



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MACHAKOS**  
**CIVIL CASE NO. 456 OF 1998**

**1. JOHN KITILI**

**2. FLORENCE MUMO KITILI.....PLAINTIFFS**

**VERSUS**

**1. MULOKA KITILI**

**2. DAVID NZIOKA KITILI.....DEFENDANTS**

**JUDGMENT**

**The Pleadings**

The Plaintiffs filed a suit by way of an Originating Summons dated 3<sup>rd</sup> December 1998 wherein they seek a determination of the following questions and issues:

1. That they are the lawful heirs to the Estate of Kitili Nyamu Kikwati (hereinafter referred to as “the Deceased”) jointly with the Defendants in equal shares

2 That they be declared beneficiaries to the estate of the Deceased comprising of :

a) A share number 497 held in Lukenya Ranching & Farming Co-operative Society (Plots Nos 377, 493, 494 and 483)

b) Share number 3195 held in Katelembo Athiani Muputi Farming and Ranching Co-operative Society (Plot Nos 1711 and 77)

c) All interests in plot No. Iveti/Mun’gala /12 registered jointly with Kitili Nyamu

d) Plot parcel no. Iveti/Kasinga/498

e) Plot no. Iveti/Mun’gala/716

f) Plot no. Iveti/Mun’gala/403

g) Interests in Iveti/Mun’gala /724 held in the names of Mary Nduku Kitili Nyamu and Makau Nyamu

h) Interests in Iveti/Mun’gala /429 now in the name of John Muloka Kitili

The 2<sup>nd</sup> Plaintiff filed an affidavit in support of the Originating Summons she swore on 3<sup>rd</sup> December 1998, in which she claims that she was married to the Deceased under Kamba customary law in 1987, and stayed with the Deceased in his homestead as his lawfully wedded second wife, together with the 1<sup>st</sup> Plaintiff who is her son until the Deceased's death. Further, that she and the 1<sup>st</sup> Plaintiff have constructed permanent homes in the said homestead, and that the Defendants who are the sons of the 1<sup>st</sup> wife of the Deceased now want to evict them from the homestead. She attached a notice from the 1<sup>st</sup> Defendant dated 19<sup>th</sup> October 1998.

According to the 2<sup>nd</sup> Plaintiff, she is a beneficiary and heir to the estate of the deceased by virtue of custom, customary marriage and /or cohabitation by virtue of the period she stayed together with the Deceased, and also by virtue of the Deceased being father to the 1<sup>st</sup> Plaintiff. These averments were reiterated by the 1<sup>st</sup> Plaintiff in an affidavit he swore on 3<sup>rd</sup> December 1998, in which he added that they have settled on the deceased's estate and more particularly plot parcel number IVETI/MUN'GALA/429, in houses which were built by the Deceased.

On 19<sup>th</sup> January 1999, the 1<sup>st</sup> Defendant swore an affidavit in response to the Originating summons, wherein he denied that the 1<sup>st</sup> Plaintiff is a son to the Deceased or that the 2<sup>nd</sup> Plaintiff is a wife to the Deceased, for the reason that the 2<sup>nd</sup> Plaintiff was never married to the Deceased under any customary law. According to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Plaintiff cohabited with the 2<sup>nd</sup> Defendant but separated in 1970 without any issue of their union, and that the 1<sup>st</sup> Plaintiff was not fathered out of that union.

Further, that on or about 1987 on request of the Deceased, he settled the 2<sup>nd</sup> Plaintiff and her children temporarily on his land being IVETI/MUNGALA/429, for reasons that the 2<sup>nd</sup> Defendant was objecting to the return of the 2<sup>nd</sup> Plaintiff to his homestead as his wife. Therefore, that the 2<sup>nd</sup> Plaintiff has never stayed on the Deceased's land but on the 1<sup>st</sup> Defendant's land, and that the process of evicting them from his land commenced before the Deceased's death.

The 1<sup>st</sup> Defendant averred that the 2<sup>nd</sup> Defendant continued objecting to resuming any union with the 2<sup>nd</sup> Plaintiff and to accepting the 2<sup>nd</sup> Plaintiff's children as his, whereupon he referred the matter to the clan, which decided that the Plaintiffs should vacate the homestead by June 1996. However, that following the death of the Deceased, the 2<sup>nd</sup> Plaintiff filed Machakos HC P&A Case No. 109 of 1996 claiming to be wife of the Deceased, and that she and her children were beneficiaries of the deceased.

Further, that this Court subsequently delivered a ruling in the said case on 14<sup>th</sup> October 1998 in which it was held that the 2<sup>nd</sup> Plaintiff was not a wife of the Deceased. The 1<sup>st</sup> Defendant filed a Further Affidavit sworn on 14<sup>th</sup> October 2009 to which he annexed a copy of the said ruling dated 14<sup>th</sup> October 1998, as well of a ruling delivered on 29<sup>th</sup> December 2007 in the said case declining to review the earlier ruling. According to the Defendants, there is nothing left to decide on the issues raised by the Plaintiffs.

### **The Evidence**

Directions were given that the Originating Summons be heard by way of *viva voce* evidence. During trial, the Plaintiffs called five (5) witness to testify, while the Defendants called one (1) witness. PW1 was Florence Mumo Kitili, the 2<sup>nd</sup> Plaintiff, and she adopted the contents of her affidavit in support of the Originating Summons which has been summarized in the foregoing as her evidence. She produced the notice to vacate from the 1<sup>st</sup> Defendant dated 19/ 10/ 1998 as her exhibit 1.

She also produced the minutes of a meeting held on 30/7/ 1988 and 5/8/1989 to pay her dowry and the translation thereof as exhibit 2. She prayed that she be declared as a beneficiary of the estate of the deceased, because she was married to the deceased and depended on the deceased. Upon cross-examination, PW1 testified that there was no ruling given in Machakos HC P&A Case no 109 of 1996 to the effect that she was not a wife of the deceased, and that no ruling was ever given in the said case.

PW2 was the 1st Plaintiff, John Kitili, who also adopted his affidavit in support of the Originating Summons. He stated that he was a son of PW1 and the Deceased, and that he was raised and educated by the Deceased, and was staying in a house the Deceased had built for his mother and they lived with the Deceased until the Deceased's death. Further, that the Defendants are his step brothers and they belong to the 1st wife who is deceased, and that his mother is the 2nd wife of their deceased father. He prayed that he be declared a beneficiary of the estate of the Deceased.

Upon cross-examination, PW2 testified that he had not been shown the part of the ruling given in Machakos HC P&A Case no 109 of 1996 to the effect that PW1 was not a wife of the Deceased, and that the ruling was not on that issue but on an injunction.

Pw3 was Masila Muya, who adopted his affidavit sworn on 28th October 2015 and filed in Court on 11th November 2015. He testified that Florence Mumo Kitili (PW1) who is his cousin, was married to the Deceased herein. Further, that on 30/7/1988 people from the home of Kitili Nyamu and specifically Makau Nyamu, Kyengo Matuna and Florence Mumo Kitili came to their home to pay dowry for Florence Mumo. Other people from their side namely himself, Wana Muindi and Raphael Makau also attended, and that the dowry paid was 3 goats, and five litres of traditional beer, after which a male goat was slaughtered according to Kamba traditions. He also told court that the Deceased later on 5/8/1989 paid Kshs 6,700/= as additional dowry.

According to PW3, Florence Mumo was legally and customarily to the Deceased, and the Plaintiffs are entitled to benefit from the estate of the deceased. On cross-examination, PW3 admitted that he testified as a witness in Machakos HC P&A Case no 109 of 1996, but was not aware of the ruling given in the case to the effect that the 2<sup>nd</sup> Plaintiff was not a wife of the Deceased.

Raphael Makau Muindi (PW4) also adopted his affidavit sworn on 28th October 2015 and filed in Court on 11th November 2015 as his evidence. He informed the court that he is a brother to Florence Mumo (PW1), and that he was one of those involved in her dowry payments. His testimony was that the Deceased fell sick sometimes between the year 1987 and 1988 and had difficulties in walking because his legs were affected, and that in the year 1988, the Deceased sent his brother to go and pay dowry for Florence Mumo Kitili.

PW4 stated that he was present in the meeting where dowry was paid. Further, that dowry of 3 goats, one male and 2 females, and 5 liters of traditional liquor was paid, and that the male goat was slaughtered in accordance with kamba customs in the ceremony called "Ntheo". Later on in 5/8/1989 the Deceased paid a further ksh 6, 700/=. It was his evidence therefore that Florence Mumo Kitili and the children were all dependants of the deceased and should inherit from the estate. On cross-examination, PW4 stated that he was a witness in HC P&A Case no 109 of 1996 and did not know if judgment was given in the case.

The last witness for the Plaintiffs was Joseph Mutua Kitili who adopted his affidavit sworn on 11th November 2015 and filed on the same day as his evidence. He stated that he is a son of the Deceased and PW1. Further, that the deceased had been taking care of him since he was born, educated him and maintained him until he died. He also stated that he was living with the Deceased, his mother and brother in the house built on land number IVETI/MUNG'ALA/429 and that they still live there up to today. He added that he is the biological son of the Deceased, and that his mother and brother were all raised by and depended on the Deceased. He prayed that they all be declared beneficiaries.

The 1st Defendant, John Muloka Kitili, gave evidence for the Defendants as DW1, and adopted the statement he signed and filed in Court on 10th November 2015 as his evidence. He stated therein that he knew both the Deceased who was his late father, and the 2nd Plaintiff who had been previously married to his younger brother, David Nzioka Kitili, and not the deceased. Further, that he knew the 1st Plaintiff as John Nzioka but that the said Plaintiff had changed his legal name to John Kitili. Further, that the said John Nzioka was not born of David Nzioka Kitili, but that the 2nd Plaintiff had borne him from a previous relationship prior to her marriage to David Nzioka Kitili .

DW1 further stated that sometimes in 1988, the 2nd Plaintiff who had earlier left her matrimonial home,

returned and met the Deceased, and begged for forgiveness to be returned to the family . That the Deceased then sent for David Nzioka Kitili, who stated that he did not want to be associated with the 2nd Plaintiff as he already re-married. It was DW1's testimony that the 2nd Plaintiff then forcefully started living in David Nzioka Kitili's homestead with her son, and that once David Nzioka Kitili found out, he destroyed the said house, and the 2nd Plaintiff was summoned by the clan elders who told her to leave the compound.

DW1 contended that he then offered the 2nd Plaintiff his parcel of land being parcel No. MUNGALA/IVETI/492 which solely belonged to him as a temporary abode, as the 2nd Plaintiff and David Nzioka Kitili tried to work things out. However, that he later found out that the 2nd Plaintiff and her son had acquired an identification card in the Deceased's name , and this fact alarmed the family and that the clan, which decided that the 2nd Plaintiff should vacate the family homestead as it was a taboo for the 2nd Plaintiff to hold that the Deceased had married her.

DW1 testified that after the death of the Deceased, the 2<sup>nd</sup> Plaintiff filed a petition for grant of representation, claiming to be the second wife of the Deceased and therefore an heir to his estate, but that the court held in the said succession cause being Machakos HC P&A Cause No. 109 of 1996, that the 2nd Plaintiff was not the legal wife of the deceased and was therefore not a dependant to his estate. DW1 produced the ruling in Machakos HC P&A Cause No. 109 of 1996 as the Defendants' exhibit, and relied on the same wholly. He claimed that the 2<sup>nd</sup> Plaintiff was as a result a trespasser on his land who had refused to vacate despite being given several notices.

Upon cross-examination DW1 denied any knowledge of any dowry having been paid for the 2nd Plaintiff, and confirmed that the 2nd Plaintiff had been staying on his land since 1996. He claimed to have a title deed in his name for the said land.

### **The Issues and Determination**

The substantive issues in this suit are only two. Firstly, whether the Plaintiffs are heirs of the Deceased, and secondly whether they are entitled as beneficiaries to a share of the Deceased's estate. This suit is brought under the repealed Order XXXVI of the Civil Procedure Rules, which gave power to the Court to determine these two questions by way of Originating Summons. The said provisions are replicated in the current Order 37 of the Civil Procedure Rules which provides as follows in Rules 1 and 2:

**“1. The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions-**

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;**
- (b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;**
- (c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;**
- (d) the payment into court of any money in the hands of the executors, administrators or trustees;**
- (e) directing the executors, administrators or trustees to do, or abstain from doing, any**

**particular act in their character as executors, administrators or trustees;**

**(f) the approval of a sale, purchase, compromise or other transaction;**

**(g) the determination of any question arising directly out of the administration of the estate or trust.**

**2. Any of the persons named in rule 1 may in like manner apply for and obtain an order for—**

**(a) the administration of the personal estate of the deceased;**

**(b) the administration of the real estate of the deceased;**

**(c) the administration of the trust.”**

The Plaintiffs' learned counsel, B.M Mung'ata & Company Advocates addressed these two issues in submissions filed in Court dated 12th January 2017, while the Defendant's learned counsel, J.J. Makau & Company Advocates, filed submissions dated 17th January 2017.

The Plaintiffs submitted that the law defines who is a dependant under section 29 of the Law of Succession Act, and that all the evidence point to the conclusion that the Deceased was supporting 2nd Plaintiff and her children, who are therefore dependants within the meaning of section 29. Further, that once the issue of dependency has been established and proved, the court has the discretion to make a reasonable provision for that particular beneficiary out of the deceased's estate. It was urged that the court in making that provision should be guided by section 26 of the Law of Succession Act, and reliance in this regard was placed on the decision in **In the Matter of the Estate of Veronica Njoki Wakagoto, (Deceased) [2013]**

The Defendants on the other hand submitted that this is a matter that has already been heard and determined, and is *res judicata* pursuant to section 7 of the Civil Procedure Act. Reliance was placed on the decision in **James Katabazi and 21 Others -vs- The Attorney General of the Republic Of Uganda EACJ Reference No.1 of 2007**, where the Court held as follows on the conditions that should exist for the application of the doctrine of *res judicata* :

a) the matter must be 'directly and substantially' in issue in the two suits,

b) the parties must be the same or parties under whom any of them claim, litigating under the same title; and

c) The matter must have been finally decided in the previous suit as also held in **Uhuru Highway Development Ltd. - v- Central Bank & 2 Others, Civil Appeal No. 36 of 1996.**

The Defendants submitted that the issue that has been brought by the 2nd Plaintiff and her son in the present suit was the same issue that was heard and determined in Machakos HC P&A Cause No. 109 of 1996 as both cases deal with the issue of whether the 2nd Plaintiff is the wife of the Deceased, and the court in Machakos HC P&A Cause No. 109 of 1996 already determined that question to its finality and the Plaintiffs never appealed the same. It was also submitted that the present suit is in abuse of the process of Court and reliance was placed on section 8 of the Civil Procedure Act, and the decisions in **E.T vs Attorney General & Another (2012) eKLR** and **Omondi v National Bank of Kenya Limited and Others (2001) EA 177** for the position that parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit

Lastly, it was urged by the Defendants that since it has been established that the 2nd Plaintiff is not the wife to the Deceased, the law thus is quite clear that she and her son are not dependents of the deceased as defined in section 29 of the Law of Succession Act, and are not in any way entitled to any share in the estate of the Deceased.

I have considered the arguments made by the parties as regards the issues arising for determination. I note in this regard that the **Black's Law Dictionary, Ninth Edition** at page 791 defines an heir as “ a person who inherits real or personal property, whether by will or by intestate succession”. At page 177, a beneficiary is defined as “a person for whose benefit property is held in trust; especially one designated to benefit from an appointment, disposition or assignment (as in a will, insurance policy etc), or to receive something as a result of a legal arrangement or instrument”.

Therefore one must first be an heir in order to be a beneficiary as regards entitlement of a deceased's property. For a will, an heir is the person named as legatee in the will. In the present case no will is alleged to have been made by the Deceased, and the question of who is a heir of the Deceased can only be resolved by applying the rules as regards intestate succession.

Under the Law of Succession Act, only persons who are spouses of, or have a direct blood link with the deceased benefit as heirs from the estate in intestate succession. Under Sections 35 and 38 of the Law of Succession Act, the property of an intestate shall devolve to the spouse and children of such deceased. Section 39 of the Act sets out the hierarchy and/or priority of the heirs where there is no surviving spouse or children, which heirs should be blood relatives until the sixth degree of consanguinity, and if no such heirs can be found, the property devolves to the state.

In the present case, the Plaintiffs claim to be heirs by virtue of being wife and son of the Deceased. This claim is disputed by the Defendants who in addition state that this issue was heard and determined in Machakos HC P&A Cause No. 109 of 1996. I have perused the file for Machakos HC P&A Cause No. 109 of 1996 and ruling given therein by J. Mwera (as he then was) on 15<sup>th</sup> October 1998.

The ruling was on an application by way of Chamber Summons dated 22<sup>nd</sup> August 1996, filed in the said cause by the Petitioner therein, seeking an injunction to restrain the Respondents therein from evicting her and/or intermeddling with the assets of the estate of the deceased Kitili Nyamu Kikwati, pending the sharing of the assets of the estate of the deceased. The said Petitioner had earlier on filed a Petition in the said cause on 26<sup>th</sup> June 1996 seeking letters of administration intestate with respect to the estate of the deceased in her capacity as wife and widow of the deceased.

In his ruling which I will quote *in extenso*, the learned judge after summarizing the pleadings in which the Petitioner was disputed to be wife of the deceased, framed the issue before the Court as follows:

**“With this kind of setting it looked imperative that the disputants be heard orally to determine whether or not to issue the orders of injunction. As each party called evidence it transpired that the question to be decided is:- Is Mumo the wife of the late Kitili?**

**If she is found to be so, then the rest follows. But quite probably whichever way goes the answer to one thing is clear that upto now Mumo is yet to be the legal representative of the estate of Kitili Nyamu Kikwati because a competent court has not said so either by probate or letters of administration.”**

After considering the evidence that was called on this issue, which included evidence by given by the witnesses called in this suit namely PW1, PW3, PW4 and DW1 who gave similar evidence, the learned Judge held as follows:

**“The litigants submitted, and now may this court determine the issue before it: Was Mumo Kitili's wife? The answer is very brief even after the very long evidence reviewed above. Mumo was not Kitili's wife. This decision is arrived at on a balance of probabilities. Mumo has brought witnesses to say that by due ceremonies she became Kitili's wife in 1987. Contradictions have been noted here and there e.g. whether her son John was present when Mbui sya Ntheo were delivered or not. If women were in the team led by Kitili 's, elder brother Makau, or not while going to Mumo's home . The court was similarly not sure whether sums variously put at shs. 1 ,700/= and shs.6,700/= were dowry for Mumo. Her witnesses were both from her side and that of Kitili.**

On the other hand the respondents put in evidence denying such a marriage between Kitili and Mumo . Them and their witnesses never witnessed it. It could not even be since Nzioka claimed that he once married Mumo, which she of course denied. The respondents and their witnesses, family members and clansmen disowned such a relationship. If it ever took place, it could be a great abomination and contrary to the Kamba custom and tradition. Meetings Were called to discuss one thing or two about Mumo's presence in the Kitili family. At the latest in January 1996, the clan decided to have Mumo expelled from the clan because she had taken on Kitili's names and was as it were living in one house with him . This court was left , with the impression that had Kitili married Mumo, he could have given him one of his listed parcels of land to build and live on. Yet the court heard that she lived in a house built on land registered in the name of Muloka. He bought it. One would also expect that if the respondents were truly Mumo's step sons, they are adults and she could consult them about their father's estate before petitioning. They would be considered as belonging to the first house . Anyway at the end of the day this Court was left to conclude that Mumo was never Kitili's wife. The court was left inclined to believe the respondents' version more than that of the applicant. As to the orders of injunction, they cannot issue.”

I am in this respect guided by sections 6 and 7 of the Civil Procedure Act which prohibit a court from hearing a matter that is *sub judice* or *res judicata* as follows:

**“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.....**

**No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”**

The Petitioner in Machakos HC P&A Cause No. 109 of 1996 was the 2<sup>nd</sup> Plaintiff herein, and the Respondents were the Defendants herein. The deceased in that cause was the same deceased person herein. In addition, the issue of whether the 2<sup>nd</sup> Plaintiff was a wife of the deceased was in issue in the said ruling and was determined with finality, even if the orders sought were for an injunction, and the learned judge in his ruling explained why this issue had to be determined in order to reach a decision on the orders sought. This Court by resuscitating the said issue will not only be in abuse of process of court but will also be acting unlawfully by sitting on appeal over a decision of a court of concurrent jurisdiction.

Therefore this Court finds that the 2<sup>nd</sup> Plaintiff has already been found by a Court of competent jurisdiction not to be a wife of the deceased, and is therefore not a heir of the deceased. It is notable in this regard that the learned judge in his ruling in Machakos HC P&A Cause No. 109 of 1996 did analyse the same evidence given in this suit in reaching his decision.

As regards the 1<sup>st</sup> Plaintiff, his claim as heir is by virtue of being son of the 2<sup>nd</sup> Plaintiff. This Court finds that he is also not an heir for two reasons. Firstly, the 2<sup>nd</sup> Plaintiff having been found not to have been a wife of the Deceased, the 1<sup>st</sup> Plaintiff cannot also be found to be son of the Deceased, as he claimed to have been a son of the 2<sup>nd</sup> Plaintiff and Deceased arising from an alleged marriage between the two which was found not to exist.

Secondly, DW2 gave evidence that the 1<sup>st</sup> Plaintiff was not a biological son of his brother David Nzioka Kitili let alone of the Deceased, and that the 2<sup>nd</sup> Plaintiff came with the said 1<sup>st</sup> Plaintiff when she got

married to David Nzioka Kitili . These averments were not denied by the 2<sup>nd</sup> Plaintiff, and the 1<sup>st</sup> Plaintiff when cross-examined on the issue stated that he did not know who his biological father is. Therefore, the 1<sup>st</sup> Plaintiff not being a blood relative of the deceased cannot be an heir within the permitted degrees of consanguinity under section 39 of the Law of Succession Act .

The Plaintiffs sought to rely on the provisions of section 26 of the Law of Succession Act seeking reasonable provision on account that the evidence showed that they were dependants of the deceased. Section 26 of the Law of Succession Act provides as follows:

**“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.”**

An application under section 26 can therefore only be brought by a dependant, who is defined under section 29 of the Law of Succession Act as follows:

**“For the purposes of this Part, "dependant" means—**

**(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, 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**

**(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”**

It is clear that under the said section, a person who claims to be a dependant of a deceased must be related to the deceased through either blood or marriage, and must fall within the categories of person listed in section 29. This Court has found that the Plaintiffs were not the wife or son of the deceased , and this finding puts them outside this category of persons who can claim to be dependants of the Deceased for purposes of reasonable provision.

Lastly, having been found not to have been heirs of the deceased, none of the Deceased properties is held for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff’s benefit as they are not entitled to inherit the same.

The Plaintiffs Originating Summons dated 3<sup>rd</sup> December 1998 is accordingly found not to have merit and is dismissed with no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 5<sup>th</sup> day of April 2017.

**P. NYAMWEYA**

**JUDGE**