



**In re Estate of Pradeep Behal (Deceased) (Succession Cause 465 of 2013)  
[2022] KEHC 3188 (KLR) (Family) (25 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 3188 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 465 OF 2013  
WM MUSYOKA, J  
APRIL 25, 2022  
IN THE MATTER OF ESTATE OF PRADEEP BEHAL (DECEASED)**

**JUDGMENT**

1. What has been placed before me for determination is the application dated 24<sup>th</sup> June 2015. It seeks confirmation of the grant herein. It is brought at the instance of Alok Pradeep Kumar Behal, one of the administrators, who I shall hereafter refer to as the applicant.
2. It may be well to give some background. The same was captured in the directions that I gave by way of a ruling that I delivered on 8<sup>th</sup> November 2013. After the deceased died, two succession causes were initiated, being Nairobi HCSC No. 2163 of 2012 and Nairobi HCSC No. 465 of 2013. Nairobi HCSC No. 2163 of 2012, was initiated at the instance of a brother of the deceased, on the basis that he was entitled to half share of the estate, being LR No. 2/314 – Original 2/55/1 Nairobi. Nairobi HCSC No. 465 of 2013 was at the instance of the widow of the deceased and her sons. Grants were issued in both causes. Eventually the two were consolidated on 20<sup>th</sup> May 2013, with Nairobi HCSC No. 465 of 2013 being the lead file. Ranjana Behal, Alok Pradeep Kumar Behal and Vijay K. Behal were appointed the joint administrators, by orders made on 8<sup>th</sup> November 2013. Vijay Behal died on 22<sup>nd</sup> April 2014, which meant that the grant of letters of administration intestate was issued to Ranjana Behal and Alok Pradeep Kumar Behal on 28<sup>th</sup> August 2014, excluding his name.
3. In the summons for confirmation of grant, the applicant states that the deceased was survived by two individuals, being himself and his mother Ranjana Behal. There is a consent form, dated 24<sup>th</sup> June 2015, executed by the applicant, Ranjana Behal Akhil Behal and Amish Behal, proposing that LR No. 2/314 – Original 2/55/1 Nairobi devolve entirely upon Ranjana Behal.
4. The confirmation application attracted an affidavit of protest by Rajni Behal, sworn on 4<sup>th</sup> December 2015. She is the widow of the late Vijay Behal, and the executrix of his will, vide a grant of probate of the said written will, that she obtained in Nairobi HCSC No. 3169 of 2014 on 27<sup>th</sup> April 2015. I shall refer to her hereafter as the protestor. She avers that the deceased herein was a brother to her



late husband. She avers that it was her late husband who had purchased LR No. 2/314 – Original 2/55/1 Nairobi in 1972. He allegedly paid the deposit for the property, and the balance was financed by the Housing Finance Company of Kenya (HFCK). HFCK felt that her late husband could not sustain the installments, hence he invited his brother, the deceased herein, and had his name included in the application to boost his chances of getting the facility. The loan was granted on the basis of that arrangement, and the property was registered in the joint names of her late husband and the deceased herein. She asserts that it was her late husband who repaid the loan amount exclusively, and that all what the deceased herein did was to donate his name for use in the loan application, and he made no financial contribution whatsoever to the payment of the loan funds or even the deposit paid for the property. She further asserts that her late husband made improvements to the property, in which the deceased herein did not contribute. The loan was taken over by the Standard Chartered Bank, and payments were made by a company belonging to her late husband, in which the deceased herein had no interest. He took another loan with Fidelity Commercial Bank, which was ploughed towards clearing the loan, and which was paid off after the demise of the deceased herein.

5. The protestor has attached, to her affidavit, a number of documents to support her case. There is a certificate of marriage to show that she was a true widow of the late Vijay Behal. There is a bundle of certificates of birth for her three children with her late husband. There is a copy of the directions that I gave on 8<sup>th</sup> November 2013, directing that the issue of ownership of that property could be determined in separate proceedings or at the confirmation of the grant. There is a copy of the grant of probate dated 27<sup>th</sup> April 2015, made in Nairobi HCSC No. 3169 of 2014, showing that she was the personal representative of her late husband. There is a statement of account from HFCK, showing payments made between 1982 and 1992, both dates inclusive. There is a bundle of documents, inclusive of correspondence, to show that her late husband was the buyer and the loanee. There are also documents bearing the names of the two, the deceased herein and the late husband of the protestor. There is also a bundle of pay-in slips and statements of accounts in the sole name of the late husband of the protestor, while some of the documents bear their joint names. There are also documents relating to the alterations made to the property, where most of the correspondence is by or to the late husband of the protestor. There is a further mortgage between the Standard Chartered Bank and the two, that is the deceased herein and the late husband of the protestor. There is the re-conveyance of mortgage between Fidelity Commercial Bank and the deceased herein and the late husband of the protestor. Documents from the Nairobi City Council on property rates are addressed to both the deceased and the late husband of the protestor.
6. There are two other affidavits of protest, sworn on 4<sup>th</sup> December 2015, by Vimal Prabha Ashwinkumar Mediratta and Ravi Prabha Satish Kent, which are complete replicas of each other. The two are sisters of the deceased herein and the late husband of the protestor. They aver that LR No. 2/314 – Original 2/55/1 Nairobi was bought by the late husband of the protestor in 1972, and that the deceased herein was invited to lend his name to the loan application form, and that he was not intended to be a purchaser, and it was on that basis that his name found its way into the title document as a joint owner of the property in question. They assert that to their knowledge the loan was repaid by the late husband of the protestor, who also maintained the same. They further aver that the deceased had always intimated an intention to eventually transfer the property to the name of the late husband of the protestor, but died before he had done so. They further assert that the deceased herein never intended to own any shares, rights or interests in the said property at all.
7. The protests prompted a response by Ranjana Behal, who is a co-administratrix of the estate with the applicant. Her affidavit was sworn on 9<sup>th</sup> June 2017. She avers to be the widow of the deceased herein. She asserts that LR No. 2/314 – Original 2/55/1 Nairobi was bought by and the title issued in the names of the deceased and the late husband of the protestor, and that the two held the same as



tenants in common in equal shares. She avers that the protestor was conceding that her late husband could not sustain the mortgage repayments, and that was how the deceased was brought in. The two borrowed from HFCK. She states that the property was initially rented to a tenant, and at expiry of the tenancy, the two moved in, on the understanding that the late husband of the protestor would take care of the loan repayments, while the deceased footed the household expenses, which constituted his contribution to the purchase price. The family of the deceased subsequently moved out of the premises on health grounds, with respect to one of their children, into rented premises. During that time the late husband of the protestor was to meet the loan repayment alone, as it was his family that was enjoying the premises exclusively. Eventually the loan was cleared in 1992. It is averred that in 1995, the late husband of the protestor needed money for his business, and a loan was taken out in the names of the two brothers, on the understanding that it was the company or business of the late husband of the protestor to repay the loan.

8. There is also an affidavit by Aman Behal, sworn on 2<sup>nd</sup> June 2017. He mentions an earlier one allegedly sworn on 4<sup>th</sup> December 2015, but I have not seen it in the bundle filed on 9<sup>th</sup> December 2015, which only carries the affidavits of Rajni Behal, Vimal Prabha Ashwinkumar Mediratta and Ravi Prabha Satish Kent. The affidavit sworn on 22<sup>nd</sup> June 2017 is titled “further affidavit.” It is in response to the affidavits of Alok Pradeep Kumar Behal and Ranjana Behal, sworn on 8<sup>th</sup> May 2017 and 9<sup>th</sup> June 2017, respectively. He avers that the assertion that the deceased herein had been contributing Kshs. 1, 000.00, towards maintenance, household expenses, utility bills, and so forth, was fallacious and misguided. He asserts that his late father, Vijay Behal, paid the mortgage single-handedly, inclusive of payments for government and municipal taxes, utility bills and household provisions.
9. Ranjana Behal swore a further affidavit on 28<sup>th</sup> June 2017. She avers that the deceased used to make monthly contributions to the loan payments, and he often did so through his brother, the late husband of the protestor. She avers that the documents attached, on government and municipal taxes, were not supported by any invoices, bank statements and cheque copies. It is further asserted that there was no evidence that the payments related to LR No. 2/314 – Original 2/55/1 Nairobi or the companies that were allegedly associated with the late husband of the protestor. She asserts that the two brothers, the deceased herein and the late husband of the protestor, were tenants in common with respect to LR No. 2/314 – Original 2/55/1 Nairobi, and that the deceased never conveyed his share in any manner or form to the late husband of the protestor.
10. Ravi Prabha Satish Kent filed another affidavit of protest, sworn on 27<sup>th</sup> June 2017, which is an exact replica of her affidavit sworn on 4<sup>th</sup> December 2015, and filed herein on 9<sup>th</sup> December 2015. I shall, therefore, not recite the contents of the said affidavit.
11. Directions on the disposal of the application, dated 24<sup>th</sup> June 2015, were given on 9<sup>th</sup> May 2017. The application was to be disposed of by way of affidavit and oral evidence.
12. The matter commenced with the first witness for the protestor, that is to say Ravi Prabha Satish Kent, taking the witness stand. She was a sister of the deceased herein and the late husband of the protestor. She averred that she was aware of the decision of the late husband of the protestor to buy a house. She stated that his salary was not adequate to meet the purchase price, they all decided to assist him. She asserted that the property wholly belonged to the late husband of the protestor. She stated that the late husband of the protestor looked for the house, and that they knew that the house belonged to him, and the deceased herein contributed nothing towards its purchase. During cross-examination, she stated that she had lived in both Kenya and the United Kingdom at different times. She stated that her brothers moved into the house in 1972, and she lived with them in the house for a while. She asserted that she was present when the two discussed about the acquisition of the house. The deceased then got married in 1977 to the administratrix, and lived with her in the disputed property. She averred that the



house was financed from the salary of the late husband of the protestor, and that neither her salary nor that of the deceased were adequate to finance the same. She further stated that she and the deceased did not contribute to the purchase of the property. She explained that the name of the deceased ended up in the mortgage account with HFCK jointly with the late husband of the deceased as the salary of the late husband of the deceased was not sufficient. She said that the same was done out of love and trust, but there was no arrangement for the deceased to make payments to the loan account. She conceded that the title was in the name of both the deceased herein and the late husband of the protestor, as tenants in common. She said that the deceased was not earning enough to be considered as a co-buyer, for although he was working and earning a salary, he did not have a reliable job. She stated that his role was to add his name to the mortgage to enable the late husband of the protestor get the loan, but he did not contribute any money to the purchase. She stated that she married in 1973, and moved out of the house, leaving the two in occupation, after which she was not privy to any discussions between them over the property. She stated that she donated her kidney to the deceased in 2001, during which occasion the deceased informed her that the property belonged to the late husband of the protestor. She further said that she did not give her kidney to the deceased as a condition for the for him to give up his share in the house.

13. She was followed to the witness stand by the protestor, Rajni Behal. She described her late husband as the elder brother of the deceased. She stated that she began living in the house in 1972, after she got married, and found the deceased living there, but he was still single. He later got married and brought his wife to the house. She stated that the administrator, Alok, was born in the house. She added that the family of the deceased lived in that house until 1981, when it moved out, ostensibly on grounds that the deceased had stabilized enough to maintain his family elsewhere. Renovations were done on the property in 1981, and the deceased did not raise any objections. She asserted that she owned the property after the death of her husband, even though the same was still registered in the names of the two late brothers. She testified that the deceased was included in the mortgage to enable her late husband qualify for the loan, but it was her late husband who made all the loan repayments. She asserted that the deceased did not contribute to the purchase price, not even the Kshs. 1,000.00 amount that was being alleged by the administrators. She asserted that the deceased was not earning much, and did not have a steady job. She further asserted that the deceased and their sister were dependent on her late husband for maintenance. She said that the deceased held a half-share to the property, and had expressed an intention to transfers the said share to her late husband. She asserted that there never was any agreement that the deceased would meet the household expenses while her late husband repaid the mortgage. She asserted that the property belonged to her late husband alone, although the title documents indicated that they were tenants in common, arguing that that registration was done in trust.
14. Aman Behal followed. He was a son of the protestor by her late husband, Vijay Behal, and a nephew of the deceased. He testified that the deceased made no contributions to the loan repayment, He stated that although the property was bought before he was born, he was aware of the circumstances surrounding its purchase. He said that it was his late father who told him that he was the one who fully paid for the house. He said that he was not privy to the discussions before the house was bought, but conceded that it was registered in the names of both the deceased had his late father. He stated that he was not born in the house but he lived in it as a family home. He stated that the family of the deceased lived in the house for a couple of years, but they left, and moved into rented premises.
15. On the side of the administrators, it was the administratrix, Ranjana Behal who took the witness stand first. She testified to have married the deceased in 1977, and that before then she did not know where he lived. After marrying her, he took her to the disputed property, where they lived with the family of the protestor. She asserted that the deceased was entitled to half-share of the disputed property. She



said that she never heard the deceased say that he intended to transfer his share to his brother, the late husband of the protestor. During cross-examination, she stated that as at the date of her marriage, she did not know who was paying the mortgage, nor who paid for the water bills and other utilities. She said that her husband was a freelancer in the publishing industry, but she did not know how much he earned from those efforts. She stated that her son was born in the disputed house in 1979. As he was asthmatic, they were forced to move out of the house, to one which was more aerated. She stated that the deceased had told her that he had contributed to the price of the property, through payments of Kshs. 3, 000.00 to the late husband of the protestor, which were meant to cater for the running of the house, in terms of foodstuffs, rations, and others. She said that she was not aware whether the deceased contributed any money to settle the initial loan to pay for the house in 1972, as she was not in the picture then.

16. The administrator followed. He testified that he was the eldest son of the deceased. He stated that the deceased was survived by four individuals, being himself, the widow and two others sons. He said that he did not know the amount of deposit the deceased made towards the purchase of the property although the deceased had told him that he did contribute by making a deposit. He said he had no evidence to support that assertion. He said that he did not know what the deceased was doing in 1972, and whether he was working. He also said that he did not know whether he was making monthly instalments to HFCK. During cross-examination, he stated that the administratrix had said in her affidavit that it was the late husband of the protestor who was paying the monthly instalments. He confirmed that the loan application was made by the late husband of the protestor, and so was the confidential questionnaire, and a bundle of correspondence done by the late husband of the protestor on the loan. He testified that the family of the late husband of the protestor had been in continuous occupation of the property since its purchase in 1972, and were maintaining it, but he would not commit on who was paying rates and land rents for the property. He said that he had no documents to show whether his father might have paid land rents and rates, and insurance for the property. He said that there was a remortgage, taken by the two brothers, but he could not tell who repaid it. He said that he did not abandon his studies in South Africa for lack of fees, instead explaining that he came back after his father fell ill. He and his brother thereafter catered for his treatment in India.
17. At the close of the oral hearings, directions were given for filing of written submissions, and both sides did file their respective written submissions, complete with bundles of authorities. I have read through them, and noted the arguments.
18. The cause herein relates to the estate of Pradeep Behal, the deceased herein. From the recorded evidence, he was survived by a widow, Ranjana Behal, and three sons: Alok, Akhil and Amish. He was said to have died possessed of LR No. 27314 – Original No. 27551 Nairobi. The dispute in this matter is not about the survivors of the deceased, but whether LR No. 27314 – Original No. 27551 Nairobi is an asset in the estate of the deceased herein, and whether it is available for distribution as a property in the said estate.
19. The most important factors in distribution of an intestate estate, at confirmation, are two. One, the persons that have been identified as surviving the deceased; and, two, the property, belonging to the deceased, and which is available for distribution amongst the persons identified as survivors. Where it is established that there was property that the deceased died possessed of, then that would be what would be available for distribution amongst his survivors. If it is established that he died possessed of no assets, then there would be nothing to distribute. Consequently, the administrators have an obligation, at confirmation of grant, to demonstrate to the court that the deceased had been survived by ascertainable individuals, and that he had ascertainable property, which was available for distribution amongst the



ascertained survivors. That is what the proviso to section 71(2) of the [Law of Succession Act](#), Cap 160, Laws of Kenya, and Rule 40(4) of the [Probate and Administration Rules](#) require.

20. The question that I have then to answer is whether the administrators herein have satisfied the proviso to section 71(2) of the [Law of Succession Act](#) and Rule 40(4) of the [Probate and Administration Rules](#), by properly ascertaining the survivors of the deceased and establishing whether the deceased died possessed of property which would be available for distribution. In the instant case, as stated above, there is no dispute on who the survivors of the deceased were, the dispute is around whether the property, said to belong to the estate of the deceased, actually belongs to the estate.
21. There is a protest to the inclusion of that property in the estate of the deceased, and the proposal to have it distributed as part of that estate. That challenge is mounted by a widow of a brother of the deceased. The property in question, which is listed as the sole asset of the estate, happens to be registered in the names of the two brothers, the deceased herein and the late husband of the protestor. Although the administrators have listed the property as if it wholly belonged to the deceased, their case is that he was entitled to half-share of it, and they appear to say that the two were registered as tenants in common. The protestor on the other hand, concedes to the joint or common tenancy, but argues that the intention of the joint registration was not to confer any benefits or rights over the property to the deceased herein, but rather he was intended to hold the property in trust for her late husband, and that the entire property was an asset in the estate of her late husband, and not that of the deceased herein. The question then should be, to whom does that property belong, that is to say LR No. 27314 – Original No. 27551 Nairobi, as between the estate of the deceased herein and the estate of his late brother, the husband of the protestor, Vijay Behal. Is it wholly an asset in the estate herein, or is it wholly an asset in the estate of Vijay Behal, or partly an asset in both estates? Before any distribution is undertaken, that question must be answered first. It is an issue of ownership of the asset as between the two estates.
22. The question that faces me then is whether I should attempt to find an answer to that question. Both sides have filed documents and gave oral testimonies to breathe life to their respective filings. They have also filed detailed written submissions, complete with extensive judicial authorities, to support their arguments. From that material, I am expected to find an answer to that question. However, I doubt whether I should venture to answer that question.
23. Firstly, the proceedings before me are with respect to confirmation of grant under section 71 of the [Law of Succession Act](#) and Rules 40 and 41 of the [Probate and Administration Rules](#). Under Rule 41(3) of the Probate and Administration Rules, the court seized of a confirmation application should be wary of proceeding, within the same confirmation application, to determine questions that relate to disputed ownership of some of the assets placed before it for distribution. The said Rule provides that any such questions ought to be placed before another court, in separate proceedings, ostensibly limited to the question of ownership. It is suggested that such proceedings could be mounted under Order 37 of the [Civil Procedure Rules](#). There is ample case law on Rule 41(3) of the [Probate and Administration Rules](#). See *In Re The Estate of Kipyego Chepsiror Kolil* [2007] eKLR (Ibrahim J), *Everline Atiang' Wanyama vs. William Osayo Siroko & another* [2014] eKLR (Tuiyott J), *In Re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR (Musyoka J), *In re Estate of Muthiani Mutule (Deceased)* [2017] eKLR (C. Kariuki J), *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR (Gikonyo J), *In re Estate of Njagi Njeru (Deceased)* [2018] eKLR (Muchemi J), *In re Estate of Kariuki Nggunyu (Deceased)* [2019] eKLR (Ngaah J), *In re Estate of Henry Njau Ngotho (Deceased)* [2020] eKLR (Muchelule J) and *In re Estate of M'guatu M'itania (Deceased)* [2020] eKLR (Gikonyo J).



24. Rule 41(3) of the [Probate and Administration Rules](#) states as follows:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subjected to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the [Civil Procedure Rules](#), and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

25. In *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim J), it was stated that succession proceedings were not the appropriate way to challenge title of the deceased to assets said to comprise his estate, and that a claim that such assets were subject to a trust in favour of the claimant ought to be subjected to separate proceedings. It was further stated that in such claim the claimants have to prove the trust, and thereafter seek revocation of the title or partition, in proceedings which require declaratory orders of existence of the trust. It was emphasised that such was not the function of a probate court or of a succession cause, where the claimant was neither a beneficiary or dependant of the deceased, and that succession proceedings were not appropriate for resolution of seriously contested claims against the estate by third parties. The court finally held that it had no jurisdiction, within the context of the succession proceedings, to determine the claim of a trust or to grant relief related to it. See also *In the Estate of Richard Karanja Javan* [2014] eKLR (Musyoka J), *In re Estate of Mbai Wainaina (Deceased)* [2015] eKLR (Musyoka J), *In re Estate of James Muiruri Kamau (Deceased)* [2018] eKLR (Ndung'u J) and *In re Estate of Henry Njau Ngotho (Deceased)* [2020] eKLR (Muchelule J).

26. Secondly, the dispute herein turns on such issues as ownership of land and trusts over land. The High Court, sitting as a probate court, is not a land court, in the sense of a court vested with jurisdiction to determine disputes over such issues. That jurisdiction is vested in the Environment and Land Court, by dint of Article 162(2) of [the Constitution](#), and the vesting is exclusive, for Article 165(5) of [the Constitution](#) is emphatic that the High Court shall have no jurisdiction over matters the subject of Article 162(2) of [the Constitution](#). Going by those provisions, it ought to be the case that I have no jurisdiction, sitting as a Judge of the High Court, to determine the dispute between the estate of the deceased herein and that of his late brother, over the ownership of LR No. 27314 – Original No. 27551 Nairobi, as that jurisdiction falls exclusively with the Environment and Land Court.

27. The relevant portions of Articles 162 and 165 state as follows:

“162.

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
  - (a) ...
  - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2) ...



- (5) The High Court shall not have jurisdiction in respect of matters —
- (a) ...
  - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

28. Parliament passed the *Environment and Land Court Act*, No. 19 of 2011, in compliance with Article 162(2) (3) of *the Constitution*, which brought into existence the Environment and Land Court. The object of the said Act is set out in its preamble, which states as follows:

“... to give effect to Article 162(2)(b) of *the Constitution* ; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes.”

29. The scope and jurisdiction of the Environment and Land Court is set out in section 13 of the *Environment and Land Court Act*, which states as follows:

“ 13. Jurisdiction of the Court

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes –
  - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - (b) relating to compulsory acquisition of land;
  - (c) relating to land administration and management;
  - (d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - (e) any other dispute relating to environment and land.”



30. I addressed the issue relating to the dispute herein, and the best way for the parties to approach the matter, in the ruling that I delivered herein on 8<sup>th</sup> March 2013, whereat I said:

“ 10. ... Ideally, the petitioner in HCSC No. 2163 of 2012 should have moved the Civil or Land court, in a suit against the estate of the deceased, for a determination of the said petitioner’s interest in the subject asset. He is not a survivor of the deceased and he should not be party to the succession cause as heir or beneficiary.”

31. I also stated that there was a second option. I wrote:

“ 11. The other option open to the said petitioner is to wait for the grant to be made to the petitioner in HCSC No. 465 of 2013, and then at the confirmation stage move to protest to the proposed distribution on the basis that the estate property belongs to him. An oral hearing would then be conducted to determine the matter.”

32. Of the two options, the late husband of the protestor opted for the second option, rather the first one. Of the two, the first was more direct, for the Environment and Land Court would have gone on to determine once and for all, on the matter of the ownership of the said property as between the two estates. If the outcome was that the property wholly belonged to the late husband of the protestor, then the same would not be available for distribution in the estate herein. However, if the finding was that the two were co-tenants or held the property as a tenancy in common in equal shares, or proportionate to the contribution of each to the acquisition of the property, then the portion that would have been found to accrue to the deceased would form part of his estate for distribution in his estate, while the other part would pass to the late husband of the protestor, for devolution in his estate.

33. The late husband of the protestor, however, opted for the second option, which is a longer route to determination of the question, primarily because the High Court has no jurisdiction, for the reasons given above, to determine questions relating to ownership of property. It would mean that after taking evidence, and establishing that there was a question as to the identity, share or estate of any person claiming to be beneficially entitled in the estate, or any condition or qualification attaching to such identity, share or estate; and such question cannot be conveniently determined at the confirmation stage, the court ought to appropriate and set aside the asset in question to abide determination of the question in separate proceedings. That is the purport of Rule 41(3) of the [Probate and Administration Rules](#).

34. The issue that arises herein relates to ownership of the sole property of the estate. It is an issue that cannot be conveniently determined in these confirmation proceedings. Firstly, on account of lack of jurisdiction on the part of the High Court. Secondly, as the confirmation proceedings, and probate proceedings in general, are not suited for determination of such questions, for they are tailored only to address questions relating to distribution of estates, not questions of ownership. Thirdly, whenever a court deals with these issues in probate proceedings, the outcome would be that one of the parties would be shortchanged, as the evidential burden would be lower, compared with circumstances where the proceedings are properly brought under the Civil Procedure Act and Civil Procedure Rules, in proceedings commenced either by plaint or originating summons, where the only issue for determination is ownership of the property in question. The question, therefore, cannot be dealt with conveniently in these proceedings, for these reasons, and ought, under Rule 41(3), to be placed before another court, in separate proceedings, in the manner indicated above.



35. Issues around how the property was acquired, the intentions of the parties, whether the tenancy was joint or in common, are questions that fall squarely within the mandate and jurisdiction of the Environment and Land Court, by virtue of Article 162(2) of *the Constitution*, as outlined above, and also by dint of sections 2 and 101 of the *Land Registration Act*, No. 3 of 2012, and sections 2 and 150, of the *Land Act*, No. 6 of 2012, which govern and regulate all matters relating to land, where “court,” for the purpose of those statutes is the Environment and Land Court, and that actions, disputes and questions relating to anything governed or regulated by those provisions shall be placed before that court for determination.
36. The *Land Registration Act* states that position, in the following terms:
- “Interpretation.
2. In this Act, unless the context otherwise requires—
- “Court” means the Environment and Land Court established under the *Environment and Land Court Act*, 2011, No. 19 of 2011:
- ...
- Jurisdiction of court.
101. The Environment and Land Court established by the *Environment and Land Court Act*, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”
37. While the *Land Act* states as follows:
- “2. Interpretation
- In this Act, unless the context otherwise requires—
- “ Court” means the Environment and Land Court established under the *Environment and Land Court Act*, 2011 (No. 19 of 2011); ...
150. Jurisdiction of the Environment and Land Court
- The Environment and Land Court established in the *Environment and Land Court Act* and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”
38. I believe that I have said enough to demonstrate that I cannot, at this stage, distribute the property herein, for the reasons given above. Consequently, I shall invoke section 71(2)(d) of the *Law of Succession Act*, and postpone determination of the confirmation application, dated 24<sup>th</sup> June 2015, and appropriate and set aside LR No. 27314 – Original No. 27551 Nairobi, to abide determination of the question of ownership or trust in separate proceedings, that the parties hereto ought to commence , either by way of an originating summons under Order 37 rule 1 or by way of plaint, before the Environment and Land Court, or any other court with jurisdiction. I cannot confirm the grant at this stage as there is no other asset to be distributed. It is so ordered.

**PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF MARCH 2022**

**W. MUSYOKA**



**JUDGE**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL  
2022**

**A.O. MUCHELULE**

**JUDGE\_**

Ms. Charity Mwangi, Court Assistant.

Mr. Ng'ang'a, instructed by Messrs. Taibjee & Bhalla, Advocates, for the petitioner.

Mr. Khan, instructed by Tariq Khan Associates, Advocates, for the protestor.

