



Mwithalie (Suing as the Legal Representative of the Estate of Teresia Ntundu) v Mwari & 4 others (Civil Appeal 22 of 2022) [2025] KECA 2227 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KECA 2227 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 22 OF 2022
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
DECEMBER 19, 2025**

BETWEEN

BONIFACE MUGAMBI MWITHALIE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF TERESIA NTUNDU) APPELLANT

AND

**MARY MWARI 1ST RESPONDENT
PETER MICHABI KIRINGURI 2ND RESPONDENT
WILLIAM MWITHALE M'ARUNGU 3RD RESPONDENT
JOSEPH GITONGA KUBAI 4TH RESPONDENT
PHILIP KIRIMI M'MWETI 5TH RESPONDENT**

(Being an appeal from the ruling of the High Court of Kenya at Meru (J. O. Otieno J.) dated 18th November, 2021 in Succession Cause No. 517 of 2008)

JUDGMENT

1. The appellant, vide summons dated 2nd September, 2019, sought revocation of a grant that was issued to the 1st respondent (petitioner) on 4th May, 2010. The contention between the parties related to the Estate of Gedion M'Arungu (deceased), who died on 6th December, 2000. He died intestate. The 1st respondent (widow) petitioned the High Court at Meru for a grant of letters of administration intestate, which were issued to her on 29th January, 2009, and confirmed on 4th May 2010. According to the petition by the 1st respondent, the deceased was survived by the 1st respondent (widow), the 2nd respondent (son) and the 3rd respondent (son). His estate comprised on land parcel L.R. No. Ithima/Ntunene/2590 (hereinafter 'suit property'), measuring 1.08 Ha, which was distributed among the three beneficiaries. The confirmed grant was on 21st May, 2015, rectified to include other properties namely; L. R. Ithima/Ntunene/2354, 2657, 1561, 2591, 2574 and 2576, which were all allocated to



other houses of the deceased's widows. The appellant sought to revoke the grant in his capacity as the legal representative of the Estate of Teresia Ntundu.

2. The appellant's case was that Teresia Ntundu (his mother) was a daughter of the deceased and the 1st respondent, and therefore a sister to the 2nd and 3rd respondents. The appellant averred that the 1st, 2nd and 3rd respondents, in collusion with the 4th and 5th respondents, secretly lodged Succession Cause No. 517 of 2008, where a grant was issued in relation to the Estate of Gideon M'Arungu (deceased). He urged that the respondents did not involve him in filing the said petition, and that they failed to disclose to the trial court that Teresia Ntundu, who passed away, was a daughter of the deceased, which meant that the applicant was a beneficiary of the estate of the deceased. He asserted that the said grant was issued without his knowledge or involvement. He contended that upon confirmation of the said grant, the 1st, 2nd and 3rd respondents caused the suit property, Inthima/Ntunene/2590, to be subdivided into parcels Nos. Ithima/Ntunene/3557, 3558 and 3559, and thereafter had parcels Nos. 3558 and 3557 transferred to the 4th and 5th respondents respectively. Parcel No. 3559 remained with the 1st respondent. The appellant stated that when his mother, Teresia Ntundu, died in 2003, she left him under the care of the deceased, Gideon M'Arungu. He asserted that before his demise, the deceased had left part of the suit property to him, where he has been residing with his wife. He maintained that he was entitled to a fair share of the estate of the deceased.
3. The 1st respondent, in a replying affidavit dated 30th September, 2019, deponed that the deceased had distributed his estate to all his widows while alive, and that he died before transferring the entire estate to the beneficiaries. She swore that the 2nd and 3rd respondents got transmission of their shares of the estate, which they lawfully disposed to the 4th and 5th respondents, upon being paid the purchase consideration in full. The 1st respondent averred that the applicant had lodged another suit against the respondents, relating to the same subject matter, before the High Court at Meru (HCCC No. 132 of 2012), which was transferred to Maua Chief Magistrate's Court (CMCC No. 247 of 2014), where the matter was heard, and a judgment delivered on 28th July, 2019, in favour of the respondents. She deponed that she has offered the appellant another property located in Timau, by virtue of him being her grandson, but he has declined. She was of the view that the appellant had no sustainable claim, and that his appeal ought to be dismissed.
4. The 4th respondent filed a replying affidavit dated 30th September, 2019, where he deponed that he purchased L.R.No. Ithima/Ntunene/3558 from the 3rd respondent, and that he has been in exclusive possession of the said property. He averred that the applicant only recently entered the 1st respondent's portion of the suit property where he has been causing destruction of property. He urged that by the time he purchased the said property, a certificate of confirmation of grant had already been issued to the 1st respondent.
5. The 5th respondent made similar sentiments in his affidavit sworn on 14th February, 2020. He averred that he lawfully purchased L.R.No. Ithima/Ntunene/3557 from the 3rd respondent, a beneficiary of the estate of the deceased. He added that he has enjoyed exclusive use and possession of the said parcel since 2011.
6. The appellant, in response, maintained that his claim to the suit property in Maua CMCC No. 247 of 2014 was not dismissed for lack of merit, but rather, the court determined that his claim ought to be canvassed within the succession cause filed by the respondents, which was being heard by a higher court.
7. During the hearing before the trial Court, the appellant abandoned his prayer for revocation of the grant issued to the 1st respondent, and only sought for provision, as a beneficiary of the estate of the



- deceased. The case was heard by way of viva voce evidence, where the parties reiterated the averments made in their respective pleadings. The 1st respondent added that Teresia Ntundu was her daughter, who was born out of wedlock, and that she was not a daughter of the deceased.
8. In a ruling dated 18th November, 2021, Otieno J. determined that the appellant was not a beneficiary of the estate of the deceased, as there was uncontroverted evidence that his mother, Teresia Ntundu, was not a biological daughter of the deceased, but rather the daughter of the 1st respondent from a previous relationship.
 9. Aggrieved by this decision, the appellant filed the instant appeal where he faulted the learned Judge for: failing to appreciate that the late Teresia Ntundu was a daughter of the deceased, and that her estate was entitled to inherit from the deceased's estate; failing to acknowledge that the evidence of the 1st respondent in Maua CMCC No. 247 of 2014, and her evidence before the trial court was inconsistent, with regards to whether Teresia Ntundu was a daughter of the deceased; failing to acknowledge that even though the 1st respondent admitted that she shared two sons and two daughters with deceased, she only distributed the deceased's estate to the sons; making a decision that was erroneous, and against the weight of the evidence before the trial court.
 10. The appeal was canvassed by way of written submissions.
Counsel for the appellant, Mr. Ngunjiri, asserted that Section 29 of the *Law of Succession Act* defines a dependant to include children of the deceased, and inter alia, grandchildren maintained by the deceased immediately prior to his death. It was his submission that the proceedings in Maua CMCC No. 247 of 2014 were produced as an exhibit before the trial court, and that in the said proceedings, the 1st respondent acknowledged Teresia Ntundu as a daughter of the deceased, and further admitted that she had not made any provision for the appellant during distribution of the estate of the deceased.
 11. Counsel for the appellant urged that the testimony of the 1st respondent, to the effect that Teresia Ntundu was not the deceased's daughter, was contradictory to what she told the court in CMCC No. 247 of 2014, and an afterthought. He was of the opinion that the deceased brought up Teresia as his own daughter, and that the 1st respondent intentionally disinherited the deceased's daughters. He urged that Teresia Ntundu survived the deceased, and that her estate was entitled to benefit from the deceased's estate. He submitted that no evidence was led to show that Teresia renounced her right to inherit. He faulted the learned Judge for dismissing the appellant's claim on the sole basis of the 1st respondent's testimony, which was an afterthought. Counsel invited us to revoke the confirmed grant issued to the 1st respondent, and order a fresh re-distribution of the deceased's estate to all beneficiaries.
 12. Counsel for the respondents, Mr. Gikunda, submitted that the evidence on record was that Teresia Ntundu was born out of wedlock, before the 1st respondent got married to the deceased, and that Teresia Ntundu had other children, other than the appellant. Counsel urged that the applicant failed to adduce evidence to prove that he was entitled to inherit from the estate of the deceased by virtue of Section 29 of the *Law of Succession Act*. He submitted that there was no evidence led to prove that the appellant's mother was adopted by the deceased. He submitted that the 4th and 5th respondents legally acquired their portions of the now sub-divided suit property, and that they were bona fide purchasers for value. He asserted that the 1st respondent offered the appellant a different property in Timau which he declined. He maintained that the 1st respondent's evidence remained unchallenged, and therefore the appellant's appeal had no merit.



13. This being a first appeal, our duty was well stated in *Selle and Another v. Associated Motor Boat Co. Ltd* [1968] E.A. 123, where the court observed as follows:

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact, if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mhamed Sholan*, (1955) E.A.C.A. 270)”.

14. In this present appeal, the issue that came to the fore for determination is whether the appellant established that he was a dependant of the deceased and therefore entitled to inherit from his estate.
15. It is not disputed that the appellant is a grandson of the 1st respondent. He is a son of Teresia Ntundu-a deceased daughter of the 1st respondent. According to the appellant, since the demise of his mother Teresia, he is entitled to inherit the portion of the estate of the deceased that would otherwise have devolved to her if she was alive. On her part, the 1st respondent, the widow of the deceased and the mother of Teresia, is emphatic that the appellant has no right to lay claim on the estate of the deceased as he is not a beneficiary.
16. It was the 1st respondent’s case that her late daughter Teresia Ntundu was born out of wedlock before she got married to the deceased. The appellant was not therefore entitled to claim from the estate of the deceased. On his part, the appellant disputes the 1st respondent’s assertion that his mother was born out of wedlock. He pointed out the contradictory evidence that the 1st respondent adduced in a civil case that the appellant had filed against the 1st respondent before the Chief Magistrate’s court.
17. Section 29 of the *Law of Succession Act* sets out who a dependant is in Succession. It includes wives and children, step children whom the deceased had taken as his own and was maintaining them. Grandchildren also qualify to be considered as dependants if “the deceased had taken into his family as his own” or “were being maintained by the deceased immediately prior to his death.” (see section 29(b)).
18. During trial, conflicting evidence was adduced regarding whether the appellant’s late mother was a child of the deceased or not. According to the 1st respondent, the mother of the late mother of the appellant, her late daughter was born out of wedlock prior to her getting married to the deceased. Although the appellant disputed this evidence, the trial court which had the opportunity to see and hear the witnesses as they testified and was therefore able to assess their respective demeanours, believed the testimony of the 1st respondent. As the first appellate court, having not had the opportunity to see and hear the witnesses, we defer to the finding made by the trial court regarding assessment of the credibility of the witness. In that regard, we are unable to disagree with the finding reached by the trial court which was to the effect that the mother of the appellant was born out of wedlock and was not therefore a daughter of the deceased, and therefore his dependant as provided under section 29(a) of the Laws of Succession Act.
19. The appellant would have had a strong case if he was able to establish that his late mother had been taken in by the deceased as one of his children. No such persuasive evidence was tendered before the



trial court. We cannot therefore fault the trial court for reaching the verdict that it did. Having pegging his right to inherit the estate of the deceased on his late mother's status as a dependant, and having failed to do so, the appellant as a grandchild has no direct claim to the estate of the deceased.

20. In the premises therefore, we find no merit with the appeal. It is hereby dismissed but with no orders as to costs as this was a family dispute.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF DECEMBER, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

