



REPUBLIC OF KENYA



**In re Estate of Fredrick Njeru Njagi (Deceased) (Civil Appeal
E064 of 2023) [2025] KEHC 7741 (KLR) (4 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E064 OF 2023
RM MWONGO, J
JUNE 4, 2025**

IN THE MATTER OF THE ESTATE OF FREDRICK NJERU NJAGI (DECEASED)

BETWEEN

DAVID MUGAMBI KATHIRI APPELLANT

AND

HELLEN MUTHANJE GITWA 1ST RESPONDENT

ROBERT MWANIKI WACHIRA 2ND RESPONDENT

GILBERT NJERU NYAGA 3RD RESPONDENT

*(An appeal from the Judgment of Hon. S. Ouko in Runyenjes MC
Succession Cause No. 150 of 2017 delivered on 19th October, 2023)*

JUDGMENT

The Appeal

1. The appellant filed a memorandum of appeal dated 06th November 2023 seeking the following orders.
 - a. The appeal herein be allowed and ruling delivered on the 19th October, 2023 be set-aside;
 - b. The grant of letters of administration intestate issued on 20th June, 2016 and confirmed on 27th April, 2017 to the respondents be revoked and/or annulled;
 - c. In the alternative, the court to order for a re-trial of the matter with an order that all beneficiaries be listed and be physically in court;
 - d. The court be pleased to grant an order for DNA in respect to the Appellant herein; and
 - e. Costs of this suit be borne by the respondents.




2. The appeal is premised on grounds that:

1. The learned trial magistrate erred in law and fact by omitting evidence given by the appellant without considering that the appellant called crucial witnesses like the deceased's step brother and step mother in support his evidence;
2. The learned trial magistrate erred in law and fact by failing to consider that nobody is in a much better position to confirm whether the appellant and his mother are son and widow to the deceased respectively than the deceased's step mother and step brother;
3. The learned trial magistrate erred in law and fact by overlooking the issue of strangers being included as beneficiaries of the estate without any proper legal basis while the appellant who is known by the family was denied any share of the deceased's estate;
4. The learned trial magistrate erred in law and fact by failing to determine the rightful beneficiaries to the estate despite the list of beneficiaries having been provided to court;
5. The learned trial magistrate erred in law and fact by failing to consider and determine that the witnesses called by the 1st respondent during the succession proceedings particularly the 2nd and 3rd respondents were all total strangers to the estate of the deceased and were gifted with plots by the 1st respondent without lawful authority to do so before she had been confirmed;
6. The learned trial magistrate erred in law and fact in believing the evidence and pleadings of the respondents despite the same having been mere allegations not proven by facts and without taking judicial notice that the respondents in the succession proceedings herein were the strangers and/or meddlers to the estate;
7. The learned trial magistrate erred in law and fact in relying heavily on the oral evidence of the respondents during trial and believing them wholly against the weight of evidence on record;
8. The learned trial magistrate erred in law and fact by ignoring the evidence presented and treating the case with impartiality against the requirement of the Law;
9. The learned trial magistrate erred in law and fact by failing to give legal directions to face off the issues which were raised regarding the succession proceedings before her;
10. The learned trial magistrate erred in law and fact by basing her Judgment on hearsay, speculative and/or immaterial evidence and or facts;
11. The learned trial magistrate erred in law and fact by introducing and/or adducing new evidence, facts and pleadings that were never part of pleadings and/or evidence at the time of trial;
12. The learned trial magistrate erred in law and fact in failing to base her Judgment on justifiable evidence and/or reasons;
13. The learned trial magistrate erred in law and fact by disregarding the issue of meddling of the estate while the 1st respondent admitted to gifting and/or donating part of the estate to third parties who were not the rightful beneficiaries of the estate but ignoring the fact that the rightful beneficiaries were all left out;
14. The learned trial magistrate erred in law and fact by failing to find that there are no provisions of the law which provide for gifting and/or donating an estate to third parties by the administrators;



15. The learned trial magistrate erred in law and fact in awarding unreasonable judgment in the circumstances, wherein they ignored their evidences and failed to analyze, give reasons and legal interpretation as required of them by the Law.
16. The Learned trial magistrate's judgment is erroneous for not being in tandem with the pleadings, evidence adduced, submissions on record more particularly by misunderstanding, misinterpreting and/or ignoring the appellant's submissions during trial;
17. The learned trial magistrate erred in law and fact in failing to determine that not all beneficiaries were in court when the grant of letters of administration issued on 20th June, 2016 and the confirmation thereof; and
18. The learned trial magistrate erred in law and fact in failing to determine that not all beneficiaries consented to the grant of letters of administration issued on 20th June, 2016 and the confirmation thereof.

Brief Background

3. The deceased died intestate on 02/01/2001. The 1st respondent as the deceased's widow, petitioned for and was granted letters of administration in the estate of the deceased on 20th June 2016. She then filed summons for confirmation of grant in the supporting affidavit she named herself as the only beneficiary and proposed a mode of distribution of the estate of the deceased as follows:
 1. 3501 Kantafu Komarock Phase IX- Gilbert Njeru Nyaga
 2. 2284 Kantafu Komarock Phase VII- Robert Mwaniki Wachira
- 
3. 1359 Kantafu Komarock Phase XI
 4. 2236 Kantafu Komarock Phase X
 5. Kyeni/Mufu/1816 Hellen Muthanje Gitwa
 6. Shares in Kantafu
 7. All Bank Accounts
 8. Any unclaimed benefits
4. A certificate of confirmation of grant was issued on 27th April 2017 reflecting the mode of distribution proposed by the 1st respondent.

Summons for Revocation

5. The applicant as the son of the deceased's first wife, filed summons for revocation of grant dated 07th March 2019, inter alia: seeking revocation of the grant and its confirmation, injunctive orders against the 1st respondent and that the properties of the deceased be encumbered with caveats. The application was premised on grounds that the grant was obtained fraudulently through concealment of material



facts to the court. That the 1st respondent was not the only beneficiary of the estate of the deceased as she had led the court to believe.

6. Through the supporting affidavit to the summons for revocation, the applicant/ appellant disclosed that the deceased had 3 wives, and that the 1st respondent was the third wife. The appellant is the only child of the first wife, Linda Njoki Njiru is the only child of the late second wife while the 1st respondent, who is the third wife has 3 daughters. The appellant took issue with the Chief's introductory letter which purported to define the boundaries of the deceased's land and it also included strangers in the estate.
7. Following issuance of the grant and a certificate of confirmation, the 1st respondent moved to subdivide and transfer the land to third parties who are not beneficiaries. At the same time, the 1st respondent started threatening the other beneficiaries if they interfered with her plans. The appellant stated that if the 1st respondent was left to alienate the land, the rightful beneficiaries of the estate of the deceased will be disinherited. That the 1st respondent failed to disclose to the court that there were other beneficiaries to the estate and so she obtained the grant fraudulently

Replying Affidavit

8. The respondents herein opposed the summons for revocation through a replying affidavit in which they jointly deposed that since the deceased died in 2001, the appellant did not petition for letters of administration. The 1st respondent took it upon herself to petition for the grant and she followed all the due processes. She stated that the appellant's mother knew about the process and even tried to illegally interfere with it to no avail because she was arrested and was charged with a criminal offence.
9. It was the respondents' averments that none of the other alleged children of the deceased are objecting to the process besides the appellant herein. She called the appellant an imposter who is being used by his mother to disturb the settled grant. She urged the court to let the matter rest since litigation must come to an end at some point.

The Evidence in the Lower Court.

10. The court took viva voce evidence.
11. PW1 was the appellant who stated that the deceased separated with his mother whose name is Jane Rose Weveti, the first wife. The appellant lived with his mother but he visited the deceased often. He stated that the 1st respondent did not involve him in the succession proceedings and that he should have been involved.
12. He did not know the people who were named as beneficiaries of the deceased's estate. On cross-examination, he stated that his official registration documents bear the deceased's name as his father. That as an adult, he did not live on any of the deceased's properties but he knew where all the plots were located. He denied knowledge of any criminal case against his mother.
13. PW2 was Jane Rose Weveti Michael who stated that she is the first wife of the deceased who was polygamous. She did not know who the 2nd and 3rd respondents were. On cross-examination, she stated that she has criminal proceedings in Nairobi regarding the same documents that were before the court in the succession proceedings.
14. PW3 was Rosemary Marigu Njagi, the appellant's step grandmother. She stated that the deceased had only 3 wives; Josephine Weveti, Irene Mwikali (deceased) and the 1st respondent being the 3rd wife. She stated that the 2nd and 3rd respondents were just villagers and not members of the deceased's family.



- She also stated that upon the death of the deceased's second wife, she took care of Linda (the deceased second wife's daughter) with the help of the 1st respondent.
15. She stated that when the deceased was marrying the appellant's mother, the deceased's father only visited the appellant's mother's parents. She urged that the estate be distributed amongst the 3 wives and 5 children of the deceased. On cross-examination, she stated that the deceased and PW2 got married in 1981 but they separated before the appellant was born. The deceased told her about his properties in Nairobi. She did not know that the 1st respondent had sold property after obtaining the grant.
 16. PW4 was Thomas Nyaga Njagi, son of PW3, who stated that the deceased had 3 wives but one of them died. When the deceased's wife died, her daughter was raised by PW2 alongside the appellant. He stated that the 2nd and 3rd respondents were not members of the deceased's family.
 17. DW1 was the 1st respondent who stated that she got married to the deceased under Ki-Embu customary law. She denied knowing the appellant and his mother since the deceased never spoke about them. She stated that the 2nd and 3rd respondents were their friends who helped when the deceased got into the accident and when he died.
 18. She decided to reward the 2nd and 3rd respondents with the land but transfers were never effected because PW2 placed cautions on the land. In cross-examination, she stated that she did know that the deceased had been married before. She gave the 2 plots to the 2 friends who are the 2nd and 3rd respondents. Her daughters were not involved in issuance of the grant.
 19. DW2 was Njeru Mwathaita, a relative of the deceased who stated that DW1 is a wife of the deceased and she did not know any other wives of the deceased. He did not know whether the deceased owned any property in Nairobi. He stated that DW1 lived in Mufu and he did not know if the deceased had other wives in Nairobi.
 20. DW3 was Peter Njeru Waweru who stated that that the deceased married DW1 in 2001 under customary law and he had 3 daughters with her. Before this wife, he had another wife who had died leaving a daughter named Linda. He stated that the appellant is not a child of the deceased and that his mother was not known to him. He did not know the circumstances under which the 2nd and 3rd respondents were given land by the 1st respondent. On cross-examination, he stated that the deceased did not speak to him about having any other wives and children. The 1st respondent did not inform him about her decision to give land to the 2nd and 3rd respondents.

Findings of the Lower Court

21. The trial court found that the testimonies regarding the place of birth of the appellant contradicted each other. The Magistrate stated that the appellant should have moved the court to have his paternity determined through a DNA test so as to clear his identity as a beneficiary of the estate of the deceased. The trial court determined that PW2 was an unreliable witness terming it as 'the fruit of a poisoned tree'. That the appellant and his mother are not beneficiaries of the estate of the deceased, neither were they dependants of the deceased within the meaning of section 29 and 39(1) of the [Law of Succession Act](#). The Trial court dismissed the summons for revocation of grant.

Submissions in the Appeal

22. The appeal was canvassed by way of written submissions.
23. The appellant submitted that the evidence tendered before the trial court proved that the 1st respondent gave away the estate to strangers at the expense of the rightful beneficiaries. This included the



testimonies of DW2 and DW3 but the trial court failed to acknowledge this fact. That it was also evident that the rest of the deceased's family, including the respondent's children were excluded from the distribution.

24. He urged the court to send the matter to retrial to include all the beneficiaries, and, possibly, order that the appellant be subjected to a DNA test to prove that he is a son of the deceased. he relied on the cases of *Re Estate of Julius Ndubi Java (Deceased)* [2018] eKLR and *In the Matter of the estate of Veronica Njoki Wakagoto (Deceased)* [2013] KEHC 1930 (KLR).
25. The respondents, in their submissions, relied on section 76 of the *Law of Succession Act* and the cases of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] KEHC 7143 (KLR) and *In re Estate of Gabriel Lazarua Muthika Kiragu alias Gabriel LM Kiragu (Deceased)* [2025] KEHC 2267 (KLR). They argued that the appellant failed to prove that the grant was obtained through fraud. They submitted that the appellant was never recognized or accepted as a son of the deceased, and, in any event, the appellant's mother's marriage to the deceased was illegitimate since it could not be proved.

Issues for Determination

26. The issues for determination are as follows:
 1. Whether the grant issued to the 1st respondent should be revoked;
 2. Who are the rightful beneficiaries to the estate of the deceased?
 3. How should the estate of the deceased be distributed?

Analysis and Determination

27. As the first appellate court, this Court is required to re-examine all the evidence adduced at the trial to reach its own conclusion. This was echoed in the case of *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, where the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

28. Section 76 of the *Law of Succession Act* provides for revocation of grant as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or



- (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

29. In this case, the appellant sought revocation under subsection (b) of this provision. In order to determine the first issue, it is necessary to go over the evidence and determine who the rightful beneficiaries of the estate are; the ones whose identities were allegedly concealed from the court. It was the appellant’s case that the 1st respondent did not include all the beneficiaries in the process and misled the court into believing that she was the only beneficiary. The 1st respondent then distributed the estate to herself and 2 other people who are not family members of the deceased.
30. During the hearing, DW1, the 1st respondent said that when she initiated the proceedings, PW2, the appellant’s mother tried to interfere with them by allegedly forging documents, which actions attracted criminal charges against her. DW1 stated that the 2nd and 3rd respondent are her friends whom she bequeathed part of the estate as a reward for helping out when the deceased was ailing and when he died. She vehemently contended that the appellant was a son of the deceased and that she never knew about him throughout her marriage to the deceased.
31. At the time of petitioning for the grant, the 1st respondent obtained consent from her children and co-respondents as follows: Lyn Njeri Njiru, Linda Njoki Njiru, Rebecca Muthoni Njiru, Dorris Mwendu Njiru, Gilbert Njeru Nyaga and Robert Mwaniki Wachira. From the evidence adduced, PW3 stated that the deceased had 3 wives; the first one is PW2, the appellant’s mother, the second one died but is the mother to Linda Njoki Njiru and the third wife is the 1st respondent who had 3 children.
32. PW2 Jane Rose Weveti testified that she was married to the deceased but had no marriage certificate. According to her, and as the appellant PW1 stated, she bore him in 1981, after her marriage to the deceased. PW3, the deceased’s step mother, stated that the deceased and his father visited PW2’s parents at the time of their union. Clearly, the testimonies of PW2 and PW3 about where PW1 was born do not match. However, the evidence is clear that PW1, the appellant, was born to the deceased and PW2 in 1981 after their marriage.
33. PW3 stated that the appellant is the eldest of the deceased’s children. DW2 vouched for the 1st respondent’s case. However, he expressly stated that he did not know whether the deceased had other wives besides the 1st respondent. The 1st respondent was married to the deceased in 2001, long after the appellant had been born, and was living with his mother who had separated with the deceased. For purposes of succession, section 3 (1) of the Law of succession Act defines “wife” to include a wife who is separated from her husband.
34. DW2, the retired Chief, stated that the deceased was from his “Ruleweru” clan. He knew only PW1, Hellen as the deceased’s wife. He could not remember her other names. In cross examination, he stated that he did not know that the deceased had other wives, nor that the deceased had properties in Nairobi. His evidence was not too helpful on the issues in question.



35. DW3 expressly stated that the deceased only married the 1st respondent and that he even attended the traditional wedding ceremony. It is evident that DW3 did not know about the 1st wife of the deceased since that union was made many years before the 1st respondent was married.
36. The trial court found that there was no concrete proof for consideration by the court. The standard of proof in civil cases on a balance of probabilities, not any higher. In the case of *Miller v Minister of Pensions (1947) 2 ALL ER 372* 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....”
37. In this case, from the evidence, it is clear on a balance of probabilities that the appellant is a son of Jane Rose Waveti who was the deceased’s first wife. For the trial court to suggest a DNA test in circumstances where it was evident that the deceased had had three customary wives, was unwise as that would appear as though it descended into the arena of litigation, unless the suggestion applied to all children of the deceased.
38. Now, back to the issue of revocation. From the evidence adduced, on a balance of probabilities, the deceased was clearly a polygamous man, having 3 wives. Therefore, it is apparent that the 3 houses should have been included at the point of petitioning for the grant. This fact was not disclosed to the court at all. In fact, the 1st respondent only sought the consent of her 3 daughters and 2 friends who are also her co-respondents not family members. This is clear basis for revoking the grant issued to the 1st respondent under section 76(b) of the *Law of Succession Act*.
39. Having clarified that, it is necessary to note that the summons for confirmation of grant excluded all the other members of the deceased’s family, even the 1st respondent’s own daughters. The mode of distribution proposed therein is flawed since it bequeaths part of the estate of the deceased to strangers, while disinheriting the actual beneficiaries.
40. PW1, PW2, PW3 and DW2 said that the 2nd and 3rd respondents were not family members of the deceased. DW3 stated that the 2nd and 3rd respondent had not bought the land. From the summons for confirmation, it is clear that they were given the land directly from the deceased’s estate as friends, a fact that was asserted by DW1 herself.
41. In light of this, the estate of the deceased ought to be distributed amongst the 3 houses of the deceased since clearly, he was polygamous at the time of his death. Section 3(1) of the *Law of Succession Act* provides that:
- ““house” means a family unit comprising a wife, whether alive or dead at the date of the death of the husband and the children of that wife”.
42. Therefore, the beneficiaries of the estate are as follows:
- 1st House- Jane Rose Weveti- 1st wife
 - David Mugambi Kathiri-son
 - 2nd House- Irene Mureki (deceased)- 2nd wife
 - Linda Njoki Njiru- daughter
 - 3rd House- Hellen Muthanje Gitwa- 3rd wife
 - Lyn Njeri Njiru- daughter



Rebecca Muthoni Njiru- daughter

Doris Mwendu Njiru- daughter

43. Since the deceased died intestate and was polygamous, section 40 of the Law of Succession Act applies. It provides:

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

44. The number of children in each house should be considered together with the widow of each house as an additional unit. The total number of units to inherit from the estate of the deceased is 8. Each of the 8 beneficiaries has an equal share in the estate of the deceased.

Conclusions and Disposition

45. In conclusion, the appellant had sought that the court should send this matter for retrial to include all the beneficiaries of the deceased. Given the vast jurisdiction of the High Court under Article 165(3) (a) of the Constitution, this court is well equipped to deal with the issues raised therein conclusively.

46. In the result, the appeal has merit and is hereby allowed. The following orders are issued:

1. The grant issued to the 1st respondent in the estate of the deceased on 20th June 2016 is hereby revoked;
2. The certificate of confirmation issued on 27th April 2017 is hereby set aside;
3. A fresh grant of letters of administration in the estate of the deceased shall be issued in the names of the 1st respondent and the appellant jointly;
4. A certificate of confirmation of grant to be issued forthwith, distributing the estate of the deceased as follows:

1. 3501 Kantafu Komarock Phase IX - to be held in equal shares by Jane Rose Weveti, David Mugambi Kathiri, the estate of Irene Mureki (deceased), Linda Njoki Njiru, Hellen Muthanje Gitwa, Lyn Njeri Njiru, Rebecca Muthoni Njiru and Doris Mwendu Njiru.

2. 2284 Kantafu Komarock Phase VII- to be held in equal shares by Jane Rose Weveti, David Mugambi Kathiri, the estate of Irene Mureki (deceased), Linda Njoki Njiru, Hellen Muthanje Gitwa, Lyn Njeri Njiru, Rebecca Muthoni Njiru and Doris Mwendu Njiru.

3. 1359 Kantafu Komarock Phase XI- to be held in equal shares by Jane Rose Weveti, David Mugambi Kathiri, the estate of Irene Mureki (deceased), Linda Njoki Njiru, Hellen Muthanje Gitwa, Lyn Njeri Njiru, Rebecca Muthoni Njiru and Doris Mwendu Njiru.



4. 2236 Kantafu Komarock Phase X- to be held in equal shares by Jane Rose Weveti, David Mugambi Kathiri, the estate of Irene Mureki (deceased), Linda Njoki Njiru, Hellen Muthanje Gitwa, Lyn Njeri Njiru, Rebecca Muthoni Njiru and Doris Mwendu Njiru.

5. Kyeni/Mufu/1816- to be held in equal shares by Jane Rose Weveti, David Mugambi Kathiri, the estate of Irene Mureki (deceased), Linda Njoki Njiru, Hellen Muthanje Gitwa, Lyn Njeri Njiru, Rebecca Muthoni Njiru and Doris Mwendu Njiru.

6. Shares in Kantafu Company Limited- to be held in equal shares by Jane Rose Weveti, David Mugambi Kathiri, the estate of Irene Mureki (deceased), Linda Njoki Njiru, Hellen Muthanje Gitwa, Lyn Njeri Njiru, Rebecca Muthoni Njiru and Doris Mwendu Njiru.

7. All monies in the deceased's Bank Accounts- to be shared equally amongst Jane Rose Weveti, David Mugambi Kathiri, the estate of Irene Mureki (deceased), Linda Njoki Njiru, Hellen Muthanje Gitwa, Lyn Njeri Njiru, Rebecca Muthoni Njiru and Doris Mwendu Njiru.

8. Any unclaimed benefits that shall be discovered after the making of these orders shall be shared equally amongst Jane Rose Weveti, David Mugambi Kathiri, the Estate of Irene Mureki (deceased), Linda Njoki Njiru, Hellen Muthanje Gitwa, Lyn Njeri Njiru, Rebecca Muthoni Njiru and Doris Mwendu Njiru.

47. In the event that, following pronouncement of this Judgment, the parties shall all agree and consent within sixty (60) days from the date hereof to a different mode of distribution that is more convenient given the size of the estate and number of beneficiaries, the court would be willing to entertain the same.

48. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 4TH DAY OF JUNE, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Ms. Mwinja holding brief for N.Ithiga for Respondent
2. Nyang for the Applicant
3. Francis Munyao - Court Assistant

