



**In re Kitheka (Deceased) (Succession Cause E003 of 2022)  
[2026] KEMC 80 (KLR) (24 March 2026) (Judgment)**

Neutral citation: [2026] KEMC 80 (KLR)

**REPUBLIC OF KENYA  
IN THE MAKINDU LAW COURTS  
SUCCESSION CAUSE E003 OF 2022  
YA SHIKANDA, SPM  
MARCH 24, 2026**

**IN THE MATTER OF THE ESTATE OF ELIJAH MUTISYA KITHEKA (DECEASED)**

**BETWEEN**

**BEATRICE KABUU MUINDI ..... PROTESTOR**

**AND**

**DAMARIS TAMALI MWANIKI ..... APPLICANT**

**JUDGMENT**

1. The dispute before the court arises from the estate of the late Elijah Mutisya Kitheka, who passed away on 3/9/2016. The deceased is said to have been survived by two widows and four (4) children. The Administrators herein jointly petitioned for a grant of Letters of Administration intestate. The only asset mentioned in the grant were terminal dues from Kenya Pipeline Company Limited, estimated at Ksh. 1.5 Million. The Letters of administration intestate was granted to both administrators on 9/5/2022. There was a delay in applying for confirmation of grant. From the record, it appears that the beneficiaries were not sure of how much was due to the estate of the deceased from Kenya Pipeline Company Limited. It also appears that there was a disagreement as to the mode of distribution of the estate of the deceased herein.
2. On 10/3/2023, the 2<sup>nd</sup> Administrator filed summons for confirmation of grant dated 7/3/2023. She proposed that the amount of Ksh. 3,716,226.75/= comprised of the deceased's estate be share equally amongst the beneficiaries. In response to the summons for confirmation of grant, the 1<sup>st</sup> administrator filed an affidavit by one Abednego Mutua Masoo, who claimed to have been a neighbour of the deceased. Attached to the affidavit, there was a proposed mode of distribution. The 1<sup>st</sup> administrator proposed equal distribution of the estate to all the beneficiaries with the exception of the 2<sup>nd</sup> administrator. It was argued that the 2<sup>nd</sup> administrator had left her matrimonial home and remarried and as such, she was not entitled to inherit from the estate of the deceased.



### **The Objection/protest**

3. As already indicated, the objection to the proposed mode of distribution by the 2<sup>nd</sup> administrator was by way of an affidavit sworn by a stranger to the estate of the deceased herein. I have checked the record more than once and I can confirm that there is no affidavit of protest by the 1<sup>st</sup> administrator. It is thus not clear whether it is the 1<sup>st</sup> administrator who is protesting or a stranger to the estate of the deceased in the name of a neighbour. According to the neighbour's affidavit sworn on 14/4/2023 but filed in court on 17/4/2023, the 2<sup>nd</sup> administrator was married to the deceased in 1998 but the two separated in the year 2000. That the 2<sup>nd</sup> administrator deserted her matrimonial home and got married to another man in Kwale County, with whom they have six children.

### **Response To The Protest**

4. The 2<sup>nd</sup> administrator filed an affidavit in response to the one by the good neighbour. She deposed that she did not know the neighbour (who appeared to know so much about her) and had never heard of him. The 2<sup>nd</sup> administrator denied having separated from her deceased husband and further denied having remarried. The 2<sup>nd</sup> administrator further deposed that after the demise of the deceased herein, the 1<sup>st</sup> administrator became hostile and forced her to leave the matrimonial home whereupon she left with her children and moved to her parents' home at Matangini village within Kibwezi Sub-county.

### **Directions On Disposal Of The Dispute**

5. The record indicates that on 3/7/2023 the parties agreed and the court directed that the protest be heard by way of viva voce evidence.

### **The Evidence**

#### **The 1<sup>st</sup> Administrator/Protestor/Objector's Case.**

6. The protester testified and called one other witness in support of her case. PW 1 Beatrice Kavuu Muindi (hereinafter referred to as the protester) adopted her statement as part of her testimony. The gist of her testimony is that when she got married to the deceased in the year 2001, she found the deceased alone with his two daughters aged 3 years and 1½ years respectively. That the deceased explained to her that the 2<sup>nd</sup> administrator had left the children behind without any reasonable excuse. The protester stated that she took care of the two children until they became adults and got married. She even caused their certificates of birth to bear her name as their mother. The protester maintained that she never found the 2<sup>nd</sup> administrator at the deceased's home and denied having chased her away from the home.
7. That she only met the 2<sup>nd</sup> administrator at the burial of the deceased where she appeared in the company of four children who were younger than her daughters with the deceased. PW 2 Abednego Mutua Masoo adopted his affidavit as part of his testimony. The witness testified that he knew the deceased for about 15 years prior to his demise. He confirmed that the 2<sup>nd</sup> administrator was married to the deceased as the 1<sup>st</sup> wife but she later disappeared. According to PW 2, it was the deceased who informed him that he (deceased) had separated from the 2<sup>nd</sup> administrator. That it was also the deceased who informed him that the 2<sup>nd</sup> administrator had remarried.

#### **The 2<sup>nd</sup> Administrator/Applicant's Case.**

8. The 2<sup>nd</sup> Administrator (hereinafter referred to as the applicant) testified and called two (2) other witnesses. The applicant adopted her affidavit as part of her testimony. The applicant testified that she



never divorced from the deceased and that she never remarried. She admitted that she lived separately from the deceased prior to his death but stated that she was staying at her father's home. Upon cross-examination by counsel for the protestor, the applicant confirmed that she left the matrimonial home in the year 2000 and left the children under the care of the 1<sup>st</sup> administrator but the children joined her later after about five months. She denied having given birth to any other children apart from the two that she had with the deceased herein.

9. The applicant's 2<sup>nd</sup> witness was Ayub Mwaniki Mwalili. He testified that the applicant was his daughter. That at some point, she separated from the deceased. The witness stated that the applicant went to stay at his home after the death of her husband in 2016. That the applicant never remarried. When the witness was cross-examined by counsel for the protestor and examined by the court, he confirmed that the applicant had other children not sired by the deceased herein. He even confirmed that one Purity Mutheu whom the applicant had denied knowledge of was actually the applicant's daughter. However, the witness maintained that the applicant never remarried.
10. The 3<sup>rd</sup> witness Lydia Muthoni Mutisya testified that she was the daughter of the applicant and the deceased herein. That her parents separated when she was in class three. That the witness and her sister remained at their father's home but later joined the applicant at her parents' home after the death of their father. She denied having any other siblings apart from Rhoda. She also denied knowledge of one Purity Mutheu.

#### **Main Issues Or Questions For Determination**

11. Having perused the application and considered the evidence on record, I find that the main issues or questions for determination are as follows:
  - i. Whether the 2<sup>nd</sup> administrator/applicant is a rightful/lawful beneficiary to the estate of the deceased herein;
  - ii. Whether the objection to confirmation of grant should be upheld;
  - iii. Whether the court should proceed and distribute the estate of the deceased;
  - iv. If so, how should the court distribute the estate of the deceased;
  - v. What other orders should the court make if need be?

#### **Submissions By The Objector/protestor**

12. The objector/Protestor did not file submissions.

#### **Submissions By The 2<sup>nd</sup> Administrator/applicant**

13. The 2<sup>nd</sup> Administrator/Applicant filed written submissions. She relied on the provisions of section 3(5), section 29 and section 40(1) of the *Law of Succession Act*. She further made reference to a certain Citation cause involving the parties. The issue of the Citation did not form part of the evidence herein and as such, I will disregard any reference to the alleged Citation cause. The applicant relied on the Chief's letter which was filed together with the petition for letters of administration intestate. The letter 15/1/2020 indicates that the deceased was survived by the two administrators as his widows, together with their four children.
14. The applicant argued that the 1<sup>st</sup> Administrator cannot, on one hand, rely on that same chief's letter to obtain a joint grant of representation, and on the other hand, turn around to dispute its contents when it no longer serves her convenience. That the record clearly identifies the 2<sup>nd</sup> Administrator as



the first wife of the deceased, and that position has not been rebutted by any credible evidence. It was submitted that the evidence of PW 2 has no probative value and should be disregarded. That PW 2 admitted in cross-examination that he did not know the family of the deceased well, and neither did he know the family of the 2<sup>nd</sup> Administrator. That he further admitted that his knowledge of the purported remarriage was based purely on hearsay, having only been told so by the deceased that the 2<sup>nd</sup> Administrator had allegedly remarried.

15. The applicant argued that PW 2 could not identify the alleged new husband, the place or time of the alleged remarriage, nor produce any independent evidence of the same. The applicant contended that once a customary marriage is established, it subsists until formally dissolved according to the relevant customs. The applicant submitted that there is no evidence whatsoever that any dowry was ever returned or that any customary divorce ceremony took place. That the mere fact that the 2<sup>nd</sup> Administrator may have lived apart from the deceased does not, in law or custom, amount to dissolution of marriage. The applicant argued that it would be contrary to both law and equity to disinherit the 2<sup>nd</sup> Administrator based on unproven allegations that are unsupported by any documentary or customary evidence. She invited the court to affirm her status as a lawful wife of the deceased and include her among the beneficiaries entitled to share in the estate. On the issue of distribution, the applicant relied on section 40(1) of the [Law of Succession Act](#) and urged the court to adopt her proposed mode of distribution. The applicant relied on the following authorities:

1. AKM & another v AKA [2015] KEHC 5799 (KLR);
2. Ombachi v Samwel & 5 others [2025] KEHC 1592 (KLR);
3. Esther Mbatha Ngumbi v Mbithi Muloli & 2 others [1997] eKLR;
4. In the Matter of the Estate of Isaac Gidraph Njuguna Mukuro (Deceased), [2013] KEHC 3965 (KLR);
5. Munyole v Munyole [2022] KECA 373 (KLR); and
6. Koech & another v Chemutai & 2 others [2022] KECA 1309 (KLR).

### **Analysis And Determination**

16. I have considered the objection as well as the evidence on record. I have further considered the submissions filed by the applicant. From the evidence of both parties, it is not in dispute that the applicant was lawfully married to the deceased and that the two separated in the year 2000 or thereabout. The bone of contention is the alleged fact that the applicant remarried and therefore lost her right to inheritance from the estate of the deceased. Section 26 of the [Law of Succession Act](#) provides:

17. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”

Section 29 thereof provides in part as follows:

For the purposes of this Part, "dependant" 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.” (Emphasis supplied)



18. In re Estate of Simeon Nyachae (Also known as Simon Nyachae) - Deceased [2026] KEHC 1147 (KLR), the court held:

“Under section 29(a), the Act recognises as dependants the wife or wives of the deceased, former wives, and the children of the deceased, whether or not they were being maintained by the deceased immediately prior to death. Courts have consistently held that persons falling within this category qualify automatically as dependants by virtue of status alone, without the need to prove actual maintenance. See Re Estate of George M'Mboroki (Deceased) [2018] eKLR and In re Estate of Solomon Ngatia Kariuki (Deceased) [2020] eKLR.”

19. Former wife refers to a woman who was legally married to the deceased at some point, but the marriage had been terminated before death. This implies that even if the applicant had been divorced from the deceased, she would still qualify as a dependant. Section 3(1) of the *Law of Succession Act* defines “wife” as including a wife who is separated from her husband and the terms “husband” and “spouse”, “widow” and “widower” have a corresponding meaning. It therefore follows that mere separation does not disinherit a wife.
20. Nonetheless, I agree with the applicant that there is no acceptable evidence to prove that she remarried after separating from the deceased herein. I must point out that the applicant did not strike me as a candid witness. She denied having any other children apart from the two that she had with the deceased but her own father, who stays with her testified that she had other children. He even confirmed that one Purity Mutheu whom the applicant denied was actually her child. The applicant’s testimony was at variance with that of her witnesses in various aspects.
21. However, it does not really matter that the applicant has other children. The fact that the protester was bound to prove was whether she had remarried prior to the death of the deceased. It is obvious that the protester and her witness gave hearsay evidence on the issue. That is evidence that has no probative value in the circumstances of this case. The applicant was married to the deceased under customary law. There is no evidence to prove either a customary divorce or divorce by court. There is nothing to refute the contention that the applicant was still married to the deceased as at the time of his demise. The authorities of AKM & another v AKA [2015] KEHC 5799 (KLR) and Ombachi v Samwel & 5 others [2025] KEHC 1592 (KLR) relied upon by the applicant are germane on this point.
22. I also agree with the applicant that all along, she was recognized as a widow of the deceased. The letter from the chief confirms the position. The disputing parties even filed a joint petition wherein they recognized each other through their affidavits as co-widows of the deceased. If the protester had an objection, she ought to have raised it from inception. She cannot turn around at this stage and purport to recant her affidavits which recognized the applicant as a widow of the deceased. That is utter double speak. The court even wonders why the protester did not swear an affidavit of protest but relied on an affidavit by a stranger to the estate of the deceased, then recorded a statement claiming to be aware of the position concerning the applicant and the deceased. In view of the foregoing, I find no basis to exclude the applicant from the inheritance.
23. How then should the court distribute the estate of the deceased? Both parties agree to equal distribution amongst the beneficiaries, although the protester had proposed to exclude the applicant. Section 40 of the *Law of Succession Act* provides:
- (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first



instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

24. In the authority of *Koech & another v Chemutai & 2 others* [2022] KECA 1309 (KLR), the Court of Appeal had this to say:

“The 2010 Constitution, the Law of Succession and judicial precedent on the subject matter provide clear guidelines towards the interpretation of section 40 of the *Law of Succession Act*: The first principle is equality and non-discrimination. The right to equal treatment requires that all persons be treated equally before the law, and without discrimination. It guarantees that those in equal circumstances are dealt with equally in law and practice. The second principle relates to the limited applicability of African customary law in succession. Retrogressive customary practices that discriminate against women and children should be shunned away. Such backward customs are repugnant to justice and morality. They go against the 2010 Constitution and, in particular, article 27. It is time they are buried. The third principle is the applicability of equitable principles. Equity will aid to put right injustice to which the law is otherwise blind. In the distribution of property among units under section 40 of the *Law of Succession Act*, equity demands that judges take into account that not every difference in treatment will amount to discrimination. Unique circumstances should be taken into account. For example, in cases where a unit in a household is a person with disability or a minor. In both circumstances, there is need for reasonable accommodation and care. The baseline on the above principles is that section 40 of the *Law of Succession Act* should be interpreted in a manner that promotes equality and non-discrimination, non-applicability of customary law repugnant to justice and morality, and the appropriate application of equitable principles. We are of the view that equal distribution of the estate among the beneficiaries as directed by the trial judge is fair and in accordance with the law and the principles set out above.”

25. Being guided as above, I will distribute the estate of the deceased equally amongst all the beneficiaries. I realize that whereas the 1<sup>st</sup> administrator/protester left out the 2<sup>nd</sup> administrator/applicant, the latter left out her own child Lydia Muthoni Mutisya from the proposed mode of distribution and indicated the wrong name for the other child.

### Disposition

26. Consequently, I make the following orders:

- a. The 1<sup>st</sup> Administrator’s/Objector’s protest is hereby dismissed;
- b. I proceed to distribute the estate comprised of Ksh. 3,716,226.75/= as follows:

SUBPARA i.

Damaris Tamali Mwaniki.....Ksh. 619,371.125/=

ii. Beatrice Kavuu Muindi.....Ksh. 619,371.125/=

iii. Lydia Muthoni Mutisya.....Ksh. 619,371.125/=

iv. Rodah Mbinya Mutisya.....Ksh. 619,371.125/=



- v. Faith Nthenya Mutisya.....Ksh. 619,371.125/=
- vi. Peter Kitheka Mutisya.....Ksh. 619,371.125/=
- c. If Peter Kitheka Mutisya is still a minor, his share shall be held in trust by his mother, who is the 1<sup>st</sup> administrator herein and shall be transmitted to him upon attaining the age of majority;
- d. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 24<sup>TH</sup> DAY OF MARCH, 2026.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**

