



**In re Estate of Elias Mwendia Gichobi alias Elias Mwendia Gicobi (Deceased)
(Succession Cause 289 of 2015) [2025] KEHC 5466 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5466 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 289 OF 2015**

EM MURIITHI, J

APRIL 30, 2025

**IN THE MATTER OF THE ESTATE OF ELIAS MWENDIA
GICHOBI ALIAS ELIAS MWENDIA GICOBI (DECEASED)**

BETWEEN

LIZMARY WAMBUI MURIITHI PETITIONER

AND

ELIZABETH KARIMI NDAMBIRI PROTESTOR

RULING

1. The applicant filed affidavit of protest dated 30th May, 2018 opposing the application for confirmation of grant and set out her case that she together with the petitioner Lizmary Wambui Muriithi were both wives of Elias Mwendia Gichobi alias Elias Mwendia Gicobi who is now deceased. That the deceased was survived by other two children (beneficiaries) namely as per chief's letter attached:

1. Martin Karani - Son (minor)
2. Elphas Muriithi - Son (minor)

The Petitioner filed this Succession Cause secretly without consulting all beneficiaries. She lives with her children on the land and have so lived ever particularly herself who is also a wife of the deceased. Further, land parcel Nos. Baragwe/ Kariru/ 1972 & Baragwe/ Kariru/ 2323 were all registered in the name of Elias Mwendia Gichobi and also shares with Fortune Sacco Account No. 1071226485290015. The Petitioner also did fail to include the following properties registered in the name of Elias Mwendia Gicobi (deceased):

- Death Gratuity — Kimunye Tea Factory
- Money at Bingwa Sacco A/C No. 331573
- Money at Fortune Sacco A/C No. 1070850655210015



- NSSF Shares
- Shares with Bingwa Sacco
- Shares with Fortune Sacco

Lastly, the deceased properties should be shared equally to the beneficiaries.

2. The Petitioner filed a reply to the protest dated 7th August, 2018 setting out her response to the protest. The petitioner avers that the protestor is not and has never been a wife to the deceased. The deceased and her acquired the properties which are both movable and immovable. The so called protestor cannot even know how those properties were acquired. Further, she got married to the deceased in a church wedding at ACK Kiandai Church on 14th February 1998. The protestor has not indicated under what system and when she got married to the deceased, because she has never been a wife. The area assistant chief and the area chief have written letters to confirm that she is the only dependant of the deceased, hence the only one who should succeed the deceased.

Lastly, that the children named in paragraph 3 of the protest being Martin Karani and Elphas Muriithi, were sired by a man from Kamweti who is the husband to the protestor. She cannot therefore be a wife to two men at the same time.

Witness Testimonies

Elizabeth Karimi Ndambiri - Petitioner

3. The Petitioner testified that she was married to the deceased under the then African Christian Marriage and Divorce Act in the year 1998 and that the protestor was not a wife as the deceased had no capacity to marry. They had no children.
4. She further stated in her response that the (2) children listed by the protestor were born by another man. She did not disclose the name in the Response or anywhere in her pleadings. She admitted that she had indeed left the matrimonial home before her husband died.
5. The petitioner also gave evidence stating that she was married in church and the marriage was never dissolved. She claimed that they had bought the land together with the deceased but no evidence was produced to that effect. She admitted that they have never resumed cohabitation and deceased died while they were separated.

Elizabeth Karimi Ndambiri – Protestor

6. The Protestor stated that she got married to the deceased who took her in together with her (2) children above named. Though he is not the biological father, he enrolled them in school and continued not only living with them as a family but also paying for the school fees.
7. She produced a letter dated 4th January, 2012 from Muungano Junior School duly signed and stamped by the Head-teacher to the effect that one Elias Mwenda (Deceased in this case) had enrolled them in and continued paying school fees for them. No evidence was advanced by Petitioner to show that this letter did not indeed emanate from the School or that it was a fake.
8. She stated that she got married in the year 2011 and that some customary rites were performed including slaughtering of a goat and sodas. The deceased had separated with the petitioner and had not returned home at the demise of the deceased or to date. She is the one living in the matrimonial home and was left there by the deceased.



Pw 2- Francis Kariithi

9. He stated that indeed the protestor was a wife to the deceased; they lived together until he died in 2015. He further stated that she is still living there and cultivate his land. He also confirmed that the protestor got married when she already had (2) kids and that his brother had taken them as his own, educated them and even lived with them until his demise
10. He stated further that even after his brother's death. It is his mother (mother to the deceased) who has been paying their school fees.

Pw3- Samuel Githinji

11. He is a neighbour, who confirmed that indeed the deceased had married the protestor and had also adopted her (2) children as his own. The deceased approached him in 2011 to take him to the protestors home for introduction. They gave the goats and were allowed to take the protestor as a wife of the deceased. The petitioner and the deceased had separated in 2009. He died leaving them on the land where they live to date.
12. The Protestor provided overwhelming and uncontroverted evidence from herself, the deceased's family and a neighbour.
13. Firstly, she stated that she got married in 2011 and customary rights were performed, including slaughtering of a goat and sodas.

Protestor submissions

Whether the Protestor was a wife of the deceased for purposes of Succession

14. Section 43 (2) of the *Marriage Act* provides that:

“Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.”
15. Even when the entire dowry was not paid herein, the slaughtering of goats and delivery of sodas form part payment, that is, the payment of a token amount of dowry, which is sufficient to prove a customary marriage as required under section 43 (2) of the *Marriage Act*.
16. They submit that indeed a customary marriage exists between the protestor and the deceased. It is not in dispute the Protestor and the deceased lived together until his demise. Most importantly, the protestor still lives in the matrimonial home after being left there by the deceased.

Whether the deceased had taken the children brought by the protestor as his own

17. The protestor submits that the deceased had accepted the children that she brought with to the marriages his own. As provided for under section 3 (2) and 2 of the *Law of Succession Act*, they submit that they are dependents of the deceased person herein. The Protestor produced a Letter dated 4th January, 2012 from Muungano Junior School showing that the deceased herein had enrolled the children to School.



Petitioner submissions

Whether the protestor was a wife to the deceased and whether her children were children of the deceased

18. Whereas the protestor claimed that she was a wife to the deceased and that her two children were children of the deceased, the petitioner claimed that she was the only wife to the deceased, having been married through a church wedding in 1998, and that the protestor and her children are strangers to the estate.
19. It was the protestor's evidence that she got married to the deceased customarily in 2011, but they settled at home in 2013. According to her, though her two children were not sired by the deceased, the deceased used to take care of them.
20. According to the evidence on record, the protestor confirmed that no dowry was paid and ngurario ceremony was not performed. There was a letter from the area assistance chief dated 11/5/2015 which stated that the deceased had only one wife. Pw1 conceded during cross examination that there was no proof of payment of school fees for her children by the deceased, and that there was nothing to show that the deceased supported the children.
21. The evidence of the protestors witness contradicted that of the protestor. Whereas the protestor confirmed that no dowry was paid and ngurario ceremony was not performed, pw2 Francis Kariithi stated that sodas were taken R to the protestor's parents and the deceased died before dowry was paid. Pw3 on his part said that goats and sodas were taken to the protestors parents and that Pw2 (Francis Kariithi) was not present.
22. As to the duration of the alleged cohabitation between the protestor and the deceased, it was the evidence of the protestor that they settled at home in 2013. Deceased died in 2015. They had no child. They never acquired any property for the said period of two years, even if it's assumed that they lived together. On her part, the petitioner stated that by the time of his death, the deceased had no other woman living with him. It's our humble submission that even presumption of marriage cannot arise. If by any chance they lived together, but which was denied by the petitioner, then at best the protestor was only a concubine and not a wife.
23. Concerning the two children of the protestor, it is common ground that they were not biological children of the deceased, it has to be shown that the deceased had taken them into his family as his own, and they were being maintained by the deceased immediately prior to his death. The protestor had to prove that the deceased had accepted or assumed permanent responsibility for the two children. As per the evidence on record, the protestor did not demonstrate how the deceased supported her two children.
24. *Eddah Wangu & another v Sacilia Magwi Kivuti (Deceased) Substituted with Ribereta Ngai* [2021] eKLR

I have considered the evidence in the court record and on a balance of probabilities, I find that the 2nd appellant has not brought any tangible evidence to show that he was being maintained by the deceased herein. In the case of *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* [2016] eKLR, it was observed that “a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.”



Issues

25. Whether the Protestor was a wife of the deceased for purposes of Succession.
26. Whether the deceased had taken the children brought by the Protestor as his own.
27. Whether the Petitioner contributed to the Purchase of the deceased's property.

Analysis

28. The petitioner Elizabeth Karimi Ndambiri filed this cause as a wife to the deceased and thereafter applied for Confirmation of Grant praying that the whole of the estate of the deceased be granted to her.
29. Subsequently the protestor Elizabeth Karimi Ndambiri filed a protest stating that she was also a wife of the deceased with (2) children namely Martin Karani and Elphas Muriithi minors both. She prayed that the properties be equally shared amongst herself and the petitioner and the (2) children.

Whether the Protestor was a wife of the deceased for purposes of Succession

30. Section 3 (5) of the [Law of Succession Act](#) provides as follows: -

“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. The Inference from the aforementioned provision is that a woman married under customary law is protected for purposes of Succession, even when the husband had contracted a previous statutory marriage to another woman.
32. This position was aptly discussed [in Re estate of Robert Ngudo Nyiva Deceased](#) 2021 eKLR where it was held: -

“From the foregoing, the succession Act under section 3(5) comes in to protect women or children in unions contracted with a man after statutory marriage. The woman in such a union who is able to prove marriage is considered as a wife for purposes of succession. In the case of [Irene Njeri Macharia v Margaret Wairimu Njomo and another Nairobi court of Appeal Number 139 of 1994](#) Justices Omolo Tunoi and Bosire held that section 3(5) of the [Law of succession Act](#) is meant to protect women who marry men under customary law, who are already married to or who subsequently marry another woman under statute. The woman married under customary law is regarded as a wife for succession purposes, notwithstanding by that by virtue of Section 37 of the [Marriage Act](#) the man had no Capacity to marry her.
33. The Protestor provided evidence from herself, the deceased's family and a neighbour. Firstly, she stated that she got married in 2011 and customary rights were performed, including slaughtering of a goat and sodas.



Section 43 (2) of the *Marriage Act* provides that:

“Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.”

34. Even when the entire dowry was not paid herein, the slaughtering of goats and delivery of sodas form part payment, that is, the payment of a token amount of dowry, which is sufficient to prove a customary marriage as required under section 43 (2) of the *marriage Act*. The petitioner claimed that she was the only wife to the deceased, having been married through a church wedding in 1998, and that the protestor and her children are strangers to the estate. It is not in dispute the Protestor and the deceased lived together until his demise. The protestor still lives in the matrimonial home after being left there by the deceased.

35. *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (Petition 9 of 2021) [2023] KESC 2 (KLR) (27 January 2023) (Judgment)

In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently.

36. The petitioner submitted that the alleged cohabitation between the protestor and the deceased, it was the evidence of the protestor that they settled at home in 2013. Deceased died in 2015. They had no child. They never acquired any property for the said period of two years, even if it's assumed that they lived together.

37. On the evidence, the Court finds that the Protestor's marriage to the Deceased was not proved as crucial ceremonies of a valid Kikuyu Marriage for the payment fo Ruracio and Ngurario were not undertaken. The ceremony which according to PW2 occurred in 2011 where a goat and soda were offered does not qualify as proof of Marriage as the saving provision of section 43(2) of the *Marriage Act* came into force on 20th May 2014.

Whether the deceased had taken the children brought by the protestor as his own

38. The protestor submits that the deceased had accepted the children that she brought with to the marriages his own. As provided for under section 3 (2) and 2 of the *Law of Succession Act*, they submit that they are dependents of the deceased person herein.

39. In the case of *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* [2016] eKLR, it was observed that “a dependent under section 29(b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.”

40. The Protestor produced a Letter dated 4th January, 2012 from Muungano Junior School showing that the deceased herein had enrolled the children to School.

41. This shows that the deceased had taken parental responsibility over the child. The reasonable inference herein is that he had accepted them as his children.



42. The petitioner submitted that the protestor did not demonstrate how the deceased supported her two children.
43. PW2 and PW3 testified and confirmed that the deceased had taken the protestors children as his own and educated them. Hence, this proves that they were his dependants.
Whether the Petitioner contributed to the purchase of the deceased's property
44. Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence. The Petitioner alleged that she contributed to the Purchase of the deceased's properties. She produced a sale agreement that shows the deceased was the sole purchaser. If anything, her matrimonial interest is unfounded as this court is not seized with a matrimonial property cause but a successional cause.
45. The petitioner submitted that the protestor and the deceased never acquired any property for the said period of two years, even if it's assumed that they lived together. There was no cogent evidence as would be required to prove contribution in the acquisition of a property which is registered in the name of the deceased as the sole owner.
46. In conclusion, on a balance of probabilities, the Court finds that the Protestor has not proved that she was a wife of the deceased but she has proved that her children were dependants of the deceased and should benefit from his estate.

Orders

47. Accordingly, for the reasons set out above, the Court finds the Protest is partially successful to the extent that the children of the Protestor are dependants of the deceased and they shall, consequently, be entitled to share in Estate in equally with the other beneficiaries.
48. The Administrator shall within thirty (30) days file an affidavit as to effect the equal sharing of the Estate among the beneficiaries in terms of the decision of this Court for adoption by the Court.
49. Liberty to apply for each party.
50. There shall be no order as to costs.
51. Mention on 29/5/2025 for compliance.
Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Maina for the Petitioner/Applicant.

Ms. Wanjiru for the Protestor.

