



REPUBLIC OF KENYA



In re Estate of Monica Katei Kithinga (Deceased) (Succession Appeal E001 of 2024) [2025] KEHC 5945 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5945 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION APPEAL E001 OF 2024**

EN MAINA, J

MAY 8, 2025

IN THE MATTER OF THE ESTATE OF MONICA KATEI KITHINGA (DECEASED)

BETWEEN

PAULINE MUTIO KITHINGA 1ST APPELLANT

KYALO KITHINGA 2ND APPELLANT

AND

JACINTA MWIKALI NDUKU MUTIE 1ST RESPONDENT

SOLOMON MUTINGA KITHINGA 2ND RESPONDENT

*(Being an Appeal from the Ruling and decree of Hon. P. Wechuli
Principal Magistrate at Kithimani Law Courts in PMCC
Succession No 108 of 2022 delivered on the 11th day of May, 2023.)*

JUDGMENT

1. This appeal arises from a ruling dated 11th of May 2023 which dismissed the Appellant’s application dated 22nd February 2023 for revocation of a grant issued to the Respondents and the confirmation of that grant. The appeal is premised on grounds that-

- “a. The learned magistrate at Kithimani Law Courts grossly erred by dismissing the Applicant’s Summons for revocation of grant of probate issued to the executors on 12th September, 2022 while the Respondent’s filed twin Petitions for grants of representation in one cause, testate and intestate, both Petitions filed the same day, 14th July 2022 which made the Petitions fatally defective, dead on arrival, null and void abinitio.



- b. The learned magistrate grossly erred in law and fact by failing to apply the Kamba traditions in determining the rightful administrators of the estate of the late Monica Katei Kithinga (deceased) who left behind a ‘widow’ under the Kamba traditions of woman to woman marriage referred to as ‘Iweto’ as provided for by the Judicature Act.
 - c. The learned magistrate grossly erred in law and fact by upholding the purported will as having taken precedence over the intestate petition filed by the Respondents while the purported will could not be propounded before the determination of the impact of twin petitions filed in one cause which in itself is a gross illegality and a succession cause mischief on the part of the Petitioners/Respondents who were confirmed as executors.
 - d. The said magistrate erred in law and fact by misapplying section 66 of the Law of Succession Act by creating a bias that the matter which lay before him was a testate application and expressly overlooked the general guide in ascertaining the persons vested with the rights to administer the Estate of the deceased who left behind a widow under the Kamba Customary law on woman to woman marriage known as ‘Iweto’ marriage.
 - e. The learned magistrate erred by failing to issue an order to have the value of the estate of the deceased determined to ascertain whether the Principal Magistrates court had the jurisdiction to entertain the value of the estate of Monicah Katei Kihinga (deceased).
 - f. The decision of the said Magistrate was against the weight of the evidence produced.”
2. By a ruling dated 5th November 2024 my predecessor, Muigai J, directed learned Counsel for the parties to canvass the appeal by way of written submissions and submissions were duly filed. The Appellants were represented by David Mutuku Manyolo Advocate and the Respondents by Mwangale & CO Advocates.
 3. The deceased to whose estate this appeal relates died on 17th March 2021. According to a letter written by the Susan M King’oo SNR Chief of Matuu Location, the deceased hailed from Matuu Location and was survived by one biological daughter, Rosalia Nduku Mutie, also deceased but survived by a son and a daughter. According to the Chief, because the deceased was not blessed with a male child, she married what under customary law is referred to as an Iweto, a woman who begot for her four children all sons. She also married a second Iweto. namely Pauline Mutio.
 4. The deceased left a vast estate comprising several parcels of land situate in Matuu in Machakos County and whose value was an issue raised in this appeal as according to the Appellants the value is beyond the pecuniary jurisdiction of the trial Magistrate. Learned Counsel for the Appellants estimated the value of the assets to be Kes 8 million while in the petition the Petitioners approximated it to be Kes 5 million.
 5. The Appellants also contend that they are the rightful heirs of the deceased being the deceased’s Iweto (customary law spouse/wife) and son of the deceased by customary marriage and accused the Respondents of disinheriting them. Learned Counsel for the Appellants faulted the trial Magistrate of not taking into account the Kamba customary marriage.
 6. Learned Counsel for the Appellants also took issue with the fact that the Respondents brought the succession proceedings first as if the deceased died intestate, then as if she left an oral will before



petitioning for letters of administration with a will annexed. Counsel contended that the Respondents unlawfully vested upon themselves the authority to be the Personal Representatives of the deceased and clothed themselves with the title of executors and thereby transferred all the assets of the deceased to themselves. Counsel disputed that the deceased left a will and argued that the wives of the deceased under customary law and her children by those wives take precedence over the Applicants and the summons for revocation ought therefore to have been decided in favour of the Appellants hence this appeal should succeed. He averred that the law did not envisage a maphrodite petition such as was filed by the Respondents, that there was misrepresentation and concealment of material facts and the grant should be annulled for being flawed and a fraud.

7. While conceding that the deceased begot a biological daughter. Rosalia Nduku Mutie, who is the mother of the Respondents, Counsel argued that that daughter was married and that in the premises the deceased having contracted the two woman to woman marriages, she is survived by a spouse and children who must take precedence over all others. Counsel urged this court to find the deceased did not leave a will, revoke the confirmed grant, make an order that a fresh cause be filed and direct the Appellants to give an account of the estate.
8. Counsel for the Appellants also argued that in view of the value of the estate being approximately Kes 8 million the trial magistrate did not, in the first place, have jurisdiction to hear and determine the summons which is also another ground to allow this appeal.
9. For the Respondent it was submitted firstly, that the deceased having died after the commencement of the *Law of Succession Act* then the estate of the deceased was subject to the Act and not Kamba customary law. Secondly that the deceased left a will whose validity was not contested hence the distribution of her estate is subject to that will and that the proceedings in the lower court were by way of a testate cause. Thirdly that the value of the estate is within the pecuniary jurisdiction of the class of the magistrate who heard the case hence the objection as to his jurisdiction has no basis and this appeal should be dismissed.

Analysis and determination.

10. The application before the lower court was heard by way of affidavits and oral submissions. I have carefully considered the pleadings and proceedings in the lower court including the submissions and the impugned will and ruling. I have also considered the grounds raised in this appeal, the rival submissions, the cases cited and the law. In my view the following issues arise for determination-
 - a. Whether the learned Magistrate had the requisite jurisdiction to hear and determine the Summons for Revocation.
 - b. Whether the proceedings filed by the Respondents in the lower court were flawed hence incompetent.
 - c. Whether there is a valid will.
 - d. Whether Kamba Customary law was applicable to the proceedings.
 - e. Consequently, whether the ruling dated 11th May 2023 should be set aside and this appeal allowed.
11. On the issue of jurisdiction, the petitioner's estimated the gross value of the assets of the deceased to be Kes 5 million. On his part Counsel for the Appellants merely stated it was more than Kes 8 million. No valuation report was annexed by either side. Section 48 of the *Law of Succession Act* limits the power of magistrates to hear succession causes to their pecuniary jurisdiction while Section 49 of the Act limits



their territorial jurisdiction to the last place of residence of the deceased. The last place of residence of the deceased in this case is stated in the death certificate to be Katulani and the SNR Chief for Matuu confirmed that fact in her letter dated 8th July 2022. The learned magistrate was therefore seized with territorial jurisdiction. As for the pecuniary jurisdiction neither side filed a valuation report and as it is also trite that he who alleges must prove and further the Appellants also being the ones who would have lost if they did not prove the exact value, the onus of proof fell upon them to prove that the gross value of the estate exceeded the pecuniary jurisdiction of the court hearing the case. It is my finding that the Appellants have not proved that the magistrate did not have jurisdiction. Being a Principal Magistrate the magistrate's pecuniary jurisdiction is Kes 10 million. Counsel for the Appellants merely stated the value of the estate was more than Kes 8 million. He did not state it was more than Kes 10 million. Therefore, it was not demonstrated that the magistrate did not have jurisdiction. In my considered view he had the jurisdiction to hear the case. In the premises that ground must fail.

12. On whether the Petition filed by the Respondents was competent or not I have perused the record and noted that what they filed on 14th July 2022 was a Petition for Probate or for Letters of Administration with a will annexed. Whereas the record shows that on the same day they filed a form P&A 80 which indicates that the petition was for letters of administration intestate at the top, in the body of that form it is stated that the deceased left a will. It is clear that the intent of the Appellants was to petition for letters of administration with a will annexed. This case has no similarity whatsoever with the case of RE the estate of Festa Lugadiru Abukira (Deceased)[2019]eKLR as there were no twin petitions filed. The fact that the cause was gazetted as an intestate cause was a mistake on the part of the court which cannot be visited upon the Respondents. It was upon the court to issue a corrigendum to correct that error, not the Respondents. It is also instructive that the grant issued was one for Probate of written will. This ground cannot also stand.
13. As to whether there was a valid will, in the case of Re Estate of Murimi Kennedy Njogu (Deceased) it was held as follows-

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

.....

There was no allegation that the above section was not complied with. There are four main requirements to the formation of a valid will:-

- a. The will must have been executed with testamentary intent;
- b. The testator must have had testamentary capacity;
- c. The will must have been executed free of fraud, duress, undue influence or mistake; and
- d. The will must have been duly executed.

Testamentary intent involves the testator having subjectively intended that the document in question constitute his or her will at the time it was executed. There is nothing before me to show that the deceased never intended the said document to be his will. In addition to testamentary intent, the testator must have the testamentary capacity, at the time the will is executed. Generally, it takes less capacity to make a will than to do any other legal act. As guidance, a four-prong test is often used. The testator must:-



- a. Know the nature of the act (of making a will);
- b. Know the “natural objects of his bounty”;
- c. Know the nature and extent of his property;
- d. Understand the disposition of the assets called for by the will.

After evaluating the law, the authorities and the facts of this case, I find that the deceased's will satisfies the above four requirements. Secondly I find that the objector has not alleged any grounds to challenge the validity of the deceased's will.”

14. The onus lay upon the Appellants to prove, on a balance of probabilities, either that the deceased died without a will or that the will annexed by the Respondents was not valid. It is my finding that other than a mere assertion no evidence was adduced to challenge the existence or validity of the will. Moreover, having perused the will I am satisfied that it is a valid. The capacity of the deceased to make it is not in doubt; it is clear as to her intent and it is also properly executed and witnessed. Accordingly, I find no reason to interfere with the finding of the trial magistrate on that issue.

15. In regard to the application of customary law to the estate my finding is that firstly, whereas woman to woman marriages under Kamba customary law are recognized by the law, the deceased having died after the commencement of the *Law of Succession Act* and having left a valid will, her estate was subject to the Act but not to Kamba customary law. My so saying finds support in the case of *Re Estate of Francis Andachila Luta (Deceased) (Succession Cause 875 of 2012) [2022] KEHC 16900 (KLR)* where while dealing with a similar issue the court stated-

“The deceased died in 2010, after the *Law of Succession Act*, cap 160, Laws of Kenya, had come into force in 1981. By dint of section 2(1), the law to apply to the distribution of the estate is the *Law of Succession Act*. The protestor and her witnesses made references to customs, but Luhya customary law is not applicable by dint of 2(1), as that provision ousted the application of customary law to estates of person dying after July 1, 1981.

For avoidance of doubt, section 2(1) of the Laws of Succession Act provides as follows; -

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.”

14. Customary law applies, by dint of section 2(2) of the *Law of Succession Act*, to estates of persons dying before July 1, 1981, and since the deceased herein died after that date, section 2(2) would not apply customary law to his estate. The provisions states as follows: -

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

16. Be that as it may, it is my finding that the issue of Kamba customary law would only have come into play if the deceased had died intestate and the woman to woman marriage had been denied or disputed. Customary law would have applied to prove the relationship of the Appellants to the deceased and hence whether they were beneficiaries to her estate. However, their relationship to the deceased is



not disputed and the deceased has herself acknowledged that relationship in the will. The deceased acknowledges that the 2nd Appellant is a member of her family and states that the 1st Appellant was her concubine and has made provision for both of them in the will. The issue of their relationship to the deceased having been acknowledged by the deceased in the will it does not arise and it cannot be properly said that the court ignored Kamba customary law.

17. The upshot is that this appeal is not merited. It is dismissed with costs to the Respondents. The ruling of the learned magistrate is upheld.

Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY IN MACHAKOS ON THIS 8TH DAY OF MAY 2025.

E. N. MAINA

JUDGE

In the presence of:

Mr. Manyollo for the Appellants

Mr. Mwangale for the Respondents

Geoffrey – Court Assistant

Respondents online

Pauline Mutio Kithinga – in Court

