



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimotho & another v Njeru (Civil Appeal E102 of 2023)  
[2025] KEHC 3890 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3890 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E102 OF 2023  
EM MURIITHI, J  
MARCH 27, 2025**

**BETWEEN**

**JOYCE NGINA KIMOTHO ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH MWANGI KIMOTHO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ESTHER WANGECHI NJERU ..... RESPONDENT**

**JUDGMENT**

1. The appeal arises from the ruling of Hon. A. K Ithuku (Chief Magistrate) at Kerugoya Succession Cause Number 377 Of 2019 delivered on the 16<sup>th</sup> November 2023 wherein he revoked the grant issued to the appellants on 6<sup>th</sup> April, 2021 and confirmed on 19<sup>th</sup> October, 2021.
2. The Appellant filed their Memorandum of Appeal dated 13<sup>th</sup> December 2023 where they raised four grounds of appeal as follows:
  1. That the Honourable Court erred in law and fact in making a finding that Esther Wangechi Njeru was a wife to Moses Kimotho Komwu (deceased) while no sufficient evidence was tendered by the Respondent.
  2. That the Honourable Court erred in law and fact in totally disregarding the evidence tendered by the Appellant hence reaching to the erroneous conclusion that the Respondent was a wife of the deceased.
  3. That the Honourable Court erred in law and fact in issuing orders revoking the grant of letters of administration issued on 6<sup>th</sup> April, 2021 without considering that the said grant had been executed and title deeds issued as per the confirmed grant issued on 19<sup>th</sup> October 2021. The title holders were not parties to the proceedings.



4. That the Honourable Court erred in law and fact in totally relying on unsubstantiated evidence tendered by the Respondent and totally ignoring the evidence by the Appellant.
3. The Respondent had filed her summons for Revocation of grant dated 14<sup>th</sup> December, 2021 where she sought for revocation of the grant issued on 6 April, 2020 and confirmed on 19<sup>th</sup> October, 2021 on grounds that she was the wife of the deceased and that the succession was done without her knowledge.
4. The Appellants opposed the said application where they denied that the Respondent was the wife of the deceased and that the deceased had only one wife being Tabitha Mumbi Kimotho. The court went on to hear the matter and the court went to revoke the grant on the grounds that the applicants concealed that the respondent was a wife of the deceased and went on to issue fresh grant in the names of the applicants and the respondent.

### **Witness evidence**

5. PW 1- Esther Wangechi Njeru testified as follows: “I am Esther Wangechi Njeru. I am a resident of Mombasa. I am unemployed. Moses Kimotho Komu was my husband. We lived together. We had seven children. I had sworn an affidavit. I wish to adopt it as evidence in chief. It is dated 14.12.21. the other is dated 16.5.2022. I adopt the annexures as my exhibits.”
6. Cross examined she testified: “I sometimes thumbprint and write my name as Esther as signatures. I do not write other names. I signed both affidavits. I got married to the deceased in 1958. There was no wedding ceremony. I have photographs taken with the deceased. I gave the photographs to my advocate. The second wife was married in 1960. I did not say that I helped to get Joyce Ngina married. I do not have chiefs letter saying that I am a wife. My father was Daniel Ngure Ngari. My ID reads Esther Wangechi Njeru. My father was also called Njeru. Three children are alive. Four are deceased. My ID dated 23.7. 1958 shows that my husband was Kimotho. It has one name.”
7. DW1- Joyce Ngina Kimotho testified as follows: “I am from Shimba Hills. I am a farmer. I filed affidavits in court. I thumb printed and signed. They are dated 5.5.22 and 21.6.22”. when Cross examined by Mr. Oduor: “I live at Shimba Hills. I was cannot tell when my mother was married. I was born in 1969. I am the eldest in our family. I know Josphat. We were brought up together. He is a son to Esther the eldest in our home. I did not see Wangechi in our home. I recognize Josphat as my brother. We met at the Chief’s office in Kirinyaga. I have only mentioned the land in Mombasa. I do not know of land at Shimba Hills.”
8. Re-examination by Mr. Maringa: “I was born in September 1969. My mother was Tabitha Mumbi. Josphat grew up with us. He was brought by my father. I did not meet Esther Wangechi.”
9. DW2- Sebastian Gitari Githii said “I am a former Chief Korona. I am the one who wrote the letter dated 9.10.19. I know that the deceased had one wife.”
10. Cross examined by Mr. Oduor: “The first four people came to me. I cannot remember when the deceased died. I visited the home of the deceased. I have met Josphat Kimotho. It was on 9.10.19. I am not aware of any other son apart from Josphat.” On Re-examination by Maringa he said: “Deceased had five children. Josphat came to my office. I know that Esther was married at Mwea.”

### **Appellant submissions**

11. Whether the court erred in finding that the Respondent was a wife of the deceased
12. The Respondent testified that she was married to the deceased herein under Kikuyu Customary Law in the year 1957 and that all the rites and ceremonies including Ruracio were conducted. She did not



call any other witnesses to prove her claim that she was the wife of the deceased. The only document that she produced was copy of a visitation card where it is indicated that she was a wife of Kimotho but the document is vague as to who the said Kimotho was. The 1<sup>st</sup> Appellant testified that she had never seen the Respondent at their home and that they were brought up by their mother Tabitha Mumbi.

13. Section 59 of the *Marriage Act* 2014 provides the evidence of marriage as follows:
  - a. a certificate of marriage issued under this Act or any other written law;
  - b. a certified copy of a certificate of marriage issued under this Act or any other written law;
  - c. an entry in a register of marriages maintained under this Act or any other written law; (d) a certified copy of an entry in a register of marriages maintained under this Act or any other written law.
14. The Respondent did not produce any of the above documents that are mentioned to be evidence of marriage under Section 59 of *Marriage Act*, 2012.
15. The Respondent did not also prove that she was married to the deceased through Kikuyu Customary Law since no concrete evidence or witnesses were produced to prove that indeed the rurario or the ngurario which is the essential in proving the validity of Kikuyu Customary law was performed.
16. The court also went to quote with approval the case of *Gituanja vs Gituanja* [1983] KLR 575 the Court held inter-alia that;

“The existence of a marriage is a matter of fact which is proved with evidence. The evidence at the trial produced a valid marriage under Kikuyu customary law as was evidenced by the slaughtering of the ngurario.”

Erred in law and fact in issuing orders revoking the grant of letters of administration

17. The honourable court went on to revoke the confirmation of grant issued on 19<sup>th</sup> October 2021 while the beneficiaries had already executed the grant and title had been issued to the beneficiaries. The title holders were not made party to the proceedings of the revocation of grant which poses the danger of the titles having been cancelled without being heard.

### **Respondents submissions**

18. Despite opportunity to do so the respondent did not file any submissions.

### **Issue**

19. The issues for determination are whether the court erred in finding that the Respondent was a wife of the deceased and whether the court erred in law and fact in issuing orders revoking the grant of letters of administration.

### **Analysis**

20. The Court has considered the submissions of the learned counsel for the appellant herein as well as the grounds of appeal. The respondents did not file submissions.
21. This being a first appeal, the role of this court is well spelt in that it must evaluate and subject the evidence tendered before the trial court to a fresh analysis and arrive at an independent conclusion as to whether to uphold the decision of the trial court (see *Selle –vs- Associated Motor Boat* [1968] EA 123).



## **Whether the court erred in finding that the Respondent was a wife of the deceased**

22. The main ground of appeal is that the Honourable Court erred in law and fact in making a finding that Esther Wangechi Njeru was a wife to Moses Kimotho Komu (deceased) while no sufficient evidence was tendered by the Respondent.
23. The Respondent testified that she was married to the deceased herein under Kikuyu Customary Law in the year 1958 and that all the rites and ceremonies including Ruracio were conducted. There was no wedding ceremony. She has photographs taken with the deceased. She gave the photographs to her advocate. The second wife was married in 1960. she did not say that she helped to get Joyce Ngina married. She does not have chiefs letter saying that she was a wife of the deceased.
24. The appellant submits that the Respondent did not prove that she was married to the deceased through Kikuyu Customary Law since no concrete evidence or witnesses were produced to prove that indeed the ruracio or the ngurario which is the essential in proving the validity of Kikuyu Customary law was performed.
25. In the case of *Gituanja vs Gituanja* [1983] KLR 575 the Court held inter-alia that;
  - i. “The existence of a marriage is a matter of fact which is proved with evidence. The evidence at the trial produced a valid marriage under Kikuyu customary law as was evidenced by the slaughtering of the ngurario.”
26. However, the respondent in her Supplementary affidavit dated 16<sup>th</sup> May, 2022 deposed that she was legally married to the deceased under Kikuyu Customary law in 1957. In 1958 she was issued with an identity Registration Card to enable visitation of the deceased while in detention in Mombasa.
27. Further, she deposes that they were blessed with four issues namely: Penninah Wambui, Hannah Wanjira, Josphat Muriuki and Pauline Muthoni.
28. The Respondent / 1<sup>st</sup> Appellant in the Replying Affidavit dated 5<sup>th</sup> May, 2022 avers that the Esther Wangeci Njeru was once a girlfriend to Moses Kimotho Komu (deceased). The relationship resulted in the birth of one Josphat Muriuki Kimotho. That the relationship soured and she left the deceased and was married by one, Njeru.
29. DW2- Sebastian Gitari Githii. He is the former Chief Korona. He testified that he wrote the letter dated 9.10.19. He knew that the deceased had one wife. On re-examination he stated that the deceased had five children. Josphat came to his office. He knows that Esther was married at Mwea.”
30. Section 3(5) of the Succession Act Cap 160 Laws of Kenya provide as follows: -
  - “(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”
31. In re Estate of RNN (Deceased) (Succession Cause 234 of 2014) [2021] KEHC 6140 (KLR) Ngetich J. held: The court in its finding limited recognition of such marriage for succession purposes; Section 3(5) recognizes such marriage for purposes of succession only. She is recognized as a wife for the purpose of the Act, and in particular Sections 29 and 40 thereof and her children are considered children within the meaning of the *Law of Succession Act*.



32. The trial court held that the respondents/appellants knew about Esther Wangeci but did not disclose this fact to the court. The chief who wrote a letter of introduction in 2019 did not know about Esther Wangeci as a wife of the deceased is not surprising given the dates when the Respondent is alleged to have married the Deceased. The Appellant's both witness DW1 and DW2 agreed that the Respondent had a child with the Deceased. Together with the respondent's colonial Pass Identity Card which registered here as wife of Kimotho, the balance of probabilities is tilted toward establishing her marriage to the deceased.
33. Although no evidence was led to support allegation of ruracio and ngurario ceremonies, the evidence of the children born with the deceased and Identity Card with the surname of the deceased and the Appellant's own admission by her witnesses of a relationship between the two which they considered girl/boy-friendship would also support a reasonable presumption of marriage.
34. Consequently, the Respondent was a wife of the deceased for the purpose of succession.
35. The Court agrees with the trial court finding that the fact of existence of the respondent as a dependant/wife and her children was crucial to the determination of this cause. Concealment of that fact brings the matter squarely within the provisions of section 76 of the act. Hence, the revocation of grant was merited.

**Whether the court erred in law and fact in issuing orders revoking the grant of letters of administration**

36. The appellant claim that the honourable court went on to revoke the certificate of Confirmation of Grant issued on 19<sup>th</sup> October, 2021 while the beneficiaries had already executed the grant and title had been issued to the beneficiaries. The power or discretion granted to the court by section 76 of the *Law of Succession Act* is for revocation of grants, including confirmed Grants, for the reasons and grounds set out therein. This Court does not find any reasons on the established principles of appellate interference with the exercise of discretion of a trial court.
37. Subject to section 93 of the *Law of Succession Act*, any third party who had benefited from the deceased's estate before the grant was revoked should make their claim against the appellants.

**Orders**

38. Accordingly, for the reasons set out above, the Court finds that the Appeal has no merit and it is dismissed.
39. There shall be order as to costs.

Orders accordingly.

**DATED AND DELIVERED THIS 27<sup>TH</sup> DAY OF MARCH 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. Otieno for Mrs. Makworo for the Appellant.

