



**In re Estate of Chabari Manyara (Deceased) (Succession Cause  
117 of 2007) [2023] KEHC 21951 (KLR) (30 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21951 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 117 OF 2007  
EM MURIITHI, J  
AUGUST 30, 2023**

**BETWEEN**

**ELIAS MBAYA ..... PETITIONER**

**AND**

**MBAABU SABARI ..... 1<sup>ST</sup> APPLICANT**

**DAVID MUTHOMI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SALESIO RIUNGU KIUGU ..... INTERESTED PARTY**

**PATRICK NKOROI THURANIRA ..... INTERESTED PARTY**

**JOHN IKUNDA M'ANYIRI ..... INTERESTED PARTY**

**JOY NKIROTE MARETE ..... INTERESTED PARTY**

**ELIPHAS KINYAMU KAIGA ..... INTERESTED PARTY**

**ERASTUS M. RIUNGU ..... INTERESTED PARTY**

**JUDGMENT**

1. By Summons under certificate of urgency dated 31/10/2019 brought under section 76(a, b, c, d) of the [Law of Succession Act](#), Rules 44 (1) and 73 of the Probate and Administration Rules, and any other enabling provision of the law, the applicants seek that:
  1. Spent
  2. This Honorable court be pleased to revoke the grant of letters of administration issued to the petitioner on 16<sup>th</sup> August 2006 herein and confirmed on 27<sup>th</sup> May 2008.



3. Spent.
  4. This Honorable court be pleased to revoke the resultant subdivisions of land parcel L.R NO. IGOKI/KINORO/64 being land parcels LR NO. IGOJI/KINORO/2259 - 2267 and have the same revert to land parcel L.R NO. IGOKI/KINOROR/64 in the name of the deceased.
  5. Costs for and incidental to this application be borne by the petitioner.
2. The application is premised on the grounds on the face of it and supporting affidavit of Mbabu Sabari, the 1<sup>st</sup> applicant herein, sworn on even date. The applicants are sons of the deceased herein, who was the registered owner of land parcel L.R NO. IGOJI/KINORO/64. The petitioner, who is their brother, filed this cause in secrecy, without their knowledge or consent and concealed material facts from this court. They have been brought up in L.R NO. IGOJI/KINOROR/64, where they have established their homes. The petitioner proceeded and distributed the land to strangers who are now trying to evict them. The green card for the parcel of land obtained from the lands office shows that the same has been subdivided into 8 portions. When they conducted official searches of the resultant subdivisions, they learnt that the same had been transferred to strangers. They have never had any dealings with the alleged 3<sup>rd</sup> parties of their father's estate and the resultant title deeds should be cancelled so that the land reverts back to the name of the deceased.
  3. The petitioner herein, Elias Mbaya swore replying affidavit on 19/11/2019 in response to the application. He avers that although this cause was filed in his name, the same was done without his knowledge or consent. The current assistant chief requested him to hand over the deceased identity card in order to procure a death certificate. Upon acquiring the death certificate, they proceeded to file this cause, made him execute documents which he later realized were court papers. The assistant chief while working in cohorts with 3<sup>rd</sup> parties deprived them of their land and he assigned his wife a part of the land.
  4. The applicants together with the Petitioner Elia Mbaya are children of the deceased herein. PW1 Lucy Wanja and PW3 Mbaabu Chabari are children of deceased 2<sup>nd</sup> wife Cecilia Nkuene. PW2 is son of deceased's 3<sup>rd</sup> wife Gladys Mukonjoka. The Interested Parties are the beneficiaries of alleged sale transactions on portions of land in the Estate.
  5. The 1<sup>st</sup> interested party herein, Salesio Riungu Kiugu, opposed the application vide his replying affidavit sworn on 17/1/2020. He avers that the application is riddled with lies skewed to mislead the court with the sole goal of depriving him his land. Prior to his death, the deceased had actually subdivided the original No. IGOJI/KINORO/64 into P/NOs. 2259 - 2267 in order to accommodate his and the 2<sup>nd</sup> - 6<sup>th</sup> interested parties' purchasers interests in the estate. He bought his share of the estate being IGOJI/KINORO/2260 & 2266 from the respective beneficiaries while the deceased was still alive and took possession and occupation thereof. It was not until the other day when someone started inciting the vendors to turn against the agreement, a move this court should not allow. The applicants, their agents and relatives made attempts to forcefully enter into their land and damaged some of their developments, which matter was reported to Kinoro police station and they were issued with OB numbers.
  6. The 2<sup>nd</sup> interested party herein, Patrick Nkoroi Thuraira swore a replying affidavit on 17/1/2020 in opposition to the application. He avers that he bought a portion of the estate property being IGOJI/KINORO/2259 from a beneficiary of the estate namely David Muthomi, and took possession and occupation thereof.



7. The 3<sup>rd</sup> interested party herein, John Ikunda M'Anyiri, opposed the application vide his replying affidavit sworn on 17/1/2020. He avers that is bought a portion of the estate property from beneficiaries of the estate namely Julius Kinyua and Kinyua Chabari, and took immediate possession and occupation thereof.
8. The 4<sup>th</sup> interested party, Joy Nkirote Marete opposed the application vide her replying affidavit and a further affidavit sworn on 17/1/2020 and 24/6/2022 respectively. She avers that she bought her share of the suit property being IGOJI/KINORO/2264 from the respective beneficiaries while the deceased was still alive, and took possession and occupation thereof. Prior to his death, the deceased had subdivided IGOJI/KINORO/64 into P/NO. 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266 & 2267 in order to accommodate the interested parties/purchasers' interests. Her averments were supported by the affidavit sworn by her husband, Dickson Muthomi, on 8/7/2022.
9. The 6<sup>th</sup> interested party herein, Erastus M. Riungu swore a replying affidavit on 17/1/2020 in opposition to the application. He avers that he bought a portion of the estate property being IGOJI/KINORO/2263 from Elias Mbaya while the deceased was still alive, and took possession and occupation thereof.

### Oral Evidence

10. The applicants evidence case was heard on 8/7/2021; the Petitioner's evidence on 30/9/2021 and the Interested Parties' case on 27/6/2022 and 26/9/2022. The full text of the relevant court proceedings showing the testimony of the parties before the court is set out below.

“PW1 Lucy Wanja.

I reside at Mitunguu. I have another plot where my mother has rented. I am not married.

Chabari Manyara is my father. I have filed a statement of 17/8/202. I wish to rely on the statement and my evidence.

When the petition of the deceased was filed. I was not informed. The Chief did not call us and I did not sign any document. I have not received my inheritance from my father. That is all.

CROSS EXAMINATION BY PETITIONER ELIAS MBAYA

NIL. She is my sister.

CROSS EXAMINATION BY MR. THANGICIA

I am a daughter of the deceased. I have my identity Card. It shows I am Lucy Wanja Bernard. It is not showing the name of Chabari Manyara. It shows I was born in Abothuguchi, Meru Central. Makandune Sub-Location. It is the place at Makandune where I live. I lived there since 1970.

[It is put to witness that she is not a daughter to the deceased]

I am a daughter of Chabari.

The land rented by my mother is rented from M'Rikanya Since 1970. I do not have the agreement for lease.

[it is put to witness that them the land belongs to her mother and her husband who is not Chabari Manyara].

It is not true.



I live on the shamba with my mother and Zacharia Muthomi and Dominic Mutiga and David Muthomi.

There is also Baba Chabari [witness hesitates].

[It is put to the witness that she has never lived on the suit property].

I lived at my husband. I live at my mothers' shamba.

Court:

Witness refuses to answer the question whether she ever lived on the property.

Court:

Did you ever claim shamba from your alleged father Chabari?

Yes, but at the time girls were not being given land.

Court

Witness refuses to answer the question as to when she ever went to ask for land from Chabari Manyara. It was During Moi's era. I went alone. I heard that he had died and that is when I went.

[It is put to witnesses that she is a liar who has been procured by the applicants]

I have not been sought to come to court. It is my brother Elias Mbaya who informed me. He told me last year.

[Court: Witness does not respond to the question who had sent Elias.]

Elias said he had been sent by his other brothers to ask me to go and follow up on matters of land.

Court:

Who had sent the brothers?

Our father had died and we started following on the land.

Court:

Only last year?

Yes.

Do you know that your alleged brothers came to court in 2019?

I did not go to school, so I do not know the years.

Question: Why did you not come with them when they came to court for the first time?

I came to court last year.

Question: Why did you not come to court together with your brother in 2019?

They came to tell me about it later.

[It is put to the witness that it was because she is not a sister]

I had been married.

Question: Who is on the suit property as a child of the deceased?



There is Elias Mbaya, Mbaabu Muthomi, Muriungi Zachary and Dominic Mwiti.

[It is put to witness that only Elias Mbaya is the only child of deceased on this suit property]

Elias Mbaya is there with Muthomi, Kinyua, Mbaabu.

[It is put to witness that she does not know about the shamba having gone to Mitunguu in 1970]

All the persons in have mentioned live on the shamba. I had been married.

Question: Do you know Kinyua Chabari sold his land?

No.

Question: Do you know Mbaya sold a portion of land?

No.

Question: Do you know all you said brothers sold their portion and they do not live on the land?

I heard that the persons on the shamba have rented. I heard from my brother Elias Mbaya. He told me that he had chased the people who pretended to have bought the land.

Question: Do you know that Chabari sons had sold the land?

I was told that they had leased out. Chabari had the 1 shamba.

It is true he had 2 shambas. One he gave to Mbaya and the other is with Kimwele who is a child of Erastus, the eldest son of Chabari Manyara.

RE EXAMINATION BY MR. KITHINJI

I am a daughter of Chabari.

When I was born I grew up at my father's land, the suit land.

PW2 David Muthomi.

I reside at Mutunguu, Kinoro. The deceased in this case Chabari Manyara is my father Lucy Wanja (PW1) is my sister by a different mother. My father had 3 wives. The first wife had 2 children M'Arimi and Mbaya. The 2<sup>nd</sup> wife had Mbaabu and Kinyua and Wanja. The 3<sup>rd</sup> wife had 1 child, myself.

Chabari had 6 children.

When the petition was filed, the chief did not call us. I have not received any distribution of the estate. I was not ever been called to attend court for the proceedings.

Affidavit of 31/10/2018 in support of application for confirmation of the Grant. Affidavit of 31/10/2019 and filed on the same date. I confirm that the Affidavit contents are true. I have never sold any land. I had given to Salesio Rwiga on lease. I also leased to Patrick Nkoroi.

CROSS EXAMINATION BY ELIAS MBAYA

Nil

CROSS EXAMINATION BY MR. THANGICIA FOR INTERESTED PARTY.



I do not have my Identity Card. I lost it. My name on the Identity Card is David Muthomi Chabari. I do not know my ID Card Number. I went to the Police and they gave me a card but I have also lost it. I know it is an offence not to carry an ID Card.

I do not have a house. I live on rented house in Kyeni at Mitunguu. I rented my shamba to Salesion Riungu. I rented it for 10,000 per year. I do not know the number I was shown by my father a portion.

It is a big shamba which I was shown. The shamba of my father has a number. I do not know the shamba number.

We wrote an agreement with Salesio Riungu. We were with Elias Mbaya. When we wrote the agreement. It is long past our fathers was alive. I do.

[Witness shown Agreement] SRK 3 Affidavit of Salesio Riungu.

I am the one who signed the agreement. Elias Mbaya has signed.

[Agreement with Patrick Nkoroi]

I wrote an agreement with Nkoroi. We agreed I had leased to him a piece of shamba. I do not know the size of shamba. I had been given by my father. I leased for 10,000/= per year. I do not have the agreement for lease to Patrick Nkoroi. It is with Patrick Nkoroi. My copy is lost. The agreement with Nkoroi was written at Kinoro.

[it is put to witness that the witness sold the land to Nkoroi]

I could not sell land which I did not have, I had just been told to utilize.

The two are on the shamba.

I have not gone to the shamba after I leased it. I used to cultivate there but I leased.

Where I have rented, I have stayed for 10 years. Before that I lived at my father's land. I left Chabari's shamba in 1997.

Before Chabari died he had shown us where to farm. I do not recall that the deceased had started the process of subdivision of the property for his sons.

The persons who leased the land from me had given money. One paid 105,000/= that is Riungu. The other person paid 100,000/=. He finished his period of lease.

[It is put to witness that he is lying]

I did not sell the land. I did not sign the agreement for sale.

[It is put to witness that it is the person that he does not have the alleged agreement for lease]

I only know of the agreement for lease.

Question: Who is Karambu?

Karambu is the wife to Mbaya.

Karambu cautioned the land. I do not know why she placed a caution. The person who is on the land now is wife to Mbaya. Mbaya lives at his place of work at Kionyo.

[It is put that it is the purchasers who utilize the land together with Mbaya's wife]

It is those who have leased the land who use the land together with Mbaya's wife. There was no one else.



The said leases were on the land since our father was alive.

[It is put to the witness that they sold the land during the life of the deceased with his consent and they started living on it]

It was leases. I do not have the agreement.

Affidavit of 31/10/2019 with Mbabu Safari.

Mbaabu has a problem with his hearing. He has had a problem since he was a child.

Question: Who stated the matters for him during the swearing of the Affidavit?

You have to talk to him loudly for him to hear.

I got to know that the person who leased had petitioned for letters of Grant three years ago. I heard from the time I was being thrown out of the shamba. I had given them for 10 years. The leases were to end. The leases are expired. When the leased expired. I went to the shamba and I was chased away.

Lucy Wanja lives at Mitunguu. Since she is elder than me, I do not know when she went there.

I left the shamba in 1997.

Mbabu Sabari left the land also but I did not know when he left. He stays at Mitunguu.

M'Arimi is deceased. He has children, Gitonga. His children live at home and another shamba belonging to Chabari. They live at kiiithe, Muiru area.

Kinyua lives at Mitunguu. Elias lives at Kionyo. I live at Mitungulu town.

Mary Karambu is the first wife. The second wife is deceased. I do not know her. The 3<sup>rd</sup> wife is also deceased. She is Gladys Mukonjoka. She is my mother.

My father had 2 shambas. The other one is occupied by Kimwale a son to Chabari's son Erastus.

[It is put to witnesses that he sold this portion of land during the life of his deceased father]

I only leased. I did not sell. I did not produce an agreement. We were chased from the shamba. It is not true that we are seeking to defraud the purchasers.

Elias came to court in 2000.

I was not in the petition, we did not consent to the petition and the distribution.

RE EXAMINATION BY MR. KITHINJI

I have seen the Agreement of sale Annexure to Interested Party.

My father has not signed anywhere on the Agreement.

I was chased from the shamba by the persons I had leased saying I did not have a shamba on the land.

My father should have signed agreement if he had allowed us to sell.

PW3 Mbaabu Sabari.

I live at Mitunguu. I work cut bricks. I know Chabari Manyara. He was my father.

I refer to Affidavit in support of the 31/10/2019.



Court:

Produced as exhibit of evidence in chief of the witness.

I leased my property for 5 years. When the 5 years expired. I went and they beat me up until my ears got impaired. I was beaten by Dick Munene, Riungu and Kaiga.

When the Petition for grant was filed I did not sign the petition.

Cross examination by Elias Mbaya

Nil

CROSS EXAMINED BY MR. THANGICIA

I have my ID Card. No. 6751137 Mbaabu Sabari.

It shows that I live at Mikumbune. I was living at Mitunguu. I went to Mitunguu during the reign of Jomo Kenyatta before 1978.

My mother his called Cecilia Nkuene. She also lived at Mitunguu but she is deceased.

Muthomi also lives at Mitunguu. We live with him at Mitunguu. Kinyua also lives there as well as Lucy Wanja. She is my sister. When our father was alive, he gave us land. He had gone to the Board so that he could subdivide the shamba. He died before the parcels had been given parcel number.

We gave...[Witness hesitates] the land – we did not give the land while our father was living.

I leased my tea plantation for 5 years. I leased to Kaiga, Riungu and Dick.

Riungu leased ½ acre.

Dickson leased ½ acre.

Kaiga leased 1 acre.

We did not write any agreement. I was alone there were no witnesses. We did not write any agreement.

Riungu paid 100,000/= He never gave me the money. All of them did not give me money.

The agreement with Riungu for lease was in Kibaki Presidency. All the leases were during Kibaki presidency between 2002-2012.

Our father was not living when we did the lease. He died during Moi's regime. When I leased the land, our father was deceased.

I leased the tea plantation after the death of our father about 15 years after his death.

James Gitonga M'Arimi.

Douglas Kinoti

I know the two. I was not with them when I leased the tea bushes. When I signed I do not write.

I was not with David Muthomi when we leased the tea.

[It is put to the witness that he lying before the court]

I am telling the truth.



I was beaten by Dick, Riungu and Kaiga. I had gone for my money when 5 years lease expired and they beat me. It was in 2000. I did not report to the police. I came to court.

I am telling the truth.

It is not true that I sold. It the leases who are on the land after they refused to move.

At Mitunguu, Nkuene had been married by M'Rikanya at Mitunguu. She has lived there since the era of Mzee Jomo Kenyatta.

RE-EXAMINATION

Nil.

Mr. Kithinji

I close the case for the Applicant.

RW1 ADULT MALE CHRISTIAN SWORN AND STATES IN KIMERU AS FOLLOWS:

I am Elias Mbaya. I filed a Replying Affidavit herein is on 20/11/2019 sworn on 19/11/2021. I wish to rely on the Affidavit. I do not wish to add anything.

CROSS EXAMINATION BY MR. KITHINJI

Succession before the court was filed by the Chief Assistant, Kirone, He is Mr. Muthomi Jameson. I know his wife. She is one of the persons who has got a parcel of land. The Assistant Chief happened to file the case. When I signed the papers it is the Assistant Chief who brought the Succession papers to court. That is all.

CROSS EXAMINATION BY MR. THANGICIA FOR INTERESTED PARTY

Question: Where is the receipt for filing of Affidavit of 20/11/2019?

I do not have it.

I do not know where the advocate who signed it for me went. The advocate who wrote the affidavit is not known to me. His office is Meru Town near the main bus stage.

[Witness avoid the questions as to the advocate]

I was alone when I went to the advocate. I do not know the advocate.

I told the advocate what is recorded in the Affidavit.

I told him that I went to the Chief and I signed the papers because I thought that my brother wanted to lease the shamba.

It is the advocate who brought the Affidavit to court. I went to the Advocate because I thought he would help me.

What was the reason for going to the advocate?

[Witness avoids answering question]

I thought I would get help.

Are there any documents you were brought by any advocate relating to this case?

There are no documents that I have been given by any advocate.



I said Kithinji is my advocate because we have been to his office with my brothers. His office is at the Meru Bus Stage area.

It is the office where your statement was written?

Yes, it was Kithinji Advocate who wrote the statement. Yes we usually go to the office of Advocate Kithinji with my brothers.

We agreed with the court should return the properties to us.

[It is put to witness, that he has been assisted by [advocate].

It is true that I have been assisted by Kithinji Advocate. We have been going to the office of Kithinji with my brothers.

I know where your [Mr. Thangicia] office is.

[Have you ever served me with any papers?] No.

My father Chabari Manyara died on a date I cant recall. Before he died he had shown us where to cultivate.

Question: Do you recall he was going to the Board to Subdivided the land?

I do not know. He had shown us where to cultivate.

On the part of the shamba where the purchasers are living it is Kinyua, Muthomi Mbaabu and I who live on the land. The 4 of us.

The purchasers of the shamba came on to the land, after the deceased died, before our father died none was using the land. They are still using the land today.

Question: On 22/5/2008 in court record shows you were before the court? You sought that the land be sub-divided?

I had signed papers without knowing what I signed.

Question: You are a witness in all the agreements?

I thought the agreements were for leasing the tea shamba. I was a witness in all the agreements.

Question: Where is the copy of the lease agreement?

I do not have a copy of the agreement.

Q: Recently you went to CID at Nkubu, who made the report?

It is Benson Muthomi who was summoned. He is now Assistance Chief who was summoned and we went with the Chief and my brothers.

Q: Did not the CID say that the agreement were valid?

He was asked to bring the original agreements. The original agreements were taken by Gikunda, Benson Muthomi, Assistant Chief, Kanyiri, Kabwere, Irungu. All these are the ones on the shamba.

Q: At the CID, the Agreements were validated and file closed?

Yes, it is true, the agreements were found to be valid.

I have not reported that I was asked to sign papers. I have also not reported to the police that there are people who filed the succession case without my authority.



Q: The purchasers on the land. Have you sued to remove them from the shamba since 2006? I have not gone to court as my brothers had leased the property.

I resided at Kionyo. I have been there for over 4 years. I had been employed at the home of a neighbor.

It is my brothers who came to look for me to file this application because they had received papers from the advocates' office. My brothers, Mbaabu Sabari live at Mitunguu. David Muthomi at Mutungulu Julius Kinyua is also at Mitunguu, Faith Karambu is my wife and she lives at Kirone.

On this shamba in dispute, It is only I and a child of my brother who live there with my wife.

On the shamba in dispute it is my wife and the persons who have leased. My brothers have leased the property and they now seek to come back.

Q: Why did your wife place a caution in 2004?

My wife put a caution after she saw my brothers had leased their portions. It is not true that she saw that they had sold the portions. When she saw that my brothers had leased their property, she placed a caution on my portion.

I was at work and I only heard that the shamba had been leased. I was at work at Kionyo. In 2004 when the land was being cautioned I was living at Kionyo.

When my father died I was at home. After the burial I went to work at Kionyo.

Cecilia Nkuene was married to my father at Kirane. They separated during President Jomo Kenyatta's era. She got married at Mitunguu until she died. Her children are Kinyua, Mbaabu, Kagendo, she lived with the children at Mitunguu. The man who married Cecilia at Mitunguu I do not recall his name. It is not true that I filed the Succession. I signed but I did not know what I signed.

I could not go to report because. I did not know what I had signed.

After 2019 when you heard, have you reported?

I have not reported to the police. We were waiting as we were still trying to follow up on the conclusion of the Succession proceedings.

It is not true that we have colluded to seek a refund as the shambas have escalated in price.

Agreement - Did everybody get the money? It is my brothers who leased. I was a witness.

#### RE-EXAMINATION

I do not have anything to add. I do not wish to call any witness.

RW1 Salesio Rwingo Kiugu. I come from Kinoro, Igoji. I prepared an affidavit of 17<sup>th</sup> January, 2020.

Mr. Kithinji: I concede that the affidavit is dated stamped 17<sup>th</sup> October, 2019 in error.

Mr. Thangicia: We have receipts indicates 17<sup>th</sup> January, 2020 as the date of filing.

RW1 continues

I made the affidavit on 17<sup>th</sup> January, 2020. I wish to rely on the affidavit of 17<sup>th</sup> January, 2020 as my evidence in chief.



Court: Affidavit of 12<sup>th</sup> January, 2020 is deemed Interested Party's evidence in chief together with its evidence attached.

The attached copies of documents marked Annexures SRK 1-11 are marked exhibits 1 – 11 as Mr. Kithinji does not object.

RW1 Continues

Elias Mbaya. I know him. He said he was not involved in filing the succession. It is not true. He is the one who went to the chief and got a letter written for purposes of filing the succession and he said we would follow up on the succession. He followed up and we got our names [and we] were called out in court for purposes of distribution of the estate.

David Muthomi said he had leased the land to me. It is not true. It's a lie. He sold the land to me and we have an agreement I am the one who was on the land from 2002 to date. When I took possession of the land the father was alive. Muthomi does not even live on that land. That is all.

CROSS – EXAMINATION BY MR. KITHINJI FOR THE APPLICANT

Deceased Chabari died in 2006. David Muthomi sold the land to you? Yes.

Annexure No. 3. At the time the deceased was alive. That the deceased signed the agreement? No, he did not sign.

Exhibit No. 4 – the deceased has not signed to state that the land should be sold.

The family of Chabari Manyara, I know Mbaabu, Kinyua, Muthoni, Mbaya and Patrick Muriungi.

Papers on succession of Chabari Manyara. We buyers signed the distribution consent. The other Children of the deceased did not sign as they were not there.

It is not true that we did not involve the other children. They had given authority to the said Mbaya. I do not have the authority.

Apart from Mbaya and Muriungi others did not get the land as they had sold their shares. We came to court with Muriungi and Mbaya.

(Mutation Exhibit no. 2)

Mutation is not signed by Chabari Manyara. It is not signed by the deceased.

Distribution was done secretly? It is not secretly because I had information the other children said that they had other lands at Mitunguu.

You got the children arrested? There was a case before the court. It was Mbaya who filed the succession. I pray that court to give me my share as I bought my land.

Agreement with Muthomi and Mbaabu. Do you have anything to show the signature belongs to them?

I took the documents to the CID. I do not have any report from the CID. I did not get any report.

Re – examination

The children of the deceased are the ones who reported the matter to the CID. We were asked to present the agreement. After the CID examined the agreement it was established



they had given the land to us. Muthomi were told they had sold the land and the signatures were confirmed to be their own.

Court case with the children was when they entered into our land and started picking tea. It was last year when the case had been going. We had lived well since 2002. It is Mbaya and Muriungi who were involved in the land. They are still in their portions of land.

The children Muthomi and Mbaabu sold their land to us. I only saw him in court when the matter was filed. Other children have sold their portions. They are Kinyua, Mbaabu and Muthomi. They had gone to Mitunguu and they came back. It is not true that we evicted from the land. I got to know them when they were selling to us and they went to Mitunguu. They had not constructed on the land.

Mbaya filed succession. Mbaya is the one who went to the chief and got the letter. He had been allowed by the other children to give the land to us and there was no problem.

Signatures by the deceased Chabari. He did not sign because he had given the sons their land portions. It was 2.64 ha for each child.

The Mutation was prepared by the surveyor. He was instructed by Chabari Manyara, deceased.

RW2 ADULT MALE CHRISTIAN SWORN AND STATES IN KIMERU

I am John Ikunda M'Anyiri. I come from Kiamweri Sub-location at Kinoro.

I filed an affidavit on 17<sup>th</sup> January, 2020. I seek to rely on the affidavit of 17<sup>th</sup> January, 2020.

Mr. Kithinji: I do object to the affidavits and its annexures the date stamp is wrong.

Court: Affidavit of 17<sup>th</sup> January, 2020 admitted as evidence in chief.

Annexures JIM 1 (a) and (b) and JIM 2 are marked RW2 Exh. No. 1 and 2, respectively.

Witness continues

I know Elias Mbaya. It is Mbaya who took my identity card and recorded it at the chief's office.

CROSS – EXAMINED BY MR. KITHINJI

Court:

1. It is noted that Elias Mbaya who is the respondent did not cross – examine the RW1.
2. RW2 is stood down to allow the conclusion of the cross – examination of RW1.

RW1 IS RECALLED FOR CROSS – EXAMINATION BY MR. ELIAS MBAYA WHO IS THE RESPONDENT

Nil. I have no questions for the witness.

RW2 RECALLED FOR CROSS – EXAMINATION BY MR. ELIAS MBAYA

I have no questions.

RW2 RECALLED FOR CROSS- EXAMINATION BY MR. KITHINJI FOR THE APPLICANTS



When Kinyua sold the land he went back to Mitunguu. When we were filing the succession proceedings Kinyua was not at the land. He did not give his consent when filing of the succession. It is Mbaya who went to the chief's office. When Mbaya prepared the documents, he brought the papers for our signatures. Apart from Elias Mbaya, there was no other child of the deceased who signed the succession papers,

When we applied for distribution of the Estate, apart from Mbaya and Muriungi no other child signed the papers. The other children were not involved.

Annexures 1 (a) and (b) exhibit 1. I did not speak to the deceased when I bought the land. The deceased did not know the son was selling the land.

Do you have anything to show that it was Kinyua who signed the agreement? One part it is a signature and on the other it is a name written. I have no report by CID. The signature belongs to Kinyua. The agreement was prepared by the wife of the deceased. He has not signed on the agreement to show that the agreement for the sale.

I know the children of the deceased. I know Mbaya, Kinyua, Muthomi and Mbaabu. I do not know Lucy Wanja as child of the deceased.

RE – EXAMINATION BY MR. THANGICIA

The children reported to the CID. It was in 2021. Signatures were examined and found to be genuine. The CID did not charge us with any offence.

The children of the deceased who I have stated here do not live on the land. I have lived on the land since 2003.

RW3 Joy Nkirote Marete testified as follows:

I come from Kirone, Kinoro. Affidavit of 17<sup>th</sup> January, 2020 I rely on it as my evidence. There is a further affidavit of 24<sup>th</sup> June, 2022. I pray that the 2 be adopted as my evidence in chief. There are annexures to the affidavit of 17<sup>th</sup> January, 2020 JNM No. 1 and SRK 2 JN3 to the further affidavit.

Mr. Kithinji: I do not oppose the production of JNM 1 and SKR 2. I oppose the production by the witness of "JNM3" as it was between Mbaabu and Dickson Awari.

COURT:

1. Affidavit of 17<sup>th</sup> January, 2020 and 24<sup>th</sup> June, 2020 are adopted as the witness evidence in chief.
2. Documents JNM 1 and SRK 2 are marked RW3 exhibits nos. 1 and 2.
3. JNM 3 is MFI 3.

Witness proceeds

I bought the Shamba from Mbaabu in 2002. I gave my husband money on the date of writing the Agreement and I was away. I started using the land the same year in 2002. After that we recorded the agreement in 2005. It is not true that he did not sell the land. There was only a few tea bushes. I uprooted them and planted grass. (Nappier) and cultivated until 2019 when I got summons to court by the person who had sold the land to us. I pray the court declare that the sale is valid as I bought the land and I even have the title to the land.



Cross – Examined By Mr. Elias Mbaya

No questions

Cross – Examined By Mr. Kithinji for the Applicant

Dickson M'Amwari is my husband. Dickson M'Awari was the Assistant Chief for the area in 2007. The chief was Cyprian.

The letter for launching the succession proceedings was written by chief. It is the chief Cyprian Miriti who wrote the letter of the chief in support of the succession proceedings.

I was in court when the distribution of the land was done. Apart from Mbaya and Muriungi the other children of the deceased were not present. Mbaabu who sold the land to us was not present. Mbaabu had gone to Mitunguu. He said he had given authority. He did not come to court.

I entered the Shamba in 2002. We paid in 2002. We wrote the agreement in 2005. Mbaabu is the one who gave me the permission to enter the land.

I finished paying in 2005. I paid the last instalment in 2005

Re – Examination – Nil

PW4 ADULT MALE CHRISTIAN SWORN AND STATES IN KIMERU WITH INTERPRETATION

I am Stephen Kinyamu Kaiga. I come from Igoji Kianjogu Location. I work. I am a retired. I make affidavit of 17<sup>th</sup> January, 2020 I urge court to consider the affidavit as my evidence in chief.

Court: Affidavit of 17<sup>th</sup> January, 2020 is adapted as witness evidence in chief and annexures as exhibits RW 1 and 2.

CROSS – EXAMINED BY MR. KITHINJI FOR APPLICANT

I bought the plot for Mbaabu Chabari. (See agreement of 21<sup>st</sup> March, 2006)

At the time of the agreement Mbaabu Chabari was not alive. He had died. I think in 2005.

When we filed the succession in court we did not inform the children of Chabari Manyara. They were not here.

Elias Mbaya is the one who filed the Succession proceedings.

Except Patrick and Mbaya, the others were buyers. Patrick did not buy. He got from his grandfather Chabari. It is Mbaya and Patrick who were involved. The others were not nearby.

The Chief listed the persons who had shamba. We are not children of the deceased. We were listed as persons who were buying parcel of land and the others were not present. We signed the papers.

CROSS – EXAMINED BY MR. ELIAS MBAYA

No question.

CROSS – EXAMINED BY MR. THANGICIA

It is Mbaya who filed the Succession proceedings.



RW5 ADULT MALE CHRISTIAN SWORN AND STATES IN KIMERU WITH INTERPRETATION

I am Erastus M. Riungu. I came from Abogeta West, Abogeta Location. I am 77 years old. Abogeta is neighboring location to Kinoro Location.

I have testified for my wife Muthoni Elizabeth Erastus. I make an affidavit in the Advocates Office. I wish that the affidavit be considered as evidence.

Court:

Replying affidavit of 17<sup>th</sup> January, 2020 is adapted as evidence in chief.

I filed the Succession and I have sale agreement.

Court: Letters of Administration, ad litem No. 64 of 2019 Nkubu PM and the sale agreement 5<sup>th</sup> September, 2003 and 17<sup>th</sup> May, 2006 are marked exhibits RW5 1, 2, 3.

CROSS – EXAMINED BY MR. KITHINJI FOR THE APPLICANT

Mbaabu Chabari died in 2006. The sale agreement was entered by my wife with Chabari.

Has Chabari signed on the Agreement? No.

The land was in the share of Chabari Manyara. In 2003 and 2006 Chabari Manyara was alive. He has not signed. He was not the one selling the land.

Is there any consent from the registered owner Chabari? He did not write any consent to sell.

Letter of the chief.

You are beneficiary no. 5? It is the administrator who did the write up on the Succession papers.

I am the one who signed not my wife.

(Succession Proceedings by Mr. Elias Mbaya)

I did not come to court during these proceedings. Apart from Mbaya and Patrick Mwirigi there are no other children of Chabari.

CROSS- EXAMINATION BY MR. ELIAS MBAYA

No question.

RE – EXAMINATION BY MR. THANGACIA

The deceased was alive when we bought the shamba. The person who sold to me had worked on the shamba. I have been using the land since 2002 up to today. Mbaya Chabari also sold to my wife 0.64acre plot No. and Mbaya refused to give the shamba. I pray for the court to order Mbaya to give me that parcel of land together with the one.

RW6 ADULT MALE CHRISTIAN SWORN AND STATES IN KISWAHILI

I am Patrick Nkoroi Thurania. I come from Kinoro. I wrote an affidavit of 17<sup>th</sup> January, 2020.

Court: Affidavit of Patrick Nkoroi Muriungi of 17<sup>th</sup> January, 2020 is adopted as witness' evidence in chief. Exhibits attached are marked RW6 exhibits No. 1, 2, 3 – Mutation Sale Agreement of 9<sup>th</sup> January 2006 and Certificate of official search.

I had bought the land from David Muthomi.



CROSS – EXAMINATION BY MR. KITHINJI FOR APPLICANTS

I bought the land in 2006. At the time deceased Chabari was alive. Agreement Exhibit no. 2. When I bought the land title was in Chabari's name. I have agreement. Chabari Manyara did not signed as he had given the shamba to his sons. He had sub-divided to land and it had new members.

(Green card Igoji/Kinoro/64)

Title is shown to have been closed on 27<sup>th</sup> May, 2014. I state that the numbers of the subdivisions had been given.

Mutation had been done.

According to the Green card subdivision was done on 27<sup>th</sup> May, 2014.

David Muthomi was the seller. Any evidence of payment of the money?

I have not produced evidence of payment.

The Succession proceedings were filed by a child of the deceased. Elias Mbaya and Patrick Muriungi. There was no other child of the deceased involved. There was no one else. David Muthomi was not in court. I do not know whether they filed consent. I also do not remember whether he signed the chief's letter. I do not recall whether I signed.

CROSS – EXAMINATION BY MR. ELIAS MBAYA

No question.

RE – EXAMINATION BY MR. THANGICIA

I am using the land and I have never been sued by any person. I bought the land during the time of the deceased as he had given the land to sons.

The mutation is dated 14<sup>th</sup> December, 2005. The Parcel number I bought is 2259 it is shown in the mutation form.

The seller David Muthomi has not complained to the police or somewhere else that I have not paid him purchase price.

RW7 Dickson Muthomi M'Mwari. I come from Kirone Sublocation in Igoji West Division. Kiamathi ward. I work as the Assistant Chief Kirueru Sub-Location. The parcel of land in dispute in this case is in my administration jurisdiction area.

Agreement of Joy Nkirote is my wife. The agreement of sale was between me and the seller. I made an affidavit of 8<sup>th</sup> July, 2022. I pray that it be considered as evidence in chief.

Court: Affidavit of 8<sup>th</sup> July, 2020 is adopted as witness evidence in chief.

I have sale agreement dated 15<sup>th</sup> April, 2005 between Mbaabu Saberio and myself on behalf of Joy Nkirote.

Court: Agreement for sale of land dated 8<sup>th</sup> July, 2005 marked RW7 exhibit No. 1.

I made an agreement for sale on behalf of Joy Nkirote.

I am the one who wrote the Succession Letter to commence Proceedings .I wrote for Silas Mbaya Saberi.



I know the family of the deceased Chabari. Sabari Manyara had children some of whom lived in the areas of Mitunguu. Some of the children used to come and visit their father. The father used to come to my office and report that his sons were threatening him. At one time David Muthomi had cut his arm. I discovered from the deceased that the children wanted to be give land. The children used to drink a lot. I advised the deceased to sub-divide his land to maintain peace. He sub-divided the land. It is early 2000. The deceased pointed their portions to each of the sons. The only one who had built on the land was Elias Mbaya. He also had not constructed when the land was subdivided about 1 year later. People came to my office and said that they had bought land from the deceased's sons. I could not restrain as the deceased had already given the sons their respective portions. I knew the purchasers. I recall their names are

1. Joy Nkirote, my wife
2. Murithi M'Arithi
3. John Gikunda
4. Patrick Nkoroi
5. Kianyamu
6. Salesio Riungu
7. There is also Erastus Riungu

Having bought the land, the portions were shown to them.

They went to the first Board. The deceased went as he was alive. The deceased started subdivisions. Before the titles were all obtained the deceased died. Mr. Elias Mbaya's wife placed a caution on the land claiming that the husband would sell his portion.

The purchasers took over possession immediately and started working on them.

None of the sons of the deceased have ever complained that the purchasers had entered the land without permission. I am aware of the criminal investigation by CID. It was a claim that succession had been secretly done. They had claimed that they had leased the land not sold. The parties were asked to go with respective document for sale of land or lease.

After investigating the CID found that it is a sales no agreement for lease and shown. The criminal investigation was closed without any prosecution of anyone. This was in 2021 during the trial of the present dispute.

The other children of the deceased came to my office and said they had given Elias Mbaya power to file succession. That is when I got to know all the children. I agreed that Mbaya be appointed as Administrator.

Why did you not give the names of the children?

At the time the land was cautioned and I am the one who wrote the caution and when I asked the Land Registrar he advised that if all the sons had sold their respective shares I could write to purchasers directly on the letter.

The purchasers have lived in the land since they bought over 12 years. There has never been any dispute. About 2019 there was a man who came to the land who is not a family member. He is called Muriungi and he started to live with Elias Mbaya on the shamba. It is from this



time when Muriungi started getting into the shamba for the other purchasers, cutting trees, nappier grass and the matter was reported to the police. Muriungi appears to be the one who has brought the incitement about the sale. Muriungi lives at Mbaya's home.

M'Arithi Murithi - M'Arithi is also a purchaser. The CID said they had no trouble with the case of M'Arithi. He got a portion of the estate but separate plot 75 Igoji Kinjogu. The CID said they had no problem with the said M'Arithi.

The persons who sold the land do not live on the shamba or on any portion. Patrick Muriungi is son of one of the sons who sold. When the father died Patrick was given the portion given to his father.

Cross – Examination by Mr. Kithinji for the Applicant

The family of Sabari Manyara is as follows:-

Mzee had 3 wives. Two were already dead. In the process of sale the other died.

I did not know the children of the deceased.

I knew the 1<sup>st</sup> wife. I do not know how many children she had. I know the 2<sup>nd</sup> and 3<sup>rd</sup> wives. I do not know their respective children. I know one child called Wanja, Kinyua, Muthomi, Mbaabu Kimwele, father of Patrick Mwirigi. I do not know the others. I know the ones who used to live in the area.

Agreement 15<sup>th</sup> April, 2005 on behalf of Joy Nkirote. Is there any where indicated you bought for Joy Nkirote? No.

At the time Chabari Manyara was alive. I am the one who signed the agreement. Chabari Manyara has not signed the agreement. Manyara did not sign any consent for the sale of the land.

Introduction letter for Succession proceedings.

How did you substitute the children with the names of the purchasers? I was guided by DCC at Seminars. I did this on account my understanding on the matter. I wrote the letter with authority of the family of the deceased. I did not know the law did not allow.

Your wife was one of the beneficiaries? Yes, she bought a part of the land.

Cecilia Nkuene the youngest wife of the deceased was alive when the agreement was done and when the chief's letter. I did not write her because she had left the deceased and had been remarried at Mitunguu. I did not have her contact and I did not contact her when writing the letter.

I did not inform Wanja child of the deceased. Lucy Wanja had not been given any shamba by the deceased.

The law now requires all the children to be included in the letter of the chief.

I did not indicate Wanja because she did not raise any objection and the sons were not with her when she came to my office.

Mutation of Estate Asset

Consent for subdivision, where is the consent given by the deceased? I only saw the mutation. I have not seen the consent.

[Mutation dated 14<sup>th</sup> March, 2004]



Is it signed by Chabari Manyara?

This is not the mutation I saw. It is not signed by the deceased.

I have come with a mutation this morning when coming to court.

[Witness is referred to copy of Green card on Igoji/Kinoro/64.]

No. Entry 3, 8<sup>th</sup> May, 2004 the caution was recorded on 8<sup>th</sup> May, 2004.

Mutation was submitted when there was a caution.

The deceased had sub-divided the land. I was not present when he sub-divided the land.

Murithi M'Arithi purchaser is not one of the parties in the case. John Muriungi who lives with Mbaya Muriungi is not shown as one of the interested parties.

The children of the 1<sup>st</sup> and 2<sup>nd</sup> wives may be part of the [list] I gave earlier. I did not know which child belonged to which wife.

CROSS – EXAMINATION BY MR. KITHINJI FOR APPLICANTS further

Erastus M. Riungu No. 5 on the chief's letter. I wrote the names of Erastus Riungu on instructions of administrator. Elias Mbaya. The purchasers were also there.

CROSS – EXAMINATION BY MR. ELIAS MBAYA

No question.

RE – EXAMINATION BY MR. THANGICIA FOR INTERESTED PARTY

One of the deceased wife is buried in Mitunguu. She left the deceased and was married in Mitunguu. I did not find her married to the deceased when I entered Civil Service in 1989. I learnt she had left the deceased. She died while the case was progressing and I was informed by the chief of Makanjune that she had been buried at her husband's place. Her husband is called M'Anyuri.

Wanja

I have not known the child. I got to know her in court when case proceedings were going. I did not know her as a child of the deceased.

There has not been any other child of the deceased who has come and sought to be included in the estate. The sons sold their land during the life of the deceased and the deceased never complained to me that they had sold the land contrary to his wishes.

Caution by Elias Mbaya's wife

She told me that her husband wanted to sell his land just like his brothers and she feared she would miss a place for herself and her children.”

## Submissions

11. The applicants filed submissions relying on section 76 of the *Law of Succession Act* and citing In re Prisca Ong'ayo Nande (Deceased) (2020) eKLR emphasized the defective process of petition in secrecy as being fraudulent where some members of survivors are not disclosed and set out the facts of the case, as follows:

“Your lordship the petitioner in his evidence agreed that the applicants are his siblings. He tendered evidence that he was [misled] by the interested parties to abandon his siblings in



filing this succession cause. He tendered evidence that its him and the interested parties who filed this succession cause in secrecy. He tendered evidence that his siblings never signed any consent to filing of this cause, confirmation of the grant or even attended court during the distribution of the estate. He prayed that the grant be revoked and the distribution of the estate to begin afresh.

Your lordship the interested parties opposed the applicant's application and tendered evidence in support of their case. They tendered evidence that the applicants sold their shares in the deceased estate during the deceased lifetime. That however none of the land agreements was executed by the deceased as the seller or witness. The interested parties agreed that that none of the applicants attested or signed the consent to filing of the cause or confirmation of the grant. The also tendered evidence that the deceased had subdivided his land however the mutation form was undated or bearing any thumbprint. That if the mutation form was registered why did the certificate of confirmation of grant bear land parcel no. LR NO. IGOJI/KINORO/64. Your lordship we submit that the subdivision was done later after the confirmation of the grant.

Your lordship the last witness was the former chief and currently the assistant chief who issued the chief introduction letter. That upon cross examination he confirmed that he knew the deceased had other children but they agreed to have the interested party included as children of the deceased. That he confirmed that one of the interested parties or purchasers is his wife. He confirmed that he did wrong by not including the applicants in the Chief introduction letter.”

12. The Interested Parties submitted that they have been in occupation of their respective portions of the estate property since 2000 to date, (resonating. though not urging, a claim in adverse possession. In countering allegation of fraud, they urged that their said occupation has been open to the applicants and other family members of the deceased. They urged that there was no fraud involved in the filing of this cause, because the beneficiaries were fully aware of it. They prayed for the dismissal of the application with costs and cited *Re Estate of M’Etirikia Nthaka (Deceased) (2021) eKLR*.
13. The Petitioner/administrator did not make any submissions but he was in obvious support of the application for revocation of grant.

### **Issues for determination**

14. Upon consideration of the application and the evidence adduced by the parties together with submissions filed the court considers the following issues to arise for determination:
  1. Validity of sale agreement; Sale or lease of estate property does it matter.
  2. Is there any fraud in the petition for grant/confirmation?
  3. Should the grant be revoked pursuant to section 76 of the *Law of Succession Act?*

### **Determination**

15. The Court has considered the alleged circumstances as to the subdivision of the estate asset and sale of the portions created therefrom to the Interested Parties. The court may even be sympathetic to the Interested Parties who bona fide purchased respective portions from the deceased's sons. The validity of the transfers is dependent on the formal compliance of the transactions with the applicable law for the disposition of interests in land. The position in the decision of this court *In re Estate of M’Etirikia*



Nthaka (Deceased) [2021] eKLR relied on by the Interested Parties was different in that there the court found a transaction was accepted as a sale and given effect after confirmation of grant in accordance with the law, and it was held -

“ 31. This Court finds that there was a form of intermeddling in that no such sale agreement ought to have been entered into in the first place. However, parties herein were all aware of this arrangement. Furthermore, the property was not transferred before the confirmed grant was issued. It was transferred later. In deciding what portions to allocate the said Siberia, this Court will consider all the above.”

16. The best case in support of the alleged sale of land to the Interested Parties herein is set up by testimony of the Assistant Chief (RW7) Dickson Muthomi, as follows:

“I know the family of the deceased Chabari. Sabari Manyara had children some of whom lived in the areas of Mitunguu. Some of the children used to come and visit their father. The father used to come to my office and report that his sons were threatening him. At one time David Muthomi had cut his arm. I discovered from the deceased that the children wanted to be given land. The children used to drink a lot. I advised the deceased to sub-divide his land to maintain peace. He sub-divided the land. It is early 2000. The deceased pointed their portions to each of the sons. The only one who had built on the land was Elias Mbaya. He also had not constructed when the land was subdivided about 1 year later. People came to my office and said that they had bought land from the deceased’s sons. I could not restrain as the deceased had already given the sons their respective portions. I knew the purchasers. I recall their names are;

8. Joy Nkirote, my wife
9. Murithi M’Arithi
10. John Gikunda
11. Patrick Nkoroi
12. Kianyamu
13. Salesio Riungu
14. There is also Erastus Riungu

Having bought the land, the portions were shown to them.

They went to the first Board. The deceased went as he was alive. The deceased started subdivisions. Before the titles were all obtained the deceased died. Mr. Elias Mbaya’s wife placed a caution on the land claiming that the husband would sell his portion.

The purchasers took over possession immediately and started working on them.

None of the sons of the deceased have ever complained that the purchasers had entered the land without permission. I am aware of the criminal investigation by CID. It was a claim that succession had been secretly done. They had claimed that they had leased the land not sold. The parties were asked to go with respective document for sale of land or lease.



After investigating the CID found that it is a sale as no agreement for lease was shown. The criminal investigation was closed without any prosecution of anyone. This was in 2021 during the trial of the present dispute.

The other children of the deceased came to my office and said they had given Elias Mbaya power to file succession. That is when I got to know all the children. I agreed that Mbaya be appointed as Administrator.

[Why did you not give the names of the children?]

At the time the land was cautioned and I am the one who wrote the caution and when I asked the Land Registrar he advised that if all the sons had sold their respective shares I could write the purchasers directly on the letter.

The purchasers have lived in the land since they bought over 12 years. There has never been any dispute. About 2019 there was a man who came to the land who is not a family member. He is called Muriungi and he started to live with Elias Mbaya on the shamba. It is from this time when Muriungi started getting into the shamba for the other purchasers, cutting trees, nappier grass and the matter was reported to the police. Muriungi appears to be the one who has brought the incitement about the sale. Muriungi lives at Mbaya's home.

M'Arithi Murithi - M'Arithi is also a purchaser. The CID said they had no trouble with the case of M'Arithi. He got a portion of the estate but separate plot 75 Igoji Kinjogu. The CID said they had no problem with the said M'Arithi.

The persons who sold the land do not live on the shamba or on any portion. Patrick Muriungi is son of one of the sons who sold. When the father died Patrick was given the portion given to his father.”

17. Simply put, the case of the Interested Parties is that, for reasons of need to maintain peace following aggressive demand for land from his sons, the deceased on advice of the area chief agreed to subdivide his land and gift the sons their respective portions, which they in turn, sold to the Interested Parties who took possession immediately and subsequently obtained title deeds, save for the petitioner Elias Mbaya whose cautioned the land against any dealings.
18. The applicants' objection in the application for revocation of grant is, however, that the Petitioner and the Interested Parties secretly petitioned for grant of letters of administration without consent of the deceased's beneficiaries, the sons who claimed only to have leased their respective portions to the Interested Parties and their sister, PW1, for whom no provision had been made in the distribution.
19. On a balance of probabilities, the court is, on the evidence adduced, willing to accept as more likely than not that the deceased must have subdivided his land and pointed respective portions to his sons, who agreed that they had only leased and not sold their said portions to the Interested Parties. This is supported by the fact, as conceded by the deceased's daughter in her testimony before the court, that the deceased had only gifted his sons because as she testified female children were at the time not considered for inheritance. The court would also accept that the respective sons of the deceased had dealings with respect to their portions with the Interested Parties. It is the question of whether the dealing were a sale and the validity of the sale of such land that is in dispute! So what does the law provide on such facts?
20. Careful consideration of the circumstances of the alleged transactions, even assuming they were for the transfer of the parcels of land rather than leases as contended by the applicants, the subdivision of the parcel of land no. 64 and subsequent transfer to the Interested Parties through the succession



proceedings reveal the same as tainted by illegality on three fronts, namely, want of consent of registered proprietor; breach of valid caution in force at the time of purported subdivision and transfer of the resultant portions of land; and non-provision of the female child of the deceased PW1.

### **Transfer by the sons in the lifetime of the deceased**

21. As the registered owner of the land, the deceased, if it is maintained he was alive at the time of the sale transactions could and should have endorsed the alleged sale of the respective portions of the estate sold by his children. Any dealing with the land, whether for sale or lease, should have the consent of the registered proprietor by his signing the relevant transfer documents. The Interested Parties who have the burden under section 109 of the *Evidence Act*, as the burden of proof as to the particular fact of sale lies on the person who wishes the court to believe in its existence and under section 112 as proof of fact within their special knowledge, as the persons who allege sale, could not prove by the formal documentation of application for Consent to subdivided and transfer, signed and valid Mutation (the want of the actual Transfer being explained by the prior death of the deceased as alleged in the testimony of the Assistant Chief RW7).
22. The children of the deceased had during his lifetime no legal authority to sell, or indeed lease as they alleged, any property allegedly pointed out to them by the deceased without formal valid transfer to them. The alleged sale agreement, even if unsuccessfully challenged through any criminal investigation of the Directorate of Criminal Investigations (DCI), could, as a matter of law, only be validly concluded with the consent of the registered proprietor of the land.
23. On a balance of probability, the lack of cogent evidence, in the form of the application for Consent to subdivided and transfer, and a valid Mutation, both signed by the deceased who dies before he could transact the formal transfer, to establish this serious allegation of unusual disposal of land by persons who have no legal authority leads the Court to the unavoidable finding that it not proved, as more likely than not, that the brothers had sold their shares in the estate.

### **Effect of registration of caution**

24. The land registrar upon application by the wife of Elias Mbaya registered, as shown on the Green Card, entry no. 3 of 2004 a caution in accordance with the land law then in force. Section 132 of the applicable Registered *Land Act* cap. 300 provides as follows:

“ 132.

- (1) The Registrar shall give notice in writing of a caution to the proprietor whose land, lease or charge is affected by it.
- (2) So long as a caution remains registered, no disposition which is inconsistent with it shall be registered except with the consent of the cautioner or by order of the court.”

25. The authenticity of the Mutation for the subdivision of the land parcel no. 64 into the parcels subsequently transferred to the Interested Parties is in doubt because it is shown to have been done on 14/3/2004 and registered on 14/12/2005 all during the subsistence of the lawful caution, which by entry NO. 4 is shown to have been withdrawn by the cautioner on 21/4/2009 and, consequently, the resultant dispositions would be illegal, null and void. Its having allegedly been made by the deceased who died before the formal subdivision and transfer could fruition is suspicious because, as pointed



out by Counsel for the applicant, the Mutation having caused the subdivision of the main parcel LR Igoji/Kinoro/64, the subsequent confirmation of Grant of 27<sup>th</sup> May 2008 could not have been issued in respect of that parcel but of the resultant subdivisions.

26. This Mutation which was denied by the PW7 as not being the one he had seen, was the only one produced before the court. The Interested Parties were duty bound under section 109 and 112 of the *Evidence Act* to produce the valid Mutation, and their failure to do so leaves the court unsatisfied that the alleged transfers of the portions of land by the deceased's sons to the Interested Parties were valid.

### **Provision for the female child of deceased**

27. Most importantly, this matter is before the succession court because the deceased died on 30/8/2006 after the commencement of the Law of Succession, and, therefore, the *Law of Succession Act* cap.160 apply to the proceedings, and section 38 thereof as applicable to this case where there are only children heirs to require that in intestate succession all children shall be provide for regardless of sex and marital status, as follows:

“

“38. Where intestate has left a surviving child or children but no spouse  
Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

28. Lucy Wanja, a female child of the deceased – and it is immaterial that her mother was separated with the deceased and remarried elsewhere - was not included in the succession petition and no provision was made for from the estate. This default entitled the court to interfere with the confirmed grant pursuant to section 76 of the Law of Successin Act for being fraudulent in disinheriting the lawful heir of the deceased.
29. Moreover, the whole picture of the succession proceedings initiated and driven by Interested Parties led by the area Assistant Chief who, alleged to have bought a portion of the Deceased's Estate for his wife RW3, without knowledge of the children of the deceased who allegedly sold their inheritance to the said Interested Parties is indicative of an attempt to steal a march and gain advantage on the beneficiaries who only come to find out when the dealings have already been done that their shares of the estate of their deceased father have been taken by others under purported sale agreements, whose validity they contest. Section 76 (b) gives one of the reasons for the court to interfere and revoke a Grant, whether or not confirmed, “that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.”
30. In this petition it was concealed from the Court that the beneficiaries of the estate namely the sons and the daughter of the deceased who are heirs of the deceased were not included in the list of survivors and that the persons therein named were alleged purchasers of the estate. If the sale of portions of the estate were authentic, there would have been no need for secrecy as the sons of the deceased who have themselves come forward to confirm the sale agreements. The Petition was an attempt to steal a march on the true beneficiaries of the deceased, and it must be considered a fraud within the meaning of the section 76 (b) of the *Law of Succession Act*, and the confirmed Grant dated 27<sup>th</sup> May 2008 must, consequently, be revoked.



## Orders

31. Accordingly, for the reasons set out above, the Court makes the following Orders:

1. This revokes the grant of letters of administration issued to the petitioner on 16<sup>th</sup> August 2006 herein and confirmed on 27<sup>th</sup> May 2008.
2. This court revokes the resultant subdivisions of land parcel L.R NO. IGOKI/KINORO/64 being land parcels LR NO. IGOJI/KINORO/2259 - 2267 and orders that the same shall revert to land parcel L.R NO. IGOKI/KINOROR/64 in the name of the deceased.
3. The administration and subsequent distribution of the estate shall proceed with a new administrator to be appointed with the consent of the parties or, failing agreement, by the Court.
4. Mention for Directions as to appointment of Administrator (s) and further proceedings on 20/9/2023.

32. The Costs of the application shall be in the cause.

Order accordingly.

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF AUGUST, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

