

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**HIGH COURT FAMILY APPEAL NO. E003 OF 2023**

DAVID MUREITHI MBATIA.....

.....1<sup>ST</sup> APPELLANT

ANN WAITHERA MBATIA.....

2<sup>ND</sup> APPELLANT

VERSUS

ELISIBA

NJOKI

MBURU.....RESPOND

ENT

*(Being an appeal against the decision of Hon. E. Kelly  
(PM) delivered on 23<sup>rd</sup> May 2023 vide Naivasha Chief  
Magistrate's Succession Cause No. 130 of 2017)*

**JUDGMENT**

1. The deceased Peter Mbatia Mureithi died intestate on 15<sup>th</sup> December 2012 and the appellants filed a petition of Letters of Administration Intestate on 21<sup>st</sup> July 2017 and letters issued on 3<sup>rd</sup> October 2017.
2. Subsequently, the appellants filed summons for confirmation of grant dated 13<sup>th</sup> April 2018 and a certificate of confirmation of grant was issued on 26<sup>th</sup> July 2018.
3. However, the respondent filed summons for revocation of grant application dated 8<sup>th</sup> March 2022 seeking for the following orders:
  - a) *Spent*
  - b) *Spent*
  - c) *Spent*
  - d) *That the grant of letters of administration intestate issued to David Mureithi Mbatia and*

*Ann Waithera Mbatia on 3<sup>rd</sup> October, 2017 and confirmed on 26<sup>th</sup> July, 2018 be revoked.*

*e) That the costs of this application be provided for.*

4. The application was based on the grounds that: -

*a) The grant was obtained fraudulently by the making of a false statement.*

*b) The grant was obtained by means of an untrue allegation of fact essential to the point of law to justify the grant.*

*c) The petitioners left out another beneficiary of the estate.*

*d) It is prudent and just that the orders sought herein be granted.*

*e) No party will be prejudiced if the orders sought herein are granted.*

*f) It is in the best interest of justice that this application should be allowed.*

5. The application was supported by the respondent's affidavit sworn on the 8<sup>th</sup> March 2022. She averred that she was married to the late Isaac Mwaura Mbatia, the deceased's son but they were not blessed with any children. That before the deceased died he distributed his land to all his children being, David Mureithi Mbatia, the late Isaac Maura Mbatia and Joseph Njoroge Mbatia.
6. That her husband Isaac Mwaura Mbatia fell ill and passed away on 10<sup>th</sup> December 2013 while undergoing treatment at AIC Kijabe Hospital. Thereafter, the 1<sup>st</sup> appellant, 1<sup>st</sup> appellant's wife, and the 1<sup>st</sup> appellant's mother, chased her from her matrimonial home and demanded the keys to their house.
7. That while admitted at Kijabe hospital, the appellants visited her and demanded for her late husband's

death certificate which she gave them. That after being discharged from hospital she did not return home owing to previous fights with her in-laws.

8. Further, she reported the issue of the death certificate to the Area Chief who summoned the 1<sup>st</sup> appellant's mother who told the Area Chief that she had destroyed the death certificate.
9. The respondent averred that the appellants commenced succession proceedings without her consent and failed to disclose that she was a beneficiary of her late husband's estate. As a result, a grant of letters of administration issued on 3<sup>rd</sup> October 2017 and confirmed on 26<sup>th</sup> July 2018 is irregular.
10. That she is apprehensive that the appellants will proceed to sub-divide or dispose of the estate of her deceased to her detriment and seek that the court issue the orders sought.

11. However, the 1<sup>st</sup> appellant opposed the application vide a replying affidavit sworn on 30<sup>th</sup> June 2022 where he averred that the deceased's son. That his brother, Isaac Mwaura Mbatia married the respondent, on 1<sup>st</sup> September 2001 later died on 10<sup>th</sup> December 2013 before the present succession cause had been filed.

12. That upon his demise the respondent immediately left the house she had been given by the 1<sup>st</sup> appellant's mother and by mid-2014 she had completely left the homestead without being forced and/or threatened by any person.

13. The 1<sup>st</sup> appellant further averred that the respondent got married to their neighbour Daniel Kamau Chege and Chege's father Simon Chege Kamau, visited the mother and confirmed the same. That, the mother demanded that either the respondent return to the

house or alternatively hand over the death certificate of the late Isaac Mwaura Mbatia and Simon Chege Kamau handed over the aforementioned death certificate to the mother.

14. The 1<sup>st</sup> appellant contended that when the respondent remarried, Chege's brothers, Peter Kimani Chege and Stephen Mboro Chege, assisted the respondent to carry her personal items from their homestead and then the respondent resigned from her job at Ubuntu Hotel in Maai Mahiu which his wife had helped her to secure.

15. That the respondent and Daniel Kamau Chege, have been blessed with three (3) children and are both residing at Ndabibi area, Naivasha where Daniel Kamau Chege works.

16. The 1<sup>st</sup> appellant argued that at the time the succession cause was filed on 13<sup>th</sup> April 2018, the

respondent had already remarried and had children with Daniel Kamau Chege and was therefore not entitled and/or considered as a beneficiary of the deceased's estate.

17. Moreover, that after the deceased's death all his properties were transferred to his two wives, Ruth Wanjiru Mbatia and Ann Waithera Mbatia save for commercial plot No. 161 at Maai Mahiu Trading Centre which was allocated to him in accordance with the deceased's wishes. Furthermore, all the title deeds had already been transferred to the deceased's wives as per the certificate of confirmation of grant.

18. The 1<sup>st</sup> appellant urged that the grant of representation was granted to the administrators without fraud or concealment of material facts or untrue allegations that will require the court to revoke and/or annul the grant.

19. However, the respondent filed a further affidavit sworn on 1<sup>st</sup> November 2022 in support of the summons of revocation. She averred that she was living with her deceased's husband, Isaac Mwaura Mbatia in their matrimonial home in L.R. No. Kijabe/Kijabe Block 1/1936 for thirteen (13) years and that her deceased husband was supposed to have a share in the said portion of land.

20. The respondent denied that she had remarried as alleged and averred that she was omitted from the succession cause as a beneficiary on grounds that she was a widow and she did not have a child. That she could not object to the succession cause as her late husband's family had confiscated his death certificate. Furthermore, the 1<sup>st</sup> appellant threatened her against going back to the matrimonial property.

21. In further response, the 1<sup>st</sup> appellant filed a replying affidavit sworn on 7<sup>th</sup> November 2022, where he reiterated the averments in his replying affidavit sworn on 30<sup>th</sup> June 2022. That by remarrying Daniel Kamau Chege the respondent had cut off any bond connecting her to his family and was therefore not a wife nor a beneficiary at the time of filing the succession cause. The 1<sup>st</sup> appellant further averred that at the time of his demise, his brother Isaac Mwaura Mbatia had no personal property nor given any property by the deceased.

22. The 2<sup>nd</sup> appellant Ann Waithera Mbatia filed a replying affidavit sworn on 7<sup>th</sup> November 2022, where she joined issues with the averments of the 1<sup>st</sup> appellant. The 2<sup>nd</sup> appellant urged that the grant was lawfully obtained and that the application for revocation is based on falsehood and should be disallowed.

23. The matter proceeded to full hearing. The respondent's case was supported by her evidence where she reiterated the averments in her affidavits. She testified that deceased gave the 2<sup>nd</sup> appellant three (3) acres and two (2) plots from Land No. 8017 while Land No. 1936 and Plot No. 161 was divided among his sons; the late Isaac, 1<sup>st</sup> appellant and Joseph. That, she and her deceased husband developed their portion of land and built three (3) house on it.

24. That after her husband fell sick and eventually died on 10<sup>th</sup> December, 2013, difference arose between her and the large family on where he was to be buried and eventually it was agreed that her husband be buried on the property he was given by his deceased father.

25. The respondent further testified that the 1<sup>st</sup> appellant took the houses she had built with her husband and in January 2014 he started to cultivate of her entire plot. She admitted that she has gotten three (3) children with Daniel Kamau whom she described as boyfriend as he has never commenced the process of marriage. She further denied that she was living with Daniel Kamau and stated that she lives alone.

26. The appellants' case was supported by the evidence of the 1<sup>st</sup> appellant who adopted his affidavit dated 7<sup>th</sup> November 2022 as his evidence in chief. He stated that the late Isaac had been given a house by their mother Ruth Wanjiku in the middle of Kijabe/Kijabe Block 1/1935 and Kijabe/Kijabe Block 1/1936 and denied that the respondent had built rental houses on Kijabe/Kijabe Block 1/1936 measures five (5) acres and neither had it been given to Isaac. He further

denied that the late Isaac was buried on Kijabe/Kijabe 1/1936 but said he was buried on Kijabe/Kijabe Block 1/1935.

27. Further that two village elders, Ben Mwanzia and William Kahuno as well as the Area Chief are aware that the respondent has remarried.

28. The appellants' case was further supported by the evidence of the 2<sup>nd</sup> appellant Ann Waithera Mbatia who adopted her affidavit as her evidence in chief. She reiterated that at the time of her husband Peter Mbatia Mureithi's death he had not divided any of his property to any beneficiary and that the deceased Isaac was living in a house given to him by his mother.

29. The appellants' case was also supported by the evidence of (DW3) Ruth Wanjiku the deceased's wife. She confirmed that the respondent was married to her

son, the late Isaac, but they did not have any children. That he did not have any property and that she gave them the house they lived in. That after the death of Isaac, the respondent relocated and that she did not chase her away. That she requested for the Identity card and death certificate of Isaac after the respondent remarried.

30. The Sub-Chief Ndabibi Location (DW4) Asef Ndungu Kariuki, produced a letter dated 26<sup>th</sup> October 2022 (Dexh 9) and averred that he knew the respondent and her husband Daniel Chege Kamau for over eight (8) years as they lived in Ndabibi Location and have three (3) children.

31. At the close of the hearing parties filed written submission. By a ruling dated 23<sup>rd</sup> May 2023, the trial court found that the evidence tendered by the appellants did not reach the threshold to establish a

presumption of marriage between the respondent and Daniel Kamau Chege. The trial court further held that, the respondent was not claiming property left behind by her late husband Isaac Mwaura Mbatia but the estate of her father in law Peter Mbatia Mureithi (deceased).

32. Furthermore, the trial court held that the respondent being a daughter in law of the deceased Peter Mbatia Mureithi is a beneficiary and is entitled to challenge the distribution of the estate where she is excluded or inadequately provided for. The trial court found that the application was merited and revoked the grant of letters of administration intestate issued to the appellants on 3<sup>rd</sup> October 2017, and confirmed grant issued on 26<sup>th</sup> July 2018.

33. The appellants are aggrieved by the decision of the trial court and appeal against in vide a memorandum

of appeal dated 22<sup>nd</sup> June 2023 on the following grounds: -

- a) *That the Learned Trial Magistrate erred in law and in fact in finding that the respondent who is a daughter in law to the deceased Peter Mbatia Mureithi ranks equally with the grandchildren of the deceased in consanguinity and affinity.*
- b) *That the Learned Trial Magistrate erred in law and in fact in finding that the respondent was not married to Daniel Kamau Chege even when they have got three (3) children together and has named the first of their children to correspond with the names of the mother and father of the said David Kamau Chege in accordance with Kikuyu Customary Law.*
- c) *That the Learned Trial Magistrate erred in law and fact in believing that it was a coincidence*

*that the children of the respondent were given the same names that correspond with the mother and father of Daniel Kamau Chege.*

*d) That the Learned Trial Magistrate erred in law and fact in believing the respondent's averments that Daniel Kamau Chege was a boyfriend to the respondent when there was evidence pointing to the contrary.*

*e) That Learned Trial Magistrate erred in law and fact in failing to find that there was a presumption of customary law marriage between the respondent and one Daniel Kamau Chege.*

*f) That the Learned Trial Magistrate erred in law and fact in holding that the provisions of section 36 of the Law of Succession Act were applicable*

*to the respondent in respect of the Estate of Peter Mbatia Mureithi.*

*g) That the Learned Trial Magistrate erred in law and in fact in finding that the grant obtained by the appellants was obtained fraudulently by making a false statement or by concealment from the Court of something material to the case.*

*h) That the Learned Trial Magistrate erred in law and in fact in implying or presuming that the respondent was a widow of the Deceased Peter Mureithi Mbatia and proceeding to find that section 36 of the Law of Succession was applicable to the respondent.*

*i) That the Learned Trial Magistrate erred in law and facts in completely disregarding the*

*appellants case and upholding the respondent's case in crucial aspects regarding the case.*

*j) That the Learned Trial Magistrate erred in law and facts in not finding that there was sufficient evidence to presume marriage between the respondent and Daniel Kamau Chege.*

*k) That the learned Magistrate erred in law and fact in findings that the appellants had not proved their claim.*

34. By reason of the aforesaid, the appellants pray for orders that: -

*a) This appeal be allowed.*

*b) The judgment/ ruling of Hon. Eunice Kelly (PM) delivered in court on 23<sup>rd</sup> May, 2023 be set aside in its entirety and the appellants objection as set out in their replying affidavits objecting to the respondent's application be allowed.*

*c) The appellants be granted costs of this appeal and the costs of the proceedings in the lower court.*

35. The respondent opposed the appeal via a reply to appeal dated 15<sup>th</sup> November 2023 on grounds that: -

*a) The respondent denies that the learned Magistrate erred in law in facts and findings and reiterates that the judgment delivered was within the law.*

*b) The respondent states that the appeal lacks merits and is a deliberate attempt of the appellants to disinherit her.*

*c) The issue of getting children after the demise of my late husband cannot be a ground to disinherit me as the same is discriminatory in the basis of gender and the Constitution spells*

*out on equality of all persons and freedom from discrimination.*

*d) That as pointed out during judgment whereas such in this matter "marriage must be distinguished from sexual relationship that results into siring children. It's not the duty of the court to presume marriage which was not proved.*

*e) There is no reason why a widow's interest should determine upon her remarriage while that of a widower would apparently survive upon his remarriage as observed by the judgment of the honourable Magistrate. Article 27 (I) of Constitution 2010 provides inter alia that every person is equal before the law and has right to equal protection and benefit of law.*

f) *The respondent retaliates that section 36 of the Law of Succession Act cap 160 is applicable is appropriate in this case. The same provides.*

*“Where intestate has left one surviving spouse but no child or children*

*(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to— (a) the personal and household effects of the deceased absolutely; and (b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and (c) a life interest in the whole of the remainder: Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.”*

*g) The respondent's states that the grant ought to be nullified and the judgment of the lower court be upheld by this honourable Court since the respondent was excluded deliberately in an attempt to exclude her from inheriting her husband. Peter Mbatia Mureithi.*

*h) The appellants did not seek the consent of the applicant and went ahead to file this probate in total exclusion of the applicant, the applicant reported the matter to the area assistant chief for Kijabe sub location who summoned her mother in law demanding the late husband death certificate which she said that she had destroyed it.*

*i) By the view of events, there was constructive motive and agenda to disinherit the respondent*

*and this court must not condone or allow this appeal to stand.*

*j) That cultural and traditions customs should not be used as an agenda to disinherit the respondent as the same is against the constitution.*

*k) I Would like to state that the episodes of this matter has been punctuated with all manner of intimidations and threats from the appellants that caused me to find refuge away from the precincts of the appellants.*

*l) The respondent thus prays that this appeal be dismissed with costs and the judgment of the lower court dated 23<sup>rd</sup> May 2023 be upheld.*

36. The appeal was canvassed through the filing of written submissions. The appellants in submissions dated 6<sup>th</sup> September 2024, argued that the trial

magistrate erred in allowing the revocation of the grant of letters of administration. That the respondent should not have been included as a beneficiary as she had remarried one Daniel Kamau Chege by the time the succession cause was filed on 21<sup>st</sup> July 2017, and in the circumstances the appellants had not concealed any material facts from the court.

37. The appellants further argued that the respondent had not produced any evidence to support her allegations that she had been chased away from her matrimonial home by the appellants. That, if she was threatened and chased away from the matrimonial home, she should have reported the matter to either the chief or the police.

38. The appellants submitted that the trial Magistrate erred in holding that the respondent had not remarried. That the respondent had admitted during

cross-examination that she does farming with Daniel Kamau Chege and that he is the father of her three children. Further, the letter and testimony of the Area Chief Ndabibi Location, Asef Ndungu Kamau (DW4) confirmed that the respondent lives in Manyatta Village together with Daniel Kamau Chege as husband and wife and that they have three children. That the appellants evidence on her remarriage was not controverted. Further, the respondent's three (3) children sired with Daniel Kamau Chege have names similar to the names of the parents of Daniel Kamau Chege. As such that evidence demonstrates a presumption of marriage between the respondent and Daniel Kamau Chege.

39. The appellants relied on the case of, *In the Matter of Estate of Gerishon John Mbogoh* [2001] KEHC 726 (KLR) where Visram J (as he then

was) held that it is settled law that a presumption of marriage is a rebuttable presumption.

40. The appellants further referred the court to the textbook Law of Succession by W. M. Musyoka where he cited the case(s) of Succession Cause No. 302 of 1999 In the Matter of the Estate of Michael Kamau Kahiri (Deceased), and In the Matter of the Estate of Charles Muigai Ndungu (Deceased) where the High Court held that the presumption of marriage can be upheld based on long cohabitation.

41. The appellants further submitted that, the respondent is not a widow of the deceased in the instant matter, and therefore section 36 of the Law of Succession Act is inapplicable to her and in the circumstances, the proper widows of the deceased being Ruth Wanjiru Mbatia and Ann Waitheria Mbatia should hold life interests in the estate of the deceased.

42. However, the respondent in submissions dated 2<sup>nd</sup> October 2024, argued that it was not in dispute that she was married to late Isaac Mwaura Mbatia proved by production of a marriage certificate and which fact the appellants never objected and/or disputed to.

43. Further, that prior to his death, the deceased had allocated the her deceased husband, one portion of land L.R. No. Kijabe/Kijabe Block 1/1936 & Plot No. 161 Maai Mahiu, which the she is claiming in this probate but the appellants are hell bent on disinherit her of her rightful matrimonial land and home on the ground that she had re-married and yet the appellants have failed to substantiate their allegations she had remarried.

44. That the appellants' actions amount to preferential treatment of men over women which is discriminatory and contravenes Article 27 of the Constitution of

Kenya, 2010 which prohibits discrimination directly or indirectly on the grounds inter alia of sex and marital status.

45. Further, the fact that she begot children after the demise of her husband is not a ground to disinherit her as having children does not amount to a marriage. That the trial court correctly held that marriage must be distinguished from a sexual relationship and held that it cannot presume a marriage that was not proved.

46. That she had lived on the said land for thirteen (13) years faithfully taking care of and serving her husband who solely supported her. That it would be inhumane to send her away and not allow her to share in her late husband's share as a beneficiary.

47. Furthermore, that even if she had remarried, the Court in the case of *In the Matter of Miriam Chepkios*

Ngetich Eldoret P&A 96 declared among others sections 35(1)(b) and 36(1)(b) to be unconstitutional for providing that the life interest of a widow shall be determined upon her re-marriage.

48. The respondent submitted that the trial court was right in revoking the grant under section 76 of the Law of Succession Act as the grant was obtained by concealment of material facts as the appellants excluded her from the application and did not obtain her consent, a clear indication that they intended to disinherit her. That in the circumstances, section 36 of the Law of Succession is applicable in the instant case and therefore the appeal should be dismissed with costs.

49. After considering the arguments herein, I find that the first issue to determine is whether the respondent had

the locus standi to file the summons for revocation in the first place?

50. *Locus standi* (Latin for "place of standing") is the legal principle determining a party's right to appear and be heard before a court. It requires that a litigant has a sufficient interest, connection, or stake in the matter, ensuring only genuine parties—not mere "busybodies"—can initiate legal proceedings. It is a preliminary question that must be met for a case to be admitted, ensuring the court acts only on behalf of legitimately affected parties.

51. Locus Standi acts as a gatekeeper and makes sure that only parties who have a sincere and direct stake in a case can bring it before the court. This ensures the court system is kept free of clogged or malicious lawsuits. It is as a key that unlocks the courtroom door;

without it, the case cannot continue in the court of law.

52. A suit filed without *locus standi* (standing) is considered legally incompetent, "dead on arrival," and liable to be struck out or dismissed, as the court lacks jurisdiction to entertain it.

53. In that regard, the Supreme Court of Kenya in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR* held that the issue of locus standi raises a point of law which touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity."

54. Under the law of succession only dependants can seek for a share in the deceased's estate. In that case, dependancy is a fundamental concept in succession law, ensuring that individuals who relied

on a deceased person for financial or other forms of support are not left destitute upon their passing.

55. Under Section 29 of the Law of Succession Act (Cap 160) in Kenya, dependants include the surviving (a) spouse or spouses and the children of the deceased whether or not maintained by the deceased prior to the deceased's death, as well as parents, step-parents, grandparents, grandchildren, step-children, children taken in as own, siblings, and half-siblings, provided they were maintained by the deceased immediately prior to death.

56. A daughter-in-law is not a dependent cannot directly inherit a father-in-law's property under Kenya's Law of Succession Act (Cap 160) if he dies without a will (intestate), as she is not considered a blood relative or a direct dependant. However, she can inherit through

her children (her deceased husband's children) or if specifically named in a valid will.

57. Further, a daughter-in-law can only inherit if she can prove to the court that she was maintained (depended on) by the father-in-law for a period of two years prior to his death, qualifying her as a dependent under Section 29 of the Law of Succession Act.

58. The evidence herein reveal that the respondent is a daughter in law to the deceased herein and therefore not a dependant of the deceased. As such had no locus standi in the first place to file the summons for revocation and therefore on that ground alone the entire proceeding in the trial court as they relate to the summons for revocation in the trial court are null and void ab initio and so is the impugned the ruling arising therefrom.

59. In that case there is no need to delve into the merit or lack of it in the impugned ruling. In order that in the given circumstances, each party will bear their costs. It is so ordered.

Dated, delivered and signed on this 26<sup>th</sup> day of March 2026

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:-

Mr. Gichuki for the appellants

The respondent present in person

Ms. Hannah: Court Assistant