



Nyagah v Kirito (Civil Appeal 42 of 2020) [2025] KECA 1103 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KECA 1103 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 42 OF 2020
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
JUNE 5, 2025**

BETWEEN

MARTIN MURITHI NYAGAH APPELLANT

AND

LUCY KIRITO RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Meru (Mabeya, J.) delivered on 16th January, 2020 in H. C. Succession Cause No. 467 of 2012.)

JUDGMENT

1. This is a first appeal from the judgment of the High Court of Kenya at Meru (Mabeya, J.) delivered on 16th January, 2020 where the Court confirmed a grant issued to the appellant (Martin Muriithi Nyaga) and the respondent Lucy Kirito (the objector in the succession proceedings). Being a first appeal it is our duty to re-analyse the evidence and reach our own conclusions of facts but always remembering that we lack the advantage of seeing and observing the witnesses, an advantage that the trial Judge had. This mandate was recognized as follows in *Peters v Sunday Post* [1958] EA 424:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”

2. The facts of the case before the High Court were briefly that Ida Mbiro Nyaga (deceased) was mother to the appellant, Martin Muriithi Nyaga, Edward Nyagah M’ Ndaka (deceased), Betty Gatakaa Kariuki (deceased), John Kibaraa Nyagah and Franklin Mugendi Nyagah (deceased) The respondent (Lucy Kirito) claimed that she was married to Franklin Mugendi Nyagah and they had one child Evans Nyaga. The appellant applied for a grant of letters of administration in respect of the estate of his late



mother (Ida Mbiro Nyaga) and listed as assets of the estate Nyaki/Kithoka/1351, Nyaki/Kithoka/746 and B.C.R. Plot No.5 – Isiolo. He did not involve the respondent as part of the family and she filed objection proceedings claiming an interest in the estate as a widow of Franklin Mugendi Nyagah (deceased).

3. In her affidavit in protest to the summons for confirmation of grant which she adopted as part of her evidence before the Judge the respondent stated that she was the daughter in law to the deceased (Ida Mbiro Nyaga) having been married to Franklin Mugendi Nyagah (deceased); that they had a child Evans Nyaga (she produced a copy of Certificate of Birth for the said child); and that the appellant had failed to disclose to the succession court that she (the respondent) was a beneficiary of the estate by virtue of her marriage. She listed the beneficiaries of the estate and assets of the estate and gave her proposed mode of distribution of the estate.
4. Samuel Ndungi Nteere (Nteere-PW2), an Assistant Chief of Kithoka sub-location testified that he knew Franklin Mugendi Nyagah since their childhood as they attended the same school, that in his official position he knew the family very well; that the deceased married the respondent and they settled in his neighbourhood and they would visit each other when the deceased and the respondent visited from their base in Mombasa. He knew that Ida Mbiro Nyaga had sub-divided her lands and allocated them to her children including the deceased (Franklin).
5. Miriam Nkatha M’Ikamati (Miriam-PW3), mother to the respondent, testified that Franklin married her daughter as per Meru customary law; that Franklin and the respondent resided in Mombasa and they used to visit her; that she would visit them at the home in Kithoka and that she knew the family very well.
6. The appellant testified and adopted his witness statement where he had stated that his mother (the deceased) had allocated land to her children before she died; that she had given him L.R. Nyaki/Kithoka/1351; that she had given Franklin LR Abothuguchi/Igane/2067; that Franklin sold that parcel of land and relocated to Mtwapa and Kilifi; that he did not know the respondent but only saw her at Franklin’s funeral; that:

“...on investigations, I understood that the objector was cohabiting with my late brother for 2 years from 2009 to 2011...”

7. Further, that Franklin was not entitled to any part of his mother’s estate as he had sold all his inheritance and therefore the respondent was not entitled to any share of the estate; that his other brother John Kibaara occupied L.R. Nyaki/Kithoka/1351. He asked the court to distribute the estate to him and his brother John. He confirmed that Franklin’s funeral programme was prepared by a committee in Mombasa which included the respondent and the respondent was named as a wife of the deceased in the eulogy.
8. John Kibaara Nyagah adopted his witness statement where he had stated that his mother had sub-divided her lands to the 3 boys (including Franklin); that the respondent was not part of their family; that Franklin had been given a parcel measuring 6 acres while him and his brother (the appellant) got 1 acre each; that local Njuri Ncheke elders had colluded with the respondent for her to be recognized as part of their family; that:

“...Our late brother has never married either in church, customary or Civil marriage. If the objector has ever been married let her prove by either certificate or photographs of marriage. She claims to have a baby boy with our late brother which is not in dispute but that does not warrant her to claim anything which is not her share...”



9. According to him Franklin had sold his share and relocated to Mombasa.
Joseph Gaikumi (Gaikumi) who called himself “family representative” in a witness statement stated that the deceased (Ida) summoned him to a meeting in December, 2004 whose agenda was distribution of property; that John Kibaara and the appellant were given land at Abothuguchi/Igane. According to him the respondent was not part of the family in 2004; that she (the respondent) joined the family in 2010; he denied that she was a member of the family or was entitled to any part of the estate.
10. The last witness called by the appellant was Saberio Nyamu (Nyamu). He was a member of the Nyaga family. He stated that the deceased (Ida) left 3 boys; that she had 3 properties which she had shared to the 3 sons; and that the respondent was not married to Franklin.
11. The Judge analyzed the evidence and as we gave seen he found that the respondent was a wife to Franklin and was entitled to a share of the estate. The Judge shared the estate equally to the appellant, his brother John Kibaara and the respondent.
12. There are 8 grounds of appeal set out in Memorandum of Appeal drawn by the appellant’s lawyers M/s Ayub K. Anampiu & Co., Advocates. The Judge is faulted in law for finding that the respondent was entitled to part of the estate of the deceased even after finding that she was not married to the son of the deceased; that the Judge erred in law for finding that the respondent cohabited with the son of the deceased when there was no evidence to prove the same; that the Judge erred in law in finding that the respondent was a wife of Franklin; that the Judge relied on extraneous matters in arriving at his conclusion; that the Judge failed to analyze the case made by the appellant and failed to find that Franklin had sold his entitlement to the estate; that the Judge erred in interpretation of the law on the distribution of the estate. The appellant states in the penultimate ground (this ground is the same as the previous one) that the Judge erred in law and fact in the interpretation of the *Law of Succession Act* as to the issue of the distribution of an estate of a deceased person. Finally:

“The Judge of the Superior Court (sic) is against the Law and evidence.”
13. We are asked to set aside/quash (sic) the judgment of the High Court and order the estate to be distributed as proposed by the appellant in that Court.
14. When the appeal came up for hearing before us on 24th February, 2025 learned counsel Mr. Ayub Anampiu appeared for the appellant while learned counsel Mr. Muia Mwanzia appeared for the respondent. Both sides had filed written submissions which they fully relied on.
15. The appellant in written submissions collapses all the grounds of appeal into one and submits that it was not proved in the case at the High Court that the respondent was a wife of the late Franklin or that she was entitled to any share of the estate. It is submitted that it was not proved that the respondent was married to Franklin under any system of law.
16. The respondent submits that there are two issues for determination in the appeal – whether the respondent was a wife of the son of the deceased whose estate was the subject of the dispute and whether the respondent was entitled to a share of the estate.
17. It is submitted that the respondent tendered evidence that there was a customary marriage between her and Franklin who was the son of the deceased; that Franklin had evinced the intention of having taken her as a wife and their cohabitation was continuous and resulted in the birth of a child; that they lived



together in Mombasa and Kithoka as husband and wife. The case of M.W.G v E.W.K [2010] eKLR is cited in support of the proposition, as held by this Court:

“...whether a marriage can be presumed is a question of fact...”

18. On whether the respondent is entitled to part of the deceased’s estate it is submitted that she has a right to inherit the estate of the deceased representing her husband’s share since the deceased died, left children with no spouse.

We have considered the whole record, submissions made and the law.

19. This Court held in the M.W.G v E.W.K (supra):

“The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.

..... Parliament realised that women who genuinely had been taken as wives were discriminated against merely because dowry had not been paid or that there had been no ceremony to solemnise the union and by Act No. 10 of 1981, Parliament added section 3(5) of the Law of Succession Act, Cap 160, Laws of Kenya....”

20. There was evidence by the respondent showing how she had resided with Franklin in Mombasa and Kithoka. According to her mother, Nkatha, they used to visit her often at her home. They had a child Evans Nyaga and the Certificate of Birth produced into evidence showed that the child’s father was Franklin. The appellant and his brother John Kibaara acknowledged that the child Evans Nyaga was a son of their late brother Franklin.
21. The Assistant Chief Nteere testified against his own boss (the appellant was the chief of the area) to the effect that he had grown up with Franklin and they had even attended the same primary school. He knew that Franklin had married the respondent and that they lived together in Mombasa and Kithoka and they used to visit each other when Franklin and the respondent were in Kithoka. He knew that the two had a son Evans.
22. The case for the appellant appeared rather confused where on the one hand he claimed that he did not know the respondent at all only seeing her at Franklin’s funeral while on the other hand he proceeded on the basis that his brother had sold his inheritance and relocated to Mombasa. There was no proper evidence to prove that Franklin had sold his inheritance at all.
23. The Judge reached the correct findings that the respondent had proved marriage through cohabitation and was entitled to a share of the estate of the deceased. We find no merit in this appeal which is hereby dismissed. As the parties are related let each meet their own costs.

DATED AND DELIVERED AT NYERI THIS 5TH DAY OF JUNE, 2025.

S. ole KANTAI

JUDGE OF APPEAL

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J. LESIIT
JUDGE OF APPEAL

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ALI – ARONI
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

