



REPUBLIC OF KENYA



**In re Estate of David Gikundi Marete (Deceased) (Succession Cause E028 of 2021) [2025] KEHC 7863 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 7863 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE E028 OF 2021  
SM GITHINJI, J  
JUNE 5, 2025**

**IN THE MATTER OF THE ESTATE OF DAVID GIKUNDI MARETE (DECEASED)**

**BETWEEN**

**FLORENCE GAKII MWITI ..... 1<sup>ST</sup> PETITIONER**

**BRENDA KARIMI GIKUNDI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NELLY DOLLY KATHURE ..... APPLICANT**

**AND**

**BANK OF BARODA ..... RESPONDENT**

**RULING**

1. For determination is the Summons dated 22/1/2025 brought under Sections 47 and 76 of the [Law of Succession Act](#), seeking orders that:
  1. Spent
  2. A sum of Kshs 60,000/= be paid directly by The Administrator Of The Estate. Of David Gikundi Marete to the Applicant for purposes of enrolling Myles Gitonga at Highlands Group of School as a PP1 learner and thereafter Kshs 40,000/= every term as Tuition fees and school transport fees.
  3. A sum of Kshs 105,000/= be paid directly by The Administrator Of The Estate Of David Gikundi Marete to the Applicant for purposes of meeting the child's monthly expenses including but not limited to:
    - i. Kshs 25,000/= for rent



- ii. Kshs 20,000/= for food
  - iii. Kshs 10,000/= for utilities
  - iv. Kshs 10,000/= for househelp
  - v. Kshs 20,000/= for clothing
  - vi. Kshs 20,000 for entertainment
  - vii. Provision for medical expenses for the child, if and when they do arise.
4. The costs of this application be provided for.
2. The application is supported by the affidavit sworn by Nelly Dolly Kathure, the Applicant herein and the biological mother to Myles Gitonga, a son to the deceased herein. The said child requires school fees to join Highlands Group of School as well as medical cover contribution. She beseeches the court to grant the prayers sought, in the best interest of the child herein. The available income generating assets of the deceased within her knowledge are Goodnight Guest House at Makutano Meru and 1951 Guest House, in Nanyuki.
3. In opposing the application, the 2<sup>nd</sup> Petitioner swore a Replying Affidavit on 18/2/2025 in which she accused the Applicant of lacking locus standi to demand maintenance for her child. According to her, a birth certificate is not final proof of paternity and the income generating properties listed by the Applicant do not belong to the deceased herein. The Applicant and her child are unknown to them as there pends an application to determine whether or not the Applicant was a wife to the deceased.
4. The application was argued orally in court and a ruling reserved.

### **Disposition**

5. I have considered the application, the replying affidavit, the oral submissions by counsel and the authorities relied on.
6. The sole issue for determination is whether the application is merited.
7. Section 3 (2) of the *Law of Succession Act* describes a child to include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, any child whom he expressly recognized or in fact accepted as a child of his own or of whom he has voluntarily assumed permanent responsibility.
8. Section 26 of the *Law of Succession Act* provides as follows; “Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”
9. In expounding the provisions of the aforesaid section, the court (G.V Odunga J, as he then was) in *In re Estate of Daniel Mulwa Kavithi (Deceased)* [2019] eKLR had this to say; “35. From the above section it is clear that an application thereunder can be made by or on behalf of a dependant. It follows that the contention by the Respondent that the application ought to have been made by an administrator is incorrect. The section applies where the will, gift or law or combination of all the three does not make reasonable provision for a particular dependant. The order that the court is then required to make is for



such reasonable provision as it thinks fit for that dependant out of the deceased's net estate. Pursuant to the said provision the court may in its discretion under section 27 of the Act order a specific share of the estate to be given to the dependant, or to make such other provision for him or her by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit. However, before doing so the court must make a specific finding that the will, gift or law or combination of all the three does not make reasonable provision for the particular dependant.”

10. Section 27 of the [Law of Succession Act](#) provides that; “In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”
11. In making the order under section 27 of the [Law of Succession Act](#) aforesaid, the court is mandated by the provisions of section 28 of the [Law of Succession Act](#) to consider;
  - (a) the nature and amount of the deceased's property;
  - (b) any past, present or future capital or income from any source of the dependant; the existing and future means and needs of the dependant;
  - (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
  - (e) the conduct of the dependant in relation to the deceased;
  - (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
  - (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.
12. The court (A. Mabeya J) in Sarah Kanini Thigunku v Elizaphan Njuki Thigunku [2016] eKLR, stated; “For one to be a dependent however, under Section 29 aforesaid, it is clear that one must prove dependency. The use of the words “...as being maintained by the deceased immediately prior to his death...” in that Section, connotes that one must prove that he was dependent on the deceased before his demise. From the record, there was no evidence to show that either the Appellant or any of her children were dependent on the late Mbungu Thigunku. A mere relationship does not automatically qualify one to be a dependant under Section 29 of the Act. Prove of dependency is imperative.”
13. The Applicant alleged that the minor herein was a son to the deceased, and produced a copy of his birth certificate, as conclusive proof of paternity. On their part, the Petitioners denied knowing either the Applicant or the minor herein, and insisted that the Applicant needed to prove that the deceased maintained the minor prior to his death, to be considered as his dependant.
14. A dependant is defined under section 29 of the [Law of Succession Act](#) to mean (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; (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; and (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.
15. The Petitioners are not questioning the authenticity of the birth certificate produced by the Applicant: No. They are just adamant that the same is not final proof of paternity.



16. I find that the undisputed birth certificate, which indicates the deceased as the father of the minor, together with other adduced evidence, prima facie discloses that the minor is a son to the deceased, and thus a dependant within the meaning of Section 29 of the Law of Succession Act. The section is categorical that a child need not have been maintained by the deceased prior to his death, to qualify as a dependant.
17. The minor's rights to basic education and health care are expressly guaranteed by the provisions of sections 13 and 16 of the Children Act. Article 53 of the Constitution is also explicit that every child has a right to (b) free and compulsory basic education; (c) basic nutrition, shelter and health care; (e) parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.
18. The court is enjoined to exercise its discretion under sections 26 and 27 of the Law of Succession Act, to promote and safeguard the minor's rights as enshrined under Article 53 of the Constitution and sections 13 and 16 of the Children Act.
19. Article 53 (e) of the Constitution bestows equal parental responsibility on both parents, and the Applicant cannot fold her hands and expect all the needs of the minor to be met by the estate. She must shoulder some responsibility, as a responsible parent to the minor.
20. In the best interest of the minor herein, I find that the Applicant has met the threshold for grant of the orders of maintenance sought, and I allow the application dated 22/1/2025.
21. When making provisions for a child from the estate of a deceased person, it is necessary to consider several key factors in accordance with the Law of Succession Act, Cap 160, Laws of Kenya. These include the value of the net estate, the nature and extent of the deceased's income generating assets, and any outstanding liabilities or debts that may diminish the estate.
22. It is also essential to evaluate the financial needs and circumstances of the child, including their age, health, education and general maintenance requirements. Furthermore, the needs and entitlements of other dependants or beneficiaries, such as a surviving spouse, other children, or any other persons recognized under Section 29 of the Act, must be considered to ensure a just and equitable provision. Balancing the interests of all legitimate claimants is critical.
23. In this case the assets, income generating assets and liabilities are not disclosed in terms of specific figures. The filed Form A5 discloses Assets which are given a value of 50,000,000/= by the Respondent/ Petitioner. Liability disclosed is of Bank a Baroda loan of 17,540,000/=.
24. However, the Applicant discloses of some other assets which were left out and income generating assets as GoodNight (FloJoy) and 1951 Lodges Nanyuki, and Topland Millers. Their net profits is not disclosed.
25. The Petitioners and their other siblings are four with only Joy Gatwiri Gikundi being a minor having been born on 28/09/2007.
26. The 1<sup>st</sup> Petitioner as well as the Applicant do not disclose their personal economic undertakings and how much they generate. The Applicant simply indicates her earnings are meagre.
27. In trying to navigate the unclear waters and make reasonable provision for the said minor from the estate of the deceased, It's only logical to give a reasonable figure that would leave the Applicant with the discretion of determining how well she can utilize it to get the best for her child. Guided by the value of the estate and the disclosed main liability, In my view a monthly payment of 100,000/= would



suffice to meet the minor's essential needs, pending the confirmation of the grant. The said amount be paid to the Applicant by 5<sup>th</sup> of every month.

**DATED AND DELIVERED AT MERU THIS 5<sup>TH</sup> JUNE, 2005**

**S.M. GITHINJI**

**JUDGE**

Appearances:-

Miss Otieno holding brief for Miss Kiome for 1<sup>st</sup> and 2<sup>nd</sup> Petitioners/Respondent.

Firm of Kiautha Arithi is for the Applicant (Absent).

