



REPUBLIC OF KENYA



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**Gitigi v Nyaga & another (Civil Appeal E052 of 2021)
[2025] KEHC 10385 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10385 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E052 OF 2021
EM MURIITHI, J
JULY 17, 2025**

BETWEEN

WARUI GITIGI APPELLANT

AND

MARGARET WANGARI NYAGA 1ST RESPONDENT

JANE MUTHONI GICHOBI 2ND RESPONDENT

*(An appeal from the Judgment of Hon. E. O. Wambo (P.M) in
Kerugoya Succession Cause No. 5 of 2019 delivered on 18/11/2021)*

JUDGMENT

1. On 23/10/2019, the Appellant, a son to the deceased, filed summons for confirmation of grant where, at paragraph 6 of the affidavit in support thereof, he proposed how L.R No. Inoi/Kimandi/183 measuring approximately 1.94 Ha (henceforth called the estate property) was to be distributed.
2. The Appellant swore a further affidavit on 10/2/2020 asserting that Muriithi Gitigi Ngeita was never married to the 1st Respondent and he lived on the estate property alone. The 1st Respondent neither attended the burial of Muriithi nor got acknowledged as his wife. In his view, the 1st Respondent's joint registration as a co-owner of L.R No. Inoi/Kimandi/1335 was through fraudulent means.
3. The Appellant swore a Replying Affidavit on 11/9/2020 urging that the 2nd Respondent was his former wife after they parted ways 40 years ago. He later married Rose Warware Warui in 1983 in a church wedding and he fully provided for his children with the 2nd Respondent.
4. On 22/11/2019, the 1st Respondent, the wife to Muriithi Gitigi Ngeita (now deceased) filed an affidavit of protest in opposition to the Appellant's mode of distribution as well as the listed beneficiaries. She termed John Wachira Kariithi, Symon Muriuki Gichira, Benson Kinyua Muriuki and Ephantus Migwi Kiragu as strangers to the estate of the deceased. She accused the Petitioner, her brother-in-



law of distributing the estate solely to strangers, himself and his children while giving nothing to his brother, her deceased husband. She urged that her deceased husband was entitled to 2 Acres of the estate property and urged the court to allow her protest.

5. The 1st Respondent swore another affidavit on 28/2/2020 in support of her protest.
6. The 2nd Respondent and the Appellant's wife filed an affidavit of protest on 10/8/2020 urging that the initial grant was revoked on a technicality which did not affect the distribution of the estate property. Consequent to the revocation of the grant, her registration as the proprietor of L.R No. Inoi/Kimandi/1263 was cancelled.

Statements

7. Jamleck Bundi Warui, a son to the Appellant and Mwai Kago, the Chairman of Nyumba Kumi at Kimandi filed their witness statements on 27/2/2020 refuting the 1st Respondent's claims that she was married to Muriithi Gitigi Ngeita.
8. The 1st Respondent filed her witness statement on 2/3/2020 restating that she was married to Muriithi Gitigi Ngeita and the Appellant warned her husband against bringing her to his home.
9. Her sentiments were echoed by Josphat Mwangi Macere and Samuel Macharia Gichuki in their statements dated 28/8/2020. They stated that their title deeds to L.R No. Inoi/Kimandi/1336 and 1335 respectively were affected by the revocation of the initial grant.
10. Upon hearing of the case, the trial court distributed the estate property as proposed by the 1st Respondent in her protest as follows;

“Warui Gitigi to get - 2.0 Acres, Muriithi Gitigi to get - 2.0 Acres and Zipporah Mabuti Gakuru to get - 0.6 Acres.”

The Appeal

11. On appeal, the Appellant filed his memorandum of appeal on 16/12/2021 raising 4 grounds as follows:
 1. The Learned Trial Magistrate erred in law and fact by recognizing the 1st Respondent as a wife for purposes of succession premised on presumption of marriage and which was not proved at all.
 2. The Learned Trial Magistrate erred in law and fact by recognizing the 1st Respondent as a wife for purposes of succession yet there was unrebutted evidence that she was and still is married to one John Bundi Ivan.
 3. The Learned Trial Magistrate erred in law and fact by failing to appreciate the fact that the affidavit sworn on the 10th November 2015 could not validate a marriage where none existed.
 4. The learned Trial Magistrate erred in law and fact by arriving at erroneous decision.

Duty of the court

12. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).



Oral Evidence

13. Protestor's Witness 1 Margaret Wangari Nyaga and the 1st Respondent herein adopted her affidavits dated 21/11/2019 and 28/2/2020 as her evidence in chief and produced the list of documents dated 3/2/2020 and 28/8/2020 as exhibits. She testified that, "I know the deceased. I know Mureithi Gitigi Ngatia. He was my husband from 2010. Warui Gitigi is a brother. He had a daughter called Mabuti. She is in Court. The other sister is deceased. We were staying in town it was rental. My husband I have 3 children with him. He signed an affidavit to prove I am the wife. It is for 10th November, 2015 Doc. No. 6. We did the affidavit as he wanted to add me in N.H.I.F. He had a parcel of land. He had been given 2 acres from his father Gitigi Ngatia. The original number of was Inoi/Kimandi/183. There was another succession which the grant was revoked. The land had been granted to 3 people. 1. Muriithi Gitigi - my husband. 2. Warui Warui Gititi- his brother. 3. Mabuti Gitigi - his sister. Inoi/Kimandi/81 was subdivided into 2 portions and titles issued. My husband was Inoi/Kimandi/1260. We never settled there they used to chase us away. There were a lot of fights. When we got 1260 we sub divided further into portion Inoi/Kimandi/1335 and 1336. 1335 we registered jointly with my husband and obtained title. 1336 we sold to Josphat Mwangi Machere and he obtained a title. During the revocation all the titles were cancelled as the son to Warui Gitigi called John Muchira Warui had petitioned for orders. We had filed a case for auction Kerugoya CM CC 80/2017 the defendant is Warui Gitigi document No. 26 in further list of documents. I was married to Mureithi. Paragraph 4(b) - (k) of the supporting affidavit the children to the Petitioner. Paragraph 6 item 11 they are strangers. I propose if be divided as before 2 acres for myself. 2 acres for the petitioner. 2.6 acres for her sister."
14. During cross examination by Mabuti, she stated that, "I am taking 2 acres as the wife of Mureithi. He married me with children and he was supporting the children. The previous man we parted. You used to visit us. He married me 2010."
15. On cross examination by the Appellant, she stated that, "I want my husband's share. I have an affidavit of marriage. I have the grant Ad Litem. Everybody knows my husband died. You know I was the wife. You chased him away. There is an eviction order."
16. Protestor's Witness 2 Josphat Mwangi Macere adopted his statement dated 28/8/2020 as his evidence in chief. He testified that, "I am a businessman. I know Muriithi Gitigi. I know WaruiGitigi he is the brother. On 2nd October 2013 Mureithi came to my shop. He wanted shop commodities. He told me he is a watchman. The only thing he would give was his interest. It had not been sub divided. We did an agreement NO.9 in further list. There was James Ngugi, John Macere Warui, Eliud Karimi, Jane Muthoni 1st wife of Warui Gitigi. We signed the agreement. He told me there was a succession. We processed the titles even Mzee has a title. Mureithi was given 1260. We did a joint registration. We obtained title. We later partitioned and he introduced his wife. I registered title and there was a court order for partition. He sued me. I produce copy of the order for ELC 36/2015 D. exhibit 28. It became 1335 and 1336. He wanted a joint registration with his wife. Mine became 1336. Theirs became 1335. Mureithi introduced her as a wife."
17. During cross examination by the Appellant, he stated that, "I know him he was picking items from me. I knew him in 2013. It's like 7 years. He died on 4.8.2018. He started picking items from me in 2013. We agreed in your presence that I will finance the succession. Everything he knew you also knew. The witnesses were: James Bundi, John Machira, Eliud Karimi, Jane Muthoni Gichobi. There were no witnesses apart from the 4 but you were present and said those were enough. You did not sign. We agreed with Mureithi. It was part of Inoi/Kimandi/183. This agreement was not sub divided land. We went to the board. 1. Yourself, Warui Gitigl,2. wife Mabuti, 3. Jane Muthoni,4. Mureithi himself. There was no stealing, we went with you through. You were present at the land board and



- signed the consent. You cannot say you were not there. Document 10 and 11 being application for consent you were present. I don't know when you got the letter to the board. You went to the board as a family. You were dividing your father's land. I did not the Administrator. You went to the board alone. I am in Court as I had agreed with your brother Simon Mureithi Gitigi. The land Mureithi was Inoi/Kimandi/183. You had earlier done sub division through the Court process. You went to the board 4 persons: yourself, Mureithi, your wife, Jane Muthoni and Loise Mabuti your sister. There had been a succession. I don't know the succession cause number. John Muchira Warui was the Administrator. We had an agreement with Simon Mureithi Gitigi your brother before the agreement I saw the land. I had an agreement with you.”
18. In re-examination, he stated that, “I am here I had already obtained a title. I purchased it from Simon Mureithi Gitigi a brother to Warui Gitigi. By the time I purchased it was in the name of Simon Mureithi Gitigi. There is an agreement.”
 19. Protestor's Witness 3 Samuel Macharia Gichuki a Ward Administrator in Kirinyaga County adopted his statement dated 28/8/2020 as his evidence in chief.
 20. During cross examination by the Appellant, he stated that, “The land which was being sold to me by Muriithi Gitigi and Margaret Wangari Nyaga was Inoi/Kimandi/9335. It was a joint ownership. According to search it was for them. I knew you when I was buying the land. I found you there on the land. I told you I am being sold land. I told you Mureithi was selling the land. It was 0.38 hectares. It is 0.2 or 2 points to be 1 acre. When I came to the land on 23rd Derember, 2016 you told me you told me a part of your house was on that land. You asked for time to construct another house on your own land. You did not mention any case. I did a search. It was joint ownership. I went to the board the land was okay. I have the search 13th December, 2016 before I entered into the agreement. I did not ask about the history. From 2016 to now it is 5 years. We are now in court. I later heard from 3rd parties that the title deeds were revoked. I was not involved in the process that revoked them. That is why we are here. The court revoked the titles. The court ordered a fresh succession. I am the Administrator. I am not aware of the other issues.”
 21. The 2nd Respondent adopted her affidavit of protest dated 7/8/2020 as her evidence in chief.
 22. During cross examination by the Appellant, she that, “I am your 1st wife. You have been my husband for long. We have many children. We have 4 children. I have never left. We have had problems. You are still my husband. You gave me 1 acre and a title. We went to the board. I am your wife. When you dividing your further land. We will have title. The succession of your father you did succession. The land you gave me for succession you subdivided by Mureithi. It was 1994. We went to the board in 2014.”
 23. During cross examination by the 1st Repondent, she stated that, “I know Mureithi Gitigi Gaita. He is a brother to my husband Warui Gitigi. I know Josphat Mwangi Macere. I went to P.M. Muchira Advocate and witnessed an agreement 21st Ocrtober 2013. This is the agreement. James Mbundi Warui is my son he was one of the witnesses. John Mucira Warui is also my son. He witnessed the agreement. Eliud Karimi Warui is also my son. He witnessed the agreement. Muriithi Gitigi signed the agreement in my presence. 2nd October, 2013. My husband Warui Gitigi was also present. He asked for a key to go to the washrooms when he came back he demanded for money. He was there. We were called to witness. They were present.”
 24. Petitioner's Witness 1 Warui Gitigi and the Appellant herein adopted his affidavits dated 28/10/2019, 4/2/2020, 10/2/2020 and 11/9/2020 as his evidence in chief. He testified that, “Inoi/Kimandi/183 be given to me. I propose 1¹/₄ for myself. Zipporah Mabuti ³/₄ of acre.”



25. During cross examination by the 1st Respondent, he stated that, “Gitigi Ngatia deceased is my father. He had 4 children. 1. Mureithi Gitigi Ngatia – deceased, 2. Waruguru Gitigi Ngatia – deceased, 3. Zipporah Mabuti Gitigi, 4. Warui Gitigi. Pauline Wanjira Warui, Jane Muthoni Warui, Alice Wanjiru Warui Are My Daughters. Paragraph 6: John Muchira, James Bundi, Eliud Karani, Jamleck Bundi, Fredrick Ndege, Moses Muriithi They Are My Sons. John Muchira, Simon Muriuki, Benson Kinyua, Ephantus Migwi Kiragu, they assisted me in the High Court. They are not my beneficiaries. They are brokers. They assisted me in the High Court. They were assisting me not my father. What we are awaiting is survey. Mureithi Gitigi was my brother. Margaret Mungai I have not seen the affidavit dated 10th November, 2020. It is a lie. It has thumb print. I have not taken it to the forensic or finger prints experts. I have no psychiatric report that he was mentally challenged. In 2017 the sub chief was Jamleck K. Gatimu. I have not seen that letter. I was served with the further list. The property had been sub divided and titles came out. Mureithi was given Inoi/Kimandi/1260. There was time it was registered in the names of Mureithi Gitigi and Josephat Mwangi Macere. 1260 was further sub divided 1335 and 1336. I confirm that it was sub divided. I don't know who 1335 and 1336 went to. John Mucira sub divided 2 acres. CC 80/2017 was involving Muriithi Gitigi Ngatia and Margaret Wangari Nyaga. There was an eviction order. I was in the police station. In the case the O.C.S was given order to provide security.”
26. On cross examination by the 2nd Respondent, he stated that, “Jane Muthoni, James Bundi, Eliud Karimi. I had not given you land. You were married Stanley Mwaniki Kamuri.”
27. Petitioner’s Witness 2 Mwai Kago adopted his witness statement dated 5/2/2020 as his evidence in chief.
28. During cross examination by the 1st Respondent, he stated that, “I don't know when Mureithi Gitigi was born. I don't know when he died. I don't know his clan's name. I don't know about his sub clan. I heard he was a watchman in town. I don't know where he was staying in Kerugoya town. We have never sat down with him and discussed his social life with him. I never saw him with a wife. I have a wife. I married in 1997. I paid my dowry. I never took my wife to Mureithi. He did not participate in my traditional ceremonies. He was not to call. I know former sub chief Jamleck. I was the Nyumba kumi. Chief represent the government. It is a lie what chief said. I have not reported the chief for lying. I don't know about the letter dated 29.10.2019. I don't know about Mureithi's affidavit of marriage. I don't know about Mureithi and wife's case against warui for eviction. We were not close friends.”
29. Petitioner’s Witness 3 Jamleck Bundi Warui adopted his witness statement dated 12/2/2020 as his evidence in chief.
30. During cross examination by the 1st Respondent, he stated that, “The 2nd protestor is my step mother. My mother is Rose Warware Warui.”
31. During cross examination by the 1st Respondent, he stated that, “In 1994 I was young. Ask for land from my father.”

Submissions

32. The Appellant urges that Muriithi and the 1st Respondent neither lived together on the estate property nor had any children and there were no traditional rites followed to show that a marriage existed, and cites In re Estate of GOR (Deceased) (Succession Cause 257 of 2017) [2023] KEHC 25658 (KLR) (Family) (17 November 2023) (Judgment). He urges that the purported affidavit of marriage did not validate a union of husband and wife that never existed, and cites M.W.G v E.W.K [2010] eKLR.



33. The 1st Respondent urged that the Appellant treated her as a wife to Muriithi Gaiti Ngeita and his share ought to be given to her. She relied on *Hottensiah Wanjiku Yawe v Public Trustee* [1976] KECA 1 (KLR), and *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another* [2009] eKLR to fortify her submissions.
34. There were no submissions for the 2nd Respondent.

Analysis and Determination

35. From the grounds of appeal, the singular issue for determination is whether the 1st Respondent was a wife to the deceased.
36. In *Kimani Gituanja v Jane Njoki Gituanja* [1983] eKLR, the Court of Appeal (Chesoni AG JA) observed that;

“The existence of a marriage is a matter of fact which is proved with evidence.”

37. The 1st Respondent testified that; “I know Mureithi Gitigi Ngatia. He was my husband from 2010. Warui Gitigi is a brother. He had a daughter called Mabuti. She is in Court. The other sister is deceased. We were staying in town it was rental. My husband I have 3 children with him. He signed an affidavit to prove I am the wife. It is for 10th November, 2015 Doc. No. 6. We did the affidavit as he wanted to add me in N.H.I.F.”
38. Although the Appellant acknowledged that Mureithi Gitigi was his brother, he did not list him as a beneficiary to the estate in his affidavit in support of his summons for confirmation of grant. He further affirmed that he had included strangers to the estate as beneficiaries when he stated that; “Gitigi Ngatia deceased is my father. He had 4 children. 1. Mureithi Gitigi Ngatia – deceased, 2. Waruguru Gitigi Ngatia – deceased, 3. Zipporah Mabuti Gitigi, 4. Warui Gitigi. Pauline Wanjira Warui, Jane Muthoni Warui, Alice Wanjiru Warui are my daughters. Paragraph 6: John Muchira, James Bundi, Eliud Karani, Jamleck Bundi, Fredrick Ndege, Moses Muriithi they are my sons. John Muchira, Simon Muriuki, Benson Kinyua, Ephantus Migwi Kiragu, they assisted me in the High Court. They are not my beneficiaries. They are brokers. They assisted me in the High Court. They were assisting me not my father.”
39. Protestor’s Witness 2 stated that Mureithi introduced the 1st Respondent to him as his wife.
40. Notably, there is an affidavit of marriage jointly sworn by the 1st Respondent and Muriithi Gitigi Ngeita on 10/11/2015 to the effect that the two got married under Kikuyu Customary Law in 2010 and conducted themselves thereafter as husband and wife.
41. In *re Estate of Geoffrey Mugwe Kamau (Succession Cause 113 of 2015)* [2023] KEHC 21814 (KLR) (10 August 2023) (Judgment), the court (Nyakundi J) expounded that:

“It is trite law that he who alleges must prove. For one to prove a civil marriage, production of a marriage certificate shall suffice. If one claims to have been married via customary law, the onus is upon them to prove the same. In *Njoki -vs- Mathara and Others Civil Appeal No. 71 of 1989 (UR)*, Kneller J. A held that: “(i) The onus of proving a customary marriage is on the party who claims it. (ii) The standard of proof is the usual one for civil action, balance of probabilities. (iii) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.”



42. In their letters dated 29/11/2017 and 29/10/2019, the Sub-Chief and the Chief of Kimandi Sub-Location and Kerugoya Location respectively unequivocally confirmed that the 1st Respondent was the only legal dependant and surviving wife to Muriithi Gitigi Ngeita. Subsequent to successful application, the 1st Respondent obtained grant of letters of administration Ad Litem in respect of the estate of Muriithi Gitigi Ngeita, on 5/12/2019.
43. The evidence on record, taken cumulatively, is proof on a balance of probabilities that the 1st Respondent was a wife to Muriithi Gitigi Ngeita (now deceased).

Court order of 21/12/2017

44. On 21/12/2017, this court revoked the grant earlier on issued to John Muchira Warui on 25/4/1995. In revoking the said grant, the court (L.W Gitari J.) noted at paragraph 6 of the judgment dated 21/12/2017 that L.R No. Inoi/Kimandi/183 was partitioned and title deeds issued: “The applicant got land parcel No. Inoi/Kimandi/1261 measuring 0.387 Ha. The other three portions are Inoi/Kimandi/1260, 1262 and 1263.”
45. The record shows that L.R No. Inoi/Kimandi/1260 was subdivided into L.R No. Inoi/Kimandi/1335 and 1336. The revocation of the grant effectively cancelled the 1st Respondent’s and her husband’s joint title to L.R No. Inoi/Kimandi/1335. The title to L.R No. Inoi/Kimandi/1336 was also cancelled.

Orders

46. Accordingly, for the reasons set out above, this court finds the appeal to be without merit and it is dismissed.
47. The appellant shall pay the costs of the appeal to the Respondent.
Order accordingly.

DATED AND DELIVERED THIS 17TH DAY OF JULY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Mugo for the Appellant.

Mr. Kahiga for the Respondent.

