



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION APPEAL NO. E039 OF 2025

IN THE MATTER OF THE ESTATE OF PAUL WABUTI WAMUKOYA

(DECEASED)

BETWEEN

LOICE NECHESA WABUTI 1ST

APPELLANT

DAVID RAPANDO WABUTI 2ND

APPELLANT

VERSUS

SCHOLASTICA CHERUIYOT LUSENO

RESPONDENT

(Being an appeal against the decision of Hon. G. P. Omondi (PM) in Mumias SPM's Court Succession Cause No. E160 of 2021 delivered on 6th August 2025)

JUDGEMENT

Background

1. The Respondent filed an application for revocation of Grant issued to the Appellants on 12th January 2022 on the ground that the same was obtained fraudulently by making of false statements and by

- concealment from the court of material particulars and or heirs of the estate of the deceased by excluding the Respondent and other beneficiaries of the estate of the deceased. She further averred that the proceedings to obtain the Grant were defective in substance in that the Appellant irregularly took out Letters of Administration Intestate excluding the Respondent alongside other beneficiaries of the estate.
2. In response, the Appellants averred that the Respondent was neither a daughter nor a dependant of the deceased. They insisted that the Respondent temporarily lived with the deceased and that whereas the deceased played a role as a father to the Respondent, this was not a guarantee of inheritance as the Respondent was not a biological child to the deceased and his mother, nor was she ever given **L.R. No. EAST/ WANGA/LUBINU/1993** which was the only asset in the name of the deceased.
 3. The objection proceedings proceeded through viva voce evidence and after hearing both parties and their respective witnesses, the learned trial Magistrate allowed the objection proceedings and ordered the Grant of Letters of Administration revoked.
 4. Aggrieved by the Judgement of the trial court, the Appellant lodged an appeal in which they set down the following grounds of appeal:-
 - (a) *The Honourable trial Magistrate lacked jurisdiction to handle the summons for revocation of grant filed by the Respondent.*

(b) The trial Magistrate erred in law when he made a finding that the Respondent was a dependant to the deceased's estate against the weight of the evidence adduced.

(c) The trial Magistrate erred in law and fact when he relied on hearsay evidence.

(d) The trial Magistrate's decision was arrived at in a cursory and perfunctory manner thereby resulting in a miscarriage of justice.

(e) The trial Magistrate's decision was predetermined and hence indefensible.

(f) The trial Magistrate's decision was bad in law and would set a bad precedent unless varied.

5. The appeal was canvassed through written submissions.

Analysis and Determination

6. This being a first appeal, the duty of the court is to review and analyze the evidence afresh with the objective of arriving at an independent conclusion while bearing in mind that unlike the trial court, it did not have the privilege of seeing and hearing the witnesses as they gave evidence. See **Selle & Another v. Associated Motor Boat Co. Ltd & others [1968] EA 123.**

7. There are three issues for determination:-

(a) Whether the Honourable trial Magistrate lacked jurisdiction to hear and determine the Summons for Confirmation of Grant.

(b) Whether the trial Magistrate erred in finding that the Respondent was a dependant of the deceased.

(c) Whether the appeal has merit.

8. Rule 44 of the Probate and Administration Rules provides as follows:-

(1)Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.

(2)There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him—

(a)whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and

(b)the extent to which the estate of the deceased has been or is believed to have been administered or to

remain unadministered, together with any other material information."

9. However, Rule 44 is derived from Sections 48 to 49 of the Law of Succession Act which were amended vide Section 23 and 24 of the Magistrates' Court Act No. 2016 of 2015. The said Sections provide as follows:-

"23. The Law of Succession Act is amended, by repealing section 48(1) and substituting therefor the following new subsection —

(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates' Courts Act, 2015.

24. Section 49 of the Law of Succession Act is amended

(a) by deleting the words "Resident Magistrate" and substituting therefor the words "Magistrate's Court"; and
(b) by deleting the words "one hundred thousand shillings" and substituting therefor the words "the

pecuniary limits set out in section 7(1) of the Magistrates' Courts Act, 2015."

10. Prior to the amendment of the Magistrate's Court Act, the Magistrates' courts were precluded from hearing and determining objection proceedings brought under Section 76 of the Law of Succession Act by the express provision of Section 48 (1) of the Law of Succession Act which stipulated that:-
"Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act..."
11. Subsequent to the amendments of the Magistrates' Court Act, the High Court no longer enjoys exclusive jurisdiction over estates whose value is Ksh. 20,000,000/= or below as the same was extended to the Magistrates' court. See ***Turfena Anyango Owuor & Another v. Mary Akinyi Dengo [2018] KEHC 5503 (KLR), In Re Estate of Charles Boi (Deceased) [2020]*** and ***In Re-Estate of Barkibii Kibor (Deceased), [2025] KEHC 3880 (KLR)***.
12. The upshot is that it is now well settled that the Magistrates' Court has jurisdiction to hear and determine summons for revocation of grant subject to its limited pecuniary jurisdiction and that is no longer open for debate.
13. In respect to the second issue, it is common ground that the Respondent was not a biological child of the deceased or of his wife

Regina Inamwenya Wabuyi (also deceased) who was the deceased's second wife and co-wife to the 1st Appellant. The Respondent personally testified that the deceased was "like a father" to her. She stated that the deceased and his second wife raised her and maintained her while she was in school and that they used to live together on the subject property and she lived with the deceased for thirty two (32) years. She also said that the deceased, who died in the year 2000 used to take necessities to her after she got married.

14. On cross-examination, the Respondent said that she had never met her biological mother Clementin Muhondo Luseno who was Regina's sister. She further said that the deceased and her mother Regina jointly purchased the subject property which she is currently using exclusively while the first house is settled on the property comprised in **L.R. No. EAST/ WANGA/LUBINU/2556**. The Respondent said she never met her biological father.
15. The Respondent's evidence that she lived with the deceased was corroborated by PW2, Francis Wamukoya Ochanji who testified that he was a paternal nephew to the deceased and confirmed that the Respondent was the deceased's dependant whom he knew since 1968 when she was an infant.
16. The 2nd Petitioner, who testified as DW1 said that the Respondent was a stranger to the family as he was in Class 1 with her then met her forty five (45) years later. On cross-examination, he said that

when he was in Class 1, he lived with his brothers Joseph, Francis and the Respondent and their deceased father and Rekina (sic) was taking care of them but he left and moved to Mumias when in Class 3 and the deceased moved to Busia but did not take the Respondent with him.

17. DW2 testified that the deceased was his cousin whom he used to visit from 1966. According to him, when the deceased got married, his wife came with a child who was approximately three (3) years old. He testified that the deceased lived in Kakamega until 1975 when he moved to Busia. However, he did not see the Respondent when he would visit in Busia until 1996 when the deceased bought the subject land. On cross-examination, he said that the deceased's family is currently on the land that the deceased inherited from his father although it is registered in the name of James. He further said that the deceased's second wife got her land when the deceased bought land **L.R. No. EAST/ WANGA/LUBINU/1993**. He said that the deceased's 1st wife has never lived on **L.R. No. EAST/ WANGA/LUBINU/1993**. He further said that the Respondent used to stay with the deceased and he would not be sure if the deceased paid fees for her.
18. Section 29 of the Law of Succession Act provides a definition of "dependant" for purposes of succession and categorizes dependency into three different groups as follows:-

“(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;

(b)such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c)where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

19. From the express provisions of Section 29, the only dependants who are entitled as of right, to the deceased’s estate are his wife and children. This means that a wife/wives or biological child of the deceased automatically qualifies as a dependant regardless of whether they were reliant on the deceased for material support immediately before his death or not.
20. The other groups of dependants falling under Section 29 (b) and (c) must prove that they were being maintained by the deceased immediately before he died.
21. Aside from the definition of dependant, Section 3 (2) (3) of the Law of Succession Act defines a child as follows:-

“(2)References in this Act to "child"or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

(3)A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.”

22. The burden of proof in a case of dependency is upon the party alleging dependency as provided by Section 107 of the Evidence Act which provide:-

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

(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

23. In **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 others [2014] KESC 30 (KLR)**, the Supreme Court reiterated that:-

“The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. “The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.”

24. The onus therefore lay on the Respondent to prove that the deceased had voluntarily assumed permanent responsibility over her or that she was his dependant and relied on him for maintenance immediately prior to his death. In **EMM v. IGM & Another [2013] KECA 37 (KLR)**, the Court of Appeal dismissed an appeal on the ground that the Appellant, who was not a biological child of the deceased had not proved on a balance of probabilities that he was a dependant within the meaning of the Law of Succession Act. Similarly, in the case of **Kimani Mathenge Muriuki & 2 others v. Patricia M. Muriuki & Another H.C. Succession Cause No. 976 of 1994, (UR)** which was cited by the Court of Appeal in **EMM v. IGM & Another (Supra)**, Githinji J. in dismissing an application for provision for a dependant stated:-

"As for Lucina Muthayo Wanjeri, she was born after her mother left the deceased. It is the burden of the mother to prove on a balance of probabilities that the deceased was the father of the child. Her mother merely said that the deceased was the father without providing concrete evidence. The respondents dispute that she is a child of the deceased. Her certificate of birth shows that her mother did not give the name of the deceased as her father. It would appear she was not named after the mother of the deceased...There is evidence that Lucina did not live with the deceased though it is accepted that she used to visit the deceased occasionally. There is no concrete evidence of direct assistance by the deceased. It is true that she accompanied the deceased abroad once and deceased referred to her as his daughter in the affidavit to support application for passport. It is also true that she was named in the funeral programme as a child of the deceased. But the deceased was dead and had no control of the events after his death. I do not think the mere occasional references of Lucina as his child in a few documents without concrete evidence that deceased was the natural father of the child; that they lived together as father and child; that she was absorbed in the family of the deceased or that the deceased voluntarily assumed permanent

responsibility over her, is sufficient to show that she was a dependant of the deceased in such sensitive matters as inheritance.

I conclude therefore that it has not been proved that Lucina is a dependant."

See also ***Njoki v. Mothara & others Civil Appeal No. 71 of 1989 (UR)***.

25. Whereas the Respondent claimed that the deceased had taken her in as his child with his second wife who was childless, the Respondent did not adduce evidence to prove that the deceased adopted her either through customary law, or through statutory law or that the deceased voluntarily took up parental responsibility over her in such manner as to demonstrate that she was a child that he voluntarily accepted and took in as his own. Apart from oral evidence from neighbours, the Respondent did not produce evidence such as school records or school fees payment receipts in proof of her assertion that she was not only a dependant of the deceased but one whom he considered to have the equal status as his biological children.
26. Bearing in mind the fact that the Respondent was a niece to the deceased's second wife and her mother was said to be alive, it was incumbent on the Respondent to lead evidence that she was fully dependent on the deceased and not merely a companion to his childless wife.

27. In the absence of proof that the Respondent was an adopted child of the deceased, the Respondent therefore needed to prove, on a balance of probabilities, that she was dependent on the deceased immediately before he passed on. By her own evidence, the Respondent has been married for years and used to support the deceased and his wife.
28. Having said that, the court notes that there is sufficient evidence that the deceased's wife Regina had taken in the Respondent as her own child. There was evidence that the Respondent lived with the deceased and his said wife and that Regina received the Respondent's dowry. DW2 on cross-examination said that there was nothing wrong with Regina receiving the Respondent's dowry. In African custom, only a parent receives dowry. It is my finding that Regina considered the Respondent to be her child and treated her as such until the end.
29. The deceased died on 11th December 2000 while the second wife Regina died on 9th January 2020 therefore Regina survived the deceased and would have been named a beneficiary of his estate if succession proceedings had been taken out promptly. Notwithstanding the failure to take out succession proceedings during the lifetime of Regina, the evidence is that she continued to live on **L.R. No. EAST/ WANGA/LUBINU/1993** until her death and was buried there.

30. There is no dispute that the deceased was polygamous and had succession proceedings been completed when Regina was alive, the estate would have been distributed in accordance with Section 40 of the Law of Succession Act which 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.”

31. In the event, Regina would have been entitled as a single unit of the deceased's household, to a proportionate share of his estate.

32. In the case of **In Re Estate of the late Cheratasi Kigen Jonatha (Deceased) [2024] KEHC 12310 (KLR)**, Nyakundi J. while determining a claim in objection proceedings, adopted a purposive approach towards the interpretation of Section 3 (2) and (3) of the Act and stated:-

“40.Thus Art. 27(4) of the Constitution prohibits unfair discrimination that the state or any other person directly or

indirectly against anyone on grounds which include race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. The Constitution also provides in Art. 28 that everyone has inherent dignity and the right to have that dignity protected. The Constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society or community. This constitutional value brings in interpretive approaches such as to the right to equality, equity, inclusivity or human rights etc. The foundation of any society is on the promotion of the welfare and the best interest of the child as envisioned in Art. 53(2) of the Constitution. It is worth mentioning that the Constitution appropriately in Art 2(5) and (6) provided an anchor of International Law to underscore the various human rights instruments as part of sources of law. I have in mind the aspects of this case and its relevance with the provisions of International law in safeguarding and protecting the rights of the child. The key international multilateral treaties of importance on these rights include the Convention on the rights of the child which states that regardless of race, color, sex, language, religion, ethnic or social origin, disability, birth or other status, a child shall

not be discriminated by the state or any other person. The African Charter on the rights and welfare of the child, similarly the international covenant of international and political rights in Art. 24(1) provides expressly that every child shall have without any discrimination as to race, color, sex, language, religion, national, social origin, property or birth, the right to such measures as required by his status as a child on the part of his family society and the estate. This court in construing these plethora of rights purposively holds the view that in consonant with section 3(2) and (3) of the Succession Act, treating extra marital children differently to those born within a marriage constitutes a suspect ground of differentiation in terms of Art. 27(4) of the Constitution.”

33. There was uncontroverted evidence that the Respondent has lived with Regina and the deceased since she was a toddler. That is the home that she knew. Her bond with Regina was demonstrable by the evidence of material and financial support including construction of a house for her. She did not live with her biological mother and there was no evidence that she had contact with her biological father. It was the evidence of PW2 and PW3 that the Respondent used to assist the deceased and Regina and that during Regina’s funeral, the 2nd Petitioner wanted to sell **L.R. No. EAST/WANGA/LUBINU/1993** to raise funds for the funeral but the

Respondent intervened and met the funeral expenses. It was also the 2nd Petitioner's case that Regina was residing on **L.R. No. EAST/ WANGA/LUBINU/1993** alone. I am persuaded that the Regina's relationship with the Respondent went beyond that of an aunt and her niece. Taking into account the nature of the relationship, I find that the Respondent was in the position of a child to Regina whom Regina had expressly recognized and in fact accepted as a child of her own and in respect of whom Article 27 (4) of the Constitution recognizes her right not to be unfairly discriminated by reason of her status as a non-biological child.

34. In light of the unique circumstances of the Respondent and bearing in mind the cultural dynamics subsisting in our society, I am of the view that I must balance the statutory provisions with the lived reality herein. Although the Respondent did not emphasize the issue of her relationship with Regina in her submissions, I find that she was a direct dependent of Regina and since Regina survived the deceased, then Regina's share of the estate ought to devolve to her.
35. In making the determination, I am persuaded by the reason that it would be grossly unjust to expect the Respondent who grew up as an only child of Regina, took care of her, and even built a house for her in the only home she knew, to be detached from that home and from Regina's final resting place. I therefore find that despite not

being an automatic dependant of the deceased, the Respondent is by extension a dependant by virtue of her relationship to Regina.

36. It is not in dispute that the Appellants failed to include the names of all the dependants of the deceased. The 2nd Appellant admitted this during cross-examination. Whereas he stated that the deceased had ten children and was survived by the first wife, they only named six children in their petition. Moreover, the consent to the making of Grant to the Appellants was signed by only three of the dependants. During cross-examination, it emerged that Ann Wabuti, Jared Keya Wabuti, Luke Chisembe Wabuti, and Joseph Wenutoya Wabuti had not been listed as dependants of the deceased. The Chief's letter, which was drafted with information furnished by the Appellants, also excluded the aforesaid dependants.
37. Suffice to say that the evidence adduced during the trial revealed a failure by the Appellants to disclose material facts to the court.
38. Additionally, the Appellants did not list the other asset of the deceased, being **L.R. No. EAST/ WANGA/LUBINU/2559**. The said land was concealed by the Appellants to be ancestral land lawfully belonged to the deceased but was registered in the name of one of his sons, James Keya Wabuti. According to the Respondent, the ancestral land is much bigger than the land where Regina was settled and indeed, from the Certificate of Official Search, it comprises 3.66 hectares whereas **L.R. No. EAST/**

- WANGA/LUBINU/1993** comprises 0.99 hectares. Curiously, it was transferred to James Keya Wabuti the year 2006 long after the deceased had passed on. The court can only deduce irregularity in this registration as the ultimate registered owner was not a legal representative of the deceased and was not entitled to be registered as a sole proprietor to his deceased father's property.
39. Further, the fact that the Appellants failed to acknowledge the Respondent as a dependant of the deceased's wife, who survived him but died before succession proceedings despite acknowledging that she was the only known child of Regina further vitiated the petition. It is well settled that where a Petitioner conceals material facts from the court, the concealment renders the grant defective. I therefore cannot fault the trial court for allowing the objection.
40. Regarding the claim that the trial Magistrate's decision was arrived at in a cursory and perfunctory manner, this court is not privy to the trial Magistrate's diary or personal conduct and will not delve into the issue.
41. On the Respondent's collecting of an illegally processed title in respect to the subject property, certainly there was intermeddling which commenced when Regina was still alive. Dependants ought to be warned that no matter how convinced they are of their entitlement to a deceased person's estate, the lawful procedure should be adhered lest they fall afoul of the law.

42. In the end, I find that the appeal lacks merit. It is hereby dismissed.
The file is hereby remitted to the trial court for hearing and determination and the ruling of the trial Magistrate upheld.

Dated, signed and delivered at Kakamega this 30th day of April 2026.

A. C. BETT
JUDGE

In the presence of:

Mr. Munyendo for the Appellants

Mr. Mbetera for the Respondent

Court Assistant: Polycap