



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 1493 OF 2013**  
**IN THE MATTER OF THE ESTATE OF WILSON MBURU**  
**GATURA (DECEASED)**

**JUDGMENT**

**INTRODUCTION**

1. This judgment is in relation to Summons for revocation of grant dated 26<sup>th</sup> June 2013, presented by Joyce Wairimu Kiriga under Sections 29, 40, 47, 68 and 76 of the Law of Succession Act and rule 44 of the Probate and Administration Rules, she seeks the following orders-
  - a. Spent
  - b. Spent
  - c. THAT the Honorable Court be pleased to revoke and or annul the grant issued on the 20<sup>th</sup> September 2011 and subsequently confirmed on the 29<sup>th</sup> May 2012
  - d. THAT costs be provided for

The summons is supported by her affidavit sworn on 26<sup>th</sup> June 2013.

2. She alleges that the Grant was obtained fraudulently as the Administrators failed to disclose that she is a wife of the deceased and that her two children are beneficiaries of the estate of the deceased. She therefore seeks orders that she and her children are dependants of the deceased and entitled to a share of his estate.
3. The respondents/ Administrators opposed the application and swore a joint affidavit on 3<sup>rd</sup> October 2013. They aver that they were duly issued with grant of letters of administration on 20<sup>th</sup> September 2011 which was subsequently confirmed on 29<sup>th</sup> May 2012. They aver that the applicant and her children are strangers to the estate.
4. The matter proceeded by viva voce evidence.
5. **OW1- Joyce Wairimu Kiriga**, she adopted her supporting affidavit and witness statement as her evidence-in-chief. She testified that she began cohabiting with the deceased in Kitengela in 2006, a union blessed with one son, Boniface Mundia, born on June 6, 2007. Furthermore, she stated that the

deceased formally introduced himself as her husband to her family in accordance with Kikuyu customary law.

6. The deceased assumed parental responsibility for Jane Wambui Mburu, who is not his biological child. Both children have birth certificates that recognize the deceased as their father.
7. At the time she met the deceased he informed her that he had another family. He was estranged from his first wife. When the deceased fell ill, she nursed him and accompanied him to hospital. She did not attend his burial on account of the hostility towards her as which made her fearful for her security.
8. At the time the deceased died she was in possession of the documents of title. She surrendered the titles to the respondents but retained the title in respect of land parcel No. KAJIADO/KAPUTEI NORTH/294. The property was bought jointly by her and the deceased. She denied that she was a caretaker and insisted that she was a spouse and not an employee of the deceased.
9. During cross-examination, she disclosed her occupation as a water vendor and confirmed she has been collecting rental

income from the property since the deceased's passing. She testified that she and the deceased previously rented a home together, where he paid the rent. While she stated that no formal dowry was paid to solemnize the marriage, she noted her family was present during the deceased's visit to her home. Regarding the Kitengela Plot, she denied allegations by the administrators that it was purchased with proceeds from the sale of the Ngong property, conceding that she was unaware of the source of funds.

10. They set up their home at Kitengela. She obtained the birth certificates for the children after the death of the deceased. Her daughter is not the biological daughter of the deceased. The deceased is the biological father of her son. Documents that show the deceased supported her daughter were burnt in a fire.

11. She denied that she was married to Kimani and that Kimani is the father of her children. She was a witness to the agreement for purchase of the Kajiado parcel of land. The Chief's letter recognised her as a wife of the deceased. She is opposed to sibling DNA test and will only concede to DNA testing with samples extracted from the deceased.

12. In re-examination she reiterated that she purchased the Kitengela property jointly with the deceased and that she and her children were beneficiaries to the estate and entitled to a share of the estate.
13. **OW2- Jane Wambui Mburu.** Her witness statement was admitted as her evidence in Chief. She is a daughter to the applicant. She met the deceased when she was 6 years old. He was as a father to her. He supported her education. They lived together as a family. Her brother was born during this period. When he fell ill, the deceased's sister used to visit their house. After his death there was animosity from the respondents. She and her mum were not able to attend his funeral.
14. Her mother had custody of the title documents of the deceased's parcels of land. She surrendered 3 of those to the respondents and retained the title for the Kitengela parcel. She resides on the parcel of land with her mother.
15. Under cross-examination, she conceded that she is not the biological daughter of the deceased. She nevertheless asserted that he voluntarily assumed parental responsibility, allowed her

to adopt his surname, and provided financial support, including payment of school fees. She admitted that her birth certificate was registered post-mortem and that she lacked documentary evidence of fee payments or photographic evidence of their familial relationship. She did not attend the burial because of the animosity of his family. She was 10 years old when the deceased died.

16. On re-examination, she confirmed that her mother was in possession of the original title deed and that the deceased had assumed parental responsibility over her.

17. **RW1- Kennedy Gatura Njoroge**, He is an Administrator of the estate of the deceased and son to the deceased. Both the replying affidavit and witness statement were adopted as his evidence in Chief. At the time of the hearing, the 1<sup>st</sup> administrator had died. He is the eldest child of the deceased. He denied that the applicant is a wife to the deceased. His parents got married in the 70s. He was born on 16<sup>th</sup> September 1975. The deceased moved to Kitengela in 2008. He bought the

Kitengela plot. It had some semi-permanent houses. He also had a bar.

18. He bought the land in Kitengela, after selling land in Ngong. The family allowed him to sell the land by agreement of 3<sup>rd</sup> August 2008. He denied that the children of the applicant were the deceased's children.
19. He visited the deceased at his home in Kitengela. He never found the applicant there. He denied barring the applicant from attending the burial of the deceased. When the applicant refused to surrender the titles, they sought the intervention of the District Officer. He stated that his father was also called Njuguna.
20. On cross examination, he stated that the titled for the Kitengela Plot was in the name of the deceased. Initially the applicant had refused to give them the titles she was holding, later she surrendered 3 but retained the one for the Kitengela Parcel of land. He did not have a birth certificate and had also not availed a marriage certificate to confirm the deceased was married to his mother. He was aware that the deceased and his

mother were married under customary law. He did not have photographs of the family together.

21. He did not find the applicant when he visited the deceased in hospital both at Shallom Hospital and Kenyatta National Hospital. He denied harassing his father.
22. On reexamination, he stated that his paternity had not been challenged by the applicant in her pleadings. They included the Kitengela Property in the Petition as it belonged to the deceased. They were not aware that the applicant had the title.
23. **RW2- Joseph Mbiru Kamau.** His affidavit and witness statement adopted as evidence in Chief. The applicant is known to him as he lived in Kitengela at the material time. He met her in 2006. At the time she was married to a Kimani who was a labourer. He was a caretaker at the plot where the applicant was living. Later the deceased bought the plot where the applicant was living. The deceased came to the Plot in 2008. The deceased is not the father of the children of the applicant. He saw her pregnant in 2006, she was not living with the deceased.

24. After the death of the deceased, his family asked him to manage the plot. However, when he returned from the burial of the deceased, he found the applicant had taken possession of the plot. At the time of his death, the deceased was not living with the objector.
25. During cross-examination, he stated that the applicant was a caretaker, not a cleaner as previously stated. The brothers of the deceased, his wife and children used to visit him on the plot. He was not present when the family executed the agreement.
26. On reexamination, he reiterated that the applicant was a caretaker at the deceased's plot.
27. **RW3- Sarah Njeri Gatura.** She is a sister to the deceased. Her witness statement admitted as her evidence in Chief. She stated that deceased had a wife called Elizabeth and together they had 4 sons. She visited him in Kitengela. She denied that the applicant was a wife to the deceased. On one of her visits to Kitengela he introduced the applicant to her as a cleaner.
28. It was not true that the sisters of the deceased accompanied him to pay dowry.

29. On cross examination, she stated that the deceased lived in Kitengela, separate from his wife. He did not have a wife in Kitengela. He introduced the applicant to her casually as a cleaner. She did not know who took him to hospital when he fell ill. She did not know why the deceased moved to Kitengela. The deceased was also known as Njuguna.

30. At the time I retired to write this judgment only the applicant had filed her submissions. Her submissions are dated 19<sup>th</sup> January 2026. She frames the following as the issues for determination-

- a. Whether the Objector (sic) by cohabitation is the wife of the deceased for the purpose of succession
- b. Whether the Objectors (sic) children JWA and BMM are children and beneficiaries of the estate of the deceased Wilson Mburu Gatura
- c. Whether the Objector (sic) and her children are entitled to inherit property Kajiado/ Kaputei North/ 294 which is the matrimonial home.

31. It is submitted that the Court should presume that there was a marriage between the applicant and the deceased arising

from the cohabitation. Reference is made to the decisions in **M.W.G v E.W.K [2010] eKLR** and **Mary Nyambura Kangara versus Paul Ogara Mayaka [2021] KLR 64** on parameters to guide the court in determining whether or not to assume that there was a marriage. It is her submission that she cohabited with the deceased, they had a child together, she nursed him in his illness and she had custody of his title documents. She states she established that the deceased was estranged from his 1<sup>st</sup> wife and family and he therefore set up a relationship with her.

32. The applicant also relies on the decision of the Court of Appeal in **Phylis Njoki Karanja & 2 Others v Rosemary Mueni Karanja & Anor [2009] eKLR**

33. She states that the respondent and his witness contradicted themselves and therefore their evidence should be disregarded.

34. She submits further that the deceased was therefore polygamous and the applicable law is Section 40 of the Law of Succession Act. She submits that both her children are the deceased's children and therefore dependants of the deceased. Brian Mundia Mburu is a biological child whereas Jane Wambui

Mburu he assumed parental responsibility. She contends that the respondents frustrated the DNA testing and extraction of samples from the deceased. Further that the issue of the DNA testing was addressed in the ruling delivered on 9<sup>th</sup> May 2019 by Honourable Farah S.M. Amin.

35. She submits that the deceased allotted some properties to the first family in his life time, it is in the interests of justice that her children and her be allocated the property Kajiado/ Kaputei North/ 294.

36. It is submitted that the Grant was obtained fraudulently as the administrators failed to disclose that the deceased had another family and that on the authority of **Re Estate of Prisca Ong'ayo Nande (Deceased) [2020] KEHC 6553 (KLR) 8** the grant should be revoked.

#### **ANALYSIS AND DETERMINATION.**

37. Having had regard to the pleadings filed, evidence adduced, submissions filed and relevant law, I deduce the following to be the issues for determination

a. Who are rightful beneficiaries of the estate of the deceased?

- b. Arising from (a) above whether the grant issued herein should be revoked? or in the alternative whether the Certificate of Confirmation of Grant should be varied?
- c. What order should be made on costs?

38. The success of the Summons is hinged on the confirmation of the existence of marriage between the applicant and the deceased. In her submissions she abandoned the claim that she was married to the deceased under Kikuyu Custom and instead asked the court to presume a marriage on account of long cohabitation and the fact that deceased demonstrated he trusted her as she was in custody of his title documents. They had a child together, he assumed parental responsibility of her daughter, she nursed him when he was critically ill until the point when he died.

39. The circumstances in the current case are somewhat similar to those in **Phylis Njoki Karanja & 2 Others v Rosemary Mueni Karanja & Anor [2009] eKLR**. In both cases, the Court was invited to presume a marriage and reliance placed on cohabitation and the presence of a child. On

presumption of marriage, Hon. Ngaah J, in **CWN v DK [2021] eKLR** stated that-

**as far as presumption of marriage is concerned, it is a status of relationship that turns much on evidence as much as it is a presumption of law**

40. The applicant seeks to rely on the decision in **Phylis Njoki Karanja & 2 Others v Rosemary Mueni Karanja & Anor** but there are material distinctions between the two cases. In the former case, the family of the deceased acknowledged that the deceased was married to the applicant, including at his burial. Paternity of the children was acknowledged. In the current case the family of the deceased including his sister denies the existence of the marriage. In that decision the Court emphasized that the it had to be established that there was infact a marriage and that the applicant was not a mere concubine.

41. Similarly, in **In MWK v A M W [2017] eKLR**, Ngugi J as he then was summarised it thus;

**To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the**

**cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage**

42. The respondents were adamant that the applicant was an employee. They called a witness who testified that the applicant worked as a caretaker although this contradicted what he had stated in his witness statement. The sister of the deceased also said the deceased introduced the applicant as a cleaner.

43. The facts herein are almost on all fours as those in **re Estate of Ruiru Muchohi Gikonyo [2022] eKLR** the Court concluded-

**The foregoing factors taken together lead this Court to conclude, on a balance of probabilities, that the deceased and the 1st Applicant were lovers. There is however no evidence to suggest that the relationship between the deceased and the 1st Applicant crystalized into a marriage. Accordingly, I find and hold that the 1<sup>st</sup> Applicant was not a wife of the deceased as alleged.**

44. I find that the applicant has not succeeded in establishing that her relationship with the deceased had crystallised into a marriage. I find therefore that she is not a beneficiary of the

estate. When the other factors do not line up in a row, the letter of the Chief cannot be relied on to establish marriage for as stated in **ASA v NA & another [2020] eKLR, ;**

**As regards the chief's letter, it is of little evidentiary value towards proving payment of dowry. It attests to an event the chief did not witness. as described in the foregone paragraphs. It is hearsay evidence which cannot be relied upon by this court.**

45. Are her children beneficiaries of the estate? She relied on birth certificates. Both certificates were obtained after the death of the deceased. The birth certificate of the Jane Wambui Mburu is false to the extent that it indicates that the deceased was her father. Under law the birth certificate is the record that indicates birth parents and not adoptive parents. The applicant does not claim that the deceased adopted her daughter, she asserts that he assumed parental responsibility.

46. The fact that the birth certificate was obtained after the death of the deceased, casts a dark hue on it. The applicant declined to subject the younger child to DNA test, notwithstanding ruling of 21<sup>st</sup> June 2024. The Law of Succession limits access to the rightful beneficiaries of a deceased person. In other words, it locks out persons who are unable to establish

their entitlement to the estate. Perhaps this is the most important role of the probate Court, to ensure that the estate of the deceased only vests in rightful beneficiaries.

47. Dependency of Jane Wambui Mburu on the deceased was not proved to the required standard. She claimed that the deceased paid her fees. No evidence was adduced to show she had been to school and the deceased paid her fees.

48. On account of the foregoing I find that the Children of the applicant are not children of the deceased and therefore not beneficiaries of the Estate. On the 1<sup>st</sup> issue therefore I find that the beneficiaries of the Estate are-

- a. Elizabeth Wairimu Njuguna (wife)-deceased
- b. Kennedy Gatura Njuguna Son
- c. Owen Ngethe Njuguna Son
- d. Martin Nganga Njuguna Son
- e. John Kamau Njuguna Son

49. The application for revocation of Grant will necessarily fail as the same was premised on the allegation that the administrators fraudulently excluded the respondent and her children.

50. The final orders are therefore-

- a. The Summons dated 26<sup>th</sup> June 2013 is dismissed in its entirety
  - b. A fresh Grant to issue to Kennedy Gatura Njuguna as sole administrator on account of the death of Elizabeth Wairimu Njuguna.
  - c. The administrator will finalise transmission within 6 months
51. Each party will bear their own costs.
52. Parties are at liberty to appeal, the party exercising their right of appeal to do so within 30 days.

**DATED, SIGNED and DELIVERED online via Microsoft Teams at Nairobi this 8<sup>th</sup> day of May, 2026.**

**P. M. NYAUNDI  
JUDGE**

**In the presence of:**  
Fardosa Court Assistant  
Gachuhi Administrator/Respondent  
Ms. Muiruri for Objector