

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**PROBATE AND ADMINISTRATION APPEAL NO. E010 OF 2022**

**IN THE MATTER OF THE ESTATE OF JOSEPH KAHIGA  
(DECEASED)**

**BERNARD NJUGUNA KAHIGA.....**  
**.....APPELLANT**

**VERSUS**

**EDITH NYAMBURA**  
**KAHIGA.....RESPONDENT**

*(Being an appeal from the judgement of Hon. S.K Nyaga (SRM) delivered on 5<sup>th</sup> September, 2022, at the Chief Magistrate's court at Murang'a in succession cause no. 209 of 2020)*

**JUDGEMENT**

- 1.This appeal arises from the judgement of the lower court, in Murang'a Succession Cause No.209 of 2020 wherein the learned trial magistrate, dismissed the appellant's affidavit of protest dated 9<sup>th</sup> November, 2021.
2. The background to this is that the respondent, *Edith Nyambura Kahiga*, a widow of the deceased and mother of the appellant, petitioned for and was issued with a grant of letters of administration intestate dated 12<sup>th</sup> November, 2020. She then filed summons for confirmation of grant on 1<sup>st</sup> July, 2021, seeking to have the grant issued to her confirmed.
- 3.The respondent in her summons for confirmation of grant, proposed that the entire estate of the deceased be distributed solely to her. However, before the grant could be

confirmed, the appellant filed an affidavit of protest, dated 9<sup>th</sup> November, 2021, protesting the mode of distribution by the respondent. The appellant at paragraph 3 of his affidavit of protest, proposed that the estate of the deceased be distributed as follows:

- (i) Kware Mukuru Kwa Njenga, Plot no. 333/123- be distributed equally between Bernard Njuguna Kahiga, Margaret Wambui Kahiga and Moses Njombai Kahiga;*
- (ii) Kayole site and service plot C6-227- be shared equally between Bernard Njuguna Kahiga, Margaret Wambui Kahiga and Moses Njombai Kahiga;*
- (iii) Nairobi/Block 111/1046- be registered in the name of Margaret Wambui Kahiga and Moses Njombai Kahiga;*
- (iv) Loc.7/Ichagaki/1366- does not form part of the deceased estate;*
- (v) Loc.7/Ichagaki/1367-be registered in the name of Bernard Njuguna Kahiga as the sole proprietor;*
- (vi) Nice and Nice hardware- does not form part of the deceased estate;*
- (vii) Motor vehicle registration no. KCK 739J to be registered in the name of Edith Nyambura Kahiga;*
- (viii) Co-operative Bank, Kayole Branch Account no. 01109313377000- be shared equally between Edith Nyambura Kahiga, Bernard Njuguna Kahiga, Margaret Wambui Kahiga and Moses Njombai Kahiga.*

4. Upon considering the affidavit of protest, the learned trial magistrate found that, pursuant to **section 29 of the Law of Succession Act**, the respondent, being the widow of the deceased, had priority as a beneficiary of the estate and was therefore entitled to inherit the entire estate.

5. Consequently, the learned trial magistrate dismissed the appellant's affidavit of protest and proceeded to confirm the Grant of Letters of Administration Intestate issued on 12th November, 2020.
6. Aggrieved by the said ruling, the appellant proffered the present appeal before this Court vide a Memorandum of Appeal dated 6th September, 2022. In the Memorandum of Appeal, the appellant advanced a total of eight grounds of appeal, in which he faulted the learned trial magistrate for awarding the whole estate to the respondent, whereas she was legally not entitled to such an order; for interpreting **section 29 of the Law of Succession Act**, to mean that the respondent had a priority as a beneficiary, whereas such priority only extends to the administration of the estate but not the assets; for treating Nice and Nice hardware as part of the deceased estate, despite evidence that the appellant was running it and paying rent.
7. The appellant also faulted the learned trial magistrate for disregarding the interest of the children of the deceased and for dismissing the application for confirmation of grant and then allowing it as prayed, for disregarding the mode of distribution proposed by the appellant without giving legally sound reasons.
8. On the above grounds, the appellant urged this court to allow his appeal, set aside the judgement of the lower court and distribute the estate of the deceased as per his affidavit of protest.
9. The appeal was canvassed by way of written submissions. The appellants written submissions dated 15<sup>th</sup> July, 2025 and 3<sup>rd</sup> October, 2025, respectively, were filed on his behalf by his learned counsel J.N Mbutia & Co. Advocates, while the

respondent's submissions dated 18<sup>th</sup> August, 2025 were filed by learned counsel Kinyua Mwaniki & Wainaina Advocates.

10. I have carefully considered the grounds of appeal, the rival written submissions by both parties as well as the judgement by the trial court dated 5<sup>th</sup> September, 2022. I find that the issues commending for determination in this appeal are three-fold:

- i. Who are the beneficiaries of the estate of the deceased?
- ii. Which assets form part of the estate of the deceased?
- iii. How should the estate of the deceased be distributed?

11. On the first issue, it is not disputed that the deceased herein left behind beneficiaries. As per paragraph 4 of the affidavit in support of the petition for letters of administration, the beneficiaries were listed as follows:

- i. Edith Nyambura Kahiga-Widow
- ii. Bernard Njuguna Kahiga-Son
- iii. Margaret Wambui Kahiga-Daughter and
- iv. Moses Chombai Kahiga-Son.

12. The above individuals were duly confirmed as beneficiaries of the deceased's estate in the letter dated 20<sup>th</sup> April, 2020, authored by the Chief of Komarock Location, Embakasi Sub-County, as well as in the letter dated 27<sup>th</sup> March, 2020, from the Chief of Maragua Ridge Location, Maragua Division.

13. It is therefore evident that the deceased died intestate, leaving behind identifiable beneficiaries entitled to inherit his estate, namely his widow and three children, all of whom are now adults.

14. Having identified the beneficiaries to the deceased's estate, the next issue for determination is whether the deceased left behind properties/assets and if so, which of them form part of his estate. As per paragraph 6 of the Affidavit in support of the petition for letters of administration, the assets of the deceased were listed as follows:

- i. Kware-Mukuru kwa Njenga-Plot no.333/123;
- ii. Kayole site and service scheme-plot C6-227;
- iii. Nairobi/ Block 111/1046;
- iv. Loc.7/Ichagaki/1366;
- v. Loc.7/Ichagaki/1367;
- vi. Nice and Nice Hardware-Imara Daima estate;
- vii. Motor vehicle registration no. KCH 739J; and
- viii. Co-operative Bank-Kayole Branch-01109313377000

15. The respondent attached the necessary documents to prove that the following properties were registered in the names of the deceased:

- i. Kware-Mukuru kwa Njenga, plot no. 333/123;
- ii. Kayole site and service scheme, plot no. C6 of 227
- iii. Nairobi/Block 111/1046;
- iv. Loc.7/Ichagaki/1367

16. It was also not disputed that motor vehicle registration no. KCH 739J, and cooperative bank account-Kayole Branch-01109313377000 formed part of the deceased's estate.

17. What is disputed, is whether Loc.7/Ichagaki/1366 and Nice and Nice hardware, formed part of the deceased estate. For Loc.7/Ichagaki/1366, the respondent only presented a caution. However, a caution cannot be evidence that the deceased is the registered owner of the said parcel of land.

18. The appellant in his evidence before the trial court, disputed that land parcel Loc.7/Ichagaki/1366, forms part of the deceased estate. According to the appellant, the said property was gifted to him by his grandfather, that is, the father to the deceased.
19. He stated that he effected a transfer of the said property to his name, after the same was gifted to him. However, no evidence was adduced to prove the appellant's assertions. There was no evidence that the said property was gifted to him by his grandfather, and there was also no evidence that he has since registered the said parcel of land in his name.
20. The respondent on the other hand, stated that the deceased had purchased Loc.7/Ichagaki/1366, from his father, and that the deceased had paid the entire purchase price in full. She stated in her evidence that the reason why the deceased placed a caution in the said parcel of land, was because his father wanted to re-sell the said parcel of land, after having sold the same to him.
21. The respondent however failed to adduce any evidence to back up the above allegation. Furthermore, upon my perusal of the declaration sworn by the deceased on 14<sup>th</sup> of May, 2015, when at paragraph 5 thereof, the deceased stated his reason for the caution to be because his father wanted to dispose of the said parcel of land without the consent of their family, yet (according to the deceased) the family had no other parcel of land other than that specific one. There was no specific mention by the deceased in the statutory declaration that he had purchased that parcel of land from his father or that his reason for placing a caution was to prevent his father from re-selling it.

22. That notwithstanding, and there being no evidence that the deceased purchased land parcel Loc.7/Ichagaki/1366, from his father, or that the same was registered in his name, it cannot be said that the said parcel of land forms part of his estate. I therefore find that this particular parcel, Loc.7/Ichagaki/1366 does not form part of the deceased's estate.
23. As regards Nice and Nice Hardware (Imara Daima Estate), the appellant maintains that the same does not form part of the deceased's estate. In his written submissions, he contends that the business operates from rented premises and that he worked alongside his father in the hardware for a period of nine (9) years.
24. He further submits that he took out various loans to sustain the business and personally paid rent for the premises. On that basis, he argues that the hardware business ought not to be considered part of the deceased's estate.
25. The respondent on the other hand testified before the trial court that the deceased established Nice and Nice Hardware in the year 2009, at a time when the appellant was still in school. She further stated that the appellant only began assisting the deceased in the business in the year 2011, after completing his high school education.
26. It was her evidence that following the demise of the deceased, the appellant took over the management and control of the hardware business and has since threatened the respondent and the other beneficiaries, barring them from accessing or participating in the said business.

27. From the evidence on record, which remains uncontroverted, Nice and Nice Hardware was established by the deceased in the year 2009. It is equally not in dispute that the appellant began working in the said hardware business after completing his high school education and assisted his father therein.

28. What is contested is whether the said hardware forms part of the deceased's estate. The appellant appears to be under the mistaken belief that because the business operates from rented premises, and because he worked alongside his father in the enterprise, it does not constitute part of the deceased's estate.

29. The evidence on record clearly demonstrates that it was the deceased who solely established the hardware business. Although it is unclear whether the business was registered as a sole proprietorship or as a limited liability company, there is no evidence whatsoever to suggest that the deceased and the appellant operated the business as partners.

30. It follows therefore that in the absence of credible evidence of a partnership between the deceased and the appellant and which would have otherwise defined the extent of the appellant's interest in the business, the only available legal deduction is that the same forms part of the deceased's estate. This is because it is not disputed that the deceased established and derived income from the business. I therefore find that the hardware business forms part of the deceased's estate and is therefore subject to distribution among his beneficiaries.

31. From the above analysis, it is clear that the following properties form part of the deceased estate:

- i. Kware-Mukuru kwa Njenga, plot no. 333/123;
- ii. Kayole site and service scheme, plot no. C6 of 227
- iii. Nairobi/Block 111/1046;
- iv. Loc.7/Ichagaki/1367;
- v. Motor vehicle registration no. KCH 739J;
- vi. Co-operative Bank-Kayole Branch-01109313377000;  
and
- vii. Nice and Nice hardware-Imara Daima estate.

32. The next and final issue for determination is the mode of distribution of the deceased's estate. The appellant urges the court to distribute the estate in accordance with his affidavit of protest dated 9th November, 2021. The respondent, on the other hand, proposes that the entire estate be distributed to her absolutely, with the understanding that she would, at an appropriate time, distribute the property to her children.

33. First and foremost, it is not disputed that the deceased herein died intestate and that that he left behind a spouse, being the respondent herein, and three children including the appellant. The appropriate mode of distribution of the estate therefore, would therefore be in accordance to **section 35 of the Law of Succession Act.**

34. **Section 35 (1) of the Law of Succession Act**, provides as follows:

***Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—***  
***(a) the personal and household effects of the deceased absolutely; and***  
***(b) a life interest in the whole residue of the net intestate estate:***

***Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.***

35. From the above provision of the Law of Succession Act, it is apparent that where the deceased dies leaving behind a spouse and a child or children, the spouse shall not only be entitled to the personal and household effects of the deceased, but also to a life interest in the whole residue of the net intestate estate.

36. The court in **Tau Katungi v Margrethe Thorning Katungi & another [2014] KEHC 3226 (KLR)**, while elaborating on the effects of **Section 35 (1) of the Law of Succession Act**, stated as follows:

***“Life interest” is not defined in the Law of Succession Act. Black’s Law Dictionary, ninth edition, West, 2009, defines it as “an interest in real or personal property measured by the duration of the holder’s or another person’s life.” In the context of Section 35 it is an interest held by the surviving spouse during their life “in the whole of the residue of the net interest estate.” Its effect is that the surviving spouse first enjoys rights over the property and at his or her death the property passes to other persons. In the context of Section 35, the widow is entitled to enjoy rights over the residue of the net intestate estate, that is after taking away the chattels and settlement of liabilities, during her life time with the property passing to the children upon her demise or remarriage of she be a widow.***

***The effect of Section 35(1) is that the children of the deceased are not entitled to access the net intestate***

**estate so long as there is a surviving spouse. The children's right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income, she would be the person entitled exclusively to the income so generated. The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance. The other aspect is that life interest ties up with the concept of matrimonial property: the said property would in most part be property acquired during marriage and with the contribution of the surviving spouse. Direct devolution of such property to the children would deny the surviving spouse of enjoyment of their own property. Life interest confers a limited right to the surviving spouse over the intestate estate. He or she does not enjoy absolute ownership over the property. They cannot deal with as if it was their own. By virtue of Section 37 of the Act, a surviving spouse cannot during life interest dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court. This is meant to safeguard**

**the interest of the children who are the ultimate beneficiaries of the property the subject of life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children.**

**At life interest there is a convergence of the interests of the surviving spouse and those of the children. The device seeks to secure the interests of both. Where the deceased therefore is survived by both a spouse and children, the net intestate estate will not pass absolutely to either of the two categories of survivors during the life time of either. The holder of the life interest in this case is still alive, and has not remarried, she is therefore still entitled to the property at this time and the same cannot be conveyed to the children. Conversely, all the children of the deceased are still alive, consequently the widow cannot have the property absolutely to herself, but she is entitled to whatever income that derives from it."(emphasis mine)**

37. The above case law buttresses the proviso of section 35 **of the Law of Succession Act** of that where a deceased is survived by a spouse and children, the net intestate estate of the deceased, cannot devolve absolutely upon either the spouse or the children during the lifetime of the other. The same position is grounded in the principle that a surviving spouse, who, in this case, has not remarried, is entitled to a life interest in the estate. Such life interest entitles the spouse to the use and enjoyment of the properties of the deceased, including any income derived therefrom, for her maintenance and sustenance during her lifetime.

38. It restates the position that where the deceased is survived by children, even if they are adults, the estate cannot vest absolutely in the surviving spouse, as the children retain a vested beneficial interest in the estate, subject only to the spouse's life interest.
39. Accordingly, the properties forming part of the deceased's estate cannot be conveyed to the respondent absolutely. It is my finding that the learned trial magistrate erred in declaring the respondent as the sole beneficiary of the deceased estate and transmitting all his properties absolutely to the respondent, without stating that it is subject to life interest or without stating that the widow holds the said properties in trust for the children, whereas it is evident that the deceased left behind children, who are also his beneficiaries.
40. I am persuaded by the sentiments of the court in, **re Estate of Ngaruhiya Kamau (Deceased) [2025] KEHC 4303 (KLR)** where the court stated as follows: ***“Even if it is acknowledged that the widow is entitled to the life interest as recognized under Section 35, my view is that it is still advisable to always include, at the time of confirming a Grant, the respective shares that would eventually devolve to each child upon their mother's death or remarriage. Another option is to state that the mother will hold the properties in trust for the respective children and proceed to expressly mention the respective shares so held in trust. Leaving the issue of shares unaddressed makes it quite difficult for the Court to later on identify and isolate the individual children's apportionments when the Certificate of Confirmation, as herein, is silent on what such shares should be.***

***The Applicant's act of returning to Court this late with the nature of Application now brought herein means that, if granted, the Court may now have to re-open the entire Succession Cause and may even have to conduct a viva voce trial since all parties would need to be given a hearing before the Court determines the apportionments. This, in my view, cannot have been the intention of the drafters of Section 35 of the Laws of Succession Act."***

41. Based on the foregoing, ***I hereby issue the following orders:***

- i. ***The entire judgement of the lower court dated 5<sup>th</sup> September, 2022, and the certificate of confirmed grant ensuing from the said judgment is hereby set aside.***
- ii. ***All the assets of the deceased stated at paragraph 31 herein above shall be registered in favour of his widow Edith Nyambura Kahiga, to hold in trust for herself and the deceased's children, namely Bernard Njuguna Kahiga, Margaret Wambui Kahiga and Moses Chombai Kahiga in equal shares, and who shall also be named in the certificate of confirmation of grant.***
- iii. ***To avoid future conflict, it shall also be expressly mentioned in the Certificate of Confirmation of Grant that the deceased's children shall inherit equal shares of the deceased estate, upon the demise or remarriage of the deceased's widow, Edith Nyambura Kahiga.***

- iv. ***This being a dispute amongst family members, there shall be no orders as to costs.***

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF MARCH, 2026.**

**HON. T. W. Ouya  
JUDGE**

**For Appellant.....Ndonga H/B for Mr. Mbuthia  
For Respondent.....Ngetich H/B for Mwaniki  
COURT ASSISTANT.....Brian**

ORIGINAL