



REPUBLIC OF KENYA



In re Estate of Komu Muthigani alias Samson Komu Muthigani (Deceased) (Succession Cause 232 of 2000) [2025] KEHC 10122 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10122 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 232 OF 2000**

MA ODERO, J

JULY 11, 2025

**IN THE MATTER OF THE ESTATE OF KOMU MUTHIGANI
ALIAS SAMSON KOMU MUTHIGANI (DECEASED)**

JUDGMENT

1. Before this Court for determination are two applications. The first is the Summons for confirmation of Grant dated 12th July 2019 by which the Applicant Catherine Wanjiru Komu seeks the following orders:-
 - “1. That the letters of administration intestate made to the said Priscilla Nyambura Komu on 14th November 2000 be confirmed.
 2. That the costs of this application be in the cause.”
2. The second application under consideration is the Summons dated 16th July 2019 in which the Applicant/Protector Milka Wambui Komu sought the following orders:-
 - “1. That the grant of probate of letters of administration intestate made to Milka Wambui Komu on 26th June 2019 be confirmed.
 2. Spent.
 3. That the costs for this application be provided”
3. On 4th May 2022 the parties agreed by consent and the Court proceeded to give directions that the application dated 16th July 2019 filed by Milka Wambui Komu to be treated as the protest to the application dated 12th July 2019 filed by Catherine Wanjiku Komu who is taken to be the applicant.
4. The matter proceeded by way of *viva voce* evidence. My predecessor Hon. Lady Justice Muchemi heard the first three witnesses. Following the transfer of the trial Judge to Thika High Court I took over the matter and heard the remaining witnesses.



Background

5. This succession cause relates to the estate of the late Komu MuthiganI alias Samson Komu Muthigani (hereinafter ‘the Deceased’) who died intestate on 18th April 1999. A copy of the Death Certificate Serial No. 53XXXX03 is annexed to the Petition for Grant of letters of Administration Intestate dated 11th July 2000. In that Petition it was indicated that the Deceased was survived by the following persons:
 - “(a) Priscilla Nyambura Komu - Wife
 - (b) Milka Wambui Komu - Daughter
 - (c) Pilsilla Nyambura Komu - Grand-daughter
6. The estate of the Deceased was said to comprise of one asset being the property known as LR Nyeri/ Naromoru Parcel 806 measuring 4.46 Hectares (hereinafter ‘the suit property’)
7. A Grant was duly issued to the widow Priscilla Nyambura on 14th November 2000. However, the said Priscilla Nyambura passed away on before this matter was concluded. The Protestor herein Milka Wambui Komu who was the daughter of ‘Priscilla’ was substituted as Administrator in place of her mother.
8. The Applicant Catherine Wanjiru Komu came in claiming to be the 2nd wife of the Deceased. The Applicant asserted that the Deceased married her under customary law in the year 1969. She claimed to have come into the union with three children and stated that she bore three children with the deceased. The Applicant opposed issuance of the Grant to Priscilla Nyambura. She asserted that she and her children were genuine beneficiaries to the estate and were entitled to inherit therefrom. The Grant which had been issued to Priscilla Nyambura on 27th May 2014 was then revoked vide the Ruling delivered by Hon. Justice Mativo (as he then was) on 26th July 2016.
9. There has been lengthy and sustained litigation in this matter culminating in both the Applicant and the Protestor seeking to have the Grants confirmed and each proposing a different mode of distribution of the estate.

The Evidence

10. PW1 was the Protestor Milka Wambui Komu told the court that she was the only child of the Deceased and that her mother the late ‘Priscilla Nyambura’ was the only wife of the Deceased.
11. The protestor stated that she knew the Applicant as a labourer employed by the Deceased on his farm. She categorically denies the claim that the Applicant was ever married to the Deceased and categorically denies that the Deceased fathered any of the Applicants children.
12. The Protestor insists that the Applicant has never lived on the suit land. She states that the matter was discussed before elders who concluded that the Applicant was not a wife to the deceased. That she has no idea when or why the Applicant and/or her children adopted the name ‘Komu’
13. PW2 Beatrice Nyawira Gitimu is a cousin to the Protestor and a niece to the Deceased. PW3 David Gichuki Wahome told the court that though not related to the family he comes from the same village and has known the Deceased his entire life. Both PW2 and PW3 state that they knew the Applicant Catherine Wanjru as a labourer employed by the Deceased. The witnesses all assert that the Deceased had only one wife ‘Priscilla Nyambura’ and only one child ‘Milka Wambui’ (the protestor). The witnesses categorically deny that the Applicant was ever married by the Deceased.



14. PW4 Paul Ouko Abuto is the Deputy Director at the National Registration Bureau. He produced the identification details for Catherine Wanjiru Komu (Applicant) and her following three (3) children
 - Loise Mukami Komu
 - Anthony Mwangi Komu
 - James Muriuki Komu
15. The Protestor Catherine Wanjiru testified on her own behalf. She stated that she got married to the Deceased in the year 1969 under Kikuyu customary law. That she came into the union with 3 children namely;-
 - Margaret Nyiha.
 - John Mwathi
 - Leah Wanjeri
16. That during the marriage she bore three children who were fathered by the Deceased namely;-
 - Loise Mukami Komu - born in 1973.
 - Anthony Mwangi Komu - born in 1978
 - James Muriuki Komu - born in 1981
17. The Applicant stated that the Deceased accepted, provided for and supported all her six (6) children. That they cohabited as man and wife from 1969 until the year 1999 when the Deceased passed away.
18. The Applicant stated that on the night the Deceased died she was chased away from her home and warned never to return. That the protestor took over and occupied her house.
19. The Applicant asserts that she and her children are all beneficiaries of the estate of the Deceased and are entitled to a share of the estate property. She proposes that LR Nyeri/Naromoru/1706, 1707 and 2943 be consolidated and be shared equally between the 1st and the 2nd Houses.
20. At the close of oral evidence the parties were invited to file and serve their final written submissions. The Applicant filed the written submissions dated 6th March 2025 whilst the protestor relied on her written submissions dated 19th February 2025.

Analysis and Determination

21. I have carefully considered the two applications before this court, the evidence adduced by the witnesses as well as the written submissions filed by both parties.
22. This is a Probate matter and the duty of the court is to facilitate and supervise the distribution of the estate to the genuine beneficiaries.
23. The Applicant claims that she was a wife of the Deceased and as such is entitled by virtue of Section 29 of the *Law of Succession Act* Cap 160, Laws of Kenya to inherit part of the estate.
24. In order to prove her claim to the estate the Applicant must satisfy the court that she was in fact a wife of the deceased. The Applicant in her evidence states that the Deceased married her under Kikuyu Customary law. The Protestor contests this and state that the Applicant was merely a labourer employed by the Deceased to work on his farm.



25. In a Civil Case such as the present one the standard of proof is on a balance of Probability. However it is trite law that he who alleges must prove. In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the Evidence Act Cap 80 Laws of Kenya provides as follows:-

“Burden of Proof

107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

26. In the case of Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR, it was held that:-

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the Evidence Act Chapter 80, Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of the law of proof of that fact shall lie on any particular person.....” [Own emphasis]

27. The Applicant claimed that she had entered into a customary marriage with the Deceased. Section 43 of the Marriage Act 2014 provides as follows:-

“43(1) A marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.

(2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.”

28. In the case of Hortensiah Wanjiku Yawe v the Public Trustee [1976] eKLR the court held that

“The onus of proving of customary law marriage is generally on the party who claims it. The standard of proof is the one usually for civil action namely “a balance of probabilities required for a customary law marriage must be proved to that standard.....” [own emphasis]

29. A Kikuyu customary marriage (like customs of other African communities) consists of certain rites which must be performed. Further marriage is not a clandestine or secret affair. It involves the coming together of two families and clans and is often conducted publicly and with much fanfare.

30. Eugene Contran’s casebook on Customary Law at page 30 sets out the essentials of Kikuyu Customary Marriage. These are stipulated as:

“1. Capacity; the parties must have capacity to marry and also the capacity to marry each other.

2. Consent; the parties to the marriage and their respective families must consent to the union.



3. Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.
 4. Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.”
31. Despite her claim that Deceased had visited her family home and paid dowry, the Appellant did not call as a witness any person who attended that event. Under cross-examination the Applicant claims that all the persons who witnessed her marriage have passed away. As stated earlier customary marriages are not clandestine or secretive affairs. They are ceremonies at which many people are in attendance. The Appellant should have had no problem securing at least one person who witnessed the event to give evidence. I do not accept the Applicant’s evidence that all the persons who were in attendance at her customary marriage are now deceased. Surely there should be one or two people who would have been available to be called as witnesses to this event.
 32. Under cross-examinations the Applicant states that three of her siblings are still alive yet she did not call them to confirm the fact of her marriage to the Deceased. The excuse the Applicant gives for this omission is that these siblings were very young when the marriage took place. The said siblings would not have stagnated at 4 or 5 years of age. Despite their young age at the time the customary marriage took place they were family members who would have been able to corroborate the evidence of the Applicant if true. These siblings would have been able to confirm to the court whether they interacted with and/or knew the Deceased as an in-law. The failure by the Applicant to call even one corroborating witness leads to the suspicion that no such event ever took place.
 33. There is no evidence that the ‘Ngurario ceremony’ which is a rite central to a Kikuyu customary marriage ever took place. In the case of *Eva Naima & Another v Tabitha Waitthera Mararo* [2018] eKLR the Court of Appeal in observing that ‘ngurario’ ceremony did not take place stated as follows:-

“From the above it becomes apparent that, no ram or goat was slaughtered to mark the coming into existence of a marriage. Without the presence of the central feature of the ngurario ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Waitthera and the Deceased.” (Own emphasis)
 34. Moreover if as alleged the Deceased did marry the Applicant under customary law then the family of the Deceased ought to have been aware of the fact. The deceased would have introduced the Applicant to his family as a wife. However the protestor PW2 a lifelong friend of Deceased and PW3 a niece to the Deceased all deny that the Deceased ever informed them that he had married the Applicant.”
 35. In her evidence in chief the Applicant stated that she got married to the Deceased in the year 1962. However under cross-examination she states that they got married in the year 1969. The Applicant does not seem sure of when the marriage was contracted. The Applicant was not able to recall which clan the Deceased belonged to. Yet this is a man she claims to have cohabited with for several years.
 36. Further the Applicant gives contradictory evidence regarding the paternity of her own daughter. Initially in her examination in chief the Applicant states

“Loise is not the biological child of the Deceased. I got married with her.”



She later switches and says:-

“Loise is the biological child of the Deceased. When Deceased married me I was pregnant with Loise.”

37. These are not the only inconsistencies in the Applicants evidence. She goes on to say

“I got married in 1962 when I was pregnant with Loise. Loise was born in 1972.....”

38. So which is which. Was this ‘Loise’ born in 1962 or in 1972. As a famous TV Judge often states “If you are telling the truth you do not need a good memory.” The fact that the evidence of the Applicant is riddled with inconsistencies leads to the assumption that she is not being truthful. She does not seem to recall very important events in her own life.

39. Based on the evidence presented before this court I find that there is no proof that the Deceased contracted a marriage under customary law with the Applicant.

40. The next thing to consider is whether there is sufficient evidence to prove a presumption of marriage between the Deceased and the Applicant.

41. In the *Hortensiah Wanjiku Case* [supra] the court stated that

“Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it. Only cogent evidence to the contrary can rebut the presumption.....”

42. In the case of *Mary Njoki v John Kinyanjui Muthuru & 3 Others* 1985 eKLR the Hon. Nyarangi Judge of Appeal stated as follows:-

”The presumption does not depend on the law of systems of marriage. The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife. In my judgment before a presumption of marriage can arise a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children that would be a factor very much in favour of presumption of marriage. Also if the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and a woman, that she is not a concubine but that the cohabitation has crystalized into a marriage and that it is safe to presume that there is a marriage.....
To my mind, presumption of marriage, being an assumption does not require proof of an attempt to go through a form of marriage known to law.” [Own emphasis]

43. In the case of *MWK v AMW* [2017] eKLR, Hon. Justice Joel Ngugi (as he then was) discussing the concept of a ‘presumption of marriage’ stated as follows:-

“Since then our case law has been consistent in following the English common law in requiring that a presumption of marriage arises only when a person proves two factual predicates



- (a) Quantitative element – namely the length of time the two people have cohabited with each other; and
- (b) Qualitative element – namely acts showing general repute that the two parties held themselves out as husband and wife. Factors tending to demonstrate these qualitative element include whether the parties had children together, whether the community considered the two as husband and wife, whether the two carried on business jointly or whether they took a loan jointly, whether the two held a joint bank account and so forth.”

44. The Applicant did not during the trial adduce sufficient evidence that would lead to a presumption of marriage. According to the Appellant she had cohabited with the Deceased from the year 1969 until the time of his demise in the year 1999. No witnesses were called to confirm this claim. No witness was called to testify that they knew the couple as man and wife. In her evidence the Applicant conceded that in a meeting held before the local chief it was determined that she and the Deceased were not married to each other.
45. The applicant in her statement alleged that she cohabited with the Deceased until he died. She states that on the night the Deceased died she was evicted from the house and the Protestor forcefully moved in and occupied the matrimonial home.
46. The events described by the Applicant are serious and would indeed amount to criminal offences. Yet the Applicant did not make a report to any authority either to police or to the local administration regarding her forceful eviction from her home. If such an incident had truly occurred then I believe the applicant would have reported the incident and would have taken steps to resume occupation of her matrimonial home.
47. I was able to observe the demeanour of the Applicant as she testified in court. She was hesitant and appeared reluctant to answer questions put to her. In my view the Applicant was not an honest witness.
48. All in all that the evidence presented to this court was not sufficient to prove that the Deceased ever married the Applicant or that the Deceased cohabited with the Applicant leading to a presumption of Marriage.
49. The Applicant in her evidence claimed that the Deceased sired three out of her six (6) children. She further claims that the Deceased accepted all her children as his own and provided for them on this basis. She asserts that all six (6) children are entitled to a share of the estate of the Deceased. As far as this court is concerned there exists a foolproof scientific way to prove paternity which is by use of a DNA test. *In the Matter of The Estate of Peter Muraya Chege Alias Muraya Chege* (2019) eKLR Hon. Justice A. K. Ndungu held that:-
- “In this time and age of considerable scientific discovery, development and achievement, where a dispute arises as to the paternity of an individual, there is no better way to settle that issue with finality than through a dependable DNA test.”
50. I am aware that this issue of DNA testing was applied for by the Protestor Milka Wambui Komu vide the summons dated 28th May 2021 and the court in a ruling delivered on 14th October 2021. Hon. Justice Muchemi declining to order that DNA testing be done on grounds that to make such an order would subject the children of the Applicant to unnecessary trauma.



51. PW4 the Deputy Director at the National Registration Bureau. He produced the identification details for the applicant and three (3) of the Applicants children. Firstly an Identity card is not proof of marriage neither does it amount to proof of paternity.
52. It is pertinent to note that the Identity cards issued to Loise Mukami, Anthony Mwangi and James Muriuki were issued in the years 2024, 2010 and 2001 respectively. Although Pw4 indicates that the identity card issued to Loise Mukami was a replacement card, he was not able to avail any information on Original card which was issued in 1987. As things stand these identity cards were obtained AFTER the demise of the Deceased in April 1999. Thus the Deceased was not involved neither did he authorize the use of his name in the said Identity cards.
53. The Applicant stated that the Deceased accepted, supported and provided for her children. Here again no evidence was tendered to prove this claim. No invoices and/or receipts were availed to prove that Deceased ever paid school fees for any of the Applicants children. No statements were availed to show any transfer of funds to the applicant to cater for upkeep of the children. I find there is no evidence to prove that the applicant and/or her children were dependants of the Deceased immediately prior to his death as provided for by Section 29 of the *Law of Succession Act*. Likewise I find no evidence to prove that the three children of the applicant were sired by the Deceased and the evidence falls way short of proving dependancy under Section 29. I therefore find no merit in the Applicants claim to a share of the estate of the Deceased.
54. I find no proof on a balance of probability that these children were sired by the Deceased.
55. On the other hand it is not in any doubt (and was conceded by the Applicant) that the protestor is the biological daughter of the Deceased. Following the demise of the protestors mother Priscilla Nyambura Komu, the Protestor remains as the only genuine beneficiary to the estate of the Deceased.
56. Based on the foregoing I allow the Summons dated 16th July 2019 and make the following orders;-
 - (1) The Grant of letters of Administration Intestate made to Milka Wambui Komu on 26th June 2019 be and is hereby confirmed.
 - (2) The estate of the Deceased to devolve to the protestor as hereunder as:-
 - (a) Land Reference Number Nyeri/Naromoru/806 – comprising 7.16 Hectares
Name Shares
Milka Wambui Komu Absolute
 - (3) Each party to meet its own costs.

DATED IN NYERI THIS 11TH DAY OF JULY 2025

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MAUREEN A. ODERO
JUDGE

