



**Kiricho v Kiricho & 6 others (Probate & Administration Appeal  
E003 of 2022) [2025] KEHC 9164 (KLR) (11 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9164 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
PROBATE & ADMINISTRATION APPEAL E003 OF 2022**

**AM MUTETI, J  
JUNE 11, 2025**

**BETWEEN**

**GERALD GACHUNIA KIRICHO ..... APPELLANT**

**AND**

**JAMES WANJOHI KIRICHO ..... 1<sup>ST</sup> RESPONDENT**

**ALICE WANGECHI KIRICHO ..... 2<sup>ND</sup> RESPONDENT**

**MARY WAIRIMU GATIMU ..... 3<sup>RD</sup> RESPONDENT**

**JOHN MATHENGE KIRICHO ..... 4<sup>TH</sup> RESPONDENT**

**ESTHER MUTHOMI NYORO ..... 5<sup>TH</sup> RESPONDENT**

**MOSES KURIA KIRICHO ..... 6<sup>TH</sup> RESPONDENT**

**JAMES MWANGI KIRICHO ..... 7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The appeal in this matter arises out of a judgment delivered on the 28<sup>th</sup> February 2022 in Nyeri CM's Court Succession Cause No. 99 of 2018 Gerald Gachunia Kiricho Vs James Wanjohi Kiricho.
2. The matter commenced before the Lower Court by way of a petition filed on 18<sup>th</sup> December 2015 as High Court Succession Cause No. 915 of 2015.
3. The Public trustee was issued with Letters of Administration on 26<sup>th</sup> May 2016 and on 1/11/2019 the appellant herein filed for summons for confirmation if grant.
4. The appellant in his summons for confirmation of grant listed the following persons as beneficiaries:-



- a. Gerald Gachunia Kiricho
  - b. Nelson Wambugu Kiricho
  - c. Philip Mathenge Kiricho
  - d. Joseph Karuri Kiricho
  - e. Jane Wacera Kiricho
  - f. James Mwangi Kiricho
  - g. Alice Wangeci Kiricho
  - h. Moses Kuria Kiricho
  - i. John Mathenge Kiricho
  - j. James Wanjohi Kiricho
5. The beneficiaries were to share out L.R Aguthi/Gatitu/577.
  6. According to the applicant Gerald Gachunia Kiricho, the 10 beneficiaries were to have the said land divided into two equal portions of 2.65 acres each and then the ten beneficiaries would share equally.
  7. The 1st Respondent in this appeal filed a protest on his own behalf and a behalf of other beneficiaries alleging that some of the persons listed as beneficiaries were not children of the deceased Daniel Kiricho Gichohi.
  8. The 1st Respondent proposed a mode of distribution that would limit distribution to the following beneficiaries:-
    - i. James Wanjohi
    - ii. Moses Kuria
    - iii. John Mathenge
    - iv. Alice Wangeci Kirichu
    - v. James Mwangi to the exclusion of all others.
  9. The 1<sup>st</sup> Respondent and the appellant in this appeal could not agree on whether the deceased was the biological father of all the persons listed by the appellant as lawful and rightful beneficiaries of the deceased's estate.
  10. The protester James Wanjohi Kiricho (1<sup>st</sup> respondent ) argued that the appellant and his brothers were born of the same mother but different fathers and since the property in issue was that of the deceased , the 1st Respondent maintained that the property in issue should only be shared out between the biological children of the deceased to the exclusion of all others.
  11. The learned Honorable magistrate agreed with the position taken by the 1st Respondent and went on to find and hold that the deceased was indeed polygamous but the appellant and some of his other siblings were not entitled to benefit from the deceased's estate since according to the learned Honorable magistrate they came into the deceased's life when they were adults and they were not able to show that they depended on deceased in order for them to benefit from his estate.



12. The learned Honorable magistrate went further to state in her judgment that:-

“It is only after his demise that the Regina Wangari and in particular the applicant ( appellant) herein, got overcome by greed and started confusion in an otherwise quiet home. It is notably curious that he is the only one in court pushing his mode of proposal. He filed not authority to plead on behalf of his other siblings. I find that the applicant (appellant) is seeking to benefit from the estate of a man who begot children with his mother and she left his mother and she left him for another life away from this man ( deceased) only to come back when his health had failed him extensively and immediately upon his demise, the struggle for inheritance kicked in.”

13. Having said so the learned Honorable Magistrate proceeded to find that the lawful beneficiaries of the deceased’s estate were the one’s set out in the protestor’s affidavit.

14. The lower court relying on the evidence tendered before it went on to find in favor of the 1st Respondent (protestor) prompting the instant appeal.

15. The appellant filed a memorandum of appeal raising the following grounds:-

- i. The Honourable Magistrate erred in law and in fact in concluding without scientific proof that the appellant was not a biological child of the deceased.
- ii. The learned Magistrate erred in law and in fact in ignoring the fact that the appellant’s mother never ceased to be the deceased wife inspite of the period she was absent from the deceased homestead a fact that was buttressed by the deceased’s conduct when he welcomed her home and instructed the respondent, her first son, to build a house for her there.
- iii. The learned Magistrate erred in law and in fact in giving 173 of the entire land to the respondent alone thus ignoring the other siblings including those who were left behind by their mother.
- iv. The learned Magistrate erred in law and in fact in visiting the "sins" of their mother upon the children.
- v. The learned Magistrate erred in denying most the children their mother’s entitlement without giving any reasons.
- vi. The learned Magistrate should have held that the parcel of land he instructed the respondent to build a house for his wife upon return and where she was buried was her share tn he inherited by all her children without discrimination.

16. The issues that arise from the grounds are that:-

- a. Whether the learned Honorable magistrate was right in declining to allow some of the beneficiaries listed by the appellant to inherit from the deceased’s estate.
- b. Whether the appellant and his other siblings qualified as dependants of the deceased and therefore were entitled to inherit from his estate.

## **DUTY OF THE FIRST APPELLATE COURT**

17. The duty of 1<sup>st</sup> appellate court is well settled in the case of *Selle Vs Associated Motor Boat Co. Ltd.* The court is expected to undertake a thorough examination of the evidence tendered before the learned Honorable magistrate , re-evaluate it and draw its own conclusions remembering that unlike the Lower Court the judge has not had an opportunity to see and hear the witnesses.



18. The appeal before me turns on basically two things:-
- i. Whether the deceased was polygamous and had children with the two wives.
  - ii. Who qualifies to be a beneficiary of the deceased's estate.

### **Analysis And Determination**

19. The law defines a dependant under Section 29 of the *Law of Succession Act* Cap 160 as:-

For the purposes of this Part, "dependant" means—

- (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, grand-parents, 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.
20. It follows from a reading of Section 29(1) of the Law of Succession that all children of a deceased person are deemed to be his dependants whether or not they were being maintained by the deceased immediately prior to his death. The Section therefore answers the first issue raised by the 1<sup>st</sup> respondent on who qualifies as a dependant in law.
21. The Court whenever called upon to decide on matters of succession involving the determination of rights of persons claiming to be children of the deceased, the court must begin by considering the question of parentage.
22. Who then in law is a child? The answer to this question for purposes of succession is to be found in Section 3 (2) of the *Law of Succession Act* which defines a "child" or "children" as:-
- References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
23. In *EMM Vs IGM & Another* 2014 eKLR the Court observed :- Additionally, the definition of a 'child' in Section 3(2) of the *Law of Succession Act* includes a child whom the deceased has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. We agree with the respondent that the appellant has to show a reasonable degree of permanency in the responsibility that the deceased is alleged to have voluntarily assumed over the appellant. Episodic support, as is the case here will not suffice.
24. It is the considered view of this court that, had the learned Honorable magistrate addressed her mind to this question of law in arriving at a decision to exclude the appellant and his other siblings from benefiting from the estate of the deceased, her decision on the right of the appellant and the rest of his siblings to inherit from the deceased's estate would certainly have been different.



25. The court having determined that the mother of the appellant had been married to the deceased and that despite her long period of separation from the deceased, she returned later before the deceased's death and was accommodated together with her children it would follow therefore that all her children would qualify as dependants of the deceased as per the *Law of Succession Act* Cap 160 of the Laws of Kenya.
26. The father of a child can only be known with certainty by the mother and in case of any doubt only scientific evidence would help in that determination. In any case separation alone does not necessary preclude the separated parents from bearing children together. Matters of the heart are personal and very complex more so where love is involved. It can never be the business of one child of the family to determine who amongst his siblings is a biological issue of their father and mother.
27. All children of a deceased person irrespective of their gender and age are considered equal before the law. It is not contested that the appellant and the rest of his siblings came into the deceased's compound while he was alive and they constructed on his land thus signifying their recognition and acceptance by the deceased as his children. The children therefore acquired the right to inherit the deceased.
28. The consideration would extent to children born out of wedlock and received by the deceased as his children during his life time.
29. The appellant vide submissions dated the 12<sup>th</sup> April 2023 submitted that he was born in 1972 on LR NO. Aguthi/Gatitu/577 and that the deceased was his biological father.
30. The submission was backed by evidence tendered by the appellant in the lower Court.
31. In his evidence he had told the court that:-

“I was born in 1972. The late Daniel Kiricho Gichohi is my father. He was my biological father. The 1<sup>st</sup> wife was Regina Wangari Kiricho. She had 8 children who are Jane Wacera , Elena Wanjiru , James Mwangi , Nelson Wambugu , the Late Susan Muthoni , Philip Mathenge , Gerald Gachunia and Joseph Karuri.”

“The second wife was Jerioth Wanjiru Kiricho whose children were; Mary Wairimu, Esther Muthoni, Alice Wangeci , James, Moses Kuria and John Mathenge. My father's land is Aguthi/Gatitu/577 measuring 5.3 acres. I pray for the court to divide the land as per my proposal of 31/10/ 2019. I am aware James Mwangi has protested my proposal. He has left out rightful beneficiaries to the estate.”
32. The 1<sup>st</sup> respondent gave evidence also but denied knowing the appellant. He stated that the deceased was married to one wife Jerioth Wanjiru who had six children.
33. The 1<sup>st</sup> respondent however admitted in evidence that the appellant Gerald lives on the disputed land.
34. He went on in his evidence to claim that the appellant came home after the father was buried.
35. John Mathenge Kiricho was called as a witness in support of the protest. However, John Mathenge on his part testified that Gerald the appellant, had come to live where James Mwangi his brother had built. He went on to say he first saw the appellant during their father's burial.
36. James Mathenge Kiricho acknowledged in evidence that his late father had told him that he had separated with Regina Wangari the appellant's mother.
37. It is clear from the testimony of James Mathenge that the appellants mother returned to the home and lived on the part of the land that according to him was set aside for Mwangi the son.



38. The witness gave evidence that the land had been subdivided by the deceased into 3 portions during his lifetime and the witnesses to that subdivision John G. Karuri and Gerald Gichoni Kiricho had died.
39. James Mwangi who is a brother to the appellant is the 7<sup>th</sup> respondent, he testified that he was a biological son of the deceased and the mother was one Regina Wangari who separated with the deceased father went and left them under the care of the grandparents.
40. According to him, Gerald ( the appellant) ,Karuri Mathenge and Wambugu have their fathers land in Nanyuki.
41. The 7<sup>th</sup> respondent further testified that he saw them for the first time in 2001 when he was 43 years old.
42. James Mwangi Kiricho went further and testified that the appellant and the other three came to Nyeri in 2012 when he was 52 years.
43. He testified further that “they demolished my house and started causing chaos with my step-mother”.
44. The 7<sup>th</sup> respondent stated that as a result of the dispute over the property he has been arrested 5 times and that happens anytime he visits home.
45. He maintained in cross examination that Gerald and his other siblings were not Kiricho’s children and that his mother came back when he was 41 years old.
46. The deceased in this matter died on 28<sup>th</sup> January 2003. The date of death is important because the question of parentage here is central.
47. The evidence on record clearly shows that the appellant and his other siblings came back to the home of the deceased in 2001 with their mother and they all settled there.
48. The 7<sup>th</sup> respondent was positive in his testimony that Gerald, Wambugu, Mathenge, Karuri and Muthoni who passed away were the children of Regina his mother.
49. It is therefore not in doubt that when the appellant came on to the land the deceased was alive and therefore had knowledge of their presence on his land at least for about 2 years before his death.
50. The learned Honorable Court in making orders of distribution excluding the appellant and the rest of the disputed children of the deceased appears to have placed much weight on the fact that the deceased’s first wife had long separated with the deceased.
51. It would appear to me that the magistrate was persuaded by that fact alone to belief that the appellant Wambugu, Muthoni and Mathenge were not the deceased’s children.
52. In my considered view, without the benefit of other evidence on parentage the court proceeded on a wrongful presumption that since Regina had separated with the deceased on grounds of alleged adulterous conduct, the two could not have given birth to the appellant and other siblings she returned with to the family in 2001 before the death of the deceased.
53. I must say that the prove of parentage could only have been ascertained by way of scientific evidence and none of that was produced in this case.
54. The presentation of DNA evidence would have served as conclusive proof of who was the biological father of the appellant.
55. However, that withstanding, the law does not require one to be of biological extraction of the deceased in order for them to qualify to inherit or qualify to be treated as a child for purposes of succession.



56. One may qualify as a beneficiary if they prove that during the deceased's lifetime he had accepted and recognized them as his children.
57. It is also not necessary to prove that they were being maintained by the deceased prior to his death for them to qualify to inherit if they were the children of the deceased.
58. The estate of the deceased in this court's view should go to all the children he had recognized as his during his lifetime. This court finds that to hold otherwise would not only be unjust but also unequitable. There is no super child in a family who has the right to arrogate himself the role of determining who is rightful siblings are or whom amongst his brothers and sisters was not born of the same father. To allow children to dictate to the world on this would be a recipe for chaos in succession disputes. Let children stay from bedroom matters of their parents and accept their place in society just as children.
59. In *Re Estate of Kimitei Cherop (deceased) (2021) eKLR*, the court in applying section 40 of the *Law of Succession Act* stated as follows;40(1)] that the number of children in each house be taken into account..."

Further, the court cited the Court of Appeal case of *Mary Rono v Jane Rono & another (2005) eKLR* where Hon Omolo, JA stated as follows; " .... If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section [section

"....I now turn my attention to the final issue, whether the estate should be divided equally between the two houses or equally amongst the 9 children and the surviving widow. It is manifest therefore that, guided by the provisions of section 40(1) of the *Law of Succession Act*, the estate herein ought to be distributed equally amongst the 9 children of the deceased and the surviving widow, thus making 10 units...."

60. In line with the reasoning above, I come to the conclusion that the children of the deceased as listed by the appellant in his proposal on distribution had equal rights to receive a share from the deceased's estate. Accordingly, this court finds that the decision of the learned honorable magistrate was wrong and the same is hereby set aside.
61. The estate of the deceased shall be shared out equally between all the children of the deceased as per the list provided by the appellant.
62. The subdivision shall respect the developments in terms of occupancy so that no child is uprooted from where they have put up their home.
63. The appeal is allowed with no order as to costs.
64. It is so ordered.

**DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 11<sup>TH</sup> DAY OF JUNE 2025.**

**A. M. MUTETI**

**JUDGE**

In the presence of:

Kiptoo: Court Assistant

Kibuka Wachira for the Appellant



1<sup>st</sup> Respondent Absent

2<sup>nd</sup> Respondent Absent

3<sup>rd</sup> Respondent Absent

4<sup>th</sup> Respondent Absent

5<sup>th</sup> Respondent Absent

7<sup>th</sup> Respondent Absent

