



In re Estate of Wachira Mithamo alias Wilson Wachira Mithamo (Deceased) (Succession Cause E024 of 2023) [2025] KEHC 11795 (KLR) (28 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE E024 OF 2023
DKN MAGARE, J**

JULY 28, 2025

**IN THE MATTER OF THE ESTATE OF WACHIRA MITHAMO
ALIAS WILSON WACHIRA MITHAMO (DECEASED)**

BETWEEN

WILLIAMSON MWANGI MITHAMO 1ST PETITIONER

JOHN GACHUGU WACHIRA 2ND PETITIONER

AND

BILHA NJERI NJORO 1ST PROTESTOR

LYDIA WACHUKA MUHUNI 2ND PROTESTOR

JUDGMENT

1. This is an application for confirmation. The deceased herein Wachira Mithamo died on 24.02.1983 intestate. Williamson Mwangi Mithamo and John Gachugu Wachira filed for petition for letters of administration intestate on 30.10.2023. The Petition indicated that the deceased was survived by:
 - a. Mary Wanjugu Mithamo
 - b. Williamson Mwangi Mithamo
 - c. John Gachugu Wachira
 - d. Julius Muriithi
 - e. Bilha Njeri Njoro and
 - f. Lydia Wachuka Muhuni
2. Mary Wanjugu Mithamo was indicated as a daughter-in-law while the rest are grandchildren. The daughter in law was said to be 88 years.



3. Sole asset was Land Parcel No. Iriaini/Kairia/380, measuring 2.10 hectares (5.187 acres).
4. The petitioners filed Summons for Confirmation of grant on 22.07.2024 where they listed the aforementioned 3 of the 6 beneficiaries to share out Iriaini/Kairia/380 as follows:
 - a. Williamson Mwangi Mithamo – 0.78 Ha
 - b. John Gachugu Wachira – 0.63 Ha
 - c. Julius Muriithi – 0.63 Ha
5. Bilha Njeri Njoro put in an Affidavit of Protest dated 31.07.2024 wherein she stated that they objected to the distribution as they were not consulted as to the mode of distribution. That their father was a child of the deceased herein who predeceased the deceased in this cause. That they were left out of their grandfather's estate. That the deceased left behind 6 beneficiaries and thus the land was not equally divided among the beneficiaries. They sought distribution as follows:
 - a. Bilha Njeri Njoro – 0.420 Ha
 - b. Lydia Wachuka Muhuni – 0.420 Ha
 - c. Williamson Mwangi Mithamo – 0.420 Ha
 - d. John Gachugu Wachira – 0.420 Ha
 - e. Julius Muriithi – 0.420 Ha and
 - f. Mary Wanjugu Mithamo to have life interest on all five portions.
6. The Petitioners put in a Replying Affidavit dated 16.09.2024 to the Protest dated 31.07.2024 wherein they stated that the Protestors are their sisters who have since inception opposed the succession proceedings. That the Protestors have frustrated the execution of the supporting documents for petition for grant of Letters of Administration Intestate.
7. The Petitioners claimed that the Protestors moved to Karatina Law Courts and filed parallel proceedings to counter these ones and was withdrawn for want of jurisdiction. That Bilha Njeri, Wanjugu Mithamo and Wilson Wachira Mithamo co-owned in proportions of 2 acres, 1.5 acres and 1 acre respectively.
8. That the said parcel of land was later partitioned to Iriaini/867, 868 and 869 and registered in the names of Bilha Njeri Njoro, Wanjugu Mithamo and Wilson Wachira Mithamo respectively. They stated that Iriaini/Kairia/867 was transferred in favour of Bilha Njeri Njoro's spouse, one Stephen Njoro Mwangiru and was later sub-divided into Iriaini/Kairia/1639 and 1640 measuring 0.365 hectares and 0.405 hectares respectively. They claimed that Iriaini/Kairia/1639 is still registered in the names of Bilha Njeri Njoro's spouse, one Stephen Njoro Mwangiru.
9. The Petitioners claimed that Iriaini/Kairia/1640 in the name of Stephen Njoro Mwangiru was later transferred to Edward Muriuki Kimathi and Iriaini/Kairia/868 was registered in the name of Wanjugu Mithamo on 16/12/1980 and later rectified to Mary Wanjugu Mithamo on 31/10/2008 and later disposed of.
10. That land parcel Iriaini/Kairia/1640 was registered in favour of late Wilson Wachira Mithamo and later registered in favour of Ronald Mwangi Kibuchi. They claimed that their sisters were all catered for before the demise of their grandfather in the sharing of beneficial interests in the land known as



Iriaini/Kairia/50 that mutated as elucidated and that Iriaini/Kairia/380 was meant for the grandsons of the deceased.

11. The Protestors put in a Further Affidavit dated 23/09/2024 in support of the Protest dated 31/07/2024 wherein they stated that the petition was filed without their knowledge and consent. They further stated that they filed citation in E301 of 2023 in Karatina where Bilha Njeri Njoro cited Mary Wanjugu Mithamo, Williamson Mwangi Mithamo, John Gachugu Wachira and Julius Muriithi Wachira. That after serving them the citation, they informed the court that the present cause had been filed and that they withdrew the citation.
12. That the deceased at the time of his death had Iriaini/Kairia/380 and the same is subject to this cause and that the deceased died intestate. They stated that Iriaini/Kairia/50 is not the subject of this cause but that for clarification is that the land belonged to their grandparents, Wilson Wachira Mithamo and Bilha Wanjeri Nyakiago. She stated that she got a portion of this land as a gift by her grandmother as per the green card and not the deceased and this being the reason she is a beneficiary and entitled to a share. She stated that it is misleading to inform court that Lydia Wachuka Muhuni was given proceeds of the sale by their mother and further, because they were not involved during the sale nor were they aware of the sale of land.
13. Mary Wanjugu Mithamo put in a Replying Affidavit dated 24/02/2025 to the Protest dated 31/07/2024 wherein she stated that she was the lawful wife and widow to the deceased herein. She stated that her husband and herself made oral dispositions concerning his share in his father's estate to the effect that their daughters and herself were to inherit Iriaini/Kairia/50 measuring 4.5 acres and the sons would get Iriaini/Kairia/380 measuring 2.10 hectares.
14. She claimed that Iriaini/Kairia/50 was registered in the joint names of Bilha Njeri Njoro 2 acres, Wanjugu Mithamo 1.5 acres and Wilson Mithamo with 1 acres which was subjected to subdivision on 16/12/1980 resulting in Iriaini/867, 868 and 869. She claimed that Iriaini/Kairia/867 was to be registered jointly in her daughters' names but was registered in Bilha's name only.
15. She claimed that Iriaini/Kairia/867 meant for her two daughters was further subdivided into Iriaini/Kairia/1639 and 1640 on 24/10/1998. She claimed that Iriaini/Kairia/1639 was registered in the name of Stephen Njoro Mwagiru, the spouse of Bilha Njeri Njoro. She claimed that Iriaini/Kairia/1640 also registered in Stephen Njoro's name was transferred by way of sale to Edward Muriuki Kimathi.
16. She claimed that Iriaini/Kairia/868 was registered in her name which she later sold to one Daniel Githinji Kangethe and she shared the cash proceeds between herself and Lydia Wachuka Muhuni. She claimed that Iriaini/Kairia/868 was registered in favour of the now deceased herein and later transferred to one Stephen Munene Mukua on 18/01/2007. She stated that her daughters were adequately provided for during the lifetime of the deceased from the portion of land known as Iriaini/Kairia/50 and that her sons should receive their portion as per the summons of confirmation of grant dated 2/07/2024.

Evidence

17. PW1, Lydia Wachuka Muhuni stated that the deceased was her paternal grandfather. She adopted her affidavits dated 31/7/2024 and 23/9/2024 as her evidence in chief and reliance was on the documents. She stated that she was not given money from the sale of land.
18. In cross-examination she stated that Iriaini/Kairia/50 belonged to her grandparents and that her sister was given 2 acres. She stated that it was true that their grandmother gave Bilha Njeri land (asked if paragraph 9 of the further affidavit was correct). She stated that these portions were given to Bilha, her



- mother, and brother Wachira. She stated that their mother was given some land about 1.5 acres and that Wachira was given 1 acre whereas Bilha was given 2 acres. She stated that she never built in the said land. She stated that it was not true that plot 50 was given to girls whereas plot 380 was given to boys. She stated that she did not know the size of plot 50 and that she lived on plot 380. She stated that Bilha sold two plots and remained with one. She further stated that their mother sold the parcel given to her.
19. She stated that it was not true that she got some money from the proceeds of sale of plot 50. She stated that only one acre belonged to Bilha and that the rest have been sold.
 20. PW2, Bilha Njeri stated that she swore two affidavits and wished to adopt the same. She stated that there were two parcels 50 and 380 and that she was given plot 50 by her grandmother who gave her, her share. She stated that this share was in one title.
 21. In cross-examination she stated that plot 50 is near where she stays and that it belonged to both parents Wilson Wachira and Bilha Nyakiago. She stated that Bilha Nyakiago's share was 2 acres. She stated that she saw the title and that she did not have it. She stated that the remaining part was sold by her grandfather. She stated that her grandmother and grandfather had an agreement. She stated that her grandfather gave her grandmother 2 acres and which became hers as she shared a name with her grandmother. She stated that she was given two acres by her grandmother and that she sold 1 acre. She stated that she would be getting excess shares if she got more. She stated that Lydia built a house on Plot 50, and that she did not get her share. She stated that the 2 acres she got were for use with Lydia. She stated that there were originally 5 acres where her mother got 2 acres, and 1 acre remained which was sold by their grandfather. She stated that she did not have evidence that their mother got 2 acres. She stated that 1 acre was sold by their grandfather and that she did not get any proceeds from the sale.
 22. In cross-examination by the court when asked who was signatory to the title given to her, she stated that only her grandmother signed. When asked how many names were on the title for plot 50 she stated Wilson Wachira and Bilha Wanjeri Nyakiago. When asked whether Bilha Wanjeri Nyakiago got a title in her own name for the land to be given to PW2, she stated that there was a title given to Bilha Wanjeri Nyakiago then to herself.
 23. In further cross-examination she stated that her grandmother died in 1991 and left a plot to her brother Julius Muriithi and that they had not done succession in the estate. She stated that she had no evidence that Julius got a title. In re-examination she stated that the land she was given belonged to her and Wachuka.
 24. DW1 Williamson Mwangi Mithamo stated that he was a son of Joseph Mithamo and Mary Wanjugu Mithamo. He stated that Joseph Mithamo was his paternal grand-father and that his father died before his grandfather. He stated that he was an administrator of the estate. He stated that he filed a Replying affidavit dated 16/9/20224 which he wished to adopt as his evidence in chief and reliance was on Dexh1-13.
 25. In cross-examination he stated that his father had one wife and 5 children, Bilha Njeri Njoro, Lydia Wachuka Muhuni, Williamson Mwangi Mithamo, John Gachugu Mwangi and Julius Muriithi Wachira. When shown the official search on Plot 50 he stated that the plot showed that Bilha Njeri Njoro got 2 acres, Wanjugu Mithamo 1.5 acres and Wilson Wachira 1 acre. He stated that this was the land given to Bilha Njeri. He stated that Wachuka is his sister and their mother gave Wachuka money. He stated that he was not there when the money was given. He stated that his grandmother Bilha Njeri Nyakiago had land with their grandfather. He stated that he did not know of any plot remaining. He stated that their mother lives with him and that she was staying on plot 380. He stated that Wachuka stays in her mother's house. In re-examination he stated that he stays on 380 together with his brother John and Julius.



26. DW2, Mary Wanjugu adopted her affidavit dated 24/2/2025 as her evidence in chief. She stated that she was a daughter in law of Wilson Wachira Mithamo. She stated that the land was sub-divided in the following terms; Plot 380 was for sons whereas herself and daughters were given Plot 50.
27. In cross-examination she stated that her husband was Mithamo who died long ago and even before her father in law. She stated that her father in law died before her mother in law. She stated that her husband was not given any property and he had her as his sole wife. She stated that when she was given the land she was given as a daughter in law. She stated that she was not given any land for her children and that the land she was given she later sold. She stated that when she was being given her land Bilha was also being given hers.
28. She stated that Lydia Wachuka was given a share comprising 1 acre. She stated that her personal share was 1.5 acres. She stated that at the same time Wachuka told her to sell the land and give her part of the money which, she did. She stated that when she sold the land she was living with her husband. She stated that she could not recall the sale agreement. She stated that Williamson and the sons were not there when she sold the land. She stated that when she sold the land she was staying at Plot No.50, where she was caring for the grandparents, which was the one she sold. She also stated that Bilha was staying at Plot 50 as well.
29. In re-examination she stated that Plot 50 was for girls and Plot 380 was for sons.

Analysis

30. The deceased herein died on 24/02/1983. He was survived by his daughter in law Mary Wanjugu Mithamo, grandsons Williamson Mwangi Mithamo, John Gachugu Wachira, Julius Muriithi, and granddaughters Bilha Njeri Njoro and Lydia Wachuka Muhuni who was wife to the son (now deceased) of the deceased.
31. The Petitioners herein contended that the sole property herein Iriaini/Kairia/380 was to go solely to the male children as the deceased had made provision for the females during his lifetime. They contended that the deceased had in his lifetime made provision for female beneficiaries and that the property was to be distributed as per their petition.
32. At the time of death, it is in consensus that the deceased herein had only one property to wit Iriaini/Kairia/380. The Protestors in their affidavits stated that they were not consulted as to this mode of distribution and that there is need for equitable distribution of the estate.
33. In considering whether the deceased herein had made a gift out to the protestors we must interrogate what the law states on gifts. Gifts *inter vivos* as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death. In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected.
34. In the case of *inter vivos* the gift must go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift.
35. Gift *inter vivos* find embodiment in Section 42 of the *Law of Succession Act* which states as follows:
Where-



- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house. [Emphasis my own]
36. The Petitioners alleged that the deceased in his lifetime settled his granddaughters in various parcels of land. It was the contention by the protestors that the land they settled on belonged to their grandmother and not their grandfather and thus were to have a share in Iriaini/Kairia/380.
37. The conditions that must be met for a gift inter vivos to be valid are:
- a. The individual making the transfer actually intends to make a gift; it must be demonstrated that the donor's objective was to make a gift when he or she transferred the property.
 - b. The second condition for a gift inter vivos to be complete is that the donee accepts the gift made to him or her; the donee must agree to the transfer of property that the donor made in his or her favor.
 - c. The other condition for a gift inter vivos to be complete is delivery of the property that is the subject-matter of the transfer by the donor to the donee
 - d. Also for a gift inter vivos to be complete, it is also a requirement that the donor has to divest him or herself of the property; he or she has to place it in the possession of the donee.
38. Thus it is incumbent upon this court to determine if indeed the alleged Iriaini/Kairia/50 formed part of the estate of the deceased and thus subject to Section 42 of the Law of succession Act or otherwise.
39. It is interesting to note that the protestors did not annex searches for Iriaini/Kairia/50. Further, the court noted with concern the demeanour of the protestors particularly Bilha Njeri Njoro during the proceedings which raised more questions than answers. I digress.
40. It has come up severally in the affidavits and in the court testimony/proceedings that the deceased herein had made provision for his female beneficiaries. A scrutiny of the land search attached labelled "MWM3" to the Affidavit dated 24/02/2025 by Mary Wanjugu Mithamo showed that the Protestor, Bilha Njeri Njoro, Wanjugu and Wilson Wachira Mithamo were registered proprietors of the Iriaini/Kairia/50 where they held 2 acres, 1.5 acres and 1 acre respectively as at 16/12/1980.
41. At "MWM5" which shows the green card concerning Iriaini/Kairia/50, particularly the green section shows that the deceased herein Wachira Mithamo and Bilha Njeri wife of Mithamo were the first proprietors as at 4/3/1959, each having 2.3 acres. Further on 16/12/1980 it was revealed that the trio of Bilha Njeri Njoro, Wanjugu Mithamo and Wilson Wachira Mithamo were registered as the proprietors of Iriaini/Kairia/50 and on the same date the title was closed due to subdivision of Iriaini/Kairia/50 into partitions 867, 868 and 869.
42. PW1, Lydia Wachuka Muhuni in her testimony affirmed that they were given land by their grandparents but denied receiving monies from the sale of land by her mother herein Mary Wanjugu Mithamo. In so far as title scrutiny is concerned I will not go beyond and into the details of the resultant parcels after 16/12/1980 as the issue of ownership is not in contention beyond this point. I should further state that by registration of the Iriaini/Kairia/50 in the names of the Protestors and one Mary Wanjugu Mithamo, the 4 prerequisites for a property to be termed as gift intervivos have been squarely met.



43. The allegation by the Protestors that the deceased herein had a separate understanding with his wife to wit, Bilha Njeri Nyakiago as to how to dispose of his alleged portion in joint title is absurd. The 1st protestor is on record stating that her grandmother had a title in her own name arising from Iriaini/Kairia/50 whereas the evidence on record has shown all along that the title was joint from 4/3/1959 up until 13/11/1979 and on 16/12/1980 when the title in these two latter dates were in the names of the trio Bilha Njeri Njoro, Wanjugu and Wilson Wachira Mithamo.
44. I thus find that the property known as Iriaini/Kairiaini/50 was property that was devolved to beneficiaries of the deceased to wit Bilha Njeri Njoro, Wanjugu Mithamo and Wilson Wachira Mithamo and will be considered under Section 42(b) of the Law of Succession Act. This court notes that the Protestors' gift *inter vivos* in Iriaini/Kairia/50 by the deceased were considerably larger than the portions proposed to the remaining beneficiaries in Iriaini/Kairia/380.
45. As observed by Nyakundi J in Khalifa Abdalla Khamis v Mohamed Abdalla Khamis [2021] eKLR, it is a cardinal rule in our jurisprudence that the right to dispose of property by will or gift is exacting in its requirement. As observed by Nyamweya J. (as she then was) In Re: Estate of the Late Gedion Manthbu Nzioka (deceased) [2015] eKLR as follows:
- “In Law, gifts are of two types (gift *inter-vivos* and gifts made in contemplation of death (gifts *mortis causa*). For gifts *inter-vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing, or by delivery, by a way of a declaration of a trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of a trust in writing. Gift's *inter-vivos* must be complete for the same to be valid.”
46. In Samuel Maina Mwangi & 2 Others vs Muthoni Kagiri [2013] eKLR the Court of Appeal held in a case where the deceased had given the appellants (his sons) gifts *inter vivos* by way of first registration: -
- We are of the considered view that the said registrations in favour of the 1st and 2nd appellants were tantamount to gifts given by the deceased during his lifetime.....Therefore, the trial court was correct in holding that the parcels of land that were given to the appellant would be taken into account in distribution of the deceased's estate.
47. In this instant case the trio of Bilha Njeri Njoro, Wanjugu Mithamo and Wilson Wachira Mithamo were registered as the proprietors of Iriaini/Kairia/50 and on the same date on 16/12/1980 during the lifetime of the deceased and this court takes into account that they each got 2 acres, 1.5 acres and 1 acre respectively, and thus shall not have a share in the remaining assets of the estate to wit Iriaini/Kairia/380.
48. What remains is the issue of PW1, Lydia Wachuka Muhuni who seemingly did not get anything as per the registration of land on 16/12/1980. It was PW1's testimony that she did not get anything from her grandparents/deceased herein. The joint affidavits of the protestors dated 31/07/2024 and 23/09/2024 make no mention of PW1 benefiting from Iriaini/Kairiaini/50. It was the contention of DW1 in her replying affidavit dated 24/02/2025 that PW1 was registered as the sole proprietor over two acres in Iriaini/Kairiaini/50 and of the two acres one was for Lydia Wachuka but never effected the same for some mysterious reason.
49. It was the contention of the Petitioners that the mutation of Iriaini/Karia/50 into several plots specifically 868 was owned and sold by DW1 and the proceeds shared with PW1, Lydia Wachuka. PW2, Bilha Njeri Njoro in her testimony stated that she sold one acre. It was the testimony of DW2, PW2 sold the acre belonging to PW1.



50. From the foregoing, it remains unclear whether PW1 benefited from the sale of one acre by PW2 as alleged by DW1 and it also has not been substantiated by the petitioners that PW1 benefited from the sale of land by DW1. The attached sale agreement does not shed any light. All this is unclear as no clear link is visible via evidence that PW1 benefited from the gift *inter vivos* in Iriaini/Kairia/50 and its subsequent mutations and resultant sales.

51. Lastly it was uncontested that PW1 has been living on Iriaini/Kairia/380. This court will take into account this fact, that rights have accrued by didn't of staying on the land undisturbed in distributing the estate. This position is in tandem with the reasoning *In Re Estate of Chesimbili Sindani (Deceased)* [2021] eKLR, where the High Court at Kakamega had this to say:

“... I am persuaded that the deceased had only licensed the sons to utilize certain assets, and as a result they had put up structures on those assets, any distribution of the assets ought to take into account those assets, and ensure that the particular sons are allocated shares in the parcels of land where they have put up structures.”

Determination

52. The court makes the following orders:

- a. Bilha Njeri Njoro, Mary Wanjugu Mithamo, and Wachira Mithamo have already benefitted from Iriaini/Kairia/50 within the meaning of Section 42(b) of the *Law of Succession Act*.
- b. Bilha Njeri Njoro, Mary Wanjugu Mithamo, and Wachira Mithamo cannot therefore benefit from Iriaini/Kairia/380.
- c. Iriaini/Kairia/380 measuring 2.10 hectares shall be shared equally among the following, with regard being had as much as possible to the current occupation:
 - i. Williamson Mwangi Mithamo,
 - ii. John Gachugu, Lydia Wachuka Muhuni, and Julius Muriithi
- d. Each party should bear their own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28TH DAY OF JULY, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Waithaka for the Petitioners

Ms. Muthui for the Protestors

Court Assistant – Michael

