



**In re Estate of Jeremiah Nyaga Kiura (Deceased) (Civil Appeal
E080 of 2023) [2025] KEHC 4211 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E080 OF 2023
RM MWONGO, J
APRIL 2, 2025**

BETWEEN

PAULINE MUTHANJE KARANGA APPELLANT

AND

ALUISIA WANJA KAMUNYORI RESPONDENT

JUDGMENT

1. Following the death of the deceased on 1st November, 2013, the respondent in her capacity as wife of the deceased petitioned in the lower court for a grant of letters intestate. A grant was issued to her on 15th March 2021. Subsequently, she filed summons for confirmation and a certificate of confirmation of grant was issued on 23rd September 2021, distributing the estate as indicated thereon.
2. The appellant filed summons dated 18th October 2021 seeking revocation of the grant issued to the respondent.
3. After hearing the parties, the trial Magistrate in a ruling dated 8th December, 2023 dismissed the summons for revocation, ruling that the allegations in the summons were not proved. The grounds for revocation in the summons dated 18/10/2021 were:
 1. “That the proceedings to obtain the grant by the administrator/respondent herein, the subsequent confirmation and the distribution of the estate of the deceased were fraudulent and false as the respondent concealed from court material facts that the applicant herein and her children Austin Mugendi Karanga Nyaga and Adrian Muthomi were beneficiaries of the estate of the deceased by virtue of them being wife and children respectively which facts if disclosed to the Court the court would not have entertained the succession.
 2. The respondent as the administrator failed to inform the applicant and her children when she filed the succession cause herein despite the fact that she knew the applicant and her said children as the 2nd house of



the deceased herein therefore lying to the court and thereby obtaining the grant by means of untrue allegation of a fact essential in point of law to justify the grant.”

4. In her replying affidavit, the respondent stated that the appellant was a stranger to the estate and she did not deserve any stake in it. She refuted the appellant’s claims that the deceased sired children with her.

The Appeal

5. Dissatisfied with the trial Court’s ruling, the applicant filed a memorandum of appeal dated 14th December 2023, seeking the following orders:
 - a. That the Ruling in Siakago Succession Cause No E028 of 2021 delivered on the 8th December 2023 be set aside;
 - b. That the honourable court do allow the summons for revocation of grant dated 18th October 2021; and
 - c. That costs of this appeal and costs of the lower court case be awarded to the appellant.
6. The appeal was premised on the following grounds:
 1. The learned Trial Magistrate erred in Law and in fact when he held that the appellant did not prove that she was married to the deceased Nyaga Kiura whereas the appellant proved beyond reasonable doubt that she was a wife of the deceased;
 2. The learned trial Magistrate erred in Law and in fact when he found that the chief did not know the appellant or even the relationship of the appellant with the deceased and stating that the chief needed to be called as witness in court;
 3. The Learned trial Magistrate erred in both Law and in fact when he disregarded the evidence of the appellant and her witness that dowry had been paid by the deceased to make the appellant a wife and that the 2 wives, the appellant and the respondent, did burial preparations and buried the deceased together;
 4. The Learned trial Magistrate erred in both Law and in fact by finding that the 2 children of the deceased and the appellant were not dependants of the deceased as per the provisions of section 29 of the *law of succession Act* and finding that the appellant was supposed to prove that the deceased was maintaining the children contrary to provisions of section 29(a) of the *law of succession Act*;
 5. The Learned trial magistrate erred in Law and in fact by finding that the paternity of the children of the deceased was not proved whereas the appellant produced birth certificates of the 2 children as evidence that the deceased Nyaga Kiura was the father and adduced evidence that the deceased was the father of her 2 children;
 6. The Learned trial magistrate erred in Law and in fact by finding that the appellant’s children were not beneficiaries of the estate of the deceased;
 7. The Learned trial Magistrate erred in both Law and in fact when he disregarded the evidence of the appellant and her witnesses that the appellant was in occupation of part of the estate of the deceased and was settled in the said land parcel no. Mbeere/Kirima /3670 by the deceased prior to his death;



8. The Learned trial Magistrate erred in both Law and in fact as he disregarded the evidence of the appellant and her witnesses that the parties herein had jointly begun the succession process before the respondent went behind the appellant and filed the current succession cause secretly; and
9. The Learned trial Magistrate erred in both Law and in fact when he dismissed the appellant's application to have the grant revoked whereas the appellants had proved grounds to have the grant revoked as per the provisions of section 76 of the *Law of Succession Act*.

Hearing of the Summons for Revocation dated 18th October 2021

7. The matter was heard viva voce in the trial Court. This appellate court's duty is to re-examine and re-evaluate the evidence adduced at the trial Court and come to its own conclusions. The evidence was as follows.
8. The appellant was PW1. She testified that she was married to the deceased under the Ki-Embu customary laws in 1997 and they lived together in Mombasa. She said that at the marriage ceremony, the deceased's friends and brothers were in attendance. Her children were born in 1999 and in 2008. She testified that when the deceased was still alive, she never met the respondent in person but they used to speak on phone, and the respondent was well known to her. She stated that the deceased showed her land parcel number Mbeere/Kirima/3670 where she farms and this could be confirmed by one of the brothers of the deceased.
9. She disagreed with the respondent when they went to the chief for an introductory letter to initiate succession proceedings and the respondent tried to take away her land. The respondent obtained a letter from the chief which did not include her. Thus, she went back to the Chief and the letter issued to the respondent was revoked and another one issued to her.
10. In cross-examination, she stated that the chief who wrote the letter for the respondent did not know the appellant. The chief wrote the second letter after she introduced herself as the 2nd wife of the deceased. She stated that she had 2 children with the deceased and he introduced her to the respondent through a phone call.
11. She started using the land parcel number Mbeere/Kirima/3670 after the death of the deceased and she had not established her home on it. The respondent reported her to the police and she was summoned over the issue. She stated that following the death of the deceased, she shared the WIBA and NSSF with the respondent, who became unco-operative when succession proceedings were initiated. She produced her children's birth certificates in support of her assertion that the deceased sired them.
12. PW2 was Jackson Njuki Kiura, a brother of the deceased. He stated that the appellant and the deceased got married under the Ki-Mbeere Customary Laws and they were blessed with 2 children. He supported the appellant's case that she and her children deserve to benefit from the deceased's estate. In cross-examination, he stated that when the deceased was marrying the appellant, he was one of the elders who presided over the ceremony since their parents had died. The others were his brothers Jackson, Abiud Kamau and James Gachoro. He also stated, twice, that the appellant got married in 1978; and that the appellant had leased out the land he was given by the deceased to one Kimani.
13. He stated that both the respondent and applicant were living in Mombasa but in different estates, and they knew each other although the respondent was married to the deceased earlier than the appellant. That the children of both parties were all sired by the deceased. The chief's letter obtained by the



appellant was from Kianjiru, where she lived. He did not know how the letter from the chief of Mbeti South location was obtained.

14. PW3 was Abiud Kamau Kiura, another brother of the deceased. He testified that the parties herein are both wives of the deceased with whom he had children. That the appellant was married under Ki-mbeere customary law. That they were both supposed to be involved in the succession proceedings but the respondent failed to involve the appellant. That the estate of the deceased was supposed to be shared equally between the 2 houses but the respondent cut the appellant off and disinherited her.
15. In cross-examination, he stated that the appellant's children did not receive land from the Marigu Clan because at the time of adjudication, she was not yet married to the deceased. That when the appellant got married to the deceased, dowry was paid to her parents by PW2 and other members of the deceased's family. However, he was not present at the ceremony, but was at work. He did not know what was taken as dowry; and that the respondent was married in 1995 as the first wife of deceased. Appellant was married about two (2) years later.
16. The deceased did not build a house for the appellant in his home but he gave her land parcel number Mbeere/Kirima/3670 which she leased after the death of the deceased in order to raise school fees for her children. On re-examination, he stated that the appellant was married in 1978 and the respondent in 1975; that both the appellant and the respondent were involved in the burial arrangements of the deceased. The dowry paid to the appellant's parents during the marriage was a container of honey and grapes. This was done about 2 years after he had married the respondent.
17. The respondent testified as DW1. She stated that she married the deceased in 1986 and had 3 children with him. She said that she was living in Mombasa with the deceased until 1995 when he relocated her to Kianjiru to live with his parents. Later, he moved her to Gachuriri in 1998 but she occasionally visited the deceased in Mombasa. During those visits, she never saw the appellant at his house.
18. She denied that the appellant was the deceased's 2nd wife and stated that the appellant was being used by the deceased's family to take away her property. She said that her own children were given land by the Marigu Clan from which the deceased hailed. She denied knowing the appellant or meeting her to discuss the estate of her husband.
19. In cross-examination, she stated that she did not know with whom the deceased lived when he returned to Mombasa in 1995 and at the time of funeral arrangements, she did not see the appellant. she denied meeting the appellant at the chief's office in Kianjiru. She did not involve the appellant in the succession proceedings because she was not known to her. She did not know whether or not the appellant was married to the deceased.
20. Kiriamburi Zacharia Kivuti, the deceased's paternal uncle testified as DW2. He stated that the deceased only had one wife, who is the respondent, and they had 3 children. He only heard rumors of a 2nd wife at the deceased's burial, but to his knowledge, that is not the case, otherwise, he would have known the truth. According to him, the appellant's narrative is being fueled by the deceased's brothers whose intention is to remove the respondent from her husband's land.
21. DW3 was Stanley Njiru Nguru. He stated that the deceased married the respondent under Ki-Mbeere customary laws and he paid dowry in the form of a drum of honey and a he-goat. He stated that he also helped the deceased to acquire his Gachuriri land on which he built his home where the respondent moved. He was not aware of any other wife purportedly married to the deceased. On cross-examination, he stated that he did not know whether the deceased had a second wife because he lived in Mombasa most of the time. The deceased visited him whenever he went home and he involved him in almost everything he did.



22. DW4 was John Kiura Ngari, the deceased's cousin, who stated that the deceased did not at any point marry the appellant. That PW2 tried to evict the respondent from the land parcel number Mbeere/Kirima/3670 and at the time, rumour had it that he wanted to sell that land. On cross-examination, he stated that when the deceased died in Mombasa, his body was brought home by his family members and co-workers, among them were the parties herein, who travelled in the same vehicle.
23. At the time of the funeral, there were rumours that the appellant was the respondent's wife but the deceased's family did not get a chance to interrogate her on the subject because she left immediately after the burial. According to him, the deceased never introduced the appellant as his other wife.
24. The trial court considered the evidence and submissions by the parties. In its ruling, the court relied on the dissenting judgment in the case of *Mary Wanjiru Githatu v Esther Wanjiru Kiarie* (Court of Appeal at Eldoret in Civil Appeal No. 20 of 2009), and the findings in *Mary Wanjiku Gachigi v Ruth Muthoni Kamau* [2003] KECA 144 (KLR) and *In re Estate of John Kiruki Wanuthu (Deceased)* [2022] KEHC 2042 (KLR). The court found that the appellant had failed to prove that she was married to the deceased and that her children were not his proven dependants within the meaning of section 29 of the *Law of Succession Act*. The trial magistrate noted that the allegations made by the appellant were not supported with documents to prove paternity. The summons for revocation was thus dismissed.

Submissions in the Appeal

25. The parties filed written submissions to canvass the appeal as directed by the Court.
26. The appellant submitted that she is a wife of the deceased and that she was given part of his last benefits from WIBA and NSSF following his death. The deceased gave her parcel number Mbeere/Kirima/3670 and the respondent does not use that land. She relied on the testimonies of PW2 and PW3 who stated that the appellant and respondent were both present before the chief in Kianjiru for purposes of obtaining an introductory letter. She urged the court to consider that the testimony of DW2 supported her position since he said that the appellant was among the mourners who brought the body of the deceased home from Mombasa.
27. Moreover, the brothers of the deceased stated that the appellant was married to the deceased. She relied on the provisions of Rule 26(1) of the Probate and Administration Rules and section 40(1) of the *Law of Succession Act* and stated that she ranks the same as the respondent when it comes to administration of the estate of the deceased. She stated that from her testimony, her 2 children are the deceased's and there was no need for dependency to be proved.
28. The respondent submitted that at the trial court, the respondent failed to prove the grounds for revocation of the grant as provided for under section 76 of the *Law of Succession Act*. Reliance was placed on sections 107 of the *Evidence Act* for the argument that the standard of proof was not met. According to her, the testimonies in support of the appellant's case were inconsistent and the trial court's finding was sound. She relied on the case of *Beth Nyambura Kimani v Joyce Nyakinywa Kimani & 2 others* [2006] KECA 348 (KLR) and argued that the alleged marriage between the appellant and the deceased was not proved thus it did not exist. That the place where the deceased was buried in his home is in Mbeti South location, whose Chief rightly issued the introductory letter.
29. If the appellant obtained another letter from the Chief in Kianjiru simply because the land she was interested in is located there, that is irregular, and it should be held as such. It was her testimony that since the appellant's children are adults, their testimony would have helped in the case but they were not called upon to testify. She relied on the case of *NEO v HWK* [2018] eKLR where it was held that a birth certificate is not proof of paternity. She urged the court to uphold the findings of the trial court and dismiss the appeal.



Issues for Determination

30. The core issues for determination are:
1. Whether or not the Ruling in Siakago Succession Cause No E028 of 2021 delivered on the 8th December 2023 should be set aside; and
 2. Whether the summons for revocation should be allowed.

Analysis and Determination

31. As earlier stated, this Court's role is to re-examine the evidence on record and come to its own conclusions. This was stated in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 where the court held:

"...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

32. The appellant sought that the grant be revoked because she was not included in the succession proceedings yet she alleges she is a wife of the deceased, married under Ki-Embu Customary Law in 1997. PW2 and PW3 stated that the deceased indeed married the appellant under customary law and dowry was paid. The respondent refuted this, stating that she did not know about her late husband having married a 2nd wife. She only knew about the appellant when she filed the summons for revocation of grant.
33. DW2, DW3 and DW4 stated that even though the deceased was living in Mombasa, they would have known if he had another wife because he was close to them. The testimony in support of the respondent's case shows that the deceased lived in Mombasa until 1995 then he moved his wife, the respondent, back to the village to live with his parents. Three (3) years later, he built her a home in Gachiriri where the respondent relocated to and he would visit since it was his home.
34. The deceased mostly lived and worked in Mombasa and the respondent stated that she used to frequently visit him there but she never saw the appellant. Regarding this, the appellant stated that the deceased introduced her to the respondent through a phone call. According to the appellant, they know each other well and that they shared the deceased's work benefits following his death through a road accident. They travelled in the same vehicle during the deceased's funeral when his body was being brought home for burial.
35. As to whether the appellant was a wife of the deceased, according to the Section 3(1) of the *Law of Succession Act*, "spouse" means a husband or a wife or wives recognized under the *Marriage Act* (Cap. 150); "wife" includes a wife who is separated from her husband. The alleged marriage between the appellant and the deceased was said to have been conducted under African customary law. PW2 and PW3 testified that they attended the traditional ceremony of marriage. However, whilst the appellant asserted that she got married in 1997, PW2 in cross examination twice said she got married in 1978, and also that in 1998 when she got married, his parents were alive. On his part, PW3 in re-examination stated that the appellant was married about two years after the respondent's marriage in 1995. That would make it 1997. There is therefore no consistent evidence as to when the appellant allegedly married the deceased.



36. PW2 said he was part of the delegation that took dowry to the appellant's parents. PW3 denied accompanying the delegation that took the dowry as he was at work, but said he knew that they took honey and grapes according to the relevant customs. DW2, DW3 and DW4 did not know for sure whether the deceased could have married another wife since he, the deceased, lived in Mombasa most of the time while they lived in Embu.
37. The burden of proof lies on the alleging party. This is stated clearly in Sections 107-109 of the *Evidence Act*, thus:
- “ 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.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
38. The standard of proof is on a balance of probabilities. In the case of *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] KECA 612 (KLR) the court stated;
- “ That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not.’ Thus, proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”
39. The marriage of the deceased to the respondent is not in contest here. What is in issue is the appellant's assertion that she is the wife of the deceased and that her children are his. However, the evidence for the marriage of the appellant to the deceased is inconsistent, inconclusive and not credible. What appears more likely is that since the respondent and the deceased lived in separate towns most of the time, there is a strong probability that the deceased co-habited with the appellant in Mombasa and likely sired children with her, but meant to keep her away from the respondent deliberately by settling her in Mombasa. Further, PW3 stated in cross-examination that the appellant used to go to the deceased's farm but she never brought her children with her. From all the evidence on record, there is a very high probability that the appellant was indeed co-habiting with the deceased, married or not.
40. As for the children of the appellant, she produced one birth certificate in support of her averment that both her children were sired by the deceased. The sole birth certificate produced was for A.M (a minor).



It indicates that A.M was born on 6th September, 2008 and that that the deceased is his father. Section 3(2) of the [Law of Succession Act](#) provides as follows:

“(2) 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.” [Emphasis supplied]

41. A birth certificate is proof of paternity, but not the only or final proof. (see *NEO v HWK* 2018 eKLR). I agree with the position that the birth certificate is, at least prima facie, proof of paternity, and I so hold. Accordingly, A.M is hereby recognized as the deceased’s child in the absence of evidence to the contrary.

42. The respondent disputed that the appellant’s children were dependants of the deceased. Dependants are provided for under section 29(a) of the [Law of Succession Act](#) as follows:

“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”

43. In my view, given this provision, the appellant’s child A.M is a dependant of the deceased. His paternity has not been challenged through any further means. However, though there may have been cohabitation of the deceased and appellant, no evidence has been availed to establish a presumption of marriage.

44. The Supreme Court in *Pet 9 of 2021 Mary Nyambura Kangara v Paul Ogari Mayaka* [2023] KESC 2 (KLR) laid out strict criteria under which the Court may presume marriage. They are:

- i. That parties must have had the capacity to enter a marriage and they did so in effect.
- ii. That there is long cohabitation of a man and woman with a general reputation as husband and wife.
- iii. That there must be consent by both parties to contract the relationship; and
- iv. That Parties must have intended to marry.

45. In the present case, no clear or sufficient credible evidence was availed by the appellant that there was consent by both parties to contract a marital relationship or that the parties intended to marry. I am therefore unable to find that the deceased and the appellant were married or presumed to be married.

Conclusions and Disposition

46. Given the discussion herein, as to whether the ruling of the trial court should be set aside, it is my view that the ruling should indeed be set aside, since the minor A.M (now an adult) has been held to be a child of the deceased. It is thus prudent that the grant be revoked because the evidence satisfies the conditions set under section 76 of the [Law of Succession Act](#). The deceased’s child A.M is entitled to enjoy the same privileges as those provided for all other children of the deceased under the [Law of Succession Act](#).

47. Accordingly, the orders that commend themselves in this case are:



1. The Ruling in Siakago Succession Cause No E028 of 2021 delivered on the 8th December 2023 is hereby set aside;
 2. Summons for revocation of grant dated 18th October 2021 is allowed to the extent that provision shall be made for A.M, the deceased's child.
 3. The grant of letters of administration issued to the respondent in the estate of the deceased on 15th March 2021 are revoked and the certificate of confirmation of grant issued on 23rd September 2021 is set aside only for purposes of making provision for A.M.
 4. A fresh grant may be issued in the joint names of the appellant and the respondent in the estate of the deceased;
 5. The joint Administrators are hereby directed to file fresh summons for confirmation of the grant within 45 days of the judgment to provide for A.M.
48. Orders accordingly.

Delivered, dated and signed at Embu High Court this 2nd day of April, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Kamochu holding brief for Ndeke for Applicant
2. Mwinja holding brief for Mageto for Respondent
3. Francis Munyao - Court Assistant

HCCA NO.E080 of 2023 – Pauline M. Karanga - v - Aluisia W. Kamunyori {Judgment} R. Mwongo, J Page
6 of 6

