



REPUBLIC OF KENYA



**In re Estate of M’Kailiba M’Tuaruchiu - Deceased (Succession Cause 5 of 2005) [2025] KEHC 15097 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15097 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 5 OF 2005**

**HM NYAGA, J**

**OCTOBER 23, 2025**

**IN THE MATTER OF THE ESTATE OF M’KAILIBA M’TUARUCHIU- DECEASED**

**BETWEEN**

**JOHN K KAILIBA ..... PETITIONER**

**AND**

**LYDIA K KAILIBA ..... PROTESTOR**

**RULING**

1. This matter relates to the estate of M’Kailibia M’tuaruchiu who died intestate on 12<sup>th</sup> August,1997 aged 65 years.
2. A petition for representation to his estate was lodged in court on 7<sup>th</sup> January,2005 by John K. Kaliba, who described himself as a son of the deceased. A copy of the affidavit sworn in support of the petition lists the survivors of the deceased as Rael Gatumwa, Julia Mwathathi, John K. Kaliba, Peter K. Kaliba, Joseph M.Kaliba , Francis Kinyanga , Stephen Kailiba & Elius M. Kailiba, who are described as widows and sons respectively. A grant of letters of administration intestate was accordingly made to John K. Kailiba on 15<sup>th</sup> June,2005.
3. On 12<sup>th</sup> July,2023, the administrator filed a summons dated 5<sup>th</sup> July,2023, seeking confirmation of the aforementioned grant. He proposed distribution of the property Land Parcel No. Kianjai/ Mituntu/152 in the following manner: -
  - a. Francis Kinyaga Mathiu- 2 acres
  - b. Joseph M. Kailiba- 2 ½ acres
  - c. Peter K. Mberia – 1 ½ acres
  - d. Julia Mwathathi- 1 acres



- e. Margaret Kainda- 30 points
  - f. Marrion Kanario- 30 points
  - g. Karimi Purity Kailiba- 30 points
  - h. Elias M. Kailibia- 2 acres
  - i. Stephen Kailibia- 2acres
4. Before the said summons could be heard, the protestor, Lydia K. Kailiba, lodged an affidavit of protest dated 25<sup>th</sup> September,2023 on the same date wherein she deposed that she is the daughter of the deceased herein and that the deceased had two wives. She averred the 1<sup>st</sup> wife, Rael Gatumwa(deceased) had the following children;
- i. Agnes Mitu- Daughter
  - ii. Miriam Ngatia – Daughter
  - iii. Lydia K. Kailibia- Daughter
  - iv. Rose Kailiba- Daughter
  - v. Mercy Nkio- Daughter
  - vi. Stephen N. Kailiba- Son
  - vii. Marion Kanario- Daughter
  - viii. Elius Kailiba- Son
  - ix. Purity Karimi Kailibia- Daughter
  - x. Margaret Kailibia- Daughter
  - xi. Mutabari Kailibia- Grandson.
5. She stated that the petitioner filed the cause herein secretly and without involving all the beneficiaries of the deceased and omitted most of the 1<sup>st</sup> wife’s children from the petition.
6. She contended that the proposed mode of distribution aims at disinheriting some of the deceased’s beneficiaries who are entitled to equal share of the estate.
7. She further contended that the petitioner concealed Land Parcel No. Kianjai/1312 in the petition, sought the grant without the consent of all beneficiaries and filed a consent on the mode of distribution bearing forged signatures of some beneficiaries.
8. She urged the court to dismiss the summons.
9. On 23<sup>rd</sup> February,2024, the petitioner filed a notice of withdrawal of petition without advancing any reason for the same. The protestor vehemently opposed such withdrawal principally on ground that the petition herein was filed almost 20 years ago and it would be miscarriage of justice to allow the said withdrawal without pertinent reasons.
10. Vide a ruling dated 6<sup>th</sup> June,2024, this court declined to terminate the petition, ordered that the petitioner be dropped as an administrator of the estate of the deceased and appointed Lydia K. Kaliba and Julia Mwathathi as the joint administrators of the deceased’s estate.



11. Thereafter, the protest was heard through viva voce evidence.

### **Protestor's /Applicant's case**

12. PW1, was Lydia Kaliba. She testified that she is the deceased's daughter from the 1<sup>st</sup> house. She said that the proposal by the petitioner herein excluded the children from the first; house. Namely, Marion Kanario, Mercy Nkio, Stephen Kailiba, Elias Kailiba, Margaret Kailibia, Rose Kaithime, Agnes Mituu, Miriam Kamathi, Karimi Kaliba and herself.
13. She stated that the children of the 2<sup>nd</sup> house are; Julia Mwathathi, John Kailibia, Francis Kinyanga, Joseph Mutuma, Joyce Mutuma, Lucy Mwanjaru, Grace Kathiga and Peter Mberia.
14. She testified that the estate of the deceased comprised two properties, to wit, Land Parcel No. Kianjai/Mituntu/152 measuring 12 acres and Land Parcel No. Kianjai/Kianjai 1312 measuring 2.64 acres and that the deceased had instructed that the same be shared equally between his two wives.
15. On cross-examination, she testified that she was married at the time of the deceased's demise and that her husband has land from his own family. She reiterated that the deceased had directed them to share the property equally, although he had not executed any written documents to that effect. She denied the allegation that there had been an agreement whereby the sons were to receive land while their mother held the remainder in trust for the daughters. She further stated that some of her siblings had developed portions of the land. She confirmed that she did not have the registration documents for Land Parcel No. Kianjai/1312 and maintained that the said parcel had not been transferred to the petitioner by the deceased.
16. PW2, Marion Kanario Kailibia, testified that she is a daughter of the deceased from the first house and that neither she nor her siblings were involved when the present cause was instituted. She corroborated the testimony of PW1 that the deceased owned two parcels of land and had directed that the same be shared equally. She further stated that the petitioner, John Kailibia, took the Kianjai land and caused it to be registered in his name.
17. On cross examination, she stated that John Kailibia was only to utilize one acre of Land Parcel No. Kianjai/1312 but instead took the entire parcel. She maintained that the deceased had never transferred the said land to the petitioner. She further testified that although some of her sisters are married, that was not a valid reason to deny them a share of the land. She added that her brothers had established their homes on the land and asserted that it would be unjust to allocate them a lesser share.
18. PW3, Elias Mwita Kailibia, testified that he is a son of the deceased from the first house and that he became aware of this cause in the year 2023. He stated that the deceased owned two parcels of land and prayed that the same be distributed equally. He confirmed that he had been allocated two acres of land.
19. During cross examination, he told court that the petitioner lived on Parcel no. 1312 during the deceased's lifetime. He said although her sisters are married, they nonetheless have a right to a share of the estate.

### **Respondent's Case**

20. Julia Mwathathi, the second wife of the deceased, testified that it was the wish of the deceased that the land be apportioned among his sons, with one acre each set aside for the two wives to retain for the benefit of any daughter who might return from her matrimonial home.



21. It was her testimony that the deceased had given John the land at Kianjai during his lifetime and stated that she did not wish to depart from the oral wishes of the deceased. She prayed that the land be apportioned in accordance with the deceased's intentions.
22. RW2, Lawrence Ntonga, testified that the deceased was his relative and a close friend. He recounted that in 1997 the deceased summoned him, together with M'Kiroro Chokera, Mutua, and Ibrahim, and declared his intention to distribute his land among his sons, allocating each two acres and 1 acre each to his two widows. He further stated that in 2001 a family meeting was held in the presence of the area Chief and the sons of the deceased during which the land was apportioned in accordance with the deceased's wishes.
23. He told court that the deceased did not make provision for the married daughters and that for the unmarried daughters, the deceased indicated they would benefit from the portions set aside for the widows.
24. RW3, John Kailibia, testified that he is the deceased's son from the second house. He said the deceased had two wives and children from the first house are ten while the children from the second house are seven.
25. It was his testimony that the deceased had two parcels of land Kianjai 152 and 1312. He said the deceased gave him land parcel no. 1312 where he lives alone and that when he instituted this succession cause this land was registered in his name and as such it did not form part of the estate. He said the deceased had transferred the land to him in 1998 and no one complained. He has lived there and developed it. He said for Land Parcel no. 152 which is about 14 acres the deceased said each son except him would get 2 acres and he was content. For the unmarried daughters, he said the deceased said they would get from their mothers' share while the married daughters would not get anything. When shown the minutes marked as KK1 he said he never said the land could be divided into two.
26. It was his further testimony that the sons took their shares and developed them. He proposed that since parties have developed on land parcel no. 152 the same should remain the same and that one acre 32 points given to each widow should be given to the unmarried daughters.
27. He added that some of his brothers, Stephen and peter, has sold part of the land and if the proposal by the protestor is accepted it will cause chaos.
28. RW4, Peter Iberi, testified that he was the chief of the larger Mintutu location where the deceased hailed from. He testified that the deceased's widows approached him concerning a dispute over the land and he advised them to involve elders to resolve the same. He stated that on 24<sup>th</sup> September, 2001, the elders together with the deceased's sons met to deliberate on the distribution of the land in accordance with the deceased's wishes. That John was tasked with engaging a surveyor and each son except John was allocated two acres of Land parcel No.152. He said John received two acres from Land Parcel No. 1312. He further stated that two acres were reserved for the widows while the married daughters were not considered in the distribution.
29. At the close of the parties' respective cases, no written submissions were filed. The parties elected to rely on the evidence on record.

### **Analysis & Determination**

30. I have considered the summons, affidavit of protest and the evidence of record. The issues which fall for determination are:
  - i. Whether the deceased left a valid oral will.



- ii. Whether Land Parcel No. Kianjai/Kianjai/1312 was gifted inter vivos to the petitioner, John Kailiba.
- iii. Whether the daughters of the deceased are entitled to a share of his estate.
- iv. How should the estate of the deceased be apportioned among the beneficiaries?

**Did the deceased leave an oral will?**

31. Section 9 of the *Law of Succession Act* provides for the making of oral wills. The relevant part of that provision, for the purposes of this ruling, is Section 9 (1) which provides as follows: -

“No oral will shall be valid unless: -

- a. It is made before two or more competent witnesses; and
- b. The testator dies within a period of three months from the date of making the will.

32. Rule 13 of the Probate and Administration Rules governs applications for grant of probate where the deceased left an oral will. The said provision states as follows: -

“(1) An application for proof of an oral will or letters of administration with a written record of the terms of an oral will annexed shall be by a petition in Form 78 or 92 and be supported by such evidence on affidavit in Form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant, together with evidence as to-

- a. The making and date of the will;
- b. The terms of the will;
- c. The names and addresses of any executors appointed;
- d. The names and addresses of all the alleged witnesses before whom the will was made;
- e. ....
- f. ....

33. The provisions of Section 9 of the *Law of Succession Act* and Rule 13 of the Probate and Administration Rules make it clear that the date of making an oral will is crucial. For such a will to be valid, the maker must die within three months of its making.

34. In the present case, the date on which the alleged oral will was made is not disclosed. RW2, Lawrence Ntonga, testified that the deceased made the oral will in his presence and in the presence of M’Kiroro Chokera, Mutua, and Ibrahim. However, none of these individuals swore an affidavit to confirm this account. Additionally, it has not been shown that the deceased died within three months of making the alleged oral will. Consequently, the validity of the oral will cannot be ascertained.

35. In the absence of proof of a valid oral will, it is presumed that the deceased died intestate. Accordingly, I shall proceed to determine the present application on the basis that the deceased died without leaving a valid oral will.



**Was Land Parcel No. Kianjai/Kianjai/1312 a gift inter vivos to the petitioner, John Kailiba?**

36. The petitioner claimed that in 1998, the deceased transferred Land Parcel Kianjai/1312 to him and that none of the beneficiaries challenged the transfer. The protestor, on her part, and her witnesses, disputed this claim and stated that the deceased had directed that the land be shared equally between the two families.

37. Gift inter vivos are provided for under Section 42 of the *Law of Succession Act* which stipulates as follows:

“Where-

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

38. In the case of *Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others* [2021] eKLR, the Court held as follows:

“The characteristics of the gifts inter vivos are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be considered as having received his share and may reduce or diminish any entitlement to the net intestate estate. The gift which is transferred and settled for the beneficiary during the life-time of the deceased, will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary. The concept of gifts is divided into two categories. First gifts inter vivos and gifts causa mortis. Gifts inter vivos as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death. In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of inter vivos the gift must go to the donee absolutely during the lifetime of the donor. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts.”

39. The petitioner bore the burden to prove the above allegation on a balance of probabilities. Section 107(1) & (2) of the *Evidence Act* Cap 80 Laws of Kenya provides that:-

- “(1) 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.”

40. The petitioner did not prove that the above land was given to him by the deceased to the exclusion of all the other beneficiaries. If the deceased intended to do so he would have registered the said parcel in the



name of the petitioner. The petitioner did not adduce a copy of the transfer of the land to substantiate his claim. Additionally, I note the petitioner said the transfer was in 1998 yet the deceased died on 12<sup>th</sup> August, 1997. If that was the case, then the transfer was unlawful.

41. Additionally, in the letter by the Chief, Mitunguu Location dated 21<sup>st</sup> July 2004 and which the Petitioner used to file the petition, the land Parcel No. Kianjai/Kianjai/1352 was listed as part of the estate of the deceased. It is thus baffling that he changed his tune and declared that the land had been given to him prior to the deceased's death.
42. I am therefore unable to agree with the petitioner that there was any gift inter vivos in his favour as alleged. In the absence of the land Registry records, it is apparent that Land Parcel No. Kianjai/Kianjai/1352 belonged to the deceased at the time of his death and as such the property forms part of the estate and is available for distribution.

#### **Whether the daughters of the deceased are entitled to a share of his estate.**

43. From the petition filed herein, it is evident that when John Kailiba came to court, he did not recognize any of the deceased's daughters.
44. Even when he moved the court for confirmation of the grant, the petitioner did not make any provision for the deceased's daughters. From the hearing, it emerged that this was on the basis that they were married and that according to the petitioner, the deceased had expressed the intention that married daughters should not inherit from his estate whereas unmarried daughters would benefit from one acre set aside for each of the deceased's widows.
45. The Court of Appeal in *Peter Karumbi Keingati & 4 Others vs Dr. Ann Nyokabi Gotha & 4 Others* Nairobi Civil Appeal No. 235 of 2014 [2015]eKLR held:-

“Article 27 of *the Constitution* guarantees for the equality of all before the law and the right to equal protection and the benefit of the law. The Article further proscribes discrimination on grounds including race, sex and marital status. These Articles (27 & 45(3)- parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and dissolution of the marriage) bind the court when applying Section 35 of the *Law of Succession Act* to ensure that all beneficiaries are treated equally though that may not mean, for purposes of distribution of an estate, a surgical precision in sharing of the assets of the estate.”

46. In *Re Estate of Solomon Ngatia Kariuki (Deceased)* [2008] KEHC 506 (KLR), the court stated as follows: -

“The *Law of Succession Act* does not discriminate between the female and male children or married and unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification of this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy the inheritance of their husband's side of the family. The petitioner did not make any provision for the deceased's daughter. During hearing it came out clearly that was so because



they are married and that the deceased had expressed his intention that married daughters will not get any share of the estate but for the unmarried ones they will get a share out of one acre set aside for each of the deceased widows or wives.”

47. I am persuaded by the above authorities. By excluding the deceased’s daughters from the proposed mode of distribution, the petitioner acted in a manner that was discriminatory and unfair.
48. This Court holds that daughters, whether married or not, just like sons, are equally entitled to a share of the deceased’s estate.

### **How should the estate of the deceased be apportioned among the beneficiaries?**

49. It is not in dispute that the deceased was a polygamous man. He was married to two wives. Section 40(1) of the [Law of Succession Act](#) provides for distribution of the estate of a polygamous deceased’s person as follows:

“40(1) where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

50. Omolo JA in *Mary Ronoh v. Jane Ronoh & Another*, [2005] eKLR with respect to Section 40(1) stated as follows:

“My understanding of that section is that while the net intestate estate is to be distributed according to houses each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses they would have been no need to provide in the section that the number of children in each house be taken into account.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work injustice particularly in the case of a young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.”

51. The Court of Appeal in *Douglas Njuguna Muigai & vs John Bosco Maina Kariuki & another* noted the absurdity of a blind application of section 40(1) of the [Law of Succession Act](#) as follows:-

“Back to section 40(1) of the [Law of Succession Act](#), that provides that a widow shall be considered as a unit alongside the children of the deceased when it comes to the distribution of the deceased’s estate. In this case, Jerioth Wangechi the first wife of the deceased who even participated in the dowry negotiations for her co-wives is equated to the last-born child of the 3rd wife of the deceased. Her contribution and support to the deceased as a spouse is not recognized and, in our view, that failure to recognize her contribution is tantamount to discrimination.”

52. The beneficiaries of the deceased estate are as follows: -



House 1 (Rael Gatumwa – deceased 1st wife):

- a. Agnes Mitu (daughter)
- b. Miriam Ngatia (daughter)
- c. Lydia K. Kailibia (daughter)
- d. Rose Kailiba (daughter)
- e. Mercy Nkio (daughter)
- f. Stephen N. Kailibia (son)
- g. Marion Kanario (daughter)
- h. Elius Kailiba (son)
- i. Purity Karimi Kailibia (daughter)
- j. Margaret Kailibia (daughter)

House 2 (2nd wife):

- k. Julia Mwathathi (widow)
- l. John Kailibia (son)
- m. Francis Kinyanga (son)
- n. Joseph Mutuma (son)
- o. Joyce Mutuma (daughter)
- p. Lucy Mwanjaru (daughter)
- q. Grace Kathiga (daughter)
- r. Peter Mberia (son)

1. Therefore, considering the 1<sup>st</sup> wife, Rael is deceased the 1<sup>st</sup> House has 10 units while the second house has 8 units. i.e. surviving widow + 7 children= 8 units
2. The estate of the deceased comprised two assets, namely Land Parcel No. Kianjai/Mituntu/152 measuring 12.15 acres & Land Parcel No. Kianjai/1352 measuring 2.67 acres, making a total acreage of 14.82 acres.
3. The evidence on record established that some of the beneficiaries have settled and built on the subject parcels. The Court is therefore bound to consider this aspect in effecting the distribution of the estate.
4. On 28<sup>th</sup> January, 2025, this court directed the Deputy Registrar to visit the aforementioned land parcels and file a report on how they are occupied.

57. From the scene visit, it was established;

On Parcel Kianjai/Mituntu/152 (12.15 acres):

Francis Kinyanga from the 2<sup>nd</sup> House is in possession of 2 acres, has built a permanent house on 1/8 acre and has been in occupation since 2001. Joseph Mutuma from the 2<sup>nd</sup> House occupies 2 acres of land. He is said to be a resident of the United States. There is no building on the land but there are



two graves belonging to M’Kailibia M’aruchi who is described as a family patriarch and the deceased herein. Peter Mberia from the 2<sup>nd</sup> house occupies 2 acre piece of land and has built a permanent house and lives there. Julia Mwathithi, the 2<sup>nd</sup> wife occupies 1 acre of the land and no house stands on the portion. Margaret Kailibia from the 1<sup>st</sup> House has built a semi-permanent house on this land and has been in occupation since 2001. All beneficiaries save for Elias agree that this parcel belonged to the first wife Rael Gatumwa. Elias Mwita from the 1<sup>st</sup> House has equally built a semi-permanent house and lives there. Stephen Kailibia from the 1<sup>st</sup> House, occupies 2 acres and has fenced off 1/8 portion on the left side, built a permanent house on the right side of the access road and has been in occupation since 1997.

On Parcel Kianjai/1352 (2.67 acres):

John from the 2<sup>nd</sup> House occupies 2.67 acres and has built a permanent house that sits on 1/8 acre of the land and fenced with live fence. The rest of the land has crops and a lot of trees.

58. From the foregoing, it is evident that the deceased’s children who have not received any share of his estate are: Agnes Mitu, Miriam Ngatia, Lydia Kailibia, Rose Kailibia, Mercy Nkio, Marion Kanario, Purity Karimi, Joyce Mutuma, Lucy Mwanjaru, and Grace Kathigu.
59. The court recognizes that a random order on equal distribution would lead to a precarious position, since many beneficiaries have already developed some portions of the estate and lived there for decades as demonstrated above. The result of such an order would be chaos and even the possibility of violence.
60. The parties are one widow and children of the deceased. In my view, it would be appropriate for them to sit down and agree on the most effective way to ensure that each one of them gets a share of the estate, bearing what I have stated hereinabove.
61. With that in mind, I will for now, not make any orders on the exact mode of distribution. That will be the course to take in the event that the parties do not agree. The parties are made aware that this may be a bitter pill, so they need to be flexible.
62. I therefore direct the parties to try and agree on the most suitable, and fair mode of distribution of the deceased’s estate which for the avoidance of any doubt comprises;
  - a. L.R. No. Kianjai/Mituntu/152 and
  - b. Parcel No. Kianjai/Kianjai/1352.

**DATED, SIGNED AND DELIVERED AT MERU THIS 23<sup>RD</sup> DAY OF OCTOBER, 2025.**

**H. M. NYAGA**

**JUDGE**

