



**In re Estate of Joseph Mwanja Ndeti alias Joseph Mutheke Ndeti (Deceased)
(Succession Cause 24 of 2006) [2024] KEHC 10384 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 24 OF 2006**

MW MUIGAI, J

JULY 29, 2024

**IN THE MATTER OF THE ESTATE OF JOSEPH MWANIA
NDETI ALIAS JOSEPH MUTHEKE NDETI (DECEASED)**

BETWEEN

TABITHA MBITHE NDETI PETITIONER

AND

PRISCILLAR MUSYAWA MWANIA MUTHEKE OBJECTOR

JUDGMENT

1. The deceased herein died on September 8, 2005 as per Death Certificate attached.
2. Petition for grant of letters of administration dated 25.01.2006 was filed by the Petitioner and Objector filed Cross Petition on 16/3/2006.
3. The Chief of Syokimau letter of 25/9/2005 listed the family of the deceased as follows;
1st Wife/Widow - Tabitha Mbithe Ndeti
James Mutheke Mwanja (deceased)
William Mutiso Mwanja
Purity Ngundu Mwanja
John Kingesi Mwanja
2nd Wife/Widow- Priscilla Musyawa Mwanja Mutheke
Joyce Mwikali Mwanja
Elizabeth Ndanu Mwanja
Damaris Dina Mwanja



Alice Kalekye Mwanja

4. The Petition listed the assets that comprised of deceased's estate were/are;
Plot No 259 Lukenya Ranching & Farming Coop Society
Plot No 1594
Plot No 598
Plot No 1059
KRF 021
5. The grant of letters of administration issued on 19.11.2009 to Tabitha Mbithe Ndeti and Priscillar Musyawa Mwanja Mutheke, the parties herein.

Summons For Confirmation Of Grant

6. The Objector filed a Summons for confirmation of Grant on 29.04.2015 seeking to have the grant of letters of administration confirmed. She same was supported by an affidavit dated 21.04.2015 in which she contended that the deceased had two houses and listed beneficiaries as per the Petition.
7. The estate consisted of the following properties;
 - a. Mavoko Town Block 3/2448 measuring 16.40 Hectares 40 acres
 - b. Mavoko Town Block 3/259 measuring 1.961 Hectares 5 acres
 - c. An undeveloped commercial plot number Mavoko Town Block 3/1059 measuring 0.0450 Hectares
 - d. An undeveloped commercial plot number 33 within Mavoko (Nzoiani Market) measuring 0.0450 Hectares
8. The Objector proposed distribution as follows;
 - a. Mavoko Town Block 3/2448 to be shared equally between the Petitioner and herself
 - b. Mavoko Town Block 3/259 to be shared equally between the Petitioner and herself.
 - c. An undeveloped commercial plot number 33 to be given to the Petitioner.
 - d. An undeveloped commercial plot number Mavoko Town Block 3/1059 to be given to the Objector.
9. The consent to confirmation of grant was signed by Joyce Mwikali Mwanja, Dinah Mwangeli Mwanja and Alice Kalekye Mwanja only.

Affidavit Of Protest

10. The Petitioner/ Applicant filed an affidavit of protest on 13.11.2018 and stated that the Objector/ Respondent was not married to the deceased herein and has included children sired with another man namely; Joyce Mwikali Mwanja, Dinah Mwangeli Mwanja and Alice Kalekye Mwanja and Elizabeth Ndanu Mwanja (deceased) as beneficiaries to the estate.
11. The Petitioner alleged that the Objector fraudulently transferred 20 acres to herself that was held by the deceased herein in Lukenya Ranching & Farming Co-operative Society Limited under the guise of



gift inter vivos by her late husband yet he was bedridden at the time he is said to have caused a transfer and later on sold the land.

12. She stated that she informed the area chief who discovered that the Objector had connived with an Acting Chief acting for another jurisdiction to secure an acknowledgement letter of her marriage which she used to make the transfers. In addition that the transfer was conducted at the Sacco was dated 11.08.2005 yet the registry entry is believed to have been done in 2004.
13. Further, she contended that the deceased was called Joseph Mwanja Ndeti yet the titles adduced belong to Joseph Mutheke Ndeti. She indicated that she had conducted searches on the titles adduced but they do not exist. She stated that the Objector was employed as a house help and was already married elsewhere where she bore children from her marriage. The Petitioner indicated that the children listed by the objector should be subjected to DNA testing.
14. Vide an order of this court dated 17.04.2023, the DCIO Machakos and the investigating officer on complaint OB No 31/11/3/2022 were directed to tender to court their investigating report pending hearing and determination of the suit among other orders issued..
15. Pursuant to the order above, a report dated 25.05.2023 was filed on the same date in court.

Hearing

16. PW2 Tabitha Mbithe Ndeti adopted her statement dated 14.06.2021 as well as the bundle of documents dated 14.06.2021. She stated that the Objector fraudulently transferred 20 acres of land to herself which she jointly owned with the deceased in Lukenya Ranching & Farming Co-operative Society Limited when the husband was bedridden. The transfer is alleged to be conducted on 11.08.2005 yet the one done at the registry was said to be done in 2004. That the initial M. in the deceased's names stood for Mwanja and not Mutheke. Yet the Petitioner obtained Identity card of the deceased after his death with the names Joseph Mutheke Ndeti. PW1 contended that the children of the Objector should be subjected to DNA since they are not children of the deceased.
17. She further stated that she had challenges regarding the land issue. That Priscilla Musyawa Mwanja Muthike has since divided her 20 acres into two parts Mavoko block 3/4951 and Mavoko block 3/4952 and the mother Title was 2403. Further that she has also started selling them without her knowledge. She stated that the name on block 3/2448 was changed by the Objector to Joseph Mutheke and yet her husband was Joseph Mwanja Ndeti. She indicated that this applied to 5 acres block 3/259. She stated that Mutheke is the name of her father in law and among the 60 acres there is 50x100 which is un-surveyed in Soyiani market.
18. It was her testimony that she was not consulted when summons for confirmation was filed and none of her family members gave consent nor were they included. She denied the people who were included and what she wanted was for the Objector to be stopped from selling the land which she purchased since she is residing in her matrimonial home. She stated that the Objector should move from there because her and deceased's children are suffering with no place to put up in.
19. Upon cross – examination she stated that she applied to revoke the grant. She indicated that she is the one who filed the petition and Priscilla protested. She stated that she never agreed to appointment of Priscilla as a co-administrator raising the issue that she was not qualified as she was a maid in 1984 when she was living in Mlolongo with her husband.
20. She stated that she had a business hence was not at home full time. In 1976 to 1980 she was working in Hotel Inter-Continental but was staying in Mlolongo. In 1980 to 1982, she was working at State House Girls School and used to return on her off days. She stated that her husband had two houses



- Mlolongo and State House Girls since she could not allow the maid to look after her husband when she was around, the maid would only cook when she was not around.
21. She stated that her husband and Priscilla had an affair. They were living in the same house and when she noticed she talked to her husband and he denied. She stated that she told him to take care of his mess. She stated that he never married Priscilla. She stated that still leaves in the matrimonial home despite telling her to leave. It was her testimony that the last time was at her matrimonial home was before 2005 before her husband died.
 22. She stated that she employed Priscilla to take care of her children but did not have any documents showing she was a maid and that she used to pay her salary. She denied knowledge of the Objector having any children before the deceased passed on. She stated that the house she agreed to build with her husband was at Mitaboni market. She said she only knew of one child of Priscilla and her late husband called Alice and she came to know of the other children through what Priscilla wrote in the Petition. She said that stopped going to the house due to Kamba customs and Priscilla refused to move out.
 23. It was her testimony that she was married under customary law in 1968 and lived with her husband and children until 1984. She was referred to photographs to which she said that her husband was in all the photographs and in one of them she could see a person who looks like Priscilla with a child. She alleged that the photo with her mother in law was not real.
 24. She also said that her house in Mlolongo was in one of the photos. She stated that her husband died in St. Mary's Hospital and she was there the day before. She alleged that the Objector snatched her husband. She did not know about Cause by the Public Trustee and only came to know about it this year neither did she know Joyce Mwanja and Elizabeth Mwanja. She only knows of Alice. She indicated that she had the allotment letter of the properties she bought with her husband and the issue of the titles being changed was being investigated by the DCI. She stated that the Summons for Confirmation of grant contained the name of her children.
 25. In re-examination she stated that the birth certificates indicated the father as xxxx. She said that titles are in the name of Joseph Mutheke Ndeti but the ID number is incorrect. The allotment letter reads Joseph M. Ndeti. .
 26. PW1 Joseph Nzau Ndeti was recalled and he adopted his statement.
 27. Upon cross examination, he stated that Joseph Ndeti was his son. He stated that she knew Priscilla as a wife to his son. Priscilla and her children stay at home. He stated that Tabitha was Mwanja's wife.
 28. Upon re-examination he stated that Tabitha Mbithe Ndeti was Mwanja wife. Mwanja had many wives since Kamba are polygamous and he said her took son to pay dowry for Tabitha and also Priscilla. He said that Tabitha was the only wife and he denied knowing Joyce Mwikali.
 29. PW3, Cpl. Urbanus Munguti attached to County Criminal investigations office, Machakos performing General investigations stated that on 19.07.2022 he received a letter from the DCIO's office ordering him to appear before this Court to answer to court summons issued on 1.07.2022. After going through the documents he saw an application by Tabitha Mbithe and Priscilla Mutheke and upon referring to his record he remembered that on 11.03.2022 Tabitha Mbithe Ndeti complained to office of CCIO that her late husband's ID Card was fraudulently changed and his parcel of land were registered in name of Joseph Mutheke Ndeti without knowledge of other family members when the husband passed away.
 30. He stated that he reduced the complaint in writing in OB No 31 of 11/03/2022 and later into a statement. That he also recorded the statement of her son and investigated to establish whether the



- complaint was genuine. He stated that he wrote a letter to Lukenya Ranching & Farming Society requesting documents for parcel No 2448, 258 and 2403 and any other relevant documents including members registers. He stated that he got some certified copies of documents and he summoned complainant and the son who confirmed his signature appearing did not belong to her late husband.
31. It was his testimony that he forwarded the same to Document Examiner and the Report has not been processed. That the complainant also produced a copy of death certificate issued by Registrar of Deaths and Births with name of Joseph Mwanja Ndeti showing that he died on 8/09/2005. Due to complaint of forgery of ID he wrote to Registrar of person and he obtained a printout showing that the ID Card was issued on 11.10.2005 in the name of Joseph Mutheke Ndeti after he had already been buried. He was then stood down.
 32. When he was recalled he stated that following the court order a report was filed with Deputy Registrar Machakos of 25/05/2023 by CCIO Benedict Kigen.
 33. Upon further cross examination ,he stated that the matter was placed before the ODPP who recommended Civil remedy.
 34. In re-examination he stated that during investigation they were able to get the death certificate of the deceased with the ID Number and we went to the Registrar of Persons and it showed the ID Card was obtained after death of the deceased. He stated that he obtained allotment letters of the properties of the deceased from Lukenya Ranching. He then wrote to the Registrar of Persons who indicated that the deceased death certificate was Joseph Mwanja Ndeti and particulars were of Joseph Mutuku Ndeti.
 35. PW4 William Mutiso Mwainia adopted his Witness Statement signed on 26/04/2022 in which he stated that in 1989 he noticed that one night the maid had moved into his father's bedroom and after a short while she was pregnant and once the father realized, he fled and went to stay with his mother at State House Girls. After a while they were taken to State house girls where their parents were staying. Later, he stated that they came back home and the father paid the maid her salary for all the months she was not paid. He stated that the parents agreed that she continues with being a maid and never to go into the father's bedroom.
 36. He stated that his father sired a child with the maid but did not marry her. That the Respondent has sold off most cows and goats, sold some plots, continues to collect rent from the father's premises and has never accounted for the monies since 2005. He stated that the Respondent did not purchase any property with the deceased as the estate property was already bought by his mother before the maid was hired. The maid was the Petitioner who was employed by his mother the Objector.
 37. He further stated that he was 49 years old having been born in 1973. He saw Priscillar in 1983. They were 4 children then ; Charles Mutheke, William Mutiso Mwanja, John King'esi Mwanja and Purity Ng'onde Mwanja . He stated that Priscillar was not married to his father but was a maid and the photos by Priscillar were fake. It was his testimony that Joyce and Alice were not children of his father.
 38. Upon cross – examination he stated that the first son child of Joseph Mwanja Ndeti(Deceased) was James Mutheke Mwanja who died in 1981 and he was the second son. The 1st born son died in 2017. He stated that he knew Priscillar Mwanja Mutheke as his mother's maid from 1983 when he was 10 years old. His parents were then living in Mlolongo but his mother was working in Nairobi as a matron and would go home over the weekend. He said that it was his late grandmother Esther Ng'onde Ndeti who brought Priscillar to the house in 1983 and she has lived there to date.
 39. He contended that his parents were paying her every month and he had no receipts. She had no children living with them in the house. He knew Joyce Mwikali Mwanja, the first born of Priscillar who used to come to visit her mother for a week or so with Dinah Mwangeli, Priscillar's daughters Elizabeth Ndanu



Mwania and Alice Kalekye. The children lived with her shortly till until his father died and until they got married. Joyce got married first. I don't remember when she got married. He said his school fees was being paid by his father and he did not know who paid for Dina, Joyce & Elizabeth. Alice's, the step sister fees was being paid by his dad (deceased). He was not aware of any dowry payment of Joyce or Dina to his father neither was he aware if Elizabeth was married during his father's lifetime. He was not aware if his father gave Priscilla's children his name, Mwania.

40. When he was referred to various photographs, he stated that he could see his father and Pricilla at the Mlolongo house. He did not know who the person in a gown was, the person next to him was Pricilla. He stated that the other photo was taken at Mua Hills during his father's funeral and he could only see his mother. He indicated that MFI-3 was a photo has his father and Alice.
41. He stated that in MFI-1 he could recognize his father, Pricilla and Alice. The brother to Pricilla, Timothy, was in MFI-2. MFI-4. was his father, Purity and Pricilla. MFI-1 was his father and Priscillar – MFI-5. He stated that in MFI-4 and 5, the background is the house in Mlolongo. MFI-6 was his dad and Priscillar. MFI-7 Purity, his father and Alice at Mlolongo, MFI-8 is his father, Priscillar, Alice, Joyce and others he did not know at Mlolongo. MFI-9 was his dad and Elizabeth in the Mlolongo house. MFI-10 was his uncles Lengesi Ndeti and Patrick Ndeti his father's brothers. He stated that MFI-11 was taken during his father's funeral in Mua Hills .
42. He stated that his mother currently lives in Mitaboni since the father died. That she is the one who built that house. In addition, that he used to visit the father in the Mlolongo house and would find his sister Purity and Pricilla. He stated that they used to visit their mother where she was working when they closed school. He said his father died in Nakuru with his cousin Esther and Purity. He testified that his father never separated from his mother.
43. In re-examination he said that he could see himself at funeral in MFI-11. The photo also had his uncle. He said that Joyce ID card indicated that she was born in 1974 and it was issued in 1996.

Defence Hearing

44. OW.1 Priscilla Musyawa Mwania stated that she lives in Mlolongo Weighbridge and is a businesswoman and farmer. She produced her statement and the list of documents dated 21/09/2020. She stated that the deceased, Joseph Mwema Ndeti was her husband and they had 4 children.
45. She stated that they went and filed a case with Public Trustee and the proceeds in the Account were to shared between Tabitha and herself. She stated that Photograph 1 was that of her husband and daughter, Alice Kalekye.
46. It was her testimony that she was a wife but was not employed. She stated that they were appointed Administrators jointly after she objected to the Petition without her Family and when Tabitha PW1 filed summons for confirmation and she protested and sought that the distribution be equal as each of them had 4 children. She said she was brought to the children by mother in law. She denied selling any property and she took taken of the children of the Tabitha. She stated that she went to Mlolongo and lived with deceased until his death and has lived there to date.
47. Upon cross –examination she stated that she took out another ID No 7710073 issued on 20.09.2016 after her ID got lost. She denied using the ID card with the name Mwania in 2016. She stated that Joseph Mwania Mutheke Ndeti was the full name of the deceased. She stated that she filed objection to Joseph Mwania Ndeti Mutheke as Tabitha is the one who filed Petition and left her out and she came to the home where she married in 1984. She found Tabitha had left. It was her testimony that they were both married to the same man – the deceased.



48. DW1 stated that she was married in 1984 and in 1985 dowry was taken to her home in the presence of Boniface Mutunga who died and there were other people present. That the deceased went home and they cooked for the people. She told the court that she took care of the deceased and was at his bedside when he died .She had the original ID which had the name Joseph Mwanja Ndeti , the name as Mutheke was not there.
49. DW1 denied being brought as a maid in 1983 and that she was brought to take care of Tabitha's children. She stated that they had 4 children and 1 died after her husband died. She gave birth to Joyce Mwikali Mwanja in 1970 and the ID card No 13616482 says she was born on 17.03.1974, Elizabeth Ndanu Mwanja (deceased) ID Card No 14730023 born in 1976 and Dinah Mwangili born in 1980 ID – 23034932
50. DW1 told the court that they had children in 1974, 1976 and 1980 before meeting the deceased. She stated she got the children with the deceased. According to her Alice Kalekye Mwanja is a beneficiary to this estate of the deceased born in 1989, on the birth certificate the father is indicated as Joseph Mwanja Mutheke.
51. DW 1 stated that the children may be taken for DNA sibling testing. She also stated that she was given 20 acres of land by her late husband. As regards the application of transfer of 11/08/2005 for Plot Lukenya Ranching & Farming Co-operation limited, she stated that they went to Kinani and the deceased gave her 20 Acres. It is her husband Joseph Mwanja Mutheke who is the deceased in this matter. The deceased married her after Tabitha left.
52. The Katani sub-location letter was not signed by Chairman/Security of Lukenya Ranching and she could not tell if they signed or not. She stated that stamps were for 13.8.2005 and 11.08.2005. She stated that she was not aware of what the Report of the DCIO of 25/05/2023 indicated and whether the Katani location exists or not.
53. Upon re-examination, she said that she had brought both birth certificates and identity cards to confirm the birth days of children. That when she went, she found the house empty house and that is the house lives in. She stated that there was a matter in ELC about the place she lives.
54. OW.2 Timothy Mulei Mule stated that he knows Priscilla as his sister and Joseph Mwanja (deceased) as his brother in-law. He adopted his statement filed on 9/07/2021 as evidence and further stated that he was in exhibit 2 and the people in the picture were Priscilla, Alice and his child. She stated that PW1 had a relationship with the deceased and they lived together in 1984 and came in 1985, she went with Joseph and later came with parents and dowry arrangements were made, 10 goats and 2 cows were paid and they were allowed to continue with their lives. That Boniface Ndeti , a cousin to Joseph (deceased) led the delegation. He stated that Priscilla was not a worker/maid .
55. Upon Cross –examination, he stated that Priscilla had 4 children, he did not know the exact date of birth. That his siblings were not present to confirm the marriage. He said that the 10 goats and 2 cows were received by my father and elders of the family and neighbors and family attended . He told the court that he heard that Joseph had another wife,Tabitha and her children were there and bought up with him at the home of Joseph.
56. He testified that he heard that Tabitha and Joseph were separated but had no evidence to confirm the same. He said that Priscilla had 4 children and 3 were alive. The deceased was buried at Mua Hill farm while the daughter who Priscilla was buried at Langata. She was not buried in Mua hills farm as the child was not born in their family.



57. He denied selling the motor vehicle nor any land. He stated that before 1984 his sister was working in Machakos as a casual laborer in homes. He also stated that she was a teacher and is now retired. That the bride price was taken to his home in Nduani village Kalawa in Makueni and they had not visited Joseph's family in Mua
58. He told the court that the purpose of the 10 goats and 2 cows in a commitment to show that the marriage under Kamba customary law. That both families sat down and discussed; in Joseph family there was Hannah (deceased), Boniface and another daughter. The deceased's father were deceased he was not represented.
59. He referred to the birth certificate and ID card and stated that Joyce Mwikali Mwanja was born in 1974, Elizabeth Ndanu Mwanja in 1976 and Dinah Mwenyeli Mwanja in 1980 and ID was issued on 22/08/2018 . He had no objection to DNA of the 4 children to be done.
60. Upon Re-examination he stated that there was a marriage between the Priscilla and Joseph. There was introduction and dowry was paid in the presence of his siblings. There were negotiation under kamba customary law and it was agreed and Joseph took the children and took care of them.

Submissions

61. The Petitioner/ Applicant filed submissions and raised 5 grounds. First, it was contended that the Objector/ Respondent was not married to the deceased. While relying on the case of *Re Andrew Manunzyu Musyoka (deceased)* [2005] eKLR, *Re estate of James Simu Nthiwa* [2005] eKLR, It was submitted that all the witnesses confirmed that Ntheo ceremony was the most essential step in Kamba customary marriage and the Petitioner's witness Joseph Nzau Ndeti confirmed that the deceased only married the Petitioner and the was not aware of the Respondent . Further, that the Respondent could not state what was paid to her parents, when, how and when her parents attended her Ntheo ceremony.
62. Further, that the Respondent did not know the name of the deceased and when challenged, she decided to use Joseph Mwanja Ndeti alias Joseph Muthke Ndeti and it was contended that this identification was because she failed to know the names of the deceased and had already fraudulently produced land titles of the estate properties thus brought in the term alias to enable her fraudulent acts sail through.
63. Secondly, it was submitted that the objector's children were not beneficiaries to this estate as RW1 confirmed this position. The children were born even before she was employed as a house manager in the deceased's home. It was alleged that the pictorial evidence presented as photo shop as the originals could not be produced.
64. Thirdly, it was submitted that the grant issued should be revoked for reasons that the letter from the chief was that of different sub location which does not exist in Kenya, the grant was obtained fraudulently. It was alleged that the Petitioner came up with a fake identification card for the deceased and proceeded to obtain various properties in the pseudo name Joseph Muthke Ndeti. When the Registra of lands declined to approve her transfers, it is alleged that she sued the Registra of lands and the Attorney General in ELC no 39 of 2019. She obtained ex parte judgment and enforced the transfer and sold to third parties. Reliance was placed on the case of *estate of Veronica Njoki Wakageto (deceased)* [2013] eKLR
65. Fourth, it was submitted that the objector has intermeddled with the properties of the estate. The Director of criminal investigations report also confirms that there is no sub location called Katani and the purported stamps and approvals from the chief do not exist. Further, that there was no proof that there was a gift inter vivos.



66. Lastly, it was submitted that there is no property Acquired forming part of this estate that was contributed to or acquired in the presence of the Respondent. The Applicant asked to be given 10% of the estate as acknowledgement of her contribution and should also be given her matrimonial home . That the objector can thus not refuse to leave the Applicant's matrimonial home where she was previously employed as a househelp.
67. The Objector/Respondent did not file submissions. On 15/2/2024, Parties through Counsel were asked to file written submissions. On 15/4/2024, Parties were asked to file written submissions. On 30/4/2024, Parties were asked to file written submissions. Later on the same day , Counsel for the Petitioner filed written submissions. The Objector/respondent did not appear, was not represented and no information was relayed for the Court to consider. The Court gave judgment date as 11/7/2024 and the Objector was to file and serve written submissions and give copies through the Deputy Registrar Machakos High Court. At the time of writing judgment there are no submissions on record or on line.

Determination

68. This Court considered the Summons for confirmation of grant, the affidavit in protest and annexures thereto, the evidence on record and the submissions on record and find that the issues for determination are as follows;
- a. Whether the Objector is a beneficiary of this estate of the deceased
 - b. Whether the children of the Objector are beneficiaries of this estate of the deceased
 - c. Whether the Objector has proved that there was property given to her by the deceased as a gift inter vivos
 - d. Whether the grant issued on 19.11.2009 should be revoked due to fraudulent obtaining of ID card of deceased after his demise and transfer of land, titles and sale of land thereof?
69. Section 107, 109 and 112 of the [Evidence Act](#) are provisions on the burden of proof.
107. Burden of proof
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him



Beneficiaries Of Estate Of Deceased

70. The Objector contends that she is a wife of the deceased and thus a beneficiary of the estate. The evidence in support of this contention are photographs taken with the deceased and contention that the deceased paid dowry. PW2, the brother of the objector contends that 10 goats and 2 cows were paid to their father and elders and the two were allowed to continue with their lives but there is no other evidence to corroborate this allegation, not even from the Objector. It is also not clear whether all the requirements of a traditional Kamba marriage were fulfilled.

The Petitioner testified that she was married to the deceased in 1968 under Kamba customary law and they had 4 children of the marriage. They lived together, while the Objector was the maid as she worked at Hotel Inter -Continental & State House Girls School and would go home in Mlolongo during weekends. On finding out the Objector was pregnant with Alice and she moved out with her children to Mitaboni where she resides. The deceased had 2 houses in Mlolongo. The Objector refused to leave her matrimonial home. The Petitioner objected to the other 13 children as they were not from her late husband.

71. As such, from the evidence on record, it is clear that the Objector was not married to the deceased herein but had a relationship with him that led to the birth of Alice Kalekye who was born on 9.02.1989. This has been stated by PW1, PW2, PW4, OW and OW2.

72. Kamba customary marriage is confirmed through the following ceremony/ceremonies outlined in *Restatement of African Law Kenya Vol 1; The Law of Marriage & Divorce* by Eugene Cotran Pg 28; prescribes a Kamba Customary Marriage entails;

‘Capacity- The Parties must have capacity to marry and capacity to marry each other

Consent- The parties to the marriage and their respective families must consent to the Union

Slaughter of Ram-No marriage is valid unless the nthenge ya kwitia mbui nthamake nthi is slaughtered

Marriage Consideration- There can be no valid marriage unless a part of the marriage consideration has been paid.

73. DW2 Timothy Mulei Mule stated that the deceased paid 10 goats and 2 cows and Boniface Ndeti their cousin was present and were received by their father and elders in Nduni village Kalewa Makueni. This is not the valid marriage under Kamba customary law as the above essentials have not been complied with. The alleged visit to pay dowry was only witnessed by the brother, yet such a ceremony is a family affair involving both families yet only DW2 confirmed the visit and not the essentials of Kamba customary law.

74. The evidence on record discloses that the Petitioner was married to the deceased under Kamba customary law and lived with deceased from 1968 – 1984 for 17 years. The Objector (alleged to have been employed as maid by the Petitioner) had a relationship with deceased as detailed by evidence of PW4 son to the Petitioner.

75. The Objector also filed Summons for Confirmation listed properties in names of deceased that are contested by Petitioner, produced photographs with deceased and children of the deceased and deposed she lived with the deceased and was married under Kamba customary law. They lived together with the deceased for 20 years since 1984 – 2005 and had children.

76. From the evidence on record, this Court finds that for all intent and purpose the Objector, Priscillar Mustawa Mwanja Mutheke had a child with the deceased and lived with him under some relationship



that did not crystallize into a marriage under Kamba customary law. The grant was issued jointly to both parties in 2009 after they presented themselves before Public Trustee and shared the benefits.

77. From the totality of the evidence on record, especially direct evidence by PW4 son of the Petitioner & deceased, this Court cannot in good conscience sanitize by sanction the law the Objector's entry into Petitioner's matrimonial home and secondly, the Kamba customary marriage was not performed as required. I find she is not wife/widow of the deceased.

Whether the children of the Objector are beneficiaries of this estate

78. It was the testimony of the objector that she had 4 children;
- a. Joyce Mwikali Mwanja daughter
 - b. Elizabeth Ndanu Mwanja daughter- (deceased) and survived by a child
 - c. Dinah Mwangeli Mwanja daughter
 - d. Alice Kalekye Mwanja daughter
79. It was also her testimony that Joyce Mwikali Mwanja was born in 1974, Elizabeth Ndanu Mwanja in 1976 and Dinah Mwenyeli Mwanja in 1980. It was the testimony of PW2 that the Objector was employed in 1984- after the birth of three of her children. The Petitioner made an application for DNA testing to which the Protester is not objected to. I therefore direct that Joyce Mwikali, Dinah Mwenyeli Mwanja be subjected to DNA testing at the cost of the Objector within 90 days and the results be sent to this court within 90 days. Alice Kalekye Mwanja was born 1989 and the basis of breakdown of marriage between Petitioner and deceased and Petitioner did not object her as beneficiary to deceased's estate.

Whether the Objector has proven that there was property given to her by the deceased as a gift *inter vivo*

80. The Objector contends that she was given 20 acres to herself that was held by the deceased herein in Lukenya Ranching & Farming Co-operative Society Limited. If indeed that is the position, the court will have to honor the wishes of the deceased upon proof of the same.
81. In the case of *Re Estate of the Late Gedion Mantbi Nzioka (Deceased)* [2015] eKLR, the court stated as follows:

“In law, gifts are of two types. There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortis causa*). Section 31 of the *Law of Succession Act* provides as follows with respect to gifts made in contemplation of death:

...For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid.”(Emphasis added)

82. Hon G.V Odunga JA's *Digest on Civil Case Law and Procedure* Vol (III) Page 2417 at paragraph 5484 (d) e – 1 thus:

“Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate



the gift. (See in *Re Fry Deceased* {1946} CH 312 Rose: and *Trustee Company Ltd v Rose* {1949} CL 78 Re: *Rose v Inland Revenue Commissioners* {1952} CH 499 Pennington v Walle {2002} 1WLR 2075 Maledo v Beatrice Stround {1922} AC 330 Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee needs no assistance from equity and the gift is complete. It is on that principle that in equity it is held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor. (See Shell's Equity 29ED Page 122 paragraph 3)"

83. In addition, *Halsburys Laws of England* 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.

83. In this case, the objector's allegation remains an allegation as there is no evidence that the gift inter vivos was completed. There is no evidence before the court that;

- a. There was a deed of an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts
- b. There was a registered transfer,
- c. or if the land is not registered it must be in writing or by a declaration of trust in writing.

84. There is a letter that has been annexed to the summons for confirmation of grant has not been signed and is from one Joseph Mwanja Nelo who is a stranger to this estate. I therefore find that there was no valid gift inter vivos in this case on any of the properties of the deceased Plot 1595 and/or the 20 acres of 1595 Katani Sub Location The Chairman & Secretary of Lukenya Ranching & Farming Cooperative Society did not sign the annexed Form dated 11/8/2005. The signatures of the Form do not indicate who signed and more importantly, other than the deceased's name there is no indication he authorized/consented to the alleged transfer to the Objector. Plot 1595 remains in the name of the deceased and is available for distribution as part of the deceased's estate. Any sale, transfer, sub division and/or registration shall revert to deceased's title forthwith.



Whether the grant issued on 19.11.2009 should be revoked

83. Rule 41(3) of the *Probate and Administration Rules* provides that:-

Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate of the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.

83. In the case of *Priscilla Ndubi and Zipporah Mutiga v Gerishon Gatobu Mbui*, Meru Succession Cause No 720 of 2013, held:-

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”

83. Section 76 of the *Law of Succession Act* provides that;

decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.



83. In this case, there are allegations of fraud that have been raised by the Petitioner as follows;
- a. That the names of the deceased are Joseph Mwanja Ndeti and not Joseph Mutheke Ndeti nor Joseph Mwanja Mutheke Ndeti .
 - b. That the alleged transfer of land to the Objector was fraudulent
84. PW4 Cpl Albanus Munguti No 48636 testified that a report was made by the Petitioner Tabitha Mbithe that the deceased her husband died on 8/9/2005 and her late husband's identity card was changed on 11/10/2005 after deceased's death. The Petitioner availed the following documents;
- a. Death Certificate of the deceased
 - b. Letters of Allotment for Land Parcels Mavoko Town Block 3/1059, 2403, 2448, 2559
 - c. 3 copies of title deeds in the names of Joseph Mwanja Muthoka & 1 in the name of Priscilla Mwanja Mutheke
 - d. A letter of Assistant Chief dated 11/8/2005 addressed to/from Chairman Lukenya Ranching & Farming Cooperative Society⁹¹ The witness produced comprehensive Report of investigations carried out dated 25/5/2023 which confirmed the allegation raised by the Applicant that the identity card of one Joseph Mutheke Ndeti allegedly issued on 11.10.2005 at Kenya Motors Co-operation Limited sub location was first, a location that does not exist and secondly, it was issued after the death of the deceased herein who died on 8.09.2005.
91. Secondly, the Allotment letters were collected from Lukenya by persons with ID Nos 7710075, 2976879 & 013627 and upon writing to Registrar of Persons to confirm the identity of persons it was confirmed they were; Priscilla Musyawa Mwanja Mutheke , Peter Nzuki Ndeti & Patrick Muthike Ndeti The Police investigated one Joseph Nzioka Muasya who confirmed the land belonged to the deceased. They summoned the Objector who came with her lawyer and asked to bring documents that they never brought.
92. In his decision rendered on 11th February, 2016, Hon. Mativo J (as he then was) in the case of [Martin Maina Ndegwa v Charles Thiongo Kanyoro & 3 others](#), Succession Cause No H.C. 121 of 2010, pointed out thus;

I have also looked at the summons for revocation of grant and I am persuaded that it raises serious issues which need to be resolved by the court and in the event of the orders in question being enforced; the said application may be rendered nugatory. The applicant in the said application has alleged fraud and concealment of material facts. These are issues which need to be resolved at the hearing of the said application.

E. A. Francis in his book discussing fraud observes inter-alia as follows:-

- i. No definition is given, either by statute or judicial decision of what constitutes fraud, nor, it seems, is any such decision possible.
- ii. Fraud, for the purposes of these provisions, must be actual and not constructive or equitable fraud.
- iii. Fraud must involve an element of dishonesty or moral Turpitude.

In the case of *Assets Co Ltd v Mere Roihi*, Lord Lindley stated as follows: ".....that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud-an unfortunate expression and one very apt misled, but often used, for



want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."

93. As such, I find that based on the National Police Service /Directorate of Criminal Investigations Report of 25/5/2023 there is sufficient evidence against the Objector Priscillar Musyawa Mwanja Mutheke directly and with others named in the Report illegally obtained another ID of the deceased with different names from unknown/non existent station and subsequently processed titles of land that belonged to the deceased. I am satisfied that the Objector was engaged in fraudulent conduct geared to disinherit the other beneficiaries.
94. Under Section 76 (b) *LSA* the grant issued in 2009 is hereby revoked and new grant in the name of the Petitioner Tabitha Mbithe Ndeti shall be issued.
95. Having found that the Objector herein was not a wife of the deceased, I direct that she immediately vacates the house of the Petitioner until such other directions are issued.

Disposition

96. I therefore find and direct as follows;
 - a. The grant of letters of administration issued on 19.11.2009 is hereby revoked.
 - b. A new/fresh Grant to be issued in the names of Petitioner Tabitha Mbithe Ndeti
 - c. Joyce Mwikali, Dinah Mwenyeli Mwanja and Alice Kalekye Mwanja be subjected to DNA testing at the cost of the Objector within 90 days and the results be sent to this court through the Deputy Registrar within 90 days.
 - d. All properties under deceased's names to revert back to his names especially Lukenya Plot 1595 Mavoko TownBlock 3/2448 (40 Acres) Mavoko Town Block 3/259 (5 Acres) un developed Plots Mavoko Town Block 3/1059 & Plot No 33 before distribution of the deceased's estate is embarked on.
 - e. The DCIO Machakos to ensure that the report document examiner on all the properties allegedly belonging to the deceased herein is filed within 90 days through the Deputy Registrar within 90 days.
 - f. The Petitioner is directed to collect all the estate properties and file a fresh summons for letters of administration within 90 days after the period for Sibling DNA testing of alleged children of the deceased.
 - g. The Objector Priscillah Musyawa Mwanja Mutheke is hereby directed to vacate the estate property within 90 days.
 - h. Order no (g) to be supervised by the OCS, Mlolongo Police Station.
 - i. Being a Family Matter no orders as to Costs

JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT ON 29/7/2024 MACHAKOS HIGH COURT. (PHYSICAL/VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE

