

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

FAMILY APPEAL NO. E007 OF 2025

IN THE MATTER OF THE ESTATE OF ALEXANDER CHEGE

NJUGUNA alias ALEXANDA CHEGE NJUGUNA (DECEASED)

DOMINIC MWAURA CHEGE.

.....**APPELLANT**

VERSUS

ANNCLAIRE WANJIKU NJUGUNA.....

.....**RESPONDENT**

(Being an Appeal from the Ruling of Hon. M. L. Nabibya (SPM) delivered on 7th May 2025 in Thika CM Succession Cause No. 818 of 2013)

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Thika Senior Principal Magistrate in CM Succession Cause No. 818 of 2013 whereby the court allowed the protest dated 1st July 2024 and found that Agnes Mwhaki Macharia, listed as a beneficiary was not the wife of one Lazarus Njuguna Chege, a son of the deceased herein.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 16 grounds summarized as follows:-

- a) The learned trial magistrate erred in fact and law by finding that Agnes Mwihaki was not a wife to the late Lazarus Njuguna despite overwhelming evidence.
- b) The learned trial magistrate erred in fact and in law by disinheriting the children of Agnes Mwihaki and Lazarus Njuguna despite no evidence being tendered challenging the paternity of the children and despite them not being allowed a chance to be heard.
- c) The learned trial magistrate erred in fact and in law by reaching a determination that no traditional wedding was carried out between Agnes Mwihaki and the late Lazarus Njuguna and no 'Mwati na Harika' was given as per Kikuyu Customs despite all witnesses for the petitioner confirming the same was done.
- d) The learned trial magistrate erred in law and in fact by totally ignoring that the late Lazarus Njuguna had written down his wishes in a will dated 19th March 2015.
- e) The learned trial magistrate erred in law and in fact and misdirected herself by dealing with issues of the estate of Lazarus Njuguna yet no petition for administration of the Estate had been commenced despite many applications by counsel for the petitioner.

3. Directions were issued that parties put in written submissions and the record shows that the appellant complied but the respondent failed to do so within the period given by the court for compliance.

Appellant's Submissions

4. The appellant submits that the late Alexander Njuguna passed away and after his demise, one of his sons, the late Lazarus Njuguna who had been appointed as the administrator of the estate also passed away on 9th April 2015. The late Lazarus Njuguna left behind one child from a previous relationship and nine children with his wife, Agnes Mwhaki. The appellant submits that their three witnesses gave uncontroverted evidence that the late Lazarus Njuguna and Agnes met in 1986 and began living together and they officially got married in the year 2000. The appellant further submits that they presented dowry of Kshs. 20,000/- and further the burial permit listed Agnes Mwhaki as the next of kin, the eulogy was not contested, the RMS funeral program and other documents which clearly showed that Agnes Mwhaki was a wife. The appellant submits that the late Lazarus Njuguna left a will which only lacked executors but left everything to his wife Agnes Mwhaki. The appellant argues that medical documents show that Agnes Mwhaki was the one who took care of the deceased when he was ill. There were photos produced of the late Lazarus with his wife Agnes

and their children yet no evidence was presented to challenge the children's paternity.

5. The appellant relies on the cases of **Gituanja vs Gituanja [1983] KLR 575** and **Re Estate of Dr. Quintus Ekessa (Deceased) (Succession Cause E011 of 2020) [2025] KEHC 274 (KLR) (24 January 2025) (Ruling)** and submits that relevant Kikuyu customs relating to marriage were fulfilled as they presented Kshs. 20,000/- as "mwati na harika" which signifies dowry and marriage. Relying on the case of **Hortensia Wanjiku Yawe vs the Public Trustees Civil Appeal 13 of 1976**, the appellant submits that Agnes Mwihaki proved her marriage to the late Lazarus and the respondent did not prove that her mother was married to Lazarus as she did not live with him. Further the respondent lived in Nyeri with her grandparents and was not in a position to know the marital status of the deceased.
6. The appellant relies on the case of **Mary Nyambura Kangara vs Paul Ogari Mayaka [2023] KESC 2 (KLR)** and submits that the issue of cohabitation was unchallenged as all the witnesses confirmed that Lazarus and Agnes cohabited since 1986.
7. The appellant submits that the respondent alleged without presenting any evidence save for a eulogy that Agnes was married to John Macharia Kariuki. Further, the respondent did not present any evidence to show that Agnes's

children were not sired by Lazarus and the only reason the lower court disinherited Agnes's children was based on an unverified eulogy not presented by the maker and whose origin is unknown. Relying on **Section 29 of the Law of Succession Act** and the **Matter of the Estate of Peter**

Muraya Chege alias Muraya Chege (2019), the appellant argued that the children of Agnes and Lazarus were dependants and for that reason, ought to be fully considered as beneficiaries.

8. The appellant relies on the case of **Re Estate of Tuaruchiu Marete (Deceased) [2019] eKLR** and submits that the lower court had no jurisdiction to determine the sub estate of Lazarus yet the succession proceedings of the estate of the deceased herein had never commenced. The appellant argues that the issues herein can only be conclusively determined in a separate succession cause.

Issue for determination

9. The main issue for determination is whether the appeal has merit.

The Law

10. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

“.....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 into account of particular circumstances or probabilities materially to estimate the evidence.”

11. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of 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.

12. Referring to the above cases, it is evident that the appropriate standard of review to be established can be stated in three complementary principles:-

- a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit

13. The record shows that the deceased herein died on 28th April 1998, leaving behind eleven children and one of his sons, Lazarus Njuguna Chege petitioned for letters of administration intestate on 30th December 2013. The court issued the letters of administration intestate to Lazarus on 25th March 2014. Lazarus Njuguna later filed Summons for Confirmation of Grant on 20th January 2015 but he passed away on 6th April 2015 before the grant was confirmed. The appellant herein filed summons to substitute the late Lazarus while Agnes Mwhaki Macharia applied to substitute Lazarus as the administrator based on the ground that she was a

beneficiary in her capacity as his daughter-in-law. The said application was allowed and the appellant was substituted as the administrator in place of the late Lazarus Njuguna Chege. The appellant then filed Summons for Confirmation of grant and proposed that Lazarus's share of the estate be distributed to Agnes Mwihaki Macharia and her nine children as well as the respondent. The respondent in opposition filed a protest which is the subject of this appeal. Thus, from the chronology of events, the lower court had the jurisdiction to deal with Lazarus's share of his father's estate as there was contention as to who were his rightful beneficiaries.

14. The appellant argues that Agnes Mwihaki was married to the son of the deceased, the late Lazarus and together they had nine children. It is trite law that he who alleges must prove. The burden of proof lies upon the party who asserts the existence of a fact or set of facts. **Section 107 of the Evidence Act** provides:-

Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exists. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

15. In **Re Estate of Joseph Irungu Gichiri (Deceased) [2020] eKLR**, the Court held that for a party to prove the existence of a valid Kikuyu marriage one had to establish the following:

The essentials of a Kikuyu marriage are described in Eugene Cotran's Case Book on Kenya Customary Law at page 30 to be:-

Capacity: the parties must have capacity to marry and also to marry each other.

a) Consent: the parties to the marriage and their respective families must consent.

b) Ngurario: no marriage is valid under Kikuyu customary law unless the ngurario ram is slaughtered.

c) Ruracio: there can be no valid marriage under Kikuyu customary law unless a part of the ruracio (dowry) has been paid.

d) Commencement of cohabitation.

16. Further in **Re Estate Benson Mathenge Muchemi (Deceased) [2020] eKLR**, the court held:-

Customary law is certainly not static and is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2020 exactly the same way they were conducted a long time ago. Critical elements of Kikuyu customary marriage were not mentioned by the objector, either in passing or corroborated by evidence adduced to

support of her case. If the essential customary rites and ceremonies were held then there has to be evidence to corroborate the conduct of such ceremony.

17. The appellant claims that the late Lazarus married Agnes in 1986 and that he paid dowry of Kshs. 20,000/- to her parents' home. Agnes Mwhaki (DW2) testified that she got married to Lazarus in 1986 and they were blessed with eight children with the first child being born in 1987-1989. The witness statements by Agnes Mwhaki state that she met Lazarus in the year 1986 and they got married in the year 2000. She further stated that on 23rd September 2000, a traditional ceremony was done and was attended by the two families whereas initial dowry of Kshs. 20,000/- was gifted to her parents known in Kikuyu as "mwati na harika" which symbolizes marriage in Kikuyu customs. The appellant in his witness statement stated that in the late 70s and 80s the late Lazarus Njuguna was living with Mary Nduta, the respondent's mother. He further indicated that Mary Nduta died, and Lazarus met Agnes and started living with her as a wife. Sometime in 2000, Lazarus told the appellant that he wanted to make things official with the said Agnes. What followed was that a traditional Kikuyu wedding ceremony was conducted on 23rd September 2000 where Kshs.

20,000/- was paid as dowry to Agnes's parents. The witness statement by Raphael Mungai stated that Lazarus

introduced him to Agnes Mwihaki and their four children in the year 1998.

18. On scrutiny of the evidence, it is noted that there existed inconsistencies in the evidence of the witnesses. DW1 and DW2 testified that Lazarus and Agnes got married in the year 1986 which differs from their witness statements. The two witnesses further testified that Agnes Mwihaki and Lazarus married after the respondent's mother died. DW2 further testified that she married Lazarus in the year 1986 and further stated that she married him after two years of their meeting. The respondent testified that her mother died in the year 2001. It is worth noting that the three witnesses did not give details of the traditional Kikuyu wedding ceremony. No mention was given about dowry negotiations in preceding the ceremony. The alleged date and year of the ceremony given by the respondent contradicted that given by DW1 and DW2. The said witnesses never gave the particulars of the persons who accompanied the deceased to pay dowry. Traditionally, dowry negotiations and payments are normally done openly and involve two families of the couple. These are normally very important events in most African communities where relatives and friends from both sides will be present as well. The late Lazarus had ten siblings, and only two spoke of the events of the day. However, the respondent's witnesses testified that the ceremony was attended by relatives from both sides. The sister to the deceased, PW2 testified that Agnes Mwihaki was married to one John Macharia in 1986

according to the eulogy of the said John produced in evidence the respondent was never married to her brother Lazarus. That the family of Lazarus did not go to the home of Agnes parents and that no dowry was paid. Agnes who was PW2 said that she took care of the respondent until she entered Class 4 before she went to Meru to join Class 5. It was her further evidence that Lazarus and the respondent's mother were married customarily as dowry had been paid. He who alleges must prove and the appellant has failed to prove that there existed any customary marriage between Lazarus and Agnes Mwihaki. Even if the court were to assume that there existed a presumption of marriage, it is my view that the appellant did not prove such relationship to have existed. The law on presumption of marriage is settled in the case of **Hortensia Wanjiku Yawe vs Public Trustee Court of Appeal Civil Appeal No. 13 of 1976** where Mustafa JJA stated:-

By general repute and in fact the parties had cohabited as man and wife for 9 years before the deceased died....and during that time, the appellant bore him 4 children....long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant, only cogent evidence to the contrary can rebut such a presumption.

19. The appellant did not show that by general repute that Agnes and Lazarus were husband and wife. It is noted that this line of argument has been advanced at the

appellate stage following the ruling of the lower court which found that the contention of the appellant was an afterthought.

20. The appellant has further argued that since Agnes Mwihaki had all of Lazarus' documents in her possession after he was sick, and that photographs of Lazarus and herself and their children were produced in evidence, that this evidence was sufficient evidence of marriage. It is trite law that photographs do not in any way prove marriage or dependency. It was held in the cases of **Lucy Wanjiru Mwangi vs Daniel Njuguna Njihia & Florence Njeri Mwaura (2016) eKLR** and **Re Estate of James Muiruri Waweru (2006) eKLR** it was held that photographs are not conclusive proof of any marital relationship.

21. Having established that Agnes was not married to the deceased, the court is tasked to evaluate and determine whether the children of Agnes were children of the deceased and therefore beneficiaries of the estate.

22. The first point of instruction is **Section 29 of the Law of Succession Act** which provides:-

For the purposes of this part dependent means-

a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

b) Such of the deceased's parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters

and half-brothers and half sisters, as were being maintained by the deceased immediately prior to his death; and

c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

23. **Section 3(2) of the Law of Succession Act** describes a child to:-

Include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, any child whom he expressly recognized or in fact accepted as a child of his own or of whom he has voluntarily assumed permanent responsibility.

24. Thus the appellant was required to demonstrate before the court below that the nine children who were not the biological children of the deceased were dependants

of the deceased during his lifetime and thus entitled to shares of his estate.

25. The standard and burden of proof provided by the Evidence Act ought to be discharged; he who alleges must prove. **Section 107 of the Evidence Act** places the burden of proof on the party that alleges. In **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others (2014) eKLR** the Supreme Court held inter alia:

The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.

26. It is thus incumbent that the appellant had an obligation to prove on a balance of probabilities that the children of Agnes were either the biological children or dependants of the late Lazarus. See **Re Estate of George Musau Matheka (Deceased) [2010] eKLR** where the court held that on proving dependency, the onus lies on

the claimant to prove paternity of the deceased. The appellant's evidence was that Agnes and Lazarus had nine children without adducing evidence to proof his claim. The two witnesses DW2 and DW3 also reiterated that Lazarus and Agnes had children together. It would have been expected that evidence, for example birth certificates would have been produced in evidence. Such documents would have supported the allegations that the children were sired by the late Lazarus. The appellant also failed to prove dependency of the children to the deceased as required under Section 29 of the Succession Act. It noted that none of the children who were said to be adults at the time of hearing were called as witnesses to tell the court whether the deceased had adopted them and that he provided for them in any way during his lifetime.

27. It is my finding that the magistrate's ruling that the children of Agnes were not children of Lazarus for the purposes of the Law of Succession Act and that were not beneficiaries to his estate or the estate of the deceased was supported by cogent evidence. In my considered view, the magistrate did not err in her finding.

28. The appellant raised the issue of want of jurisdiction on part of the magistrate in that she purported to determine issues of the estate of Lazarus while this cause was in respect of the deceased herein, Alexander Chege Njuguna. The record shows that after the death of Lazarus Njuguna who was the initial administrator, Dominic Mwaura Chege was substituted as the administrator. In his

application to confirm the grant, the appellant brought in Agnes Mwihaki as a beneficiary so as to inherit the share of Lazarus the son of the deceased who had passed on in her capacity as the wife. The court below had to determine the issue of whether Agnes Mwihaki was a beneficiary in the estate of the deceased herein. This was after a protest was filed by the respondent herein who is a daughter of the deceased. The magistrate had to determine the issue of whether Agnes Mwihaki could substitute Lazarus in order to inherit the share of Lazarus as his widow in the estate of Alexander Chege Njuguna. For that reason, the court did not deal with the estate of Lazarus Njuguna but with the estate of the deceased herein. The court had to determine the protest as to whether Agnes was a legal wife to Lazarus with a view of her taking the share of Lazarus in this cause. It is important to note that it is the appellant

who introduced the issue of Agnes in this cause. As such, the issue had to be determined by the court.

29. I am of the considered view that the court below did not decide any issues of the estate of Lazarus. As such, the court had jurisdiction to deal with the issue of Lazarus' share.

30. In view of the foregoing, I find that the appeal lacks merit and is hereby dismissed.

31. This being a family matter, there will be no order as to costs.
32. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 13TH DAY OF MARCH 2026.***

**F. MUCHEMI
JUDGE**