



**In re Estate of Mbogo Ndwiga (Deceased) (Family Appeal
E004 of 2024) [2025] KEHC 7139 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
FAMILY APPEAL E004 OF 2024
RM MWONGO, J
MAY 28, 2025
IN THE MATTER OF THE ESTATE OF MBOGO NDWIGA (DECEASED)**

BETWEEN

CATHERINE WANJIRA MUGO APPELLANT

AND

DAVID KARIUKI MBOGO RESPONDENT

*(An appeal from the Judgment of Hon. F.N. Kyambia, CM in Embu
Succession Cause No. E028 of 2020 delivered on 15th February 2024.)*

JUDGMENT

The Memorandum of Appeal

1. The appellant filed a memorandum of appeal dated 26th February 2024 seeking that the Appeal be allowed and the Judgement delivered on 15th February 2024 and other consequential orders be reversed, reviewed and or set aside and the land be transferred to the Appellant. The appeal is premised on the grounds that:
 1. The Learned Trial Magistrate erred in Law and fact when he failed to consider the entire evidence of the Appellant which was clearly stated in her statement in which she stated particularly that she was a daughter of the Deceased by virtue of being a daughter of the second wife of the Deceased Mbogo Ndwiga;
 2. The Learned Trial Magistrate erred in law and fact when he failed to appreciate that the Appellant was the Biological Daughter of One Mbogo Ndwiga and got three children two of whom were deceased and the Appellant was the only surviving child. The Learned Trial Magistrate erred further when he failed to note and appreciate that the Appellant's evidence was strongly corroborated by the evidence of Protestor's Evidence Number Two;



3. The Learned Trial Magistrate erred in Law and fact by failing to apply section 29 of the Law of Succession properly because the Appellant was a child of the Deceased having clearly stated that she was a child (among three others) of the Deceased in this matter;
4. The Learned Trial Magistrate erred in Law and Fact when he concluded that the Protestor did not prove that it was a cultural practice of a wife inheritance among the Embu Community. The Protestor had clearly stated that she was the child of the Deceased after father's brother died in detention;
5. The Learned Trial Magistrate erred in Law and Fact when he ignored the Protestor's evidence as clearly stated in paragraphs 4,5,6,7,8 and 9 of her evidence as stipulated in the statement which clearly establish that she was:
 - (a) A daughter of the Deceased
 - (b) She was brought up by the Deceased in his land where she lived with the father in the land which is the subject of this succession.
 - (c) That the mother had three children with the Deceased.
6. The Appellant avers that other than the flat denials by the Petitioner, they did not substantially challenge and deny the facts and evidence set out by the Protestor in her evidence;
7. The Learned Trial Magistrate erred in Law and Fact when he failed to consider the evidence of PW2 which evidence clearly established that she was the daughter of the Deceased;
8. The Learned Trial Magistrate erred in law and fact when he completely ignored the evidence of PW3 and PW4 in which he clearly stated that he paid the dowry of the Protestor to the Deceased, a fact which clearly established that she was his daughter; and
9. The Learned Trial Magistrate erred in Law and Fact in relying on the evidence of petition and his witnesses most of whom were brothers and sisters and whose evidence was full of very material contradictions.

Background

2. The background of the case is as follows.
3. In the lower Court the respondent was issued with a grant of letters of administration in the estate of the deceased. He filed summons for confirmation of grant together with a supporting affidavit through which he proposed a mode of distribution of the deceased's estate. Such distribution comprised of land parcel number Ngandori/Kirigi/1362. In the same affidavit, he named the following as children and dependants of the deceased: 1) Jacinta Gicugu Njue, 2) Mary Wambeti Njue, 3) Njue Mbogo, 4) Simon Karagirwa Mbogo and 5) David Kariuki Mbogo. He proposed that the land be subdivided amongst Njue Mbogo, Simon Karagirwa Mbogo and himself, each getting 1 acre and left the others out.
4. The appellant filed an affidavit of protest disputing the mode of distribution as proposed by the respondent. She listed 6 beneficiaries of the estate, noting that one is deceased. She deposed that her mother, Ruth Muthanje, was previously married to the deceased's brother known as Gitari Kivara and they had 2 children namely Alice Rwamba and Mbogo Ndwiga.
5. Upon the death of Gitari Kivara, she asserts, the appellant's mother was inherited by the deceased herein (who already had another wife) according to the Embu customary rites of wife inheritance. During her marriage to the deceased herein, the appellant's mother bore the appellant, Gichugu



Mbogo and Njagi Mbogo. The appellant deposed that she was born and raised by the deceased on parcel number Ngandori/Kirigi/1362.

6. She stated that the deceased subdivided this land into 2 portions and gave a portion to each of his 2 wives and their children. They lived and worked on the land until the death of the deceased when the respondent and his brothers became hostile. The appellant deposed that when she got married in 1979, her dowry was paid to the deceased, her father, but in the distribution, she is not recognized as the deceased's child. She proposed that the land parcel number Ngandori/Kirigi/1362 be shared equally amongst the following: David Kariuki Mbogo, Njue Mbogo, Simon Karagirwa Mbogo and Catherine Wanjira Mugo.
7. In the respondent's reply to the affidavit of protest, he deposed that the protest is brought in bad faith and it should be dismissed. He denied the contents of the affidavit of protest urging that the information therein was contradictory.

Summary of the Evidence at the trial Court.

8. At the hearing of the protest, PW1 was the appellant who adopted her statement which is in the same terms as the affidavit of protest. On cross-examination, she stated that the respondent is her half-brother and that she was raised by the deceased.
9. PW2 was Albert Mbogo Nthiga, former Chief of Ngandori. He stated that the appellant is the respondent's sister, both being children of the deceased. That the deceased's brother died and his wife was inherited by the deceased. After the deceased inherited the appellant's wife, the appellant and the respondent were born almost at the same time but by different mothers. The deceased was then given land by the clan and he relocated to Njukiri. He stated that when the appellant's mother died, the deceased's sons refused to have her buried on the deceased's land, that is why the appellant's mother was buried elsewhere.
10. PW3 was Simon Mugo, the appellant's husband, who stated that when he was marrying the appellant, he paid dowry to the deceased and the appellant's mother. He knew the respondent as the half-brother of the appellant.
11. PW4 was Alexander Njiru who stated that he accompanied PW3 when he went to pay dowry to the deceased as the father of the appellant. After that ceremony, he visited the deceased and his family on several occasions and even helped with the farm work. He stated that the deceased had 2 wives.
12. The respondent testified as DW1. He stated that the deceased had 6 children by his wife Sarah Wanja Mbogo. The 6 are Livingstone Ndwiga, Mary Gicugu, Jacinta Wambeti, Njue Mbogo, Simon Karagirwa and David Kariuki Mbogo. He stated that the deceased's brother, Gitari, married a wife called Muthanje and together, they had 3 children called Ndwiga Gitari, Robert Gitari and Wanjira Gitari. Gitari, the deceased's brother was given land in Kairuri by the clan while the deceased herein was given land in Njukiri in 1963. It was his evidence that the deceased died in 1983 and they planned on how to share his property and the appellant demanded a share of it.
13. The respondent demanded that the appellant conduct a DNA test to verify that she is a child of the deceased. On cross-examination, he stated that the appellant is his cousin who is also older than him. He could not recall when the clan gave land to the deceased but he knew that the deceased was the only one given land in Njukiri. He disputed that the deceased and the appellant's mother were married. He also denied that the deceased received the appellant's dowry.
14. DW2 was Jacinta Gicugu who stated that the appellant is her cousin who only used to visit their home but she never stayed there with the deceased. That the appellant stayed in Kianjiru where her



mother was buried. On cross-examination, she testified that she did not know the appellant's father because they did not live in the same area. She stated that her father was in detention and she did not know whether the appellant's father died while in detention. She did not know whether the deceased inherited the appellant's mother.

15. DW3 was Josephine Gicuku Mbabu who testified that the appellant was not the daughter of the deceased but a niece. That the appellant only used to visit the deceased at his home. On cross-examination, she stated that her father was Njoroge and her mother was Grace Wambeti, a sister to the deceased, and they lived in Gatunduri which is 4km from Njukiri. That they used to visit their uncle, the deceased, in Njukiri. She heard people say that the appellant was a child of the deceased but she never knew the appellant.
16. DW4 was Mercy Wambeti, a daughter of the deceased who stated that the appellant is her cousin, and a daughter of their uncle, Gitari. Their uncle had 3 children. He had been given land from the clan. She said that the appellant did not deserve to be given land from the estate of the deceased. On cross-examination, she confirmed that the appellant is not her sister.
17. DW5 was Eliud Moses Njue, a resident of Kibugu. He stated that the appellant's father is called Gitari, the deceased's brother. He testified that he did not know the appellant and has never seen her.
18. DW6 was John Njue, the husband of Jacinta Gicugu who stated that he knew all the children of the deceased and the appellant was not one of them. He did not know the appellant but he knew that her mother was buried in Kairuri. He stated that the appellant's father was buried in Nairobi.
19. DW7 was Charles Mwoca who was unaware of the appellant being one of the deceased's children.

Findings of the Trial Court

20. In its judgment, the trial court found that the appellant's case was not supported by any evidence. That the requirements of section 29 of the [Law of Succession Act](#) were not proved either, for the appellant to be held as a dependant of the deceased. The protest was dismissed with costs.

Parties' Submissions on the appeal

21. In her submissions, the appellant relied on the provisions of section 29 of the [Law of Succession Act](#) and argued that she was raised by the deceased after he inherited her mother as a wife. She argued that sufficient evidence had been adduced to this effect. That the distribution should be done according to section 38 of the [Law of Succession Act](#). She relied on the case of *In re Estate of Kamau Njoro alias Kamau s/o Njoro (Deceased) (Family Appeal 7 of 2020) [2022] KEHC 14884 (KLR)* and urged the court to allow the appeal.
22. The respondent submitted that the evidence of the appellant should be treated as lies. That she is not a child of the deceased as proved through the evidence adduced. He stated that unless a DNA test is done to confirm her paternity, the appellant should not be included in the list of beneficiaries of the deceased. He relied on the case of *In re Estate of JMK (Deceased) [2021] KEHC 2767 (KLR)*.

Issue for Determination

23. The issue for determination herein is whether or not the appeal has merit.



Analysis and Determination

24. The role of an appellate court is to re-examine the evidence at trial and come up with its own conclusions while keeping in mind the findings of the trial court. This principle was enunciated in *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, as follows:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

25. The estate of the deceased is made up of only one property, namely, land parcel number Ngandori/Kirigi/1362. The appellant, through her affidavit of protest, stated that when her father died while in detention, her mother was inherited as a wife by the deceased in accordance with Embu customary law. She stated that it is during her mother’s marriage to the deceased that she (the appellant) was born. At the hearing of the protest, she called witnesses including her husband and his companion who stated that the appellant’s dowry was paid to the deceased who is her father. PW2 stated that the deceased inherited his brother’s wife and had children with her, one of them being the appellant.

26. On her part, the respondent testified and called witnesses to disprove the appellant’s allegations. The general thought of their testimonies was that the appellant is unknown to them and that she was not a child of the deceased. DW1, DW2, DW4 and DW6 are children of the deceased and a son-in-law, all of whom stated that the appellant is a niece of the deceased, not a daughter.

27. The standard of proof in Civil cases is on a balance of probabilities. The evidence adduced for the opposing sides is completely divergent. The respondent even stated that for the appellant’s case to succeed, a DNA test must be conducted to ascertain that she is herself, a child of the deceased. Section 3(2) of the *Law of Succession Act* provides:

“(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.” [Emphasis added]

28. The onus was on the appellant to prove that the deceased recognized her as his daughter. The testimonies in support of her case simply state that her mother was inherited by the deceased as a wife and she bore 3 children. However, the respondent disputed having lived with the appellant. Some of the respondent’s witnesses stated that the appellant is their cousin who only used to visit them once in a while. In fact, many of the respondent’s family members stated they did not know the appellant.

Conclusions and Disposition

29. On a balance of probabilities, the appellant has not been able to prove that she was a child of the deceased. While it is possible that her mother was inherited by the deceased as a wife, no credible evidence of Embu Customary Law was adduced. It is also not very clear when this alleged inheritance occurred and whether the deceased sired her and her siblings. At the very least, the appellant was obliged



to prove that she was under the care of the deceased immediately prior to his death as provided for under section 29(b) of the *Law of Succession Act*, which provides:

“For the purposes of this Part, "dependant" means-

- (a)
- (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;”

30. This dependency was also not proved on a balance of probabilities. Therefore, the trial magistrate had no choice but to find as he did. That finding is thus not in error.

31. In the result, I find that the appeal has no merit and it is hereby dismissed.

32. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 28TH DAY OF MAY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Ms. Wanjiku holding brief for Mbogo for Appellant

David Kariuki Mbogo - Present in Person

Francis Munyao - Court Assistant

