



In re Estate of the Late Kipkosgei arap Moita (Deceased) (Succession Cause 25 of 1995) [2024] KEHC 10301 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 25 OF 1995
RN NYAKUNDI, J
AUGUST 21, 2024**

IN THE MATTER OF THE ESTATE OF THE LATE KIPKOSGEI ARAP MOITA (DECEASED)

BETWEEN

- JOHN KIRWA MOEK FOR AND ON BEHALF OF JEBOR JELEL MOEK 1ST OBJECTOR**
- CLEMENTINE JEPKETER KOSGEI 2ND OBJECTOR**
- HELLEN JEPTOO KOSGEI 3RD OBJECTOR**
- VERONICA JEMELI KOECH 4TH OBJECTOR**
- ROSELYN JEPKOLUM KOSGEI 5TH OBJECTOR**
- LEAH JELIMO MOEK 6TH OBJECTOR**
- CHRISTINE JELAGAT MOEK 7TH OBJECTOR**
- MAGDALINE JEPTOO MOEK 8TH OBJECTOR**
- ANNE JEPLETING KOSGEY 9TH OBJECTOR**
- VINCENT KIMUTAI KOSGEI ON BEHALF OF CHILDREN OF MARY KIMUTAI KOSGEY 10TH OBJECTOR**
- HELLEN JEPKOSGEI MUIGEI ON BEHALF OF THE ESTATE OF JULIUS KIMENGICH KIRAREI (DECEASED) 11TH OBJECTOR**

AND

- CORNELIUS BUNGEI KIRORYO 1ST RESPONDENT**
- REUBEN KOSGEY KIPSEREM 2ND RESPONDENT**



JUDGMENT

1. The background facts of this case are that the deceased whose estate is in issue herein passed away on 11th June 1992, now being over 31 years. The deceased had 5 wives and equally has 29 beneficiaries before this court.
2. At the time of his demise, the deceased was perceived to be testate with a Will. The will was subsequently challenged in this Honourable Court and by way of a Judgement dated 4th February 2020, the court nullified the Will especially because it was not properly executed and attested.
3. Upon the parties to this Succession Cause returning to court for distribution, the court suggested to the parties to attempt an out of court agreements where various family meetings were held, attended by all the beneficiaries, designed to agree on the mode of distribution. The meetings include meetings of 5th August, 2023 and 8th September, 2023 as per the record of the Court file.
4. As a result of the said family meetings, all the beneficiaries named in the Estate of the deceased agreed as follows:
 - a. Two administrators, namely Cornelius Bungei and Monica Ruto.
 - b. Distribution of the estate assets per house. There are five houses, representing the deceased's 5 wives.
 - c. How to effect the distribution? Assignment to each beneficiary, what is due to each beneficiary
 - d. List of estate assets
 - e. Any claim for Molo Farm be pursued as a separate case by the estate, against the partnership or registered owners.
5. A consent to this effect was presented in court and adopted on the 22nd November 2023 and a confirmed Grant pursuant to the consent was then issued on 22nd November, 2023.
6. At the close of the case, when adopting the consent, the objectors reinstated a claim on Molo Farm and the court then invited the parties to submit on the issue of Molo Farm herein. It should also be noted that the family meeting had agreed to leave out the issue regarding Molo Farm to the administrators, for ELC court to decide, and against 3rd Parties, who would need to be enjoined.

1st Respondent's case Summary

7. The 1st Respondent sworn an Affidavit in support of Molo Property LR NO. 1029 dated 24th November 2023, and averred as follows:
 - a. That the deceased died on 11th June 1992
 - b. That in the year 1995 Julius Kirarei- Deceased and Nathan Kipserem Morogo petitioned the court for grant of Probate alleging that the deceased had died testate and a grant was subsequently issued to them on 15th March 1996.
 - c. That in the Petition of grant of probate and in the summons for Confirmation Julius Kirarei and Nathan Morogo swore that the deceased had shares in Molo Farm



- d. That in the now invalidated will Molo property was distributed as part of the estate of deceased. At paragraph 7, the will states:

“I bequeath my land in Molo to Julius Kirarei and to Thomas Koskei I bequeath 15 acres thereof and to Kirwa Kirarei I bequeath 15 acres thereof.”

- e. That I am advised by my advocates which advice I verily believe to be true that on the 5th September, 2023 he received a proposed consent from Katwa & Kemboi Advocates which stated as follows regarding the Molo Property.

“ 1. Molo Farm

8.1 Claim to Molo farm to be determined by the court. Parties to file Affidavits to enable court determine

i. If it is part of the estate

ii. In case the said Molo farm is found to be part of the estate, then decision be made whether the claim for the said farm is against the partnership as a group, or against the one discriminated partner and his share, the late Julius Kirarey [deceased] whose Molo partnership share was distributed after gazettment, and with no objection, in his earlier succession cause ELD H.C P & A 61 OF 1991.

iii. If Molo Farm, and its acreage is found to be due to the estate then determine how it is to be distributed to the beneficiaries.

i. It is being noted that Molo farm was originally a partnership of:

1. Kiptarus Cheruiyot- Over 200 acres as per his paid shares
2. Julius Kirarei – 160 acres as per his paid shares
3. Andea Kuto-20 acres as per his paid shares
4. Chelule.....-70 acres as per his paid shares
5. Kipkosgei Arap Moek- who according to the main and lead partner, Kiptarus Cheruiyot, did not pay anything to get any shares and or acreage

ii. Others who got Molo farm, according the main and lead partners Kiptarus Cheruiyot, are; -

- 1). John Moek- 15 Acres
- 2). Thomas Kosgei-15 Acres
- 3). Hon. Henry Kosgei-200 acres”



- f. The deceased was a shareholder in Molo Farm which was a partnership of 5 people. Julius Kirarei was also a shareholder and got 160 acres approximately which is separate from that of the deceased.
- g. There is a cavalier attempt to have the deceased share taken by the estate of Julius Kirarei yet he is a Petitioner in this matter had listed Molo Farm as part of the estate of the deceased and put up for distribution.
- h. That according to the Evidence of Hellen Kirarei during the meeting of 5th August, 2023 the deceased had 85 acres out of which two people have already benefitted that is:
 1. Thomas Kosgei- 15 Acres
 2. John Kirwa Moek- 15 Acres
- i. That the remaining 55 acres is currently being utilized by the children of Julius Kirarei who is now alleged to be the owner.
- j. That alleged Affidavit of one Kiptarus A. Cheruiyot on the issue of Molo Farm is of no probative value as it is not commissioned, not dated and was Drawn by Bundotich Korir & Company Advocates representing other parties herein.

10th Applicant/Objector's case summary

8. Monica Ruto, the 10th Applicant/Objector herein sworn an Affidavit dated 4th December 2023, in support pursuant to Court directions and orders of 16th October 2023. She averred as follows:
 1. That I am a beneficiary of the Estate of Kipkosgei Arap Moek/Arap Moita and I am also one of the two administrators of the Estate.
 2. I represent the position of over 21 out of 29 beneficiaries in these averments and also represent the position that was agreed upon by all the beneficiaries in all family meetings.
 3. The Affidavit is sworn in reaction to the court's invite that parties in the estate address it on the matter of Molo Farm.
 4. The position agreed upon on the Molo Farm was that the farm (i) would be taken to ELC court, (ii) by administrators, on behalf of the estate, if adequate material become available to show the deceased had interests in the farm, (iii) against the registered owner Kiptarus Arap Cheruiyot, the partners, the Agricultural Finance Corporation (AFC) and any other parties who already have any part of the original partnership form.
 5. The family agreements in various meetings made me a Co-administrator together with Cornelius Bungei.
 6. The consent on distribution and appointment of administrators, myself and Mr. Cornelius Bungei was adopted as a Court order on 22nd November 2023 and a Confirmed Grant issued.
 7. After the adoption of the consent and the confirmation of the grant, the Objectors and other beneficiaries, total seven (7) re-introduced the matter of Molo Farm. The parties were then invited by the court to make filings on the remaining issue of Molo Farm. I make this affidavit with regard to the said Molo Farm.
 8. In the said consent, culminating from various family meetings, it was agreed that; -



- a. I/Monica Ruto and Cornelius be Administrators.
 - b. All pending Application as at then compromised and dispensed with.
 - c. Agreed distribution be done per house/per home/per wife. The estate had five (5) homes, representing the five (5) wives.
 - d. Considering that the deceased passed on in 1992, now over 31 years later, it was necessary to distribute the known estate in the meantime. In any case even if the Molo Farm is part of the Estate, to be acquired, then the Molo Farm issue should be separated, by the estate vis-à-vis the partners that held the farm.
9. In support of my averments, I annex hereto, and mark MR-4 page 1 to 18 true copies of the documents to be relied on.
 10. On the said issue of Molo Farm, on behalf of myself, and the other 21 beneficiaries, out of 29 beneficiaries, I wish to state our position has hereunder.
 - 10.1. All family beneficiaries had agreed that the Molo parcel can be litigated after distribution of all the other parcels, for good reasons explained above, hence should not be reintroduced herein.
 - 10.2. The 21 beneficiaries aver that, as discussed at the meetings, the Molo parcel is partnership land, now registered in the name of one Kiptarus Arap Cheruiyot. Acquired and developed using AFC loan. It was initially a partnership. The Molo farm has already been parcelled out and assigned to people including 3rd Parties.
 - 10.3. The Molo parcel was not part of the estate, and should therefore be treated separately from distribution.
 - 10.4. If there are shares in the Molo Farm partnership belonging to the deceased, the Objectors should give evidence to the 2 administrators, so that the administrators can pursue the estate's claim in the Molo Farm partnership, or otherwise from Mr. Kiptarus Arap Cheruiyot, and/or AFC who had a charge over the parcels, and or all the three (3), for the welfare of all the estate beneficiaries. Upon recovering and part of the Molo Farm from the partnership and or Mr. Kiptarus Arap Cheruiyot, if done, then the collected parcel can be distributed to all the estate beneficiaries.
 - 10.5. This far, no evidence exists to show, (i) the title of the parcel, and or (ii) the deceased had shares and or (iii) paid for part of the Molo Farm. Even after the invite to the Objectors, they could not provide any evidential material even remote.
 - 10.6. Nothing is available to show that the deceased paid for any shares, (a) to the vendor, (b) or to partners, (c) or to the partners herein, or, (d) to AFC.
 - 10.7. This far no title has been provided to show basis for the estate to pursue any claim by the estate on the said Molo Farm. No title and or share certificate and or prove of payment and or claim by the deceased exists in the name of the deceased.
 - 10.8. This far there are no documents executed or even stating generally that the deceased had any interest or claim or right over the Molo Farm Parcel.



11. In all these circumstances, the 21 out of 29 beneficiaries submit that the court does not have enough material upon which to rope in, and address the Molo Farm matter, as if it is part of the estate.
12. In all these circumstances, the Objectors;
 - i. Should either avail the Administrators enough material upon which to mount a Claim, or otherwise they can themselves directly, (Objectors) litigate in any claim Molo parcel at an Environment and Land Court (ELC), court separately.
 - ii. Any claim by the estate to the Molo Farm should ideally be through the Administrators of the estate, and at ELC court.
 - iii. Any claim on Molo Farm would require enjoinder of Mr. Kiptarus Arap Cheruiyot, Andrew Samoei, Samuel Chelulei and Julius Kirarei and or Agricultural Finance Corporation (AFC) to determine actual ownership of the Molo Farm. Also 3rd party purchasers, heirs and inheritors of the parts of the said Molo Farm. Such enjoiners are not possible in these succession proceeding. The enjoinder is necessary to give these parties an opportunity to be heard on a parcel where they have rights and where any orders made will affect them.
 - iv. The consideration, hearing and decisions on Molo Farm cannot successfully be determined using Affidavit evidence. *Viv-voce* hearing on the claim would be necessary.
 - v. No party will be prejudiced if the estate's claim to Molo is pursued separately through another cause, preferably ELC, noting that the deceased passed on in 1992, over 22 years later.
13. The 21 out 29 beneficiaries, in support of these averments rely on the annexures MR-4 Page 1-18 being;
 - i. Confirmed Grant dated 22nd November 2023. MR-4 Page 1 to 4
 - ii. Consent duly signed by both parties dated 22nd November 2023, MR-4 Page 5-10
 - iii. MR-4 Page 11 an Affidavit, though not dated and not commissioned, but signed, showing the Molo Parcel:
 - a. Is registered in the name of one Kiptarus Cheruiyot.
 - b. Was a partnership parcel initially.
 - c. Was charged to AFC, and redeemed by payment by partners, who then got parts of parcel.
 - iv. MR-4 Page 12 to 16, documents obtained from AFC. The documents show the partners to the Molo Farm. The partners being those who paid and who share in the parcel. The partners do not include the deceased herein; whose estate is on trial. The documents are namely; -
 - a. Resolution dated 18th July 1992, MR-4 page 12, indicating how members agreed to have the farm divided amongst themselves according to each member acreage and also share out the outstanding loan.



- b. Resolution letter confirming the meeting of the 18th July, 1992, MR-4 page 12b, which states how Kiptarus Cheruiyot and partners Henrey Kosgey, Andrew Samoei, Kiptarus A. Cheruiyot, Samuel K. Chelulei and Julius Kirarei, agreed to have the farm and the AFC loan dispensed among themselves.
 - c. Letter to AFC authorizing the corporation to transfer the parcel farm to Kiptarus Cheruiyot and partners Henrey Kosgey, Andrew Samoei, Kiptarus A. Cheruiyot, Samuel K. Chelulei and Julius Kirarei, MR-4 Page 13 to 14.
 - d. Letter dated 24th October, 1997, MR-4 page 15 to 16, which states the conditions of the AFC loan that was requested had been met
 - v. MR-4 Page 17 to 18 showing the Estate of one Julius Kirarei, Deceased, duly distributed in Eldoret H.C succ 61 of 1999, and Confirmed Grant on 5th April 2019. Julius Kirarei is one of the sons of the deceased. The late Julius Kirarei, was a partner in the Molo Farm, in his own right. Had his share in the Molo Farm, distributed on 5th April 2019, in the grant given by the court. This distribution was after public gazettment, inviting any objections to the distribution of his estate.
14. It would be discriminatory, unfair and unjust that, just because one of the deceased's beneficiaries, Mr. Julius Kirarei was in partnership, the beneficiary's partnership share should be singled out and imported into the estate herein for sharing.
 15. The 21 out of the 29 beneficiaries have been advised by our Advocate herein, that it might be irregular of the Court herein, to issue these proceedings, ELD H.C SUCC 25 OF 1995, Estate of Kipkosgei Arap Moita, to interfere with another closed estate, Estate of Julius Kimengich Kirarei, Eldoret H.C SUCC 61 OF 1999. To allow these proceedings to be used to alter, or review, or set on Appeal, on the grant orders, made in the said Eldoret H.C SUCC 61 OF 1999, maybe irregular.
 16. The beneficiaries aver that to determine this issue of Molo Farm, ownership AFC, witnesses must be called to avail the records on its ownership. Oral evidence would be necessary.
 17. In all these circumstances, the 21 beneficiaries out of the 29 beneficiaries pray that the issue of the Molo Farm be addressed separately and in a different cause, (i) presumably Environment and Land Court [ELC], (ii) whereby the Estate administrators are Claimants, and, (iii) Respondents/Defendants are Mr. Kiptarus Arap Cheruiyot and or partnership and or AFC and or any other registered owner (s) of the parties who got shares in the said Original Molo Farm and or 3rd parties who have now got interest in the original Molo Farm, (iv) the administrators should be given latitude on pursuing the said Molo Farm upon getting adequate material upon which to pursue it.

1st Respondent's Submissions

9. The 1st Respondent filed submissions dated 24th November 2023 where his Learned Counsel submitted only one issue for determination: Whether Molo Farm LR NO. 1029 forms part of the estate of the deceased.
10. It was his counsel's submission that the deceased owned 85 acres in Molo Farm which is available for distribution herein. Learned Counsel also urged this Honourable Court to so hold and distribute



the 85 acres to the beneficiaries and with the Will having been revoked the property be distributed in accordance with the rules of intestacy with each beneficiary getting 2.8 acres.

10th Applicant/Objector's Submissions

11. The 10th Applicant/Objector filed submissions dated 4th December 2023 where her Learned Counsel submitted five issues for determination:

a. Whether there is adequate material to persuade this court that Molo Farm is part of the estate of deceased.

12. On this issue the Learned Counsel stated that the 21 out of the 29 Beneficiaries submit that the Molo Property lacks any clear definition or evidence of its affiliation or ownership by the deceased and there exists no document of conveyance, no contract or partnership agreement, no proof of payment and no instrument of any nature that establishes the deceased had any stake or entitlement or prerogative over the Molo Property. There is no title in the name of the deceased or share certificate or evidence of any payment for any shares.

13. The learned Counsel made reference to the Law of Succession Act, Cap 160, Laws of Kenya which is the Law that governs this area of distribution of the assets of a dead person. Learned Counsel further made reference to Section 3 of the Law of Succession Act, Rule 41(3) of the [Probate and Administration Rules](#) and relied on the following cases to support this issue;

- i. [In re estate of Kimani Kimitibia](#) (2008) eKLR
- ii. [Estate of Salome Mukami Kariuki](#) (Deceased) 2016 eKLR
- iii. [Re Estate of Alice Mumbua Mutua](#) (Deceased) [2017] eKLR
- iv. [In re estate of Julius Ndubi Javan](#) (Deceased) [2018] eKLR

b. Whether the question of Molo farm can be decided by this court in these proceedings, (i) based on the limited documents and affidavit evidence, without viva-voce evidence, (ii) without enjoining and giving a hearing to the registered owner(s) and or partners, and or AFC and or 3rd parties who have acquired rights in the original partnership land.

14. The Learned Counsel submitted that 21 out of the 29 beneficiaries state that the question of Molo Farm is a complex and contentious one that involves the determination of rights and interests of various parties in relation to the disputed property and that this Court cannot decide the question in this proceedings without viva-voce evidence and without enjoining and giving a hearing to the registered owner(s) and or partners, and or AFC and or 3rd parties who have acquired rights in the original partnership land.

15. The learned Counsel further stated that principles of natural justice are the fundamental rules of fair hearing and due process that must be observed in any Judicial or quasi-Judicial body in the exercise of its jurisdiction. Learned Counsel further stated that the principles of natural Justice are firmly grounded in Article 50 of the [Constitution](#) of Kenya 2010, which guarantees the right to a fair trial to every person.

16. Learned Counsel also submitted that the 21 out of 29 beneficiaries state that the court therefore cannot decide the question of the Molo Farm without enjoining and giving a hearing to the registered owner(s) and or partners, and or AFC and or 3rd parties who have acquired rights in the original partnership land, because doing so would violate the principles of natural justice and the constitutional right to a fair trial. Further, he submitted that the court has a duty to ensure that all the parties who have direct or



substantial interest in the subject matter of the dispute are properly joined and given an opportunity to be heard and that the court cannot make a binding and conclusive determination of the rights and liabilities of the parties without giving them a chance to ventilate their claims and defenses. Further, the court cannot also ignore or disregard the rights and interests of third parties who may be affected by its decision and that the court must ensure that the question of Molo Farm is decided in accordance with the law and the evidence, and in a manner that is fair, just and equitable to all the parties concerned.

17. On this issue, Counsel relied on the following cases:

- i. [*In re estate of Alfred Wandanda Wanganya*](#) (Deceased) [2019] eKLR
- ii. [*Patisho Holdings Ltd & Another v. Paul Nderitu Ndun'gu & Others*](#) Civil Appeal No. 138 of 1997 [1997] 1 KLR (E&L)

c. Whether this Court can make orders in this succession cause, Eld H.C. Succ 25 1995, Estate of Kipkosgei Arap Moita, whose effect is to alter change, review or sit on appeal on the other succession cause, Eld 61 of 1999 distributed, wound up, and closed on 5th April 2019, 4 years ago

18. Learned Counsel submitted that there are two succession causes involving the same matter involving the same estate of Kipkosgei Arap Moita, one filed in 1995 and the other in 1999. He submitted that the latter one was distributed, wound up, and closed by a court of concurrent jurisdiction on 5th April 2019 and it therefore follows that this is the final judgement on the matter, since there is no appeal or revision pending and therefore the court hearing the former cannot make orders that would, alter change, review, or sit on Appeal on the latter one, unless there is a valid reason to do so.
19. Further the learned Counsel submitted that the 21 beneficiaries sate that this position is so well established that it would be a strange aberration for a judge to embark on what is essentially an examination of the judicial pronouncements of judges of the same status as himself, a task that is left to the courts and judges of higher status in hierarchy, by way of appeals and that pronouncements by judges of the High Court on this point are germane and demonstrative of this understanding.
20. The learned counsel also submitted that a grant of representation is conclusive as to the representative title of the deceased and all the persons holding property which belongs to him, and vests in the person to whom it is granted all rights belonging to the estate of the deceased as such and this means that once a grant is confirmed and the estate is distributed, the court cannot reopen or revisit the matter unless there is a valid ground for revocation of a grant.
21. The learned counsel also submitted that the grounds for revocation of a grant are specified in section 76 of the Law of Succession Act and the application for revocation or variation of a grant must be made within six months from the date of the grant, unless the court extends the time for sufficient cause shown. Counsel stated that in this case, there is no evidence that the Respondents applied for revocation or variation of the grant made in Eld 61 of 1999 within six months or with the leave of the Court and that there is no evidence that the Applicant has shown any of the grounds specified in Section 76 of the Law of Succession Act for revoking or varying the grant.
22. The learned counsel made reference to the following cases in this issue;
 - a. [*Bellevue Development Company Ltd v Francis Gikonyo & 7 Others*](#) [2018] eKLR
 - b. [*Kombo v Attorney General*](#) [1995-98] 1EA 168
 - c. [*Civicon Limited v Kenya Revenue Authority & Another*](#) [2014] eKLR



d. Whether this court can take upon itself, and decide on a matter of land rights that would otherwise belong to an ELC court.

23. The Learned Counsel submitted that the 21 out of 29 beneficiaries state that this court, sitting as a probate Court, cannot arrogate itself the mandate of deciding or adjudicating on the ownership of property, that such a responsibility or mandate belongs to the Environment and Land Court and that the ELC Court is established by Article 162(2) of the Constitution of Kenya to hear and determine disputes relating to the environment and the use and occupation of, and title to land.
24. Counsel further submitted that this Court sitting as a probate court, cannot usurp the jurisdiction of the ELC court in the matters relating to ownership of land and that the probate court can only grant or revoke probate or administration of the estate of the deceased, and it cannot determine the validity or invalidity of any claim to any property forming part of the estate. The probate court can only refer such disputes to the ELC court for determination.
25. The learned Counsel made reference to the following cases in this issue;
- a. *In the Matter of the Estate of Mbai Wainaina (Deceased)*
 - b. *In re Estate of Stone Kathuli Muinde (Deceased)* [2026] eKLR
 - c. *In the re matter of the Estate of Mbarak Awadh Salim (Deceased)* (Succession Appeal E14 of 2020) [2022]

e. Whether this court can entertain a dispute that requires joinder of third(3rd) parties to determine ownership of the Molo Farm. The third parties include a registered owner of Molo Farm one Kiptarus Arap Cheruiyot, AFC, the partnership [mesers Kiptarus Arap Cheruiyot, Samuel Chelulei, Andrew Samoei and Julius Kirarei], and also persons who have taken up and used original partnership Molo farm parts.

26. On this issue, the Learned Counsel submitted that the High Court sitting as a Probate Court lacks the requisite jurisdiction to entertain a dispute over the ownership of the Land and that the ELC is the appropriate court to deal with such matters, as it has the mandate to hear and determine such disputes. Further, the probate court can only deal with the issues of inheritance or succession, and not with issues of ownership or possession of land.

Analysis and Determination

I have considered the parties' submissions and there are 2 issues for determination:

- a. Whether Molo Farm LR NO. 1029 forms part of the estate of the deceased
- b. Whether the question of Molo farm can be decided by this court in these proceedings

a. Whether Molo Farm LR NO. 1029 forms part of the estate of the deceased

27. Section 66 of the Laws of Succession Act provides that preference has to be given to certain persons to administer a deceased's estate where the deceased died intestate and further that the court shall save as otherwise expressly provided, the final discretion as to the persons and person to whom a grant of letters of administration shall, in the best interests of all parties concerned, be made. It will however



accept as a general guide the order of preference as set out in Section 66(a) – (d). Section 66 provides as follows: -

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- a) surviving spouse or spouses, with or without association of other beneficiaries;
- b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interest as provided by Part v;
- c) the Public Trustee; and
- d) Creditors:

Provided that, where there is [atrial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

28. Further, guidelines on making of grants are found in Part VII Rule 26(1) and 2 of the [Probate and Administration Rules](#) which provides as follows: -

Rule 26

- (1) Letters of Administration shall not be granted to any applicant without notice to any other person entitled in the same degree as or in priority of the applicant.
- 2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of communication, or written consent in Form 38 or 39, by all persons so entitled in equality or priority be supported by an affidavit of the applicant and such other evidence as the court may require.”

29. From a reading of Section 66 of [Law of Succession Act](#) the person given priority over an intestate is the surviving spouse and children. In this case, since the spouse was not alive, the children of the deceased had priority to petition the court for letters of administration.

30. 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 on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed.

31. And that is the very reason why rule 41(3) of the [Probate and Administration Rules](#) was enacted so that claims which prima facie valid should be determined before confirmation. See rule 41 below: -

41. Hearing of application for confirmation

- (1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.



- (2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.
- (3) 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 or 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. [Underlining mine for emphasis]
- (4) In proceedings under sub rule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.
- (5) Where the court in exercise of its power under section 71 (2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval.
- (6) Where the court, in exercise of its power under section 71 (2) (b) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55.
- (7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court's approval is given. (8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced. (9) On the date for approval of the accounts and on any adjourned date application may be made for an adjournment to a fixed date not longer than three months away.

32. The decision to pack or appropriate and set aside the property or portion thereof in dispute for determination under order 37 of the Civil Procedure Rules is made by the Probate Court under rule 41(3) of the Probate and Administration Rules. For emphasis I reproduce the said sub rule below: -

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 or 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.

33. For better appreciation of the effect of the determination of ownership under Order 37 of the Civil Procedure Rules on a succession cause and the relationship between the two proceedings, see Musyoka J *in re Estate of Stone Katbuli Muinde (Deceased)* [2016] eKLR that:

“...If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

34. In the case of *In re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR it was held that, The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows

‘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 or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

35. I note that the learned Counsel for the 1st Respondent submitted that Molo Farm forms part of the estate of the deceased and invited this Honourable Court to look at the Petition for grant of probate filed in 1995 where Molo Farm was listed as an asset of the deceased. Counsel further stated that it is not disputed that Julius Kirarei owned land in Molo Farm but the land was separate from that of the deceased. He also stated that Julius Kirarei was one of the administrators of the estate of the deceased herein before he died and that he is the one who petitioned the court for grant of probate herein in 1995 and if indeed it is true that the deceased did not own land in Molo , then Julius Kirarei could not have listed it as an asset in the estate of the deceased herein.

36. The learned Counsel also submitted that the Certificate of Confirmation of a Grant in the estate of Julius Kirarei does not state the acreage he gets in Molo Farm and the allegation that what the deceased herein owned has been distributed in the estate of Julius Kirarei is far from the truth and that Julius Kirarei owned land in Molo . He stated that the deceased herein owned land Molo distinct from that of Julius Kirarei and what was distributed in the estate of Julius Kirarei was owned by him and no the deceased in his estate.

37. Further, Learned Counsel brought the attention of this Court to the Will which was invalidated by the court which stated as follows at paragraph 7 thereof: “I bequeath my land in Molo to Julius Kirarei and to Thomas Koskei I bequeath 15 acres thereof and to Kirwa Kirarei I bequeath 15 acres thereof.” He stated that the two beneficiaries named in the Will have already benefitted from the Molo property being Thomas Koskei 15 acres and Kirwa Koskei 15 acres. It was also stated that the estate of Julius Kirarei has the remainder of 55 acres and it appears that part of the reason why the Will was written was to vest the Molo property to Julius Kirarei. Moreover, the estate of Julius Kirarei is in possession of the 55 acres belonging to the deceased herein and 160 acres that were bought by Julius Kirarei as distinct from that of the deceased herein.

38. I also note that the learned counsel stated that there is a certificate of Confirmation of Grant with respect of Julius Kirarei and in the confirmed grant Molo property has been mentioned but no acreage has been indicated and there is no doubt that Julius Kirarei owned 160 acres in Molo . The certificate of confirmation of grant distributed property owned by Julius Kirarei and not Kipkosgei Moita. It



was the learned Counsel's final submission that the deceased owned 85 acres in Molo which some few beneficiaries want to benefit from the exclusion of the rest of the beneficiaries.

39. The learned Counsel for the 10th Applicant/Objector on the other had submitted that the 21 out of the 29 Beneficiaries stated that the Molo Property lacks any clear definition or evidence of its affiliation or ownership by the deceased and there exists no document of conveyance, no contract or partnership agreement, no proof of payment and no instrument of any nature that establishes the deceased had any stake or entitlement or prerogative over the Molo Property. There is no title in the name of the deceased or share certificate or evidence of any payment for any shares.
40. He also submitted on behalf of the 21 out of 29 beneficiaries that the court therefore cannot decide the question of the Molo Farm without enjoining and giving a hearing to the registered owner(s) and or partners, and or AFC and or 3rd parties who have acquired rights in the original partnership land, because doing so would violate the principles of natural justice and the constitutional right to a fair trial. Further, he submitted that the court has a duty to ensure that all the parties who have direct or substantial interest in the subject matter of the dispute are properly joined and given an opportunity to be heard and that the court cannot make a binding and conclusive determination of the rights and liabilities of the parties without giving them a chance to ventilate their claims and defenses. Further, the court cannot also ignore or disregard the rights and interests of third parties who may be affected by its decision and that the court must ensure that the question of Molo Farm is decided in accordance with the law and the evidence, and in a manner that is fair, just and equitable to all the parties concerned.
41. From my analysis of this issue of Molo Farm I wish to state as follows:
 - a. This far, no evidence exists to show, the title of the parcel, and or the deceased had shares and or (iii) paid for part of the Molo Farm.
 - b. Nothing is available to show that the deceased paid for any shares, (a) to the vendor, (b) or to partners, (c) or to the partners herein, or, (d) to AFC.
 - c. This far no title has been provided to show basis for the estate to pursue any claim by the estate on the said Molo Farm. No title and or share certificate and or prove of payment and or claim by the deceased exists in the name of the deceased.
 - d. This far there are no documents executed or even stating generally that the deceased had any interest or claim or right over the Molo Farm Parcel.
42. I am also in total agreement with the Counsel for the 10th Applicant/Objector that the Molo Property lacks any clear definition or evidence of its affiliation or ownership by the deceased and there exists no document of conveyance, no contract or partnership agreement, no proof of payment and no instrument of any nature that establishes the deceased had any stake or entitlement or prerogative over the Molo Property. There is no title in the name of the deceased or share certificate or evidence of any payment for any shares.
43. Notwithstanding the eloquent submissions made by both counsels, on this subject matter relating to the moral property, it is plausible to reiterate what constitutes free property of the deceased as defined in Section 3(1) of the [Law of Succession Act](#). It is couched in this language that free property in relation to a deceased, means the property of which that person was legally competent freely to dispose during his life time and respect of which his interest has not been terminated by his death. It is not easy for this court to answer the characteristics of this definition on free property of the deceased from the rival submissions and affidavits manifested in this application.



44. The series and chain of evidence provide some kind of light primarily pointing at some interest, benefit, lien or rights to property likely to accrue from the Molo immovable Registrable interest. As one can see from the record this succession opened before this court for the very purpose of identifying the free property survived of the deceased and the heirs within the scope of Section 29 of the *Law of Succession Act*.
45. It was the duty of the personal representative appointed by this court to see to it under section 83 of the *Law of Succession Act* that they ascertain all the free property of the deceased, including debts owing to him and money is payable to his personal representative and even beneficiaries by reason of his death. The law does not envisage that the court exercise jurisdiction to determine the legal validity of both immovable and movable assets for purpose of inheritance, that burden is vested with the executor or the legal personal representatives duly appointed by the probate court. In considering intestate succession for that matter, a petition for grant or representation is issued upon gazette to the Kenya gazette paving way for the personal legal representative to search, trace, identify and locate all that free estate owned by the deceased during his lifetime.
46. This deserves attention for the drafters of the *Law of Succession Act* must have had the African family in mind given the six months timeline within which an administrator/administrators appointed under section 66 of *the Act* can launch confirmation proceedings for the certificate of grant of letters of confirmation. Therefore, under the current law it is not the work of the court to declare property as being owned by the deceased unless there are issues to do with earlier transmission of the estate defeating his legal rights. That is not the case here. We are being urged to rule in favour of the applicant but the deceased's issue on the entitlement to the legal share to the Molo property remains in the realm of conjecture.
47. Why do I say so, I find no probative documentary evidence admissible to provide reasonable support on what would have been an entitlement share for the deceased who died intestate alleged to be a partner with some other shareholders to the Molo property. In the framework of the evidence adduced by both the petitioners or objectors, a mere declaratory decision cannot be made by this court in absence of meeting the criteria expressly stated in Section 18, 19, & 20 of the *Partnership Act* No. 16 of 2012 as herein restated:

Section 18: Rules for identifying partnership property

- i. All rights and interest in the property acquired on behalf of the partnership or for the purpose and in the course of business of the partnership, and acquired on behalf of the partnership, is partnership property.
- ii. Property which is held in the name of the partners and which is
 - a. Acquired on behalf of the partnership or
 - b. Contributed to the partnership as capital, is held in trust for the partnership by the partner who acquired the property or contributed the capital.

Section 19: Land acquired out of partnership Profits

Where co-owners of an estate or interest in any land, not being itself partnership property, are partners with regard to profits made by the use of the land or estate and purchase other land or estate out of the profit to be used in the same manner, the land or estate so purchased.

- a. Is co-owned by the partners in the same manner as the original land was co-owned by them at the date of the acquisition and



b. Is not in the absence of an agreement to the contrary, partnership property.

Section 20: Execution of Deeds

- i. A document is validly executed by a partnership as a deed under this Act if it is
 - a. Executed by at least two partners, each with the authority of all the partners to execute on behalf of the partnership.
 - b. Expressed to be executed on behalf of the partnership: and
 - c. Delivered as a deed.

48. For reasons of procedural economy, the beneficiaries who have a lawful interest in the question of rights arising out of the Molo property ought to have brought the remedies of the questionable shares according to the specific context of the Partnership Deed. In so far as direct individual access to this estate is concerned there are several possibilities and models in which any one of the beneficiaries is entitled to take action against the governance of the Partnership as defined in the legal instrument which defined various obligations, covenants, agreements, as to ownership of property acquired during the subsistence of the partnership including issues to do with liabilities. It is evident from these proceedings among these mechanisms non has been concretized to formulate a valid right in favour of Applicant or respondent to this Succession cause. Specific issues concerning the Partnership Deed as alleged by the parties to this litigation exist but not yet filtered to retransmit the shares of the immovable property to the intestate estate of the deceased for distribution. The question and the scope of the deceased share in the Molo property has not been debunked by the affidavit evidence from either the Applicants or the Respondents. This court was therefore in a dilemma of being overburdened with issues on the Molo property which had not ripened to enable it exercise jurisdiction under the [Succession Act](#).

49. Generally speaking, and analysing the evidence by the Applicants and Respondents for this court to enforce any valid agreement whether under a contract or Partnership Deed the nature of the relationship must be established and the intention of the parties. For this case the subject matter is not certain and there is no positive evidence that there was a contractual obligation borne out of an oral or written Partnership Deed which is in existence. This remedy being applied for by the Applicant fails the test set out in *Stekel V Eliice* (1973) 1WLR 191 in which the court pointed out “that what must be done, I think is to look at the substance of the relationship between the parties, and there is ample authority for saying that the question whether or not there is a partnership depends on what the true relationship is, and not on any mere label attached to that relationship. A relationship that is plainly not a partnership is no more made into a partnership by calling it one that a relationship which is plainly a Partnership is prevented from being one by a clause negating Partnership. The question whether a partnership existed is a question of missed law and fact. Parties cannot by their mere say so, crate a partnership, nor is the fact that they assert that they are not, determinative of the matter. (See *Winer v Harris* (1919) 1 KB 285.

In [Lindley on the law of Partnership](#), (14th edition) p 126, the learned editor’s states as follows:

“As between the alleged partners themselves the evidence relied on, where no written agreement is forthcoming. Is their conduct the mode in which they have dealt with the each other, and the mode in which each has with the knowledge of the other, dealt with other people. This can be shown by books of accounts. By the testimony of clerks, agents, other persons, by letters and admissions.” The partnership Act (1890) U,K defines partnership as the relation which subsists between persons carrying on business in common with a view of profit. This Act, it should be noted is declaratory of the common law. One of the rules under



the Act for determining whether a partnership exists Is that the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business. Section 2(2) Partnership Act it is important to bear in mind as well that the test of partnership is the carrying on of a business and not the agreement to carry it on. Partnership, properly so called, must be distinguished from some loose agreement such as was held to be in the case of *Keith Spicer Ltd v Mansel* (1970) 1WLR 333

50. Striking on the face of it the Partnership Act No. 16 of 2012 is substantially in context and text similar to Partnership Act of England as subsequently amended. If the answer to the issues raised by both the Applicant and the Plaintiff was to be determined by this court as a question of law then the expectation of this court was either of them to bring themselves within the guidelines outlined by the Court of Appeal in *Mworia and Another v Kiambati* (1988) KLR 665 which states that: “ For the plaintiff to succeed in their claim, they must prove the existence of the Partnership within the meaning of Partnership, partnership is defined as the relationship, which subsists between persons carrying on a business in common with a view of profit. There must at least be two people or two parties. It can be a partnership between a natural person and a limited company or between to unnatural persons. The main object of the partnership is making profit. The parties must agree to contribute either in cash, or in kind go the capital of the business. The contributions may not necessarily be equal. One would contribute skill and as a result of their contribution to the capital they must agree to share profits. The receipt of a person of a share of the profits of the business is prima facie evidence that he is a partner in the business but the receipt business with the profits of a business, does not of itself make him a partners in the business.
51. On the face of this evidence, I am of the considered view that the application to determine the existence and specific shares of the property in the Molo farm allocated to the deceased remain in the realm of conjecture unless and until the administrators pursue the claim in a commercial court or as the case may be in the Environment and Land Court. As of now there is no evidence of free property survived of the deceased capable of being distributed to the beneficiaries.
52. In all these foregoing circumstances, I note that the court does not have enough material upon which to rope in, and address the Molo Farm matter, as if it is part of the intestate estate of the deceased hence it cannot declare itself on this issue.

b. Whether the question of Molo farm can be decided by this court in these proceedings

53. This court sitting as a probate court, cannot arrogate itself the mandate of deciding or adjudicating an ownership of property, that such a responsibility or mandate belongs to the Environment and Land Court. The Environment and Land Court is established under Article 162(2) of the *Constitution* of Kenya to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Moreover, the Environment and Land Court is robed and clothed with the original and appellate jurisdiction to hear and determine all the disputes relating to land by dint and virtue of Article 162(2) of the *Constitution*, with the provisions of the Environment and Land Court Act or any other written law relating to Land and Environment. It also has the jurisdiction to deal with the disputes relating to land administration and management, public, private and community land, and contracts or instruments granting any enforceable interests in Land.
54. Thus, this Court sitting as a probate Court, cannot usurp the jurisdiction of ELC court in matters relating to ownership of land. The probate Court can only grant or revoke probate or administration of the estate of the deceased, but it cannot determine the validity or invalidity of any claim to any property forming part of the estate. The probate court can only refer such disputes to the ELC court for determination. This is to avoid conflicting decisions and to ensure that the ELC is the sole arbiter



of land and environment disputes in Kenya. On the other hand, matters arising under the Partnership Deed as incorporated within the framework of the *Partnership Act* 16 of 2012 are to be adjudicated by a Commercial High Court to delve into many issues arising thereto as defined in the Act,

55. In sum I am in concurrence with the dicta in the case of *In the matter of the Estate of Mbai Wainaina (Deceased)* [2015] eKLR Musyoka J. stated that;

“The applicants claim that Kiganjo/Gachika/460 was held by the deceased in trust for them, and therefore that makes them heirs to his estate. Whether the deceased held Kiganjo/Gachika/460 in trust for the applicants is a matter of both fact and law. It is incumbent upon the applicants to establish that such trust did exist. The issue is that the applicants have provided material upon which I can conclude whether such trust existed or not. I have not seen material from what is deposed in the affidavit sworn on 17th April 2012 by John Ng’ang’a Wainaina in support of the application.

Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”

56. From the view of the foregoing, this court has no requisite jurisdiction to deal with the issue of Molo Farm. It is settled law that courts as constituted by the Constitution within the hierarchy of our legal system must confine themselves on jurisdiction as defined in the law. Now and again, the superior courts have emphasized on the issue of jurisdiction as seen in the decision of the Court of Appeal herein *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 Others* (2012) eKLR where the court stated as follows:

“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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

57. For the reasons I have explained in my ruling, and the issues raised by both the Applicants and Respondents in both the Affidavits, there are substantial grounds to hold that any immovable share held by the deceased during his life’s time in Molo farm property has not crystallized by the Applicant to



have it declared as free property within the letter and the spirit of the Succession Act to be distributed to the heirs to the intestate estate. Failure to ripen the claim to bring it within the probate court, renders it unsustainable as a remedy to be granted by this court.

DATED SIGNED AND DELIVERED BY EMAIL AT ELDORET HIS 21ST DAY OF AUGUST 2024

.....

R. NYAKUNDI

JUDGE

