



In re Estate of the Late Wausi Mutelo Muli (Deceased) (Succession Cause 165 of 2005) [2023] KEHC 23175 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 165 OF 2005
FR OLEL, J
SEPTEMBER 26, 2023**

BETWEEN

SIMON KIMOTE WAUSI 1ST PETITIONER

SAMMY KATHUKU WAUSI 2ND PETITIONER

AND

SHADRACK MBITHI MUTISYA 1ST APPLICANT

PETER MUTISO WAUSI 2ND APPLICANT

JUDGMENT

A. Introduction

1. The petitioners are the sons of the late Wausi Mutelo Muli who died in intestate on 18th December 1987. The petitioners herein did move this court 2nd January 2014 and sought for confirmation of grant. They proposed that the only Estate property plot 15 Kitanga Settlement Scheme (hereinafter referred to as the suit property) be registered in their joint names.
2. The 1st protestor did file an Affidavit of protest dated 12th June 2015, wherein he stated that the deceased was his grandfather and he was a son to One Timothy Mutiso Wausi who was also a son of the late Wausi Mutelo Muli and a brother to the petitioners. He did object to the proposed mode of distribution and gave his alternative mode of distribution. In response to the protest filed the petitioners did file a reply to protest dated 29th January 2016 and a supplementary Affidavit dated 18th September 2017. The protestor further did file a Response to the Supplementary Affidavit dated 30th October 2017 and a further affidavit dated 6th December 2017.
3. The parties did agree to have the protest heard by way of viva voce evidence and reliance was placed on witness statements filed and the affidavits already on record.



B. Evidence

4. The 1st objector in his affidavit of protest did state that he was the son of the late Timothy Mutiso Wausi who was also a son of the deceased the late Wausi Mutelo Muli and represented his interest in this cause. The deceased Wausi Mutelo Muli had two wives. The 1st wife was Nthambi Mutelo and her children were
 - i. Daniel Kimunyi Wausi (deceased)
 - ii. Timothy Wausi (deceased)
 - iii. Simon Kimote Wausi
 - iv. Johana Wausi (deceased)2nd wife Mbula Mutelo
 - i. Kavivi Wausi (deceased)
 - ii. Kaute Wausi (deceased)
 - iii. Mutengo Wausi (married)
 - iv. Kalondu Wausi (married)
 - v. Peter Mutiso Wausi
 - vi. Sammy Kathuku Wausi
5. The deceased Wausi Mutelo Muli died and left two assets being plot 15 Kitanga Settlement Scheme and plot No 97 Shimba Hills. It was his proposal that plot 15 Kitanga Settlement Scheme be given to the following beneficiaries;
 - a. Mbindyo Kimonyi
 - b. Ruth Jonna
 - c. Sammy Wausi
 - d. Peter Wausi
 - e. Shadrack Mbithi
 - f. Simon Kimote Wausi

One Peter Mutiso Wausi occupied plot No 97 Shimba Hills and he had no problem if he is given that property exclusively while plot number 485 did not belong to the deceased as it was transferred to his late father Timothy Mutisya Wausi. It was his contention that the children of the late Daniel Wausi, Jonathan Wausi and Timothy Wausi had consented to this mode of distribution.
6. In cross examination the 1st Objector did testify that his grandfather used to work for Whiteman in the 1960's and was a member of Katanga Settlement Scheme. When the Whiteman was leaving/ going back to Europe, he gave each of his employees a share of Ksh.800 and registered them as a member of the scheme. He was not personal present and was not aware of what happened in the Whiteman's house but was old enough as he used to take for his grandfather food and see him at his place of work. Further when his father, Thomas wausi was alive, he was opposed to the petitioner's being given plot number 15 Katanga settlement scheme, though he did not have any evidence of the same. It was also not true that the other beneficiaries were agreeable to the proposed mode of distribution by the petitioners.



7. The Objector acknowledged that plot 87 Shimba Hills was given to his uncle Peter Wausi but plot 15 and plot 485 was to be shared amongst all beneficiaries to divide amongst themselves. He also admitted that plot 485 had been transferred to his father Timothy Wausi. Their family did not reside on plot 15 Katanga settlement scheme, but initially the entire family resided there with the white man. The loan on plot 15 Katanga settlement scheme was taken by his grandfather and he used to pay for the same. His father Timothy Mutisya Wausi also contributed money to buy shares in plot 15 Katanga settlement scheme.
8. In re-examination the 1st Objector did admit that plot 485 belonged to his grandfather but was registered in the name of his father Timothy Mutisya Wausi. The petitioners had not shown any evidence that they had paid for the shares of plot 15 Katanga settlement scheme and it being the estate property it should be shared equally amongst all beneficiaries.
9. The 1st Objector did file a further Affidavit sworn on 06.12.2017 and was recalled to enable him testify as to its content. According to document annexed in the said affidavit (OEX2) the suit parcel of land was given to his father exclusively by the grandfather and those present included one Kimonyi Wausi, Sammy Wausi, Timothy Mutisya, Simon Kimote Wausi and Peter Wausi all who were the deceased's sons. All the said person signed the said document. Further he reiterated that it was his deceased (grandfather) who was paying off the loan for the suit parcel and later on his father Timothy Mutisya Wausi completed the said loan payment. The allegations by the petitioners that it is them who paid for the suit parcel was thus not true and thus he was justified to seek that the said parcel of land be shared amongst all the deceased children and their beneficiaries.
10. In further cross examination, he confirmed his father had died on 26.08.2006 and that plot 485 belonged to his deceased grandfather but was given to his father Timothy Mutisya Wausi while plot 17 Kitanga also belonged to his father. Both petitioners and his other uncle Peter Wausi had no plot in Kitanga. Further the objector testified the suit parcel belong to settlement trustee and had a loan which was paid by his father though he had no receipt to prove the same. He also confirmed that both petitioners resided on the suit parcel and were not given any other plot within Kitanga Settlement Scheme.
11. As regards, the documents/ agreement which he had produced showing that this father was given the suit parcel (OEX2), the 1st objector testified that it was given to him by his father and he could recognize the signatories of the parties (uncles) who signed it. The document was genuine and it was his father who kept the receipts for payment of the loan but his brothers/uncles requested for them. In fresh re-examination he reiterated that it was his father who was paying the loan after their grandfather had passed on and plot 17 katanga settlement scheme was not in dispute as it was purchased by his father Thomas Mutisya Wausi.
12. OW2 Thomas Wambua Mutungi testified that he knew the deceased Wausi Mutelo Muli in 1945 and was his neighbour at Katanga, his plot was 14 while that of the deceased was 15 within the settlement scheme. The deceased got land while working as a squatter and they formed Katanga Co-operative Society which gave him his parcel of land. He did not know in whose name the suit parcel was allocated to after death of Wausi Mutelo Muli.
13. The said witness also relied on his witness statement filed on 11.08.2016 where he stated that the claim by the petitioners that it is them who paid the loan for the suit parcel is not true as the deceased Wausi Mutelo had sold another parcel of land and paid the society to secure the suit parcel. The suit parcel should thus be equally divided and shared amongst all the sons.



14. In cross examination, the witness stated that the deceased Wausi Mutelo was not able to pay for his share, as he was very old and he told his child to pay for his shares. The 1st objector was unhappy with the proposal on distribution of the estate and he did not know what the children of the deceased had discussed and agreed upon with respect to the suit parcel of land. In re-examination the witness stated that they were given the suit parcel in 1968 and were to pay for the same.
15. The protestor's case was closed and PW1 Antony Mutua Simon testified on behalf of his father Simon Kimote Wausi who had donated to him power of Attorney. He relied on the Affidavits sworn by his father dated 18.01.2017, 03.10.2017 and 02.02.2016. He testified that Wausi Mutelo Muli was his grandfather and owned plots 97 Shimba Hills, plot 485 Kasunguni which was ancestral land and plot 15 Kitanga which belonged to Simon Kimote Wausi and Samuel Kathuku Wausi. His grandfather was the manager for the Whiteman at the settlement scheme and he had three other children Daniel Kimayo Wausi, Timothy Mutisya Wausi and Paul Wausi.
16. The deceased Wausi Mutelo Muli got them registered on various parcels within the settlement to with;
 - a. Daniel Wausi got plot No 50
 - b. Timothy Wausi got plot No 17
 - c. Peter Wausi got plot No 97
 - d. Simon Kimote Wausi and Samuel Kathuku Wausi got plot No 15

Simon Kimote Wausi, Daniel Wausi and Timothy Wausi were blood brothers and children of the 1st wife while the brothers from the 2nd wife were Sammy Kavuku Wausi and Peter Mutiso Wausi. Both Simon Wausi and Peter Wausi used their father's name (Wausi Mutelo Muli) to acquire their parcels of land and contributed towards their purchase.

17. Plot No 17 Katanga settlement was exclusively occupied by the family of Timothy Mutisya Wausi, while the family of Daniel Wausi exclusively occupied parcel No 50. Plot 15 Katanga settlement scheme exclusively belonged to Simon Kimote Wausi and Samuel Kathuku Wausi. All family members had accepted the distribution as it is and never interfered with the others in terms of use and occupation. Even the 1st objector's father Timothy Mutisya Wausi died after this succession cause had been filed never complained about the distribution as effected. It was his father and uncle (Samuel Kathuku Wausi) who paid for plot 15 and he had receipts to prove the same. The said receipts were produced as exhibit P2).
18. In cross examination, PW1 acknowledged that plot 15 Katanga settlement scheme was in the grandfather's name and stated that the said parcel was bought by Simon Wausi and Sammy Wausi and he had produced receipts to support his contention. His grandfather had died in 1987 and amongst the receipts produced some were for years 1981 and 1983. PW1 also confirmed that he did not have any signed agreement that Simon Wausi and Sammy Wausi were to pay for the suit parcel of land but insisted that the deceased was by then old and was no longer a member of the settlement society.
19. PW1 further reiterated that his grandfather Wausi Mutelo Muli had been the foreman of the Whiteman but by the time he was retiring he had not bought the various parcels of land and it was Simon Wausi and Sammy Wausi who paid the allocation fees for plot 15 Katanga settlement scheme though the charge was in the name of his deceased grandfather. It was not true that his uncle Timothy Wausi had possessions of the receipts used to pay for the suit parcel as his plot was plot 17 Katanga settlement which he paid for while working at the settlement scheme. Daniel Wausi too paid for his parcel as he too worked in the settlement scheme. It was thus his contention that the objector and/or



the family of Timothy Wausi should not get the subject property since they had not settled thereon and did not pay for its purchase. In re-examination PW1 did confirm that there were receipts for payment even after 1987 by which time his grandfather had died.

20. PW2 Paul Mutisya Kilui stated that he was 78 years old and knew the late Wausi Mutelo Muli. He was also treasure of Katanga settlement scheme and a member of Katanga Cooperative Society. Those who were working at the scheme were being allocated land and the later Wausi Mutelo Muli brought his children Sammy and Simon to work with them. They used to be paid Ksh60/- and later when the society was wound up, they were entitled to get plots. From their pay every month they would be deducted money from their pay since they had been given a loan to acquire the plots. Both Sammy and Simon were allocated one parcel of land since they used their father's name and the plot was divided equally between them.
21. PW2 adopted the contents of the Affidavit he had filed and witness statement. Simon and Sammy had been in continuous occupation of plot 15 Katanga settlement scheme since 05.07.1967 while Timothy Mutisya Wausi had a Separate plot which he worked on. In cross examination PW2 stated that the signature in the witness filed on 11.09.2017 was his but the signature on the affidavit sworn on 07.10.2014 was not his. He had started working in Katanga settlement scheme in 1967 but did not have any employment documents apart from the entry of his name in the register. The deceased was a squatter and was not employed there, but brought his children who were employed within the settlement scheme. By being a squatter, he meant that he was a person not employed because he could not work and instead told his children to do so and would be paid monthly though he had no evidence of such payment records in court since the record were taken to the Cooperative Society. No one else had utilized plot 15 Katanga settlement scheme apart from the two petitioners. In re-examination PW2 did confirm that he was the treasurer of the Society until it was wound up.

C. Protestor's Submissions.

22. The protestors did file their submissions on 05.08.2022 and paused three questions for determination.
 - a. Who were the beneficiaries of the estate
 - b. What properties form part of the estate.
 - c. How the properties should be distributed.
23. All the children of the deceased (from both houses) as listed in the 1st beneficiary witness statement and affidavits were the automatic beneficiaries. One of the deceased son Timothy Mutisya Wausi had died and the 1st Objector Shadrack Mbithi Mutisya who was his son automatically became a beneficiary by virtue of being a grandson and was entitled to get his father's share.
24. Further the Estate property as discerned from the proceedings were plot number 15 at Katanga Settlement Scheme (the suit property) and plot number 97 shimba hills. Plot number 17 Katanga settlement scheme also featured but evidence was lead to show that it belonged exclusively to Timothy Mutisya Wausi (deceased). Plot number 485 Kasunguni adjudication section too did belong to the late Timothy Mutisya Wausi.
25. There was evidence lead to show that the suit property had a charge on it and the petitioners alleged it belonged to them as they had paid off the loan. This fact was strongly contested as the charge was in the name of their deceased grandfather and there were payment made before he died and later some payments were made after he had died. If indeed the petitioners had paid off the said loan (which was disputed) the said amounts were recoverable from the estate as a liability and they could not claim the entire suite parcel. Further even if the petitioners had full occupation of the said property it did not



change the fact that the said property was in the name of the deceased and formed part of his estate and thus should be distributed as provided for in law.

26. The 1st Objector too had a valid claim over the suit parcel of land as exhibit OEXH2 showed that the said property was given to his father Timothy Mutisya Wausi in the presence of his brothers and they all signed the said document. The 1st Objector thus had a valid claim over the suit parcel as it was his father Timothy Mutisya Wausi who completed payment of the loan taken to secure the said parcel. It was therefore not true that it was the petitioners who paid off the said loan.
27. Further even though the 1st Objector had confirmed that both the petitioners had exclusive use and possession of the suit parcel, other beneficiaries too were entitled to a share of the same and he proposed that the suit parcel be shared equally between the children of the deceased except children of Peter Mutiso Wausi who settled in Simba Hills Plot 97.
28. The law also recognized that grandchild could stand in for their deceased parents and he thus had locus standi to pursue this matter. Reliance was placed on *Re Estate of Kimitai Cherop (deceased)* (2021) KLR and *Re Estate of Veronica Njoki Wakagoto (deceased)* (2013) eKLR. The 1st Objector further submitted that the suit parcel of land should be shared equally between the children of the deceased. The deceased had two wives and pursuant to provisions of Section 40 of the *law of Succession Act* the proposed mode of equal distribution was approved. Reliance was placed on *Re Estate of Kimitai Cherop (deceased)* (2021) eKLR (*supra*). There was also no dispute that plot number 97 Shimba hills be given to the family of Peter Mutiso Wausi as they had settled there.

D. Petitioners Submissions.

29. The petitioners did file this submission on 06.05.2022 and submitted that they bought the suit parcel through their father when they were working on Katanga farm. The 1st Objector's father bought his own land plot 17 Katanga where they settled and the objector's family had never settled and/or lived on the suit parcel of land. The petitioners continued to pay off the loan even after their father had died and the property had not been discharged even at the time of hearing this petition and hence was not free property of the estate and could not be distributed unless freed from the encumbrance.

E. Analysis & Determination

30. The deceased Wausi Mutelo Muli died intestate on 18th December 1987. He was a polygamous man, and was survived by two widows and their children. The members of the said families were listed as follows;

Mbula Mutelo 1st Wife

- a. Kavivi Wausi (Deceased)
- b. Kaute Wausi (Deceased)
- c. Mutango Wausi (Married)
- d. Kalondu Wausi (Married)
- e. Peter Mutiso Wausi
- f. Sammy Kathuku Wausi

Nathambi Mutelo 2nd Wife

- a. Daniel Kimonyi Wausi (Deceased)



- b. Timothy Wausi (Deceased)
 - c. Simon Wausi
 - d. Johana Wausi (Deceased)
31. The estate of the deceased constituted Plot No 15 Katanga settlement scheme and Plot 97 shimba hills. Plot 485 Kasunguni Adjudication Section too initially belonged to the deceased, but the same was transferred to his son Timothy Mutisya Wausi. The 1st objector did propose that plot 97 shimba hills be given to the family of Peter Mutiso wausi, since they exclusively resided there, and the petitioners did not in any of the affidavits filed and or during the evidence in chief contradict this assertion. The only property of the estate which is in contention is thus Plot 15 Katanga settlement scheme.
32. The protest herein was exclusively perused by the 1st objector, who is a nephew of both the petitioners. In his affidavit of protest dated 12th June 2015, he did state that the suit property Plot 15 Katanga settlement scheme, should be shared equally to particular beneficiaries namely; Mbindyo Kimonyi, Ruth Jonna , Sammy Wausi , Peter Wausi, shadrack Mbithi and simon Kimote Wausi, but changed his position during his evidence in chief, where he did testify that the suit property should be given equally to all children of the deceased and/or be shared equally between the two families of the deceased.
33. The protestors case was the suit property acquired by his deceased grandfather who used to work for a Whiteman and when the said Whiteman was leaving, he gave each of his employees Kshs 800/= as a present and registered them as members of the settlement scheme. The loan was repaid by his grandfather, and later on it was his father who took over settlement of the same, after the said parcel was given to him in the presence of his other brothers (see OEXH2). The deceased had other parcels of land the plot in Makueni was given to David Muasya son's, Plot 97 shimba hills was given to Peter Wausi, Plot 485 was given to his father Timothy Wausi.
34. Plot 15 Katanga settlement scheme belonged to all beneficiaries. The 1st objector further denied that he was a lone ranger as the other family members supported his proposed distribution plan. The objector's witness OW2 Thomas Wambua Mutungi did testify and confirmed that he was the deceased neighbour as he owned Plot 14 Katanga settlement scheme. The deceased got land within the scheme in 1968. He was very old and he told his children to pay for the loan charged as against the said parcel. He knew that the deceased had land in Kilungu but was not aware if it was sold to offset the loan. The objector was upset with the mode of distribution as proposed.
35. The petitioners did file a registered special power of Attorney registered on 4th July 2019, which gave PW1 Antony Mutua Simon authority to handle this succession cause. He did testify relying on the affidavits and witness statement filed by the petitioners. He did state that his grandfather worked as a manager for a Whiteman and managed to register several plot in his children's name and also had the suit parcel registered in his name. The various parcels of land registered by the grandfather were;
- a. Plot 97 Katanga settlement scheme was registered in favour of Peter Wausi.
 - b. Plot 50 Katanga settlement scheme was registered in favour of Daniel Wausi.
 - c. Plot 17 Katanga settlement scheme was registered in favour of Timothy Wausi.
 - d. Plot 15 Katanga settlement scheme was registered in favour of his grandfather Wausi Mutelo, but given to simon kimote Wausi and Samauel Kathuku wausi
 - e. Plot 485 was Ancestral land.



36. Each family was staying on their allotted parcel of land and had never interfered with each other, nor had they any complaint regarding how the parcels of land were allotted. The 1st objector's immediate siblings David Mutisya , Muoka Mutisya , Muinde Mutiya, luke Mutisya and Kamacha Mutisya had never complained and or claimed the suit parcel nor had any of their other cousins. Further the said suit parcel loan was paid for by both petitioners and they had annexed receipts to prove the same.
37. Timothy Wausi, never owned the suit parcel nor did he possess the receipts used to pay for the same as his plot was No 17 which he paid for. PW2 Paul Mutisya Kilui stated that he was 78 years old and was the treasurer of Kitanga cooperative society Ltd until it was dissolved. He relied on his witness statement filed on 11th September 2019, but denied signing his affidavit presented in court.
38. In the said witness statement and during his testimony the witness confirmed that the deceased was a member of the society and brought his two sons simeon Kimote wausi and Sammy Kathuku Wausi to continue working so as to enable them buy shares in plot 15 Kitanga settlement scheme. The two sons also roped in their wives Phelis Sammy and Agnes Kimote to be working in the said society so as to help them pay off the loan. In 1978 the plots were divided to members and it is the petitioners who are entitled to the said parcel and had resided thereon from 05.07.1967. He reiterated that the deceased did not have a plot within the scheme as at the time of sub division as he was too old and had no strength to work. That is why he gave the suit parcel to his two sons.
39. PW2 in cross examination stated that he stated working at Katanga in 1967, and though he did not carry the records his evidence was truthful. The deceased Wausi Mutelo was a squatter as he was not employed due to his old age but his children were employed and no other person had utilized the suit parcel apart from the petitioner's. He was sure of his facts as he had worked as the treasurer of the society until it was dissolved.

F. How Is Distribution Of The Estate To Be Effected.

40. Based on the evidence adduced, the petitioners did request that the suit parcel Plot 15 Katanga settlement scheme be bequeathed to them, while the 1st objector did state that the said property should be distributed as provided for under section 40 of the *law of succession Act*, which provides for equal distribution between both houses in a situation where the deceased was in a polygamous setup.
41. Though the 1st protestor did plead that he had authority of other beneficiaries to file this protest on their behalf and specifically depone in his affidavit of protest dated 12th June 2015 that the children of the late Daniel Wausi, Johana Wausi and Timothy Wausi had consented to his proposal on distribution, upon perusal of the entire court file no such consent was filed nor was it attached to the said affidavit. Further from the time this cause was filed and/or specifically the protest was filed, no other beneficiary has filed any document in support of the protest, not even the 2nd objector Peter Mutiso Wausi. It is clear thus the 1st objector is a lone ranger in his pursuit of a share in Plot 15 Katanga settlement scheme.
42. While it is true that provisions of section 40 of the *law of succession Act* comes into play when distribution of the estate of a polygamous deceased person is effected, depending on the facts of the case there are instances where the court applies equity and fairness as equitable distribution of the estate does not always work justice to the case as it ignores the peculiar circumstances of each case.
43. *In Re Estate of John Musambayi Katumanga-Deceased* (2014) eKLR Judge W Musyoka stated that

“The inequality in the distribution principle has often caused disquiet. In *Rono v Rono and another* (2005)1 EA 363, Omolo JA remarked that, “ Equal division works injustice especially in the case of a young child who still has to be maintained and educated and



generally seen through life. The appeal judge took the view that section section 40 of the Act did not provide that each child must receive the same or equal portion. That was the opinion of the higher bench. Section 40 of the Act is not independent of section 35 and 38 of the Act.....The plight of minors is no doubt precarious in this scenario.”

44. Further in the said citation of *Re Estate of John Musambayi Katumanga-Deceased* (2014) eKLR Judge Musyoka did state that ;

“Equal distribution does not always work justice, especially in polygamous situations, where the youngest child of the deceased maybe one (1) year old, while the eldest maybe over fifty (50) years of age. The infant no doubt would have far greater needs that the fifty-year-old, who would generally have received education and has probably been settled in life by the deceased. There cannot be justice in equal distribution in such case..... The law as currently framed does not do justice in the circumstances. Ideally, equal distribution should be the principal, with some discretion left to the court to consider the circumstances of each case.”

45. OW2 Thomas Wambua Mutunga did testify that the deceased was his neighbour in the settlement scheme and he owned plot 14 Katanga settlement scheme. He testified that he knew the deceased Wausi Mutelo in 1945 and the plots within the scheme were allocated in 1968. He further testified that he knew that the deceased Wausi Mutelo was a squatter within the scheme. Specifically in cross examination he did testify that, “I know that wausi was not able to pay for his share, he was very old and he told his children to pay.”
46. PW2 Paul Mutisya Kilui too did testify that he was 78-year-old and was the lifelong treasurer of Katanga cooperative Sacco Ltd. He specifically testified that he was the treasurer of the Sacco until it wound up. It was his evidence that the deceased was old and could not work and that is why he brought his children the petitioners to work and pay off the loan with respect to Plot 15 Katanga settlement scheme. Both the petitioner’s took possession of the suit parcel on 05.07. 1968 and shared the said parcel equally. They worked and were being deducted to pay off the loan. PW2 also reiterated OW2 evidence that the deceased Wausi Mutelo was a squatter, to mean he was not employed but his children were employed and worked within the settlement scheme. It was only the petitioners and their wives who had solely occupied and utilized the suit parcel Plot 15 Katanga settlement scheme.
47. I do find that the evidence of OW2 and PW2 are consistent and reliable. They were the actual witnesses who were present and had personal/real knowledge as to what transpired during the initial period of settlement in the 1960’s. Both OW1 and PW1 are grandchildren, who had secondary knowledge of what transpired and by the early 1960’s were still too young to comprehended, how and why the deceased Wausi Mutelo decided to give both the petitioner’s the suit parcel Plot 15 Katanga settlement scheme. The evidence of both OW2 and PW2 tally with that of the petitioner’s that indeed they were the ones who were given the said suit parcel and worked to repay off the loan charged as against it.
48. OW1 did allege that the deceased Wausi Mutelo did give the said parcel to his father Thomas Wausi and this was supported by his Exhibit OEXH2, the agreement purportedly signed by the deceased and his uncles. First and foremost, the contents of the said exhibit could not be verified and its authenticity is doubtful as facts on the ground did not support its content. OW1 was not present when the said agreement was made, and more importantly OW1 did not call any surviving witness to confirm its authenticity as expected under provisions of section 35, 63 & 65 of the *Evidence Act* Cap 80 laws of Kenya.



49. Secondly it is common ground that his father Thomas Wausi, from inception after the plots were given to members never laid a claim on the said parcel, nor did he ever leave or work thereon. The principle of estoppel therefore comes into play and by conduct it can be safely concluded that the said Thomas Wausi knew the said suit parcel belongs exclusively to his brothers and that is why during his lifetime never ever laid any claim on the said suit parcel from 1960's when Simon Kimote Wausi and Sammy Kathuku Wausi took possession to the time of his death on 14.12.1987.
50. The final issue raised by the protestor was that, it was his father Thomas Wausi, who paid off the loan with respect of the suit parcel and had possession of the receipts, which were taken by his uncles. This contention too remains unproven as the evidence presented showed that his father Thomas Wausi only paid for his parcel 17 Katanga settlement scheme. PW2 Paul Mutisya Kilui evidence did shade proper light as who paid for the suit parcel Plot 15 Katanga settlement scheme. He was the lifelong treasurer of Katanga cooperative society Ltd and confirmed that due to his old age the deceased Wausi Mutelo brought his two sons (the petitioner's) to continue working and pay off the said loan charged against the suit parcel. The sons involved their wives Phelis Sammy and Agnes Kimote and they too joined the workforce and were being deducted to pay off the loan.
51. PW2, evidence therefore did confirm the petitioner's contention that, indeed they were the ones who paid off the loan even though the suit parcel was in the name of their father Wausi Mutelo. The petitioners further did produce a bundle of receipts (PEXH 2) which was in their possession and showed that even after the death of their father Wausi Mutelo in 1987, they still continued to pay the loan.
52. This court also notes while the other brothers got different parcels of land, both petitioners only got their share in Plot 15 Katanga settlement scheme. Daniel wausi got plot 50 Katanga settlement scheme, Timothy Wausi got plot 17 Katanga settlement scheme, Plot 97 was given to Peter Wausi and parcel 485 Kasunguni Adjudication section (which was ancestral land) and which belonged to the deceased Wausi Mutelo was given to Thomas Wausi, a fact also confirmed by the 1st objector in his evidence before court. The petitioners were brothers from the 1st and 2nd house respectively and placing them together under one title was the ingenuity of the deceased to secure their interest.

Disposition

53. Section 27 & 28 of the [law of succession Act](#) does provide that;
- “ In making provision of a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments of a lump sum, and to impose such conditions as it thinks fit.
54. Section 28 of the [law of succession Act](#) further provides that;
- In considering whether any order should be made under this part, and if so what order, the court shall have regard to-
- a) The nature and amount of the deceased property.
 - b) Any past, present or future capital or income from the source of the dependant.
 - c) The existing and future means and needs of the dependant.



- d) Whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- e) The conduct of the dependant in relation to the deceased;
- f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
- g) The general circumstances of the case, including so far as can be ascertained, the testator's reasons for not making provision for the dependant.

55. From the evidence as analysed above, it is clear that the protest is without merit and is an attempt by an individual beneficiary to upset/ overturn the apple cart that was set way back in the 1960's. It would be grossly unfair and unjust to destabilize the petitioners' peaceful use, and occupation of Plot 15 Katanga settlement scheme which has been acknowledged by all from 1960's. The protestor must hold his peace and allow the petitioners to continue with their exclusive use of the suit parcel, just the way he has accepted that Plot 97 Shimba Hills was given to Peter Wausi and his father was given Plot 485 Kasunguni Adjudication section. The protest is thus unmerited and is dismissed.
56. Further having considered the parameters provided under Section 27, 28 and 40 of the *Law of Succession Act*, and having considered the persuasive authority of *Re Estate of John Musambayi Katumanga-Deceased* (2014) eKLR and the binding stare decisis in the court of appeal case of *In Rono v Rono and another* (2005) 1 EA 363, I do find and hold that Simon Kimote Wausi and Sammy Kathuku Wausi are the rightful beneficiary of Plot 15 Katanga settlement scheme. I do therefore confirm the summons of confirmation of Grant dated 2nd January 2014 and vest the said suit property to them. They shall each own half share therein.
57. The parties herein are family members and it is in the interest of justice that each party bears its own costs.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF SEPTEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

