



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kuria v Irungu (Succession Appeal E028 of 2022)
[2025] KEHC 3340 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION APPEAL E028 OF 2022
BK NJOROGE, J
MARCH 13, 2025**

BETWEEN

MIRIAM WAIRIMU KURIA APPELLANT

AND

GLADYS WANGARI IRUNGU RESPONDENT

JUDGMENT

1. This is an appeal arising out the ruling and orders of Hon. G. Onsarigo-SPM delivered on 3rd February, 2022. This is in respect of (Kikuyu) SPM SC No. 39 of 2013.
2. In its ruling aforesaid, the Trial Court dismissed the Objection proceedings by way of a Summons for Revocation of Grant dated 18th December, 2019. The dismissal was with costs to the Respondent.
3. The Appellant in this case was the Objector in the original succession cause before the Trial Court. The Respondent herein was the Petitioner.

Background Facts

4. The deceased David Kuria Waiyaki passed away on 29th March, 2013 at the age of 56 years. He left behind a single parcel of land known as described as Dagoretti/Thogoto/xx comprising out of 1.52 acres. This is inheritance from his late mother Jane Wangari Waiyaki. At the time of his death, he was cohabiting with Gladys Wangari Irungu, the Respondent herein. She has Two (2) children. She applied for Letters of Administration jointly with one Eunice Wangari Wanjiku, who is her cousin. The grant was ultimately issued and confirmed in her name, as a sole beneficiary.
5. It turns out that the deceased was previously married to one Mariam Wairimu Kuria the Appellant. They had 3 children. She had left the deceased in the year 2000. The marriage which had solemnized on 1st October, 1983 (under the African Christian Marriage and Divorce Act Cap 151 of the Laws of Kenya) had a lot of challenges. The couple were living separately. The Appellant lived with the children.



In the year 2002 she relocated to USA. She acquired citizenship and resides in USA with her 3 children. They have never returned back to Kenya to live as a family.

6. Upon the death of the deceased, they did not return to Kenya. They did not take part in the burial. The Appellant stated that one of the children was unwell, so she could not travel to Kenya take part during the burial.
7. The Appellant maintained that as the legal wife, the only woman who had a marriage certificate, she was the only one entitled to inherit the estate. Her children were the only heirs thereof. She accused the Respondent of supplanting herself in the home during her absence. That since the Respondent was not a legal wife, and she had no biological children with the deceased, they could not inherit.
8. The Appellant sought to have the Court revoke the Certificate of Confirmation of Grant issued to the Respondent. This is on the basis of Section 76 of the [Law of Succession Act](#).
9. It is the Court's orders declining to revoke the Grant that has triggered the appeal.
10. This appeal was admitted and directions given for filing of written submissions.
11. The Court has seen and read the Appellant's submissions dated 23rd May, 2024 with authorities cited. The Court has equally seen and read the Respondent's submissions dated 3rd June, 2024 with authorities attached.
12. The Court apologizes to the parties for the delay in delivering of this judgment. This has been caused by pressure of work. Any unintended consequences to the parties are highly regretted.
13. The Appellant has filed a Memorandum of Appeal which raises the following grounds of appeal;
 - i. That the Learned Magistrate erred in law and in fact in failing to appreciate the fact that the application for revocation of grant dated 18th December, 2019, proceeded virtually through viva voce evidence and the Appellant testified and adopted her affidavit in support of the Summons for Revocation of Grant sworn on 29th November, 2019 and the supporting affidavit sworn by her on 31st August, 2020 as her evidence in chief and the annexures was produced as exhibits respectively.
 - ii. That the Learned Magistrate erred in law and in fact and failing to consider the sworn testimony of the Appellant that she was the widow of the deceased as evidenced by the marriage certificate Exhibit 1 and as such a wife defined under Section 3 (1) of the [Law of succession Act](#) Cap 160 Laws of Kenya and reached a wrong decision thereof.
 - iii. That the Learned Magistrate erred in law and in fact and failing to appreciate the fact that the deceased and the Appellant's children as evidenced by birth certificate produced as exhibits number 2,4 and their passports exhibit 6 were excluded from the application for petition of grant and subsequent application for confirmation of grant.
 - iv. That the Learned Magistrate erred in law and in fact and failing to appreciate the fact that though the Respondent purported to petition for grant with one Eunice Wangari Wanjiku (who she confirmed was her cousin and not related to the deceased on cross examination) the certificate of confirmation of grant dated 14th January, 2015 and rectified dated on 6th May, 2014 was issued and confirmed to the Respondent alone yet there are purported minor children as per paragraph 2 of the affidavit in support of the application for confirmation of grant and the interests of the deceased's biological children were not disclosed or considered contrary to the provisions of Section 58, 66 and 71 (2) and (2A) of the [Law of Succession Act](#) Cap 160 of the Laws of Kenya.



- v. That the Learned Magistrate erred in law and in fact and reached an erroneous decision and despite the Respondent admitting the fact that the children disclosed at paragraph 4 of the affidavit in support of the application for confirmation of grant was neither biological or adopted children for the deceased.
- vi. That the Learned Magistrate erred in law and in fact and failing to appreciate the fact that the Appellant was married under statutory marriage that is the African Christian Marriage and Divorce Act (Cap 15) (now repealed) hence lacked capacity to enter into another union before dissolving the first marriage and the respondent failed to prove under which regime of marriage known in law, she married the deceased.
- vii. That the Learned Magistrate erred in law and fact in failing to protect the interests of the estate and interrogate who were the rightful beneficiaries despite enough evidence that was tendered and provided to the court by the parties.
- viii. That the Learned Magistrate erred in law and in fact in failing to appreciate the fact that the proceedings to obtain the grant was defective in substance.
- ix. That the Learned Magistrate erred in law and in fact and failed to record and capture the evidence tendered by the Appellant.

Issues for Determination

- 14. The Appellant has not isolated any issues for determination. Borrowing from the issues in the Respondent's submissions, the Court frames the following issues;
 - i. Who was/were the deceased's wife/wives at the time of his death?
 - ii. Who was/were the deceased's children at the time of his death?
 - iii. Who were the deceased's Dependants at the time of his death?
 - iv. Whether the Summons for Revocation of Grant was merited.
 - v. What reliefs lie in this appeal?
 - vi. Who should bear the costs of the appeal?
- 15. The Court will proceed in its analysis to determine the issues raised in seriatim.

Analysis

- 16. This is a first Appeal. The Court is under a duty to re-look, re-evaluate and re-analyze the evidence presented before the trial Court. Having done so, the Court has a duty to reach or arrive at its own independent conclusion based on the facts and the evidence. In doing so the Court has to warn itself that it neither saw nor heard the witnesses, as all that took place before the trial Court. Hence, some allowance should be given for that. See *Selle & another -vs- Associated Motor Boats & others* [1968] E.A 123.
- 17. In its very essence, the Summons for Revocation seeks the cancelling of the Certificate of Confirmation of Grant and the Grant issued to the Respondent. In place thereof that the Grant be issued to Miriam Wairimu Kuria the Appellant.
- 18. The power to revoke a grant is donated, by Section 76 of the Laws of Succession Act Cap 160 of the Laws of Kenya. It states as follows;



76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.

19. The situation before this Court in the Appeal is that two women claim to be married to the deceased. They each deny that the other woman is a lawful wife. The answer to this question will unravel part of the questions raised by this appeal.

Who were /was the deceased's wife/wives at the time of his death?

20. The Court starts with the Appellant. The hearing proceeded by viva voce evidence. The Appellant and the Respondent were cross examined as to the contents of their respective affidavits.

21. The Appellant presented a marriage certificate. Her marriage with the deceased was solemnized on 1st October, 1983. From the evidence before the Trial Court, the marriage hit the rocks. The Appellant left the deceased in the year 2000. By the year 2002 she says she left the country for the United States of America, she never returned back to Kenya to cohabit with the deceased.

22. There is no evidence of a divorce which is a question of fact as well as evidence. Statutory marriages such as under the African Christian Marriage and Divorce Act are dissolved through Court proceedings. No decree nisi or a decree absolute were produced before the Trial Court. This Court can only presume that there were no proceedings filed by either the Appellant or the deceased to dissolve their marriage.

23. The Respondent argued strongly that the Appellant was now an American citizen. She had acquired the America citizenship by way of naturalization. Evidence led by the Respondent was that for a person to gain an American Citizenship, they must have been married to an American spouse. It was submitted that this was proof that the Appellant had entered into another marriage. Thus, she could not claim marriage to the deceased. No expert on this foreign law was called to testify before Court.



24. The Court notes that the Appellant was hesitant to divulge evidence as to her citizenship status or which person accompanied her to Kenya in the year 2011. As this was a witness being cross-examined, it is not clear why she was not pressed to answer questions put to her. It is not up to witnesses who have taken the oath to choose the questions they wish to answer. That should be left to the Court to determine which questions are irrelevant or prejudicial to a witness. Once a witness takes to the stand, they become fair game to Counsel for or the opposing party and have to answer questions put to them. The essence of cross examination is to ferret out the truth or expose hidden lies. It is a useful tool that leads the Court to the truth. As matters stand the chance to get answers to those questions were lost, as the opportunity to seek direct answers was not taken.
25. The Trial Court was urged to find that the long separation of the Appellant from the deceased amounted to divorce by presumption and conduct.
26. The applicant left the deceased in 2000 and did not rejoin him by the date of his death on 29th March, 2013.
27. The Trial Court had this to state;
- ” It is clear from the marriage certificate that the objector and the deceased was married but the situation at play fits well in the emerging jurisprudence of what is known as divorce by presumption and conduct.
- In the case of the Estate of Jacinter Njoki Okoth (Deceased) (2020) eKLR Justice R. Nyakundi held;
- “Divorce is not the procedure of filing a decree nisi in court perse. On a much broader perspective, divorce pertains to the intention and conduct of parties. If parties in a marriage shows an intention not to continue with their marriage or conduct themselves unmarried persons, then the same should be treated as such. The law cannot attach obligations upon persons who have decided to part ways but fail to formalize the same because that is not the true reflection of what they want.”
28. The Court has perused the decision of Honourable Justice R. Nyakundi. It fits the particular circumstances of the case that was before that Court. There was no clear evidence that the parties in that case were married, even under Customary Laws. Hence it was a case of presumption of a marriage. It was therefore befitting that the Court could equally presume a divorce from the conduct of the parties. The Court is yet to set eyes on a legal precedent that statutory marriages can be dissolved by presumption. The Court will hesitate to apply this emerging jurisprudence of divorce by presumption, to a statutory marriage.
29. The upshot is that the Court disagrees with the Trial Court and finds that the Appellant was a lawful wife of the deceased. She was estranged from him; however, she was still a wife. As long as there is no evidence of a formal divorce or proof of remarriage, she is for all intents a wife, though an estranged one. She may not have professed any love for the deceased even during the hearing, however she is still a wife.
30. As to the Respondent, the evidence she had was that she cohabited with the deceased from the year 2001. This ties up with the evidence of the appellant that she separated from the deceased in the year 2000. As power abhors a vacuum, so does love. It is not unusual in our Kenyan setting to find a deserted man or woman entering into another relationship to soothe and mend a broken heart. It is said that one is wounded in a relationship and one heals in a relationship. Perhaps there is some truth in that.



31. The evidence of the Respondent is that she lived with the deceased in the same house. She had two children from a previous relationship. She alluded to the deceased having made a visit to her parents to make a deposit for her dowry. No witnesses were presented to corroborate this evidence.
32. The Respondent and the deceased presented themselves to the community as a husband and a wife. The Respondent took active part in the burial of the deceased. She was recognized by the deceased's family as a wife. She was the solemn widow in black besides the deceased's coffin. The burial photos attest to that.
33. The Trial Court summed up the evidence as follows;
- “The respondent, on the other hand has been living with the deceased as husband and wife since 2001 and held themselves to the world as husband and wife until his demise.
- In view of the foregoing, the deceased and the respondent's relations fits in the shoes of presumption of marriage.”
34. The Court agrees with the Trial Court that the circumstances in which the Respondent and the deceased lived, brings about a presumption of a marriage. For the purposes of the Law of Succession Act, the Court presumes that the Respondent was a wife to the deceased.
35. Having found so, the Court finds that Section 29 of the Laws of Succession Act applies to the Respondent. The section states as follows;
- ” 29. Meaning of dependant
- 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.

Who were the Deceased's Children at the Time of his Death?

36. From the evidence before the Trial Court, the marriage between the Appellant and the deceased provided three (3) heirs namely;
- i. Gary Watson Waiyaki
 - ii. Clayton Harun Njonjo Waiyaki
 - iii. Lerline Jean Wangari Waiyaki
37. They were all born on 5th March, 1988, making them 37 years of age.
38. The Respondent does not deny that these three (3) persons are children of the deceased, born during his marriage with the Appellant. As the deceased died intestate, it is not clear to this Court, why the Respondent failed to name them as the deceased's beneficiaries.



39. The Respondent has two (2) children namely;
 - i. RMK 16 years
 - ii. EMK 13 years
40. As about 12 years have passed since the filing of the Petition in 2013, the children are now no longer minors, as they should be currently about 28 and 25 years old respectively.
41. The Respondent maintains that the deceased took in the children as his own. Though they were not his biological children, he brought them up in his own house. They even took up his name Kuria.
42. The Appellant submits that since they were not the biological children of the deceased, they ought not to inherit. That they were not formally adopted by the deceased as his children. That they are strangers to the estate seeking to replace the biological children of the deceased.
43. The evidence led by the Respondent shows that the children were treated by the deceased's siblings as the deceased's own children. They participated at the funeral as his children.
44. The Court's considered opinion is that sufficient evidence was led to show that the deceased stepped into the shoes of a step-father. He treated the two boys as his step-sons. Section 29 (b) of the Law of Succession Act comes to the aid of the Respondent.
45. To this court the 3 biological children of the deceased plus his two step sons were the children of the deceased at the time of his death.

Who were the Deceased's Dependents at the Time of his Death?

46. The Court has said enough to show that it recognizes the Respondents two (2) children as Dependents of the deceased.

Whether the Summons for Revocation of Grant was Merited.

47. The Court notes the following pertinent issues were raised by the Objector. Certificate of confirmation was issued in the sole names of the Petitioner yet there was a resulting trust.
48. The Court notes that the Respondent applied for a Grant jointly with one Eunice Wangari Wanjiku. The Certificate of Confirmation of Grant was issued on 14th January, 2013. It is not clear to this Court why the Grant was confirmed in the sole name of the Respondent, yet there was a resulting trust, as her sons were still minors. This means that even her two sons were disinherited by this process, yet they could not give any consent or waive away their rights to inherit.

The Deceased Died Intestate

49. As the deceased left no will, again it is not clear why the estate which comprised only one piece of land devolved to the Respondent only. What were the shares of the two (2) children who were already named as beneficiaries. By law the entire estate does not devolve to a spouse, where there are children. As the two (2) children were minors they could have given consents to waive away their right to inherit.

The Names of all the Beneficiaries Left Out in the Petition

50. The Respondent did not name the Appellant as a wife of the deceased. In any event, even if there was no love lost between them, she very well knew the deceased had three (3) other older children with the Appellant, yet she deliberately left them out of the Petition.



51. To this Court the proceedings to obtain the grant was defective in substance as there was concealment of crucial information and material facts. Therefore, the application for revocation of the certificate of confirmation for grant is merited.

What Reliefs lie in this Appeal?

52. The Court is persuaded that the Summons for revocation is merited.

53. The Petition as filed does not name or recognize all the beneficiaries of the Estate. A fresh Petition ought to be filed within the next Forty-Five (45) days naming all the beneficiaries of the Estate.

54. The Administrators should be named from a representative of each of the two families.

Who Should Bear the Costs of this Appeal?

55. Costs ordinarily follow the event. However, this being a family matter, the order that best renders itself to the case is let each party bear their own costs.

Determination

56. The Appeal succeeds and the Summons for Revocation of Grant dated 18th December, 2019 is allowed.

57. A fresh Petition be filed within the next Forty-Five (45) days naming all the beneficiaries of the Estate. The Administrators should be named from a representative of each of the two families.

58. The Lower Court file be placed before the Trial Court for mention for compliance and further orders.

59. There be no orders as to costs.

60. It is so ordered.

SIGNED, DATED, AND DELIVERED IN VIRTUAL COURT THIS 13TH DAY OF MARCH 2025

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

Mr. Onsembe holding brief for Mr. Ongeru for Appellant

Mr. Maina for Respondent

Mr. Luyai– Court Assistant

