

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
FAMILY APPEAL NO. E002 OF 2024

MOSES NTONGAI STEPHEN.....

APPELLANT

VERSUS

MARGARET KANUNGU M'RITHAMBU.....

RESPONDENT

**IN THE MATTER OF THE ESTATE OF M'LITHABU
M'THARANJU alias RITHAMBU THARANJU (DECEASED)**

***(An appeal from the Ruling of Hon. R. Ongira (S.R.M) in
Tigania Succession Cause No. E063 of 2021 delivered on
5/1/2024)***

JUDGMENT

1. This Appeal arises from the Ruling of the learned Senior Resident Magistrate Hon. R. Ongira delivered on 5/1/2024 in Tigania Succession Cause No. E063 of 2021, wherein the court dismissed the Appellant's application dated 28/10/2022.

2. Aggrieved by the said Ruling, the Appellant set forth the following grounds in the Memorandum of appeal dated 2nd February, 2024;

1. The Learned Resident Magistrate erred in fact and law in dismissing the appellant's objection when it was proved the objector was a step son and entitled to the estate of the deceased.

2. The Learned Resident Magistrate erred in fact and law in her interpretation of Section 39 of Law of Succession Act and therefore arrived at impugned decision.

3. The Learned Resident Magistrate erred in fact and law in finding that the Objector is not a beneficiary to the estate of the deceased despite over whelming evidence by the appellant and his witnesses.

4. The learned Resident Magistrate's decision is against the weight of law and evidence.

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Evidence at Trial

3. **PW1 Moses Ntongai Stephen** and the Appellant herein told the court that the Respondent is his Aunt, his father was Stephen Karera Lithambu, while the deceased herein was his grandfather. He was chased away from the estate by the Respondent, and his house was demolished. He attended his

grandfather's burial, and the names of his siblings were listed in the eulogy.

4. **PW2 Charles Kimathi** told the court that the Respondent was his mother's sister and the deceased herein was his grandfather. The deceased had 4 children, and the Appellant was his uncle's son.

5. **PW3 Senior Assistant Chief Bathlomew Mwika Akwalu** from Thubuku location authored the letter dated 1/9/2020 under the instructions of the Respondent. The Respondent told him that she was the only surviving beneficiary of the estate, and thus, he wrote the letter dated 28/4/2021.

6. **PW4 Peter Kalunge M'Arungu** the Senior Chief of Thibuku location, authored the letter dated 7/3/2023 at the request of the Appellant. The deceased was known to him, but he did not know all his children.

7. **PW5 Joseph Kalari Lubere** adopted his statement dated 5/5/2022 as his evidence in chief. He told the court that he

knew the Respondent and Stephen Kumira. The Appellant and Stephen Kaburu lived on M'Nthambu's land until they were chased in 2018 or thereabouts.

8. **DW1 Margaret Kanungu M Nthambu**, the Respondent herein adopted her statement dated 15/5/2022 as her evidence in chief. She told the court that she and Simon Kaburu (a minor) were the only beneficiaries of the estate. She denied knowing the Appellant but stated that when her brother died, he said he had another son. Stephen Kumira was her brother and he only had one son namely Simon Kaburu. After the confirmation of the grant, she sold part of the land to educate Simon.

9. **DW2 Simon Kaburu**, a student at Kirwa College told the court that the Respondent was his aunt. He had been living with the Respondent from 2008 when he was 5 years old. The Appellant was his brother from a different father and he lived with the Respondent in Timau while the Appellant lived with his father in Tigania. His name and that of the Appellant were

included in his father's eulogy as his children. He used to see the Appellant and even visited him after circumcision.

10. **DW3 Jackson Thurania M'Lungu** told the court that the Respondent, who lived with Kaburu, a son of Kumira Stephen, was the only surviving child of the deceased, and the Appellant attended the burials of his mother and father.

Submissions

11. The Appellant through the firm of Ayub K. Anampiu & Co. Advocates filed submissions dated 18/8/2025. Counsel

urged the court to allow the appeal and set aside the impugning ruling so that the estate property can revert to the deceased for proper distribution.

12. The Respondent submitted that the succession process was carried out legally and prayed for the dismissal of the appeal with costs.

Analysis and Determination

13. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.
14. In **Selle & another v Associated Motor Boat Co. Ltd [1968] EA**, the court held as follows: ***“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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.”

15. I have considered the appeal herein, the trial court’s Ruling which is the subject of this appeal as well as the submissions on record.

16. From the grounds of appeal, the issue for determination is whether the trial court’s decision was grounded on law and supported by the evidence on record.

17. The deceased herein died intestate survived by 4 children namely Mwiralia Lithabu (deceased), Gathuruku Lithabu (deceased), Stephen Lithabu (deceased but survived by Simon Kaburu) and the Respondent herein Margaret Kanungu M’Rithambu.

18. The bone of contention is whether the Appellant was a son of Stephen Lithabu.

19. DW2 acknowledged in his testimony that, ***“I was living with my aunt in Timau while Moses was living with my father in Tigania. My father died in 2018 and his eulogy said he had 2 children being myself and Moses Ntongai. I saw Moses Ntongai in my father’s burial and I was told he was my brother and son of my father. I used to see Moses previously but he never mingled much. I knew him when he was circumcised, as I visited him. My father came for me in Timau, and he told me my brother was being circumcised.”***

20. His testimony was corroborated by the Appellant and his witnesses, who affirmed that the Appellant and Simon Kaburu were children of Stephen Kumira (now deceased).

21. The Appellant adduced cogent evidence that he was a son of Stephen Kumira and a grandson of the deceased herein. Further, he established that he had constructed a

house on a portion of the estate, which was subsequently demolished, and he was thereafter forcibly evicted. The Appellant produced his birth certificate which indicated his parents as Stephen Kuniira M'Lithaba and Ancieta Karimi M'lubere. Additionally, the Appellant was explicitly recognized as a son of Ancieta Karima M'lubere in her eulogy. In my candid view, that evidence, taken cumulatively, is proof on a balance of probabilities that he was indeed a beneficiary of the estate entitled to inherit his deceased father's share thereof.

22. I find that the trial court fell into error in holding that the Appellant was not a beneficiary of the estate of the deceased, notwithstanding the overwhelming evidence to the contrary.

23. For the foregoing reasons, I find that the appeal is merited and it is hereby allowed.

24. The Appellant herein should be included as a beneficiary of the Estate of the Deceased.

**DATED AND DELIVERED AT MERU THIS 14TH DAY OF
APRIL, 2026.**

S.M. GITHINJI- JUDGE

14/4/2026

In the presence of:-

1. Mr. Ayub Anampiu for the Appellant (Absent).
2. Respondent (in person) Absent.