



**In re Estate of Samuel Mburu Ngirau (Deceased) (Succession Cause  
27 of 2019) [2021] KEHC 12528 (KLR) (13 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 12528 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
SUCCESSION CAUSE 27 OF 2019  
CM KARIUKI, J  
OCTOBER 13, 2021**

**BETWEEN**

**JULIAH MUTHONI MBURU ..... 1<sup>ST</sup> PETITIONER**

**ELIZABETH WANGARI MBURU ..... 2<sup>ND</sup> PETITIONER**

**AND**

**PETER KARIITHI MBURU ..... PETITIONER**

**RULING**

1. By chamber summons dated November 25, 2021, the applicants/petitioner s sought to confirm the grant and supported same with the affidavit. She swore on 2 November 5, 2021, proposing a mode of distribution . The applicant filed submissions and made her a proposed method of distribution. respondent also did same via her replies via protest. The parties filed their submissions and exchanged.

**2nd Petitioner/Applicant's Case and Submissions**

2. The said Samuel Mburu Ngirau (Deceased) died intestate on 19<sup>th</sup> of February 2005, at Olkalou Special Scheme, which place was also the matrimonial home of his lawfully wedded wife Mary Kagure Mburu (now deceased) vide marriage certificate of the marriage ceremony that took place at Nyahururu Catholic parish on the March 14, 1957.)
3. The matrimonial union of the late Samuel Mburu Ngirau and Mary Kagure Mburu was blessed with eight issues (children).
  - a. Elizabeth Wangari Mburu was born in the year 1953
  - b. Peter Kareithi Mburu born in the year 1956
  - c. Zacharia Kaboro Mburu was born in the year 1958



- d. Flora Wanjiku Mburu, born in the year 1960 (deceased)
  - e. Alice Njoki Githinji, born in the year 1962 (deceased)
  - f. Hellen Mumbi Wanyoike, born in the year 1965 (deceased)
  - g. Joseph Ngirau Mburu born in the year 1963
  - h. John Mbogo Mburu, born in the year 1968 (deceased)
4. The deceased, later in life, although lawfully wedded in the church, had a relationship with one Julia Muthoni Mburu, one of the courts appointed administrators. That relationship was blessed with the following issues.
1. Michael Ngirau Mburu was born in the year 1971
  2. Jane Wangari Mburu
  3. Lucy Njoki Mburu
  4. James Kigomo Mburu
  5. Elizabeth Njeri Mburu
  6. Margaret Wairimu Mburu
5. There is no contest as to whether or not the children born out of wedlock ought to inherit from their father as there are enough precedents and the backing of the *Constitution*; however, his contention is on whether the 1st petitioner Julia Muthoni Mburu should be a beneficiary in the estate *Law of Succession (Amendment) Act, 2021*
6. It is submitted that the *Marriage Act* under section 6 recognises five (5) types of marriages: Christian marriage, Civil marriage, Customary marriage, Islamic marriage, and Hindu Marriage are monogamous in nature. In contrast, i.e. Customary marriage and Islamic marriage are polygamous or potentially polygamous.
7. Secondly, section 29 of the *Law of Succession Act, 1981*, is also amended by deleting the previous section and substituting it with a new section 29, which provides the meaning of dependant. In this regard, the recent amendment provides that dependent means –The spouse and children of the deceased, whether or not maintained by the deceased immediately prior to his death; andSuch of the deceased’s parents, step-parents, grandparents, grandchildren, stepchildren, and children whom the deceased had taken into his family as his own, brothers and sisters, as were being maintained by the dead immediately before his death.

### **Marriage Act**

8. It is submitted that, in Kenya, marriage is governed by the *Marriage Act* of 2014 and is defined as the voluntary union of a man and a woman, and whether in a monogamous or polygamous union and registered in accordance to the act. A marriage may be registered under the *Marriage Act* if it is celebrated –

“By the rites of a Christian denomination, as a Civil marriage. By websites relating to any of the communities in Kenya. In accordance with the Hindu Bryce with Islamic law.”

9. A Christians monogamous as per clause 9 (a) of the *Marriage Act* [2014].



10. Reliance is made in Succession Cause No. 164 of 2010; *in the matter of the Estate of BMK – deceased*; where the court ruled that having children together is not proof of marriage. That  
 ” One cannot be a former wife of a presumed marriage. A former wife must be a wife in a marriage contracted in one of the established systems for contracting”.
11. It is thus submitted that Julia Muthoni Mburu, strictly speaking, is not widow of the deceased. The *Marriage Act* agrees with the 2<sup>nd</sup> petitioner and guides as follows in section 11-” Union is not a marriage if at the time of the making of the union . Either party is incompetent to marry because of a subsisting marriage.
12. Therefore, for any portion of property proposed to be showed to the 1<sup>st</sup> petitioner /respondent, the court is invited to determine that the same ought to be shared equally amongst the children of the deceased only.
13. Reliance is also made in Succession Cause No 9 of 2018, *in the matter of the Estate of the late M’thigai Muchangi (deceased)* [eKLR] where it, there held:  
 “ ..... that the distribution of the estate should be guided by the law and should only be distributed to rightful beneficiaries in – order to maintain peace and harmony in the families” .....

#### **Respondent – 1st Petitioner’s Case and Submissions**

14. The protestor case is that Julia Muthoni Mburu (also the 1<sup>st</sup> petitioner ) filed an affidavit of protest dated January 28, 2022
15. As for the other three properties, she proposes that she be given 5 acres out of Plot No. 403 Suwerwa Settlement Scheme and that her son Michael Ngirau gets the balance of 3 acres out of the said land, to be supplemented with 2 acres out of Lr. No. Nyandarua/Olkalou Central/228. Further, she proposed that all the other children of the deceased be given 5 acres each out of the LRabove. No. Nyandarua/ Olkalou Central/228. (See paragraph 8 of Julia’s affidavit for details of her proposal).
16. She submitted that section 51 of the *Law of Succession Act* requires petitioner s to disclose all information about the deceased, including his assets, liabilities, and, most importantly, the surviving beneficiaries of his estate. Indeed, the petitioner s, in the instant case, did just that.
17. The 1<sup>st</sup> petitioner ’s position in the life of the deceased is also noted in the Chief’s introduction letter dated August 28, 2019, in which the chief stated that Julia was one of the two wives of the deceased.
18. The 2<sup>nd</sup> petitioner displayed a document purporting to be a marriage certificate as proof of a monogamous marriage between the deceased and the 2<sup>nd</sup> petitioner ’s mother. As a bare minimum, a marriage certificate is ordinarily signed by the parties contracting the wedding by two adult witnesses.
19. The document in question does not bear the signature of either party to the marriage. Neither does it have the requisite two witnesses’ signatures. Ergo, the document is not a marriage certificate. It is also worth noting that the document was issued in 1990. Yet, the 2<sup>nd</sup> petitioner /applicant readily admits in her affidavit that her father had lived with the 1<sup>st</sup> petitioner /protestor from 1971 or thereabouts.
20. The 2<sup>nd</sup> petitioner has, in her submissions relied on the provision of the *Marriage Act* 2014 as read with the Law of Succession (Amendment) Act 2021 to support her contention that Julia is not a legally recognized wife.



21. These two statutes were enacted in 2014 and 2021, respectively. The deceased died in 2005, long before said statutes became law. It is trite law that a statutory provision cannot apply retrospectively unless it expresses a clear intention to do so.
22. The 2<sup>nd</sup> petitioner /applicant’s reliance on the case of *Estate of BMK (deceased)* Succession Cause No. 164 of 2020 is also misguided as that case is distinguishable from the present case. In the former, the purported widow admitted in court to being a former wife separated from the deceased before his death.
23. More than sufficient evidence demonstrates that Julia Muthoni was the deceased’s wife from 1970 or thereabouts. At the time of registration of the property in the deceased’s name, he had been married to and living with the 1<sup>st</sup> petitioner for a good number of years
24. This is a case where the deceased had two houses, but the matriarch of one place is deceased. The applicable provision of the *Law of Succession Act* is section 40. Section 40 of the *Law of Succession Act*
25. Given the view of this provision of the law, the best proposal is the one given by the 1<sup>st</sup> petitioner / protestor as every beneficiary of the deceased, including herself, gets to inherit equal portions of land and money.
26. The 1<sup>st</sup> petitioner /protestor, in her affidavit introduces herself as a resident of the Suwerwa Settlement Scheme in Trans Nzoia County, a fact supported by the 2<sup>nd</sup> Pet, petitioner who states that the deceased lived with the protestor in Kitale. The reason she seeks that her initial share of five (5) acres out of the deceased’s estate be derived therefrom. It is her matrimonial home, and it makes little sense to displace a widow from her home to distribute. It is also not denied that only eight (8) acres out of Plot 403 Suwerwa Settlement Scheme are available for distribution. The rest of the land is tied up in litigation. In exchange for the five acres in Suwerwa, she proposed that she inherits nothing from Olkalou Central/228.
27. Reliance is placed in the case of *re Estate of Josephat Mwaniki Gitau (deceased)* [2017] eKLR Nairobi H.C Succession Cause No. 1883 of 2015 where at paragraphs 33 – 35, J.N. Onyengo, J rightfully observed that:
 

“Concerning Plot No. 8 Kamahindu, the respondent claimed that it is her matrimonial home and that she has been staying in that property during the subsistence of her marriage. She further claimed that she was staying there with the deceased on the same property till the time when he died. Nobody challenged this allegation. If this property was to be shared out now, where would the respondent go?...

...The court will not countenance the eviction of the widow so as to satisfy the wish of any beneficiary for a share.”
28. This is the question that this court must ask itself; If the protestor does not get a larger portion of Plot 403 Suwerwa Scheme, where she was settled by the deceased, where will she go?.”
29. See also the case of *re Estate of Kimitei Cherop (deceased)* [2021] eKLR (paragraphs 24 to 26 thereof), where the trial judge was presented with a similar situation to that in the instant case, in that the deceased was polygamous but was survived by only one widow and children from both houses—citing the case of *Rono v Rono* [2005] 1 E. A 363, the Judge then proceeded to distribute the estate amongst all who survived the deceased, including the surviving widow who was counted as a unit. The import of the words of Hon. Omollo JA in *Rono v Rono (supra)* is that at the end of it all, it is what is fair,



and not necessarily what is equal, that matters whenever section 40 (1) of the *Law of Succession Act* is called into question.

30. The 2<sup>nd</sup> petitioner /applicant’s proposal does not justify why some people are getting more significant shares than the rest of the family. If followed, Elizabeth’s proposal will result in not only unequal distribution but also unequal distribution. It is a manifestly unfair proposal compared to the 1<sup>st</sup> petitioner /protestor.
31. There was an error in calculating the acreage of L.R No. Nyandarua/Olkalou Central 228 which has only now been noted while doing the submissions. The land is 31.5 hectares which translates to 78 acres or thereabouts. It is proposed that the said acres be distributed equally among the fourteen children of the deceased.

### **Issue analysis and determination**

32. I have gone through the record, pleadings, affidavits, and submissions, and I find the issues are as to whether the first petitioner is a widow of the deceased and thus a beneficiary of the deceased, and if in negative, what are the appropriate orders? And what is the order as costs?
33. It is not contested that Samuel Mburu Ngirau- (deceased) died intestate on 19th of February 2005 at Olkalou Special Scheme, which place was also the matrimonial home of his lawfully wedded wife Mary Kagure Mburu (now deceased) vide marriage certificate of the marriage ceremony that took place at Nyahururu Catholic parish on the March 14, 1957.)
34. The matrimonial union of the late Samuel Mburu Ngirau and Mary Kagure Mburu was blessed with eight issues (children).
  - a) Elizabeth Wangari Mburu was born in the year 1953
  - b) Peter Kareithi Mburu born in the year 1956
  - c) Zacharia Kaboro Mburu was born in the year 1958
  - d) Flora Wanjiku Mburu, born in the year 1960 (deceased)
  - e) Alice Njoki Githinji, born in the year 1962 (deceased)
  - f) Hellen Mumbi Wanyoike, born in the year 1965 (deceased)
  - g) Joseph Ngirau Mburu born in the year 1963
  - h) John Mbogo Mburu, born in the year 1968 (deceased)
35. Later in life, although lawfully wedded in church, the deceased had had a relationship with one Julia Muthoni Mburu, one of the courts appointed administrators. That relationship was blessed with the following issues.
  - a. Michael Ngirau Mburu was born in the year 1971
  - b. Jane Wangari Mburu
  - c. Lucy Njoki Mburu
  - d. James Kigomo Mburu
  - e. Elizabeth Njeri Mburu
  - f. Margaret Wairimu Mburu



36. However, the contest is focused on whether the 1st petitioner, Julia Muthoni Mburu, should be a beneficiary in the estate. The Marriage Act under section 6 recognizes five types of marriages: Christian marriage, Civil marriage, Customary marriage, Islamic marriage, and Hindu marriage. They are monogamous, while Customary and Islamic marriages are polygamous.
37. Section 29 provides the meaning of dependant. In this regard, the new amendment provides that dependant means –The spouse and children of the deceased which are or not maintained by the deceased immediately before his death; andSuch 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, as were being maintained by the deceased immediately before his death.
38. Marriage Act,12: In Kenya, marriage is governed by the Marriage Act of 2014 and is defined as the voluntary union of a man and a woman, whether in a monogamous or polygamous union, and registered by the act.
39. A marriage may be registered under the Marriage Act if the rites of a Christian denomination celebrate it as a Civil marriage, By the customary rites relating to any of the communities in Kenya, with the Hindu rites and ceremonies, and with Islamic law. A Christian, Hindu, or Civil Marriage is monogamous as per clause 9 (a) of the Marriage Act [2014].
40. In Succession Cause No. 164 of 2010, *in the matter of the Estate of BMK – deceased*; the court ruled that having children together is not proof of marriage. The court ruled in an objection application thus, ” One cannot be a former wife of a presumed marriage. A former wife must be a wife in a marriage contracted in one of the established systems for contracting marriage....”
41. The court then concluded that the objector was not a wife of the deceased for purposes of the Law of Succession Act and could not be a beneficiary to the deceased’s estate. This court agrees with the same view and holds that Julia Muthoni Mburu, is not a widow of the dead
42. The Marriage Act guides as follows in section 11- ” Union is not a marriage if at the time of the making of the unions. Either party is incompetent to marry by reason of a subsisting marriage”.
43. The union of Julia Muthoni Mburu and the deceased could not attain the marriage status as the deceased was in a monogamous marriage and, therefore, incompetent to marry because of that subsisting marriage.
44. Thus, Julia Muthoni Mburu, not qualifying as a widow of the deceased and thus not a beneficiary, will be excluded from the distribution of the deceased estate. However, in her affidavit, the 1<sup>st</sup> petitioner / protestor introduces herself as a resident of the Suwerwa Settlement Scheme in Trans Nzoia County, a fact supported by the 2<sup>nd</sup> petitioner, who states that the deceased lived with the Protestor in Kitale.
45. This is why she seeks that her initial share of five (5) acres out of the deceased’s estate be derived from that place. It is her averment that she treated the home place as a matrimonial home, and it makes little sense to displace a old lady from her home in the name of distributing an estate Thus she will get the 5 acres she occupies, the same be reduced from her children’s share in the overall distribution. This is in the interest of justice and fairness.
46. Therefore, the estate will be shared equally by the deceased person’s children, save 5 acres occupied by the 1<sup>st</sup> petitioner .



**Thus the final orders are:-**

- a. Sharing; to the listed children below;
  - i. Elizabeth Wangari Mburu
  - ii. Peter Kareithi Mburu  
Zacharia Kaboro Mburu
  - iv. Flora Wanjiku Mburu, (deceased) (to her child/children)
  - v. Alice Njoki Githinji, (deceased) (to her child/children)
  - vi. Hellen Mumbi Wanyoike, (deceased) (to her child/children)  
Joseph Ngirau Mburu
  - viii. John Mbogo Mburu, (deceased) (to her child/children)  
And Julia Mburu's children with the deceased,  
Michael Ngirau Mburu
  - ii. Jane Wangari Mburu
  - iii. Lucy Njoki Mburu
  - iv. James Kigomo Mburu
  - v. Elizabeth Njeri Mburu
  - vi. Margaret Wairimu Mburu
- b. Julia Muthoni Mburu; to get 5 acres of Plot 403 Suwerwa Settlement Scheme.
- c. Parties to bear their costs.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 13TH DAY OF OCTOBER, 2022.**

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**CHARLES KARIUKI**  
**JUDGE**

