



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Ndila Nzioka Chondo (Deceased) (Succession Cause  
47 of 2012) [2023] KEHC 18379 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18379 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 47 OF 2012**

**MW MUIGAI, J**

**MAY 31, 2023**

**BETWEEN**

**JOHN MUASYA NZIOKA ..... 1<sup>ST</sup> PETITIONER**

**SIMEON WAMBUA NZIOKA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**JOHN MUTINDA NDUMBU ..... PROTESTOR**

**AND**

**SAMMY NZIOKA NDUMBU ..... OBJECTOR**

**JUDGMENT**

1. The Deceased herein died on 18.07.1994.
2. The Grant of Letters of Administration was issued on 16.07.2012 to John Muasya Nzioka and Simon Wambua Nzioka by Hon. Justice G. Dulu.
3. The Summons for confirmation of grant was filed on 31.08.2016. In the affidavit in support of the summons for confirmation of grant deposited by Simon Wambua Nzioka, it was indicated that the deceased was survived by;
  - a. Joseph Ndumbi Nzioka deceased(has children)
  - b. Esther Mulee Nzioka married and mentally sick
  - c. Munyiva Mutisya Nzioka daughter (married)
  - d. John Muasya Nzioka son
  - e. Simon Wambua Nzioka son



- f. Ndululu Nzioka daughter (married)
  - g. Samuel Kimanthi Nzioka deceased
4. It was deposed that the deceased's estate comprised of one asset; Land Parcel No. Mwala/Mathunthini/242 measuring 4.8 hectares. It was proposed that 1 acre be excised and sold to cover the cost of the proceedings and the cost of administration and the remainder of the land be shared equally amongst the deceased's children.

### **Affidavit Of Protest**

5. John Mutinda Ndumbu filed an affidavit of protest on 20.09.2017 in which he stated that the petition was a forgery and there was concealment of material facts. He contended that he was a beneficiary of the estate by virtue of being a grandson and a son to Joseph Ndumbi Nzioka, the 1<sup>st</sup> son to the deceased herein. That the Petition was filed and processed in a corrupt scheme orchestrated by the Petitioners and the Area Chief to disinherit him of his father's share. Further, that the chief's letter was suspect and a falsehood as it does not list the name of the deceased's son as a beneficiary.
6. It was contended that the sub chief who authorized the letter is from Kyamutwii sub location whereas the deceased hailed from Mathunthini sub location, the locality of the suit land. The sub chief of Kyamutwii Sub Location is said to have fallen prey to the Petitioners upon decline by Area Chief Mathunthini to issue a letter to them.
7. The Protestor stated that the consent to making the grant dated 20.01.2012 and consent to confirmation of grant filed on 31.8.2016 do not tally in that the parties who have consented are 5 in the former and 2 in the latter. He denied his father consented and Esther Mulee Nzioka having been mentally sick and there being no such record ever reported. That his father was the custodian of title deed number Mwala/Mathunthini/242 till his demise in 2013. He questioned how the Petitioners who live in Kwale County could be informed of the father's mental illness who resided in Mwala, Machakos County and why he or his mother was not approached for substitution in the event of mental disability.
8. The Protestor opined that Samuel Kimanthi Nzioka (deceased) was married to Kithei Kimanthi and had a child. He contended that the administrators chased away Kimanthi's wife and sold his share of land at Malamba in Kwale County. Further, that it was not disclosed that the deceased herein had acquired through settlement scheme in 1965 where the petitioners have lived and the deceased was buried therein.
9. It was stated that the consent to making the grant was never presented to the Protestor's father nor himself and they were alive at the time. In addition, it was deposed that the deceased herein subdivided her Malamba land for her sons Kimanthi Nzioka, Muasya, Wambua Nzioka and herself and Mwala/Mathunthini/242 to his father only.
10. He deposed that since 1965 the Petitioners have never raised any ownership claims wholly or part of parcel number Mwala/Mathunthini/242 neither have they cultivated or built a mud house on the suit land. The protestor approached the administrators upon demise of his father so as to jointly file the succession but they declined and instead continued working behind his back.
11. He asked the Court to decline sale of 1 acre to settle the cost of processing the Succession Cause and contended that by all standards, it could not exceed Kshs 30,000. It was averred that the Petitioners sold off their share of land in Kwale, squandered the loot and are now trying their luck to have a share in the father's inheritance. They had taken someone's cash in exchange of land which matter the Protestor referred to Amuunda Clan for arbitration who referred the matter to this court for determination.



He contended that the Petitioners could not be trusted to render a fair account as they had not filed a schedule of mode of distribution.

### **Petitioner's Further Affidavit**

12. The Petitioners filed an affidavit dated 14.11.2017 deposed by Simon Wambua Nzioka in which he stated that the Protestor does not dispute the fact that the deceased hailed from Mathunthini Location and that any Chief or Assistant from the said location who knew the deceased and knows the deceased's family is and was competent to issue the letter that was filed together with the Petition nor the contents in the said letter.
13. The protestor is a grandson of the deceased herein being a son of Joseph Ndumbu Nzioka who is listed in the Chief's letter. That the protestor and his siblings are beneficiaries of the deceased's estate through their father's share once Land Parcel No. Mwala/Mathunthini/242 is shared out amongst the deceased's children. The consent to the making of the grant has therefore been given by the deceased's children as required by law.
14. The Petitioner stated that Kimanthi Nzioka was his elder brother and Kithei, the alleged wife left him in the 1970s when he was still alive and got married to another man. He said the Protestor should prove his allegations and tell the court how old he was when the said Kithi left the said brother. He maintained that the late Kimanthi had no family.
15. He said the deceased herein had no land in Kwale and the Protestor should furnish the court with details and particulars of the same. He stated that he and the 1<sup>st</sup> Petitioner bought land in Shimba Hills in Kwale in 1960s, registered in their names when the area came under Land Adjudication in early 1970s. That the deceased herein lived with them as their mother and they took care of her until her demise and buried her in his land. The father of the protestor was of unsound mind when the petition herein was filed and could not be made party to the proceedings, a fact he alleges the protestor is not disclosing to the Court.
16. It was deposed that Land Parcel No. Mwala /Mathunthini/242 has always been the Nzioka family home. Further, that the Protestor has always been aware of the proceedings but chose to go silent on the matter and follow proceedings from a distance. That he has chosen to file a protest at this stage and deliberately lie to the Court.
17. It was averred that before the petition herein was filed, the Protestor took the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner to a particular advocate in Machakos whom the protestor said would file the petition on their behalf. The said advocate did nothing and that is how they ended up instructing the current advocate on record.
18. It was deposed that the costs of the proceedings was a matter of law and the same should be taken from the deceased's estate as provided by law. The court was urged to dismiss the Protest for lack of merit.
19. The parties were cross examined on the contents of their affidavits.

### **Hearing**

20. The Protestor PW.1 John Mutinda Ndumbu stated that he knew the deceased herein since she was his grandmother who bore his father Joseph Ndumbu Nzioka. His father died in 2013 due to old age, over 90 years and had never been of unsound mind as alleged. He was sure there was no Chief's letter, there is no such location going by the name of Mathumthini. He said that Mathunthini used to be a sub location in Mwala. His location is Makutano location and Kyamutwii is a sub location of Makutano.



21. As of 2012 the Chief of Makutano might have been there. He agreed that the chiefs or assistants of other areas could assist if their counterparts are not there. His grandmother had four sons and three daughters. The sons were Joseph Ndumbu Nzioka, Samuel Kimanthi Nzioka, John Muasya Nzioka and Simon Wambua Nzioka. The daughters were Esther Mulee Nzioka, Ndululu Nzioka, Munyiva Nzioka.
22. His father was alive when this cause was lodged and he did not lodge a protest before he died. He has not taken out letters of administration on behalf of my father's estate. Two of his uncles John Muasya and Simon Wambua are still alive and are the petitioners herein. The deceased had two parcels of land namely Mwala/Mathunthini/242 and Kwale/Malamba but do not know the parcel number of the Kwale land.
23. The Kwale land was bought in 1965 by the deceased's daughter Munyiva who had signed the consent to confirmation. He did not have the documents showing that the Kwale land was purchased. The deceased died in Kwale on her land in Kwale, The 2nd petitioner resides in Kwale and likewise 1<sup>st</sup> petitioner having lived there since the 1960s. The petitioners lived with deceased and when she died she was buried on 2nd petitioner's land. He alleged that the 2nd petitioner did not buy any land as he was given by the deceased.
24. He said it was not true that the 1st petitioner bought land of his own as he was given by the deceased. He said he is aged 55 years old and his ID card shows date of birth as 1964. The Petitioner moved to Kwale in 1965 when he was one year old. He said it is not true that the petitioners took the deceased to a land they had bought in Kwale. Munyiva is married in Kwale. The petitioners are on their own lands that had been given by their mother.
25. He could not tell if the deceased had lands registered in her names. He confirmed that his father lived on the deceased's land and never bought his and he had not bought land himself. He said that the deceased had seven children and who had equal rights over the Mwala parcel of land. He contended that the estate expenses could only be made from the beneficiaries if there are no resources. He was aware that he is supposed to claim under his father's share. He agreed that all the children of the deceased have been listed.
26. He maintained that the family of Samuel Kimanthi Nzioka has a family in Mwala. Kimanthi's wife left for her home and lives there to date. Kimanthi died on 25-6-1981 but he did not have the certificate of death or burial permit. Kimanthi had children at the time of his death and the wife Kithei has not brought a protest. He was about ten years when Kimanthi's wife Kithei deserted Kimanthi. She had two children a boy and a girl. Kimanthi used to live in Shimba Hills and is buried there. Kimanthi left for Shimba Hills when he was four years old and came back to Mwala in 1972. His family currently reside in Mathuntheni which is the deceased's land.
27. He said they have another ancestral land in Shimba Hills. His grandfather is deceased. He denied assembling his uncles and taking them to a certain lawyer in Machakos town. His grandmother had indicated that the Mwala land was to be occupied by his father and there are records to that effect. They were not involved in the succession cause. He confirmed that all the children of the deceased have been listed and should be involved unless they cede their rights. He was not involved and he is not a pastor. He indicated that he was not objecting to the sharing of the land.
28. Upon Re – examination, he said that he is a grandson to the deceased and does not support the mode of distribution because the Shimba Hills farm has not been included. the Shimba Hills farm was bought from dowry proceeds for the deceased's daughter Munyiva. It was the deceased who invited her sons to Shimba Hills. He went to Shimba Hills in 1968 when he was four years old and came back.



29. His father was not aware of this case and he died in 2013. There is no evidence that his father was mentally sick. They were not aware of the succession cause. It was his father who lived alone in Mwala and there had never been any dispute. Samuel Kimanthi was buried in Shimba Hills and this parcel has not been included in the schedule of assets to be distributed. He said the letter from the Chief was not proper and he has a right to block the confirmation since his father was not been involved. He had no report that Petitioners had bought the Shimba Hills land. The elders at Mwala had deliberated on the land there. His father lived on the Mwala land all his life. He wanted the grant revoked.
30. PW.2 Simon Wambua Nzioka a resident of Shimba Hills in Kwale County stated that the deceased herein was his mother. He adopted the affidavits dated 12-8-2016 and 14-11-2017. He indicated that he was also testifying on behalf of the 1st petitioner. Their late mother had four sons and three daughters and were Joseph Ndumbu Nzioka, Samuel Kimanthi Nzioka, John Muasya Nzioka and himself and sisters are; Esther Mulea Nzioka, Monica Munyiva Mutisya, Ndululu Ndongye.
31. Esther Mulee was married in Yatta and is now deceased while Munyiva Mutisya is married in Shimba Hills and is alive. Ndululu Ndongye died recently in Muranga where she had been married. Joseph Ndumbu Nzioka who is father to the Protestor and Sammy Nzioka Ndumbu. Kimanthi Nzioka had married a wife who separated from him in 1970 and moved to Mwala area where she remarried. His brother Kimanthi had only one daughter by the name of Nzilani. His brother's wife Kithei is happily married in Mwala.
32. His mother had one parcel of land known as Mwala /Mathuthini/242 measuring 4.9 Ha and is to be shared between himself, John Muasya Nzioka, Monica Munyiva who are alive. The families of the deceased brother Joseph Ndumbu Nzioka Kimanthi had no one from his family. The sisters Esther Mulee, Ndululu Ndongye are married but if all the four sisters' families request for a share then they can be given. He had made a proposal for the mode of distribution. His mother had no land in Shimba Hills. He grew up on his mother's land in Mwala and in 1966 he moved to Shimba Hills to join his sister Munyiva. He worked in a settlement scheme and later bought his land and later invited his brothers John and Kimanthi who came with their mother.
33. His two brothers later managed to buy their own land. Their mother lived on John's parcel of land. John later moved to Lungalunga. Their mother then lived on his land and he later buried her there. His land was surveyed in 1972 and he obtained a title deed. His mother had no land in Shimba Hills except the one at Mwala. The only ancestral land is the one in Mwala. They had involved the Protestor when filing this Petition and he is the one who led them to a certain advocate in Machakos and he guided them but the Protestor later left them when he realized that they intended to share the family land at Mwala. The protestor was with them when we sought the Chief's introductory letter. He indicated that they have no problem in the Protestor's father getting a share of the Mwala land.
34. Upon cross examination, he said the Protestor was with them in the initial stages of filing the Petition and they did not file the petition secretly. At the time Joseph was not of sound mind and they engaged his family members. He was aware that a Chief's letter in commencing a succession cause is necessary and they were issued with a Chief's letter.
35. He said that he left Mwala in 1966 and has never tilled land in Mwala. His mother had no land in Shimba Hills. It is not true that their brother Joseph Ndumbu Nzioka was given the Mwala land. All family members are entitled. It is not true that they chased their brother's daughter. They are entitled to the land belonging to their late mother. He wanted a share of the Mwala land.
36. Upon re-examination, he said the Protestor's father was still alive when they lodged the petition and they involved his children John Mutinda Ndumbu & Sammy Nzioka Ndumbu and the Protestor's



father was then of ill mental health and engaged the Protestor instead. He denied engaging in any fraud. The Chief directed his Assistant to write the introductory letter. Form P&A 5 indicated all the children of the deceased and none was left out. He denied authoring any fraudulent documents. He stated that he moved to Shimba Hills in 1996, his mother moved to join them and the family land had not been registered. They used to visit Mwala during the survey to project the family land during the survey in 1982. The title deed came out in 1985 in names of their late mother despite the fact that her eldest son Joseph Ndumbu resided thereon. Their mother directed her eldest son to ensure the land was shared among her children. My mother had no land in Shimba Hills and he wanted the Mwala land to be shared among four persons.

### **Notice Of Objection**

37. Sammy Nzioka Ndumbu filed a Notice of objection dated 16.11.2019 which was allowed and he was made a party to the proceedings. He further contended that he was the son of Joseph Ndumbu Nzioka and the property in question belonged to him and John Mutinda Ndumbu, his brother which they inherited from their father.

### **Submissions**

#### **Protestor Submissions**

38. Protestor filed submissions dated 12.7.2021 and submitted on two issues. As to whether summons for confirmation of grant should be confirmed as is, it was submitted that when a party is making an application, there should be a mode of distribution outlined, that the rest of the family members have to sign when the letters are being made failure to which the Court cannot move on with the process. It was contended that Joseph Ndumbi Nzioka who was indicated as mentally sick did not sign the letters of administration. The Petitioners did not provide proof that he was mentally ill, they recognized him as a beneficiary but did not table the application before the family of the protestor.
39. It was submitted that procedures are handmaid to justice and failure to follow procedure leads to miscarriage of justice. The petitioners were on a secret mission of distributing the estate of the deceased while leaving others alone and this was concealment of material facts which is a ground for revocation of a grant under Section 76 of the Act. Reliance was placed on the case of Jamleck Maina Njoroge vs Mary Wanjiru Mwangi (2015) eKLR.
40. As to whether the protestor is entitled to a share from the entire estate of the deceased, it was submitted in the affirmative as he contended that he is a grandson of the deceased and becomes a beneficiary through the interest of his late father to the estate of the deceased. It was submitted that by virtue of Section 29 of the Act, he was a beneficiary. Lastly, it was submitted that the family should be directed to sit down and apply for letters of administration afresh and when time matures apply for confirmation of the same by including all the dependents / beneficiaries of the estate.

#### **Petitioners Submissions**

41. The Petitioners filed submissions dated 27.09.2021 and submitted while relying on Section 29 of the [Law of Succession Act](#) (hereinafter referred to as “the Act”) stated that whereas both children and grandchildren of the estate are entitled to a share of the estate of the deceased and /or an opportunity at administration thereto, the Act puts the children of the deceased at a higher echelon of priority in so far as benefits and administration is concerned. The estate of the Joseph Ndumbi Nzioka has not been succeeded by the Objector/Protestor herein.



42. It was submitted that the protestor is not a direct beneficiary having failed to provide evidence of being maintained by the deceased prior to his death and can only benefit through his late father who is a direct beneficiary and who had been listed as one of the beneficiaries. Reliance was placed on the case of Peter Mwai Muchahi vs John Maina Mwai [2017] e KLR.
43. It was submitted that a widow loses her interest upon remarriage and Kithei Kimanthi dissolved her union with Samuel Kimanthi Nzioka a long time ago and no evidence of any said children from the union has been tendered before the Honourable Court. The Court was urged to dismiss this ground of Objection/Protest.
44. It was submitted that the Protestor's father was devoid of the requisite capacity as by law provided to be considered to provide consent in the administration of the deceased's estate. His mental state did not negate his status as a beneficiary to the same. What he lacked at the time was capacity to express consent to the same capacity to appoint any other person to consent to the same instead. Unfortunately, he passed away and the estate is not yet distributed.
45. While relying on section 109 of the *Evidence Act* and section 26 of the *Land Registration Act*, No 3 of 2012, it was submitted that the objector has failed to prove that the land alluded to belongs to the estate of the deceased nor controverted the ownership of the said property by the Petitioners and as such his averments remain as allegations.
46. The Petitioners submitted that upon confirmation of the grant, they will have a duty to administer the estate effectively including payment of debts owed by the estate. The legal costs are a matter of law and that they should excise a portion of the estate for satisfaction of any debts owed by the estate, they should be allowed to do so. That they have put it on record that any balance will be distributed among the beneficiaries of the estate. It was contended that the Protestor had failed to meet the threshold under Section 76 of the Act and as such urged the Court to find merit in the summons for confirmation of grant and confirm the same as drawn.

### **Determination**

47. I have considered the summons for confirmation of grant, the affidavits in support and against it, the evidence on record and submissions of the parties and find the following as issues for determination;
  - i. Whether Joseph Ndumbi Nzioka (deceased) was considered in the Petition.
  - ii. Whether Samuel Kimanthi Nzioka (deceased) was married and had beneficiaries.
  - iii. Whether the Protestor is a direct beneficiary of the estate herein.
  - iv. Whether the property in Kwale forms part of the estate herein.
  - v. Whether one (1) acre of the estate should be hived off to cater for legal costs.
  - vi. Whether the summons for confirmation of grant should be confirmed.
48. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
49. Section 108 of the *Evidence Act* is also to the effect that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.



50. Section 109 of the same Act states that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
51. The parties herein have raised various allegations and it is upon them to prove them so as the court can issue appropriate orders.

**Whether Joseph Ndumbi Nzioka (deceased) was considered in the Petition.**

52. From the Petition for letters of administration, it is indicated that the Joseph Ndumbi Nzioka (deceased) was a beneficiary of the estate but was “mentally sick.” In the Summons for confirmation of grant, it is indicated that he is a beneficiary and now deceased.
53. Section 2 of the *Mental Health Act* Cap 248 provides that:

“A person suffering from mental disorder” means a person who has been found to be suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and suffering from mental impairment due to alcohol or substance abuse.”
54. At the time of petitioning for the letters of administration, there was no contention as to the mental status of Joseph Ndumbi Nzioka. From the evidence in Court, both parties have raised parallel allegations but none of them has provided medical evidence in support of or against the mental status of Joseph Ndumbi Nzioka.
55. To this extent, I make reference to section 51 of the LSA on the form of a grant on the guidelines on making of grants found in Part VII Rule 26(1) and 2 of the Probate and Administration Rules which provides as follows:-

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- (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.”
56. Section 51 (1) and (2) of the *Law of succession Act* and Rule 7 to 14 of the Probate and Administration Rules provide on the form of an application for grant. It provides as follows;

Every application shall include information as to:

    - a. The full names of the deceased;
    - b. The date and place of his death
    - c. His last known place of residence;
    - d. The relationship (if any) of the applicant to the deceased;
    - e. Whether or not the deceased left a valid will;
    - f. The present addresses of any executors appointed by any such valid will;



- g. In cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
- h. A full inventory of all the assets and liabilities of the deceased; and
- i. Such other matters as may be prescribed.

57. To this end, this Court finds that the Petitioners considered JOSEPH NDUMBI NZIOKA in the Petition as a beneficiary. Perhaps the question of mental illness is what remains in abeyance as there is no proof of the same on record however now it is alleged that he died yet none of the parties have provided a death certificate for consideration by the court.

58. This Court also notes that parties have made reference to a Chief's letter from Kyamutwii sub location but there is no Chief's letter on the court record.

59. Secondly, as to whether, the Protestor is a direct beneficiary of the estate herein, it is not contested that he is the son of Joseph Ndumbi Nzioka (Deceased) and therefore a grandson of the deceased herein. In re Estate of Florence Mukami Kinyua (Deceased) [2018] eKLR it was held that;

“A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent's share in the estate of the grandparent”

60. Similarly in Re Estate of Wahome Njoki Wakagoto (2013) eKLR it was held that;

“Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1<sup>st</sup> July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

61. In the case of Cleopa Amutala Namayi vs. Judith Were Succession Cause 457 of 2005 [2015] eKLR the Court observed thus:

“Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents (sic) who died intestate after 01/07/1981 when the Act came into operation. The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents (sic) indirectly through their own parents, the children of their grandparents. The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildrens own parents are dead. Those grandchildren can now step into the shoes of their parents and take directly the share that ought to have gone to the said parents. Needless to say, such grandchildren must hold appropriate representation on behalf of their parents.”



62. In this case, Joseph Ndumbi Nzioka, the father of the Protestor is said to have died in 2013 after the mother, Ndila Nzioka Chondo died in 1994 who is the deceased herein. The Protestor had a right to be involved in the succession proceedings and as he was listed as a beneficiary, the court would not have confirmed the grant without proof of his mental illness or his physical presence if he was still alive. As we speak, he has died, so what happens to his share? Naturally the estate of the deceased has to be divided among all the rightful beneficiaries who will get their share. Thereafter the deceased's share can be distributed to his children among them the Protestor.
63. From the Protestor's evidence, he is yet to take out letters of administration of the father's estate and as such he cannot represent that estate until then.
64. Thirdly, as to whether Samuel Kimanthi Nzioka (deceased) was married and had beneficiaries, the Petitioners contend that he was not married at the time of his death and he had separated with his wife who had remarried allegations which the protestor claims to be false. PW1 stated in his oral evidence stated that Kithei had one child, a daughter called Nzilani whose name does not appear anywhere in the Summons. The Protestor contended that the uncle had a son and a daughter. Besides the allegations herein, no evidence of either of the allegations has been presented to this Court and the Court cannot act on speculation. If Simon Kimanthi Nzioka (deceased) had a child/children if proved whether or not they separated with the mother, his/their father's share should be allocated to them. For now such proof of the deceased's son Samuel Kimanthi Nzioka is wanting and unavailable.
65. Fourthly, as to whether the property in Kwale forms part of the estate herein or not, none of the parties provided direct and/or documentary evidence eg. Official search evidence for consideration by the Court. The Protestor alleges that there was subdivision of the said land but has not provided any evidence to that effect. The Court shall only refer to the asset(s) disclosed as forming part of the deceased's estate and is/are available for distribution. Kwale is not proved as forming part of deceased's estate.
66. Fifth, as to whether one (1) acre of the estate should be hived off to cater for legal costs or not, the Court considers whereas the Court can sanction sale of a property of a deceased before grant is confirmed, in this case, the decision to sell part of the estate to settle legal and other related costs/ expenses shall be upon agreement by beneficiaries and/on how much of the land valuation/market price and Administrators rendering accounts as provided in section 83 (c ) and (d) LSA.

Personal representatives shall have the following duties-

- (a) .....
- (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;

67. In re Estate of Mukhobi Namonya (Deceased) [2020] eKLR where Musyoka J stated thus;

“One of the duties of administrators, set out in section 83(d) of the [Law of Succession Act](#), is to ascertain and pay out of the estate all the debts of the deceased. Ascertainment of the debts of the estate is about identifying them, in terms of finding who the creditors were, how the debts were incurred, what documentation is available, before pay out can be done. If the debts arose during administration, and were necessitated by the exigencies of administration, such as where funds were needed to pay for the administration process, in terms moneys for court fees, advocates costs, land rents and rates, taxes, and attendant



expenses, then section 83(c) of the *Law of Succession Act* would be relevant. That provision requires administrators to pay out of the estate all the expenses of obtaining the grant and all other reasonable expenses of the administration. Where estate assets have been dissipated to address the expenses envisaged in section 83(c) then it must be stated what these expenses were, how they arose and how they were settled. The same would apply where certain debts and liabilities of the estate needed to be settled and estate assets had to be sold to facilitate the settlement of such debts. Section 83(d) of the *Law of Succession Act* requires administrators to ascertain and pay, out of the estate, all the debts of the deceased. In addition, section 83, at paragraph (e), requires the administrators to render accounts of their administration within six months of their appointment. “

68. Should there be any expenses needed, the same can be paid out of the estate once the confirmation of grant has been issued. If there will be any excess after selling of the acre of land, then the proceeds should be shared equally among all the beneficiaries.
69. Lastly, as to whether the summons for confirmation of grant should be confirmed, The written consents for confirmation of grant have been signed by Sabina Ndululu Ndonge and Munyiva Mutisya Nzioka who appear to be the only children who are alive save for the administrators. The rest of the beneficiaries have been listed as;
- a. Joseph Ndumbi Nzioka deceased(has children)
  - b. Esther Mulee Nzioka married and mentally sick
  - c. Munyiva Mutisya Nzioka daughter (married)
  - d. John Muasya Nzioka son
  - e. Simon Wambua Nzioka son
  - f. Ndululu Nzioka daughter (married)
  - g. Samuel Kimanthi Nzioka deceased
70. There is no Chief's letter attached to the petition. The purpose of this letter was stated in re Estate of Mukhobi Namonya (Deceased) [2020] eKLR where the court stated as follows;
- It is not a requirement of the law, for it is not provided for in the *Law of Succession Act*, Cap 160, Laws of Kenya, nor in the Probate and Administration Rules. It was a device resorted to by the court to assist it identify the persons who survived the deceased, for the court has no mechanism of ascertaining the persons by whom the deceased was survived save by relying on officers of the former provincial administration, who represent the national government at the grassroots and are in contact with the people, and therefore, the best suited to assist the court identify the genuine survivors of the deceased.
71. The certificate of official search of land parcel Mwala/Mathunthini/242 dated 13.12.2011 states that the proprietor is Ndila Nzioka Chondo. The asset forms part of the deceased's estate available for distribution.
72. This Court finds that the Protestor has failed to prove his case on a balance of probability with regard to revocation of Grant. The Grant issued to Administrators is not contested and he seeks to have the grant revoked under Section 76 LSA but there is no confirmed grant in this matter therefore that ground cannot stand.



73. However, on the issues raised in the Protest, this Court found no evidence to prove fraud or forgery and no evidence of concealed facts as the Protestors father's name is in the Petition and in the summons for confirmation of grant.

### **Disposition**

74. This Court directs as follows;

- a. The Protest is upheld and the Protestor and other children of his late father be included as beneficiaries of the deceased's estate through their father Joseph Ndumbi Nzioka.
- b. The List of beneficiaries shall be amended and updated as the Chief's letter is not in the Court file.
- c. The assets that comprise of the deceased's estate available for distribution shall be determined if documentary proof of Kwale properties are owned by deceased at that point they Shall be included for distribution.
- d. The Petitioners, beneficiaries shall agree on the mode of distribution of the estate and if so file written consents, names and Identity card numbers and appear in Court.
- e. If agreed by ALL beneficiaries and Administrators, the Summons for confirmation of grant dated 31.08.2016 shall be confirmed in the following terms;
  - i. The estate property being Mwala/ Mathunthini/242 be shared equally amongst all the beneficiaries.
  - ii. The one (1) acre to be sold by Administrators to settle Succession Cause costs and expenses for distribution of the estate. If there is any balance, it is to be shared by all beneficiaries.
  - iii. The administrators shall produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account within 6 months from the date of issuance of the confirmed grant as provided by Section 83 LSA.
  - iv. Any aggrieved party may apply.

It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 31<sup>ST</sup> MAY, 2023  
(VIRTUAL/PHYSICAL CON-FERENCE).**

**M.W.MUIGAI**

**JUDGE**

In the presence/absence of:

Mr. Nzei - for the Petitioners

Mr. Mwazighe - for the Protestor

