



**Gachewa v Mwaniki & another (Civil Appeal 5 of 2020)
[2025] KEHC 4216 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 5 OF 2020
RM MWONGO, J
APRIL 3, 2025**

BETWEEN

BERTHA NJERI GACHEWA APPELLANT

AND

ROSE MUTHONI MWANIKI 1ST RESPONDENT

ANN WAGATWE NJENGA 2ND RESPONDENT

*(Being an appeal against the Judgment of Hon. Barasa (S.R.M) in
Kerugoya Succession Cause No.770 of 2013 dated 18 th December, 2019)*

JUDGMENT

Background and the Appeal

1. The deceased, Evans Ndambiri Gachewa, died on 10th February 2011. Letters of administration were taken out by his wife, Bether Njeri Gachewa, the appellant herein. The respondents filed protests in the lower Court against the appellants summons for confirmation dated 23/07/2014.
2. The trial Court found that the deceased had allowed the protestors to occupy Land Parcel No. Ngarama/Nyangeni/140 without any interruption and had thus taken them as his own children as dependants. The Court therefore directed that the said parcel be shared equally between the protestor/ respondents.

Brief facts

3. The facts that emanated in the Lower Court were that the deceased was the 1st cousin to the Respondents since his late father Gachewa Njuni was a brother to the respondent's father the late Njege Njuni.



4. During the land consolidation and demarcation, the clan allocated to Evans Ndambiri Gachewa L.R Ngariama/Nyangeni /215 as his father was already deceased whereas Njege Njuni was allocated L.R Ngariama/Nyangeni/140. That land, L.R Ngariama/Nyangeni/140, was registered in the names of Njege Njuni on 22/08/1957 as indicated in the copy of the green card. The respondents were born and brought up on L.R Ngariama/Nyangeni/140. Their mother and father died in the year 1961 and 1962 respectively. Their only brother also died in the year 1973 and was buried in their father's land L.R Ngariama/Nyangeni/140.
5. On 28/05/1974 their land was registered under the names of their 1st cousin Evans Ndambiri Gachewa – deceased Gichugu Succession Cause No.4 of 1974. The Appellant herein proceeded to file summons for confirmation of grant in respect to her husband's estate after his demise on 10.02.2011. However, she included L.R Ngariama/Nyangeni/140 as part of the estate hence causing the respondents to file a protest. The Court upheld the protest in its judgment dated 18th December, 2019.
6. Dissatisfied, the appellant filed this appeal against the said Judgment on the following grounds:
 1. That the learned magistrate erred in law and facts in not finding that the issue of the respondent's interest in L.R No. Ngariama/Nyangeni/140 were determined in Succession Cause No.4 of 1974 at Gichugu and the Court had no jurisdiction to sit and reverse the said findings.
 2. The trial Magistrate erred in law and in fact when he found that the respondents were dependents of the deceased when in fact they never depended on him in any way.
 3. The learned Magistrate erred in law when he awarded the whole of L.R No. Ngariama/Nyangeni/140 to the respondents when the evidence tendered although not also proved was in respect of (2) Acres only.
 4. That the learned Magistrate erred in law in failing to find that the law cannot be applied retrospectively.

Parties Submissions

7. Parties filed written submissions as directed by the Court.

Appellant's submissions

8. The appellant submitted that she applied for confirmation of grant listing among the assets, L.R Ngariama/Nyangeni/140. She produced Succession proceedings in Succession Cause No.4 of 1974, Gichugu Court. They clearly show that both protestors appeared in Court at Gichugu and expressly stated that they had no claim over the land. They prayed that it be registered in the name of Evans Gachewa the deceased herein. It was on the basis of their statements that the Gichugu Court granted the deceased the land. The learned Magistrate in the present Judgment, could not reverse a ruling already made by a competent Court, namely the Succession Court in Gichugu in Succession Cause No.4 of 1974.
9. Further, the appellant submits that the Court could not determine an issue of trust in a Succession Matter. She relied on the authority In the matter of the estate of Samuel Katheri (2014) where the Court held that it had no jurisdiction to hear and determine a claim of trust and the same ought to be filed in a separate suit at an appropriate Court.



Respondents' submissions

10. The respondents submit that after land Parcel No. L.R Ngariama/Nyangeni/140 was registered in the names of Evans N. Gachewa, the Respondents continued to live and cultivate on the land without any hindrance as the deceased was living with his family at their matrimonial home in land Parcel No. Ngariama/Nyangeni/215. The respondents have built and raised their families on the same land.
11. The fact that Evans N. Gachewa was registered as the owner of L.R No. Ngariama/Nyangeni/140 never disinherited the Respondents. The only reason as to why he was registered as the proprietor of the estate is because there was no other male left in the Respondent's family line and the appellant's husband was the closest male relatives.
12. The respondents submit that the trial Court was correct in finding that they were dependants of the deceased. Their interests in the suit land are protected by Section 29 of the *Law of Succession Act*. They rely on the case of *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* [2016] eKLR where A. Mabeya held that:

“From the foregoing, a dependent under Section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.”

Issues for Determination

13. The Core issue for determination is whether the respondents are dependants of the deceased and hence entitled to the suit land.

Analysis and Determination

14. The issue for determination in the lower Court was whether the respondents/ protestors were entitled to inherit land Parcel No. Ngariama/Nyangeni/140. The Court held that the suit land should be shared among the protestors having found that they were dependants. This position is impugned by the appellant who urged that the trial Court was wrong to find that the respondents were dependants of the deceased when in fact they never depended on him in any way.
15. It is clear from the evidence availed that land Parcel No. Ngariama/Nyangeni/140 was registered in the names of Njege Njuni on 22nd August, 1957 as indicated in the copy of the green card. It is not in dispute that the Respondents were born and brought up on L.R Ngariama/Nyangeni/140. Their mother and father died in the years 1961 and 1962 respectively. Their only brother also died in the year 1973 and was buried in their father's land L.R Ngariama/Nyangeni/140. However, the appellant's position is that L.R Ngariama/Nyangeni/140 was allocated to her late husband in Succession Cause No.4 of 1974 at Gichugu and the trial Court had no jurisdictions to sit and reverse the said findings.
16. The petitioner/appellant testified that she occupied land L.R Ngariama/Nyangeni/140 after the Succession Cause No.4 of 1974. She stated that her husband was given the land as the next of kin of his brother, that the protestors came to Court and stated that they did not want the land. Her husband did not chase or evict the protestors from the said land; allowed them to build semi-permanent houses on the land. Further, she stated that the protestors occupied two acres of the land. Lastly, she stated that she did not live on the land.
17. The 1st protestor/respondent testified that the appellant's husband allowed them to continue using the land after the Succession Cause No.4 of 1974 at Gichugu. She had been married by 1974. She stated



that in the Succession Cause, they allowed the appellant's husband to hold the land in trust for them. However, her sister occupies 2 acres of the suit land.

18. The 2nd protestor/respondent testified that they were utilizing the land when the appellant's husband, Evans Gachewa, died. She had planted coffee and tea and her sons have built in the land. She stated that she has been utilizing half of the land and the other half has been utilized by the appellant. Her late brother John was buried on the land. Further, the appellant does not live on the said land but on another parcel where she lives with her family.
19. Thus, the question of dependency arises: Section 29 of the *Law of Succession Act* provides as follows on the meaning of dependant:
 - a. "dependant means: 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;" [Emphasis added]
20. In this matter the respondents have demonstrated that they had always occupied L.R Ngariama/Nyangeni/140 and that the deceased allowed them to build temporary houses and farm the land. Further, the land belonged to their father until it was transferred to the deceased after Succession Cause No.4 of 1974. To the extent that the respondents whole livelihood depended on the said land, they became the deceased's dependants after the land was transferred to him b his act of allowing them to remain on it and to live off it as his behest.
21. In the case of *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* [2016] eKLR where it was held that a dependent under Section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise that aspect was proved by the respondents. It is not the mere relationship that matters, but proof of dependency that counts.
22. Moreover, the protestors stated that according to the Kikuyu Customary Law, girls were not allowed to own land. Consequently, that the land was held by their father's brother in trust for them. The appellant's husband after acquiring the land following the Succession Cause No.4 of 1974 did not evict the protestors but allowed them to live on the land. They remained on the land as dependants of the deceased, Evans Gachewa.
23. In the decision below, the Court held that upholding and affording unsubstantiated custom that offers differential treatment is unconscionable. See the case of *In Re the Estate of Mugo Wandia (Deceased)* [2009] eKLR where it was stated:

"...the petitioner had a duty to adduce expert evidence on Kikuyu customary law to establish that the applicant is not entitled to her father's estate. In the absence of such evidence I find the submissions that the applicant should be left out discriminatory and the existence of such custom and its requirement would not pass the threshold of the provisions of the *Judicature Act*. Besides the *Judicature Act* there is *the constitution* of the Republic of Kenya. Under section 82 of *the Constitution* discrimination of the basis of sex is prohibited. Upholding and affording unsubstantiated custom that offers differential treatment to the petitioner is unconscionable."



Conclusions and Disposition

24. Ultimately, the appellant cannot rely on the decision of Succession Cause No.4 of 1974 to deny the respondents their right over their deceased's father's estate. She admitted in Court that her husband did not chase or evict the protestors from the land. Further, she stated that the protestors continue to use 2 acres of the land.
25. In the result, I am not persuaded that there is a justification for interfering with the Judgment of the lower Court, which is hereby upheld.
26. The appeal is hereby dismissed. Each party to bear its own costs.
27. Orders Accordingly.

DELIVERED VIRTUALLY AT KERUGOYA HIGH COURT THIS 3RD DAY OF APRIL, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Ms. Wanjiru for the Applicant
2. Mr. Kahiga for the Respondent
3. Francis Munyao - Court Assistant

