



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kimani v Mugure & 5 others (Civil Appeal 175 of 2017)  
[2024] KECA 1258 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1258 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 175 OF 2017  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**BENADETTA NJERI KIMANI ..... APPELLANT**

**AND**

**ALICE MUGURE ..... 1<sup>ST</sup> RESPONDENT**

**GRACE WAMBUI ..... 2<sup>ND</sup> RESPONDENT**

**HENRY MWANGI ..... 3<sup>RD</sup> RESPONDENT**

**PETER KARIUKI ..... 4<sup>TH</sup> RESPONDENT**

**ESTHER WAIRIMU ..... 5<sup>TH</sup> RESPONDENT**

**FAITH WANJIRU ..... 6<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling and order of the High Court of Kenya at Muranga (G.B.M. Kariuki, J.) delivered on 9th October 2015 in HCCC No 2 of 2017 (formerly Nairobi High Court Succession Cause No 521 of 2012))*

**JUDGMENT**

**Background**

1. Benadetta Njeri Kimani, the appellant herein, claims to be a widow of Benson Kiwani Gikuru, (the deceased) allegedly having married him in 2009 under Kikuyu Customary Law. The appellant claims that she was married to the deceased under the Kikuyu Customary Law from July 2009 until his death in April 2011. The appellant further claimed that she was the deceased's second wife, as the first wife, Tabitha Njeri died on 18<sup>th</sup> April, 1996. The appellant claimed to have applied for a grant of representation to her deceased husband's estate but she did not have a death certificate and neither did she have the required consents from the respondents. The appellant therefore filed a



separate summons dated 13<sup>th</sup> March, 2012, seeking various orders, including that her petition for confirmation be admitted despite the fact that it did not contain the necessary documents; that the respondents be restrained from interfering in any way with the property known as Plot No LOC 3/ Githumu/25 (the suit property) or the proceeds of a bank account at Muramati Sacco. She further sought an order that the proceeds in the bank account be released to her for her upkeep. Alice Mugure, Grace Wambui, Henry Mwangi, Peter Kariuki, Esther Wairimu and Faith Wanjiru are the 1<sup>st</sup> to 6<sup>th</sup> respondents respectively and are the children of the deceased and Tabitha Njeri (deceased).

2. The summons was heard on the basis of the affidavit evidence and the written submissions filed. On her part, the appellant claimed that as a widow of the deceased, she was entitled, in priority to the respondents, to apply for a grant of letters of administration. She further claimed that she was apprehensive that the respondents intended to evict her from the matrimonial home, where she was resident at the time, and that she was also apprehensive that the respondents intended to disinherit her.
3. From the record, on 15<sup>th</sup> May, 2012, the appellant abandoned the claim against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the summons, denying the jurisdiction of the court and denying that the deceased was married to the appellant.
4. Upon conclusion of the hearing, the High Court, (GBM Kariuki, J. – as he then was) relying on Section 51(2) of the Law of Succession Act, found the application without merit and stated as follows:

“Has the applicant complied with Section 51(2) of the Succession Act? The applicant has not shown by evidence that she was the lawful wife to the deceased and that her children were not adopted by the deceased as his own. It was incumbent upon the applicant to show that there was a valid marriage between her and the deceased. Without such proof, the applicant would not be qualified to seek a Grant of Letters of Administration as there would be no relationship between her and the deceased that would give rise to any interest in the deceased’s estate. If the applicant established existence of a valid Kikuyu Customary Law marriage between her and the deceased, she would be entitled to life interest in the deceased’s land. It is my finding that the applicant has not complied with S.51(2) (*supra*) and there is no proof that the land referred to forms part of the estate of the deceased, or that the applicant lived on it and was lawfully married to the deceased under Kikuyu Customary Law.

The orders sought by the applicant cannot, in view of the above, be granted.

In the result, the application fails. The summons dated 13<sup>th</sup> March, 2012 filed by Benadetta Njeri Kimani is hereby dismissed. Each party shall bear its own costs in the application.”

5. The appellant sought leave to appeal to this Court which was granted on 20<sup>th</sup> January, 2017, leading to the instant appeal. The appellant challenges the decision of the trial court. The appellant sought orders that the appeal be allowed; that the ruling of the High Court be set aside and substituted with a ruling allowing with costs, the appellant’s summons dated 13<sup>th</sup> March, 2012; that this Court be pleased to make any other orders as it deems fit; and that the costs of the appeal be awarded to the appellant.
6. The memorandum of appeal sets out 13 grounds of appeal. We have carefully considered these grounds of appeal, alongside the submissions filed by the appellant, and find them to raise three challenges on the decision of the High Court.
7. The first of the appellant’s grounds is that in dismissing the summons, the trial court erred by deciding on issues that were not pleaded before it. The first of the issues that the court determined was whether the appellant was a lawful wife of the deceased as this was not an issue in the application before him. That in any event, there was ample evidence that the appellant and the deceased were married under



Kikuyu Customary Law. In the appellant's view, this error is compounded since there was no objection to the petition by any of the respondents, or a cross petition challenging the status of the appellant.

8. The second issue that the court determined that was not before it was whether or not the appellant's children were beneficiaries to the estate, as it ignored ample affidavit evidence that the deceased had adopted and accepted her

children as his. In the appellant's view, these were issues not pleaded before the court, as the main issue that related to the summons dated 13<sup>th</sup> March, 2012 was whether or not the petition could be admitted in the absence of a death certificate.

9. The respondents on their part argued in submissions that under section 51 of the [Law of Succession Act](#), as read with rule 7 of the Probate and Administration Rules, a death certificate, or a photocopy of it, is a mandatory document that needs to be annexed to the petition to evince the death of the deceased.

### **Determination**

10. We have duly considered the record, the respective submissions, the authorities cited and the law. In line with our duty as a first appellate court which was re-affirmed in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 where this Court stated that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

11. We have considered the summons and agree with the appellant that the issue before the Court was whether or not the petition could be admitted for hearing without a death certificate, or the consents from the respondents. For this, the court had to consider the provisions of the [Law of Succession Act](#), and in particular, the regulations, which at Regulation 7 set out the requirements for an application for a grant of representation.
12. Regulation 7(1)(f) of the [Probate and Administration Rules](#) provides inter alia that particulars of “the relationship (if any) which the applicant bore to the deceased or the capacity in which he claims.”
13. Regulation 7(2) of the [Probate and Administration Rules](#) requires that “There shall be exhibited in the affidavit a certificate or a photocopy of a certificate of the death of the deceased or such other written evidence of the death as may be available.”
14. It is true that the question of the validity of the union between the parties was not among the orders set out by the appellant before the trial court. However, one the respondents denied that the applicant was married, and therefore a proper person to apply for a grant of representation. The court could therefore not ignore those allegations as under Regulation 7(1)(f) of the Probate and Administration Rules, there is a requirement that an applicant disclose the relationship she had to the deceased, if any. That is not all. Regulation 7(2) thereof is couched in mandatory terms, requiring that a death certificate, or a copy thereof, is attached to the application. On this latter ground alone, it is clear that the summons before the trial court could not succeed.
15. The second basis of the appeal is the decision by the trial court dismissing the summons for failure to comply with the requirements of Section 51 of the [Law of Succession Act](#).



16. Section 51(2) of the Act provides as follows:

An application shall include information as to—

- a. the full names of the deceased;
- b. the date and place of his death;
- c. his last known place of residence;
- d. the relationship (if any) of the applicant to the deceased;
- e. whether or not the deceased left a valid will;
- f. the present addresses of any executors appointed by any such valid will;
- g. in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
- h. a full inventory of all the assets and liabilities of the deceased; and
- i. such other matters as may be prescribed.

17. We have considered the appellant’s submission that a copy of the death certificate is not a necessary document for the purpose of an application for grant. In this regard, the appellant contended that the trial court on the one hand found that the petition could not be admitted for want of a death certificate, yet under Section 51 of the *Law of Succession Act*, a death certificate is not a mandatory document and that failure to attach the certificate was a violation of Articles 48, 50 and 159(2)(d) of the *Constitution*.

18. We note that the mandatory nature of the wording in Regulation 7 requires that the appellant provide either the death certificate or a copy thereof. This is the document that proves to the court that the deceased is in fact, deceased. It matters not that the fact of death was not controverted. To our minds, this requirement, established in the law as a procedural requirement is not one that could be casually set aside on account of Article 159(2)(d) of the *Constitution* of Kenya, 2010.

19. As the Supreme Court has stated in *National Rainbow Coalition Kenya (NARC Kenya) v Independent Electoral & Boundaries Commission*;

*Tharaka Nithi County Assembly & 5 others (Interested Parties)* (Petition 1 of 2021) [2022] KESC 6 (KLR) (17 February 2022) (Judgment):

“Secondly, article 159(2)(d) of the *Constitution* has repeatedly been invoked as a cure-all, a magic bullet even where, as here, it is inapplicable. It was never the intention of the framers to oust the obligations of litigants and parties to comply with the law or procedural imperatives as they seek justice from the courts.”

20. This holding applies with equal force to the circumstances before us: while courts shall administer justice without undue regard to procedural technicalities, it still behooves litigants to substantially comply with the substantive and procedural requirements of law in order to actually receive justice. We find that the trial court did not err in finding the summons without merit, and on this ground of appeal, the appeal fails.

21. The appellant’s final front on this appeal is on the delay on hearing the applications, which in her view, the actions to be restrained had long passed and thus violated her right to access justice. It is indeed



regrettable that the <sup>time taken to complete the ruling on the summons amounted to 3 1/2 years.</sup> However, having considered fully the ruling by the trial court, it is apparent to us that it properly considered the issues before it and arrived at a correct conclusion.

22. The upshot is that we are satisfied that there is nothing on record to warrant our interference with the decision of the trial court. In the result, the appeal fails. The 1<sup>st</sup> and 2<sup>nd</sup> respondents shall have the costs of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

