



**Wanjiru v Wahu & another (Probate & Administration
237 of 2013) [2025] KEHC 10590 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10590 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 237 OF 2013**

JRA WANANDA, J

JULY 18, 2025

BETWEEN

TABITHA WANJIRU OBJECTOR

AND

NANCY WAHU 1ST PETITIONER

ELIZABETH WANJIRU MAINA 2ND PETITIONER

JUDGMENT

1. This Judgment is on determination of whether the Objector is a “widow” to the deceased.
2. The background of the matter is that the deceased, William Maina Githinji, died on 28/10/2012 at the age of 50 years. On 20/08/2013, the Petitioners, Nancy Wahu Maina and Elizabeth Wanjiru Maina, applying as widow and daughter of the deceased, respectively, through Messrs Wambua Kigamwa & Co. Advocates, jointly petitioned for Grant of Letters of Administration over the estate of the deceased. The Petitioners listed 4 survivors of the deceased, including themselves, as beneficiaries, and 2 parcels of land and 2 motor vehicles were also cited as comprising the estate.
3. However, before the Petition could be determined, the Objector, through Messrs Mtai Maritim & Co. Advocates, filed the Objection dated 4/09/2013. She later however filed a “Notice to act in Person”.
4. The Objection was then directed to be heard by way of viva voce trial. The parties then filed Witness Statements and Lists of Documents. However, for various reasons, including transfer of Judges, and perhaps, also some level of lethargy by the parties, the trial did not take off until 20/06/2023 when I took it over. Although the parties filed a number of Witness Statements, I will only recite those made by the Witnesses who actually testified as only those were adopted in evidence.



Objector's Witness Statement

5. The Objector's Statement is dated 31/08/2015. She stated that the deceased, prior to his death cohabited with her as husband and wife at Kapchemutwa, Elgeyo Marakwet County, and the relationship was blessed with 2 issues, born on 8/10/2010 and 20/12/2011, respectively. She stated further that on 11/11/2012, accompanied by others, she travelled to the deceased's rural home in Tongarina, Bungoma County for his burial, that she arrived late but was able to talk to family members after the function, that a brother of the deceased asked her and her delegation to visit the family after 1 month to enable them discuss the issue of her relationship with the deceased since he had not informed the family of the same before his death. She stated that on 11/12/2012, she and 5 neighbours went back to the home of the deceased as agreed with the said brother of the deceased, during which, the mother of the deceased told them that she was not in a position to make decisions over the issue without involving other family members and thus asked the Objector return after a few months and give her time to inform family members. She stated that in May 2015, she was called by the mother of the deceased and asked to return as the mother had now informed other family members, which she did, and the meeting took place but the 1st Petitioner declined to recognize her and her children as being the 2nd family of the deceased, and the family members thus decided that the matter be handled as per the law. She stated that on several occasions, she approached the 1st Petitioner to join her in petitioning for Grant of Letters of Administration of the estate of the deceased or in the alternative, to grant her a consent to do so but the 1st Petitioner has refused to co-operate. In the end, she urged that it is necessary that she and her children inherit the estate.

Petitioner's Witness Statement

6. The 1st Petitioner, Nancy Wahu Maina's, Statement is dated 8/07/2015. She stated that she got married to the deceased in the year 1985 under the Kikuyu customary law, and that they met in Nyeri when they were still bachelor and spinster and that the deceased was employed at the Kenya Wildlife Services. She stated that on 13/12/2009, they formalized their marriage and received confirmation of the 1st Holy Communion at Tongaren where they had purchased land, and that the deceased was a Forester in Keiyo District. She stated that the deceased never told her or any member of the family that he had another wife, that by the time he died, he left only the 1st Petitioner and 3 children, even during his burial, nobody identified herself as his 2nd wife and even the burial programme indicated only herself as the wife. She added that even when collecting the body for burial, she was solely issued with the burial permit, and thus it came as a surprise when after 2 weeks of the burial, she was called and told that there were visitors to see her. She stated that this was the time when she came to learn that the Objector was claiming to be the 2nd wife of the deceased, and the entire family got surprised since they knew the 1st Petitioner as the sole wife of the deceased. She then urged that the deceased, having married in church, by virtue of the African Christian Marriage and Divorce Act, Cap. 151, could only have a monogamous marriage and could not have a 2nd wife, that the deceased was an elder in the church and he could not have a 2nd wife, and that the employment records of the deceased showed that he had only one wife, herself.

Objectors' testimony and/or evidence at the trial

7. The Objector testified on 20/06/2023 as PW1. She adopted her Witness Statement recited above and produced the 4 documents contained in her List of documents. She reiterated matters contained in the Witness Statement and stated that she knew the deceased when he came to Elgeyo Marakwet in 2006 as a Forester, that she had a kiosk and in 2009, she started living as husband and wife with the deceased, and in the same year they got a child, and the second in 2011. She testified that she was an orphan and



thus, although the deceased wanted to pay dowry for her, he could not do so as she only had brothers. She stated that the deceased fell sick in 2011 when he developed a tumour and he kept telling her that he had a wife in Tongaren where they used to live, that he was taken to hospital in Eldoret and when he recovered he went to Tongaren to live with his other wife. She testified that the house they used to live in belonged to the Forestry Department and she thus had to move out and returned to her parent's home, that in March 2001, the deceased was taken to hospital in Nairobi for treatment and when he recovered he went to visit the Objector in Elgeyo, he again returned to visit her in July, he later he fell sick again and was taken to Turbo where he died in October 2010. She testified that upon hearing of the death, she tried to get in touch with the co-wife (1st Petitioner) but who never wanted to speak to her, that she however attended the burial together with many other people from Elgeyo, she looked for relatives of the deceased and who were informed that the Objector was a wife of the deceased, and the children were also introduced since she had also taken them to the burial.

8. She then repeated matters already contained in her Witness Statement and added that during the meeting with the family of the deceased in Tongaren about 2 months after the burial, the 1st Petitioner accepted the Objector's children after which they went to a Mediator but who was not able to resolve the dispute and that is why she has come to Court. She stated that the children are now 11 and 12 years old and she wants them to be recognized as the deceased's. Under cross-examination by Mr. Mengich Advocate, she stated that the funeral was on 11/11/2012 but when shown the Funeral Programme, she agreed that the date stated therein is 10/11/2012. She conceded that she did not have a Marriage Certificate with the deceased, and also that she was aware that the deceased and the 1st Petitioner conducted a church wedding but she stated that she only learnt of this fact much later. She also conceded that her name did not appear in the Funeral Programme. She also agreed that no marriage ceremony was conducted for the deceased and herself. She then stated that her only concern is the children but also conceded that she only processed the Certificates of Birth after the deceased died. She also conceded that under the law, the deceased may not have been eligible to marry a 2nd wife.

Proceedings subsequent to Objector's testimony

9. After concluding her testimony on 20/06/2023 as aforesaid, the Objector informed the Court that her other witnesses were on the way and requested the Court to wait for them. After waiting for the witnesses until 4.00 pm but who never showed up, I adjourned the hearing to 18/10/2023. On 18/10/2023 date, the Objector again successfully prayed for an adjournment on the ground that she was unable to bring the witnesses on that day, and I thus fixed the matter for further hearing for 6/02/2024. The Objector however did not show up on that date, and did not also attend Court on the subsequent hearing dates of 29/05/2024, 28/11/2024 and 5/02/2025.
10. On the said date of 5/02/2025, Mr. Wambua Kigamwa, Counsel for the Objector informed me that he was unable to serve the Objector as he had no knowledge of her whereabouts or her contacts. In the circumstances, I directed him to serve the Objector by way of substituted service, namely, via a Newspaper notice. I then set the matter down for further hearing for 13/03/2025. On 13/03/2025, satisfied that Mr. Wambua had caused the publishing of the notice indicating the hearing date as there was a Return of Service on record, and the Objector again being absent, I closed the Objector's case and permitted the Petitioners to present their case (defence case), which they did when the 1st Petitioner took the stand.

Petitioners' testimony and/or evidence before the trial Court

11. The 1st Petitioner, Nancy Wahu Maina, testified as DW1 on 13/03/2025, as aforesaid. She adopted her Witness Statement and produced the 8 documents contained in her List of Documents. She reiterated



the matters already stated in the Statement and added that she did not know the Objector who did not even attend the burial of the deceased. She testified that she only learnt of the deceased after the burial sometime around October 2012 when she claimed to be a wife of the deceased and that she was living with the deceased in Iten where the deceased used to work. She stated thaty she has Certificates of Birth for her children and urged the Court to dismiss the Objection.

12. As the Objector never showed up, the 1st Petitioner was not cross-examined and the defence case was closed.

Petitioners' Submissions

13. The trial was then closed and the Petitioner's Advocates filed the written Submissions dated 30/06/2025.

14. In his Submissions, Counsel for the Petitioners, after recounting the testimonies and evidence on record, submitted that that the Objector led no evidence to support her assertion that she was married to the deceased, that none of the documents she sought to rely on demonstrates any form of marriage between herself and the deceased, and neither did she call any witness to buttress her assertion. He urged that the mere mention of the name of the deceased in the children's Health Cards, Birth Certificates or the Chief's letter do not suffice as proof of marriage, and the Objector made no attempt to place herself under the protection of customary law either, nor did she lead evidence or call witnesses to confirm that the deceased had married her customarily. He cited the case of Elizabeth Gachambi v Grace Nduta Kinuthia & Another [2017] KEHC 6 166 (KLR). Counsel then submitted that, on her part, the 1st Petitioner has demonstrated that she was a wife of the deceased, even though the issue is not in dispute as she tendered a copy of her Marriage Certificate which remains unchallenged and also, the Objector has equally recognized her as a wife of the deceased. On the Health Cards and Certificates of Birth relied upon by the Objector, Counsel urged that the same do not suffice as proof of paternity. He cited the case of S.M. v S.C. [2017] eKLR, and pointed out that the while the deceased died on 28/10/2012, the Certificates bear the date of their issuance as 23/09/2015, a month shy of 3 years since the demise of the deceased, and after this matter had already been confirmed for hearing. According to Counsel, the logical inference that can be drawn is that the Objector obtained the same specifically for purposes of this suit since no explanation was tendered as to why it took her more than 4 years since the birth of the children to obtain the Certificates. According to him, it is suspect for the Objector to have waited until the demise of the deceased for her to register the children and that these anomalies paint a picture of a litigant who has been caught in her lie, and urged the Court to find as such.

Determination

15. The issues for determination in this matter are evidently the following:
 - i. Whether the Objector was the 2nd wife of the deceased and thus, whether she is entitled to inherit from the estate of the deceased as a widow.
 - ii. Whether the Objector's children are also entitled to inherit from the estate of the deceased as his children.
 - iii. Whether, in the alternative, the Objector and her children are entitled to inherit from the estate of the deceased as his "dependents".
 - iv. Whether the Objector should be appointed an Administrator of the estate of the deceased, or a co-Administrator?



16. Regarding the order of preference or priority, to be applied in determining Petitions for Grant of representation, and/or the person or persons to be appointed to administer the estate, Section 66 of the [Law of Succession Act](#) provides as follows:

“When a deceased has died intestate, the court shall save as otherwise expressly provided, have a final discretion, as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:

- a) Surviving spouse or spouses with or without association of other beneficiaries.
- b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c) The public trustee; and
- d) Creditors;

17. Under Section 66 therefore, the Court has final discretion as to whom a Grant shall, in the best interests of all concerned, be made. It is however generally agreed that the order of preference set out above is only a guide and the Court retains a discretion thereon.

18. In this case, that the 1st Petitioner was the deceased’s wife and thus her widow, is not in issue as that status has not been challenged. According to the 1st Petitioner, she was the only wife as she wedded the deceased in church and she holds a Marriage Certificate. On her part, the Objector claims to have been the deceased’s 2nd wife and thus his widow, just like the 1st Petitioner. Of course if the Objector can prove that she is a “wife”, then, just like the 1st Petitioner and her children, she and her children, too, will be eligible to inherit therefrom.

19. On the issue of “dependency”, Section 26 of the [Law of Succession Act](#) provides that:

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

20. On the definition of a “dependent”, the relevant provisions of Section 29 of the [Law of Succession Act](#) are premised as follows:

- “(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased’s parents, step-parents, grandparents, 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; and
- (c)



21. It is therefore clear that a person claiming under Section 29(a) of the [Law of Succession Act](#) above, does not need to also prove that he/she was being maintained by the deceased prior to his death. However, unlike Section 29(a), proof of “dependency” is a condition precedent to the exercise of the Court’s powers under Section 29(b).
22. In respect to the above,, Mabeya J, in the case of Beatrice Ciamutua Rugamba. vs. Fredrick Nkari Mutegi & 5 Others, 2016 eKLR, held as follows:
- “From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency.”
23. Regarding the definition of a “child” or “children” of a deceased person, eligible to inherit from his estate, the [Law of Succession Act](#) in Section 3(2), contains the following explanations in its interpretation provision:
- “(2) References in this Act to “child” or “children” shall 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 to 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.
- (3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.
24. Regarding the provisions of the [Law of Succession Act](#) guiding the handling of a claim of paternity of a child for purposes of inheritance from the estate of a deceased person, the Court of Appeal, in the case of E.M.M v I.G.M & Another [2014] eKLR, stated as follows:
- “The real issue before us on this appeal is whether the appellant proved before the High Court on a balance of probabilities that he is a child of the deceased. Under section 29(a) of the [Law of Succession Act](#), if the appellant is able to prove that he is a biological child of the deceased, he would be a dependant of the deceased without having to prove that he was maintained by the deceased immediately prior to his death.
- Independent of being a biological child of the deceased, and therefore an automatic dependant, the appellant would also qualify as a dependant of the deceased if he can prove that he is a child whom the deceased had taken into his family as his own, and who was being maintained by the deceased immediately prior to his death. Unlike the dependant under section 29(a), the dependant under section 29(b) has to establish that the deceased had taken him or her into his family as his own child and that he or she was being maintained by the deceased immediately prior to his death.
25. The question in this case is therefore whether the Objector was a “wife” to the deceased.



26. On the issue of determining the existence of a marriage, the Court of Appeal, in the case of *M.W.G v E.W.K* [2010] eKLR, held as follows:

“The existence or absence of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except whereby reason of a written law it is excluded. For instance, a marriage can’t be presumed in favour of any party in a relationship in which one of them is married under a statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.”

27. In this case, the 1st Petitioner produced a Certificate of Marriage indicating that she wedded the deceased in church in Bungoma in 2003 under the African Christian Marriage and Divorce Act, Cap. 151. She stated that this was long after she had already got married to the deceased in the year 1985 in Nyeri under Kikuyu customary law. She also testified that they were, during the pendency of their marriage, blessed with 3 children, the eldest born in 1986. These facts were not disputed and I therefore accept them as correct.

28. On her part, the Objector testified that she met the deceased in 2006 in Elgeyo Marakwet where the deceased used to work as a Government officer, and that she started cohabiting with him in 2009. She then stated that they were blessed with 2 children, born in 2010 and 2011, respectively, before the deceased died in 2012.

29. Needless to state, although the deceased is said to have initially married the 1st Petitioner under Kikuyu customary law, which there is no doubt, allows polygamy, the moment he formalized the marriage in church as aforesaid, he converted the customary marriage to a statutory marriage, a marriage under the Christian religion, which is strictly monogamous, and he thus immediately lost or forego the capacity to contract any other or further marriage. In fact, the Objector readily admits this fact. For this sole reason, assuming that he indeed subsequently went ahead and “married” the Objector as a 2nd wife, such union, if any, would automatically be null and void, and the Objector cannot be deemed a “wife” for purposes of the *Law of Succession Act*. On this point of law alone, the Objector’s claim to have been the 2nd wife of the deceased therefore fails.

30. In any event, the Objector concedes that no marriage ceremony of any kind was conducted or performed in regard to her alleged “marriage” to the deceased, no dowry payment was made, and no family “introduction” visits were held. She also concedes that the deceased never introduced her to any member of his family or relative. She also did not call any independent witness, not neighbours, not her own relatives, and not friends, to testify about the “known” or “understood” nature of her relationship with the deceased. Being the one alleging that she is a “wife”, she bore the burden of proving this fact to the required standard, which burden she failed to discharge. Her claim of being a “wife” therefore also fails on this further ground.

31. Regarding the Objector’s children, although she relied on Certificates of Birth for the 2 children bearing the name of the deceased as the father, she conceded, as is apparent on the face thereof, that the Certificates were issued in 2015. Considering that the deceased died in 2012, it is evident that the Certificates were procured long after the deceased had already died, 3 years earlier. The name of the deceased as the “father” could not have therefore been entered into the Certificates with his knowledge or authority as he was already dead by then. The entry of the name of the deceased in the Certificates, even if genuine, may have therefore been clandestinely procured. Production of Birth Notifications from the hospital would have presented stronger evidence in my view, and also corroborated the entries



appearing in the Certificates of Birth. However, for unexplained reasons, the Objector did not produce any such Birth Notifications.

32. It is also not lost on me that the Objector having filed the Objection in 2013, and the Certificates having been issued in 2015, it means that that she procured the same long after she had already filed the Objection, and during a time when the Objection proceedings were actively underway in Court.
33. For a case in which reliance on a Certificate of Birth suspiciously procured was impeached, I cite the holding of S. Githinji J, in the case of S M v S C [2017] KEHC 7523 (KLR), referred to by the Petitioner’s Counsel, Mr. Wambua:

“..... The produced birth certificate was obtained on 8th February, 2016 while the suit and the application were filed on 11/02/2016. It is therefore clear that the birth certificate was obtained for the purpose of filing this suit and the application.

The respondent stated that he did not give consent for his name to be indicated as the father of the child in the birth certificate, and the said birth certificate was fraudulently obtained. I wish in that regard to state here that appearance of a person’s name as a parent of a child in the birth certificate, where the authenticity of such birth certificate is not established and where a party disputes parenthood, the birth certificate cannot safely be held as prima facie evidence that the person named is the child’s parent.”

34. The Objector also relied a letter from the Chief, Keiyo District, but that Chief was never called as a witness to be cross-examined on the authenticity or correctness of the contents of the letter. No explanation was given why he was not called, as the Objector did not allude that she was facing any challenges or difficulties in procuring his attendance. She did not seek the Court’s intervention, by seeking issuance of Witness Summons to the Chief. The issue of her alleged “marriage” to the deceased and paternity of her children having been strenuously opposed, and the same being at the core of the dispute herein, in my view, the Chief, having authored the letter, was a crucial witness whom the Objector ought to have called to testify.
35. The other documents relied on by the Objector were “Child Health and Nutrition Cards” for the children bearing the name of the deceased as the father. However, the same bear handwritten entries, with no stamp or seal or signature thereon. The origin and/or authenticity of the documents cannot therefore be ascertained as the makers remain unknown.
36. As aforesaid, the Objector did not also call any independent witness, such as neighbours, or relatives, or friends, to testify about the “known” or “understood” or “presumed” paternity of the children.
37. In my view therefore, the Objector has also failed to prove that the minors were the children of the deceased
38. Regarding the Objector’s alternative claim under the limb of “dependency”, both in respect to herself and also her 2 children, she also did not produce anything whatsoever to suggest that the children were being “maintained by the deceased immediately prior to his demise”, or that they were children “whom the deceased had taken into his family as his own”. This alternative claim brought under the basis that the Objector and her children were “dependents” of the deceased therefore remains unproven, and also fails.



39. Before I pen-off, I may remark that this case reminds me of the following statements made by Mativo J (as he then was), in the case of *In re Estate of Patrick Mwangi Wathiga - Deceased* [2015] eKLR:

“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 proof 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 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 was his father. He ought to have supported the said allegation by adducing the necessary supporting evidence.”

40. In conclusion, I add that the Objector having failed to prove her claims, the Objection is for dismissal. In the circumstances, there would now be nothing barring the issuance of the Grant of Letters of Administration to the Petitioners in the manner they had applied, way back in the year 2013.

Final Orders

41. In the end, I rule and order as follows:

- i. The Objection filed herein, and dated 4/09/2013, is hereby dismissed but with no order on costs.
- ii. The Grant of Letters of Administration should now be issued to the Petitioners as joint Administrators since, from the record, the Petition had already been gazetted in the year 2013. The Petitioner should thereafter move to apply for Confirmation of Grant so as to expedite the conclusion of this very old matter.
- iii. Any party aggrieved by the decision hereinabove has forty-five (45) days leave to file an appeal, and which period shall also act as stay against implementation or execution of this Judgment.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 18TH DAY OF JULY 2025

.....



WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

N/A for the Objector

Mr. Wambua for the Petitioners

Court Assistant: Brian Kimathi

