



**In re Estate of Francis Mutua Kyalo (Deceased) (Probate & Administration
77 of 2009) [2022] KEHC 15736 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PROBATE & ADMINISTRATION 77 OF 2009**

MW MUIGAI, J

NOVEMBER 22, 2022

**IN THE MATTER OF THE ESTATE OF FRANCIS MUTUA KYALO
(DECEASED)**

BETWEEN

GAUDENSIA MWIKALI MUTUA 1ST PETITIONER

FRANCIS MUEMA KATIKU 2ND PETITIONER

AND

KIMEU MUTUNGA OBJECTOR

JUDGMENT

Court Record

1. Francis Mutua Munyao died intestate on January 27, 2020 vide Death Certificate serial No xxxx.
2. Gaudensia Mwikali Mutua and Francis Muema Katiku petitioned for letters of administration and annexed the following documents:
 - a. The Death Certificate of Death Certificate No xxxx – Francis Mutua Munyao who died on June 29, 2008 aged 66 years issued at Machakos.
 - b. The Chief’s letter dated October 29, 2008 confirming the list of beneficiaries left behind by the deceased.
3. The Deceased left the following heirs/beneficiaries surviving him:
 - i. Gaudensia Mwikali Mutua – daughter
 - ii. David Mutunga Mutua – son



4. The Deceased left behind property known as follows;
 - i. Kalama/Kiitini/32
 - ii. Machakos/Kiandani/16
 - iii. Post Bank Account
 - iv. K-Rep Bank Account
5. The Grant of letters of Administration was issued to Gaudensia Mwikali Mutua and Francis Muema Katiku on May 18, 2009.
6. The Petitioners filed their summons dated July 31, 2009 under certificate of urgency seeking the following prayers:
 - a. That this Court issue a preservative order directing the deceased's family members and any interested parties to maintain the *status quo* of the deceased's estate as at the time of the deceased's death pending the hearing and determination of this application.
 - b. That this Court to issue an Order prohibiting and restricting any use, development, damage and/or disposal of the estates by John Kimeu Mutunga pending the hearing of the cause herein and final distribution of the estate.
7. Kimeu Mutunga the Objector herein filed his replying affidavit sworn on October 3, 2009 deposing that he is a creditor to the estate of the deceased in that in or about the year 2004 he bought a portion of the said land measuring 84 metres (width) x160metres (length) from the deceased at an agreed purchase price of Kshs 212,500/-; that the said portion was marked out for him by the deceased and elders witnessed the sale. A sisal boundary was planted accordingly. The agreement between the deceased and the Objector was that the said purchase price be paid in installments; that upon the death of the deceased herein Gaudensia Mwikali Mutua, the first petitioner/applicant and the only child of the deceased, refused to accept the balance of the purchase price and asked him to leave the said land; that he had already filed citation proceedings against the Petitioner being Succession Cause No 793 of 2008.
8. Justice HPG Waweru in his ruling delivered on 21st day of May, 2010 in relation to the Petitioner's Summons dated July 31, 2009 stated as follows;-

“..... I hold the view that granting any order as sought in the preset application will be inimical to the main duty of a succession Court to expeditiously determine the persons beneficially entitled to the estate and their respective shares thereof. The application is refused with costs to the Creditor.....”
9. Summons for confirmation of grant was filed on February 28, 2011 together with the Affidavit in Support sworn by Gaudensia Mwikali Mutua on February 21, 2011.
10. Affidavit in Protest to confirmation of Grant sworn by Kimeu Mutunga on November 9, 2012 was filed on 9/11/2012.
11. Reply to Protest by the 2nd Petitioner sworn on January 7, 2013 was filed in Court on January 15, 2013.
12. On 7/09/2016 the Court directed that the Affidavit of protest filed by Kimeu Mutunga the objector herein to be heard vide oral evidence. The said hearing commenced on April 26, 2017 before Kemei, J.



Evidence

Protestor's Case

13. OB Pw1- Kimeu Mutunga told the Court that the deceased herein was his friend. He had filed a Protest herein together with several sworn affidavits in which he had registered his protest towards the distribution of the deceased's estate. He had purchased portion of land from the deceased to wit Kalama/Kiitini/32. The sale started on 4/01/2004 when one Philip Nzuki Munyao visited him and claimed that the deceased wanted to use the proceeds to take his wife Annah and daughter Gaudensia for treatment. The deceased showed him the portion he intended to sell. A sketch of the measurements was made. The width was 84 human steps while the length was 160 human steps. The boundary marks were made. A sale agreement was eventually entered on 9/1/2004. The agreed purchase price was Kshs 212,500/-. On that date he paid 41,100/- and the balance was to be made as and when the seller needed money. The agreement was reduced into writing. Francis Mutua Munyao, Philip Nzuki Munyao, Pius Maingi Nguu, and Eunice Mulekyo Kimeu witnessed the sale. Philip Nzuki Munyao was the deceased's witness while the rest were his witnesses. A sisal boundary was fixed. The agreement was written in Kikamba language but the issue of the money written in English language. He made subsequent payments as follows; 8/12/2004 – Kshs 20,000/- and 6/08/2007 – Kshs 30,000/-.
14. The deceased later passed on. He had already put him into possession of the land which he started working on it. The sale agreement and translation thereof was attached as OB Exhibit 1A & B -. After making the last payment of 30,000/- the deceased did not demand for further payment. He later died. By that time he had made payments of 92,500/- since he paid to the deceased 91,100/- and another 1,400/- to Philip Nzuki on behalf of deceased. Before deceased died he did not refuse to pay money as demanded. All this time he remained on the land and they had no disputes. The deceased's wife Annah Ngina Mutua died a year earlier before the deceased and he paid their debts of 5,000/- due to our welfare group called Kamueka self-help group. The portion of land contained an abandoned dwelling structure belonging to the deceased as he had already moved to Machakos region. The deceased was buried on a separate portion. The Objector parcel is 621 while that of the deceased is 32. Deceased had one daughter Gaudensia Mwikali Mutua. After the demise of deceased, the said Gaudensia demanded that he moved out of the land. The Petitioner sought assistance of the area assistant chief. She later took her complaint to Machakos Land Tribunal - OB Exhibit 2 – Machakos Land Disputes Tribunal Form (86/2008) is attached. By this time the deceased was already dead. The ground of complaint was that the land had been sold without consent from family members. She signed the complaint. She was not saying that the Objector had refused to pay purchase price. The area Chief Martin Mutisya later wrote a letter to confirm that he had bought part of deceased's land.
15. Later the Objector filed a citation at Machakos High Court being Citation Cause No 743 of 2008. Gaudensia refused to take up letters of administration and the court granted the Objector leave to file Petition No 437 of 2009. Petition 437 of 2009 and annexures. Later he received a letter from Gaudensia's lawyers that she had already filed a separate succession cause in respect to the estate of deceased being the succession cause herein (Machakos Succ No 77/2009). Upon receipt of that letter, he then filed his protest herein. This court ordered that petitioners herein should not harass him on the land as this case is being heard. They bought land from the deceased herein and he is the one who put him into possession. The deceased did not at any time harass the Objector before he died and he was staying peacefully.
16. The land was registered in the names of deceased. The 1st petitioner did not demand any payment from him. The balance outstanding was 108,000/- which he is still willing to pay the same to the administrators. The 2nd Petitioner is a nephew of the deceased. He is not a beneficiary of the estate.



- The house on the land was an abandoned structure and was part of the land sold. It was Philip Nzuki who later removed the iron sheets when the structure collapsed. The land was sold including what was contained thereon.
17. On Cross – examination by Mr Kamolo he reiterated that he bought the land as per the agreement. The parcel number is not indicated on the document. The map was a sketch one. It was not true that the only payment he made was for Ksh 41,000/-. The deceased had moved out and was living in Machakos. They had not gone to the Land Board. He had not completed the payments. He only bought a portion of the land. The 1st Petitioner was aware of the sale. It is not true that he blocked burial of the deceased on the land. The Objector carried out developments on the land. There was a tribunal case. He entered land in 2004 and deceased died in 2008. That he is ready to pay the balance as he will not be willing to part with the land. He filed a citation as he had not known that the 1st Petitioner had filed this cause. He did not forge signatures.
 18. On re-examination he stated that Philip Nzuki is a brother of deceased. He stated that he made payments on three occasions totalling to Kshs 92,500/- leaving balances due. It is not true that he made forgeries. The land was full of shrubs which he cleared. He has since planted trees thereon as well as grevillea for timber. The injunction sought by petitioners against him was dismissed.
 19. Objector Witness 2 Pius Maingi Nguu stated that Gaudensia Mwikali Mutua is a daughter of the deceased. While the second petitioner is also a neighbour and a nephew to the deceased. That he witnessed a sale agreement between deceased and objector herein. The sale agreement was also witnessed by deceased's brother Philip Nzuki Munyao and one Eunice Mulekyo Kimeu who was deceased's wife. The subject was land and the price was 212,500/-. The deceased informed the Objector that he was to be collecting the money as and when he needed it. He received a deposit of 41,000/- that day. The portion of the land sold was measured by use of human steps. They comprised of 84 steps step (width) and 160 steps (length). They then marked the boundaries by planting sisal plants. The deceased handed over portion to the buyer. The buyer paid them 1,500/- as labour for fixing the boundary features. He and Philip and deceased's wife shared the money equally.
 20. The deceased promised to call them later once he had received all his money but he did not do so as he later passed on . He cannot tell if he had received all the purchase price. There was no dispute by then over the purchase price. The buyer cleared the bushy land and developed it by planting trees and crops. The trees and fruit trees are many. He also grew crops. He had used it since that day. The deceased had an old structure which had been abandoned on the land. He was not residing there. Later deceased's brother Philip Nzuki Munyao took away the iron sheets. He do not know the parcel number. Deceased did not have another parcel in the area but he knew the portion sold.
 21. On Cross – examination by Mr Kamolo for the Petitioner he stated that he signed the agreement. He did not see his signature on the particular page. He did not see the draft drawing of sketch. He only witnessed the payment of 41,000/-. The mode of payments is not indicated in the agreement. He did not witness the payment of 1,400/- but knows of 1,500/- being labour for fixing boundaries. The deceased's wife was present. The parcel number is not indicated in the agreement. He was present when the surveyor visited the land in question. The deceased had one daughter but he learnt he adopted a child. Deceased was not burried on the land since he had already sold it. He did not witness payment of remaining amount. The buyer had already taken possession of the land and developed it. The Chief could not stop the buyer from cutting trees as he had already taken possession long time ago.
 22. On Re-examination he reiterated that the agreement was a home made one. He cannot tell if the deceased and buyer had agreed on size of land before he came onto the scene. It was the buyer who was writing the agreement and they all signed on 9/01/2004. The agreement did not state the exact amount



to be paid in installments. They were to be called back by the deceased to confirm receipt of the whole amount. The surveyor visited the land in question. The first time surveyor visited, the deceased's family was absent and he went away. According to his own view it is the large portion that remained which was not sold. He cannot tell the exact size of the whole land. There was a building which had appeared to have been in bad shape and abandoned. The objector cleared the bushes and planted trees and crops. The deceased then was living in Machakos. At the time of deceased's death, the objector had already developed the land. He was called to go and give his version to the Chief and he found the petitioners wanted to refund the purchase price to objector but objector refused and asked them to collect the balance. The Deceased had no problem with objectors during his lifetime but issues cropped up from Petitioners one year after the death of deceased. The Objector has kept to his boundary to date and the land should belong to him.

23. Objector Witness 3 Solomon Mutua stated that he is a surveyor at the Machakos County office. He visited parcel number Kalama/Kiitini/32 on 19/4/2016 situated in Kalama behind Muumandu. He was accompanied by the Objector and Petitioner, the area assistant Chief plus two Police Officers. He had been tasked to conduct subdivision. However, a disagreement arose over the size of the acreages. The Objector claimed that he had bought the land measuring 160 x 85 meters equivalent to 3.36 acres while Petitioner claimed he had sold 84 x 84 equivalent to 1.73 acres. The land the objector is occupying is 2.94 acres and is less than what he says he bought while Petitioner maintains that it is more than what he had sold. The Protestor was claiming for more land. He learnt that the petitioner had sold part of the remaining land to other people. He did not see any building on the Protestor's portion but it was being farmed. The exercise was peaceful. However, he could not access the portion allegedly sold out. There was existing life fence marking the boundaries.
24. On Cross Examination by Mr Kamolo for the Petitioner he stated that there was a Court order authorizing him to visit the land and subdivide it. He found the land already demarcated. The assistant Chief of Kiitini was present during the exercise. There were no names in his report. He had no other documents apart from the court order. He could not recall if the court order had specific measurements for him as a guide. He could not tell the measurements as per the sale agreement. He did not see a building on the farm. The size bought did not reflect to the area on the ground. There could have been houses nearby. He had no information that the petitioners relatives resided near the land.
25. On Re-examination he reiterated that the neighbours and other onlookers were present. The protestor claimed that he had bought the land and gave sizes while Petitioners claimed that a lesser size had been purchased. The issue of measurements was given by the parties. There was no building at the farm. It is not true that his report is/was one sided.

Petitioner/Respondent's Case

26. Pw1 Francis Muema Katiku stated that Francis Mutua Munyao (the deceased herein) was his uncle from his father's side. That the deceased had a son and a daughter who are now adults. At the time of filing this petition in the year 2009 the said son was a minor. The only property of the said deceased was Kalama/Kiitini/32. As an Administrator he knew that the deceased sold a portion of the estate to one John Kimeu Mutunga. There was a big delay of completion of the purchase price and only a deposit was paid. Philip Nzuki Munyao and Maingi Nguu witnessed payment of Kshs 41,000/- as deposit but not the whole purchase price. The plot measurement was 84M². The Objector claimed 160x84m width. There is an agreement made on January, 2004. The deceased died in the year 2008. From 2004 – 2008 after deposit was paid no other payments were made and they needed money to pay medical bills, their children sold another piece of land. There was a land case at the Land Control Board – Land Disputes Tribunal but was not completed as the deceased passed on. The Land Board Consent was not



given for the sale. The deceased son – David Mutunga was legally adopted. The deceased’s daughter objected to the adopted son of the deceased to be disinherited. The children of the deceased have no other place to live and the land was not sold as the sale was not completed. The sketch plan drawn by the Objector shows the house/home of Nyumba ya Mutua. The deceased’s son will be desolate, he is still in school – 3rd Year university student and they are willing to refund the deposit to the Objector.

27. On cross – examination by B N Nzei for the Objector he stated that the deceased herein had 2 children – David Mutua (2nd born) and Gaudensia Mwikali Mutua (1st born). Currently he does not know the whereabouts of Gaudensia. He is only in touch with David Mutua. David Mutua is now an adult aged about 23 years. The said David has not given him written authority to present him in this case. He has told the Court what he knows. He has been authorized verbally by the said David Mutua and has no written document. The Objector is/was defiance of the Police and Chief’s Orders. These proceedings were initiated by Gaudensia Mwikali Mutua at Land Tribunal after the deceased’s demise. Gaudensia and Pw1 were administrators of the deceased’s estate. Gaudensia was challenging the sale Agreement and the Objector was on the demolition. The Objector did not give final part of payment and it was not confirmed when and how much was paid. It is not indicated in the Agreement for payment of the purchase price. Before the deceased died, he was complaining about the payment of balance of the purchase price. There was a lot of bitterness and disagreement on the lack of completion of payment. He did not have any evidence showing that the son refused to give consent. The measurements of the Objector differed with measurements of the Surveyor’s. that he is willing to refund the deposit of Kshs 41,000/- paid to the deceased. That the Objector is/was to blame due to his failure to complete payment of the purchase price. That he started cutting trees immediately the deceased was buried.
28. On re-examination he stated that there was a Ruling by HPG Waweru, J delivered on May 18, 2010 when the Objector claimed to have paid Kshs 100,000/-. In the Protest the Objector said he had paid a substantial amount but not the entire amount. That he will refund the deposit paid. Since he is an Administrator of the estate he does not need authority as his interest is to protect the children of the deceased. There is no waiver of the right of inheritance by any child. That the Objector came to the land after the deceased’s death. The land was not sold as the consent from the Land Board was not obtained. The Objector uses the land by grazing, cultivating and burning charcoal.

Written Submissions

Objector’s submissions dated September 22, 2022

29. The Objectors raised two issues for determination;-
- i. Whether the Objectors’s claim to the purchased portion of Land Parcel No Kalama/kiitini/32 is valid?
 - ii. Is the Objectors claim to the purchased portion of Land Parcel No Kalama/kiitini/32 valid?
30. The *Law of Succession Act* under Section 3 proffers an astute definition as to the meaning to the term “Free Property” it provides;
- “free property” in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated.
31. It is not in dispute that the estate fo the deceased herein comprises of a singular parcel of land - No Kalama/kiitni/32 therefore the deceased herein was free during his lifetime to dispose of the said land parcel No Kalama/kiitini/32.



32. The Objectors submitted that in or about the year 2004 he purchased a part fo land parcel No Kalama/kiitini/32 from the deceased herein. An agreement was reduced to writing. A deposit of Kshs 41,000/- paid and parties agreed that the balance be paid in installment on and as when required basis.
33. Reliance is made in the case of *Kenya Akiba Micro Financing limited -vs- Ezekiel Chebii & 14 others* [2012] eKLR where the Court stated as follows:-

“...in my view, a statement made on oath should as a mater of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.....”
34. That the assertion that the Objector’s interest in the purchased property can only be compensated in terms of the deposit and/or monies hold no water. Also the assertion that the sale did not materialize as no consent of the Land Control Board was sought it is submitted that the execution of the sale agreement between the deceased and the Objector herein and the subsequent possession, occupation and use of the same by the Objector herein immediately after purchase therefore and before transfer created a constructive trust in favour of the Objector.
35. Reliance was made in the case of *Macharia Mwangi Maina & 87 Others -Vs- Davidson Mwangi Kagiri.*
36. It is submitted that no dispute arose or ever arose before the demise of the deceased regarding the purchased portion or occupaiton thereof by the Objector.
37. In the case of *Willy Kimutai Kitilit -v- Michael Kibet* [2018] where the Court made a finding that the circumstances of each case determine whether the equitable doctrines of constructive trust and proprietary estoppel are enforceable to land subject to the Land Control Board.
38. Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Adminsitration Rules* direct that the agreement as contemplated between thte deceased and the Objector herein be performed specifically by the deceased’s administators upon his demise.

Petitioner’s Submissions

39. The deceased had acknowledged what sum can be verified and which was witnessed as Kshs.41,100/- the Protestor allegation that the balance was paid and at the same time alleges that there is a balance which himself cannot state how much cannot be a basis to be given the deceased land. The only logical conclusion is for refund of what is acknowledged and witnessed that is a sum of Kshs 41,100/-.
40. The Petitioner urge this Court to dismiss the protest and the Grant be confirmed with an order that the estate refunds what was paid by the Protestors as per paragraph 5 of the summons for confirmation of grant dated February 21, 2011.

Determination

41. The Court is to determine the question/issue whether part of Land parcel Kalama/Kiitini/32 is /or not available for distribution amongst the beneficiaries of the deceased’s estate.
42. This court notes that there are parallel and competing claims over the estate of the deceased as follows;
43. The Protestor Kimeu Mutunga claims a proprietary right over the suit property Kalama/Kiitini/32 registered in the names of the deceased as Creditor to the deceased’s estate; of 84m x 160m length of Kalama/Kiitini/32. He relied on the Succession Cause 439/2009 that he filed as Creditor citing Administrators of the deceased’s estate which was consolidated to the instant Succession cause.



44. The Protestor relied on the Sale Agreement translated from Kikamba to English; which in part reads;
- "I Mutua Munyao sold portion of land measuring 84m by 160 m to Kimeu Mutunga at a price of Ksh 212,500/-
- The amount paid was Ksh 41,000/-
- On 8/12/2004 Kimeu Mutunga paid Mutua Munyao Ksh 20,000/-
- On 6/8/2007 Kimeu Mutunga paid Mutua Munyao Ksh 30,000/-
- On 9/1/2004 Kimeu Mutunga Paid Mutua Munyao Ksh 21,100/-
- He claims he was given the sketch map by the deceased."
45. The Protestor claimed that the deceased placed him on the suit property and he has been in possession and developed the land at considerable cost and therefore the deceased's daughter/administrator should/must complete the sale by accepting the outstanding balance and cannot dishonor the sale agreement.
46. The Administrator/Respondent relied on the fact that from 2004 when the Protestor entered into an agreement for the sale of land part of Kalama/Kiitini/32 for Ksh Ksh 212,500/- admittedly, the Protestor made part payments of Ksh 41,000/- and failed to complete payment of the purchase price.
47. Secondly, the administrators sought refuge from the Chief of the area and lodged their claim with the Land Disputes Tribunal which found that the sale of the land was not with the consent of the family.
48. Thirdly, the sale /purchase of land became voidable after 6 months for failure to obtain the Land Board Consent.
49. Fourthly, the land and the house on it were bequeathed to the Child Welfare Society in trust for the adopted son of the deceased who was by then a minor.
50. The Court finds that in its exercise of jurisdiction, its mandate under Law of Succession Act is to oversee administration and distribution of the deceased's estate, by identifying the beneficiaries, appointment of administrator in intestate estates and naming executors according to the Will of the deceased, identifying the assets that comprise of the deceased's estate and if the assets are available for distribution. Where there are claims, encumbrances, debts ownership disputes, then this Court in exercise of the Law of Succession act, hives off the asset(s) with claims and disputes and distributes the rest of the deceased's estate.
51. Applied to the instant/present matter, the Protestor's claim to the part of the LR Kalama/Kiitini/32 is contested, the payment of deposit and instalments from 2004 to 2009 during the lifetime of the deceased, it is agreed that the full purchase price was not paid. The protestor took possession of the land and spent funds developing the land using it cutting trees and burning charcoal for sale instead of first or before completion of the land sale /purchase agreement making full payment. Over 10 years later, after taking over the land the Protestor demanded that the Administrator, the deceased's daughter Gaudensia accepts balance of the purchase price, when the land had/has appreciated in price and value and in exchange of being displaced. Similarly, the adopted son of the deceased is to consent to the sale of the land, a transaction which he was not a party to and give up the land where it is his only home. I find no basis in law to enforce such actions by the Protestor to the beneficiaries of the deceased's estate.



52. *In re Estate of Barrack Deya Okul (Deceased)* [2018] eKLR

“Whereas it is urged that by virtue of Section 86 of the Law of Succession Act it provides that “debts of every description enforceable at Law and ordered by or out of the estate shall be paid before any legacy.”

53. This Court takes the view that it is the Protestor who owes a debt to the estate of the deceased before any exchange of the land is contemplated. The Protestor is not a Creditor to the estate of the deceased as the sale is contested and it is confirmed only part payment was made from 2004.

54. In High Court at Chuka Succession Cause No 660 of 2015, *in the matter of the Estate of Zakaria Nthiga Matumo – Deceased*; Mabeya J relied on several cases quoted on page 4 & 5 all of which cases point to the principle that “Such a Courts sphere of inquiry is limited to ascertain what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate.” Executing decrees from other Courts is not one of the functions of the family court dealing with succession matters.

55. *In re estate of Solomon Mwangi Waweru (deceased)* [2018] eKLR the Court had this to say;

“Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator (s) of the estate and not through an objection like the one before court”

The Court went further to state thus;

“It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land court. The succession court would then proceed with the administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit”.

56. *In re Estate of Alice Mumbua Mutua (Deceased)* Succession Cause No 3142 of 2003 [2017] eKLR where Hon W Musyoka J held;

“Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.” [Emphasis added].



57. Hon Joel Ngugi J (as he then was) in *Joseph Koori Ngugi & another vs Stephen Ndichu J Mukima* [2017] eKLR stated:

"24. I am persuaded that this is the correct appreciation of the law and circumstances of this situation. I say so both for doctrinal and prudential reasons. Doctrinally, as alluded to above, a claim for an equitable interest in land is a claim against the legal owner of land and hence a dispute over ownership of the land. I am persuaded that the drafters of the Kenyan Constitution intended such questions to be determined in the ELC. The text of the Constitution and section 13 of the ELC Act seems perfectly clear to me on that question.

25. In addition, in my view, prudential reasons militate in favour of these kinds of disputes being heard at the ELC or at least in a separate suit. While I agree that the Law of Succession Act envisages a class of people beyond "traditional" beneficiaries to bring proceedings for revocation or annulment of a grant of representation in a probate cause, cases which present a straightforward challenge to the ownership of property by the Deceased present a separate question and not a probate matter. To attempt to resolve such issues of contested ownership in the context of a probate case could obfuscate the real issues and lead a Court to reach wrong or compromised conclusions. This is in part because probate proceedings are not designed for parties to be able to effectively litigate complex issues of ownership. In a separate suit, parties are better able to plead their case, go through discovery process and a fully-fledged hearing where evidence can be properly presented, contested, examined and veracity tested..." See *Re estate of P N N (Deceased)* [2017] eKLR.

58. This Court finds from the evidence on record that the Protestor's claim as purchaser of part of the deceased's estate specifically Kalama/Kiitini/32 is not borne out by the evidence on record as there was only part performance and not completion of payment of the purchase price.

59. Section 112 of the *Evidence Act*, CAP 80, which is categorical that in civil proceedings, when any fact is especially within the knowledge of any party to these proceedings, the burden of proving or disproving that fact is upon the claimant. From the averments made in his affidavit, coupled with the annexures thereto and the oral evidence on record, the only claim proved is payment of deposit to the deceased of Ksh 41,000/- for purchase of the said property. The sale was not completed since 2004 15 years on.

Disposition

1. The Court is satisfied that the suit property Kalama/Kiitini/32 belongs to the estate of the deceased and is available for distribution to the children of the deceased Gaudentia Mwikali Mutua & David Mutunga Mutua.
2. The Protest is dismissed as the Protestor admittedly failed to pay the full purchase price before settling on the land. He paid Ksh 41,000/- as deposit and other instalments outlined in the translated version of the sale agreement which payment shall be refunded by the Administrators.
3. Any claim to the title/ownership/use of land and/or any proprietary interest can be ventilated before Environment & Land Court.



**DATED, DELIVERED & SIGNED AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2022
(VIRTUAL/PHYSICAL CONFERENCE).**

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE - FOR THE PETITIONERS

B.M. NZEI - FOR THE PROTESTOR – ONLINE

GEOFFREY/PATRICK - COURT ASSISTANT(S)

