

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT SUCCESSION APPEAL CASE NO. E014 OF 2024**

**GRACE GATHONI MWATHI.....**

**APPELLANT**

**VERSUS**

**ELIZABETH WANGU KARANI.....**

**RESPONDENT**

**JUDGEMENT**

1. Before this Court is Memorandum of Appeal dated **25<sup>th</sup> July 2024** by which the Appellant **GRACE GATHONI MWATHI** seeks the following orders:-

**“(a) THAT the Appeal be allowed and the judgment of the subordinate court be set aside.**

**(b) THAT costs of the Appeal be awarded to the Appellant.”**

2. The Respondent **ELIZABETH WANGU KARANI** strenuously opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written

submissions dated **30<sup>th</sup> October 2025** whilst the Respondent relied upon her written submissions dated **3<sup>rd</sup> November 2025**.

### **BACKGROUND**

3. The succession cause relates to the estate of the late **JOHN KIRAGO GITAHO** (hereinafter "**the Deceased**") who died intestate on **28<sup>th</sup> April 2017**.
4. Following the demise of the Deceased the Respondent **Elizabeth Wangu Karani** and her sister **Lucian Nyawira** sought and obtained a Grant of letters of Administration Intestate issued on **20<sup>th</sup> March 2018**. Thereafter the Appellant **Grace Gathoni** filed a summons for revocation of Grant dated **11<sup>th</sup> June 2018**. Vide a Ruling delivered on **27<sup>th</sup> November 2018** the first grant was revoked and a fresh grant was issued jointly to **Elizabeth Wangu** and **Grace Gathoni**.
5. On **25<sup>th</sup> August 2021** Grace Gathoni filed a Summons for Confirmation of Grant. Elizabeth Wangu filed a protest against the same.
6. The Appellant stated that she did not know the Respondent **Elizabeth Wangu** and stated that the Respondent and her Co-

Administrator **Lucian Nyawira Muriithi** were total strangers to the estate. The Appellant claimed that the grant was obtained fraudulently by concealment of material facts to wit that the Deceased left behind a widow and children as well as his father who were the ones legally entitled to administer and inherit the entire estate.

7. On her part the Respondent stated that she got married to the Deceased in the year **2006**. That she came into the marriage with one child and that the couple bore another child together. The Respondent stated that she lived with the Deceased in **Mihango**. She concedes that the Appellant was her co-wife but states that in the year **2006** when the Deceased married her the Appellant was not in the home having earlier separated from the Deceased. She stated that the Deceased took care of and provided for herself and the two children.
8. The Protest was heard in the Lower Court by way of Vive Voce evidence. Vide the Ruling delivered on **28<sup>th</sup> July 2024 Hon. MATUTU Principal Magistrate** dismissed the Protest finding that it had been proved that the Respondent was a wife of the Deceased. The trial court proceeded to confirm the Grant of

letters of Administration made to the Appellant and the Respondent on **27<sup>th</sup> November 2018** and gave directions on how the estate was to be distributed.

9. Being aggrieved by this ruling the Appellant filed this Memorandum of Appeal which is premised upon the following grounds:-

- “1. THE Learned Magistrate erred in law and fact in finding that Protestor was a wife to the deceased whereas no evidence was tendered before the court to ascertain this position.**
- 2. THE Learned Magistrate erred in law and fact in finding that the Protestor and the deceased had a child whereas the birth certificate produced before the court was proved to be fraudulent and/or fake.**
- 3. THE Learned Magistrate erred in law and fact in finding that the Protestor had purchased the Mihango Plot (LR No. 6845/1202) together with the deceased whereas the documents presented**

by the Protestor to this court relate to different parcel of land.

4. **THE** Learned Magistrate erred in law and fact in finding that the Protestor had purchased the Parcel of land known as LR No. 6845/1202) together with the deceased yet she failed to explain as to why the Appellant was collecting rent from the time of purchase to date.
5. **THE** Learned Magistrate erred in law and fact in finding that the Mihango Plot did not form part of the Estate of the deceased yet the same was on the name of the deceased at the time of his death.
6. **THE** Learned Magistrate erred in law and fact in overlooking the fact that the Protestor had transferred the Land Parcel known as LR No. 6845/1202 after the death of the deceased without any orders from the court in an effort to defeat justice.

7. **THE Learned Magistrate erred in law and fact in failing to appreciate the evidence before the court and erroneously referred to Parcels of land not forming part of the Estate thus delivering an ambiguous judgment.**

8. **THE Learned Magistrate erred in law and fact in disregarding all evidence that was tendered by the Appellant.”**

#### **ANALYSIS AND DETERMINATION**

10. I have carefully considered this appeal, the record filed on **5<sup>th</sup> march**

**2026** as well as the written submissions filed by both parties.

11. This is a first appeal and in this regard I take cognizance of the holding

in **Imanyara & 2 others v Attorney General [2016]**

**KECA 557 (KLR)** in which the **Court of Appeal** stated as

follows:-

***This being a first appeal it is trite law, that this Court is not bound necessarily to accept the findings of fact***

***by the court below and 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 is 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. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V. Brown [1970] E.A.L***

***As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters -vs- Sunday Post Ltd [1958] EA 424. In its own words:-***

***“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is***

***no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.....”***

12. It is not in dispute that the Deceased herein passed away on

**28<sup>th</sup> April**

**2017.** A copy of the Death certificate Serial Number **0652258**

appears at **page 6** of the Record of Appeal. The controversy in this matter relates to the identities of the beneficiaries to the estate. The Protestor herein claimed that she was a wife of the Deceased having been married by the Deceased in the year **2006**. That she came into the marriage with one child and that she and Deceased were blessed with a son '**V N**' born on **January 2008**.

13. On her part the Appellant denies all knowledge of the Protestor and

states that she only saw the protestor at the funeral of the Deceased.

14. It is trite law that he who alleges must prove. **Section 107 (1)** of the

**Evidence Act, Cap 80 Laws of Kenya** provides that

**“107 (1) Whoever desires any court to give judgment as to any legal right on liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

15. Similarly **Sections 109 and 112** of the same Act provide that:

**“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

**“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”**

16. The Protestor having alleged that she was a wife of the Deceased has

the obligation in law to prove this fact. The Protestor claims that she got married to the Deceased under Kikuyu Customary Law. Therefore she needed to prove that the cultural rites constituting to a Kikuyu Customary marriage were performed key being payment of dowry '**Ruracio**' and the '**Ngurario ceremony**'.

17. In her evidence the Protestor made no mention of the payment of any

dowry by the Deceased to her parents/family. It would also appear that no ngurario ceremony was conducted.

18. **PW2 Elizabeth Wangu** who was the Protestors mother told the court

that she does not recall the year when her daughter got married. **PW2** further stated that although she attended the burial of the Deceased she was not recognised at that funeral as an in-law.

19. **PW3 John Kinyua** is an elder brother to the Protestor. He too cannot

recall when the Protestor got married to the Deceased. **PW2** and

**PW3** were both close relatives of the Protestor who would have been intimately involved in any marriage of the Protestor. Neither witness is able to state with clarity when the dowry was paid, how much was paid and/or when the customary marriage took place. Their evidence was sketchy at best. I find that the evidence on record falls short of proving the existence of a customary union between the Deceased and the Protestor.

20. The next question would be whether the evidence available is sufficient

to establish a '**presumption of marriage**'. Presumption of marriage is a well settled common law principle that a long cohabitation of a man and a woman with the general reputation as man and wife raises a presumption of marriage. However this presumption is rebuttable.

21. **Section 119** of the Evidence Act provides as follows:-

**“The court may presume the existence of any fact which it thinks likely to have happened,**

**regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”**

22. According to **Halsbury’s Laws of England, Matrimonial and Civil**

**Partnership Law (Volume 72) 5<sup>th</sup> Edition 2015:**

**“Where a man and a woman have cohabited for such a length of time, in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed even if there is no prior evidence of any marriage ceremony having taken place, particularly where the relevant facts have occurred outside the jurisdiction and this presumption can be rebutted only by strong and weighty evidence to the contrary.”**

23. **Section 2** of the Marriage Act defines the word cohabit, in its technical term as follows:

**“cohabit” means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.”**

24. The Protestor did not call any evidence to prove a “presumption’ of

marriage. No witness e.g. neighbours, friends etc were called to testify that they knew the couple and regarded them as man and wife. The mere fact of cohabitation does not lead to a presumption of marriage. In the case of **PHYLIS NJOKI KARANJA & 2 Others -vs- ROSEMARY MUENI KARANJA & Another [2009] eKLR** the **Court of Appeal** held as follows;-

**“Before presumption of marriage can arise a party a needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is the nature of an assumption it is imperative that certain**

**customary rites be performed. [emphasis my own]**

25. In the case of **SWK v RNK [2019] eKLR**, the court held as follows;

**“The Respondent’s evidence on alleged cohabitation, and strenuously denied by the Appellant, was not corroborated by any other witness. Not a single independent witness was called, or probative documentary material produced by the Respondent to confirm such cohabitation. Not even a single photograph was placed before the Court to support the alleged cohabitation. Had she cohabited with the Appellant in Nakuru since 2006....., she would surely have been able to call witnesses such as parents, siblings, friends or neighbours or to tender documentary evidence in proof, beyond the four MPesa transactions.. Reviewing the evidence tendered in the lower Court, I am of the**

**view that there was neither credible proof of cohabitation between the parties.”**

26. Likewise in this case I find there is no evidence to suggest the existence

of a presumption of marriage between the Deceased and the Protestor.

I therefore fault the finding of the trial magistrate that the protestor

was a wife to the Deceased.

27. The Protestor stated that she bore a son with the Deceased and

contends that this child is a dependant of the Deceased and is entitled to inherit from the estate. Firstly the fact that a man and a woman bore a child together does not prove the existence of a marriage.

28. The Protestor did produce as evidence a copy of a birth certificate

Serial No. **0467198** (see Annexure '**EWK 1**') to the Replying to Summons for revocation of Grant dated **5<sup>th</sup> September 2018**. That Birth Certificate was issued on **13<sup>th</sup>**

**June 2013** relates to a child '**V N**' who was born on **6<sup>th</sup> January 2008**. The document lists the father's name as **John Kiragu Gitaho'** (the Deceased herein).

29. On the face of it the birth certificate appears to be genuine.

However

vide a letter to the Registrar of Birth [see **Page 40** of the Record of Appeal] Counsel for the Respondents sought to verify the authenticity of the document. In a reply dated **24<sup>th</sup> August 2018 (Page 41** of the record) the County Civil Registrar Nyeri County indicated that the birth certificate did not represent the true facts as the genuine document held in the official records did not indicate the name of the child's father.

30. This reply was confirmed by the copy of the Register of Births (**Page**

**42** of the Record) which reveals that only the mother's name **Elizabeth Wangu** was listed in the official Register. The name of the Father is not indicated - that portion is left blank. Another letter dated **29<sup>th</sup> August 2018** written by the Director Civil Registration Services (**Page 43** of the

record) clearly states that “There is ‘**No Fathers**’ name in our records.”

31. From the above it is manifestly clear that the birth certificate relied

upon by the Protestor as proof that the Deceased was the biological father of her child is not in fact a genuine document. It would appear that the name of the Deceased was inserted **AFTER** that birth certificate had been issued. As such I find that there is no proof that this child ‘**V N**’ was sired by the Deceased. There is no evidence that the Deceased was providing for the Protestors two children immediately prior to his demise. I therefore find that the two children are not dependants and are not beneficiaries of the estate.

32. The Protestor stakes a claim to the property known as **Plot No. 723**

(**LR 6845/12**) (hereinafter the ‘**Mihango Plot**’) which she claims to have purchased from Mathare Trade Union where she settled and currently resides. That the said Mihango plot was registered in her name by the time the Deceased

passed away. The Protestor complains that the rental income derived from this Mihango Plot is currently being collected and utilized by the father of the Deceased despite the said property being registered in her name.

33. I have perused the Summons for Confirmation of Grant dated **23<sup>rd</sup>**

**August 2021.** At **Paragraph 6** of the Supporting affidavit is a list of the Deceased's assets. Item No. 3 is **Mathare Trader Union - Plot No. 173 now LR 6845/1202.** This is different from **Plot 723 (LR 6845/1202)** which the Protestor has referred to in her Affidavit of Protest. Further at **Paragraph 8** of the said Affidavit a Protest reference is made to a **"Plot 175 now LR 6845/1202"**. There is therefore no clarity over which parcel of land the Protestor is laying claim to.

34. The protestor alleges that she together with the Deceased purchased

the **Mihango Plot.** On the other hand the Appellant claims that she purchased the plot and developed it and has been collecting rent therefrom todate. The obvious question

which would arise is if as the Protestor claims the **Mihango Plot** had been transferred into her name in the year **2015**, then how come it was Deceased's father who has been collecting the rent from the said property? Why has the Protestor taken no action from **2015** to date to reclaim this property? Why has she only come forward to claim this **Mihango Plot** after the death of the Deceased.

35. The Protestor claims that the Mihango Plot is her property, that it does not form part of the estate of the Deceased and **is not** available for distribution. If the Protestor is staking a claim over part of the estate property then her remedy lies in the **Environment and Land Court (ELC)** which is the only court mandated under Article **162 (2) (b)** of the **Constitution of Kenya 2010** to determine issues relating to ownership of land.
36. With respect to the other assets being
- (a) LR Muhito/Mbiuni/1100
  - (b) Motor Cycle Registration KMDS 447
  - (c) Bank Account No. **1370161952795** held at Equity Bank,

Kangemi Branch.

I find that these forms part of the estate of the Deceased.

37. Based on the foregoing I do find merit in this appeal. The same is

allowed and this court makes the following orders;-

**(1) The Summons for Confirmation of Grant dated 25<sup>th</sup>**

**August 2021 is allowed.**

**(2) The estate to be distributed as follows;-**

	<b>ASSETS</b>	<b>BENEFICIARY</b>	<b>SHARES</b>
1.	Money held in Equity Bank Ltd A/C No. 1370161952795 Kangemi Branch	GRACE GATHONI MWATHI	WHOLLY
2.	MATHARE TRADER UNION PLOT NO. 173 NOW LR 6845 /1202	GRACE GATHONI MWATHI	In trust for the children Elizabeth Wangari Kiragu, Margaret Wanjiru Kiragu, Lawrence Gitaho Kiragu and Jane Nyambura Kiragu.
3.	L.R MUHITO/MBUINI/11 00	GRACE GATHONI MWATHI	In trust for her children Elizabeth Wangare Kiragu, Margaret Wanjru Kiragu, Lawrence Gitaho Kiragu and Jane Nyambura Kiragu

**(3) Each party to meet their own costs for this appeal.**

**Dated in Nyeri this 17<sup>th</sup> day of April 2026.**

.....  
**MAUREEN A. ODERO**  
**JUDGE**