



REPUBLIC OF KENYA



**Mathiu v Kiruki & 4 others (Family Appeal E006 of 2023)  
[2025] KEHC 7678 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7678 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
FAMILY APPEAL E006 OF 2023  
HM NYAGA, J  
MAY 29, 2025**

**BETWEEN**

**PETER MBIJIWE MATHIU ..... APPELLANT**

**AND**

**CHARITY RINYA KIRUKI ..... 1<sup>ST</sup> RESPONDENT**

**NAOMI NGIRI ..... 2<sup>ND</sup> RESPONDENT**

**JANE GATWIRI ..... 3<sup>RD</sup> RESPONDENT**

**REBECCA MUTHONI ..... 4<sup>TH</sup> RESPONDENT**

**PETER KABURU ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The deceased herein died on 5/9/2002.
2. By a Petition filed in Meru Chief Magistrate’s Court, the 1<sup>st</sup> respondent sought letters of administration of the deceased’s estate. She listed the following as the beneficiaries who survived the deceased:-
  - a. Charity Kinya Kiruki (1<sup>st</sup> respondent)
  - b. Peter Mbijiwe (Appellant)
  - c. Tabitha Mbuthi (Deceased)
  - d. Zipporah Nduru (Deceased)
  - e. Elizabeth Karambu (Deceased)
  - f. Evangeline Tirindi (Deceased)
3. Subsequently, the appellant filed an objection to the making of the grant dated 30/11/2018.



4. Despite the objection, a grant was issued to the 1<sup>st</sup> respondent on 24<sup>th</sup> December, 2018. This prompted the appellant to file summons for revocation or annulment of the grant dated 7<sup>th</sup> March, 2019. On 6<sup>th</sup> February, 2020, by consent, the court revoked the grant and ordered that a fresh grant be issued to the 1<sup>st</sup> respondent and the appellant. The court further ordered the 1<sup>st</sup> respondent to apply for confirmation and the appellant be at liberty to file a protest.
5. The protest and summons for confirmation were heard and Judgment was delivered on 16<sup>th</sup> February, 2023, in which the court made the following orders:-
  - a. The grant issued jointly to the Petitioner and protestor is confirmed.
  - b. It is declared that LP. NO. NKUENE/KATHERA/711 is not part of the estate of the deceased.
  - c. LP. NO. Nkuene/Kathera/115 shall be shared equally amongst the six children of eh deceased who is dead shall have her share inherited by her children.
  - d. The children of the deceased daughters of the deceased to attend court for their identification and directions by the court.
  - e. Pending compliance with order (4) above, confirmation of grant and distribution of eh estate is stayed.
6. After delivery of the said Judgment, the court set a date for the identification of the children of the deceased's children (grandchildren) and on 28/3/2023, the court made further orders as follows:-

Land parcel no. NKUENE/KATHERA/115 shall be shared as follows:

  - i. Peter Mbijiwe Matheu – 0.57ha
  - ii. Charity Ringa Kiruki – 0.57ha
  - iii. William Kaburu Ametea – 0285ha
  - iv. William Kaburu Ametea – 0285 ha as trustee for the sole benefit of children of his deceased brother, one, Julius Magaju M'arimi.
  - v. Naomi Nyiri Kungania and Moses Kiriti Kungania – 0.57ha as a trustee for themselves and siblings in equal shares
  - vi. Rebecca Muthomi Kiambi and Dickson Kathurima Murithi as trustee for themselves – 0.57 ha and siblings in equal shares
7. It is the said judgment and subsequent orders that the appellant has appealed against.

### **The Appeal**

8. Vide a Memorandum of Appeal dated 15<sup>th</sup> March, 2023, the Appellant set forth the following grounds:
  - a. The learned Senior Principal Magistrate erred in law and fact in ordering that the estate of the deceased be shared amongst undisclosed strangers to estate who were not mentioned in the chief's introduction letter dated 5/6/2018.



- b. The learned magistrate erred in law and in fact in ordering that the children of the deceased daughters of the deceased attend court for identification despite them never having participated in the proceedings before judgment.
  - c. The learned Senior Principal Magistrate erred in law and fact by not finding that the children of the deceased daughters of the deceased were not dependants of the deceased and could not be beneficiaries to the estate.
  - d. The judgment/decreed is against the weight of evidence before the lower court.
9. The appellant thus sought for an order setting aside the lower court's order requiring each child of the deceased who is dead or alive to have her share inherited by the children and in lieu thereof, substitute it with an order that the only children and dependants entitled to the estate of the deceased are the appellant and the 1<sup>st</sup> respondent.
  10. The appellant also sought the costs of this appeal and those of the lower court.
  11. The appeal was canvassed through written submissions.

### **Appellant's Submissions**

12. The appellant submits that the trial court erred by ordering that the estate be distributed to strangers who were not disclosed in the chief's letter dated 5<sup>th</sup> June, 2015. It was submitted that succession commenced with a letter from the chief, which sets out the beneficiaries of the estate. The appellant cited the following authorities to buttress his position:-
  - a. The Estate of Shem Kitanga (Deceased) 2018eKLR
  - b. The Estate of Ambutu Bogori (2018) eKLR
  - c. The Estate of Mukhobi Namonya (Deceased) [2020]eKLR
13. It is argued that the 1<sup>st</sup> respondent who is one of the administrators did not mention the 2<sup>nd</sup> to 5<sup>th</sup> respondents and that despite no proper identification, they were included in the summons for confirmation, as daughters of the deceased's children. To the appellant these were strangers to the estate.
14. The appellant further submits that the court erred in ordering the attendance of the deceased's daughter's children for identification, despite the fact that they did not participate in the proceedings. That this was odd and unprocedural as they had not properly identified themselves.
15. Lastly it is submitted that the learned magistrate erred by not making a finding that the children of the deceased's daughters were not the dependents of the deceased and could not be beneficiaries of the estate.
16. The appellant thus concludes by stating that having demonstrated that the 2<sup>nd</sup> to 5<sup>th</sup> respondents are strangers to the estate, they cannot inherit any part of it.
17. The appellant urged the court to allow the appeal with costs.

### **Respondent's Submissions.**

18. For the respondents, it was submitted that Section 41 of the *Law of Succession Act* was clear on the rights of grandchildren of the deceased, whose parents who were children of the deceased. That in



short, when a child of the deceased is himself/herself deceased and is survived by children, then the share devolving to that child of the deceased will devolve to the children of that child.

19. To buttress this point, the respondents cited the estate of Wahome Njoki Wakagato (Deceased) (2013) eKLR and Christine Wangari Gachege – Vs- Elizabeth Wanjoo Evans and 11 others (2014) eKLR.
20. The respondents submit that the learned magistrate was right to summon the children of the deceased's daughters when that fact became apparent. Cited were the Estate of Hellen Wangari Waithai (2021) eKLR.
21. It is further argued that in so far as the appellant does not deny that the 2<sup>nd</sup> to 5<sup>th</sup> respondents are children of the deceased's daughters, then the appeal lacks merits.

### **Analysis & Determination**

22. By virtue of Section 80 of the *Law of Succession Act*, an appeal lies as of right against any order or decree of the subordinate court.
23. Being a first appeal, the court has a duty to re-evaluate the evidence tendered before the trial court and come up with its own independent decision. This was so held in *Selle – Vs- Associated Motor Boat Limited Company* (1968) EA 132 where the Court of Appeal stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that, this Court must 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 this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

24. It is thus necessary to consider the evidence adduced during the hearing of the summons for confirmation of the grant and the protest.
25. The protestor/appellant stated that the deceased had 5 children namely:-
  - a. Tabitha
  - b. Elizabeth
  - c. Zipporah
  - d. Evangeline
  - e. The appellant
26. The protestor/appellant stated that he could not confirm if the 1<sup>st</sup> respondent was a child of the deceased, as he had not seen her at home. To the appellant, the children of his deceased sisters should not have inherited the estate as they have their own fathers.
27. He also confirmed that he was the registered proprietor of Land Parcel No. NKUENE/KATHERA/711, while NKUENE/KATHERA/115 was in the name of the deceased. That his father left him living on the latter parcel of land.



28. The appellant's case was thus that the said land ought to have been distributed between him and the 1<sup>st</sup> respondent only.
29. PW2 was one Jason Muriuki M'Imanene. He asserted that none of the respondents herein are eligible to inherit from the deceased as they have their own fathers, who he listed. In particular, he stated that the 1<sup>st</sup> respondent whose parents were known, ought to inherit from the estate of her father and husband.
30. PW3 was John Kinoti M'Inoti. He confirmed that Peter (Appellant) was given land by his grandfather being land Parcel No. 711, where he lives with his family. He was categorical that the 1<sup>st</sup> respondent was not a child of the deceased herein, but of one M'mungania M'ikiugu and Julia M'mungania.
31. The 1<sup>st</sup> respondent told the trial court that the protestor/appellant was his elder brother. That she is also a child of the deceased herein. She listed the other children of the deceased as being: -
  - a. Tabitha
  - b. Zipporah
  - c. Elizabeth
  - d. Evangeline
  - e. Peter (appellant)
32. The 1<sup>st</sup> respondent insisted that the two parcels of land in question belonged to the deceased. She proposed that both parcels be shared equally among the children of the deceased. That the shares of the beneficiaries who are deceased be given to their children who have been identified.
33. Having considered the matter, I find that the following issues fall for determination: -
  - a. Whether the trial court erred in making provision for the other parties rather than the appellant and the 1<sup>st</sup> respondent only.
  - b. Who bears the costs of this appeal?
34. To start with, it is evident that the appellant is the registered owner of land parcel No. NKUENE/KATHERA/ 711. As such the said land is not part of the estate of the deceased.
35. The appellants argument is that the trial court ordered for the appearance of the 2<sup>nd</sup> to 5<sup>th</sup> respondents for identification, despite the fact that they were not present during the proceedings before it. That they were not disclosed in the letter of the chief.
36. Perhaps, the best place to start is to determine who is entitled to inherit from the estate of the deceased person. From the evidence adduced in the lower court, it is clear that the 1<sup>st</sup> respondent listed all the children of the deceased. The disclosure is consistent with details set out in the chief's letter addressed to the court.
37. As was stated in the authorities cited by the appellant, the chief's letter is not a legal requirement. The chief is presumed to know the details of the family and if not, he/she can make appropriate enquiries to help this court identify the beneficiaries to the estate, since the court does not have the capacity to do so.
38. Having stated so, it is obvious that the chief's letter cannot be binding upon the court. It is only a reference point and if there is sufficient evidence to include or exclude a beneficiary omitted or included respectively, the court has the power to act accordingly.



39. The gist of the appellant's argument is that the 2<sup>nd</sup> to 5<sup>th</sup> respondents were not included in the chief's letter and did not participate in the proceedings.
40. That argument is in my view, baseless. The said respondents are said to be the children of the daughters of the deceased, who were disclosed in the Petition, and not contested by the appellant.
41. In any case, the appellant has no capacity to determine who are the children of his siblings and their purported fathers. What matters is that the deceased had 6 children. The trial court was right to find that fact.
42. At the time of his death the deceased had no spouse. Therefore, the provision of Section 38 of the Act came into play. The same provided as follows:-

38.

- (1) The making of a grant of representation under rule 36 or 37 shall be without prejudice to the right of the representative so appointed or of any other person to apply under any other provision of these Rules for a grant of representation to the deceased.
- (2) Upon the making of a grant under any provision of these Rules other than rules 36 and 37, any earlier grant made under either of those rules (in this subrule called the temporary grant) shall cease to have effect, but without prejudice to any act or other thing lawfully done thereunder, and the holder of the temporary grant shall forthwith surrender that temporary grant and account to the court for all the assets collected and shall be given credit for any payments properly made and expenses properly incurred by him as such holder.

43. The Estate of Wahome Njoki Wakagoto (Supra) it was held as follows: -

Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1<sup>st</sup> July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.

44. That is the correct interpretation of the law, in my view.
45. The same position was affirmed in estate of Florence Mukami Kinyua (deceased) (2018) eKLR where the court held that:-

“A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shares of their deceased parents and take the parent's share in the estate of the grandparents”.

46. It is thus clear that, a child of a deceased is entitled to inherit the estate of the grandparent, but only limited to the share that the child of the deceased would have been entitled to.
47. The trial court correctly adopted this approach and declared that the sole property of the estate would be shared between the six children of the children of the deceased.



48. In my view, the appellant is drawn from the old thinking that daughters of a deceased are not entitled to inherit any part of the estate. At first, he had even disowned his own sister, the 1<sup>st</sup> respondent.
49. Clearly, what the appellant wanted was to inherit the estate alone and when that was not allowed, he now accepts that the 1<sup>st</sup> respondent can get half of the estate and he gets the other half.
50. The witnesses he brought to court clearly demonstrated this outdated thinking, which is contrary to the principles of non discrimination on the ground of gender, marital status among others, as set out under Article 27 of *the Constitution*.
51. The deceased died in 2002, before the promulgation of *the Constitution* in 2010. Even then Makhandia J (as he then was) in Re Estate of Solomon Ngatia Kariuki (Deceased) (2008) eKLR was clear on the issue of discrimination against daughters generally in succession matters and he said:-

“The *Law of Succession Act* does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to state a claim to the deceased’s estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu customary law. Like most other customary laws in this country, they are always biased against women and indeed, they tend to bar married daughters from inheriting their father’s estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father’s inheritance because they are likely to enjoy inheritance of their husband’s side of the family.”

52. Having considered the matter, I find that the trial court acted correctly in applying the law, and most importantly, treating all the children of the deceased equally.
53. In conclusion, I find that the appeal lacks merit and it is dismissed.
54. Being a family dispute, I think that the right order is for each party to bear their own costs.

**DATED, SIGNED & DELIVERED AT MERU THIS 29<sup>TH</sup> DAY OF MAY, 2025.**

**H.M. NYAGA**

**JUDGE**

