

**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E035 OF 2024**

**STEPHEN IRUNGU WAMBUI.....**  
**APPELLANT**

**-VERSUS-**

**ELISIFA NYAWIRA KABUI.....**  
**RESPONDENT**

*(Being an appeal against the judgment of the learned magistrate hon. A.A. Okullo, (Resident Magistrate) delivered on 1<sup>st</sup> march 2022 in Murang'a chief magistrate's court succession cause no. 484 of 2016).*

**JUDGEMENT**

1. The Appellant approached this Court vide a Memorandum of Appeal dated 8<sup>th</sup> May 2024, challenging the decision of the trial Court delivered on 1<sup>st</sup> March 2022 in Murang'a Chief Magistrate's Court Succession Cause No. 484 of 2016 whereby, the Appellant was the Petitioner while the Respondent was the Protestor, on the following four (4) grounds:

- i. The trial Court erred in law and fact by compelling the Appellant to proceed with the hearing of the suit in person despite having an advocate on record.***
- ii. The trial Court erred in law and fact by relying on the Chief's Letter dated 25<sup>th</sup> November 2016 to include the Respondent as a beneficiary of the Estate of the deceased and disregarding a similar letter from the Chief's office dated 3<sup>rd</sup> June 2016 on the ground that that the balance of probability was in favour of the letter dated 25<sup>th</sup> November 2016.***

**iii. The trial Court erred in law and fact by finding that the Respondent was married to the Appellant's late brother despite no evidence having been presented to prove that fact.**

**iv. The trial Court erred in law and fact by misinterpreting and applying the provisions of Section 38 of the Law of Succession Act CAP 160 Laws of Kenya."**

2. The deceased *Wambui Gakuo* died on 24<sup>th</sup> January 2015 at Kiamara area of Murang'a County and was mother to the Appellant. Subsequently, the Appellant procured Letters of Administration Intestate for the estate of *Wambui Gakuo* (deceased) dated 15<sup>th</sup> August 2017 and Summons for Confirmation of Grant dated 2<sup>nd</sup> February 2018 wherein he is named as Beneficiary alongside *Mercy Wanjira Wambui; Elizabeth Wangui Wambui; and, Grace Wanjiru*. The Appellant was further named the sole Administrator of the deceased's estate. The Respondent jointly with *Grace Wanjiru Katana* filed Affidavits dated 13<sup>th</sup> November 2018 in protest to the Confirmation of the aforesaid Grant. They claimed that the deceased gave birth to seven (7) children as opposed to only the four (4) children indicated in the Summons for Confirmation of Grant dated 2<sup>nd</sup> February 2018.
3. The Respondent claimed that the deceased was her mother-in-law by virtue of the marriage between the deceased's son *Charles Kimani* (deceased) and the Respondent, contracted sometimes in 1978. The Protestor's (now Respondent) claimed before the trial Court that her husband *CHARLES KIMANI* was a son the deceased, the registered owner of land parcel number (LOC 10/MUKANGU/695 (*the subject property*)) as per the copy of Certificate of Official Search dated 6<sup>th</sup> May 2016 appearing at page 12 of the Record of Appeal. Furthermore, the marriage between *Charles Kimani* and the Respondent was blessed with four (4) issues named as

follows: *Stanley Mwangi Kimani, Gladys Wambui Kimani, Beatrice Wangari Kimani, And, Samuel Wachira Kimani.*

4. It was the Respondent's further contention that being a daughter-in-law to the deceased and having been resident on a section of the suit property throughout her marriage and in the period after her husband's demise, she is entitled to the same in equal share with the Appellant. She accused the Appellant of attempting to disinherit his late brother's family.
5. In the Affidavit of Protest to Confirmation of Grant sworn by *Grace Wanjiru Gatana* on 13<sup>th</sup> November 2018 in her capacity as the daughter and beneficiary of the deceased's Estate, in support of the Respondent's (then Protestor) case; she deponed that the Appellant (then Petitioner) wilfully omitted three (3) other children/beneficiaries of the deceased in his Affidavit in support of Summons for Confirmation of Grant dated 2<sup>nd</sup> February 2018 namely: 1. Charles Kimani (Deceased) And Survived By His Wife Elisifa Nyawira Kabui (The Respondent Herein) 2. Jane Waithira Kabira 3. Mary Njoki Kahuhi referenced at page 21 of the Record of Appeal.
6. While the Appellant admitted in his written submissions filed before the trial Court dated 17<sup>th</sup> February 2022 that *CHARLES KIMANI* was his brother, the Appellant maintained that his brother died without entering into any marriage with the Respondent or at all. Furthermore, no "**Ngurario**" or Kikuyu customary marriage was conducted between his brother and the Respondent. He further contended that the Respondent did not present the birth certificates of her children, thereby failing to establish that his brother CHARLES KIMANI (deceased) sired them.
7. In the impugned decision, the trial Court ruled in favour of the Respondent and found that she had sufficiently established that she was the deceased's daughter-in-law, therefore, she was entitled to half of the suit property. The

trial Court, upon assessing the two Letters issued by the Chief's office dated 3<sup>rd</sup> June 2016 and 25<sup>th</sup> November 2016 held in favour of the latter on grounds that the former was signed by the Assistant Chief in an acting capacity whereas the latter was signed by the substantive Chief. Furthermore, the trial Court determined that the Appellant failed to disclose the deceased's other three (3) beneficiaries when giving information resulting in the Chief's Letter dated 3<sup>rd</sup> June 2016, thereby excluding Charles Kimani (Deceased); Jane Waithira Kabira; And Mary Njoki Kahuhl as beneficiaries of the deceased's Estate.

8. This appeal was dispensed by way of written submissions following directions of the court. The Appellant filed written submissions dated 7<sup>th</sup> July 2025 through his Counsel and argued that the trial Court erred in compelling the Appellant to act in person whereas he retained an Advocate, which prejudiced the Appellant. Reliance was placed in the holding of the Court in **Jopa Vilas LLC v Oversea Private Investment Corp & 2 Others**; and, **Delphis Bank Ltd V Channan Singh Chathe & 6 Others [2005] eKLR** to anchor the argument that the trial Court occasioned prejudice to the Appellant by requiring that he proceed with the hearing of the suit in person whereas he was duly represented by an Advocate.
9. On the question of the weight which ought to be placed upon the Chief's Letter dated 3<sup>rd</sup> June 2016, the Appellant submitted that the fact the aforesaid was signed by the Assistant Chief in an acting capacity does not invalidate the same because, the effect of appointing a person in acting capacity is to invest such appointee with the authority to execute the duties of the substantive officeholder. Furthermore, the trial Court's erroneously cited the date of the Letter by the substantive Chief as 25<sup>th</sup> November 2016 whereas the correct dated is 18<sup>th</sup> November 2016.

10. Furthermore, the Respondent failed to demonstrate the occurrence of a meeting held at the Chief's office between the parties whereby, it was resolved that each party to "stick to their own place", meaning the section of the suit land under each party's occupation.
11. Citing the reasoning of the Court in **Magero (Suing as the Legal Representative of the Estate of Wibrotor Namukhula Minyekenye and Widroda Namukhula Minyekenye v Shitanda & Another [2017] eKLR**, and; **Abdalla Rubiya Hemed v Kavuma Mvurya [2017] eKLR**, the Appellant argued that the Respondent failed to establish the existence of a filial relationship with Charles Kimani (deceased), in addition dependency; hence, she was not entitled to a share of the subject property. The Appellant expressly abandoned the fourth ground of his Appeal vide his written submissions.
12. The Respondent filed written submissions dated 24<sup>th</sup> September 2025 through her Counsel. With respect to the first ground of appeal submitted that the Appellant was previously represented by counsel namely firm of M/S Gacheru Advocates however, following the demise of Appellant's counsel on record he retained the services of the firm of M/S T.M. Njoroge & Company Advocates. Furthermore, at the hearing of the suit, the Appellant informed the trial Court that he was proceeding in person as indicated on pages 40 and 43 of the Record of Appeal. She further submitted that the Appellant failed to avail himself of the option of either arresting the Judgment of the trial Court or setting it aside, if indeed he was compelled by the trial Court to proceed with the hearing of the suit as claimed.
13. The Respondent subscribed to the position that the Chief Letter dated 3<sup>rd</sup> June 2016 was signed by one *Titus G. Nduati* who occupied the position of "Headman", hence, he lacked the necessary legal authority to issue the letter in question. It was argued that the essence of the

Respondent's Protest related to the omission of three of the deceased's beneficiaries by the Appellant in the Letter from the Chief dated 3<sup>rd</sup> June 2016.

14. The Respondent admitted that the trial Court erred in referring to the Letter dated 25<sup>th</sup> November 2016, as the appropriate date of the aforesaid is 18<sup>th</sup> November 2016 and described the same as a genuine human error. Furthermore, the contents of the 18<sup>th</sup> November 2016 were corroborated by the evidence of Grace Wanjiru who was named as the Appellant's sister in the Chief's Letter dated 3<sup>rd</sup> June 2016, and, therefore, lacked any motive to mislead the trial court.
15. Reliance was placed on the holding of the Court in the cases of Wangari **Munyaga v Zachary Waweru Ileri (2016) eKLR**; and, **Re Estate of Karuri Magu (deceased) (2016) eKLR** to buttress the position that a daughter-in-law is entitled to inherit the Estate of her deceased father-in-law or mother-in-law.
16. Having carefully reviewed and considered the parties' rival written submissions together with the entire record of proceedings before the trial court, the following three (3) issues were identified for resolution by this Court:
  - i. Whether the trial Court compelled the Appellant to conduct the hearing of the suit in person despite having retained counsel.
  - ii. Whether there was a valid marriage between the Respondent and Charles Kimani (deceased).
  - iii. Who shall bear the costs of the appeal?
17. The record of proceedings before the trial Court as captured on page 40 of the Record Appeal indicates the following statement made by the Petitioner (now Appellant) on 20<sup>th</sup> June 2019:

***“My advocate has passed on and I am ready to proceed”.***

18. On pages 41 and 42 of the Record of Appeal, it is indicated that the Petitioner was represented by the firm of M/S T.M. Njoroge Advocates. Page 43 of the Record shows that the Appellant was represented by Mr. Kimani who was holding brief for M/S T.M. Njoroge Advocates. On the same page, it is indicated that on 1<sup>st</sup> February 2022, the Appellant was acting in person. Having reviewed the record of proceedings at the trial Court, the Court is not persuaded with the Appellant’s contention that he was “compelled” by the trial Court to conduct the hearing in person as claimed. The foregoing record does not reflect the Appellant’s unwillingness to proceed with the hearing of the suit. It was incumbent upon the Appellant to establish that he was not willing to proceed with the hearing of the suit but for compulsion by the trial Court which he has failed to do. Accordingly, the Court holds and finds that the first ground of appeal is unsubstantiated and must fall.
19. The parties to the subject Appeal belong to the Kikuyu ethnic community. Regarding the question of proof of the existence of a valid marriage as between the Respondent and the deceased’s son Charles Kimani, the Court is bound by the holding in the case of **Gituanja v Gituanja [1983] KLR 575**, where the Court declared *inter-alia* as hereunder:
- “The existence of a marriage is a matter of fact which is proved with evidence. The evidence at the trial produced a valid marriage under Kikuyu customary law as was evidenced by the slaughtering of the ngurario.”***
20. The Appellant argued and submitted that the Respondent failed to adduce any evidence before the trial Court relating to: the venue and the date of the alleged

marriage, as well as the system of marriage which she contracted.

21. The Respondent's Statement dated 9<sup>th</sup> November 2021 and filed before the trial court stated that she contracted a marriage to the deceased's son Charles Kimani sometimes in 1978. According to the copy of Certificate of Death on file, Charles Kimani died in 1997. This means that the marriage which the trial Court found to have existed between the Protestor (Respondent) and Charles Kimani lasted for about 19 years. The Respondent submitted that during the trial, the Appellant failed to adduce evidence rebutting her claim that all her four children bear the surname of her husband and the Appellant's late brother, namely, Kimani. In addition, the Appellant failed to controvert the Respondent's evidence that she was residing in her mother-in-law's house which is located on the suit land.
22. Further, this Court notes that during cross-examination by the Appellant, DW2 Grace Wanjiku Wambui maintained that the Respondent lives in the house belonging to the deceased "*as we [the deceased's children] had all agreed*", see page 47 of the Record of Appeal. It is reasonable to expect the Appellant to have denied his involvement in the preceding agreement alluded by DW2 or, even the existence of such agreement.
23. The Appellant also did not controvert DW2's evidence during cross-examination regarding the basis for the Respondent's residence on the subject land. Equally, the Appellant did not impeach the DW2's evidence to the effect that the Respondent's husband had not established his house on the suit land at the time of death because he used to live in NYERI County.
24. As appears from pages 50, 51, 52 and 53 of the Record of Appeal, the trial Court considered the evidence supplied by the Respondent and her witness DW2 Grace Wanjiku

Wambui to the effect the deceased had expressed her wish for the suit property to be sub-divided between her two sons namely, Charles Kimani and Stephen Irungu (the Appellant herein).

25. The Appellant deliberately omitted his deceased brother and two sisters from among the beneficiaries of the deceased's Estate. It is noteworthy that the Appellant never proffered any explanation either before the trial Court or this Court for not mentioning the deceased's other three beneficiaries in the process leading up to the issuance of the Acting Chief's Letter dated 3<sup>rd</sup> June 2016. DW2 disclaimed any interest in the subject land at the trial.
26. This Court has carefully perused the impugned decision and is satisfied that the Appellant's failure to disclose the existence of three other beneficiaries of the deceased's Estate to the local Chief, resulting in the issuance of the Letter dated 3<sup>rd</sup> June 2016 which named four beneficiaries as distinguished from seven, contributed towards a decision favourable to the Respondent (Protestor).
27. Taking to account the entirety of the evidence placed before the trial Court and the manner in which same was evaluated in the impugned decision, this Court is satisfied that the trial Court did not proceed wrongfully and carefully evaluated the evidence adduced by the parties before it.
28. The following are the Final Orders of the Court:
  - (i) The subject appeal is found unmerited and is hereby dismissed.**
  - (ii) The subject property to be apportioned equally between the Appellant and the Respondent as directed by the trial Court.**

***(iii) The Respondent is hereby awarded the costs of the Appeal.***

***(iv) Parties to bear their own costs in respect of the proceedings at the trial Court.***

***Dated Signed and Delivered virtually this 9<sup>th</sup> day of April, 2026.***

**HON. T. W. OUYA  
JUDGE**

**For Appellant - No Appearance  
For Respondent - Wambui Gitau  
Court Assistant - Nyabuto**