Gatwiri v Karonga (Succession Appeal E001 of 2023)
[2026] KEHC 1061 (KLR) (5 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1061 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

SUCCESSION APPEAL E001 OF 2023

CW MEOLI, J

FEBRUARY 5, 2026

BETWEEN

FAITH GATWIRI ..... APPELLANT

AND

ANNE MAKENA KARONGA ..... RESPONDENT

(Being an appeal from the ruling A.N Makau, SPM delivered on the 9th December, 2022 in Ngong SPM Succession Case No 4 of 2020)

JUDGMENT

1. This appeal emanates from the ruling delivered on 9th December, 2022 in Ngong Succession Case 4 of 2020. Faith Gatwiri (hereafter the Appellant) had in that cause filed an application seeking revocation of grant issued and confirmed in favour of Anne Makena Karonga (hereafter the Respondent). By her affidavit sworn on 2nd June 2022 in support of the summons for revocation, the Appellant asserted that the Respondent, had earlier petitioned for letters of administration intestate in respect of the estate of Samson Nabea Karonga (deceased) in her capacity as his spouse, allegedly without the knowledge of the Appellant and failed to disclose to the court that the Appellant was also a wife to the deceased pursuant to Section 3 (5) of the *Law of Succession Act* and the existence of other beneficiaries including the minor P.H.K , a daughter to the deceased.

2. In response, the Respondent filed a replying affidavit sworn on 12th July, 2022 asserting that she was the legal wife of the deceased having been married under the African Christian Marriage and Divorce Act (Repealed) in a ceremony conducted on 2/4/1988; that the said marriage being monogamous, the deceased lacked the capacity to contract a subsequent marriage; that the Appellant was not a wife to the deceased but engaged in an adulterous relationship with him; and that she recognized the identified minor H.P.K as a child of and beneficiary to the estate of the deceased.

3. Upon hearing the application, the lower court via a ruling delivered on 9th December 2022 found that the Appellant failed to demonstrate that she was a widow of the deceased or a dependant under Sections 2 of the *Marriage Act* and Section 29 of the *Law of Succession Act*. The trial court hence concluded that the impugned grant had been properly issued. This outcome provoked the instant appeal which is based on the following grounds: -

> " 1. That the learned magistrate erred in law and fact when she failed to appreciate the import of the provisions of Section 3(5) of the *Law of Succession Act* when she found that the Applicant was not a wife for the purpose of succession.
>
> 2. That the learned magistrate erred in law and fact when she disregarded the evidence produced by the Applicant in support of her position that she was a wife of the deceased for purposes of succession under Section 3(5) of the *Law of Succession Act* despite acknowledging in her ruling the fact that the applicant had been recognized as a wife to the deceased in the funeral programme, the area assistant chief had introduced her as a wife and dependant of the deceased and that the applicant had been receiving pension from Teleposta on account of being the widow of the deceased.
>
> 3. That the learned magistrate erred gravely in law and in fact when she failed to determine the second issue raised by the applicant as to whether the grant of letters of administration issued and confirmed to the Respondent as the sole administrator was in violation of the provisions of Section 58(1)(a) of the *Law of Succession Act* owing to the fact that one of the beneficiaries is a minor.
>
> 4. That the learned magistrate erred in law and fact when she found that the grant issued to the Respondent as the sole administrator and confirmed on 20th January, 2022 was lawfully and procedurally issued despite the fact that the Respondent had admitted that one of the beneficiaries of the estate of the deceased was a minor, which is an affront to the provisions of Section 58(1)(a) of the *Law of Succession Act*.
>
> 5. That the learned magistrate erred in law and fact when she found that there was no non- disclosure of material information by the Respondent, no consent of the Applicant or the minor P.H.K was ever obtained when the petition leading to the impugned grant of letters of administration was filed.
>
> 6. That the learned magistrate erred in law and fact in finding that the grant was procedurally issued and confirmed despite the Respondent having not provided a schedule of distribution that outlined the share of each beneficiary in the estate of the deceased in total disregard of the provisions of Section 71(2) of the *Law of Succession Act*.

4. Pursuant to directions issued by the court, the appeal was canvassed by way of written submissions. The Appellant, by her submissions dated 2nd April, 2025 complained that the lower court failed to appreciate the purport of Section 3(5) of the *Law of Succession Act*, which recognizes women married under systems of law permitting polygamy as wives for succession purposes, even where the husband had previously contracted a subsisting monogamous marriage. All despite the Appellant furnishing proof in the form of the burial program, death and funeral newspaper advert, a chief's letter listing her as a beneficiary, and a letter recognizing her as a widow of the deceased under the TelPosta Pension

Scheme. In addition to prolonged cohabitation with the deceased from 1999 until his death in 2018, resulting in the birth of a child, H.P.K.

5. The Appellant invoked in support the decision made In the Matter of the Estate of Lihasi Bidali alias Charles Lihasi (Deceased) [2019] eKLR, where the court held that although a man who had contracted a previous and subsisting statutory monogamous marriage lacked the capacity to contract another marriage under any system of marriage, any subsequent marriage contracted during such subsistence of the statutory monogamous marriage, could only be recognized upon his death for purposes of succession, by virtue of Section 3(5) of the *Law of Succession Act*. The Appellant therefore submitted that her prolonged cohabitation and recognition as a wife should have been sufficient to establish her status under Section 3(5) of the *Law of Succession Act*.

6. She also faulted the lower court for failing to address the question whether the impugned grant violated Section 58(1)(a) of the *Law of Succession Act*, on account of the fact that one of the beneficiaries, H.P.K was a minor at the time. Hence there was a continuing trust arising and necessitating appointment of more than one administrator. And citing In the Matter of the Estate of Raphael Chessa Oyeyo (Deceased) [2013] eKLR, the Appellant asserted that a grant issued in violation of Section 58(1)(a) of the *Law of Succession Act* was a nullity and liable for revocation.

7. Further, the Appellant takes issue the lower court's finding that there was no material non-disclosure despite the Respondent having failed to disclose that one of the beneficiaries was a minor, and having failed to obtain the Appellant's consent on behalf of the minor, proceeded to present a consent allegedly signed by the minor who lacked the capacity to give consent. Here basing her argument on the provisions of Section 76 (b) of the *Law of Succession Act*, which provides for the revocation or annulment of a grant obtained fraudulently by making of a false statement or by concealment from the court of something material to the case.

8. In highlighting the asserted anomaly that the confirmed grant was not accompanied by a schedule of distribution as required by Section 71(2) of the *Law of Succession Act*, the Appellant contended that the lower court erred in holding that the grant was procedurally issued and confirmed, despite the absence of a schedule of distribution of assets showing the respective identities and shares of all persons beneficially entitled, as required by Section 71(2) of the *Law of Succession Act*. Thus, the grant was procedurally defective. Moreover asserting that no consent to the distribution had been obtained on behalf of H.P.K, the minor.

9. The Appellant concluded by asserting due to the foregoing errors in law and fact on the part of the lower court, the appeal ought to be allowed with costs and the impugned ruling set aside.

10. On her part, the Respondent filed submissions dated 9th April, 2025. She contended that the Appellant cannot be recognized as a wife under the *Law of Succession Act* because at the material times, the deceased was already in a subsisting Christian monogamous marriage to the Respondent, citing in support Section 9 and 11 of the *Marriage Act* providing that a person in a monogamous marriage lacks capacity to contract another marriage, and that any such union is void. Thus, the Appellant's alleged customary marriage to the deceased was null and void ab initio. She relied on Re Estate of Naran Lakhman Ravji (Deceased) [2023] KEHC (2540) and Re Estate of Jackson Nduva Kathula (Deceased) [2018] eKLR, and M.W.G - VS - E.W.K (2010) eKLR.

11. Further the Respondent submitted that the Appellant failed to prove marriage under Section 59 of the *Marriage Act* by way of evidence such as a marriage certificate or entry in an appropriate register. And that the Appellant's assertion of a customary marriage is untenable for lack of capacity on the part of the deceased to contract another marriage whilst in a subsisting Christian monogamous union. Equally relying on Re Estate Of Lihasi Bidali (Deceased) [2019] KEHC 7583 (KLR.

12. In defence of the grant issued in her favour, the Respondent invoked the provisions of Section 66 of the *Law of Succession Act*, in asserting the priority given to the surviving spouse and children of a deceased person. And therefore, contending that as the lawfully wedded wife, she had the right to petition for the grant of letters of administration. Whereas the Appellant, not being a spouse or recognized dependent, lacked equal rights to petition. In this regard calling to her aid the decision in Re Estate of Gamaliel Otieno Onyiego (Deceased) (2018) eKLR.

13. The Respondent further submitted that the grant was procedurally issued and confirmed in compliance with Section 71 of the *Law of Succession Act*, which requires identification of beneficiaries and their shares. Pointing out that the Appellant's child, HPK was included as a beneficiary, and thus there was no concealment of material facts. She contends that the present case had not been brought within the grounds for revocation of grant as spelt out in Re Estate of Hannah Wanjiku Mwangi (Deceased) [2023] KEHC 20044 (KLR, namely where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.

14. In conclusion, she reiterated that the Appellant had failed to prove she was a wife or dependant of the deceased and in the absence of such standing, could not benefit from the estate. Whereas her child is recognized as a beneficiary. The court was urged to dismiss the appeal with costs.

15. The court has perused the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See Kenya Ports Authority v Kusthon (Kenya) Limited (2000) 2EA 212, Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; William Diamonds Ltd v Brown [1970] EA 11 and Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278.

16. The Court of Appeal stated in Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

17. Although in her summons for revocation before the lower court the Appellant invoked Section 76 (b) of the *Law of Succession Act*, in asserting that the impugned grant was fraudulently procured by making of false statements and concealment of something material (viz the existence of the Appellant and her child as wife and child of the deceased both whom had not given consent), as the case evolved, she introduced through submissions further grounds based on Section 76 (a) to allege that the procedure to obtain the grant was defective in that the impugned grant violated Section 58 (1) (a) of the *Law of Succession Act* which requires the appointment of more than one administrator where a continuing trust arises.

18. Further, she introduced the additional ground that the absence of a schedule of distribution of assets showing the respective identities and shares of all persons beneficially entitled, as required by Section 71(2) of the *Law of Succession Act*, and want of proper consent on behalf of the minor H.P.K renders the confirmed grant procedurally defective.

19. Section 76 of the *Law of Succession Act* provides as follows:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

(d) ...; or

(e) ....."

20. Some basic facts relating to the dispute in the lower court were not contested. These include the fact that the Respondent and the deceased contracted a monogamous marriage under the African Christian Marriage and Divorce Act (Repealed) in 1988, had two children (both adults at the time of the petition for grant) and had not divorced by the time of the death of the former; that the deceased died intestate; that the Appellant and the deceased sired the minor H.P.K about 2014 during the subsistence of the first marriage; and that the said minor was a rightful beneficiary of the estate of the deceased by virtue of being his child.

21. In the court's view, this appeal turns on the twin core questions whether the Appellant qualified as a wife or dependant of the deceased for purposes of succession under Section 3(5) of the *Law of Succession Act* hence ranking pari passu with the Respondent under Section 66 of the *Law of Succession Act*; and whether the impugned confirmed grant violated the provisions of Section 58 1(a) and 71(2) of the *Law of Succession Act*.

22. The summons for revocation was canvassed via affidavits and submissions of the respective parties at the lower court. On her part, the Appellant, relied on alleged prolonged cohabitation with the deceased allegedly since 1999 until 2018, her recognition as a spouse in funeral documents such as announcements and program, introductory letters from the chief and from the Telposta pension scheme, and the undisputed fact that she sired a child with the deceased (exhibited as annexures marked FG-2a, FG-2b to FG-5 in her supporting affidavit). The Respondent for her part stridently asserted that the deceased's Christian monogamous marriage to her which subsisted in the material period barred any subsequent marital union. She asserted that the Appellant had been engaged by her family as a house help and subsequently begat H.P.K with the deceased in the course of an adulterous relationship .

23. On the first question, it cannot be gainsaid that the deceased lacked the capacity, during the subsistence of his undisputed monogamous union with the Respondent, to contract another marriage with the Appellant. However, for purposes of succession, spouses who contracted a marriage with a deceased person subsequent to his previous monogamous marriage to another woman, Section 3(5) of the *Law of Succession Act* throws them a life-line. The provision states that:

> "Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless, a wife for the purposes of this Act, and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act".

24. In the case of MNM V DNMK [2017] e KLR the Court of Appeal spelt out the rationale of this provision as follows:

> " This Section was introduced in 1981 by the statute Law (Repeals and Miscellaneous Amendments) Act, No.10 of 1981. The purpose of the amendment was to mitigate against the rigours of decisions such as Ruenji's Estate (supra) and Re Ogola's Estate (supra), which did not recognize as beneficiaries, widows and children born from a union of a man already married under statute, and another woman during the subsistence of the statutory marriage. To the extent that a marriage arising from a presumption of marriage is a marriage that is potentially polygamous, the prior monogamous marriage of the deceased to M would not preclude E from being recognized as a beneficiary of the deceased (see Irene Njeri Macharia v M. Wairimu Njomo and Another C.A. No 139 of o1994, Miriam Njoki Muturi V Bilha Wahito Muturi C.A No 168 of 2009 and Muigai v Muigai [1995 – 1998] 1 E A 206)".

25. So, what was the nature of the union alleged between the deceased and the Appellant? From her material before the lower court, the Appellant did not expressly describe the system of marriage under which her alleged union to the deceased was based. She did not directly assert the existence of a customary marriage, regarding which the Court of Appeal stated in Gituanja v Gituanja)1983) KLR 575 that , "(T)he existence of a customary marriage is a matter of fact to be proved with evidence."

26. It appeared that she was relying on a presumption of marriage based on her alleged prolonged cohabitation with the deceased and the fact of the child HPK born to them in 2014. The Court of Appeal in Mary Wanjiru Githatu v Esther Wanjiru Kiarie [2010] 1 KLR 159 held that:

> " There is a long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on Section 119 of the *Evidence Act*, Cap 80 Laws of Kenya which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of this case."

27. Was cogent evidence of long cohabitation and intention by the deceased and Appellant to live and act together, holding themselves out as husband and wife presented in this case? Black's Law Dictionary 9th Edn, page 296 defines cohabitation as:

> " The fact or state of living together, especially as partners in life usually with the suggestion of sexual relations."

Section 2 of the *Marriage Act* defines the term "cohabit" to mean:

> " to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles marriage."

28. Cohabitation is therefore entails more than a series of intermittent incidents of the coming together of a couple; it is a settled continuous living together that entails the mutual ordering of life and affairs by them so as to resemble a marriage. Hence, the siring of a child between the Appellant and the deceased alone cannot be proof of prolonged cohabitation. The court in MNM V DNMK & 13 Others [2017] e KLR referencing its earlier decision in MWG V EWK [2010] eKLR stated that "the existence or

otherwise of a marriage is a question of fact and likewise, whether a marriage can be presumed is a question of fact."

29. Documents presented to the lower court by the Appellant in proof that she was the deceased's wife, such as the funeral announcement, program, chief's introductory letter and a letter from Telposta Pension Scheme that was not supported by any document executed by the deceased (annexures FG-2a to FG-5G), were all prepared after the death of the deceased herein. These pieces of evidence were disparaged by the Respondent via her replying affidavit and submissions, describing the Respondent as having been engaged as domestic help in 2010 to care for the children of the deceased, and the Respondent who was sick at the time. In reference to the letter from Telposta Pension Scheme, the Respondent accused the Appellant of falsely misrepresenting herself as the deceased's widow. The said letter refers to her introduction as a dependent of the deceased without reference to the source of the information, but despite its purported contents, the Appellant did not tender proof of actual receipt of any dues from the deceased's pension scheme.

30. The court also noted that although the Appellant claimed to have been recognized by the family of the deceased as his wife, she presented no evidence to support that claim, beyond her own depositions. Ordinarily, one would expect a cohabitation of almost 19 years as alleged between the Appellant and deceased, to have left enough material proofs and witnesses particularly in relation to the period when the deceased was alive. Here, not even photographs of the alleged cohabitants together, either at home or at social events, were presented. Thus, in the court's considered view, the Appellant's sparse evidence, at best merely showed that she was involved in some form of romantic relationship with the deceased, resulting in the birth of H.P.K, but fell short of proving her status as a wife. Her invocation of provisions of Section 3(5) and 66 of the *Law of Succession Act* is therefore to no avail. Grounds 1 and 2 of the appeal therefore fail.

31. Regarding the second issue, Section 58(1) (a) of the *Law of succession Act* provides that,

> "(1) where a continuing trust arises—
>
> (a) no grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation."

32. It is undisputed that one of the beneficiaries, H.P.K was a minor at the time of the lodging of the petition for grant in the lower court and is still a minor, having been born in 2014. The law prohibits the issuance of a grant to a sole administrator where, as here, a continuing trust arises, unless the administrator is the Public Trustee or a trust corporation. The lower court's failure to address this ground in its ruling appears to be a material misdirection and or omission.

33. Similarly, for purposes of confirming the grant, the proviso to Section 71(2) of the *Law of Succession Act* states that:

> "Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled, and when confirmed shall specify all such persons and their respective shares."

34. The requirement above is repeated in Rule 40(4) of the Probate and Administration Rules. Moreover, Rule 40(8) requires that written consents by all dependents and persons beneficially entitled be presented to court at the time of making the application to confirm the grant. In the circumstances, the Respondent was obligated in her summons to confirm the grant to disclose the identities and

shares due to each person beneficially entitled and to have procured appropriate consents in writing including a consent on behalf of the minor H.P.K, to confirmation of the grant and the proposed mode of distribution. This she evidently failed to do.

35. That said the assertion by the Appellant that the Respondent had submitted a purported consent by the minor H.P.K is not borne out by a scrutiny of the lower court record. While the minor was listed as such among the children of the deceased, only the Respondent's adult children executed the consent to the petition for grant and for confirmation of grant.

36. In the circumstances, the remaining grounds of appeal have some merit; the lapses above amount to procedural defects in obtaining the grant. In the circumstances, the appeal has partially succeeded with regard to the procedural lapses identified above and the ruling of Makau SPM delivered on 9th December 2022 must be accordingly varied. It is so ordered.

37. What orders ought to be made in the circumstances? The Appellant had sought that consequent to her appeal succeeding, the impugned ruling of the lower court be set aside, and an order made directing that the summons for revocation be heard afresh before a different court. The court has considered the age of the dispute, the fact that one beneficiary (HPK) is a minor and that by her petition the Respondent had indeed disclosed the existence of HPK, clearly indicating that she was a minor. Thus, the Respondent cannot be exclusively blamed for the non-compliance with Section 58(1) of the *Law of Succession Act*. The court issuing the grant ought to have had recourse to Section 58(2) which provides for a remedial step in such circumstances. That statutory remedial path appears more expedient and reasonable in the circumstances of this case, than the orders proposed in the memorandum of appeal, or the revocation of the grant issued on 7th December 2020.

38. As regards the Respondent's non-compliance with Section 71(2) of the *Law of Succession Act* as found above, the court is of the view that the interests of all the persons beneficially entitled, and especially the minor H.P.K, could only be secured and upheld upon proper proceedings to confirm grant being initiated and conducted in accordance with the applicable provisions of the *Law of Succession Act*. The impugned confirmed grant is liable for revocation to pave way for such proceedings.

39. In the interest of justice, and to avoid undue delay, the court will in lieu of the prayers in the memorandum of appeal make the following orders: -

    a. That with regard to the grant issued to her on 7 th December 2020, the Respondent shall within a period of 45 (forty-five) days of this judgment lodge an appropriate application before the lower court (in Ngong SPM's Succession Cause No. 4 of 2020 In the matter of the Estate of Samson Karonga Nabea) , pursuant to Section 58(2) of the *Law of Succession Act*. In default, the said grant shall automatically stand revoked.

    b. That the confirmed grant issued on 20 th January 2022 to the Respondent is hereby revoked, and upon a proper grant being issued by the lower court in accordance with (a) above, the Respondent and co-administrator(s) shall be at liberty to file a fresh summons for confirmation of grant, in compliance with the provisions of Section 71 of the *Law of Succession Act* and the Probate and Administration Rules.

    c. In order to facilitate compliance with the foregoing orders, the Deputy Registrar of this court is directed to ensure the immediate remittance of the lower court file, accompanied by a copy of this judgment to the subordinate court .

    d. The parties to the appeal shall bear their own costs considering the nature of the dispute.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 5 TH DAY OF FEBRUARY 2026.

C. MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Manyonge h/b for Mr. Juma

For the Respondent: N/A

C/A: Lepatei