



REPUBLIC OF KENYA



In re Estate of M'Twarugoji M'Twaruchiu (Deceased) (Family Appeal E012 of 2023) [2025] KEHC 9948 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9948 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

FAMILY APPEAL E012 OF 2023

SM GITHINJI, J

JULY 10, 2025

IN THE MATTER OF THE ESTATE OF M'TWARUGOJI M'TWARUCHIU-DECEASED

BETWEEN

CLIFFORD MAITETHIA APPELLANT

AND

STEPHEN MUTWIRI 1ST RESPONDENT

MARTIN KIMATHI 2ND RESPONDENT

(Being an appeal from the Judgment of Hon. T.M. Mwangi (S.P.M) in Meru Succession Cause No. 231 of 2018 delivered on 11/5/2023)

JUDGMENT

1. This Appeal arises from the judgment of the learned Senior Principal Magistrate Hon. T.M. Mwangi delivered on 11.05.2023 in Meru Succession Cause No. 231 of 2018.
2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 9th June, 2023;
 1. The learned magistrate erred in law and fact in failing to weigh and analyse the evidence as a whole and in dealing with the evidence of selected witnesses hence failed to determine the issues that were in dispute.
 2. The learned magistrate erred in law and fact in failing to determine the issues that were raised regarding the introductory letter issued by the chief, the respondents' averments contained in the affidavit in support of the petition, and in totally failing to address the same yet there were vital issues that had been raised regarding the said documents.



3. The learned magistrate erred in law and fact in making a finding that the late Scolastica Kagwiria was not known to the late M'twarugoji M'twaruchiu relatives and that the late M'twarugoji M'twaruchiu had not recognized her as his daughter hence making a wrong finding that the appellant could not claim through her.
4. The learned magistrate erred in law and fact in his determination of the beneficiaries of the estate whom he held to be James Kihara Kamau, Martin Kimathi M'Mwamba and Stephen Mutwiri and further erred in distributing Land Parcel Number Nyaki/Nkabune/501 to them.
5. The learned magistrate erred in law and fact in rejecting the evidence which was tendered by the appellant and his witnesses and in taking into account extraneous matters not in evidence hence arrived at the decision not supported by the evidence.
6. The learned magistrate erred in law and fact by shifting the burden of proof to the appellant by making a finding that the appellant should have produced the identity card of the late M'twarugoji M'twaruchiu and by creating a non-existing doubt that there was no proof that the late M'twarugoji M'twaruchiu had taken an identity card and further failed to take into account the death certificate which could not have been processed by the respondents without surrender of the identity card to the Registrar of Persons.
7. The learned magistrate erred in law and fact by making a finding that the respondents/ protestors had proved their case against the appellant hence erred in dismissing the appellant's case.
8. The learned magistrate's decision was against the weight of the evidence placed before him.

Evidence at Trial

3. Protestor's witness 1 Stephen Muchui, the 1st Respondent herein adopted his witness statement dated 9/9/2020 as his evidence in chief. He told the court that his mother was Esther Gatije, a sister to the deceased herein, and he had his father's land namely M'Kiara at Nkabune, where he lived. When they filed this cause, Scholastica had died, and his mother was still cultivating and utilizing $\frac{1}{3}$ of the estate property to date given to her by the deceased, where she has planted coffee, arrowroots, cassava, bananas and other food crops. In 2003/2004, the deceased called Kihara to go and live with him because he had no son. Clifford is a child of Scholastica, who they never accepted as a daughter to the deceased. The reason they included Scholastica in their affidavit in support of the petition for letters of administration is because she had been named as a beneficiary in the chief's letter. He was claiming a share of the estate of the deceased through his mother who was alive. Clifford and Scholastica had never lived on the land, but Scholastica used to cultivate on the land after the death of the deceased. James Kihara came to the land in 2000, and has been living there ever since. Esther Gitije, James Kihara and Zacharias Marete cultivated on the land during the lifetime of the deceased, and during the lifetime of the deceased, Scholastica and her mother were never in his life.
4. Protestor's Witness 2 Martin Kimathi Mwamba, the 2nd Respondent herein, adopted his witness statement dated 9/9/2020 as his evidence in chief. He told the court that the deceased was his paternal uncle and his father, Joseph Mwamba has his land adjoining that of the deceased. Mutwiri was a child of Gatije and he wanted the land given to Kihara, who used to take care of the deceased. The deceased had a wife called Kananu who was the mother to Scholastica while Scholastica was the mother to Clifford. He did not know whether the deceased left behind a will, and Kihara's brother named Nganga was buried on the estate property. Gatije started cultivating the land in 2001, and she should get a portion thereof, together with James Kihara and him. Kananu had never lived on the land, and the tribunal



held that the deceased had no wife or child. They wanted to inherit the land because they were the closest relatives of the deceased.

5. Protestor's Witness 3 Zachary Marete M'Nturiogoni adopted his statement dated 9/9/2020 as his evidence in chief. He stated that he leased $\frac{1}{2}$ acre of the land from the deceased for Ksh. 2,000 yearly and entered into a lease agreement with Kihara in 2003 when the deceased was ill, because Kihara was staying on the land. Scholastica, who identified herself as a daughter to the deceased, came after the death of the deceased to evict him when his crops were still on the land, and besides him and the deceased, the family of Esther Gatije used to cultivate the lower side of the land as well, while Kihara was living with the deceased and utilizing another portion of the land.
6. Protestor's Witness 4 Esther Gatije adopted her witness statement dated 9/9/2020 as her evidence in chief. She stated that M'Arungoji was her brother and all her brothers got land from their father, M'Ruichiu. Kahara was supposed to claim land from his uncle one M'Rugoji, because he took care of M'Rugoji when he fell ill. She was claiming the land, which she has been tilling and utilizing, because it was shown to her by her father and the deceased gave it to her as a blessing. She did not want Scholastica and Kananu included in the chief's letter, and M'Rugoji said his siblings' children were his children. She utilized the middle part of M'Rugoji's land during his lifetime and that of her father. Clifford was a son to Scholastica, who had never utilized the land, and Kiara was on the land before the death of M'Rugoji while Zachary Marete had leased land in the lifetime of the deceased. She prayed for the land to be shared out amongst herself and the families of her brother.
7. Protestor's Witness 5 Cecilia Kaaria Muguna, the Chief of Nkabune Location adopted her affidavit sworn on 21/9/2021. She stated that she knew Albert M'Arimi M'Itanga nicknamed Rube and Paul Muguku nicknamed Muthee. The deceased to her knowledge had no children and she issued the burial permit to Kihara because he was living with the deceased. The deceased was living with Kihara's wife, Esther Gatije and James Kihara at the time of his death, and she included the name of Scholastica in the letter because she claimed she was a child to the deceased. When the deceased passed on, Scholastica came for his burial permit but by the time she issued the chief's letter, Scholastica had already died. Kihara came to live with the deceased, and he was shown the place to cultivate, and Esther was also shown where to cultivate.
8. Protestor's Witness 6 M'Ihiaru M'Mugwika, a neighbour to the deceased, adopted his statement dated 9/9/2020 as his evidence in chief. He told the court that the deceased had no child and he lived on his land with Kihara. The deceased called the elders and said that he did not have any children, and the will of the deceased was with Kihara. The deceased had leased his land to people but Gatije was also using about $\frac{1}{8}$ of the land.
9. Protestor's Witness 7 James Kihara Kamau adopted his witness statement dated 9/9/2020 as his evidence in chief and produced the burial permit, chief's letter, proceedings and the lease as exhibits. He told the court that the deceased was a brother to his father named Stephen M'Anani M'Igoji. He came to live with the deceased in 1998, where he built his own house. He assisted the deceased in cultivating, picking coffee and took care of him. Gatije was utilizing 20 points of the land, Marete utilized 30 points while he and the deceased utilized the balance. The deceased called elders and willed the entire land to him, and the lease agreement was entered into during the lifetime of the deceased and under his instructions. Scholastica's son forcefully entered into the land but they asked him to vacate and even reported the matter to the police. He proposed that the land be shared amongst him, Gatije, Martin Kimathi and Stephen Mutwiri.
10. DW1 Zipporah Kanana adopted her witness statement dated 22/7/2020 as her evidence in chief. She told the court that Scholastica was her daughter with the deceased herein, and his brothers and sisters



knew about her. She knew James Kihara lived on the land during the lifetime of the deceased and Gatije started utilizing a small portion of that land after the death of the deceased. Zachary Marete who was also utilizing the land as a lessee left before the deceased died, and when Scholastica was given land by the deceased, she planted gravelia tree, coffee, nappier grass and quince.

11. DW2 Albert M'Arimi, a neighbour to the deceased, adopted his witness statement dated 22/7/2020 as his evidence in chief. He told the court that apart from Kihara, Gatije and Scholastica, nobody else utilized the land of M'Rugoji. Scholastica was a child to the deceased and Kanana, and Kanana's father was called Kabuli. Gatije started utilizing the land after the deceased had died and Marete had leased a portion of the land, which he was utilizing, until the death of the deceased. M'Rugoji and Kanana were living together on the land in dispute when Scholastica was born.
12. DW3 Clifford Matethia testified that his mother, Scholastica Kagwiria M'Rugoji was a daughter to M'Rugoji and James Gicheru was given a portion of his grandfather's land. He had brought the claim on behalf of his deceased mother, although he had not obtained a grant to claim on her behalf. He had lived on the land as his home and he proposed to give Kihara ¼ acre of the land, which was left to him by his grandfather.
13. DW4 Paul Abulo, the assistant director at National Registration Bureau produced the forwarding letter dated 7/10/2022 and Schola's Identity Card as exhibits. He confirmed that Schola Kagwiria Twarugoji was the daughter to M'Rugoji Twarigu and Zipporah Kanana, although there was a variance between Schola's surname and her alleged father's in that her surname did not have "M" which was in the father's name.

Submissions

14. The Appellant through the firm of J.K Ntarangwi & Co. Advocates filed submissions dated 13/12/2024. Counsel urged the court to find that Scholastica was a child of the deceased herein and the Appellant was entitled to claim through her under the provisions of section 41 of the [Law of Succession Act](#). Counsel cited Daniel Otieno Migore v South Nyanza Co. Ltd (2018) eKLR and Independent Electoral and Boundaries Commission and Another v Stephen Mutinda Mule and 3 Others (Civil Appeal 219 of 2013) [2014] KECA 890 (KLR) (31 January 2014) (Judgment) to buttress their submissions.
15. The Respondents through the firm of Thangicia David & Co. Advocates filed submissions dated 5/2/2025. Counsel contended that the Respondents and their witnesses were candid that the deceased had no children, and thus the Appellant was an impostor. Counsel submitted that the horrifying behavior of adults resurfacing to claim from a deceased person's estate in the name of a family relationship that was never raised in the deceased's lifetime, should be condemned and cited Re Estate of Patrick Mwangi Wathiga – Deceased (2015) eKLR and Re Estate of Thambu Baimundi (Deceased) [2019] eKLR.

Analysis and Determination

16. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.
17. In *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA, the court held as follows: "This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions



though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

18. I have considered the appeal herein, the trial court’s judgment which is the subject of this appeal as well as the submissions by counsel.
19. From the grounds of appeal, the issue for determination is whether the Appellant proved his case on a balance of probabilities. The Appellant’s case is pegged on the fact that he is a son to an alleged daughter of the deceased namely Scholastica Kagwiria (deceased).
20. The undisputed evidence on record is that James Kihara lived with the deceased and took care of him until his death. Scholastica was the mother to the Appellant herein but the Respondents and their witnesses have vehemently contested her relationship with the deceased, although she is included in their affidavit in support of the petition for letters of administration intestate filed on 9/10/2018 and the chief’s introductory letter dated 14/9/2018 as his daughter. The 1st Respondent herein testified that his mother, Esther Gatije, was cultivating and utilizing $\frac{1}{3}$ of the estate property to date, Scholastica used to cultivate on the land after the death of the deceased and James Kihara has been living there since 2000. The 2nd Respondent herein told the court that the deceased had a wife called Kananu who was the mother to Scholastica while Scholastica was the mother to Clifford. Kananu has never lived on the land and they wanted to inherit the land because they were the closest relatives of the deceased.
21. Protestor’s Witness 3 stated that Scholastica came after the death of the deceased to evict him when his crops were still on the land, and besides him and the deceased, the family of Esther Gatije used to cultivate the lower side of the land as well, while Kihara was living with the deceased and utilizing another portion of the land. The 1st Respondent’s mother told the court that she was claiming the land, which she was tilling and utilizing, because the deceased gave it to her as a blessing. Clifford was a son to Scholastica, who had never utilized the land while Kiara was on the land before the death of M’Rugoji.
22. The Chief of Nkabune Location testified that the deceased was living with Kihara’s wife, Esther Gatije and James Kihara at the time of his death, and she included the name of Scholastica in the letter because she claimed she was a child to the deceased. Protestor’s Witness 6 M’Thiaru M’Mugwika, a neighbour to the deceased, told the court that the deceased had no child and he lived on his land with Kihara. The deceased had leased his land to people but Gatije was also using about $\frac{1}{8}$ of the land. Protestor’s Witness 7 James Kihara Kamau told the court that Gatije was utilizing 20 points of the land, Marete utilized 30 points while he and the deceased utilized the balance.
23. The Appellant’s grandmother told the court that she knew James Kihara lived on the land during the lifetime of the deceased and Gatije started utilizing a small portion of that land after the death of the deceased. DW2 Albert M’Arimu, a neighbour to the deceased told the court that apart from Kihara, Gatije and Scholastica, nobody else utilized the land of M’Rugoji.
24. The Appellant testified that his mother, Scholastica Kagwiria M’Rugoji was a daughter to M’Rugoji and James Gicheru was given a portion of his grandfather’s land. He had lived on the land as his home and he proposed to give Kihara $\frac{1}{4}$ acre of the land. The assistant director at National Registration Bureau confirmed that Schola Kagwiria Twarugoji was the daughter to M’Twarugiji M’Twarigu and Zipporah Kanana, although there was a variance between Schola’s surname and her alleged father’s in that her surname did not have “M” which was in the father’s name.
25. A child is defined under Section 3 (2) of *Law of Succession Act* to 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 of 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.



26. It is said that Scholastica Kagwiria was a daughter to the deceased herein and Zipporah Kanana, although the two were not married. Zipporah Kanana and her said daughter Scholastica never lived on the estate property, and Scholastica got to the land after the death of the deceased. The Appellant has failed to discharge the burden of proving that the deceased expressly recognized Scholastica Kagwiria as his daughter or accepted her as his child or voluntarily assumed permanent responsibility for her, to qualify as his child within the meaning of section 2 (3) of the *Law of Succession Act*. It is curious why Scholastica Kagwiria applied and was issued with an Identity Card on 21/6/2001 barely two years before the deceased passed on.
27. In *Re Estate of Patrick Mwangi Wathiga - Deceased* [2015] eKLR, the court (John Mativo J, as he then was) espoused that; “In my view, the practice of persons emerging after the demise of a deceased person purely to claim a share of properties of the deceased person should be discouraged unless the alleged claimant can demonstrate that there were attempts to have him or her recognized as a beneficiary/member of the family during the deceased’s life time, or the deceased left clear instructions to that effect, or his claim can be reasonably inferred from the express or implied circumstances of the case including the conduct of the deceased or from such reasonable or probable circumstances that can be proved by way of evidence. Alternatively, such a claim can also be admitted if the claimant demonstrates that he was prevented from associating with the deceased during the deceased’s life time by either infirmity of body or mind or both or any other reasonable circumstances. In my view, where someone remains delinked from a family or the person he claims to be a parent for 24 years and only emerges after his/her death, the burden lies on him/her to establish his claim to the deceased’s estate and to tender such evidence as may be necessary to establish his claim beyond reasonable doubt. I am clear in my mind that the burden of prove lies on the objector to prove paternity or his claim to be a beneficiary of the deceased’s beyond reasonable doubt. In *Kimani Mathenge Muriuki vs Patricia M. Muriuki & Another* [5] the court of Appeal emphasised on the need for the person alleging paternity to prove it on a balance of probabilities. The case becomes even more difficult where no medical evidence is adduced to prove paternity or to prove that the deceased’s was step father or lawful guardian. No other evidence was adduced except what the objector states. The position is complicated by the fact that the objector emerged only after the deceased’s death and 24 years after the Petitioner had been married to the deceased. It is trite law that the burden of establishing all the allegations rested on the objector and in law he was under an obligation to discharge the said burden. It’s not enough to state that the deceased’s was his father. He ought to have supported the said allegation by adducing the necessary supporting evidence.”
28. I find that without proof that the Appellant’s mother, Scholastica Kagwiria was a child or a dependent of the deceased, the Appellant’s claim cannot be sustained, and it was properly dismissed by the trial court.
29. Consequently, I find the appeal in want of merit and it is hereby dismissed with costs to the Respondents.

DATED AND DELIVERED AT MERU THIS 10TH JULY, 2025

S.M. GITHINJI

JUDGE

Appearances:-

Mr. Wamache holding brief for Mrs. Ntaragwi for the Appellant.

Mr. Thangicia for the Respondent (absent).

