



**In re Estate of James Mutonga Mulinge (Succession Cause 367 of 2015)
[2023] KEHC 26090 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26090 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 367 OF 2015
M THANDE, J
NOVEMBER 30, 2023
IN THE MATTER OF THE ESTATE OF JAMES MUTONGA MULINGE**

RULING

1. The deceased in respect of whom the proceedings herein relate, is James Mutonga Mulinge (“the deceased”) who died intestate on 21.8.15. A Petition for a grant of letters of administration was filed in this Court on 12.10.15 by Kennedy Mulinge Mutonga (Kennedy), Khalfan Macharia Mutonga(Khalfan) and David Muema Mutonga, sons of the deceased.
2. In their affidavit in support of the Petition, the Petitioners averred that the deceased was survived by the following:

Beth Wanjiru Mulinge	Widow
Kennedy Mulinge Mutonga	Son
Khalfan (Peter) Macharia Mutonga	Son
David Muema Mutonga	Son
Mary Kilombe James Mulinge	Daughter
Joseph Kioko Mutonga	Son
Samuel Ngui Mutonga	Son

3. The assets of the estate listed in the said affidavit are:
 - a. Mbooni/ Kalawani/755
 - b. Mbooni/ Kalawani/1016



- c. Mbooni/ Kalawani/1556
- d. Mbooni/ Kalawani/1704
- e. ½ share in Mombasa/Block XIX/22
- f. Mazeras Mulgold Ltd (20 acres)
- g. Taru Area (1 Ha)
- h. Maungu Area (2 acres)
- i. Makindu (½ acre) ½
- j. Makindu Kiundwai (1 acre)
- k. Kibwezi 2 parcels (30 acres)
- l. Petrol Station on Plot 118/3, Lungalunga, Likoni.

Shares in:

- m. Mutonga Construction Ltd
 - n. Mutonga Investment Ltd
 - o. Pwani Trading Ltd
 - p. Famutex Ltd
 - q. Mulgold Lts
 - r. Pearl Energy (Kenya) Ltd
 - s. Coast Uniform Ltd
 - t. California Dream Hotel
 - u. Harbourway Hotel
 - v. Paul Mutonga Enterprises Ltd
4. Following gazettment of the Petition, objections were raised. The first is dated 17.12.15 by Agnes Walker Mutonga (Agnes). She claimed to present the petition as a widow of the deceased and on behalf of her son Paul Jamie Mulinge (Jamie) who suffers from autism. In addition to the persons listed by the Petitioners, she stated that the deceased was also survived by herself, her son and daughter Shobel Mulinge (Shobel), who were left out by the Petitioners. She further listed the following additional assets as forming part of the estate of the deceased:
- a. Kwale/Pungu Fuel Area/58
 - b. Kimama/Tikondo/152
 - c. Kwale/Galu Kinondo/207
 - d. Kwale/Galu Kinondo/308
 - e. Mulgold LR No. CR. 28864
 - f. Mulgold Totle No. 53487



- g. Mbooni/Itetani/519
 - h. Mbooni/Itetani/958
 - i. Kinduani Plots
 - j. Other untitled Plots.
5. The second Petition by way of cross-Application is dated 19.2.16 and is filed by Shobel. She listed the same beneficiaries and assets as her mother did in her application. She too stated that the Petitioners did not make full disclosure of all the beneficiaries of the estate of the deceased.
 6. Followed close on the heels of this petition is the third petition by way of cross-application dated 21.3.16 by Irene Wayua Katua (Irene). She too claimed to be a widow of the deceased and that the Petitioners had deliberately failed to disclose that she and her 2 daughters Ivy Nthenya Mulinge (Ivy) and Elizabeth Kilombe Mulinge (Elizabeth) were also heirs of the deceased.
 7. Bamburi Cement Limited also laid claim over the estate of the deceased as creditor. This is in respect of the sum of Kshs 2,130,400/=, being rent arrears owed to it by the deceased, for occupation of House No. 16 on Plot No. 1168, Section I Mainland North belonging to the company.
 8. By consent of the parties dated 6.9.16, Khalfan representing the first family, Shobel representing the second family and Elizabeth representing the third family were to be appointed administrators of the estate. It was further agreed that all children named in the proceedings are children of the deceased. The issue of whether Irene and Agnes were wives of the deceased was however to proceed to hearing. Pursuant to this consent, a grant of letters of administration was on 10.10.16 issued to the agreed administrators.
 9. In the meantime, Khalfan died on 29.9.18. Thereafter parties engaged in negotiations and an agreement was reached. However, Kennedy and the estate of Khalfan opposed the same. Following the demise of Khalfan, the Court on 27.7.22, revoked the grant issued on 10.10.16 and a fresh grant issued to Shobel, Elizabeth and David Muema Mutlinge (David). The Court further directed the new Administrators to file a summons for confirmation of grant within 30 days. Kennedy and any other beneficiary were directed to file an affidavit of protest within 14 days of service.
 10. Shobel filed the summons for confirmation of grant dated 1.11.22 in which she included Irene and Agnes as widows of the deceased. The assets of the estate were listed as follows:
 1. Kiboko/Kiundai/307A
 2. Kwale/Galu Kinondo/207
 3. Kwale/Galu Kinondo/308
 4. Makueni/Ngulu/226
 5. Mbiuni/Mumbuni/780
 6. Mbiuni/Mumbuni/869
 7. Mbooni/Itetani/519
 8. Mbooni/Itetani/958
 9. Mombasa/Block XIX/22
 10. Mbooni/ Kalawani/755



11. Mbooni/ Kalawani/1016
12. Mbooni/ Kalawani/1556
13. Mbooni/ Kalawani/1704
14. Mbooni/Itetani/495
15. Mbooni/Itetani/500
16. Mbooni/Itetani/595
17. Mbooni/Itetani/596
18. Mbooni/Itetani/496
19. Mbooni/Itetani/493
20. Mbooni/Itetani/1267
21. Mbooni/Itetani/896
22. Kimana/Tikondo/152
23. Kwale/Pungu Fuel Area/58
24. Makueni/Ngulu/2657
25. Taru Area (1 Ha)
26. 20 acre plot registered in the name of Mazeras Mulgold Limited
27. 2 acre plots in Maungu Area
28. ½ acre plot in Makindu/Kiunduai
29. 2 plots in Kibwezi altogether measuring 30 acres
30. Plot registered in the name of Mulgold as CR No. 53487
31. Kathekani/Iviani/Survey No. 2924
32. Kinduani Plots
33. Mlolongo Plot No. 12 Phase II B under Mutonga Investments Limited.
34. Motor vehicle(s)
Shares in:
35. Mutonga Construction Limited
36. Mutonga Investments Limited
37. Pwani Trading Agencies Limited
38. Famutex Limited
39. Mulgold Limited
40. Pearl Energy (Kenya) Limited



41. Coast Uniform Limited
 42. California Dream Hotel
 43. Harbourway Hotel
 44. Paul Mutonga Enterprises Ltd
 45. Petrol station on Plot No. 118/3 Mainland South, Likoni, Mombasa
 46. Mbooni Ranching & Dairy Cooperative Society
11. The liabilities of the estate were in the sum of Kshs 16,930,400/= made up as follows:

Liquidated damages to Bigview Investments Limited	Kshs 12,000,000/=
Refund of loan by Shobel Mulinge	Kshs 2,800,000/=
Rent arrears to Bamburi Cement Ltd	Kshs 2,130,400/=

12. In the proposed distribution, all children of the deceased, Agnes, the 2nd widow and Irene, the 3rd widow were to get 5% of the residual estate while Beth Wanjiru, the 1st widow (now deceased), was to get 29% while Jamie was to get 16% owing to his disability and future dependence. In addition, Jamie would also get the petrol station on Plot No. 118/3 Mainland South, Likoni, Mombasa in the name of Paul Mutonga Investments Limited. It was further agreed that Title No. Mombasa/Block XIX/22 would be sold at a price to be agreed by the 3 Administrators based on valuation. A further term of the consent was that all pending interlocutory applications together with Mombasa HCCC No. 26 of 2009; Beth Wanjiru Mulinge v James Mutonga Mulinge, and any other court case relating to the estate herein, stood withdrawn as at the date of the summons herein.
13. All beneficiaries signed the consent to confirmation, save for Kennedy and the estate of Khalfan, who filed affidavits of protest.
14. Ali Mutonga Khalfan, a son of Khalfan filed an affidavit of protest dated 20.2.23, in which he stated that he was acting on behalf of his mother Mwanaisha Ali Yusuf. He claimed that Plot No. Kathekani/Iviani/Survey No. 2924 was gifted to his late father by the deceased. Further that his father was a major shareholder of Bigview Investment Limited with 34% shares. Additionally, that Plot No. 245 Ngai Ndeithya Settlement Scheme belonged to his late father. He alleged that there was a scheme to deny the family of Khalfan their right as beneficiaries of the estate of the deceased and have omitted their names and only mentioned their late father. They urged that their interests be catered for as heirs of the estate of their late father.
15. In his affidavit of protest dated 20.1.23, Kennedy Mulinge Mutonga opposed the confirmation of the grant. His grounds are that Plots Nos. Mbiuni/Mumbuni/780 and Mbiuni/Mumbuni/869 are not available for distribution having been given to him and his wife by the deceased on 28.3.98, as a wedding gift. The deceased handed over to him, the title deeds in respect of the said properties. He immediately took possession of the said properties and carries out farming activities. He has also erected permanent structures thereon. The deceased intended to transfer the plots to him but fell ill and died before doing so. He further stated that during his lifetime, the deceased gifted to Khalfan parcel no. 245 Kathekani Settlement Scheme Iviani sublocation on 7.1.99, Plot No. 263 Ngai Ndeithya Settlement Scheme to



David Muema, Plot No. Makueni/Ngulu/225 to Joseph Kioko and Plot No. Makueni/Ngulu/226 to Samuel Ngui. None of these properties have been listed for distribution.

16. Kennedy further stated that the monthly rent of Kshs 1 million, payable under a lease between the Deceased and Bigview Company Limited over Title No. Mombasa/Block XIX/22 from October 2015 has not been factored in, in the mode of distribution. The cumulative rent of Kshs 88 million should be available for distribution as part of the estate of the deceased. Further, that prior to his demise, the Deceased filed Environment and Land Court Case No. 306 of 2014 wherein he denied the purported lease for a term of 15 years in which Bigview Investment Limited is claiming Kshs 12 million as liquidated damages, for abandoning their claim in respect of the residual term of the alleged unexpired lease. The suit has since abated. It is Kennedy's case that that this part of the estate should not be distributed pending the hearing and determination of the said suit. Kennedy further stated that his share in Plots Nos. Kwale/Galu Kinondo/207 and Kwale/Galu Kinondo/308 owned by Pwani Trading Agencies Limited of which he is a shareholder is not available for distribution as part of the estate of the deceased, nor is Mlolongo Plot 12 Phase II B which was transferred to Maridadi Enterprises Limited by Mutonga Investments Limited. He further claims that the petrol station on Plot No. 118/3 was wrongly registered in the name of Paul Mutonga Investments Limited as the same belongs to Mutonga Investments.
17. As regards the higher percentage proposed to be given to Jamie as well as 1/3 share of Kimana/Kinondo/152 in the name of Miutonga Construction Limited, on account of his disability, Kennedy opposes the same. He contends that other beneficiaries including himself have medical needs. He further claimed that Irene is not a widow of the deceased and the matter was determined in Civil Case No. 3415 of 1988.
18. In addition to the foregoing, Kennedy claimed that the deceased engaged him to work for him. However, the banker's cheques with which he paid him were dishonoured and the same totalling Kshs 4,000,000/= remain a liability of the estate. He further rejected the amount claimed by Shobel as liability of the estate vide a loan agreement, contending that the same is a forgery.
19. Bamburi Cement Limited also opposed the proposal for distribution vide an affidavit sworn on 21.2.23 by Waeni Ngea, its Head of Legal and Compliance and Company Secretary. It was averred that by an agreement dated 28.7.04, the deceased has leased House No. 16 on Plot No. 1168, Section I Mainland North belonging to the company and had fallen into arrears amounting to Kshs 2,130,400/=. The Company filed Mombasa CMCC 573 of 2009; Bamburi Cement Ltd v James Mulinge seeking payment of the amount due and eviction of the deceased. On his part, the deceased Mombasa CMCC 635 of 2012; James Mulinge v Lafarge Eco-Systems and obtained injunctive orders. The company thus seeks that these cases be withdrawn after payment of the amount due to it and not before.
20. At the hearing on 2.5.23, all parties entered into a consent on terms that:
 - i. The amount of Kshs 2,130,400/= would be paid to Bamburi Cement Limited out of the estate before distribution, whereupon CMCC 573 of 2009 between Bamburi Cement Limited and the deceased and CMCC No. 635 of 2012 between the deceased and Lafarge Eco-Systems shall be marked as settled.
 - ii. Paul Jamie Mulinge is entitled to 16% of the estate of the deceased on account of his disability and future dependence.
21. Additionally, the issue of the loan of Kshs 2.8 million advanced to the deceased by Shobel Mulinge was settled. Kennedy stated in his evidence that after seeing a letter from the Bank indication that the said



- sum was indeed paid into the deceased's account from Shobel's account, he confirmed that the estate owes Shobel the said amount, vide a loan agreement dated 29.4.13.
22. On 2.5.23, the Court directed Mr. Birir, learned counsel for Ali Mutonga Khalfan to file a report in respect of Kathekani Plot No. Kathekani/Iviani/Survey No. 2924 and 245. A report by the Kibwezi Land Adjudication & Settlement Officer dated 17.5.23 was filed indicating that there is no plot known as No. 2924 in the Kathekani Settlement Scheme. However, the records showed the name of Peter Macharia Mutonga against Plot No. 245 Ngai Ndethya Settlement Scheme. On 29.5.23, counsel for the estate of Khalfan informed the Court that his clients were satisfied with the report and had no further issue. He further stated that the pending issues were not for consideration by this Court but for resolution with directors of Bigview. Accordingly, his clients were no longer protesting and were satisfied. The Court therefore marked the protest by Ali Mutonga Khalfan as settled.
23. The issues that remain for determination are thus the following:
- a. Whether the deceased gave to Kennedy the properties known as Plots Nos. Mbiuni/Mumbuni/780 and Mbiuni/Mumbuni/869
 - b. Whether Kennedy is owed Kshs 4 million by the deceased
 - c. Whether rent collected by Bigview Investments Limited from Title No. Mombasa/XIX/22 amounts to Kshs 88 million
 - d. Whether Irene Wayua was a wife of the deceased
 - e. What constitutes the estate of the Deceased
 - f. How should the estate of the deceased be distributed?
24. Section 71 of the *Law of Succession Act* (LSA) makes provision for confirmation of grant as follows:
- After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
25. What is before the Court is an application for confirmation of grant.
26. The law recognizes that there will not always be concurrence of beneficiaries to the distribution of the estate of a deceased person. Where a person entitled to such estate objects to the distribution of the same as proposed by the personal representatives, such person may file an affidavit of protest under Rule 40(6) of the *Probate and Administration Rules* which provides:
- Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.
27. Kennedy, being opposed to the mode of distribution proposed by the Administrators herein, is thus well within his right to file the affidavit of protest expressing his objection to the confirmation of the grant.
28. The Court is now tasked with the determination as to whether any of the objections raised by Kennedy are justified.



Whether the deceased gave to Kennedy the property known as Plots Nos. Mbiuni/Mumbuni/780 and Mbiuni/Mumbuni/869

29. In his testimony in support of his protest, Kennedy claimed that the deceased gifted him with Plots Nos. Mbiuni/Mumbuni/780 and Mbiuni/Mumbuni/869 as gifts, at his wedding in 1998. He stated that there were people who witnessed his father gifting the plots to him but that he did not call any of them. Further, that he developed the same with a permanent building with 5 rooms and there are photos to demonstrate this. He denied that the structures were built by the deceased as quarters for his workers. Although he said that he had the receipts for construction at home, he did not place them before the court as he was in a hurry.
30. Shobel opposed this and wondered why transfer of the plots was not effected yet the deceased only fell in in 2015, which was 17 years after the Plots were allegedly gifted to Kennedy. She claimed that the deceased entrusted all his documents with his 2nd born son Khalfan, now deceased. She suspects that Kennedy took the title documents in respect of the Plots upon Khalfan's demise. She stated that the family has on numerous occasions asked Kennedy to return the tiles but he has adamantly refused to release them to date. She further denied that Kennedy put up the structures on the Plots which she stated were put up by the deceased for his workers. She asserted that the deceased only allowed Kennedy to farm on the said Plots. As such, the same are available for distribution. Shobel further denied that the deceased gifted any of the beneficiaries with any of the listed properties as alleged. Further that Plot No. Makueni/Ngulu/225 is registered to Simon Munyoki Munyilu and does not form part of the estate of the deceased.
31. It is trite law that he who alleges must prove. This is succinctly stated in the [Evidence Act](#) as follows:
- 107.
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
32. It is common knowledge weddings are often public events attended by many people to witness the joyous occasion. The Protestor ought to have called some witnesses who were at the wedding and who he says witnessed his father giving him the Plots in question- as a wedding gift. One would have expected his own mother Beth Wanjiru to swear any affidavit to confirm that her husband did indeed gifted Kennedy, their firstborn son, with the Plots at his wedding. She did not. Moreover, had the deceased intended to give the Plots to Kennedy he would have over the period of 17 years taken steps to transfer the same to him. This he did not. Other than merely stating that he was given the said plots and that he had developed them, Kennedy was required to call evidence to prove his allegations by way of a document demonstrating intention of the deceased or even testimony of any of the witnesses whom he said were present at the wedding when the gift was made. Further, it is noted that his affidavit of protest



was filed on 23.1.23 while hearing of the same commenced on 2.5.23. Kennedy hence had all the time to file the construction receipts to prove his claim. My conclusion therefore is that the material placed before me is insufficient to persuade me that the Deceased gave Plots Nos. Mbiuni/Mumbuni/780 and Mbiuni/Mumbuni/869 to Kennedy as claimed. Accordingly, his claim over the same fails.

Whether Kennedy is owed Kshs 4 million by the deceased

33. On the claim of Kshs 4 million from the estate, Kennedy stated that he safeguarded the deceased's property in Gigiri until it was sold and handed it over to the purchaser. He also supervised eviction. The cheques given to Kennedy by the deceased as payment totalling Kshs 4,000,000/=, were all dishonoured. He thus claims that the amount remains a liability on the estate. His claim is denied by the Administrators.
34. I have looked at the exhibited cheques and note that they are all drawn by the deceased in favour of Kennedy. 4 cheques are for the sum of Kshs 900,000/= each while 1 cheque is for Kshs 400,000/=, making a total of Kshs 4 million. Notably all the cheques are dated 21.10.11. The exhibited return cheque advices all dated 26.10.11 indicate that all 5 cheques were returned. The reason for return is not clear as it simply reads "Return Reason".
35. It is quite evident that the deceased issued the 5 cheques to Kennedy on the same date. What is not clear is what the payment was in respect of. Kennedy states that they were in respect of payment for safeguarding the Gigiri property before sale and handing over the same to the purchaser as well as supervising eviction.
36. The evidence shows that the deceased was a man of record. The lease between him and Bigview was reduced in writing as was the loan agreement between him and Shobel. This was notwithstanding, that he was dealing with family members. Kshs 4,000,000/= is not pocket change. It is therefore not conceivable that the deceased omitted to have an agreement between him and Kennedy over the work he allegedly did for him. More so when the cheques issued in payment to Kennedy as payment, were dishonoured by the bank. Further, the work that Kennedy allegedly did for the deceased is rather vague. He gives no details of how he safeguarded the Gigiri property, the persons evicted, nor indeed the purchaser to whom he handed over the property. No dated have also been given. Notably Kennedy did not indicate the efforts he made to recover this money from the deceased from 2011 to the time of his demise in 2015. The claim is not persuasive at all and therefore fails.

Whether rent collected by Bigview Investments Limited from Title No. Mombasa/XIX/22 amounts to Kshs 88 million

37. It is Kennedy's case that the monthly rent of Kshs 1 million, payable under a lease between the Deceased and Bigview Company Limited (Bigview) Title No. Mombasa/Block XIX/22 (Mombasa property) from October 2015 amounting to a cumulative amount of Kshs 88 million should be included and availed for distribution as part of the estate of the deceased.
38. Further, that prior to his demise, the Deceased filed Environment and Land Court Case No. 306 of 2014 (ELC case), wherein he denied the purported lease for a term of 15 years in which Bigview is claiming Kshs 12 million as liquidated damages, for abandoning its claim in respect of the residual term of the alleged unexpired lease. Kennedy acknowledges that he was unable to assist the deceased and that Bigview had stepped in to assist the Mombasa property was on the verge of being auctioned for loan default. He however said that the deceased had filed suit against the Bigview which however abated following his demise. He therefore opposed payment to Bigview of the amount owed to it by the deceased and his position is that this part of the estate should not be distributed pending the hearing and determination of the said suit.



39. Shobel contended that Kennedy is aware that Bigview holds an unexpired 15-year lease from the deceased over the ground floor of the Mombasa property. Bigview has been collecting rent pursuant to interim orders in the ELC Case. Further that the family including Kennedy has had extensive discussions on how a compromise could be reached so that Bigview surrenders the lease before expiry. She confirmed that the suit abated following the demise of the deceased.
40. The record shows that Bigview came to the rescue of the deceased when the Mombasa property was at risk of being sold by auction for loan default. In consideration of Bigview's agreement to pay off the loan, the deceased leased to Bigview, the ground floor of the said property for a period of 15 years commencing 1.10.14. There is on record a ruling dated 10.5.15 in the ELC Case dismissing the deceased's application to restrain Bigview from collecting rent pursuant to the lease. It is not disputed that Bigview was granted a lease of the ground floor of the Mombasa property to enable it pay off the amount due to the bank in respect of the loan the deceased had borrowed. Given these facts, it is not clear how Kennedy arrived at the conclusion that Bigview owes the estate the sum of Kshs 88 million in rent collected.
41. Under the *Evidence Act*, the burden of proving this claim lay on Kennedy. Other than simply bandying a figure of Kshs 88 million, Kennedy has not discharged the burden placed upon him to prove that this amount is owed by Bigview to the estate. As such, this claim fails.
42. Kennedy contends that the amount due to Bigview should not be paid until the suit is heard and determined. The record shows that the suit was subsequently dismissed by an order dated 10.10.17 for want of prosecution. As such, there is no suit pending hearing and determination.

Whether Irene Wayua was a wife of the deceased

43. It is Kennedy's case that Irene is not a widow of the deceased. He also only recognises Elizabeth as a child of the deceased and not her sister. He conceded that he was in a meeting in 2022 where it was agreed that Irene be recognised as a wife but he objected and filed the protest in 2023. He relied on the ruling dated 9.1.89 in Civil Case No. 3415 of 1988.
44. Shobel opposed Kennedy's contention and stated that the family had extensive negotiations regarding Irene's status and it was unanimously agreed that she should be included as a widow of the deceased having been married traditionally. Further that her 2 children were already recognised and had been included as beneficiaries of the estate.
45. On her part, Irene deponed that she is a widow of the deceased and that they were blessed with 2 children. She should therefore be included as a beneficiary of his estate. She exhibited an affidavit on 20.6.16 by the deceased's 6 brothers confirming that she was the deceased's wife, having been married in 1980, under Kamba customs. They confirmed that Irene was the legal wife of their deceased brother. Also exhibited is an affidavit of Evangeline Celeste Muli, sworn on 1.3.16 in which she stated that she was aware of her own knowledge, that Irene was married to the deceased as the 2nd wife in a Kamba traditional ceremony. The ceremony took place at the home of Evangeline in Garden Estate. Further that she, her late husband Mathew Guy Muli gave Irene away to be married to the deceased in the presence of his parents Paul Kemuli and Tabitha Kilome. Irene further stated that the administrators and beneficiaries all agree that she was married to the deceased.
46. I have looked at the ruling in *Civil Case No. 3415 of 1988* relied on by Kennedy to support his assertions concerning Irene. Akiwumi, J. (as he then was) found that Irene and the deceased lived together on LR No. 7258/54, Gigiri until the deceased left. The learned Judge found that it would be proper on a



balance of convenience for Irene to continue to stay in the said property and the deceased be restrained from disposing of the same. The learned Judge went on to state:

As for the plaintiff's claim for maintenance for her two daughters which she alleges she had with the defendant, it now seems that no marriage subsisted between the plaintiff and the defendant since the defendant, as deponed to by him and not denied by the plaintiff, was at the material time and even now married under the African Christian Marriage and Divorce Act to another.

47. This finding of the learned Judge is what Kennedy has relied on to deny that Irene was a widow of the deceased. This brings to the fore the legal paradox that has plagued our courts for a long time arising from Section 3(5) of the [LSA](#) which provides:

Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

48. Section 3(5) provides that a woman married under a system of law that permits polygamy, is a wife for the purposes of the [LSA](#), notwithstanding that her husband had previously or subsequently contracted a monogamous marriage to another woman. Section 3(5) appears to sanction bigamy. It redefines marriage in the sense that a woman who is not a wife under [Marriage Act](#) is a wife under S. 3(5) of the [LSA](#).

49. The import of Section 3(5) was considered by the Court of Appeal in the case of [Irene Njeri Macharia v Margaret Wairimu Njomo & another](#) [1996] eKLR. The learned Judges stated:

The courts correctly held that Ruenji and Ogola were incapable of contracting other marriages during the existence of their statutory marriages and that accordingly the two women who claimed to be entitled to a share in the men's estates were not wives in law and could not inherit. We repeat that those decisions were correct at the times when they were made. But in 1981, the male-dominated Parliament intervened and added paragraph (5) to section 3 of the [Law of Succession Act](#).

Paragraph 5 of section 3 added by Act No. 10 of 1981 provided as follows:- "Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act. "Our understanding of this provision is that it was intended to reverse the position taken by the courts in the cases of Re Ruenji's Estate and Re Ogola's Estate. The section was, however, directly in issue in 1986 in the case of "In the Matter of the Estate of Reuben Nzioka Mutua (deceased) to which we have referred earlier. The relevant facts in Mutua's case were that on 2nd September, 1961, at the PCEA Church in Nyeri, he married Theresiah Mumbua Mutua and that marriage was obviously under the African Christian Marriage and Divorce Act. That marriage was never dissolved until 26th May, 1986 when Mutua died in a road traffic accident. There were seven children of the marriage.



But in March 1980, Mutua, once again being true to his African manhood, purported to marry Josephine Mumbua Mutua and that marriage was said to have been conducted in accordance with Kamba law and custom.

50. The learned Judges went on to state:

Our understanding of section 3(5) of the Act is that it was expressly intended to cater for women who find themselves in the situation in which Josephine found herself. Mutua, previous to his union with Josephine, had contracted a statutory marriage which remained undissolved upto the time of his death. But subsequent to that marriage, he purported to marry Josephine under Kamba customary law. Kamba customary law recognizes polygamy and Josephine was telling the court that she was a woman married under a system which recognizes polygamy. Parliament, in its wisdom, and whatever it might have intended to do, provided that:- "Notwithstanding the provisions of section 37 of the *Marriage Act* ..."

Josephine was, nevertheless, a wife for the purposes of the *Law of Succession Act*, and in particular sections 29 and 40 of *the Act*. We have unhesitatingly come to the conclusion that Mutua's case was wrongly decided and must now be treated as not correctly stating the position at law.

51. It must be noted that Akiwumi, J. was not seized of a succession matter when he made the decision relied on by Kennedy. Accordingly, by dint of Section 3(5) and duly guided by the Court of Appeal in the Irene Njeri Macharia case (*supra*), I find that Irene Wayua is a wife of the deceased, for purposes of succession. Accordingly, the claim by Kennedy is without basis and his objection in this regard thus fails.

What constitutes the estate of the Deceased

52. Out of the properties listed in the affidavit in support of summons for confirmation of grant, the Court notes that some do not belong to the estate but are registered in the name of companies in which the deceased was a shareholder. It is trite law that a company is a separate legal entity apart from its members. This principle is espoused in the famous case of *Salomon v Salomon & Co. Ltd.* [1897] AC 22.

53. The long title to the *LSA* reads as follows:

An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.

54. It can be seen that the provisions of the Act apply to estates of deceased person. In the premises, this Court may only deal with assets that belong to a deceased person and any property not belonging to the estate of a deceased person, cannot be dealt with under the Act. Accordingly, the following properties which do not belong to the Deceased, do not form part of his estate and are not available for distribution herein:

- i. Galu/Kinondo/207 registered in the name of Pwani Trading Agencies Limited
- ii. Galu/Kinondo/308 registered in the name of Pwani Trading Agencies Limited
- iii. Kwale/Pungu Fuel Area/58 registered in the name of Famutex Limited
- iv. Mlolongo Plot No. 12 Phase II B registered in the name of Mutonga Investments Limited



- v. Plot in Makindu vide agreement dated 3.4.11 in favour of Mutonga Investments Limited
 - vi. Kimana/Tikondo/152 registered in the name of Mutonga Construction Limited
 - vii. LR No. 28864 Mariakani registered in the name of Mulgold Limited.
 - viii. Plot 118/3, Lungalunga, Likoni is registered in the name of Paul Mutonga Investments Limited.
 - ix. Maungu Misharini registered in the name of Mutonga Investments Limited.
55. The Court further notes that the following properties do not also belong to the estate of the deceased:
- i. Makueni/Ngulu/225 is registered in the name of Simon Munyoki Munyilu.
 - ii. Mbooni/Itetani/500 is registered in the name of Mune Mbali Yalata.
 - iii. Mbooni/Itetani/595 is registered in the name of Titus Musau Mulinge, Frederick Mutua Mulinge, Charles Mulei Mulinge, Jeremiah Soo, Mulinge and Francis Munyao Mulinge.
 - iv. Kathekani/Iviani/Survey No. 2924
56. In light of the foregoing, all properties listed in the affidavit in support of the summons for confirmation of grant constitute the estate of the deceased save those listed herein which belong to other parties.

How should the estate of the deceased be distributed?

57. The Court has found that Kennedy's objection to the distribution of the estate of the deceased as contained in his protest has not been substantiated and is without basis. It follows therefore that the estate of the deceased will be distributed in accordance with the proposal contained in the affidavit in support of the summons for confirmation of grant save only that properties not belonging to the estate are not available for distribution.
58. In the end and in view of the foregoing I make the following orders:
- a. The grant of letters of administration in respect of the estate of the deceased is hereby confirmed.
 - b. The estate of the deceased shall be distributed in accordance with the mode of distribution set out in the affidavit in support of the summons for confirmation of grant sworn on 1.11.22 by Shobel Mulinge, save that the properties excluded herein do not form part of the estate of the deceased and are not available for distribution.
 - c. Prior to distribution of the estate, the sum of Kshs 2,130,400/= shall be paid to Bamburi Cement Limited, whereupon, Mombasa CMCC 573; Bamburi Cement Limited v James Mulinge and Mombasa CMCC No. 635 of 2012; James Mulinge v Lafarge Eco System, shall be marked as settled.
 - d. This being a family matter, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF NOVEMBER 2023

M. THANDE

JUDGE

