



**In re Estate of Njoroge Gikuni Ngata (Deceased) (Succession Cause  
621 of 2009) [2024] KEHC 9413 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9413 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 621 OF 2009  
HM NYAGA, J  
JULY 29, 2024**

**IN THE MATTER OF THE ESTATE OF NJOROGE GIKUNI NGATA(DECEASED)**

**BETWEEN**

**AMOS NICHOLAS MUIRURI ..... 1<sup>ST</sup> APPLICANT  
AMOS GIKUNI KAMAU ..... 2<sup>ND</sup> APPLICANT  
AMOS GIKUNI MUCHIRI ..... 3<sup>RD</sup> APPLICANT  
PAULINE WANJIKU ..... 4<sup>TH</sup> APPLICANT**

**AND**

**ELIUD MATHU NJOROGE ..... 1<sup>ST</sup> RESPONDENT  
JOSEPH NJUGUNA NJOROGE ..... 2<sup>ND</sup> RESPONDENT  
TERESA WANJIRU ..... 3<sup>RD</sup> RESPONDENT  
ELIZABETH WAMBUI GIKUNI ..... 4<sup>TH</sup> RESPONDENT  
ELIUD MATHU NJOROGE ..... 5<sup>TH</sup> RESPONDENT  
JOSEPH NJUGUNA NJOROGE ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**JOSEPH MWANGI NDEGWA ..... INTERESTED PARTY  
BHAVIK RAVJIBHAI PATEL ..... INTERESTED PARTY  
SUSAN JESIRE KEMEI ..... INTERESTED PARTY  
PHILIS WANJERI WANYOIKE ..... INTERESTED PARTY  
MORUMBASI B. MAGOMA ..... INTERESTED PARTY  
ENOCK NYAMOSI OBAYO ..... INTERESTED PARTY**



<b>AMOS MWANGI MACHARIA .....</b>	<b>INTERESTED PARTY</b>
<b>DEBRA OMBATI ZACHARY .....</b>	<b>INTERESTED PARTY</b>
<b>DORIS GESARE AYIENDA .....</b>	<b>INTERESTED PARTY</b>
<b>MARY C. WANJIKU .....</b>	<b>INTERESTED PARTY</b>
<b>KULWINDER S. TARLOCHAN .....</b>	<b>INTERESTED PARTY</b>
<b>SAMMY MBUGUA NGANGA .....</b>	<b>INTERESTED PARTY</b>
<b>KULJIT SINGH .....</b>	<b>INTERESTED PARTY</b>
<b>KAMAU JOHN WAWER .....</b>	<b>INTERESTED PARTY</b>
<b>MIKE KIPKIRUI ROP .....</b>	<b>INTERESTED PARTY</b>
<b>JOYCE CHEPKORIR YATOR .....</b>	<b>INTERESTED PARTY</b>
<b>LOICE NJOKI KAMAU .....</b>	<b>INTERESTED PARTY</b>
<b>JOSPHAT MANGURU .....</b>	<b>INTERESTED PARTY</b>
<b>CALVINS ANDITI MALOWA .....</b>	<b>INTERESTED PARTY</b>
<b>SHINALBEN KEVAL KUMAR .....</b>	<b>INTERESTED PARTY</b>

## RULING

1. This ruling is in respect of two applications.
2. The first application is dated 9<sup>th</sup> November 2022 brought by Amos Nicholas Muiruri, Amos Gikuni Kamau, Amos Gikuni Muchiri and Pauline Wanjiku.(First Application).
3. The second application is dated 30<sup>th</sup> August, 2023 filed by the 1<sup>st</sup> to 20<sup>th</sup> interested parties. (Second Application).
4. Before I deal with the said applications there is need to give a brief history of the matter.
5. By a petition for grant of letters of administration filed on 24<sup>th</sup> February 2010, Joseph Njuguna and Eliud Mathu applied for the said grant.
6. Vide Summons for Confirmation dated 27<sup>th</sup> September 2010, they sought a confirmation of the said grant in which they shared the entire estate between themselves, save for the property known as Kampi Ya Moto/Menengai Block 1/1502 which was distributed to the two administrators then and one Edward Koigi Kariuki. The Summons for Confirmation were allowed by the court on 29<sup>th</sup> October, 2010.
7. On 28<sup>th</sup> January 2011, Mary Wangui, one of the daughters of the deceased sought to have the grant revoked/annulled on the grounds that the same was fraudulently obtained through concealment or non-disclosure of material facts.
8. After hearing the parties, my sister Justice T. M. Matheka delivered a Ruling on 14<sup>th</sup> January 2021. The Judge declined to revoke the grant but instead orders inter alia that;
  - a. The Certificate of Confirmation of Grant dated 27<sup>th</sup> September 2010 is cancelled and set aside.
  - b. Any transfer of the estate pursuant to the said Certificate of Confirmation of Grant is revoked.



- c. The entire estate be shared equally between the 2 houses of the deceased and the children of each house to share their share equally among themselves.
9. Subsequently the court was moved again vide a Chamber Summons dated 27<sup>th</sup> September, 2022 which sought inter alia that;
  - a. The Honourable Court do substitute the current administrators with Elizabeth wambui Gikuni and Theresiah Wanjiru.
  - b. That the District Land Registrar does not restore the original title No. Kampi Ya Moto/ Menengai/1502 (Mangu) and the cancellation of subsequent subdivisions namely 1644 to 1667, 1687, 1688, 1689 and 1690 and all subsequent subdivisions.
10. After hearing the parties the court (Justice T. M. Matheka) ordered that;
  - a. The two (2) applicants become co-administrators of the estate and an amended grant to issue accordingly.
  - b. The District Land Registrar is ordered to restore the original title No. Kampi ya Moto/ Menengai/502 (Mangu) and all subsequent subdivisions that were cancelled pursuant to the judgment of 14<sup>th</sup> January 2021.
11. The Court did point out that the sale of L.R. Thika Municipality Block 9/1123 was not affected by the orders of the Judgment of 14<sup>th</sup> January 2021 as it was sold with the authority of the court.
12. Directions were given on 23<sup>rd</sup> October, 2023 that the two applications, would be determined simultaneously.
13. Having given the history of the matter, I will now address each application, starting with the one dated 9<sup>th</sup> November, 2022.
14. The first application is brought under Sections 47 and 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. It seeks the following orders;
  - i. Spent
  - ii. Spent.
  - iii. That the grant of letters of administration of letters intestate issued to the petitioners on 31<sup>st</sup> March 2021 and the rectified certificate of confirmation of the grant issued on 31<sup>st</sup> March 2021 be revoked.
15. The application is propped by the grounds set out on the face of the application and is supported by the affidavit of Amos Nicholas Muchiri sworn on 9<sup>th</sup> November 2022.
16. In a nutshell, the applicants state that the deceased herein had two wives(houses) namely Milka Mbairé and Pauline Ngendo. That the former had 5 children while the latter had eleven children.
17. The applicants further state that they are the children of Gabriel Njuguna Gikuni, Duncan Kamau Gikuni and Josephat A. Muchiri Gikuni, all deceased now, who were the children of the deceased with the said Pauline Ngendo, the 2<sup>nd</sup> wife of the deceased.
18. The applicants further aver that the petitioners herein obtained the grant of letters of administration herein by concealment of material facts, that is non- disclosure of their existence despite the facts that



- they are entitled to a share of the estate. They referred the court to the affidavit in support of the petition for the grant of letters of administration dated 31<sup>st</sup> July 2009.
19. They further aver that even when there was an application to revoke the grant of letters of administration by Mary Wangui there was no disclosure of the existence of their parents.
  20. They further aver that by a judgment delivered by this court on 14<sup>th</sup> January 2021, the court ordered that the estate be shared equally between the two houses of the deceased and the children of each house to share their share equally among themselves. That on 27<sup>th</sup> September 2021 the two houses shared a sum of Ksh. 500,000/- equally but they never got anything despite them being entitled to the same. That the petitioners have proceeded to cause some of the property belonging to the estate to be subdivided amongst themselves to the exclusion of the applicants. That it is unfair that the beneficiaries of the second house have excluded them from getting a share of the estate as children of the said children of the deceased.
  21. The applicants thus seek that the grant be revoked and that they be given a chance to object to the petition.
  22. In response thereto, Elizabeth Wambui Gikuni, swore a replying affidavit on 16<sup>th</sup> October 2023 on her behalf and on behalf of Theresia Wanjiru, a co-administrator.
  23. In a nutshell, she averred that she is a daughter of the deceased herein and Pauline Ngendo, his second wife.
  24. She confirmed that Amos Nicholas Muiruri is a son of Gabriel Njuguna Gikuni, her late brother. That before his death, the deceased gave the said Gabriel Njuguna Gikuni land parcel number Bahati/ Kabatini Block1/850 and that the deceased declared that land as Gabriel's inheritance from him. That Gabriel buried his wife, the mother to Amos Nichlas Muiruri on that land and that Amos has already obtained that land which has devolved to him. That it is for this reason that the administrators then did not include the said Gabriel in the list of beneficiaries. That Eliud Mathu Njoroge, who is one of the administrators, is from the second house and could have included Amos Nicholas Muiruri if he was a beneficiary of the estate.
  25. In regard to Amos Gikuni Kamau, claiming to be a son of Duncan Kamau Gikuni, the respondent stated that they have no brother by that name. That she is only aware of her brother by the name Joseph Kamau Gikuni, who disappeared without a trace and had no children.
  26. In respect to Amos Gikuni Muchiri, the respondent stated that he is a total stranger to her as Josephat Muchiri had no wife.
  27. To the respondent, the deceased had only eight children but there are only seven beneficiaries excluding the father to Amos Nicholas Muiruri whom was given land while the deceased was alive.
  28. The respondent further states that the applicants have in reality been sourced by Eliud Mathu Njoroge and Joseph Njuguna Njoroge the co administrators who sold part of the deceased's properties when they had secretly obtained letters of administration that were revoked by the court and the distribution of the estate is complete. That the application is meant to scuttle the finalization of the distribution since the people that they sold land to are on their necks. That the two said administrators have refused to sign the mutation forms to enable each beneficiary get his/her rightful share.
  29. The other co-administrators namely Eliud Mathu Njoroge and Joseph Njuguna Njoroge did not file a response to the application.



30. The application was argued through written submissions which I have considered and I need not rehash the same.

### **Analysis & Determination**

31. The application is addressed at the grant issued on 31<sup>st</sup> March 2021.

32. A perusal of the court record shows that the said grant was overtaken by events by the issuance of the rectified grant on 18<sup>th</sup> October 2021 and the subsequent certificate of confirmation of the grant of even date.

33. Therefore, the grant addressed by the applicants is non-existent.

34. In addition, there were subsequent orders of the court issued on 29<sup>th</sup> March 2023, after the Application in question was already filed.

35. No explanation has been tendered as to why at the time the court was dealing with the Application dated 27<sup>th</sup> September 2022, it was not asked to deal with this Application. The applicants acknowledge that they were aware of the application but claim that even then they were left out as beneficiaries.

36. It must be taken that at the time the court issued the said orders, it was aware of the Application in question. It would be rather awkward for the applicants to have failed to raise their issue when the court was dealing with the other applications at the time. Asking me to revisit that application would be tantamount to asking me to interrogate the manner the orders of my sister judge were issued. I don't have the jurisdiction to do so.

37. In my opinion, the Application is so far as it addresses a non-existent grant, is incapable of being granted.

38. In addition, even though the grant once existed, it was overtaken by events with the issuance of the rectified grant of 18<sup>th</sup> October 2021 and the further rectified grant of 29<sup>th</sup> March, 2023.

39. On these grounds, I decline to grant the application. It is dismissed with no orders as to costs, as this is a family matter.

40. The second application, dated 30<sup>th</sup> August, 2023, is brought by way of Chamber Summons under Sections 93 of the *Law of Succession Act*, Rules 44 and 73 of Probate and Administration Rules, and Rules 3, 16 and 17 of the High Court (Organization & Administration (General) Rules, 2016. It seeks for: -

i. Spent

ii. Spent

iii. The Honourable Court be pleased to vary the ruling and orders dated 29<sup>th</sup> March, 2023 in so far as they relate to and affect LR. Kampi Ya Moto/Menengai Block 1/1667.

iv. Costs of this Application be provided for.

41. The Application is premised on grounds on its face and supported by an affidavit of the 16<sup>th</sup> interested party, Joyce Chepkorir Yator, sworn on her behalf and on behalf of the other Interested Parties.

42. In a nutshell, it is the Interested Parties' case that on 30<sup>th</sup> June, 2022 they purchased LR Kampi Ya Moto/Menengai Block 1/3332(Mangu) measuring 50 x 100 feet from Lesedi Developers Limited who were the agents of the registered owner, Edward Koigi Kariuki at a purchase price of Ksh. 990,000/=.



43. That the above parcel of land was a subdivision of LR Kampi Ya Moto/Menengai Block1/1667, registered in the name of Edward Koigi Kariuki who purchased the said land from one Joseph Njuguna Njoroge (the 4<sup>th</sup> Respondent herein) who is one of the Administrators of the deceased's estate.
44. They averred that in the process they acquired the following titles;

Name	Title Number
Joseph Mwangi Ndegwa	1/3315
Bhavik Ravjibahi Patel	1/3314
Susan Jesire Kemei	1/3316
Philis Wanjeri Wanyoike	1/3317
Morumbasi Breda Magoma	1/3318
Enock Nyamosi Obayo	1/3319
Amos Mwangi Macharia	1/3320
Debra Ombati Zachary	1/3321
Doris Gesare Ayienda	1/3323
Mary C. Wanjiku	1/3324
Kulwinder Singh Tarlochan	1/3326
Sammy Mbugua Nganga	1/3328
Kuljit Sinch	1/3329
John Kamau Waweru	1/3332
Mike Kipkirui Rop	1/3331
Joice Chepkorir Yator	1/3332
Loise Njoki Kamau	1/3336
Josphat Manguru	1/3337
Calvins Anditi Malowa	
Akinalben Keval Kumar	



45. They asserted that the sale of the above parcels was prominently advertised by a billboard standing on the parcel indicating the address of the agents selling the land and the board of that advertisement remained on the parcel until they were issued with titles in November 2022.
46. They stated that in the entire process of acquiring the parcel, the Respondents who owned 3 parcels contiguous to the land on sale did not raise any objection and or protestation nor did they register any caveat or protest against the mother title.
47. They averred that in the first week of August 2023, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein, who claimed to be administrators of the Estate of the deceased herein invaded their parcels of land, arbitrarily surveyed it without regard to the beacons on the ground and titles they held and without notice to them.
48. They contended that they have seen the judgement of the court dated 14<sup>th</sup> January, 2021 and the ruling dated 29<sup>th</sup> March 2023 referring to the titles in their name yet none of them were joined as a party in the court case or served with the process in this cause.
49. They believed that the Order of 29<sup>th</sup> March, 2023 in so far as it relates to Kampi Ya Moto/Menengai Block 1/1667 and subsequent divisions thereof was made by a court devoid of jurisdiction as the requisite jurisdiction lay with the Environment and Land Court.
50. They also believed that the aforesaid judgement and order were made against the clear provisions of Section 93 of the Law of Succession Act and Rule 44 of the Probate & Administration Rules.
51. They averred that they have acquired indefeasible titles under the Land Registration Act that are incapable of being impeached by way of an application in a Probate & Administration Cause.
52. In response to the Application, Elizabeth Wambui Gikuni swore a replying affidavit on her behalf and on behalf of her co-administrator, one Teresa Wanjiru on 12<sup>th</sup> September, 2023.
53. She averred that this court in its judgement dated 14<sup>th</sup> January, 2021 set aside a certificate of confirmation of grant dated 27<sup>th</sup> September, 2010 and revoked any transfers of the estate pursuant to the said Certificate of Confirmation of grant.
54. That one such property that had been subdivided and transferred is Kampi ya Moto/Menengai 1/502 (Mang'u) whose further subdivisions are what the interested parties have annexed as evidence.
55. She averred that on 31<sup>st</sup> March, 2021 the court did issue rectified Confirmation of Grant which clearly stated Kampi ya Moto Menengai 1/502 (Mang'u) was to be subdivided amongst the beneficiaries of the two houses.
56. She deposed the interested parties should be candid and show sale agreements of the parcels that they have acquired title deeds as well as evidence that they did pay any stamp duty or attend the Land Board for the subdivisions to be allowed. That the Original Kampi Ya Moto/Menengai 1/502 (Mang'u) was subdivided and sold out illegally to persons who were not beneficiaries of the Estate.
57. She contended that the title deeds that are exhibited in court are non-existent having been cancelled by the Land Registrar in accordance with the decree dated 3<sup>rd</sup> May, 2023.
58. She stated that the interested parties are not the children of the deceased neither are they beneficiaries of the estate, and that their application has been overtaken by events.
59. They prayed that the Application be dismissed and the Applicants be directed to claim their refunds from whoever sold them the land.



60. The interested party Joyce Chepkorir Yator swore a further affidavit in response to the aforesaid Replying affidavit wherein she deponed that the search for Kampi Ya Moto/Menengai/502(Mangu) clearly indicates that the same consisted of 4.53 Hectares while the Applications filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, court judgement and resultant orders refer to 2.5 Ha and not the entire original 4.53 hectares, and as such the extension of the resultant orders to Kampi Ya Moto/Menengai Block 1/1667 is illegal.
61. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not file any response to this Application.
62. The Application was argued through written submissions.

### **Applicants’/ Interested Parties’ Submissions**

63. The Applicants filed two sets of submissions on 2<sup>nd</sup> November 2023 and 26<sup>th</sup> February, 2024 reiterating the averments contained in their supporting and further Affidavits.
64. The Applicants argued that this court under Rule 73 of the Probate and Administration Rules has jurisdiction to grant the orders of revision sought as they offend the law and affect parties that have not been heard. They contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents though aware of the adverse interests that had crystalized in KAMPI YA MOTO/BLOCK 1/1667 as an offshoot of 502, did not enjoin the registered owner or the Applicants in the cause rendering the provisions of the order inoperable.
65. The Interested parties citing the provisions of Section 25 and 26 of the *Land Registration Act* No. 3 of 2012 submitted that they hold valid titles that cannot be subsumed in orders emanating from proceedings they are not party to or they have not been made party to. They thus submitted that they have acquired indefeasible title and they are bonafide purchasers for value without notice of any defect in title. In support of this proposition reliance was placed on the cases of Diplock v Wintle 1984 Ch 485 & Ibrahim v Hassan & Charles Kimenyi Macharia [2019] eKLR & Katende v Haridar & Company Ltd [2008] 2 EA 173 cited in the case of Lawrence Mukiri v Attorney General & 4 Others [2013] eKLR
66. The Applicants also referred this court to the case of In re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR.
67. They urged this court to grant the orders sought.

### **Respondent’s Submissions**

68. The Respondent submitted that Vide confirmation of grant filed on 28<sup>th</sup> September,2010 Kampi Ya Moto/Menengai Block 1/502(Mang’u) 2.5 acres ,6.45 acres and 3 acres was subdivided to Eliud Mathu Njoroge, Joseph Njuguna Njoroge and Edward Koigi Kariuki respectively.
69. The Respondents submitted that as per the green card the original title measured 4.53 Hectares and the Registrar revealed the land was subdivided through entry No. 4 and title was issued in the names of the two administrators Joseph Njuguna Njoroge and Eliud Mathu Njoroge vide this cause. They submitted that the next entry showed the land was further subdivided creating new titles No. Kampi ya Moto/Menengai Block1/1664-1667.
70. They submitted that parcel No. 1667 was registered in the name of Edward Koigi and that all the above subdivision was from the Original Title Kampi ya Moto/Menengai Block 1/502(Mang’u) measuring 4.53 Hectares. They argued that these were the titles which were ordered cancelled by this Honourable Court and they were indeed cancelled by the Land Registrar and the Original title restored as per the court judgement and specific orders issued in a ruling dated 29<sup>th</sup> March,2023.



71. They posited that if the Applicants are genuine they should disclose who sold them land knowing since they knew this land had controversies from the year 2010 when the beneficiaries went to court seeking revocation of the grant that was issued to 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
72. They submitted that the law cannot be interpreted to mean that even where the grant of representation was obtained fraudulently that the actions committed by virtue of the same once revoked can still be binding in law. That a court of law cannot, will not and has never sanitized an illegality.
73. The Respondents argued that the applicants are not beneficiaries of the estate and they ought to have filed their disputes in the Environment & Land Court against the administrators.
74. In buttressing their submissions, the Respondents relied on the cases of *Musa Nyaribari Gekone & 2 others v Peter Miyienda & another* [2015] eKLR where the court held inter alia that a thief acquires no right or interest which is transferable in stolen property and *In re Estate of Leah Wanguii Nding'uri (Deceased)* [2020] eKLR for the proposition that revocation of the grant means that all actions taken on the basis and/or strength of the it are a nullity.
75. The Respondents also referred this court to the cases of *In re Estate of Leah Wanguii Nding'uri (Deceased)* [2020] eKLR & *Musa Nyaribari Gekone & 2 others v Peter Miyienda & another* [2015] eKLR

### **Analysis & Determination**

76. The first issue raised was that of jurisdiction. The interested parties aver that the probate court was not possessed of jurisdiction since the property in question was at the time they purchased it in the name of Edward Koigi who is not a beneficiary of the estate.
77. This argument, as I will demonstrate shortly, is a double-edged sword that actually works against the interested parties.
78. I say so because if they feel that the probate court that issued the orders in question lacked the requisite jurisdiction, then they cannot come back the same court to ask it to review the same orders. What they ought to have done was to appeal to the Court of Appeal on the grounds that the probate lacked jurisdiction to grant the orders in question. Going by their own argument, then a court that issues any orders without jurisdiction cannot purport to act on the same orders.
79. I think that on that argument alone this court to determine the application here and now, but I think that there is need to clear the air on the question of jurisdiction, albeit late in the day since the orders in question have already been issued by the court.
80. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi, J.A. held as follows:-

“I think that is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its stools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

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it holds the opinion that it is without jurisdiction.....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

81. A court’s jurisdiction flows from either *the Constitution* or legislation or both. The Supreme Court of Kenya in the case of Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011 stated thus:-

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

82. The *Law of Succession Act* in section 47 provides for jurisdiction of the High Court in respect of matters falling under the Act as follows:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

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.”

84. In the case of Priscilla Ndubi and Zipporah Mutiga v Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013, it was 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.”

85. This application seeks for review of the orders made on the 29<sup>th</sup> March, 2023 by Mumbua T. Matheka J in the following terms: -

- a. That the District Land Registrar be and is hereby directed to restore the original title No. Kampi ya Moto/ Menengai 1/502 (Mang’u) as all subsequent divisions were cancelled pursuant to the Judgement of 14<sup>th</sup> January, 2021.

86. In the aforesaid Judgement of 14<sup>th</sup> January, 2021, the same Judge issued the following Orders: -

- a. The Certificate of Confirmation of Grant dated 27<sup>th</sup> September 2010 is cancelled and set aside.  
b. Any transfer of the estate pursuant to the said certificate of confirmation of grant is revoked.



- c. The entire estate be shared equally between the two houses of the deceased and the children of each house to share their share equally among themselves.
- d. Orders accordingly.
87. From the above it is clear that the orders of 23<sup>rd</sup> March 2023 stemmed from the judgment of the court delivered on 14<sup>th</sup> January 2021. As at 14<sup>th</sup> January 2021, the interested parties had not purchased the land in question, which was a subdivision of part of the estate herein. The said subdivision was declared a nullity. Thus their rights, if any, accrued after the nullification of the subdivision of the purported transfer to Edward Koigi on 14<sup>th</sup> January 2021.
88. In my view, the probate court was as 14<sup>th</sup> January, 2021 seized of the jurisdiction to deal with the illegal distribution of part of the estate to Edward Koigi.
89. Another issue that works against the interested parties is the fact that they did not purchase the property from the deceased or the administrators herein. They did so from a party whose right to the land was extinguished by the orders in question. For these reasons I find that they have no claim against the estate, but against the vendor, who sold to them the land knowing very well that the distribution of part of the estate to him had been declared unlawful, or the then administrators who went ahead to sanction the impugned subdivision and subsequent transfer. That claim does not form a dispute as to the distribution of the estate amongst the beneficiaries or persons beneficially interested and would be outside the jurisdiction of the probate court.
90. Musyoka J. in this regard in *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR expounded as to when a matter is best placed for a succession cause and when it ought to be referred to another Court with concurrent jurisdiction as follows:

“.....The [Law of Succession Act](#), and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the [Law of Succession Act](#) and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the [Law of Succession Act](#) and the Probate and Administration Rules. Such have to be resolved through the structures created by the [Civil Procedure Act](#) and Rules, which have elaborate rules on suits by and against executors and administrators.

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for



the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above."

91. To put it simply, a probate court deals with disputes to the estate involving persons entitled thereto, being beneficiaries, creditors of the estate, or any person who acquires an interest in the estate with authority of the probate court. Any other claim which does not relate to the estate is not for consideration by the probate court. This also applies to any person who may purport to purchase an interest in the estate from the beneficiaries, or even the administrator(s) without authority from the court. Their cause of action will lie as against the persons who purported to sell the property to them, in a separate cause of action.
92. On the above finding, I think that it is sufficient to hold that the rights of the applicants cannot be addressed by the probate court, hence application has no foundation to stand on.
93. Assuming that this court has powers to review the orders sought, then what falls for determination is whether sufficient grounds have been put forth to warrant the review sought.
94. The law on review in Succession Matters is contained in Rule 63(1) of the Probate and Administration Rules provides that:

"Save as in the Act or in these rules otherwise provided, and subject to any order of the court a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order V, X, XI, XV, XVIII, XXV, XLIV and XLIX together with the High Court practice and Procedural Rules, shall apply so far as relevant proceedings, under these rules.

95. In *John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another* [2016] eKLR, the court cited Rule 63 of the Probate and Administration Rules, and then stated as follows:

"As stated above, the only provisions of the Civil Procedure Rules imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the Civil Procedure Rules imported into succession practice by rule 63 of the Probate and Administration Rules. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the Civil Procedure Rules."

96. It is, therefore, clear that any party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 of the Civil Procedure Rules. The substantive provisions of Order 45, state as follows:

"1. (1) Any person considering himself aggrieved—  
(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or



(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) ...”

97. Thus the said Order hinges an application for review on:-
- a. Discovery of new and important matter or evidence which after the exercise of due diligence was not within the time when the decree was passed or the order was made;
  - b. Mistake or error apparent on the face of the record;
  - c. Or any sufficient reason.
98. In the case of James M. Kingaru & 17 others v J. M. Kangari & Muhu Holdings Ltd & 2 others [2005] e KLR Visram.J (as he then was) held as follows: -
- “Applications on this ground (review) must be treated with caution. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial.
99. In the instant case the Applicants/Interested parties submitted that there are errors on the face of the record that warrant setting aside and review of the aforesaid order in this cause. The errors highlighted are: -
- a. Failure by the respondents to include in the proceedings for revocation of grant the holder of title in respect of Kampi ya Moto/Menengai Block 1/1667.
  - b. Failure to join the interested parties to the Application
  - c. Inclusion of the parcel occupied by the Applicants in an order that clearly excludes it.
  - d. One Edward Koigi Kimani, was a creditor to the estate whose debt had been settled in the Original grant with a provision of 3 acres of Kampi ya Moto/Menengai Block 1/502, and that demise was not in dispute or in issue in subsequent applications and adjustments.
100. The respondent submitted that the Interested parties knew very well that this matter had controversies from the year 2010 when they went to court seeking to revoke the grant issued to 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
101. It is decipherable from the court’s Judgement dated 14<sup>th</sup> January,2021 that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were aware that part of the deceased’s land had been sold to Edward Koigi Kariuki.
102. The interested parties averred that they purchased L.R Kampi Ya Moto/Menengai Block1/3332(Mangu) which was a subdivision of L.R Kampi ya Moto/ Menengai Block 1/1667 from Lesedi Developers Limited who were the agents of the Registered owner, the said Edward Koigi Kariuki on 30<sup>th</sup> June,2022.



103. It is noted that the titles to their aforementioned respective portions were issued on 1<sup>st</sup> November, 2022. At this time, the grant had already been revoked vide a court judgement dated 14<sup>th</sup> January, 2021.

104. The Applicants/Interested parties were strangers to this matter at the time the summons for revocation was filed by the Theresia and Elizabeth as their rights to their respective portions had not crystallized yet. Thus, there was no basis for joining them.

105. The interested parties contend that they were affected by the orders of this court revoking the certificate of grant and any transfer of the estate pursuant to the said grant. In buttressing their case, they made reference to Section 93 of the Succession Act. Section 93 of the Law of Succession Act provides as follows:

“93(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this act.

(2) A transfer of immovable property by a personal representative to a purchase shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”

106. Section 93 of the said Act has been a subject of Judicial interpretation in a number of cases. For instance, in *Jane Gachola Gathetha v Priscilla Nyamira Gitungu and another* [2006] eKLR, a purchaser claimed that he was not aware of, and was not party for the fraudulent dealings with the title in issue and was therefore not only protected under Section 93(1) of the Law of Succession Act (Cap 66) but also Section 143 of the Registered Land Act. The Court of Appeal stated thus: -

“We think with respect, that there is a fallacy in invoking and applying the provisions of Section 93(1) of the Law of Succession Act and the Superior Court fell into error in reliance of it. The section would only be applicable where firstly there is a transfer of any interest immovable or moveable property. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”

107. In *Jacinta Wanja Kamau v Rosemary Wanjiru Wanyoike and Another* [2013] eKLR where the appellant therein unsuccessfully sought protection under Section 93, the Court of Appeal stated as follows: -

“Before the appellant could seek protection as a purchaser under Section 93 of the Act, she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser. In any case and as provided by Section 82(b) (11) of the Act it would have been illegal for Beatrice Njeri Mugondu to sell the land before the confirmation of the grant.”

108. In *Re Estate of Christopher Aide Adela (Deceased)* [2009] eKLR it was held that: -

“As per my considered view, Section 93(1) of the Act talks of interest for immovable or movable property and Section 93(2) refers to transfer of immovable property. Obviously both provisions talk of different types of transfer and Section 93(2) protects a purchaser



of the immovable property only if he was aware of some liabilities or expenses of the estate which are not met or paid and still got the property transferred in his names. The aspect reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of Section 23 of the Registered Land Act (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation where a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of right beneficiaries of the estate.”

109. In *Adrian Nyamu Kiugu v Elizabeth Karimi Kiugu and Another* [2014] e KLR the High Court at Meru stated: -

“Whereas the above section states that a transfer by person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act, I am of the considered view that such transaction can only be relied upon where one has obtained the grant fraudulently. The purchaser in this cause came from the neighbourhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid.”

110. As already observed above, the interested parties’ case is that on 30<sup>th</sup> June, 2022 they purchased L.R. Kampi Ya Moto/Menengai Block 1/3332(Mangu) which was a subdivision of L.R. Kampi ya Moto/Menengai Block 1/1667 from Lesedi Developers Limited who were the agents of the Registered owner Edward Koigi Kariuki. Subsequently, title deeds were issued to them on 1<sup>st</sup> September, 2022.
111. The interested parties confirmed in their Affidavit that the 4<sup>th</sup> Respondent herein informed him that he was one of the administrators of the estate of the deceased herein and he had sold to the title to Edward Koigi Kariuki. At the time the interested parties purchased the aforesaid land and titles thereto issued to them, the grant that had initially been issued to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents had been revoked by the Court and as such any actions that were undertaken on the strength of the revoked grant were rendered a nullity.
112. The court took a close look at the process the 3<sup>rd</sup> and 4<sup>th</sup> Respondents took in applying for the said grant of letters of administration and concluded that the said grant was obtained through fraudulent non-disclosure of material facts. That decision has not been appealed against.
123. Now that the court in its judgement found that the alleged sale was contrary to Section 82(b) (ii) of the Law of Succession Act, the provisions of Section 93 do not validate unlawful acts. In my view, what was intended by Section 93 was where a grant is properly and lawful issued then, it can come to the rescue of such a purchaser.
124. The land the Interested parties claimed to have purchased was from an initial subdivision of the Land of the Mother title Kampi ya Moto/Menengai Block 1/502 which belonged to the deceased’s estate. This is borne by the summons for confirmation filed by Joseph and Eliud. That initial subdivision then led to further subdivisions. Thus their contention that the said land was not part of the said court orders is misplaced.



125. For the foregoing reasons, I find that there was no error on the face of the court record to warrant a review of the orders of the court as sought.
126. I also find that there is no discovery of any new matter. The court was categorical as far back as January 2021, that the purported transfer of the property in question to Edward Koigi was unlawful. Thus, an occurrence that took place after that order was made cannot be described as discovery of a new matter envisioned under the law on review. The then administrators were made aware that the transfer to Edward Koigi was unlawful, yet they did not take any steps to correct the illegality.
127. To allow the interested parties' application would be to be essentially set aside the orders of a court of concurrent jurisdiction. It would also amount to sanctioning those transactions which are an illegality in regards to the estate.
128. Therefore, it is not tenable for the interested parties to seek this court to assume jurisdiction which they claimed this court did not possess, preside over the matter and perpetuate an illegality. See *Macfoy Limited v United Africa Co.LTD*(1961)3All E.R 1169 where it was held that ;
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside...You cannot put something on nothing and expect it to stay there”
129. For the foregoing reasons, inevitably, I come to the conclusion that the interested parties' summons for review is unsustainable and without merit.
130. I hereby dismiss the application dated August 31, 2023 but will order that each party bears its own costs.
131. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF JULY, 2024.**

**H. M. NYAGA,**

**JUDGE.**

**In the presence of;**

**Court Assistant Jeniffer**

**Mr. Ayuka for interested parties**

**Mr. K. Mbugua for Eliud and Joseph (Administrators)**

**Mr. Maina for N. Njoroge for Theresia and Elizabeth (administrators)**

**No appearance for others**

