portions namely: Ngariama/Ngiriambu/3632 measuring 1.62 Hectares, Ngariama/Ngiriambu/3633 measuring 0.70 Hectares and Ngariama/Ngiriambu/3634 measuring  $\frac{1}{4}$  acre which he colluded with the protestor herein to sell off.
5. She resides on Ngariama/Ngiriambu/3633. She demanded half of the deceased's properties since the protestor did not participate in acquisition of the same. That the remaining half of the estate should be distributed equitably amongst the beneficiaries as the court shall deem fit.
6. The 2<sup>nd</sup> administrator, on behalf of the 3<sup>rd</sup> administrator, filed summons for confirmation of grant dated 01<sup>st</sup> November 2013 together with a supporting affidavit deposed by herself. She stated that the 1<sup>st</sup> administrator/protestor has remained uncooperative throughout the process. She learned that the deceased had subdivided his land parcel number Ngariama/Ngiriambu/827 into 3 portions, with the intention of transferring Ngariama/Ngiriambu/3633 to the 3<sup>rd</sup> respondent, his first wife.
7. The 2<sup>nd</sup> administrator deposed that the 3<sup>rd</sup> respondent, her mother, had moved to court under the Married Women Property Act 1882 seeking her share of the matrimonial property. That following the divorce, the deceased subdivided the land but he mysteriously died before transferring this part of the land to the 3<sup>rd</sup> respondent in settlement of the matrimonial claim. The 2<sup>nd</sup> Administrator urged that parcel number Ngariama/Ngiriambu/3633 be given to the 3<sup>rd</sup> respondent.
8. Further, she deposed that the protestor did not acquire any property with the deceased and that she related poorly with him. That the Plot No. 43 Njukiini Market does not form part of the estate of the deceased since he was a joint proprietor with the 3<sup>rd</sup> respondent thus upon his death, the property belongs to the 3<sup>rd</sup> respondent wholly. She urged the court to put the protestor to account for the rent she has forcefully collected from the tenants at Plot No. 43 Njukiini Market.
9. In response, the protestor filed a replying affidavit stating that she got married to the deceased in 1997 under Kikuyu Customary Law and she has 4 children with him. That the deceased and the 3<sup>rd</sup> respondent were divorced in the year 2003. She stated that the 3<sup>rd</sup> respondent has not utilized Plot No. 43 Njukiini Market since 1997 but she had been cultivating all of parcel number Ngariama/Ngiriambu/3633 and part of parcel number Ngariama/Ngiriambu/3632. That the 3<sup>rd</sup> respondent is wrong to claim half of those parcels of land. She deposed that she needed the money from the estate more because her children were still in school and one was mentally and physically challenged.
10. The Protestor also proceeded to file an affidavit of protest dated 22<sup>nd</sup> July 2019 challenging the mode of distribution proposed by the 2<sup>nd</sup> administrator/ respondent in the summons for confirmation of grant. She proposed that the estate of the deceased, which comprises of 3 properties should be distributed as follows:

Ngariama/Ngiriambu/3632 to be shared equally between:

- a. Elizabeth Wawira Njagi
- b. Alex Wachira Njeru
- c. Winfred Wambui Njeru



- d. Daniel Njagi Njeru
- e. Phillip Muriuki Njeru

Ngariama/Ngiriambu/3633 to be shared equally between:

- a. Lydia Wambura Njeru
- b. Ann Muthoi Njeru
- c. Esther Wangui Njeru
- d. Simon Mureithi Njeru
- e. Sarah Waruguru Njeru

Plot No.43 Njukiini Market to go to:

Elizabeth Wawira Njagi

11. The matter was referred for court annexed mediation which culminated into a partial mediation settlement agreement which was adopted by the court in an order. In the settlement, agreement, the protestor relinquished all claim upon land parcel number Ngariama/Ngiriambu/3633. Distribution of Ngariama/Ngiriambu/ 3632 and Plot No. 43 Njukiini Market was referred back to the court for determination. On these issues, the court scheduled a hearing and took viva voce evidence.

### **The hearing**

12. At the hearing, the protestor testified as PW1. She stated that she was married to the deceased under Kikuyu Customary Law and she is aware that he owned land parcel numbers Ngariama/Ngiriambu/3632 and Ngariama/Ngiriambu/3633. She stated that prior to the death of the deceased, the 3<sup>rd</sup> respondent was using all of parcel number Ngariama/Ngiriambu/3633 and a part of Ngariama/Ngiriambu/3632. After the death of the deceased, she said the 3<sup>rd</sup> respondent began using both parcels of land and she chased the protestor and her children away. That the 2 pieces of land are adjacent to each other and are separated by a barbed wire fence which the 3<sup>rd</sup> respondent pulled down.
13. It was her evidence that the deceased intended that she retains the land where her house was built on parcel number Ngariama/Ngiriambu/3632 and that Ngariama/Ngiriambu/3633 should go to his son, Simon (son of the 3<sup>rd</sup> respondent) who has built a house there as well. She testified that she does not reside on the land out of fear that the people who killed the deceased might come after her next. That she abandoned her house on the property and it has since been vandalised. Regarding Plot No. 43 Njukiini Market, she stated that at the time of the deceased's death, that property belonged to him and her jointly since the 3<sup>rd</sup> respondent had already been divorced.
14. In cross-examination, she stated that the deceased paid dowry at the time of their customary law marriage and that he has already separated from his first wife. That he acquired the land on his own and that he told her that Ngariama/Ngiriambu/3633 should go to his son with his first wife. She asserted that all his children with his first wife are well educated upto university and they do not participate in these proceedings. She stated that there are minutes from the Land Disputes Tribunal showing that she was a co-owner of the Plot No. 43 Njukiini Market.
15. The 3<sup>rd</sup> respondent testified as DW1, the deceased's first wife. She stated that she got married to the deceased in 1964 through Customary Law and in 1965, she had her first child. She has 9 children with the deceased, 2 of whom are deceased. It was her testimony that when she got married to the deceased,



- they were living in town with the deceased's brother who later chased them away, causing the deceased's father to give him Kshs.2,000/= . The deceased used that money to build a mud house and at the time, the Protestor was schooling with her children as she was born in 1997.
16. In cross-examination, she stated that she did not know whether the protestor had children with the deceased and she had never seen them on the land. Following her divorce, she filed a case in Embu High Court seeking her portion of the matrimonial property but the deceased died before it was concluded. The protestor had a house on the deceased's land but did not live there for long. 2 weeks before the deceased's death, she moved out of the land and she was not at home when he died.
  17. She knows that Plot No. 43 Njukiini Market belongs to her since it was registered jointly to her and the deceased and she was collecting rent from the development before and after the divorce. She testified that she and her children drove the protestor away from the property which she has heavily developed and planted cash crops. She demanded all of parcel number Ngariama/Ngiriambu/3632 which she said is her matrimonial property and said that the protestor does not deserve any inheritance. That the protestor's children were not sired by the deceased even though his name appears on their birth certificates.
  18. DW2, Patrick Wachira Murage is a farmer, married from the deceased's family. He testified that the deceased only paid dowry for one person and that is the 3<sup>rd</sup> respondent. He said that the protestor was not a wife of the deceased. In cross-examination, he stated that he did not know that the deceased and the 3<sup>rd</sup> respondent were divorced and he was not familiar with any court proceedings to that effect. He did not know whether the deceased had another wife and children.
  19. Witness A1 was the 2<sup>nd</sup> administrator respondent and the daughter of the 3<sup>rd</sup> respondent. She testified on behalf of her siblings. She stated that the deceased is her father and she named her siblings. It was her testimony that the property be distributed such that the 3<sup>rd</sup> respondent is prioritised as the first wife. She said that parcel number Ngariama/Ngiriambu/3633 measuring 1 $\frac{3}{4}$  acres is fully occupied by the 3<sup>rd</sup> respondent while 4 acres out of parcel number Ngariama/Ngiriambu/3632 is unoccupied and is used as farm land. She urged that their mother should remain on parcel number Ngariama/Ngiriambu/3633 and herself and her siblings should inherit parcel number Ngariama/Ngiriambu/3632.
  20. She further stated that the deceased acquired Plot No. 43 Njukiini Market with the help of the 3<sup>rd</sup> respondent and herself and it should thus be given to the 3<sup>rd</sup> respondent; and that the properties were acquired long before the deceased began his relationship with the protestor. She said that the protestor does not farm on the land she is claiming. According to her, in cross examination, the registered owner of Plot No. 43 Njukiini Market is the deceased and the county records prove this. She disagreed with the protestor's claim on it. The witness denied that the protestor had any children with the deceased and she challenged the validity of the birth certificates produced as evidence. She stated without producing proof, that the protestor has been triggering fights. She said that the land was acquired through the joint efforts of the deceased and the 3<sup>rd</sup> respondent.

### **Parties Submissions**

21. The parties filed their written submissions.
22. In her written submissions, the protestor drew the court's attention to the extract of minutes from the Land Dispute Tribunal and urged it to consider the most recent extract. She argued that the respondents could not prove that the deceased and the 3<sup>rd</sup> respondents were the joint proprietors of the land. She stated that the protestor is indeed a wife of the deceased since the court had already



- appointed her as one of the administrators. She urged the court to distribute parcel number Ngariama/Ngiriambu/3632 to her and her children in equal shares. She also demanded that the 3<sup>rd</sup> respondent should account for all the rent collected from Plot No. 43 Njukiini Market.
23. The 2<sup>nd</sup> and 3<sup>rd</sup> administrators/respondents submitted that the protestor is a late comer. She came into the life of the deceased long after his retirement and after he had already acquired his properties with his then wife, the 3<sup>rd</sup> respondent. She demanded that since parcel number Ngariama/Ngiriambu/3633 was settled through mediation, parcel number Ngariama/Ngiriambu/3632 and Plot No. 43 Njukiini Market should also be given to the 3<sup>rd</sup> respondent since the protestor cannot claim any right. The ¼ acre of the land parcel number Ngariama/Ngiriambu/3632 should be given to the 3<sup>rd</sup> respondent and the remaining portion should be given to the 3<sup>rd</sup> respondent's children.
24. She placed reliance on the cases of Virginia Wanjiku Kinuthia v Muthoni Kinuthia & another [2014] KEHC 2680 (KLR) and Douglas Njuguna Muigai v John Bosco Maina Kariuki & Jerioth Wangechi Muigai [2014] KECA 753 (KLR) and argued that the protestor has failed to prove her contribution towards acquisition of the properties she is laying claim over. She urged the court to distribute the estate according to the summons for confirmation of grant.
25. The 3<sup>rd</sup> respondent filed her written submissions in which she relied on Page 30 of Eugene Cotran's 'Casebook' on Kenya Customary Law and the case of Kimani Gituanja v Jane Njoki Gituanja [1983] KECA 25 (KLR) where the common sentiment was that marriage is a matter of fact that should be proved through evidence. She pointed to the contradictions in the two different extracts of minutes from the Land Disputes Tribunal; in that one shows that the protestor was the proprietor whilst the other indicates that the deceased was the proprietor. She urged that the correct way to go is to give the whole estate of the deceased to the 3<sup>rd</sup> respondent since she contributed to acquisition of the properties.

### **Issues for Determination**

26. From the foregoing, the issues for determination are the following:
1. Who are the beneficiaries of the estate of the deceased; and
  2. How should the estate of the deceased be distributed?

### **Analysis and Determination**

#### **Where are the beneficiaries of the deceased?**

27. On the first issue, it is clear from the evidence that the deceased was married to the 3<sup>rd</sup> respondent through Kikuyu Customary law, and that the marriage was solemnised under the African Christian Marriage and Divorce Act. This marriage was dissolved in 2003 and the deceased died before a suit to determine and distribute matrimonial property was determined. In her testimony, the protestor acknowledged that the deceased had another wife with whom he had separated. She said that she lived with the deceased since 1997 until shortly before his death and she had 4 children with him. She also acknowledged that the deceased's first wife had more children with him than her.
28. In her testimony DW1, the 3<sup>rd</sup> respondent, who was the deceased's first wife, stated that the deceased did not have another wife and children. She knew the protestor as the schoolmate of her children. She stated that she removed her from the land. DW2 and witness A1 also stated that they did not recognise the protestor as a wife of the deceased and asserted that her children are not the deceased's children. Therefore, they could not be, and are not beneficiaries of the estate of the deceased.



29. Section 66 of the *Law of Succession Act* offers guidance as to who may be appointed as administrator of the estate of a deceased person. In this case, the 3<sup>rd</sup> respondent initially petitioned for the grant and when the matter was heard before Musyoka, J., the parties recorded a consent on 07<sup>th</sup> December 2012 to the effect that the letters of administration be issued jointly to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Administrators and the parties present and the objectors all agreed. The consent order is still in force and has not been set aside.
30. The question arising is whether the 1<sup>st</sup> administrator/protestor is to be held as a wife of the deceased. Section 3 of the *Law of Succession Act* defines "spouse" as a husband or a wife or wives recognised under the *Marriage Act* (No. 4 of 2014), and includes a wife who is separated from her husband. The terms "husband" and "spouse", "widow" and "widower" according to that section shall have a corresponding meaning.
31. The protestor stated that she was married to the deceased in the year 1997 under customary law and that at the time, the deceased was separated from his wife. This is indeed a matter of fact that can only be proved through evidence to the required standard. Section 107 of the *Evidence Act* puts the onus on the alleging party to prove his allegations. It states:
- “ 107
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
32. The protestor’s evidence regarding the allegation that she was a wife of the deceased is not persuasive on a balance of probabilities. The only evidence she produced was her children’s birth certificates which indicate that the deceased was their father. I have perused those birth certificates and noted that they were registered and issued around the times when the protestor’s children were born. The onus was on the protestor to prove that the deceased married her under Kikuyu Customary law. In my view, there is no such proof on a balance of probabilities. The evidence does not persuade me that the protestor was a wife of the deceased. However, on the basis of the prima facie evidence of the birth certificates, her children ought to be counted as the children of the deceased.
33. The 3<sup>rd</sup> respondent produced proof that she was married to the deceased but this marriage was dissolved before the deceased’s death. At the time, he allegedly married the protestor in 1997, he was separated from his wife and their marriage was dissolved in 2003. The 2<sup>nd</sup> administrator/respondent stated that she supports the argument that the whole estate should be given to the 3<sup>rd</sup> respondent because she contributed in acquiring the properties during her marriage to the deceased. Through evidence, it has also been clarified that when the marriage was dissolved, the 3<sup>rd</sup> respondent filed originating summons at Embu High Court seeking distribution of matrimonial property. However, the deceased died before the matter was determined, and the suit abated.
34. The arguments by the 3<sup>rd</sup> respondent and the 2<sup>nd</sup> administrator respondent regarding contribution towards acquiring the property belong to the matrimonial causes court, in which the suit abated on account of death of the deceased. This court cannot entertain that line of argument since as a probate Court, it is bound to determine distribution of the estate according to the *Law of Succession Act*. Section 3(1) of the Act acknowledges that for purposes of succession, a separated wife is a wife of the deceased but the Act is silent on a divorced wife.



35. It is trite that a person divorced is separated, absolutely, from the spouse. A separated wife is considered a wife for succession purposes (The Law of Succession, by Musyoka William, Pg.100). The divorced former spouse may make a claim under the family provision in Section 26 Law of Succession Act which states:

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

(see also the case of *In re Estate of the Late Joseph Muhika Irungu (Deceased)* [2024] KEHC 2316 (KLR))

36. The 3<sup>rd</sup> respondent did this through her summons dated 06<sup>th</sup> September 2013 where she sought half of the estate. Through mediation proceedings, whose partial settlement was adopted as an order of the court, it was agreed that the 3<sup>rd</sup> respondent gets parcel number Ngariama/Ngiriambu/3633. For clarity, the 3<sup>rd</sup> respondent is a separated wife of the deceased for purposes of succession since her marriage to the deceased was dissolved before the death of the deceased.

37. In the circumstances, the beneficiaries of the estate of the deceased are the following:

1. Leah Wambui Njeru
2. Lydia Wambura Njeru
3. Ann Muthoni Njeru
4. Esther Wangari Njeru
5. Judith Waweru Njeru
6. Simon Muriithi Njeru
7. Sarah Waruguru Njeru
8. Alex Wachira
9. Winifred wambui
10. Daniel Njagi
11. Philip Muriuki

Whilst Grace Kathungu Njeru is a dependent of the deceased.

### **How should the Deceased’s estate be distributed?**

38. On to the second issue, estate of the deceased, therefore, comprises of land parcel number Ngariama/Ngiriambu/3632 and Plot No. 43 Njukiini Market. Regarding the latter, the 3<sup>rd</sup> respondent and the 2<sup>nd</sup> administrator/respondent have argued that there are 2 ownership documents being extracts of minutes from the Land Disputes Tribunals. I have perused the 2 documents, one from a meeting held on 18<sup>th</sup>



July 2007 indicating that the deceased applied for addition of the protestor's name as the owner while the one produced by the 3<sup>rd</sup> respondent refers to a meeting held on 20<sup>th</sup> July 1990.

39. This puts the ownership of the Plot No. 43 Njukiini Market into question. That question that can only constitutionally, be determined by the Environment and Land Court (ELC) since this court lacks jurisdiction to do so. The ELC's jurisdiction is clearly set out under Article 162 of *the Constitution* and section 13 of the *Environment and Land Court Act*. As to jurisdiction, the case of Owners of The Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) where it was held:

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

40. Rule 41(3) of the Probate and Administration Rules speaks to the identity or any share of any person claiming to be beneficially interested. It then refers to Sections 71(2) and 82 of the *Law of Succession Act* Rule 41 (3) which defines the duties of personal representatives in defining the estate for distribution. It provides thus:

"(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant."

41. In pursuance to that provision, my view is that Plot No.43 Njukiini Market should be hived out of the estate so that the pending question of its ownership is placed before the ELC for determination before it can be distributed under succession.

42. Moving on to distribution of parcel number Ngariama/Ngiriambu/3632, the deceased died intestate without a spouse but with 11 children as aforesaid. The law makes provision for situations where the intestate has left a surviving child or children but no spouse, as in Section 38 *Law of Succession Act* which states:

"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."

### **Conclusions and Disposition**

43. In light of the foregoing and guided by the above provision, the estate of the deceased comprising of parcel number Ngariama/Ngiriambu/3632 should be distributed amongst the 11 children of the deceased in equal shares. For the avoidance of doubt, these children are:

1. Leah Wambui Njeru



2. Lydia Wambura Njeru
  3. Ann Muthoni Njeru
  4. Esther Wangari Njeru
  5. Judith Waweru Njeru
  6. Simon Muriithi Njeru
  7. Sarah Waruguru Njeru
  8. Alex Wachira
  9. Winifred Wambui
  10. Daniel Njagi
  11. Philip Muriuki
44. Distribution of Plot No.43 Njukiini Market will be done once its ownership is determined through the ELC Court. Until then, it is prudent to order that all income from Plot No.43 Njukiini Market be deposited into a joint account held by Elizabeth Wawira Njagi and Grace Kathugu Njeru.
- This Court notes that the consent order recorded by C. Githua, J. on 28<sup>th</sup> May 2014 will lapse after delivery of this judgment.
45. No order is made as to costs this being a family matter.
46. Orders accordingly.

**DELIVERED VIRTUALLY AT KERUGOYA HIGH COURT THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025**

.....  
**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Ms. Kinutthia holding brief for Kipruto for 2<sup>nd</sup> and 3<sup>rd</sup> Administrators
2. Ann Muthoni Njeru
3. Grace Gathungu Njeru
4. Leah Wambui Njeru -Online
5. Lydia Wambura
6. Sabina Kamori Kagwi
7. Sarah Waruguru Njeru
8. Esther Wangui Njeru
9. Francis Munyao - Court Assistant

