



**In re Estate of M’ugambi M’nkanata (Deceased) (Civil Appeal  
E012 of 2022) [2023] KEHC 20150 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20150 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E012 OF 2022  
TW CHERERE, J  
JULY 13, 2023**

**BETWEEN**

**WINFRED KAJUJU JOSES ..... APPELLANT**

**AND**

**JOHN KIRIMI MUGAMBI ..... 1<sup>ST</sup> RESPONDENT**

**IRENE MUGITO BONIFACE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree in Nkubu PMCC  
Succession Cause No. 38 of 2018 by Hon. J. Irura on 15th December, 2021)*

**JUDGMENT**

**Background**

1. M’Mugambi M’Nkanata (Deceased) died on April 27, 2017. The cause before the trial court was filed by Jane Nkatha M’Mugambi and George Mbabu Boniface in their capacity as daughter and son of the deceased respectively. In support of the cause, the Petitioners filed a chief’s latter dated February 12, 2018 with the names of the beneficiaries of the deceased among them the children of the deceased and the Appellant as the only surviving wife of deceased.
2. Letters of Administration were issued to Jane Nkatha M’Mugambi and George Mbabu Boniface on July 19, 2018. Subsequently however, the court upon being moved by the 1<sup>st</sup> Respondent, appointed both Respondents as administrators of deceased’s estate by an order dated February 14, 2019.
3. Subsequently by an application dated March 29, 2019, the 1<sup>st</sup> Respondent applied for confirmation of the grant. In his supporting affidavit, he stated that the deceased had 5 wives and children but that all the wives were deceased and he proposed to distribute the estate to the children and some grandchildren. He did not propose to make any provision for the Appellant.



4. The application was opposed by Irene Mugito Boniface and the Appellant on the ground that Appellant was deceased's wife who together with her daughter GN were also beneficiaries of the estate.
5. A dispute having arisen as to whether the Appellant and her daughter were beneficiaries of the deceased's estate, the trial court proceeded to hear the parties in support and in opposition to that proposition and came up to the conclusion that Appellant and GN were not wife and daughter of the deceased respectively and were therefore not beneficiaries to his estate.

### **Analysis and Determination**

6. Aggrieved by the finding of the trial court, Appellant filed this appeal. I have considered the appeal in the light of the evidence on record and submission on behalf of the parties and the first issue for determination is whether Appellant proved on a balance of probability that she was deceased's wife and GN the daughter of the deceased.
7. In *In re Estate of JMM(Deceased)* [2020] eKLR, the court stated that marriage can either be proved through a certificate if registered under the [Marriage Act, 2014](#) or through acceptable evidence.
8. I wish to add that acceptance evidence would include evidence in support of a customary law marriage or marriage by cohabitation.
9. In support of the proposition that she was married under Meru customary law, Appellant stated that Mbae, Marete, Janet Karegi and Justa accompanied the deceased to her parents' home to pay dowry and that one Mutwiri represented her father who is deceased. She also confirmed that her mother is still alive. Justa Nkanata who was deceased's neighbour stated that deceased gave her dowry in the sum of KES 50,000/- which he delivered to Appellant's brother as her father was deceased. Appellant neither called her mother nor brother to confirm that dowry was paid.
10. The trial court after considering the evidence on record found that Appellant failed to call her brother and mother who participated in the dowry negotiations and thus failed to prove the existence of a customary marriage between her and the deceased.
11. In *In re Estate of Wallace Nderu Kamau* [2017] eKLR, the court held that  

"In the absence of oral evidence by any family member on either side of the family, I find that the evidence does not disclose a customary marriage between the deceased and the Objector."
12. In *Hellen Tum v Jepkoech Tapkili Metto & another* [2018] eKLR, the court of appeal stated that:  

"..... one of the most crucial evidence in proof of a customary marriage is the evidence of the customary rites required to establish a customary marriage and proof that these rites were indeed fulfilled."
13. I have considered the decision by the learned trial magistrate that existence of a customary marriage between Appellant and the deceased was not proved vis a vis the existing case law and from the evidence on record find that the decision was well founded.
14. Concerning whether a marriage could be presumed between the deceased and the Appellant, whether or not a presumption of marriage arises in a particular case and whether or not that presumption is rebutted is a question of fact. The person asserting the presumption must put in evidence sufficient evidence which, on a balance of probabilities, demonstrates the quantitative and qualitative elements. Once this happens, it would then be up to the other party to rebut the presumption.



15. In this case, the 2<sup>nd</sup> Respondent who is one of deceased's 12 surviving children and six grandchildren stated that deceased had introduced Appellant as his wife. 1<sup>st</sup> Respondent's evidence that Appellant lived with deceased as an employee was supported by Regina Nduru Cyrus who is deceased's sister, Jeniffer Karimi John, deceased's daughter and Mathias Muthomi Edward, deceased's grandchild all of who maintained that Appellant was deceased's employee.
16. In the presence of all the overwhelming evidence tendered by the 1<sup>st</sup> Respondent and his witnesses against the presumption of marriage between the Appellant and the deceased, I find that the trial court correctly applied the holding in *Phylis Njoki Karanja & 2 Others v Rosemary Mueni Karanja & Another* [2009] eKLR and [Anastasia Mumbi Kibunja & 4 Others V Njibia Mucina](#) [2013] eKLR in arriving at the conclusion that marriage between the Appellant and the deceased could not be presumed.
17. Concerning whether or not GN was deceased's child, Section 107 of the [Evidence Act](#) provides: -

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
18. The burden of prove of paternity in this matter squarely lay with the Appellant. It is accepted practice that where one wishes to prove that the deceased is the father of a child or children, birth certificates, identity cards, baptism cards or any other relevant documentation is tendered in evidence (See [In re Estate of Patrick Mwangi Wathiga - Deceased](#) [2015] eKLR and [In re Estate of Ndongu Kabugua \(Deceased\)](#) [2019] eKLR).
19. In the absence of any other evidence concerning paternity of GN other than the oral evidence by the Appellant, I find that the trial court correctly found that it had not been demonstrated on a balance of probability that GN was deceased's daughter.
20. For the reasons that I have outlined hereinabove, I find that this appeal has no merit and it is dismissed. Each party shall bear its own costs.

**DELIVERED IN MERU THIS 13<sup>TH</sup> DAY OF JULY 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

Court Assistant - Mr. Kinoti

For Appellant - Mr. Sandi for Hillary Sandi & Co. Advocates

For 1<sup>st</sup> Respondent - Mr. Muthomi for Muthomi John & Co. Advocates

For 2<sup>nd</sup> Respondent - In person

