

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
FAMILY APPEAL NO. E029 OF 2024

ROSE WAHU KIMANI.....1ST APPELLANT
NATASHA MOYA AKINYI.....2ND APPELLANT

-VERSUS-

ANNW WANGARI.....RESPONDENT

*(Being an appeal from the ruling and orders in the Chief Magistrate’s Court at Ruiru
(Hon. Mr. Joseph Were CM) dated 9th August 2024 in succession cause number E082
of 2023)*

JUDGMENT

John Kimani Kang’ethe (hereinafter referred to as ‘the deceased’) died on 3-07-1994. The respondents petitioned for grant of letters of administration for his estate vide Ruiru Chief Magistrate’s Court succession cause number E082 of 2023 which letters were issued on 11th October 2023. The deceased had married Lucy Njoki Kimani (hereinafter referred to as ‘Lucy’) who was the appellant’s biological mother. The appellant had been born to Lucy in 1968 before her marriage to the deceased but she was not immediately introduced to the deceased or his family. The appellant’s mother died in 1995 when the appellant was 26 years.

In the petition for the grant, the respondents who were the deceased’s daughter and grandson respectively did not include the appellant as a beneficiary of the estate with a consequence that when they applied for confirmation of the grant, the

appellant protested on grounds that she was the deceased's child and was entitled to a share of the estate.

Upon hearing the parties, the trial Magistrate held that the appellant was not a child of the deceased but she was entitled to a small share. It was acknowledged and there was no dispute that the appellant was not a biological child of the deceased. The trial court also held that the appellant had not proved that the deceased used to provide for her or had taken her in as his own child thereby removing her from the provisions of Section 29(b) of the Law of Section Act.

Having stated as above, the trial court went on to make reference to the Section 14 of the Matrimonial Property Act and in his words stated;

'The above proviso is a small opportunity for the protestor to have some consideration. Indeed, during hearing, the petitioners agreed that the protestors recourse was in the estate of her late mother but not for the deceased.'

I will thus direct that the petitioners herein either:

- a. Review the mode of distribution as had earlier been agreed upon to make a provision for the estate of Lucy Njoki Kimani alias Lucy Njoki Wainaina and the protestor to be included as a beneficiary of the said estate or*
- b. Make a reasonable monetary provision for the protestor to cater for her right to benefit from the estate of the late Lucy Njoki Kimani alias Lucy Njoki Wainaina.*

c. In the circumstances of this matter, I will order that each party shall bear its costs of the application’.

It is the above ruling which has triggered this appeal in which the appellant have pleaded the following 8 grounds;

1. The learned Magistrate erred in both law and fact in failing to find that the Matrimonial Property Act did not apply and has no application of whatsoever kind in succession matters, as succession matters are solely governed by the Law of Succession Act (Cap 160) Laws of Kenya to the exclusion of all other Laws.
2. The learned Magistrate erred in both law and fact in holding that the respondent was entitled to a portion of the deceased's estate as a beneficiary when evidence on record showed that the entire estate was owned by the deceased to whom these proceedings relate and not to the estate of their deceased mother.
3. The learned Magistrate erred in law and in fact after he upheld that the respondent herein (and who having proved by her own admission that she was not a dependant of JOHN KIMANI KANGETHE [deceased]) was entitled to the said estate as a beneficiary.
4. The learned Magistrate did also err in law and in fact by purporting to include the respondent as a beneficiary of the deceased's estate, when he had made a categorical finding that the respondent was not a biological daughter of the deceased to whom the proceedings relate to.

5. The learned Magistrate did also err in law and in fact by making a nebulous order for the monetary provision of the respondent from the estate of Lucy Kimani alias Lucy Njoki Wainaina, which was not the subject of the said succession cause at any one moment.
6. The learned Magistrate did also err in law and in fact by making a nebulous order purporting to include Lucy Njoki Kimani alias Lucy Njoki Wainaina (deceased) as a beneficiary of the estate of JOHN KIMANI KANGETHE yet she was long deceased prior to the institution of the present succession cause from which this appeal emanates.
7. The learned Magistrate erred in law and in fact by entertaining extraneous matters that were not the subject matter of the respondent's claim and were not within his realm and/or jurisdiction.
8. The learned Magistrate erred in law and in fact in making presumptions that the deceased held the matrimonial property in trust for the respondent's mother when no evidence to that effect was tendered nor could any be tendered in a succession cause.

I have read the submission of the appellants dated 4th August 2025 and those of the respondent dated 1st August 2025. Having done so, I have identified the following issues for determination;

- a. Whether the court erred in applying the provisions of the Matrimonial Property Act.
- b. Whether the trial court erred in making provision for the estate of Lucy Njoki Kimani and making orders for the respondent to be provided for.

c. Who should bear the costs of this appeal?

Before I go to the identified issues, it is important to dispense of an issue raised by the respondent which I think is foreign to this appeal. She has submitted that she was a dependant of the deceased. The trial court found that she was not and I note that she has not appealed against that finding. She has raised the issue in her submissions and there is no prayer in the appellant's memorandum of appeal asking me to overturn that finding of fact. That being the case, the respondent is not allowed in law to introduce it in her submissions. In ***David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] KECA 155 (KLR)***, the Court of Appeal held that;

'It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.'

I now turn to the issues I have identified. The appellant has argued that the trial court fell into an error as application for Matrimonial Property Act is only

applicable as between married couple and in their lifetime. Such that if one of them or both dies, the Act does not become applicable to administration of the property they held. On the other hand, the respondent submits that the Act applies even after the death of the spouses. The respondent has in reliance to Section 14 argued that the property of the deceased's estate was acquired on 27th July 1992 during the subsistence of the marriage between the deceased and Lucy and therefore by virtue of the said Section 14 of the Matrimonial Properties Act, Lucy had a share in the said property.

It is true that the Section 14 provides for rebuttable assumption that any property acquired during subsistence of marriage belongs to both spouses. The Section provides as follows;

Where matrimonial property is acquired during marriage-

(a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and

(b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.

My interpretation of the above subsection (b) is that the presumption being rebuttable, the spouse claiming stake in the property registered in the name of the other is called upon in the event of a dispute to prove their interest in it as it remains an assumption. The courts have held position that a spouse who claims a share of the property must prove their contribution to acquisition of the same. This position was so held by the Supreme Court of Kenya in ***JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR)***, where it held that;

‘The guiding principle in matrimonial property division was contribution. A party must prove contribution—monetary or non-monetary—to be entitled to a share.’

Marriage alone does not automatically entitle a spouse to a share on property acquired by another during the subsistence of marriage. The burden of proving contribution lies with the spouse claiming the share which in this case it would have been Lucy. The respondent’s submissions and the holding of the trial court were in effect placing the appellant in the shoes of Lucy which means that it was the respondent who bore the burden of proving contribution. I have not seen any iota of evidence in the proceedings to show an attempt to discharge this burden.

I have stated above just in case the Matrimonial Property Act was applicable in the matter. However, I hold the position that the application of the Act is not applicable in matters of succession unless the person seeking to rely on it is claiming in their capacity as a legal representative to the spouse’s estate. Rule 4 of the Matrimonial Property Rules provides as follows.

Any person, including the following persons, may institute civil proceedings claiming any right or relief in relation to matrimonial property-

(a) a spouse;

(b) any person against whom a spouse has made a conflicting claim in respect of property; and

(c) a trustee in bankruptcy, an executor under a will or other testamentary grant, an administrator or a personal representative, of the estate of a spouse for an order or declaration relating to the status, ownership,

vesting, or possession of any specific property by, or for the beneficial interest of, a spouse or former spouse.

In this matter, the spouse who would have put the claim forth was Lucy who is deceased which places the matter under paragraph (c) of the above Rule. The respondent did not present herself as an administrator or legal representative of the estate of Lucy. Actually, there was no evidence that there was any succession cause for Lucy's estate.

A person who does not hold grant in respect of a deceased person has no capacity to represent them in any proceedings notwithstanding blood or otherwise relationship there may have been between the person and the deceased. In that regard, I hereby hold that the trial Magistrate erred by importing and applying Section 14 of the Matrimonial Property Act in these proceedings and consequently erred in making the provision that the estate of Lucy be included in the distribution yet there was no legal representative or administrator of the said estate.

The consequence of the above discussion is that this appeal succeeds and the ruling and orders of the trial court are hereby set aside and substituted for the following orders;

- a. The respondents' application dated 21st November 2023 in Ruiru Chief Magistrate's Court succession cause number E082 of 2023 is hereby allowed in terms of paragraph 4 of the affidavit of Rose Wahu Kimani and Natasha Moya Akinyi dated 21st November 2023, specifically the table of distribution therein.

b. The appellant shall pay the costs of this appeal and in the lower court proceedings.

Dated, signed and delivered at Nairobi this 30th day of **January** 2026.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Muriungi holding brief for Mr. Njau for the appellant and Mr. Kimata holding brief for J.G. Waweru for the respondent.