



REPUBLIC OF KENYA



KENYA LAW
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**Mbithi v Ngao & another (Civil Appeal 584 of 2019)
[2025] KECA 1857 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1857 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 584 OF 2019
W KARANJA, K M'INOTI & LA ACHODE, JJA
NOVEMBER 7, 2025**

BETWEEN

RHODA NDUNGE MBITHI APPELLANT

AND

JOYCE KALEKYE NGAO 1ST RESPONDENT

LUCIA NTHOKI NGAO 2ND RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court at Machakos
(Odunga J.) delivered on 4th March 2019 in Succession Cause No. 225 of 2015)*

JUDGMENT

1. Rhoda Ndunge Mbithi the appellant, has filed this appeal against the ruling delivered on 4th March 2019 in Machakos HC Succ Cause No 225 of 2025 by Odunga J. (as he then was) dismissing her application for revocation of grant and finding in favour of Lucia Nthoki Ngao and Joyce Kalekye Ngao, the respondents. The crux of the matter is whether or not she was the wife of Benson Ngao Wambua, (deceased).
2. Following the demise of the (deceased) on 18th September 2014, the respondents in their capacity as the widows of the deceased, jointly petitioned for grant of letters of administration. Apart from themselves, they identified two sons with the identical name of Simon Wambua Ngao, and two others named Stephen Kavoi Ngao, and Robert Mutisya Ngao as the sons and beneficiaries of the deceased. Through a grant issued on 8th September 2015 and dated 14th September 2015 the respondents were granted letters of administration intestate of the deceased's estate.
3. However, through the summons dated 13th August, 2015, the appellant applied for revocation of the grant on grounds that the grant was fraudulently made and was obtained by means of an untrue statement of fact.



4. During the hearing, the appellant testified that she was the deceased's first wife having been married under Kamba customary law in 1979. All Kamba rites and rituals were performed in the presence of family members and other witnesses. Thereafter they cohabited as husband and wife in his house at Dandora, Plot No. Nairobi 3/1609A. They were blessed with one issue called Maureen Syokau.
5. The appellant stated that the respondents failed to disclose all the assets of the deceased such as: Plot No. 1198, Yatta Mutauni; Plot No. 1199, Yatta Mutauni; Plot No. 433, Yatta Utumoni, among others. It was her evidence that the deceased bought various parcels of land and registered them in his father's name, Wambua Nzomo. However, he registered Plot No. Nairobi 3/1609A, in Dandora in his name and that is where they cohabited until his demise on 18th September 2014.
6. The appellant did not attend the burial ceremony of the deceased because there was a dispute between the deceased's father and the 1st respondent on the burial place. The deceased's father wanted him to be buried at Kangundo on the land occupied by the 2nd respondent, a position the appellant agreed with, while the 1st respondent wanted to bury him in her home. The matter went before the court and it found in favour of the 1st respondent.
7. The appellant stated that the deceased paid her dowry in 1985 to her elder brother Moses Mutua, since her father was deceased. The ceremony was attended by her uncle, Josephat Mutua, her siblings, and from the deceased family the father, brother Muthama and sisters attended. Since it was short notice, there were no neighbours in attendance. The deceased's family brought three goats, one of which was slaughtered by Muthama.
8. It was her evidence that her relationship with the deceased was good but that he did not build for her a house at home. That the deceased married the respondents after her in 1990 and 1995 respectively and built houses for them back at home, while she lived in Nairobi in a rented house. That the first respondent's sons: Simon Wambua and Stephen Kanui used to live with her in the Dandora plot and they would refer to her as mother. She however denied that Stephen was the one who nursed the deceased when he was unwell.
9. Daniel Muthama Wambua, PW2 testified that the deceased was his younger brother and he had three wives, the appellant and the respondents. The appellant was the deceased's first wife, and they had a daughter named Syokau. According to him there was a small ceremony attended by his family and the appellant's family in 1985. The attendance from the deceased's family included his father, mother, and his sisters Jennifer and Mukami and himself. From the appellant's family two brothers attended, one of whom was called Morris to whom the dowry was paid. They performed the 'Ntheo' ceremony where they slaughtered one of the four goats they brought. The goat was slaughtered by his son and one other hired person. Further that the respondents knew the appellant since they would meet her whenever they visited the deceased in Nairobi.
10. PW2 stated that he did not attend the deceased's burial because there was a dispute as to the place of burial. The 1st respondent wanted to bury the deceased in her home in Yatta claiming that she was the first wife, precipitating the suit filed by the 2nd respondent seeking to have the deceased buried at Kangundo as designated by their father. The court found in favour of the 1st respondent, and their father instructed them not to attend the burial. He denied having told the second respondent or facilitated her to go to court. It was his evidence that the appellant was the one taking care of the deceased in Dandora, thus the court should give her and her daughter their share of the deceased's properties.
11. Moses Mutua Mbithi, PW3 the appellant's elder brother confirmed that the deceased's family brought four goats to their home in 1985 and slaughtered one of them in a ceremony known as 'Ntheo'. The



- ceremony took place in his house since their father was dead. The deceased's family was represented by the deceased's parents, his brother, and sisters, while the appellant's family was represented by PW3, his wife, elder brother, and sisters. In cross examination he clarified that his two other brothers are Onesmus Mbithi and Maxwell Mbithi, and that he does not have a brother called Morris. Further that the dowry payment was made in his presence and in the presence of his brother and their two wives.
12. The respondents opposed the application. To prove their case, five witnesses testified.
 13. The 1st respondent DW1, testified that she was lawfully married to the deceased in 1990 under Kamba customary law. They were blessed with two children, Simon Wambua and Robert Mutisya. At the time of her marriage she and the deceased resided at Dandora Phase I, in plot No. 3/1609C belonging to the deceased's father. She later relocated to Nunguni in Matungulu upon securing employment as a teacher, while the deceased remained in Dandora, being stationed at Kahawa Garrison under the British Army. She averred that although she visited her husband frequently, she never met or heard of the appellant, until the present proceedings. That the deceased later married another wife, the 2nd respondent in 1995, also in accordance with Kamba custom.
 14. It was her testimony that the deceased was taken ill in 2012 suffering from diabetes and was treated at Mater Hospital, and later at Bishop Kioko Hospital and Machakos General Hospital. She maintained that she was present at the time of his death, together with Daniel Muthama the deceased's brother and Jennifer Mueni his sister and therefore, disputed the appellant's assertion that the deceased died in her arms.
 15. Upon obtaining the burial permit, she and the extended family initially agreed to inter the deceased in Yatta, where she had her matrimonial home. However, the deceased's siblings, Jennifer and Daniel, influenced the 2nd respondent to institute Kangundo PMCC No. 130 of 2014 to restrain her from proceeding with the burial. As a result, the deceased's remains stayed in the mortuary for about two months. When the case was dismissed, she buried the deceased in Yatta on 14th November 2014.
 16. DW1 further stated that during the said Kangundo case, both Daniel Muthama and the deceased's father, Simon Wambua, recorded statements identifying her as the deceased's first wife. She contended that if indeed the appellant was married to the deceased, those family members would have acknowledged her.
 17. DW1 denied that the appellant ever cohabited with the deceased, or collected rent from Plot No. Nairobi 3/1609A in Dandora. According to her, the said property was developed by the deceased between 2006 and 2008 and left under the management of a caretaker known as Ben Ambani, when the deceased was transferred to Nanyuki. She maintained that the appellant had no proprietary or matrimonial claim over that property and that the respondents were the rightful administrators of the deceased's estate.
 18. The 2nd respondent, DW2 confirmed that she was married to the deceased in 1995 under Kamba customary law, as his second wife. She was blessed with two children, Simon Wambua Ngao and Robert Mutisya Ngao. Upon her marriage, she resided with the deceased at Ndunduni before the deceased was transferred to Nanyuki for work. She asserted that she never knew or met the appellant prior to these proceedings and that her children were also unaware of any such person. She denied the existence of a woman named Maureen Syokau as a child of the deceased.
 19. DW2 confirmed that upon the deceased's demise on 18th September 2014, she, together with Daniel Muthama and Jennifer Mueni, were involved in the burial dispute before the Kangundo Court. In that suit, the deceased's father filed a statement confirming DW1 as the first wife and herself as the second wife. The appellant was not mentioned and she was not present during the proceedings or the



- burial arrangements. She confirmed that the deceased was buried at Yatta, though she did not attend the burial due to the family disagreements.
20. DW2 later reconciled with DW1 and jointly they petitioned for the grant of letters of administration. She maintained that the deceased never cohabited with the appellant and denied that the appellant or her daughter were ever recognized members of the family. She admitted that some properties were registered in the name of the deceased's father, Simon Wambua Nzomo and that the respondents only included in the succession cause, those properties registered in the deceased's own name.
 21. Simon Muli Nzomo DW3, an uncle to the deceased, testified that the deceased had only two wives, Lucia and Joyce, the first and second respondents respectively, whose dowry negotiations he attended and which were done in accordance with Kamba customary law. He denied any knowledge of the appellant and stated that no dowry ceremony was ever conducted for her.
 22. Martha Kimeu Wambua DW4, a sister-in-law to the deceased, testified that she joined the family in 1973 when the deceased was still in school and unmarried. She confirmed that she personally witnessed the deceased's marriage ceremony to Lucia in 1990 and to Joyce in 1995. She never met or saw the appellant before the proceedings and denied knowledge of any dowry ceremony being conducted for her, or the existence of a child between the deceased and the objector.
 23. Stephen Kavoi Ngao DW5, son of DW1 and the deceased, testified that he lived with his father in Dandora and Nanyuki between 2012 and 2014. He categorically denied that any woman lived with them during that period. He stated that he personally cared for his father during his illness, assisted by the caretaker Ben Ambani. He saw the appellant for the first time in court and denied knowledge of her alleged daughter
 24. Upon considering the evidence, the trial Judge found that the appellant failed to prove that she was a wife of the deceased under Kamba customary law. The learned Judge dismissed the summons for revocation of grant with no orders to costs.
 25. This decision grieved the appellant and she preferred this appeal. In the memorandum of appeal dated 22nd November 2019, she faulted the Judge on the following grounds:
 - a. Failing to appreciate the essentials of Akamba Customary marriage, thus finding that the appellant did not prove that she was a wife to the deceased.
 - b. Finding that if dowry was paid for the appellant wife of the deceased, the same was done in a hurry and secrecy contrary to Kamba Customary Culture.
 - c. Failing to appreciate the authority of a father in an African patriarchy system of family and that he had a choice on the place of burial of the deceased that the appellant respected.
 - d. Holding that the appellant had no explanation as to why she did not participate in the funeral ceremony of the deceased and attending burial.
 - e. Finding that the appellant took a laidback approach when the battle for the burial of the deceased was raging between the respondents, a characteristic not expected of a first wife, while the objector gave reasons that were indeed corroborated by the other witnesses including the petitioners.
 - f. Relying on affidavits filed in Kangundo court in the burial dispute, case No. 130 of 2014 and an affidavit of marriage sworn between the 1st respondent and the deceased in arriving at his finding without inquiring into the circumstances under which they were made.



- g. Finding that the appellant did not prove to the required standards that she was a wife of the deceased.
 - h. Failing to appreciate the circumstances and position of the appellant in the life of the deceased and instead considering extraneous matters which do not determine whether a customary marriage under Kamba Customary law subsists or not.
26. The appeal was disposed of by way of written submissions. The appellant filed her submissions dated 26th June 2024 through the firm of Nzavi & Company Advocates. The respondents did not file any submissions.
27. The appellant submitted under three heads, to wit: that the court misapprehended the Akamba customary law on marriage by finding that the appellant did not prove to the required standard that she was a wife to the deceased; the court failed to appreciate the impact of a father figure in the African patriarchal system of family in determining the conduct of the appellant during the burial dispute and interment of the deceased; and, that the court made findings that were contrary to the evidence on record.
28. The appellant urged that the most essential step in an Akamba customary marriage is the performance of the “Ntheo” ceremony, which involves payment by the groom of three traditional goats, one of which should be slaughtered. That her testimony was that dowry was paid in 1985, was corroborated by PW2, the deceased’s elder brother and PW3 her own brother. She asserted that from the evidence, the Kamba Ntheo marriage ceremony was performed, therefore she validly got married to the deceased.
29. It was urged that the Kamba customary law does not set a threshold as to the number of people who should attend the Ntheo ceremony. It does not prescribe that neighbours must attend. It is for the two families of the bride and the groom to decide. Thus, she faulted the learned Judge for finding that if dowry was paid for the appellant, it was done in a hurry and in secrecy, contrary to Kamba customary culture. It was her submission that she proved on a balance of probability that she was a wife to the deceased and therefore a beneficiary of his estate.
30. She argued that she did not participate in the burial dispute between the respondents and she did not attend the deceased’s burial because the deceased’s father advised against it and she obeyed. She also explained that she was for the wishes of the deceased as to his resting place which was in line with the position of the father of the deceased.
31. It was urged that the trial court capitalized on minor contradictions to find against the appellant. The real issue for determination was whether the ‘Ntheo’ ceremony took place or not, and if at least three goats that seal a Kamba customary marriage were delivered to the family of the appellant by the deceased’s family. Which the appellant established on a balance of probability. Further, that the trial court laid too much unnecessary weight on the proceedings in Kangundo PMCC No. 130 of 2014 and the fact that the deceased’s father and PW2 filed statements where they described the 1st respondent as the deceased’s first wife. PW2 explained to the trial court that he referred to the 1st respondent as the first wife only in comparison to the 2nd respondents.
32. It was also asserted that the trial court erred in laying a lot of emphasis on the affidavit produced by the 1st respondent indicating that it was sworn before the Resident magistrate, Kithimani law courts in which the deceased seems to have stated that he was a bachelor when he married the 1st respondent. It was submitted that the authenticity of the affidavit was not verified.



33. Our mandate in this first appeal is as stated in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 thus:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

34. We have considered the record of appeal and the submissions filed by the appellant. The sole issue arising for our determination is whether the appellant proved on a balance of probability, that she was married to the deceased under Kamba customary law.

35. Section 107 and 108 of the *Evidence Act* Cap 80 dictate as follows on who bears the burden of proof in a case:

“107. (1) Whoever desires a 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.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies in that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

36. The onus is on the appellant to prove that indeed, there was a valid Kamba customary marriage between herself and the deceased. The standard of proof was established in the often-cited decision of *Hottensiah Wanjiku Yawe vs Public Trustee CA* [1976] eKLR. (Civil Appeal No.13 of 1976), where the Court of Appeal of East Africa stated that the standard of proof for a customary marriage is the usual one for a civil case. That is on a balance of probabilities.

37. This Court in *Palace Investment Limited vs Geoffrey Kariuki Mwenda & another* [2015] KECA 616 (KLR), aptly described the standard of proof in reliance of the decision in *Miller vs Minister of Pensions* [1947] 2 All ER 372, where Lord Denning had this to say:

“The degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such as the tribunal can say: “we think it more probable than not” the burden is discharged, but if the probabilities are equal it is not. Thus proof on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been met.”

38. This Court discussed the burden of proof with specific reference to African customary law in *M N M v D N M K & 13 others* [2017] KECA 172 (KLR) and held as follows:

“Having carefully analysed the evidence, we do not see any basis for faulting the learned judge in his finding that E did not prove that she was married to the deceased under Kikuyu customary law. The onus was on her to prove such marriage. In *Kimani v. Gikanga* (supra), Duffus JA explained the position thus:



“To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case.”

39. In finding that the appellant did not prove Kamba customary marriage in the present case, the trial court pronounced itself thus:

- “67. It was her evidence that they got married under Kamba customary law in 1979 following the performance of all the rites and rituals in the presence of both family members and other witnesses. It was her evidence that dowry was paid in 1985 though she could not recall the month. Since her father was dead by then, the dowry was paid to her elder brother, Moses Mutua, at a ceremony attended by one of her uncles, Josephat Mutua. According to her, due to the short notice, there were no neighbours and the ceremony was not a big one and was only attended by her brothers and sisters. From the deceased’s side were his father, brother Muthama and sisters. However, her witness, Moses Mutua Mbithi, her own brother, who was allegedly present during the ceremony testified that his two other brothers are Onesmus Mbithi and Maxwell Mbithi and that he does not have a brother called Morris. According to him the dowry payment was made in his presence and in the presence of his brother and two wives and at that time he was 25 years old. However, his sisters were not there. He admitted that he has an elderly uncle known as Josephat Mulwa though at the time he had many maternal uncles who did not attend. According to him, there were no neighbours. PW1, Daniel Muthama, on the other hand testified that from the family of the Objector, were two brothers, one of whom was called Morris to whom the dowry was paid.
68. It is therefore clear that even the persons who were present during the alleged ceremony cannot be ascertained due to the contradictions in the evidence of the Objector and her witnesses. It cannot be by coincidence that Daniel Muthama, stated that the dowry was paid to Morris while DW3 insisted it was in fact paid to him and that he was unaware of a brother called Morris.
69. While the Objector testified that the deceased’s family brought three goats, one of which was slaughtered by Muthama, Muthama himself who testified as PW2, was categorical that the goat was slaughtered by his son and another person who was hired.
72. As regards the alleged dowry ceremony, it is clear that if it ever took place, it was conducted in a hurry and almost in secrecy. None of the persons present save for PW2 and the Objector’s brother testified to confirm its occurrence. As I have stated above their evidence contradicted each other in material respects. Ordinarily payment of dowry in the African Culture is never a private affair especially where it is being conducted in a rural set up. That dowry is not paid



in secrecy was conceded to by PW2 though according to him, it was meant to enable the deceased go back to his work and that there was a fear that the deceased would get lost unless the ceremony was arranged. This explanation, with due respect was not convincing. Just like in statutory marriage some independent witnesses do often participate therein. In this case no other ceremony seems to have taken place thereafter and after the ceremony, the couple seems to have not even immediately stayed together but the Objector continued staying at her parent's home while the deceased proceeded to his place of work."

40. We are persuaded by the decision in *Anna Munini & Another v. Margaret Nzambi* [1984] eKLR, relied on by the trial court, where the essentials of a valid Kamba customary marriage set out by Dr. Eugene Cotran in *Restatement of African Law: The Law of Marriage and Divorce*, include the capacity of the parties to marry; consent of both families; the slaughter of a billy goat (Ntheo ceremony) as a symbolic act sealing the union; payment of bride price or marriage consideration; and subsequent cohabitation of the parties as husband and wife. These requirements are also reflected in the Court of Appeal decision in *Kimani vs Gikanga* [1965] EA 735, which emphasized where customary law is relied upon it must be "accurately and definitely established" through credible and consistent evidence.
41. As captured by the trial court the appellant and her witnesses gave contradictory evidence on the happenings during the 'Ntheo' ceremony, which as the trial court correctly observed was material. Further, beside PW2, the deceased's family members who testified did not know the appellant. They learnt of her existence when she filed the present suit and were very categorical that the deceased had only two wives who are the respondents.
42. Additionally, the appellant did not bring any other witness, apart from PW2, whose evidence we do not find credible, to prove that she was cohabiting with the deceased. We find that the explanation of PW2 as to why he referred to the 1st respondent as the first wife during the burial dispute is not plausible. The evidence of cohabitation between the appellant and the deceased is scanty. There was also the affidavit produced by the 1st respondent in evidence, indicating that it was sworn before the Resident magistrate, Kithimani law courts, in which the deceased himself stated that he was a bachelor when he married the 1st respondent. It was up to the appellant to dispute the authenticity of that affidavit which she failed to do.
43. Consequently, we find that this appeal has no merit and dismiss it with no orders as to costs, since the respondents did not file written submissions in opposition of the appeal or appear in Court for the hearing.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2025.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

K. ACHODE



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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

