



REPUBLIC OF KENYA



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In re Estate of the Late Benson Mwangi Kimanga alias Mwangi Kimanga (Deceased) (Succession Cause E1445 of 2020) [2025] KEHC 4153 (KLR) (Family) (3 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E1445 OF 2020**

HK CHEMITEI, J

APRIL 3, 2025

**IN THE MATTER OF THE ESTATE OF THE LATE BENSON
MWANGI KIMANGA ALIAS MWANGI KIMANGA (DECEASED)**

BETWEEN

**ALICE WANJIKU MWANGI 1ST APPLICANT
MARY WAITHERA MWANGI 2ND APPLICANT
JANE WAMAITHA MWANGI 3RD APPLICANT**

AND

**STEPHEN MAINA KIMANGA 1ST RESPONDENT
FREDRICK NJORA MWANGI 2ND RESPONDENT
PAUL KIMARI MWANGI 3RD RESPONDENT
JOTHAM GITHINJI 4TH RESPONDENT**

JUDGMENT

1. The estate herein relates to the late Benson Kimanga who died on 17th November 1999. The Respondents filed Succession Cause no 1728 of 2000 which was dismissed by this court, Muchelule J (as he was) for failure to disclose that the deceased had a written Will. The Respondents appealed to the Court of Appeal but they did not succeed.
2. The court had directed them to file probate with a Will annexed which they did after failing at the appellate court. The Applicants whom for the purposes of this cause are objectors filed their objection application dated 5th May 2023 which among several prayers asked the court to deem the purported Will dated 27th June 1994 invalid as it disinherited the 1st wife and her children.



3. In the said objection they prayed that the estate be divided between the two houses which the deceased left behind, that is the house of Alice Wanjiku Mwangi and Prisca Wanjiku.
4. The court gave directions during pretrial and ordered the matter to proceed by way of oral evidence.
5. The Applicants called two witnesses and the Respondents one witness. The court thereafter directed the parties to file their written submissions which they complied.
6. I shall proceed to summarize the evidence as presented by each side.

Applicant's Case

7. Pw1 Alice Mwangi Kimanga testified that she was married by the deceased in 1951 under the tenets of Kikuyu customary law. The ceremony was conducted at Kihitini village Muranga and they later moved to Majengo.
8. That they later moved to Tumaini in Nyandarua where the deceased built a house for her. She said that they were blessed with three children Waithira, Njeri and Nyambura and that the deceased paid for their fees and clothing's.
9. That the deceased was detained and when he came out, she was carrying on with development including running a restaurant before he was detained.
10. When cross examined, she said that he did not have the documentary evidence on the dowry process and all the witnesses had died. She said that she did not go back to the house at Kihutini because it was a mud house and was later demolished.
11. She further on cross examination said that nobody chased her from the home but she went out of her own volition. When the deceased died, she did not attend the funeral.
12. As regards her son who died Paul Kimanga, she said that she buried him without the involvement of the deceased.
13. Pw2 Mary Waithera Mwangi testified that she was the deceased's daughter and she adopted her statement on record.
14. When cross examined about her name, she said that the proper name ought to be Mary Waithera Mwangi as per her identity card and that she was born in 1973 and pursued her studies till class four.
15. She said that she was employed as a house help so that she could help her siblings as her mother had mental problems.
16. Although she knew when the deceased died, she did not attend his burial.
17. She further said that her mother had other children whom she did not see and they had died and she did not know where they were buried.
18. When reexamined she said that their suffering was not because of their parents but their own and that they stayed with their grandmother.
19. Pw3 Kamanga Ezra Murithi testified and adopted his statements. When cross examined, he said that he was born in 1948 and that during the dowry negotiations the children are not allowed in and therefore he did not get closer.
20. That the booklet which contained the minutes of the negotiations got burned in 1968 although the dowry was brought later.



21. He said that the deceased married his sister Alice and they stayed for long before getting their first child in 1973.
22. When reexamined he said that Mary Waithera was the Alice's first child.

Respondent's Case

23. The applicant Stephen Maina Kimanga testified that he was among the three executors /administrators of the estate and that he was the son to the deceased. That there was a Will done by one Kimani Githongo Advocate sometimes in 1994 which he was not part of it and that he only saw it in the year 2000 when it was read to them.
24. When cross examined, he said that he was born in 1958 and that he did not know when his parents married.
25. That Jotham Githinji was a brother to his father and after his death he did not attend his funeral as it was not a must.
26. He said that they earlier filed succession proceedings which the court nullified because they had been filed yet there existed the Will and thus, they had to start afresh and therefore the reason they delayed was because there was an appeal.
27. He denied knowing Alice or Ezra and that he was not aware whether Ezra worked at Runyeki hotel owned by the deceased and others.
28. That the Tumaini farm was bought in 1963 and he went there in 1978 and that he did not know who was living there before then.
29. He denied that he was present when the Will was written and when it was read.
30. When reexamined he denied that the Will was fake and that there was no notice to produce any document.
31. The court directed the parties to file written submissions and as indicated above they complied.

Applicants Submissions

32. The Applicants identified several issues for determination the central of which is the question of whether the deceased died testate; whether Alice was the deceased wife and whether her children were therefore deceased's and thus entitled to the share of the estate.
33. On the first issue the Applicants contented that there was no existence of the Will as the same was not produced in court and that the maker of the will Advocate Githongo was not called to produce the same.
34. On the question of whether Alice was the deceased wife the Applicants relied on the affidavit of the late Jotham Githinji the deceased brother to argue that indeed the deceased had married her under the Kikuyu customary law as all the rites were performed and that the deceased stayed with the Applicants in various places.
35. He also relied on the evidence of Ezra Karuga the younger brother of the objector.
36. The third issue of Alice's children with the deceased according to them was buttressed by the evidence of Ezra and Alice who testified that the children were named after the deceased's relatives as per the Kikuyu customs.



37. In view of the above relationship, they were therefore entitled to the share of the estate herein.
38. The Applicants relied further on the provisions of Section 26 of Cap 160 to argue that in as much as an individual has the liberty to make a Will, he must always make some reasonable provisions for the beneficiaries and or dependants. In this case therefore the court must order that they be provided noting that Alice was his first wife.
39. Finally, and because of her entitlement in the estate the Applicant Alice ought to be made a joint administrator of the estate as provided under Section 66 of Cap 160. The Applicants relied on Duncan Kauma & Another v. Irene Lenas Mulunga & Another (2015) eKLR.

Respondents Submissions

40. The Respondents on the other hand disagreed with the Applicants arguing that the Will was valid and that the court relied on it while granting grant to the executors. That in any case there was no notice to produce the same and that there was nothing from the applicant's evidence that it was fraudulently done.
41. The Will was thus valid as provided under Section 11 of the Act and during the hearing nothing was raised concerning its invalidity.
42. As regards the marriage of the deceased to Alice the Respondents argued that there was no evidence. The only evidence was of Ezra Karuga who was a minor by then and was not even allowed to participate in the proceedings. By then he was 11 years old.
43. Jotham Githinji whose affidavit was later admitted was 7 years old when the traditional ceremony was conducted and therefore according to them his testimony which was not tested by way of cross examination was unreliable.
44. In this score they relied on Njoki v. Mutheu (1985) KLR 874.
45. They submitted while relying on Beatrice Rugamba v. Fredrick Mutegi & 5 Others (2016) KLR that the Applicants were never dependants of the deceased as they did not lay any evidence of such support.
46. They prayed for the objection to be dismissed.

Analysis And Determination

47. I have carefully perused the proceedings herein, the history of the matter, the evidence adduced by the parties as well as the submissions on board.
48. The main issues of contestation as were well captured by the parties are the question of the validity of the Will, the marriage between Alice and the deceased and whether the Applicants were dependants of the deceased and therefore entitled to the share of the estate.
49. On the first issue of the Will, it is not in dispute that the Respondents had earlier filed Cause Number 1728 of 2000 which this court Muchelule J (as he was) dismissed it for the simple reason that they filed it intestate yet there was a valid Will.
50. They Respondents moved to the Court of Appeal and they lost. That necessitated that they come back to the drawing board, hence this cause.
51. It has been submitted by the Applicants that there was no valid Will as the same was not produced as evidence in court. I think this argument cannot stand for the reason that this court (Odero J) issued a



grant dated 3rd May 2023 in favour of the Respondents. I believe that the court was satisfied that there was a valid Will on record by the time it issued the above grant under form P&A 45.

52. Ordinarily and administratively for that matter before the cause is gazetted it is one of the requirements that a party provides the court with the original Will where it is alleged that there was one. To turn around and submit that there was no original Will is disingenuous on the part of the Applicants.
53. More importantly there was no request to have the original Will produced either during pre-trial or during hearing. The matter proceeded under an assumption of all the parties including the Applicants that they were contesting a Will which was already on record. If there was such an argument, I think the Applicants would have demanded that the same be produced.
54. This goes with the argument that the maker of the said Will ought to have been called. I find that in a situation where the parties and specifically the Applicants acquiesced one would assume rightly that there was no reason to call the maker of the said Will.
55. Looking at the proceedings there was no time where the Applicants doubted the said Will except when they asked DW1 where the original Will was.
56. In the premises I do not agree with the Applicants on this score. What is available on record remains the valid Will and if the court requires its production in the usual manner, then it shall make such order.
57. The second issue was whether Alice was married to the deceased. As far as the evidence on record is concerned there was nothing exhibited indicating the Kikuyu customary marriage was conducted in 1951. I agree with the Respondents that the two persons namely Ezra Karuga and Jotham Githinji were minors at the time and they did not or were not allowed to witness if indeed there was such.
58. The affidavit of Jotham Githinji which was admitted posthumously was not tested by way of cross examination. It becomes difficult for the court to rely on its veracity.
59. On the same score I did not find sufficient evidence by Alice to suggest that she was present during the said ceremony. Being a subject of the ceremony, it behooved upon her to have shed more light on what transpired, if any, in 1951 for instance those who participated in the ceremony and how it was conducted. She left it to the two minors then, to shed some light which they could not.
60. I have perused the evidence of Alice as well as Mary Mwangi, Pw2, regarding how they stayed with the deceased. There was no evidence to exhibit such a connection between the deceased and Alice in terms of husband and wife.
61. She for instance testified that dowry was paid when she was already married. If that is true, I find that even if the dowry record book burned in 1968 as alleged by Ezra there ought to be other persons who may have witnessed.
62. Secondly the Applicants stayed in a life of abject poverty. The children were unable to complete school despite the ability of the deceased who was fairly rich to help them.
63. Alice testified that she left on her own volition as the deceased did not chase her. To make the matters worse, in my view, she went on to state on cross examination that;

“ ... Nobody chased me from my house/home. I left on my own volition. I do not know when he died. I did not attend his funeral...”
64. If she was a lawful wife as she claims then the least of all she would have done is to attend to her husband’s funeral. She did not even know when he died!



65. Further when her son Paul Kimanga died the deceased was not involved. She said that:-
- “...He did not bury him because I went and took the body and went to bury”
66. If the deceased was a father to her son, I guess it was prudent in the usual cause of events to at least notify him of the incident and allow him to participate or not in the interment.
67. Pw2 in as much as she claims to be the daughter to the deceased and named after the deceased relatives did not attend his funeral. Again, that raises serious questions as to relationship with the deceased. If truly they were close it appears to me that there was no relationship of daughter and father.
68. Pw2 testified that she went looking for some house help work so that she could assist her siblings. Was she really the daughter of the deceased taking into consideration that she was born in 1973 and I reckon that by then the deceased may have been well endowed judging by the vastness of the estate?
69. In any case and as admitted by Alice there was no evidence that they demanded any upkeep from the deceased either through a legal process or other means.
70. Lastly on this issue of relationship the stay of the Applicants in Tumaini Nyandarua with the deceased was not made clear. The only scanty information are some set of photos of the house which was allegedly build by the deceased. There was no iota of evidence that the deceased stayed with Alice as husband and wife in Tumaini or at all. She of course later moved to her home in Muranga.
71. There was some contention that Alice suffered from some mental illness. That evidence was not corroborated and it was never connected to her relationship with the deceased.
72. In light of the above deductions, I’m not convinced that the Applicants have proved any dependency to the deceased. Their history with the deceased is so scanty such that in the cause of time Alice went to her parent’s home in Muranga. There is no evidence of how she found herself in Tumaini and how and why she left for Muranga which is her parents’ home.
73. The sum total of my findings therefore is that the Will before this court has never been challenged in want or form. Section 11 of Cap 160 in acknowledges the rights of a party to make testamentary choice as long as the same remains within the following parameters.

“No written will shall be valid unless—

- (a) 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;
- (b) 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 thereby to give effect to the writing as a will;
- (c) 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.”



74. For the above reasons the objection proceedings are hereby disallowed with no order as to costs.

75. The grant be confirmed as per the deceased will dated 27th June 1994.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 3RD DAY OF APRIL, 2025.

H K CHEMITEI

JUDGE

