



**In re Estate of Anthony Mugo Mwai (Deceased) (Succession Cause  
39 of 2017) [2023] KEHC 590 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 590 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
SUCCESSION CAUSE 39 OF 2017  
CM KARIUKI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**FRANCIS MWANGI MUGO ..... PROTESTOR**

**AND**

**MIRRIAM WAMBUI MUGO ..... RESPONDENT**

**JUDGMENT**

1. Before this court is a protest filed by Francis Mwangi Mugo , the protestor herein and a co-administrator of the deceased's estate against the confirmation of grant filed by Mirriam Wambui Mugo, co-administrator of the deceased's estate.
2. The protest was grounded on the fact that:-
  - i. That said Mirriam Wambui Mugo had presented the summons for confirmation of grant purportedly as the wife of the deceased. However, she was not married to the deceased either under Kikuyu Customary Law or under any known system of marriage. That before she can purport to file a summons for confirmation of grant claiming to be a dependant, she must demonstrate that she was a wife of the deceased.
  - ii. That the net estate of the deceased consists of the parcel of land known as Nyandarua/Karati/37XX, the suit land hereinafter measuring 24 acres or thereabout. Before his death, the deceased had sub divided the land and all the dependants had been shown their respective portions in the following terms:-
  - iii. Francis Mwangi Mugo ..... 6 Acres
  - iv. Paul Wachira ..... 7 Acres
  - v. Leah Wambui ..... 3 Acres



- vi. Joyce Nduta .....3 acres
  - vii. Phyllis Wangari ..... 2 acres
  - viii. Miriam Murugi ..... 2 Acres
  - ix. Samuel Waithaka ..... 5 acres
  - x. Anthony Mugo Muigai (the deceased) - sold 4 acres to a third party and a title deed was issued.
  - xi. That each of the beneficiaries occupied and built their respective portions of land and they settled. That Samuel Waithaka never settled because he was deceased and that his son who was to settle on his portion lives in Nairobi.
  - xii. That the parcel of land cannot be distributed as proposed by the applicant because she has not demonstrated that she was the deceased's wife and that some of his siblings had sold portions of their bequest and the third parties ought not to be affected adversely.
  - xiii. That the applicant came to live with the deceased after the death of their mother in 1992 or thereabout. That she came with two children and they never had a child with the deceased. As part of her scheme to inherit from the estate, the applicant forged a letter from [particulars withheld] Primary School to assist in changing her identity card yet she never attended the school.
3. He prayed that this court confirm the wishes of the deceased as expressed in the subdivision plan and further the court should refrain from giving an order which will affect third parties.
  4. Moreover, Hellen Ngina Kimani, the deceased's sister in law in an affidavit deponed that the deceased called her when he was dividing his land and that she is aware that each of the children were shown their portions and settled in them. She attested to the fact that the deceased divided his land.
  5. Further, the David Kiiria Ngugi, the surveyor submitted that in 1995, the deceased instructed him to sub divide the suit land into 9 portions. That his intention was to distribute the land to his children and to sell four acres.
  6. Pursuant to the deceased's instructions, he visited the land and subdivided it into 9 portions and erected beacons marking the physical extent of each of the portions of the land then he prepared the field diagram. That he was aware that the deceased distributed the land to his children and each of the portion in the field diagram has the name of the person who was allocated.
  7. In rejoinder, the respondent filed an affidavit dated February 28, 2022. She deponed that the deceased died intestate and that there was no subdivision scheme in existence for the suit land. She reiterated that she was the deceased's wife having being married under Kikuyu Customary Law.
  8. She stated that on August 19, 2000, the deceased invited her brother, Shem Wainana Kinga in place of her father who has been ailing and bed ridden since 1998 and her aunt Safinda Wairimu Waweru to a ceremony where her two children namely Teresia Wangui Mugo and Laban Kinga Mugo were customarily by way of slaughtering of a goat adopted as children of the deceased.
  9. It was further deponed that the protestor has not denied to have biological sisters by the names of Mirriam Wambui Mugo, Mirriam Wambui Mugo and Flora Wairimu Mugo who she proposed to have share in her father's estate. That the protestor has not disclosed to the court why he would want



to disinherit them and has not filed any notice of renunciation by them if at all they have rejected or denounced their right to inherit their father.

10. Shem Wainana Kinga, the respondent's brother in his witness statement dated February 28, 2022 stated that he was present on December 6, 1993 at his father's house in [particulars withheld] Village Naivasha Sub County in Nakuru County when the deceased and his entourage came and brought a she-sheep and ewe "*mwati na harika*", Kikuyu traditional beer "*muratina*" code name "*njobi ya ndabi*" and 60,000/- which were in respect of dowry price 90 sheep.
11. That he was also present on December 20, 1997 when the deceased and his entourage came to his father's homestead for the second time and brought with them a heifer (*mori ya ureri*), bull (*degwa ya muthuri*), a father's coat and a simi (double edged sword), 30,000 as part of dowry price and traditional beer (*muratina*).
12. That he was also present on December 18, 1999 when the deceased visited his father's homestead for the third time to deliver 4 castrated he sheep (*ngoima cia muhiriga*) and after feasting of the two clans, the deceased was informed of other requirements which he needed to bring forth so that he can slaughter a castrated he-sheep in the ceremony of '*ngurario*'
13. That he was present on August 19, 2000 when the deceased visited his father's homestead for the fourth time where his agents slaughtered and castrated a he-sheep in the ceremony of *ngurario* which signified the certificate of marriage in the Kikuyu tradition.
14. That he also represented his father on December 23, 2000 at the deceased's homestead in [particulars withheld] Village in Kinangop Sub County of Nyandarua County where the deceased conducted the Kikuyu traditional ceremony of slaughtering a castrated lamb for adopting Wangui and Kinga, the respondent's children as his children.
15. He concluded that he knew his sister as a wife of the deceased having been fully married in Kikuyu Customary Law from as early as the year 2000.
16. Additionally, Safinda Wairimu Waweru, the respondent's aunt, averred in her statement that she was also present in all four occasions for dowry taking process and the ceremony of adoption of the respondent's children through the Kikuyu tradition of '*guciara ciana na mburi*'
17. The matter proceeded by way of oral submission with each side calling 2 witnesses

#### **18. Protestor's Submissions**

19. The protestor reiterated that the respondent/petitioner is not a wife as defined under the [Law of Succession Act](#) and that she was not entitled to a share of the net estate of the deceased. That both witnesses presented by the petitioner to testify that she was indeed a wife under Kikuyu Customary Law; fell short of the requisite credibility test and what they claimed to have been a Kikuyu customary marriage and adoption of the children was a sham.

#### **Did the Petitioner Demonstrate Existence Of A Customary Law Marriage?**

20. The protestor submitted that the petitioner called the evidence of her brother and her aunt to prove the existence of a Kikuyu customary marriage. She deposed that the brother stood in place for her ailing father during the dowry ceremony but her brother stated that their father was alive and well raising credibility issues. That the brother said that he was not called to receive dowry but to record what had happened.



21. It was submitted that the brother confirmed that at the time when the dowry was purportedly paid, he was an uncircumcised boy aged 12 or 13 years. He admitted that he could not take part in such proceedings because marriage negotiations are an adult's affair. The protestor submitted that the witness was lying about his presence at the ceremony or that whatever he participated in was anything but a dowry negotiation and payment ceremony.
22. In addition, the objector stated that the aunt's evidence was also skeletal. That she was unable to mention the person who conducted the dowry negotiations
23. It was also argued that the brother alluded to attending the ngurario ceremony at the home of the deceased where he slaughtered a sheep for ngurario. He was also approximately aged 18 years old in 1999 but such ceremonies are not child's play. That had such a ceremony taken place the persons who attended and/or conducted it would have been available to testify.
24. Reliance was placed on *Eva Naima Kaaka & Another v Tabitha Waitbera Mararo* [2018] eKLR
25. It was therefore their submission that in the absence of ngurario there was no marriage between the petitioner and the deceased and therefore she is not a wife under the *Law of Successions Act*.  
Has the petitioner made out a case for adoption of the children?
26. The protestor pointed out that the petitioner's brother gave contradictory evidence as to the position of their father and that there was no medical evidence to prove that the father was ill. That the men who conducted the alleged adoption ceremony were never called as witnesses.
27. It was asserted that the petitioner failed to tender evidence to demonstrate that the custom of adoption existed and if it did exist how the same was conducted. That she relied entirely on slaughtering of a goat and wished the court to infer that as evidence of adoption.

### **Was There An Inter Vivos Settlement By The Deceased?**

28. The objector reiterated that the petitioner's evidence goes to confirm the contents of paragraph of the objector's affidavit. Therefore, whether the petitioner was a wife or not, the net estate had been settled by the deceased. At any rate the deceased had expressed his wish on the settlement of the estate.
29. They prayed that the court directs that each of the beneficiary settles in their respective portion as set put in paragraph 4 of the objector's affidavit.
30. Respondent's submissions was unavailable at the time of drafting this ruling.
31. Analysis and Determination
32. The issues for determination herein are:-Whether the respondent was married to the deceased under Kikuyu Customary Law and is thus a beneficiary of the deceased's estate? Whether the respondent's children were indeed adopted by the deceased as his children through Kikuyu traditional rites and are therefore the deceased's children for purposes of succession.

### **33. Whether the estate should be distributed as per the protestor's subdivision plan?**

34. Section 29 of the *Law of Succession Act*, defines a dependant as:
35. 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;
36. 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; and

37. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”
38. The protestor strongly anchored his protest on the fact that the respondent was not the deceased’s wife under Kikuyu Customary Law or any other system of marriage. Contrarily, the Respondent claimed that she was married to the deceased under Kikuyu Customary Law. The onus of proving that a customary marriage indeed existed rests on the respondent as per section 107 of the *Evidence Act*. In the case of *Njoki v Mathara and Others* Civil Appeal No 71 of 1989 (UR), Kneller J A reading the judgment of the court held that: -
39. The onus of proving a customary marriage is on the party who claims it.
40. The standard of proof is the usual one for civil action, balance of probabilities.
41. Evidence as to the formalities required for a customary law marriage must be proved to the above standard.”
42. Further in the case of *Hortensiah Wanjiku Yawe vs The Public Trustee*, Civil Appeal No 13 of 1976, the court held: -

“The onus of proving customary law marriage is generally on the party who claims it. The standard of proof is the one usually for a civil action namely “on the balance of probabilities.” Evidence as to the formalities required for a customary law marriage must be proved to that standard. 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. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage”.
43. *In the Matter of the Estate of Karanja Kigo* [2015] eKLR the court lists five elements that must be present for the existence of a Kikuyu customary marriage, that is:-Capacity which includes age, physical and mental conditions and marital status;Consents of the family of the couple and, if the intended bride is a second or subsequent wife, the consent of the senior wife;The ceremonial slaughtering of a ram in a rite called Ngurario;Ruracio (bride price) partly paid;Commencement of cohabitation.
44. (See also *Priscilla Waruguru Gathigo v Virginia Kanugu Gathigo* [2004] eKLR)
45. To prove that a customary marriage existed the respondent relied on the evidence of her brother and aunt, DW3 and DW2 respectively.
46. DW1, the respondent testified that she was the deceased wife. She stated that mwati and harika were given by the deceased and Gorishen Muiruri who is also deceased who met his relatives including her father. That there were 2 people from each side. That dowry was paid by the deceased but she didn’t know the dowry payable.
47. In her testimony DW2 reiterated what was in her witness statement. He stated that the deceased paid dowry and that he came with 4 elders and a woman.
48. DW3 expounded that in the first ceremony in 1993 he was in class 8 and he was called to record what was going on. He stated that was 13 years old and he saw money being paid by the deceased to an elder. During cross examination he stated that he was not sure of Kikuyu



customs as he was 13 years old at the time. That he was a kahii at the time of the customary marriage and that he was told what to write.

49. He asserted that each side had 2 elders and his father and his brothers were present. He also stated that he was representing his father but that he was alive and well.
50. On the other hand, the protestor asserted that the Respondent was not the deceased's wife and that at no time did the deceased go to the petitioner's parents to pay dowry.
51. It is noteworthy that the respondent called on the evidence of her brother who was only 13 years old at the time the dowry was said to have been paid to prove her claims. Even as the ceremonies happened; four of them in total, DW2 was still young in the circumstances. It is strange taking into account that ordinarily children are usually not part of such ceremonies even as note takers. I am skeptical whether DW2 had the ability to actually comprehend what was going on if indeed the alleged ceremony took place in tune with his statement and testimony. In any case, the respondent did not produce the alleged notes as evidence from the onset and DW2 only tried to produce them when he was giving testimony which is against the rules of evidence.
52. The respondent insisted that his father was ill but the brother stated that he was alive and well which begs the question as whether the same is true and why he did not write a witness statement in support of his daughter to confirm that he did receive dowry from the deceased. Further, no other witness even from the deceased side was called to corroborate the respondent's testimony, it is of course very convenient for the respondent to allege that they were all deceased.
53. In addition, I find that DW3's evidence was also not compelling and/or credible as to whether the alleged ceremonies took place. In my view her evidence seemed coached to support the respondent's case.
54. In *Mary Wanjiru Githatu v Esther Wanjiru Kiarie* (Court of Appeal at Eldoret in Civil Appeal No 20 of 2009), the court stated:-
  - a. "It is important to observe that customary law marriages have some important ingredients without which they cannot possibly qualify as such. The ingredients are essentials in the making of a customary law marriage. A customary law marriage is a covenant of marriage sealed by the necessary customary ingredients and for the Kikuyu these ingredients are well known and documented. If the courts were to fail to take this into account, they would be giving recognition to the 'come we stay' marriages which are neither customary nor statutory"
55. In totality, I am not satisfied on the weight of evidence presented by the Respondent that she was a wife of the deceased under Kikuyu Customary Law. I am not persuaded that the respondent has discharged the burden of proving the existence of a Kikuyu customary marriage between herself and the deceased. I find that she was not the deceased's wife under Kikuyu Customary Law for purposes of this succession. In saying so, I am also not convinced that the adoption ceremony for her children took place.
56. However, they deceased and the respondent have allegedly lived together from 1992, a fact that the protestor also admitted to. It is my view that the evidence produced by the respondent proved that she was cohabiting with the deceased together with her children who are not biologically his.



57. The question that lingers then is whether the respondent and her children are dependants as far as the deceased's estate is concerned. My determination of this issue is that the Respondent is a dependant as defined under Section 29, cap 160 whether they were married or not. In addition, I also find that her children, were children whom the deceased "had taken into his family as his own" and they therefore qualify as dependants as per section 29 and are entitled to benefit from the estate. (See *Re: James Mberi Muigai Kenyatta* [2001] eKLR)
58. The protestor asserted that the deceased had subdivided the suit land while he was alive and PW2 and PW3 corroborated his assertion. Whilst I find their evidence to be credible, and put in mind the stipulation of section 40 & 42 (a) of the *Law of Succession Act*, I cannot blindly apply the same in the interest of justice and fairness. I have a duty to take into account factual circumstances of this particular case that are relevant to the fair and equitable distribution of the deceased's estate. (See *Scholastica Ndululu Sura v Agnes Nthenya Suva* [2019] e-KLR)
59. Based on the foregoing, I am tasked to balance between the deceased's wishes and intention and fair and equitable distribution of the deceased's estate in the circumstances and also taking into account that there are third parties involved herein.
60. Consequently, I am of the view that the protestor's mode of distribution cannot suffice and thus directs;
- (i) That each party should file a further affidavit giving a clear account of the beneficiaries of the estate and the suit property including details on the current size of the suit land and its occupancy; any subdivisions done; the size and estimated value of each property therein; clear details of what part of the suit land has been sold and by who; any titles issued in relation to the suit land so as to enable the court make a fair assessment.
  - (ii) The affidavit also to factor in proposal on distribution in view of the finding herein above.
  - (iii) Parties to bear their costs.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 9<sup>th</sup> DAY OF FEBRUARY 2023.**

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**CHARLES KARIUKI**

**JUDGE**

