



**Njeri (Having substituted) Peterson Samson Muriithi v Mwarari & 2 others
(Civil Appeal 66 of 2017) [2025] KECA 1378 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1378 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI**

CIVIL APPEAL 66 OF 2017

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

JULY 18, 2025

BETWEEN

**CATHERINE NJERI (HAVING SUBSTITUTED) PETERSON SAMSON
MURIITHI APPELLANT**

AND

ELIUD NDUGUTO MWARARIT 1ST RESPONDENT

ROBERT NJOKA MWARARI 2ND RESPONDENT

CECILIA KANINI RANGATA 3RD RESPONDENT

(An appeal against the Ruling of the High Court of Kenya at Embu (F. Muchemi, J.) delivered on 7th September, 2016 in H.C. Succ. Cause No. 388 of 2007)

JUDGMENT

1. This appeal arises from the ruling dated 7th September, 2016 (Muchemi, J.) in Embu Succession Cause 338 of 2007 which was determined in favour of the respondents and the appellant’s application for revocation of grant dismissed.
2. Being a first appeal, our mandate is as stated in the case of *Nairobi Bottlers Limited vs. Imbuga (Civil Appeal E661 of 2022)* [2024] KECA 434 (KLR) as follows:

“Our mandate in a first appeal as donated by rule 31 of the Court of Appeal Rules, 2022 is to re-appraise the evidence and to draw inferences of fact; to retry the case. That mandate has been the subject of various judicial pronouncements in such cases as Nicholas Njeru vs. Attorney General & 8 Others [2013] eKLR where it was stated: “[In] a first appeal, we are required to re-evaluate the evidence and arrive at our own independent findings and conclusions of the matter.”



3. The record shows that the original matter relates to the Estate of Javan Mwarari and the Estate of Milka Mwarari who were husband and wife and were parents to the parties herein.
4. The estate of Javan Mwarari Mithamo was previously filed at Kerugoya SRM No. 138 of 1999. Javan Mwarari died on 28th August, 1983 leaving behind one wife and 4 children. He left a property known as LR Mutira/Kaguyu/211 (the suit property). His wife Milka Mwarari was appointed as the administratrix to his estate on 10th December, 1999 and the grant was confirmed on 27th March, 2001. The administratrix, Milka Mwarari, passed away on 3rd December, 2003. On 24th March, 2006, the appellant applied in Embu Misc. Application No. 30 of 2006 to have the confirmed grant revoked as it had become inoperable or useless. This application was allowed on 24th July, 2007 and the parties were directed to make a fresh application for the grant. Consequently, the file known as Kerugoya SRM No. 138 of 1999 ceased to be material to the proceedings going forward.
5. The 1st respondent filed Kerugoya CMSC No. 9 of 2008 (Estate of Javan Mwarari) and obtained a grant dated 27th March, 2008. He filed an application dated 29th September, 2008 to have the grant confirmed but the application was opposed and the matter proceeded for hearing. The trial court delivered judgment on 17th July, 2009 where it held that the suit property be shared jointly between only two brothers; Peterson Muriithi and Robert Mwarari. The three respondents herein filed Embu High Court Civil Appeal No. 108 of 2009 seeking to overturn this decision and on 31st January, 2012, the court held that the decision to have the land shared between the two brothers was unfounded and that the pecuniary jurisdiction of the magistrate had been exceeded. The court set aside the grant dated 27th March, 2008 which had been confirmed on 21st July, 2009. The court gave a fresh grant to the appellant and the 1st respondent jointly (Estate of Javan Mwarari) on 31st January, 2012. The court directed the parties to apply for confirmation of the grant.
6. Meanwhile, the 1st respondent herein filed Embu Succession Cause No. 338 of 2007 (Estate of Milka Mwarari) where he sought a grant of letters ad colligenda bona to allow him manage the monies received from his late mother's tea crops, refund himself costs of running the tea farm and then divide the surplus to his brothers. The other two respondents supported the motion and the motion was granted on 12th October, 2007 though termed as a grant ad litem. On 2nd May, 2008, the late initial appellant filed an application in Embu HCSC No. 338 of 2007 accusing the 1st respondent of interfering with the Estate by changing the tea account to his name and failing to render accounts. The appellant told the court that he was the one who had always taken care of the properties until his brothers forced themselves into the tea business and mismanaged the same. He stated that he was in a better position to manage the Estate and the court ought to issue a grant in his favour, instead of the 1st respondent. This application was determined on 9th December, 2010 when the 1st respondent was directed to render accounts within 60 days. This application was eventually dismissed on 2nd February, 2012 when the court held that the 1st respondent had been building up the tea business while the appellant had withdrawn funds without explaining the use, therefore there was no reason to dethrone the 1st respondent as the administrator of Milka Mwarari. Effectively, the 1st respondent is the administrator of the Estate of Milka Mwarari.
7. Presumably, following the court orders of 31st January, 2012 given in the Matter of the Estate of Javan Mwarari, the 1st respondent prepared an application dated 14th March, 2012 seeking to confirm letters of grant of administration "dated 27th March, 2008". This application was, for unclear reasons, filed in Succession Cause No. 338 of 2007, Estate of Milkah Mwarari. The application was allowed on 20th December, 2012 with the suit property divided into 4 portions.



8. The deceased appellant, Peterson Muriithi, filed summons dated 6th May, 2015 for revocation of the grant, stating that the 1st respondent had received a limited grant in October, 2007 for their mother's estate and the matter where the grant was confirmed related to the estate of their father and not their mother. He further stated that there were no letters of administration dated 27th March, 2008 and the grant issued to them jointly in their father's estate was never prepared. In response to this motion, the 1st respondent stated that he filed the application as administrator for his mother, who was to manage his father's property.
9. On 7th September, 2016, the court held that the mixing of proceedings between the two estates did not affect the validity of the proceedings and that no fraud had been proved against the respondents to warrant revocation of the grant. The application was dismissed. The appellant is now seeking an order that the ruling of 7th September, 2016 be set aside and the appellant's summons for revocation of grant dated 6th May, 2015 be allowed with costs. The appeal is supported by submissions dated 9th November, 2024.
10. The appellant contends that the application for confirmation of grant was filed in relation to the wrong estate of Milka Wangithi Mwarari and therefore the proceedings were void. He also states that the court disregarded the fact that the summons for confirmation of grant was not served upon him and he was not able to respond to the same. The appellant states that there were no letters of administration in the Estate of Javan Mwarari Mithamo in Embu Succession Cause No. 338 of 2007 therefore there was nothing to confirm. He also submits that the grant was executed without him signing any documents. He opines that the ruling was against the weight of evidence.
11. The appellant Peterson Muriithi passed away and Catherine Njeri Muriithi was substituted to take his place.
12. The 1st and 3rd respondents have filed submissions dated 18th November, 2024 where they state that they were not shown to have caused material non-disclosure and no reason was offered for revocation of the grant. They agree with the court that the issue of mix up of the estates was not fatal to the proceedings and that each beneficiary remains in occupation of their portion of the estate. They state that it would serve no useful purpose to revoke the grant and they urge the court to dismiss the appeal.
13. The 2nd respondent has filed submissions dated 18th November, 2024 where he is of the view that the appeal is merited because the land never changed hands to their mother's name and the appellant was never served with the application for confirmation of grant. Additionally, he states that there was no grant to be confirmed in their mother's estate and there was miscarriage of justice to those unaware of the application.
14. The appeal came up for hearing before us on 25th March, 2025 when Miss Muturi held brief for Mr. Magee for the appellant; while Mr. Kisa appeared for the 1st and 3rd respondents but there was no appearance for the 2nd respondent despite being served with a hearing notice on 3rd March, 2025. Both parties appearing had filed their written submissions and opted to rely entirely on the same.
15. We have considered the record of appeal, the written submissions of counsel and the relevant law.
16. As we have seen and as has been observed by the many Judges through whose hands the family dispute has passed the patriarch of the family was Javan Mwarari who had married Milka Mwarari and they were blessed with 4 children. When he died on 28th August, 1983 his wife Milka took out succession proceedings in respect of his estate. His only asset was the suit property. She was given a grant of letters of administration; the suit property was sub- divided resulting in 5 parcels of land being created allocated as follows: Eliud Nduguto Mwarari (the 1st respondent) got 1 acre; Robert Njoka Mwarari



(the 2nd respondent) got 2.75 acres; his brother Symon Rangata Mugo got 1 acre; his other brother Peterson Muriithi Mwarari (the appellant substituted by his daughter Catherine Njeri after he died) got 2.75 acres while their mother Milka got 1.4 acres. Dissatisfied with the judgment dated 27th March, 2001 where that distribution was adopted Milka appealed to the High Court of Kenya at Embu but she died on 3rd December, 2003 before the appeal could be prosecuted.

17. In an application filed before the said High Court of Kenya at Embu Peterson Muriithi Mithamo stated that his mother (Milka) had died and “... with the death of the administratrix the grant has become useless and inoperative since the orders of the court cannot be executed...”
18. Khaminwa, J. agreed with that position through a ruling delivered on 24th July, 2007 and the Judge parting shot was:

“... I find that there is confusion in this family. It is not possible to distribute the estate of the deceased since, the administrator is now deceased. I am satisfied that the grant has become useless and inoperative and the same is hereby revoked and annulled. Fresh application for the grant shall be made by any of the beneficiaries. It is so ordered.

No order as to costs....”

19. What followed were a multiplicity of applications including one by Eliud Nduguto (1st respondent) and Peterson Samson Muriithi Mithamo (his brother) who died and ended out being the appellant) who petitioned the Senior Principal Magistrates Court at Kirinyaga in the matter of the estate of their later father Javan Mwarari Mithamo. In the course of time Peterson Samson Muriithi Mithamo, one of the petitioner filed objection proceedings protesting issue of a grant in terms of the petition. P.T. Nditika, Senior Principal Magistrate took viva voce evidence by those concerned and in a judgment delivered on 17th July, 2009 the protest was found to have no merit and was dismissed. The magistrate found that under the Law of Succession Act beneficiaries of their deceased father were entitled to inherit his parent’s property equally. The magistrate proceeded to hold that it had not been proved that Milka had a will. The magistrate ordered that the suit property be shared equally between Peterson and the 2nd respondent. Litigation was escalated to the High Court through appeals.
20. That judgment by the magistrate was appealed in HCCA No. 108 of 2009 where Ongu’di, J. in the judgment delivered on 31st January, 2012 allowed the appeal by finding that the magistrate erred by holding there was no mode of distribution when, indeed, there was such a mode of distribution; the Judge found there was no basis in law to give the suit property to only two of the children of the deceased; she found that Milka only had a life interest in the suit property. The Judge also found that the value of the suit property exceeded the magistrates’ pecuniary jurisdiction under the Law of Succession Act and in the end the judgment and orders of the magistrate were set aside. The Judge cancelled the Certificate of Confirmation of Grant dated 21st July, 2009 together with the grant of letters of administration dated 28th March, 2008 and ordered that:

“... a grant to be issued by this court to Eliud Nduguto and Peterson Samson Muriithi Mithamo jointly. They will then file an application for confirmation of the grant before this court as by law required....”

21. There is on record an application by the 1st respondent made in Embu High Court Succession Cause No. 338 of 2007 praying that the grant made to him be confirmed. It is supported by an affidavit which sets out the children of the deceased and an identification of shares of all persons beneficially entitled to the estate of the deceased. It was proposed that the 1st respondent get 1.7 acres from the suit land;



the deceased appellant (Peterson) get 7.5 acres; the 2nd respondent get 2.75 acres and Cecilia Kanana Rangata get 1.71 acres.

22. The grant was confirmed by the said Judge on 20th December, 2012.
23. The appellant complains that the Judge (Muchemi, J.) failed to note the grant was confirmed in the wrong file. The Judge identified two issues for her determination: whether the application before her for revocation of the grant met the requirements of the Law of Succession Act and whether the mix-up of the ad colligenda bona proceedings with those of Kerugoya Succession case No. 9 of 2008 rendered the succession cause void and ab initio.
24. The Judge considered the said provision – section 76 and various case law and finding that proceedings involved members of the same family who had filed many suits and applications in various courts after the death of the deceased (Javan); considering the long history of the dispute dating back to 1999 when Milka filed petition for a grant after her husband died; the grant was confirmed and the suit property distributed but Milka filed an appeal but died before she could prosecute the appeal and which many other suits and appeals followed passage of time and involvement of the suits by the same family could have led to confusion and mixing up of record. Summons for confirmation of grant in the estate of Javan ended up being filed in the proceedings for grant of letters ad colligenda bona (estate of Milka). The Judge found that none of the parties or the Judges had noted the mix –up. The Judge stated at paragraphs 22-26 (inclusive) of the judgment.
 - “22. I refer to the orders of Ong’udi, J. made on 31/01/2012 in HCA No. 108 of 2008 where she canceled all the orders of the Senior Resident magistrate Kerugoya in Kerugoya PM Succession Cause No. 9 of 2008. The honorable Judge canceled the grant issued on 28/03/2008 and confirmed on 21/07/2009. She then proceeded to appoint the 1st and the 2nd respondents as co-administrators of the estate of Javani Mwariri Mithamo. This was a legal and appropriate appointment by the appeal court after setting aside the orders in the earlier cases.
 23. It does not make sense therefore, for the applicant to argue that the 1st respondent has never been appointed an administrator of the estate of Javan. The order of the honourable judge issued on 31/01/2012 is still in force since on appeal was filed against the ruling by the applicant or any other party.
 24. In pursuance with the orders of the judge, the 1st respondent applied for confirmation of the grant which summons was allowed without any protest and the estate was distributed as follows:-

Mutira/Kaguyu/211 Eliud Nduguto Mwarari - 1.7 acres Robert Njogu Mwarari - 2.75 acres Peterson Samson Muriithi - 2.75 acres Cecilia Kanini Rang’ata - 1.7 acres
 25. During confirmation of grant the court noted that the beneficiaries were present as per the list. The list referred to must have been the one contained in the supporting affidavit. The applicant was one of the beneficiaries whose name was on the list. Although he contends that that grant was obtained fraudulently, he has not attempted to show how the alleged fraud was committed.



26. The grant was made to the applicant and the 1st respondent by the court and confirmed without any objection from any of the beneficiaries. The applicant has not at all complained about the share given to him during the distribution. It was himself and his brother Robert Njogu who got bigger shares than the 1st and 3rd respondents.

255. The Judge found, and we agree, that the grant ad colligenda bona was in respect of Milka's estate and related only to 2842 tea bushes and the account at Kirinyaga District Farmers Sacco which was totally different from the succession cause in the estate of Javan. The confirmed grant related to the estate of Javan and the only asset was the suit property. Mixing up of the proceedings did not affect the validity of the proceedings. We further agree with the Judge that there was no fraud as all parties attended the proceedings where the grant was confirmed.

26. In the end we find no merit in any of the grounds of appeal.

27. The appeal is dismissed with costs to the respondents

DATED AND DELIVERED AT NYERI THIS 18TH DAY OF JULY, 2025.

S. OLE KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL ALI- ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

