



THE SUPREME COURT OF KENYA

YOSE MOSELA VS GRACE WAMBUI AND BIDALI LIHASI & OTHERS

SC PETITION NO. E030 OF 2024

DATE OF JUDGMENT: 5TH SEPTEMBER, 2025

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Petition of Appeal dated 18th July, 2024 is dismissed.

Background

Yose Mosela, the appellant, petitioned for grant of letters of administration intestate, listing Jedidah Kisia Lihasi as the deceased's widow, five sons, including himself and six daughters. He listed nine (9) properties as assets of the estate and declared no liabilities. Furthermore, he petitioned for a grant of letters of administration *ad colligenda bona* to preserve the estate, which the court declined to grant and directed that the petition for the full grant of administration be processed. He obtained letters *ad litem* for LR. No. 209/118/77, sparking opposition from Grace Wambui Bidali and her 4 children, who claimed to be the deceased's second family, married under Kikuyu custom, living on the contested property since 1972, and that a written Will existed. After the Will was read and deposited in court, the executor, Felix Ayuya Midikira, petitioned for a grant of probate of the written Will of the deceased, drawing objection from various heirs.

Grace and her son challenged the validity of the Will, arguing that it lacked pagination, signatures, and attestation, and further contending that it was fraudulently executed at a time when the deceased was incapable of writing due to ill health. Similarly, Magdaline Mutugi Bidali and her 8 children objected, arguing that the deceased lacked capacity due to ill health and that the Will unfairly excluded them. Susan Njeri claimed dependency stating that she cohabited with the deceased in a rented house between 2006 and 2012 and had been verbally gifted three properties L.R. Nos. Dagoretti/Thogoto 1814, 1815 and 1817 which she sought to be transmitted to her. In defence, the appellant, insisted the Will was genuine, properly witnessed by two persons, and made when the deceased was mentally sound, citing a supporting medical report at the time of signing the will.

The High Court in its Judgment upheld the Will as valid, finding the deceased mentally capable and the attestation proper. On survivorship, Jedidah Kisia was confirmed as the lawful wife by virtue of a statutory Christian marriage. Further the Court held that under the marriage statutes, once a man contracts a previous statutory monogamous marriage such as a Christian marriage, during its pendency he has no capacity to contract another marriage under another system of marriage. However, upon his death, by virtue of Section 3(5) of the Law of Succession Act, subsequent marriages can be recognised for purposes of succession. Although Grace Wambui and Magdaline Mutugi failed to prove customary marriages, given evidence of cohabitation and children fathered with the deceased, despite his own

misgivings, the trial Judge presumed marriages and recognized them as widows for succession purposes, consistent with Court of Appeal precedent. Their children, as well as others expressly acknowledged in the Will, were recognized as children of the deceased. Susan Njeri, however, failed to establish marriage or dependency. Finally, the court deferred the issue of dependency claims to the confirmation stage, but ruled that Susan Njeri's dependency application was spent.

Aggrieved, the appellant appealed. The Court of Appeal upheld the trial court's finding recognizing Grace Wambui and Magdaline Mutugi as the deceased's widows pursuant to Section 3(5) of the Law of Succession. The Court also upheld the finding that their children were heirs of the deceased, more so as dependants for purposes of Section 29 of the Law of Succession. Further, the appellate court upheld the trial court's finding that those excluded from the Will could, under Section 26 of the Law of Succession Act, raise the issue of dependency and seek reasonable provision at the stage of distribution; and that the trial court would be better placed to address any pending matters before the confirmation of the grant of probate. Accordingly, the appeal was unsuccessful.

The appellant then filed an appeal before the Supreme Court and the following issues arose for determination:

- i. *Whether the Court has jurisdiction under Article 163(4)(a) of the Constitution to determine the appeal.*
- ii. *If the answer to i) above is in the affirmative, whether the Court of Appeal erred in its decision of 14th June 2024.*

Upon consideration, the Supreme Court held that there was no discernible issue that required the Court to interpret or apply the Constitution afresh. The constitutional provisions referred to were neither the subject of novel interpretation nor applied in a manner that raised any substantial controversy requiring this Court's intervention. What the appellant essentially sought was a re-evaluation of findings that had already been conclusively settled by the trial court and affirmed by the Court of Appeal. Such a challenge, devoid of a demonstrable constitutional trajectory, did not fall within the appellate jurisdiction of this Court under Article 163(4)(a) of the Constitution.

Orders of the Court

The Supreme Court dismissed the Petition of Appeal dated 18th July, 2024 with each party ordered to bear their own costs.

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