



REPUBLIC OF KENYA



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In re Estate of Mutaba Kioko alias Michael Mutava Kioko (Deceased) (Succession Appeal E004 of 2023) [2025] KEHC 8434 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION APPEAL E004 OF 2023**

RC RUTTO, J

JUNE 12, 2025

**IN THE MATTER OF THE ESTATE OF MUTABA
KIOKO ALIAS MICHAEL MUTAVA KIOKO**

BETWEEN

JOSEPH MUSEE KASYUMA 1ST APPELLANT

MUTEMI KASYUMA 2ND APPELLANT

MUTINDI KASYUMA 3RD APPELLANT

AND

PETER MUISYO MUTAVA 1ST RESPONDENT

STELLA NDUNGE MUTAVA 2ND RESPONDENT

BENARD WAMBUA MUTAVA 3RD RESPONDENT

(Being an appeal from the Ruling delivered by Hon. Khapoya S. Benson (SPM) on 8th March 2023 in Kithimani Succession Cause No. 24 of 2020)

JUDGMENT

1. This is an appeal against the Ruling of Hon. Khapoya S. Benson (SPM), delivered on 8th March 2023 in Kithimani Succession Cause No. 24 of 2020. In the trial court, the Appellants filed an objection dated 23rd July 2020, together with a cross-petition dated 24th February 2021, objecting to the issuance of a grant and seeking to stay any further proceedings in the matter. It was their contention that they were beneficiaries of the estate of the deceased thus entitled to letters of administration. Further, that the Respondents did not seek their consent when petitioning for the letters of administration intestate.
2. The hearing of the objection and cross-petition proceeded viva voce. Thereafter the trial Court delivered its Ruling on 8th March 2023 wherein it dismissed the objection and cross petition with costs.



3. Aggrieved by the Ruling, the Appellants filed this appeal on the grounds that the Learned Magistrate erred in fact and in law by failing to appreciate the Chief's letter dated 20th April 2020 and the Assistant Chief's letter dated 20th April 2010; misdirected himself when he held that the identity card returned for Agnes Mumbi Mutava belonged to Hagai Othieno Opondo by relying on individual number and not identity card number in the said identification report; erred and misdirected himself when he failed to give due weight to the testimonies of the Objector's witnesses; misdirected himself when he failed to appreciate that the Appellants had settled and lived in the suit property since 1992 without any objection or disturbance from the Petitioners; erred in failing to appreciate that the Late Agnes Mumbi Mutava, the appellants mother was buried by the late Mutava Kioko at his home in Kangundo; erred in failing to appreciate that the deceased and his brothers acknowledged the objectors to be his own biological children; misdirected himself and exhibited biasness and failed to consider submissions by the Appellant hence arriving at a wrong conclusion.
4. The Appellants prayed that the ruling of the subordinate court delivered on 8th March 2023 and all consequential orders and decrees be set aside and vacated and the objection and cross petition be allowed. The Appellants also prayed that the costs of the appeal and the costs of the lower court be awarded to them.
5. The Appeal was canvassed by way of written submissions pursuant to the directions issued on 5th November 2024. The Appellant's submissions are dated 14th February 2025 and the Respondent's submissions are dated 17th January 2025.

Appellants Submissions

6. The Appellants provided a background of the matter and the proceedings before the trial court leading up to the present appeal. They identified four issues for determination: the role of the Chief's letter in succession proceedings; whether the Appellants had proved, on a balance of probabilities, that they are indeed the children of the deceased; whether the Appellants' objection and cross-petition before the trial court ought to have been allowed; and lastly, who should bear the costs of the proceedings.
7. On the duty of the appellate court, the Appellants placed reliance on the cases of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Santosh Hazari v Purushottam Tiwari (Deceased)* [2001] 3 SCC 179. They submitted that, as a first appellate court, this Court has jurisdiction to affirm or reverse the findings of the trial court. They urged the Court to exercise its appellate jurisdiction to the fullest extent by re-evaluating the evidence afresh and departing from the reasoning adopted by the trial Magistrate.
8. On the role of the Chief's letter in succession proceedings, the Appellants submitted that there were two conflicting letters issued by Jane Kisangai, the Chief of Kithimani, dated 20th April 2020 and 18th May 2020 respectively. They relied on the decisions in *Re Estate of Ambutu Mbogori* [2018] eKLR and *Re Estate of Shem Kitanga (Deceased)* [2018] eKLR to underscore the evidentiary significance of a Chief's letter in succession matters. The Appellants argued that such a letter serves to introduce the estate to the court and that courts typically presume that the local administration possesses accurate knowledge of the deceased's family composition, thereby enabling the identification of rightful beneficiaries.
9. The Appellants contended that the letter dated 20th April 2020 listed all the children from both families, including both the Appellants and Respondents. In contrast, the letter dated 18th May 2020 upon which the Respondents relied to petition for letters of administration, strategically omits the Appellants. The Appellants argued that the second letter was deliberately crafted to mislead the court and to exclude them from the list of beneficiaries. They maintained that they approached the court



- with clean hands, armed with a letter that reflects the full composition of the deceased's family, unlike the Respondents. Consequently, they urged the court to find that the second letter was intended to mislead the court and to facilitate the disinheritance of the Appellants.
10. On the question of whether the Appellants proved, on a balance of probabilities, that they are the children of the deceased, the Appellants submitted that it is not in dispute that a marriage existed between the deceased and their mother, Agnes Mumbe Mutava, who passed away on 18th February 1988. It is equally not disputed that the deceased was married to the Respondents' mother and was the father of the Respondents. The Appellants submitted that conventional methods of proving paternity such as DNA evidence and birth certificates were not practical in the circumstances of this case, and that such forms of evidence would not be conclusive given the historical and customary context. They therefore argued that alternative forms of proof, such as oral testimony and sworn affidavits, are sufficient to establish that they are indeed children of the deceased.
 11. The Appellants contended that the marriage between their mother and the deceased took place in the 1970s under Kamba customary law, which did not yield a formal marriage certificate, as is common in statutory unions. They submitted that the existence of the marriage is supported by witness statements and affidavits from individuals familiar with the union, notably an affidavit sworn by Peter Mulwa Kasema, a nephew of the deceased, who affirmed that the marriage took place. They further relied on the affidavits of the 1st Appellant and a supplementary affidavit dated 8th November 2020, all of which confirm the marital relationship.
 12. Additionally, the Appellants submitted that their mother adopted the name of the deceased, raising a legitimate question as to why she would do so unless she was indeed his wife. It was also not disputed that she was buried on the deceased's property in Kangundo, a burial said to have been conducted by the deceased himself. They asserted that the deceased had settled them on the subject property, where they had lived peacefully since 1991. They claimed that the Respondents, were aware of their presence on the land and only raised objections when they attempted to sell the land without the Appellants' knowledge, prompting the filing of legal proceedings to prevent the sale. Summarily, the Appellants maintained that the Respondents had failed to provide substantive evidence to rebut their assertion that they are heirs to the deceased's estate, being children born within a customary marriage duly recognized under Kenyan law and Kamba tradition.
 13. On the standard of proof applicable in succession matters, the Appellants relied on the decision in *Christopher Maina Kimaru v Josephine Wairimu Ngari & Another* [2016] eKLR, to submit that they had adduced sufficient evidence to establish, on a balance of probabilities, the existence of a customary marriage between the deceased and their mother. In response to the Respondents' allegation that the Appellants had previously been charged with forging a death certificate, the Appellants submitted that they had been acquitted of the said criminal charges.
 14. On whether their objection and cross-petition ought to have been allowed by the trial court, the Appellants made reference to Sections 67 to 69 of the *Law of Succession Act* as well as Rules 17(1) and 17(11) of the Probate and Administration Rules. They submitted that their objection, filed on 23rd July 2020, was lodged within the prescribed timelines, the gazette notice for the petition having been published on 12th June 2020. They further submitted that their cross-petition sought to include both families of the deceased in the administration of the estate, thus demonstrating good faith and inclusivity.
 15. The Appellants thus urged the Court to allow the Amended Memorandum of Appeal as prayed.



Respondent's Submissions

16. The Respondents relied on the case of *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR to submit on whether the Appellants proved their claim on a balance of probabilities and whether the trial court adequately considered the evidence adduced. They submitted that no witness was called to confirm the allegation that the Appellants were children of the deceased by virtue of their mother having been married to him. The Respondents further contended that, during the deceased's lifetime, the Appellants neither lived with him nor were they known to the family. According to the Respondents, the Appellants only surfaced and laid claim to the deceased's estate after his death.
17. In further support of their position, the Respondents relied on the case of *Re Estate of Ndongu Kabugua (Deceased)* [2019] eKLR, to submit that the Appellants failed to produce sufficient evidence to prove a customary marriage between their mother and the deceased. They argued that, had such a marriage existed, the Appellants ought to have produced a document evidencing payment of dowry or called a witness capable of attesting to the fact of cohabitation or other elements of a customary union prior to the deceased's subsequent marriage. The Respondents further cited the case of *Gituanja v Gituanja* [1983] KLR 575, where the Court of Appeal held that the existence of a customary marriage is a matter of fact that must be proved with evidence. They submitted that the Appellants failed to meet the required evidentiary threshold. Specifically, they emphasized that the burden of proof lies with the party alleging the existence of a customary marriage; that the standard of proof is on a balance of probabilities; and that the customary formalities must be established by credible evidence. In the absence of such proof, they argued, the Appellants failed to demonstrate the existence of any valid marital relationship between their mother and the deceased. The Respondents also made reference to *Re Estate of Stephen Kimuyu Ngeki* [1998] eKLR and *Hellen Tum v Jepkoech Tapkli Metto & Another* [2018] eKLR.
18. The Respondents submitted that they concurred with the trial court's findings, particularly that the existence of a customary marriage between the Appellants' mother and the deceased was not established in accordance with the applicable legal standards. They further noted that the Appellants were unable to recall or disclose the specific year of their mother's death, or the precise location and land parcel where she was buried, thereby further weakening their case. In view of the foregoing, they urged the Court to find that the trial court's decision was proper both in law and in fact.
19. The Respondents submitted that their father, the deceased, was in a monogamous marriage and produced a marriage certificate in support of this assertion. They contended that this document was not challenged by the Appellants. In response to the Appellants' claim that they had resided on the subject property since 1992, the Respondents argued that mere occupation of another person's land in Kenya does not, in itself, establish a familial relationship under the law. They submitted that any legal rights arising from such occupation would only accrue under the doctrine of adverse possession, a matter which is already the subject of pending litigation before the Kithimani court. The Respondents further argued that the Appellants failed to demonstrate that the deceased recognized or accepted them as his children, as envisioned under the *Law of Succession Act*. In the absence of documentary evidence such as birth certificates, DNA results, or a court order affirming paternity or maternity, the Respondents submitted that the Appellants' claim lacked merit.
20. In conclusion, the Respondents submitted that the Appellants had failed to establish any familial relationship with the deceased. They maintained that the findings of the trial court were proper both in law and in fact, having been based on the evidence presented by the parties. The Respondents therefore urged the Court to find that the appeal lacks merit and to dismiss it with costs.



Analysis and Determination

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd (Supra)* and *Peters v Sunday Post Limited [1985] EA 424*.
22. After careful analysis of the record of appeal and the Appellant's submissions, the major issue for determination is whether on a balance of probability the Appellants sufficiently proved being beneficiaries of the deceased's estate.
23. The primary issue before this Court is whether the Appellants have established, on a balance of probabilities, that they are indeed the biological children of the deceased and hence rightful beneficiaries of his estate under Section 29 of the *Law of Succession Act*. In considering this issue, it is imperative to evaluate the evidence adduced before the trial court holistically including the contested Chief's letters, the nature of the alleged customary marriage between the deceased and the Appellants' mother, and the conduct of the parties both before and after the demise of the deceased.
24. In the trial court, the Appellants called four witnesses to testify in support of the objection filed by them. The witnesses were: PW1, Joseph Musee Kasyuma; PW2, Peter Mulwa Kasema; PW3, Benson Nzyoka Kasyuma, brother to Mumbe Mutava; and PW4, retired Assistant Chief Elijah Katulu Kioko. The Appellants produced and relied upon the following evidence: copies of the National Identity Cards of Winfred Mutindi Kasyuma and Agnes Mumbe Mutava; a certificate of death for Agnes Mumbe Mutava; photographs of developments on the property; a family photograph; a letter from the area chief dated 20th April 2020; an agreement from the Deputy County Commissioner; and a letter from the area chief dated 20th July 2010.
25. PW1 testified that the Respondents are his stepbrothers, explaining that the deceased, his father, had two wives, with his mother being the first. He further stated that he does not bear the deceased's surname because he and his siblings were raised by their maternal grandmother following the separation of the deceased and their mother. He confirmed that the chief's letter produced supports the fact that the deceased had two wives. PW2 testified that his father, Kasema Kioko, was a cousin of the deceased, and that the deceased's first wife separated from him before marrying the Respondents' mother, Nthonki Mutava. PW2 also stated that he could not recall when the deceased married the Appellants' mother, but he remembered when the deceased showed the Appellants property. PW3 testified that the Appellants are his nephews, that his sister married the deceased in 1962, and that he was aware the deceased married another wife and had children he had never met. He further testified that the deceased's brothers knew about the Appellants and had consented to their building on the subject property. PW4 testified that he knows the Mutava family, that the deceased had two wives, one in Yatta and another in Kangundo and that the Appellants lived with their uncle, Phillip Kasyuma, in Yatta before later moving to Mutava's home. He produced the letter dated 20th July 2010 and stated that he drafted the letter at the request of Musee Kasyuma to facilitate the obtaining of his father's death certificate.
26. The Respondents, on the other hand, called three witnesses: Peter Muisyo Mutava, Stella Ndunge Mutava, and Rosemary Kamane Musyoka. They produced and relied upon the following documents: a Certificate of Marriage between the deceased and Naomi Nthoki Mutava; a photograph of the marriage ceremony; particulars of identification from the National Registration Bureau regarding a National Identity Card; and a letter dated 6th August 1994. Peter Muisyo Mutava testified that he did not know



the Appellants and that the deceased, his father, had never disclosed to him the existence of any other children. He produced the marriage certificate and denied the allegation that his father had another wife. He also asserted that the certificate of death relied upon by the Appellants was a forgery, and stated that the Appellants had been charged with the offence of forgery, a case which was ongoing at the time. He produced the letter dated 6th August 1994, which he claimed was used to allocate family land. Stella Ndunge Mutava reiterated Peter's testimony, stating that their father had only one wife and that she did not know anyone by the name of Mumbe Mutava. Rosemary Kamane Musyoka testified that she is the deceased's niece and stated that the Kasyumas are not the deceased's children. She further testified that she is the eldest in the family, having been born in 1960 in Kangundo, Kathamana, and that their fathers were raised together by their sister. She also stated that she attended the wedding between the deceased and Naomi Nthoki in 1976, which she described as a formalization of their cohabitation.

27. Upon evaluating the evidence, the trial court determined the matter by holding as follows;

“Having failed to avail any certificates of birth to this court to prove paternity coupled with absence of any adoption certificates and or DNA results to this end, it is indeed a heavy burden to convincingly establish and prove they are deceased's children. Evidence tendered by the Applicants borders on hearsay. No direct witness to this matter has been called to testify in court in their support. All evidence tendered I must state is circumstantially remote and what stands out from the evidence tendered is the applicant's invasion on deceased's land immediately after his death. This is suspect to say the least in light of the fact that we have not been shown any relational connectivity between the applicant's mother or the applicants themselves with the deceased.”

28. From the record, the Appellants assert that their mother, Agnes Mumbe Mutava, was the deceased's first wife and claim to be the biological children of that union. They testified that their mother even adopted the deceased name raising legitimate expectation and was buried at the deceased's home in Kangundo, and that they have resided on the deceased's land since 1991 without objection, until when conflict arose following the Respondents' attempts to dispose of the land.

29. To support their claims, the Appellants relied significantly on a letter dated 20th April 2020 authored by the area chief, which identified and listed both the Appellants and the Respondents, as beneficiaries of the deceased estate. However, a subsequent letter dated 18th May 2020, written by the same chief, one Jane Kisangai, excluded the Appellants from the list of beneficiaries. Despite the apparent contradiction between the two letters, the trial court solely relied on the second letter and disregarded the first without interrogating the source or reasons behind the contradicting information. This Court takes judicial notice of the important role played by Chief's letters in succession proceedings. When one files for letters of administration intestate, one of the crucial documents that is required is a letter from the chief. In the case of *Ayako v Oronje* [2024] KEHC 7641 (KLR) the court held that;

“29. I should point out that the act of issuing a chief's letter or that of local Administration in succession proceedings is Administrative, not legal, on the part of the local Administrator.

30. The courts, traditionally, require the chiefs to assist the court to ascertain the immediate kindred of a Deceased person. The chiefs are considered reliable, as it is expected that he/she is well acquainted with the residents of his location. However, there is no law that binds the chiefs to issue such a letter (s).”



30. In *Mombasa Maize Millers Limited v Roselyne Atieno Ouma & another* [2017] KEHC 7842 (KLR), the court in determining the survivors of the deceased stated that;

“ Given that the defendant had at paragraph 2 of the defence disputed the Plaintiff’s locus the issue ought to have been allowed to go for trial because a consent on liability presupposes that even the locus of the persons bringing the suit is admitted. In any event the Chief’s letter suffices to prove that fact on a balance of probabilities more so as there is no evidence rebutting it.”

The Chief’s letter as I have stated proves the status of the estate of the deceased as well as who his survivors were.”

31. The foregoing authorities underscore the importance of a chief’s letter. Though not legally conclusive, they are foundational documents used to introduce the deceased’s family to the court. The assumption is that the local administration possesses reliable knowledge of familial structures within their jurisdiction. The inconsistency between two letters authored by the same chief within one month and with materially different content is a critical evidentiary issue that the trial court ought to have interrogated. The failure to summon the chief, or even question the legitimacy of the two contradictory letters, left a material evidentiary gap in the proceedings. Therefore, this Court finds that the trial court failed to properly evaluate the evidence before it.

32. The Appellants called four witnesses, including a retired Assistant Chief and relatives of the deceased, who confirmed the existence of a customary marriage between the deceased and the Appellants’ mother. The Assistant Chief produced a letter from 2010 referencing the deceased as the husband of Agnes Mumbi. The Appellants further adduced a death certificate of their mother bearing the deceased’s name, and photographs allegedly showing their continued residence and developments on the deceased’s land. The Respondents challenged these assertions, claiming the Appellants only emerged after the deceased’s death. They relied on the existence of a monogamous marriage between the deceased and their mother, supported by a marriage certificate, to rebut the claim that there was a relationship between the deceased and Agnes Mumbi.

33. As a first appellate court has the obligation to re-evaluate the entire record and arrive at its own conclusions. On the basis of the record, this Court finds that there exists a substantial question as to whether the Appellants are indeed beneficiaries of the deceased. However, due to the unresolved evidentiary conflict occasioned by the two Chief’s letters, which were not clarified at trial, and the absence of direct testimony from the author, this Court finds it would be premature and unjust to conclusively determine the Appellants’ status without further inquiry.

34. Accordingly, and in the interest of justice, I find that the matter should be remitted back to the trial court for a fresh hearing before a different magistrate, during which the Chief Jane Kisangai or any representative of the office of the Chief shall be summoned to clarify the conflicting letters dated 20th April 2020 and 18th May 2020. This will allow the court to make a factual finding with full knowledge of the circumstances that led to the preparation of two materially different letters, and to resolve the credibility of the Appellants’ claim with the benefit of a complete evidentiary record.

35. The Appeal therefore partially succeeds to the extent that the Ruling of the trial Court dated 8th March 2023 is set aside and the matter remitted back to the subordinate Court for a fresh hearing before a different magistrate. Each party to bear the costs of the appeal.

36. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF JUNE, 2025.



RHODA RUTTO

JUDGE

In the presence of;

.....for Applicant

.....for Respondent

Sam Court Assistant

