



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**In re Estate of Milka Wairimu Kathethu alias Milcah Wairimu Kathetu (Deceased)  
(Civil Appeal E029 of 2021) [2025] KEHC 7757 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7757 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E029 OF 2021**

**JK NG'ARNG'AR, J**

**JUNE 5, 2025**

**IN THE MATTER OF THE ESTATE OF MILKA WAIRIMU  
KATHETHU ALIAS MILCAH WAIRIMU KATHETU (DECEASED)**

**BETWEEN**

**MARGARET WANJIKU NGARI ..... APPELLANT**

**AND**

**SAMUEL MURIITHI GIKUNJU ..... RESPONDENT**

*(Being an appeal from the judgment of the learned magistrate Hon. G. W. Kirugumi  
(PM) delivered on 28th July 2021 in Kerugoya CM Succession Cause No. 162 of 2017)*

**JUDGMENT**

1. In a ruling delivered on 28<sup>th</sup> July 2021 to the objection raised by the Appellant dated 4<sup>th</sup> October 2012 stating she was a dependant of deceased's estate and the Respondent who was the petitioner had filed the petition without informing her. In dismissing the objection, the trial magistrate held that at the time the objector purchased 1 acre of land to be excised from Land No. Mutira/Kanyei/2X5 (hereinafter referred to as the suit land) from Jane Muthoni Ngige, the latter had no legal capacity to sell the said land for the deceased was still the registered owner of the suit land. Further, that the objector had not financed or given money to the deceased hence the objector failed in the category of a creditor to the deceased persons.
2. Aggrieved by the above ruling, the Appellant who was the objector has filed this appeal on the following grounds:
  - a. That the learned magistrate erred in law and in fact by issuing letters of administration to a neighbour who is not connected to the deceased.



- b. That the learned magistrate erred in law and in fact in completely disregarding the evidence induced and objection put forth by the Appellant.
- c. That the learned magistrate erred in law and in fact in failing to realize the deceased life interest was to be terminated upon death and therefore the land would revert back to the family of Gerishon and his relatives.
- d. That the learned magistrate erred in law and in fact in stating that the objector is not a creditor of the deceased persons.
- e. That the learned magistrate erred in law and in fact in failing to realize that the family of the brother of the deceased was the one in line to inherit the deceased or if not the land should revert to the clan since the deceased had no children.
- f. That the learned magistrate erred in law and in fact in failing to fairly evaluate the evidence tendered by the parties.
- g. That the learned magistrate erred in law and in fact by failing to realize the Respondent had already benefited from the deceased land by getting  $\frac{3}{4}$  acre and should not get anything else.
- h. That the learned magistrate erred in law and in fact in ruling in favour of the Respondent yet the Respondents witness statement was missing and his evidence alone could not stand.

#### **Appellant's submissions.**

3. She submitted that the deceased had no children of her own as was noted in the court's judgment in *Kerugoya Succession Cause No. 71 of 2003* where it also held that the deceased was to hold a life interest over the suit land which interest would terminate upon her death. The deceased also died intestate and this was after she had got the said estate upon the death of her husband – Gerishon Gathui Nduku and the estate was given to her though would terminate upon her marriage as held in *Civil Appeal No. 31 of 2006*.
4. Deceased husband had a brother – Ngigi Nduku who had 2 sons with one of them being deceased thus leaving behind one Muthike Ngige who was the closest relative of the late Jane Muthoni Ngige as her son. It was Jane and her 2 sons who sold the portion of the suit land their share to her though Muthike Ngige was reluctant in taking out letters of administration for he knew she would file a protest. That the Respondent being the petitioner therein was a neighbour of the deceased and could not be trusted to take out letters of administration for he was neither a child nor a relative of the deceased.
5. His dishonesty was evident from the petition where he alleged that the deceased had 3 children yet even the court determined the deceased had no children at all. The Respondent also had a sale agreement dated 11.2.2003 where he was listed as a witness. However, in *Kerugoya Succession Cause No. 71 of 2003*, he was not named as a child of the deceased and Gerishon Nduku yet in the current cause alleged he was their son. That no citation has ever been filed and served upon Muthike Ngige or the family of Jane Muthoni Ngigi, the deceased co-wife as admitted by the Respondent.
6. In that case, letters of administration cannot be given to a stranger or neighbour as he was very far from the nearest degree of consanguinity for had he been the son of the late Gerishon Nduku, then he would have appeared during his succession cause as a beneficiary of the estate together with the deceased herein. The Respondent had bene given  $\frac{3}{4}$  acres of the suit land during his lifetime but then he sold it and if he wanted to bequeath the remaining portion, he had a chance to do it via a will which he did not do. For herself she paid purchase price for 2 acres of the suit land and produced the agreement as proof that she bought the said portion from the late Jane Muthoni Ngigi.



7. That if the Court was not going to issue her with the letters of administration, then the same to be issued to the brother of Gerisha Gichuru who was the closest relative so that she can also file a protest therein if she will not be consider in the summons for confirmation of grant. She thus prayed for this Court to allow the appeal as prayed.

#### **Respondent's submissions.**

8. He started by stating that the deceased was the wife to the late Gerishon Gachuri Nduku who was the registered owner of the suit land. Her late husband had a brother the late Ngigi Nduku whose wife was the late Jane Muthoni Ngigi. He went on to corroborate Appellant's submissions that after the death of Gerishon Nduku, the deceased herein filed *Kerugoya Succession Cause No. 71 of 2003* wherein she was issued with letters of administration but then the late Jane protested claiming she was entitled to the land since the deceased had no children.
9. In its judgment delivered on 8<sup>th</sup> January 2005, the deceased was given a life interest on the parcel of land. It was then he petitioned for letters of administration in *Kerugoya CM Succession Cause No. 162 of 2017* wherein the Appellant filed an objection which was heard before the court delivered its ruling on 28<sup>th</sup> July 2021 wherein the said objection was dismissed while he was issued with letters of administration intestate. That the only issue for determination is who ranks first in the order of preference according to Sections 39 and 66 of the *Law of Succession Act*.
10. He alleged that the deceased was the aunt for his paternal father was the late Gerishon Nduku's stepbrother. That the 2 had no children of their own and so they took him is as their own child as confirmed by his witnesses James Kabai Kirungi and Peter Magu Ndwiga and so it was evident the Appellant was not a relative to the deceased. Appellant's interest was the land she bought from Jane and not the deceased hence she cannot claim to be a creditor in the deceased's estate with her recourse being suing Jane while she was alive for refund of her money.
11. That she had now changed her narrative by introducing new facts that Jane had 2 sons named therein who sold their share of the suit land to her which evidence was not adduced when she filed her objection. Assuming that indeed they sold her land, she had no power and authority to sell land belonging to the deceased thus amounting to intermeddling which was an offence. Jane's only surviving beneficiary – Muthike Ngigi had not objected to him being issued letters of administration and he had not shown interest in the same. He asked the Court to dismiss the appeal with costs being issued to him.

#### **Analysis and determination.**

12. From the perusal of the record herein, it was clear that the Appellant was not one of the heirs or survivors of the deceased. Her interests in the estate of the deceased herein arose from a purported sale agreement between her and one Jane Muthoni Ngigi, wife to the deceased's brother in law. As such, she averred that her interest is that of a creditor. A creditor generally is a person to whom a debt is owing by another person, called the "debtor." It means one who has a legal right to demand and recover from another a sum of money on any account whatever.
13. It is settled principle of law that he who alleges must prove. Although the Appellant claimed that she had bought 2 acres to be excised from the suit land and for this she produced their sale agreement dated 5<sup>th</sup> June 2011 which proved that she started purchasing the said portion from the year 2003. It was in the acknowledgment slip wherein one Muthike Ngige admitted having received Kshs.50,000/- from the Appellant on 15<sup>th</sup> August 2003 stating that it was part of the purchase price of the said portion of the suit land as per the sale agreement dated 19<sup>th</sup> June 2003 leaving a balance of Kshs.105,000/-.



14. The above sale agreement and acknowledgement and their contents have not been controverted by any other evidence adduced by the Respondent thus proving that the allegation by the Appellant that she bought the said 2 acres from Jane Muthoni Ngige and her sons was not an afterthought raised only during this appeal. Further uncontroverted evidence that there was *Kerugoya Succession Cause No. 71 of 2003* which pertained to the estate of the deceased late husband – Gerishon Nduku Gachuri. From the date of filing the said cause, the same was in the year 2003 with the grant of letters of administration issued to the deceased herein being confirmed on 7<sup>th</sup> March 2006. The same proved that the deceased had a life interest over the suit land which was the only property forming the estate of the deceased with the suit land being registered jointly in the names of Joseph Kariuki Ngigi, Muthike Ngigi and Margaret Wanjiku Ngari, the Appellant herein.
15. With the exact date of the filing of the aforesaid succession cause not being disclosed to this or the trial court though the year is clear to be 2003, it cannot be said that the sale of 2 acres of land to the Appellant was before the filing of the said succession cause where eventually the Appellant was listed either as a beneficiary of the estate or a creditor, for the pleadings in that cause have not been filed herein, though before certificate of confirmation of grant was issued. It is therefore my finding that the trial magistrate erred in finding in her ruling by stating that the objector did not finance or give money to the deceased who was living at the time hence she could not fall in the category of the creditor for how then was she able to be listed as one of the people who were to be jointly registered owners of the suit land while the deceased herein was given a life interest.
16. It is also worth noting that in the same ruling the trial magistrate at page 5 noted that it was the Respondent’s witness who produced the late Gerishon Nduku’s last will but the determination in *Kerugoya Succession Cause No. 71 of 2003* was that the said deceased’s husband had died intestate. This was the same decision arrived at in *Embu Succession Civil Appeal No. 31 of 2006* which leads me to certificate of confirmation of grant dated 27<sup>th</sup> January 2007 wherein it was held by Justice Khamiwa (as he then was) that suit land was to be inherited by the deceased herein terminable upon her death or remarriage.
17. It is further uncontroverted fact that during the hearing and determination of *Kerugoya Succession Cause No. 71 of 2003*, there is nowhere that it was stated that the Respondent herein was either biological or adopted son of the deceased herein and Gerishon Nduku. Who then was he to the deceased herein? It was his evidence that the deceased was his aunt for his paternal grandmother and the late Gerishon Nduku were stepbrothers. This thus leads me to Section 66 of the Law of Succession which provides: “When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:
  - a. surviving spouse or spouses, with or without association of other beneficiaries;
  - b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
  - c. the Public Trustee; and
  - d. creditors:Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”



18. When it came to the estate of the late Gerishon Nduku, it was noted he left behind the deceased as his wife thus being granted life interest over the suit land. There was no mention of the Respondent being their alleged son and who in that cause never raised any objection and adduced proof that he was so entitled as the late Gerishon Nduku's dependant. So, how was he now the rightful beneficiary of the deceased who ranked in priority. This priority he relied on is found in Part V hereinabove was set out in Section 39(1) of the Law of the Succession as follows:

“Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority:

- a. father; or if dead
- b. mother; or if dead
- c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
- d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
- e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”

19. In page 2 of his submissions, the Respondent stated: “It was the evidence of the Respondent in (pg 38 of the record of appeal) that the deceased Milka, was his aunt. Gerishon who was the husband to Milka and the Respondent's (father to his mother) were stepbrothers. Milka and Gerishon did not have any children of their own and they decided to take in Respondent as their own child.....” The above proves that the deceased herein, who was the registered owner of the suit land had no parents or siblings who were alive and from the above Section, the Respondent did not rank anywhere as he was not a relative of the deceased to the nearest degree of consanguinity. This is because he was a relative to Gerishon Nduku and not the deceased herein.

20. It is evident that if there were no relatives at all relating to the deceased herein but there are those present of her late husband's family as the closest relatives as pertains to their degree of consanguinity, then the family of the late Gerishon Nduku brother – Ngigi Nduku and his children rank the highest and not the Respondent herein for the late Ngigi Nduku was said to be the brother of the late Gerishon Nduku and not a half-brother and nowhere has it been provided for stepbrothers or stepsiblings in the above Sections.

21. It is for the above reasons that this appeal succeeds and hereby revokes the grant issued in *Kerugoya Succession Cause No. 162 of 2017* issued to the Respondent and comply with the orders issued in *Embu Succession Civil Appeal No. 31 of 2006* that upon the death of the deceased herein who was only to have a life interest, the suit land reverts to the names of the late Gerishon Nduku Gachuri whose rightful beneficiaries noted above are to petition for the grant of letters of administration. It is further ordered that the Land Registrar Kerugoya is to immediately register a restriction over the suit land until the above rightful beneficiaries' petition for the issuance of letters of administration and the certificate of confirmation of grant issued therein.

**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 5<sup>TH</sup> DAY OF JUNE, 2025 IN THE PRESENCE OF:**

N/A for the Appellant



Mwagiru for the Respondent  
Siele/Mark (Court Assistants)

.....

**J.K. NG'ARNG'AR**

**JUDGE**

