



REPUBLIC OF KENYA



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Maina v Njeru (Civil Appeal E037 of 2023) [2025] KEHC 10866 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10866 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA**

CIVIL APPEAL E037 OF 2023

EM MURIITHI, J

JULY 24, 2025

BETWEEN

LUKE MUCHOKI MAINA APPELLANT

AND

PERIS MUTHONI NJERU RESPONDENT

*(An appeal from the Judgment of Hon. Grace Kirugumi (P.M) in
Kerugoya Succession Cause No. 46A of 2016 delivered on 26/4/2023)*

JUDGMENT

1. On 27/5/2022, the Respondent herein and the wife to Joseph Njeru Muritu, the deceased herein, filed summons for confirmation of grant where, at paragraph 6 of the affidavit in support thereof, she proposed that L.R No. Inoi/Kamando/1569 measuring approximately 1.41 Ha (henceforth called the estate property) be distributed equally amongst her, Benson Gitari Njeru, Geoffrey Kinyua Njeru, Antony Murimi Njeru and Julius Muriithi Njeru.
2. On 23/6/2022, the Appellant herein, a son to the deceased herein filed an affidavit of protest in opposition to the Respondent's mode of distribution as well as the listed beneficiaries. He stated that at the time of his death, the deceased herein had 2 wives namely Mary Njoki Mbui-Imwe and the Respondent herein. The 1st house comprised of Mary Njoki Mbui-Imwe – 1st wife, David Kinyua Maina - son, Peter Murage Maina - son, Luke Muchoki Maina - son, Isaac Mwai Mary -son and Francis Muriuki Maina - son while the 2nd house comprised of Peris Muthoni Njeru - 2nd wife, Gerishon Gichibi Njeru - son, Patrick Muriuki Njeru - son, Benson Gitari Njeru - son, Geoffrey Kinyua Njeru - son, Antony Murimi Njeru - son and Julius Muriithi Njeru - son. The deceased had during his lifetime already allocated and settled his houses on the estate property, and the deceased set aside 0.20 Hectares for himself. The said intentions of the deceased were reduced into writing on 1/8/2003, and the 1st house settled on the eastern side, the 2nd house on the western side while the deceased retained the northern portion of the estate property. Thereafter, permanent but informal boundaries were erected



and the deceased proceeded to procure Land Control Board Consents to subdivide the estate property. Each house has extensively developed and has been utilizing its respective portion of the estate property by putting up permanent houses thereon. He proposed at paragraph 14 of his affidavit that the estate property be distributed equally between the 2 houses.

3. In its impugned judgment, the trial court rendered thus;

“The protestor and his mother have tendered no evidence to prove that the deceased was also known as Maina. They have not explained why the siblings indicated different names as their father's name in the identification reports. They have not produced birth certificates, DNA test results or any other documentary evidence that the deceased was father...I find that the protestor has not proved that the deceased was his father or that his mother was married to the deceased..I find that the protestor has failed to prove that the deceased had gifted him a portion of the suit land prior to his demise. I dismiss the protest with costs to the petitioner and allow the petitioner's summons dated 23rd May 2022.”

The Appeal

4. On appeal, the Appellant filed his memorandum of appeal on 18/5/2023 raising 3 grounds as follows:

1. The learned trial magistrate erred in law and fact in failing to consider and evaluate the evidence on record as a whole, from the filing of the succession cause, the hearing and determination of summons for revocation of grant and the protest as filed while arriving at the decision she made.
2. The learned trial magistrate erred in law and fact in failing to consider the occupation on Land Parcel Inoi/Kamondo/1569 belonging to the deceased.
3. The judgment of the learned trial magistrate was against the pleadings, evidence adduced in court and the applicable legal principles.

Duty of the court

5. 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

6. Protestor Witness 1 Luke Muchoki Maina adopted his affidavit filed on 23/6/2022 as his evidence in chief and produced the chief's letter dated 20/7/2015, agreement dated 2003, subdivision plan, Bundle of 4 photographs, application for land control board consent, letter of consent, 6 photographs as exhibits. He testified that, “The late Joseph Njeru Muritu he was my father. I know Peris Muthoni Njeru. She was my father's wife. My father had two wives. Peris and Mary Njoki. Witness referred to photos exhibit (4). This is a boundary of the shamba. It was sub divided. The trees are on my part. Each family planted trees on their part. Witness referred to exhibit (6). This is my home, I have constructed on the land. Witness referred to exhibit (7). This is a photo of my father's burial events. The two families are captured. The land should be distributed the way my father had divided.”
7. On cross examination, he stated that, “My mother is Mary Njoki. She is called Mbui-imue. That is her father. He was not her husband. My mother lives in Chuka. She purchased a parcel of land there. It was in 1986. I was born in 1972. I was living at Ngomongo Gitwe. It was in my father's land Joseph Njeru. My mother did not bring me to Kirinyaga. I did not come to live with another father. I got an ID card



in 1990. Witness referred to Petitioner's document 9 (2). In 1997 I did not change my ID. I did not change to include Joseph Njeru as my Father. I have never changed ID card. The first ID my father was Luke Muchoki Maina. I have it todate. I have it here in court. This one I was issued in 1997. Date of issue 1997. The first generation was 1990. This one is for 1997. This is the second generation ID. My father was also called Maina. Joseph Njery Muritu was called Maina. I don't have proof. I am Kikuyu tribe. Clan Mugaciku. Francis Muriuki Maina is my brother. Witness referred to Petitioner's document 3 identification report for Francis Muriuki Maina. He says his father is Andrew Maina. I don't know Andrew Maina. David Kinyua Miana is also my brother. Witness referred to petitioner's document (4). Identification report. I don't know Maina Gachogu. Peter Murage Maina is also my brother. Witness referred to document (5) in petitioner's list. I don't know Joseph Maina Njeru. Isaac Mwai. Mary is my brother. Witness referred to documents (6) application for registration in Petitioner's list. He just says he has a mother Mary. David Kinyua Maina was studying at Tharaka South when he obtained an ID card. Peter Murage Maina says he is from Mumbui. I don't know why he said he is Mumbui. Clan is from father's side. Witness referred to his exhibit (c) chief's letter. It is not the chief who recommended if the letter says so. My father sub divided not the chief. I know the letter. In my exhibits 1 & 2 the chief handwrote it. David Kinyua and Luke Muchoki were present. The other family four members were there. That day not all family members were present. I cultivate the suit land 1 1/2 acres. I am the only one who cultivates. My mother cultivated when we were young. In 1960's -1990's. I was not a licensee. My father was married to the deceased. I don't know when she got married."

8. In re-examination, he stated that, "I cultivate 1 1/2 acre approximately. The other family cultivates about 2 acres. I live on that land. The others just cultivate. They don't live there. My mother lived there in the 60's - 90's. She had a home there. I had a 1st generation ID card. I returned it for a 2nd generation ID. I am Luke Muchoki Maina. Witness referred to Protestor's exhibit (1) Chief's letter dated 20.7.2015. The chief has attached an agreement to the letter. The agreement was between our family and the other family. David Kinyua and Luke Muchoki represented our family. We signed. The other family were represented by Gerishon Gichobi, Benson Gitari, Geoffrey Kinyua, Julius Mureithi."
9. Protestor's Witness 2 Mary Njoki adopted her statement dated 29/7/2021 as her evidence in chief. She testified that, "I know Peris Muthoni. We are Co-wives. Each was cultivating her portion. It was Joseph Njeru's land. He had two wives. Peris and myself. Peris was the first wife. I have five children. We had a customary union. She has her portion. I have mine. Luke Muchoki has been cultivating my portion. It is about 2 acres. There is a house on Peris portion. It is unoccupied. It was subdivided 30 years ago. We have lived that way to date. There is a boundary. There are trees. The court will see the boundary."
10. On cross examination, she stated that, "I was born in 1948. I was born at Gathuthuma in Kirinyaga. I am Joseph Njeru's wife. I got married in 1968. It was under Kikuyu customary laws. The elders died, I have not availed any. We did not take any photos. Joseph Njeru's father was Muritu Miatu. He had two wives. One was I can't recall them. One was Gacheke the other Kiruri's daughter. My son is called David Kinyua Maina. I name him after my father in law just used a different name. His father is not Maina Gachogu. Francis Muriuki Maina is my son. Witness referred to Petitioner document (3). I don't know why he said his father is Andrew Maina. Luke Muchoki is my son. He indicated Joseph Njeru as the father in document (2) of the Petitioner. Peter Murage Maina is my son. He said his father is Joseph Maina Njeru. Isaac Mwai Mary did not mention his father in document 6 of the Petitioner. They did not know the name of the father. They did not ask me they just gave out those names. Maina is their father. He referred to himself per all those names. We could not have anticipated a court case. I live there in Inoi/Kamondo/1569 in 1968. I left and came back. I had a house. I recall when I left. I live in Tharaka Nithi. Mbui-mwe is not my husband. He is my father. Witness referred to agreement. Protestor exhibit (2) of 2003. We went to the office of the chief. They told me later about it. I was not told to attend. Luke told me about it."



11. In re-examination, she stated that, “He had different names. Tukaa Maina. They took ID cards while at school. One was studying at Marimanti in 1968. We lived on this suit land. He constructed a house for me. Luke Muchoki’s house is on the land.”
12. Petitioner’s Witness 1 Peris Muthoni Njeru adopted her statement dated 23/5/2022 as her evidence in chief and produced the list of documents dated 29/7/2022, 26/10/2022 and 18/11/2022 as exhibits. She testified that, “I live at Karia in Kirinyaga. He never married a second wife. My husband never had children with her. He never introduced any wife when he died. My husband is not called Andrew Maina. He is not called Maina Gachugu, Joseph Njeru, Tukea and Rugaita. He was never referred to as Joseph Maina. We have never utilized the name Maina. He was Joseph Njeru even in my ID. My children utilize the six name Joseph Njeru.”
13. On cross examination, she stated that, “I live and cultivate on the land. Luka was allowed to cultivate but he has refused to vacate. There is a main house and kitchen he lived with my husband. Luke occupied and refused to vacate as I was at work. I was living at school. I am currently living at Karia at my mother’s land. Witness referred to protestor exhibit (c) photographs. I don’t know which shamba is represented in the photographs. He never sub divided it into two. There are trees. I was cultivating one side with my husband. My sons were cultivating the other side. My husband side was the smaller one. When we were cultivating with my husband. Luke Muchoki cultivates the smaller portion. He was allowed to cultivate. Witness referred to protestor annexure (1). We disputed what the chief wrote. In 2003 I was in hospital. I didn’t attend the meeting annexure (2) of the protestor. They went for the meeting. One son refused to sign. He was locked up other signed. He did not have different names. He was just Joseph Njeru, Rugaita and kea.”
14. In re-examination, she stated that, “My husband allowed Luka to cultivate since the land was very large and I was not around. He was Joseph Njeru, Rugaita or Tukea. The official name is Joseph Njeru. He was never known as Maina in 2003. I did not attend the meeting at the chief’s office I was at hospital. Geoffrey Kinyua told me there was a meeting and he refused to sign. I never agreed with the chief.”

Submissions

15. The Appellant urges the court to find that the deceased was a polygamist, and allow the protest. He beseeches the court to allow the appeal with costs, and cites Paul Kiruhi Nyingi & Another v Francis Wanjohi Nyingi (2009) eKLR.
16. The Respondent faults the Appellant and his siblings for failing to prove dependency, and relies on In re Estate of Kithogu Charii (Deceased) [2020] KEHC 9760 (KLR), Paul Kiruhi Ngingi & Another (Supra) and Estate of Etete Masakhalia (Deceased) (2021) eKLR. She urges the court to dismiss the appeal with costs, and relies on Jasbir Singh Rai & Others v Tarlochan Rai & Others (2014) eKLR.

Determination

17. From the grounds of appeal, the singular issue for determination is whether the trial court’s judgment was grounded on law and the evidence adduced.
18. In his introductory letter dated 21/3/2016, the Assistant Chief of Nduini Sub-Location listed the Respondent and her 4 children namely Patrick Muriuki Njeru, Benson Gitari Njeru, Geoffrey Kinyua Njeru, Antony Murimi Njeru and and Julius Muriithi Njeru as the only beneficiaries of the deceased.
19. In his letter dated 20/7/2015, the chief of Koroma Location listed Mary Njoki Mbui Imwe – 1st wife, David Kinyua Maina - son, Peter Murage Maina - son, Luke Muchoki Maina - son, Isaac Mwai Mary –son, Francis Muriuki Maina – son, Peris Muthoni Njeru - 2nd wife, Gerishoni Gichibi Njeru - son,



- Patrick Muriuki Njeru - son, Benson Gitari Njeru - son, Geoffrey Kinyua Njeru - son, Antony Murimi Njeru - son and Julius Muriithi Njeru – son as the beneficiaries of the deceased. While the Respondent disputes the contents of that letter, she did not seek to have the said chief summoned for purposes of cross examination.
20. The Appellant testified that, “The late Joseph Njeru Muritu he was my father. My father had two wives. Peris and Mary Njoki. Each family planted trees on their part. This is my home, I have constructed on the land. The land should be distributed the way my father had divided.” On cross examination, he stated that, “I cultivate the suit land 1 1/2 acres. I am the only one who cultivates. My mother cultivated when we were young. I was not a licensee.” In re-examination, he stated that, “I cultivate 1 1/2 acre approximately. The other family cultivates about 2 acres. I live on that land. The others just cultivate. They don’t live there. My mother lived there in the 60’s - 90’s. She had a home there. The agreement was between our family and the other family. David Kinyua and Luke Muchoki represented our family. We signed. The other family were represented by Gerishon Gichobi, Benson Gitari, Geoffrey Kinyua, Julius Mureithi.”
 21. Protestor’s Witness 2 testified that, “I know Peris Muthoni. We are Co-wives. Each was cultivating her portion. It was Joseph Njeru’s land. He had two wives. Peris and myself. Peris was the first wife. I have five children. We had a customary union. She has her portion. I have mine. Luke Muchoki has been cultivating my portion. It is about 2 acres. There is a house on Peris portion. It is unoccupied. It was subdivided 30 years ago. We have lived that way to date. There is a boundary. There are trees.” On cross examination, she stated that, “Maina is their father. He referred to himself per all those names. Mbui-mwe is not my husband. He is my father.” In re-examination, she stated that, “He had different names. Tukaa Maina. We lived on this suit land. He constructed a house for me. Luke Muchoki’s house is on the land.”
 22. The Respondent admitted on cross examination that, “Luka was allowed to cultivate but he has refused to vacate. There is a main house and kitchen he lived with my husband. Luke occupied and refused to vacate as I was at work. I am currently living at Karia at my mother’s land. There are trees. I was cultivating one side with my husband. My sons were cultivating the other side. My husband side was the smaller one. Luke Muchoki cultivates the smaller portion. He was allowed to cultivate.” In re-examination, she acknowledged that the deceased was known by other names when she stated that, “He was Joseph Njeru, Rugaita or Tukea. The official name is Joseph Njeru.”
 23. Section 29 (b) of the *Law of Succession Act* provides that; “For the purposes of this Part, “dependant” means — (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.”
 24. The Court finds that the Appellant was a dependant of the deceased within the meaning of section 29 of the *Law of Succession Act*.
 25. Section 42 of the *Law of Succession Act* provides 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 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”
 26. The Appellant’s occupation of 1½ of the estate property is a material fact which cannot be disregarded. While such occupation may not, in itself amount to a gift inter vivos, it nonetheless bears some legal significance.



27. It would be an injustice to expect the Appellant to move from his only known abode under the pretext that he was not a son to the deceased, yet he was admittedly put in such occupation by the deceased himself, thereby in the very least confirming him as a dependant in terms of section 29 of the *Law of Succession Act*.
28. In underscoring the import of a beneficiary's residence or settlement by the deceased, the court (Luka Kimaru J, as he then was) in *Re Joseph Sigilai Mutai, Maria Chepkemoi Lelei & Tapsabei Chepkemoi Lelei v Philip Kipyegon Lelei* [2006] eKLR, stated as follows:
- “I am satisfied that the petitioners have established on a balance of probabilities that the deceased had settled his wives in their respective portions of land. The 1st wife was settled at Kericho while the three other wives of the deceased were settled at Transmara. The three wives and their children recognized this fact when they subdivided the Transmara parcel of land among themselves to the exclusion of the 1st wife and her children. I therefore hold that none of the children of the three wives who reside at Transmara, including the objector, are entitled to the parcel of land occupied by the 1st wife and her children at Kericho namely Kericho/Kapkatet/1226.”
29. On a balance of probability, the court finds that the Appellant proved by consistent evidence that he has been residing, cultivating and utilizing 1½ of the estate property since his birth to date. The court also notes the agreement dated 30/4/2003 where the deceased herein expressly directed that the estate property be subdivided equally between his 2 houses in the presence of Josphat Mugo Munene, the Chief of Koroma Location, David Kinyua Njeru, the Appellant herein, Gerishon Kinyua Njeru and Antony Murimi Njeru.
30. This court finds that the trial court misapprehended the evidence on record and fell into an error, justifying the interference by this appellate court with its judgment subject of the appeal.

Orders

31. Accordingly, for the reasons set out above, the Court finds that the appeal is merited and it is allowed in the following terms:
1. The trial court's Judgment dated 26/4/2023 is set aside.
 2. The Appellant's Protest sworn on 23/6/22 is allowed.
 3. The estate property L.R No. Inoi/Kamondo/1569 shall be distributed equally between the 2 houses as proposed by the Appellant at paragraph 14 of his affidavit of protest.
32. There shall be no order as to costs.
- Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF JULY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Mwagiru for the Appellant.

Mr. Ngigi for the Respondent.

