



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**SUCCESSION CAUSE NO. 141 of 2015**

**IN THE MATTER OF THE ESTATE OF ESTHER FRANCIS THOYA (Deceased)**

**TABITHA NJERI NJENGA.....PETITIONER**

**VERSUS**

**KAHINDI FRANCIS THOYA.....1<sup>ST</sup> RESPONDENT**

**KALUME FRANCIS THOYA.....2<sup>ND</sup> RESPONDENT**

**KARISA FRANCIS THOYA.....3<sup>RD</sup> RESPONDENT**

**MASUMBUKO FRANCIS THOYA.....4<sup>TH</sup> RESPONDENT**

**JUMA FRANCIS THOYA.....5<sup>TH</sup> RESPONDENT**

**REHEMA FRANCIS THOYA.....6<sup>TH</sup> RESPONDENT**

**KADZO FRANCIS THOYA.....7<sup>TH</sup> RESPONDENT**

**KANZE FRANCIS THOYA.....8<sup>TH</sup> RESPONDENT**

**SHIDA FRANCIS THOYA.....9<sup>TH</sup> RESPONDENT**

**GRACE FRANCIS THOYA.....10<sup>TH</sup> RESPONDENT**

**AND**

**HADIJA ESSAJEE BHAJEE.....CREDITOR**

**RULING**

**1. Tabitha Njeri Njenga, the Petitioner herein purchased a 1 acre portion of the piece of land known as Plot No. Kilifi/Mtwapa/991 (the property) from Esther Francis Thoya, the deceased herein and her son Kahindi Francis Thoya (Kahindi), who were the administrators of the estate of Francis Thoya Chengo the original owner of the property. The property was subdivided into various plots, for which the Petitioner paid. In spite of paying the full purchase price and obtaining all the consents, the transaction was never completed. A search of the property in 2012 revealed that the property was registered in the name of the deceased and Kahindi. The deceased died at Kidutani/Kilifi on 16.5.00. Upon her demise however, the Respondents as the children of the deceased declined to take out a grant of representation in respect of her estate. As a result, the transaction has remained incomplete.**

2. Being apprehensive that she may die before obtaining title to the 1 acre portion that she purchased, the Petitioner filed a Citation against the Respondents dated 12.11.15 requiring them to take out a grant of representation in respect of their late mother’s estate. None of the Respondents entered Appearance or applied for a grant of representation. On 27.1.16, the Petitioner filed a petition for grant in her capacity as creditor. There were other purchasers of various portions of the property. The Petitioner undertook to complete the transfer of the various subdivisions of the property, according to the mutation form as follows:

Kilifi/Mtwapa/1881	0.41 ha	Family of Esther Francis Thoya
Kilifi/Mtwapa/1882	1.20 ha	About Faraj by order of Tribunal
Kilifi/Mtwapa/1883	0.41 ha	Tabitha Njeri Njenga
Kilifi/Mtwapa/1884	0.37 ha	Family of Esther Francis Thoya
Kilifi/Mtwapa/1885	1.62 ha	Hadija Essajee Bhaijee

3. A grant of letters of administration (the Grant) in respect of the estate of the deceased was on 24.5.16 issued by the Court to the Petitioner. On 23.6.17, the Petitioner filed a Summons for Confirmation of Grant dated 22.6.17. She stated that the deceased was indebted to her as purchaser of the 1 acre portion of Plot No. **Kilifi/Mtwapa/991**. The deceased had other creditors who had purchased portions of the said piece of land, namely About Faraj and Hadija Essajee Bhaijee. The persons entitled to the estate of the deceased were the family of the deceased and the said creditors.

4. On 2.5.18, the 2<sup>nd</sup> -9<sup>th</sup> Respondents filed an objection to the making of a grant to the Petitioner dated 30.4.18. The Court directed that the Objection be heard before the Summons for Confirmation of Grant. By its ruling on 17.12.18, the Court struck out the said Objection for the reason that the same was filed out of time and no enlargement had been obtained.

5. Hadija Essajee Bhaijee (Hadija) in her affidavit sworn on 15.2.19 supported the summons for confirmation of grant. She exhibited an agreement for sale as well as correspondence relating to her interest in the estate of the deceased. She averred that the family of the deceased was aware of her said interest. She ceded 2 acres of the 6 she had purchased. As such the family of the deceased has no reason to object to mode of distribution.

**6. The Respondents did not file a response to the summons for confirmation of grant.**

**7. I have considered the matter herein including the documents exhibited by the Petitioner and Hadija.**

**8. The Petitioner's documents include *inter alia* copies of the following:**

**i) Agreement for sale dated 9.10.96 between her and the deceased and Kahindi for 1 acre to be excised from Plot No. Kilifi/Mtwapa/991.**

**ii) Application dated 11.4.00 and letter of consent from the Bahari Land Control Board dated 27.4.00 for the subdivision of Plot No. Kilifi/Mtwapa/991 into 5 portions.**

**iii) Application dated 11.4.00 and letter of consent from the Bahari Land Control Board dated 27.4.00 for sale by the deceased and Kahindi to the Petitioner of 1 acre of subdivision of Plot No. Kilifi/Mtwapa/991.**

**iv) Mutation form for Plot No. Kilifi/Mtwapa/991 showing that the subdivision yielded Plots Nos. 1881 measuring 0.41 ha; 1882 measuring 1.21 ha; 1883 measuring 0.41 ha 1884 measuring 0.31 ha and 1885 measuring 1.63ha.**

**v) Death certificate of the deceased indicating that she died on 15.5.00.**

**9. It is clear to me that the Petitioner did indeed purchase the said 1 acre portion of Plot No. Kilifi/Mtwapa/991 from the deceased and Kahindi. The death of the deceased on 15.5.00 shortly after consent was issued, appears to be the reason the transaction was not completed.**

**10. For her part, Hadija exhibited copies of various documents. The following are what I consider relevant for the purposes herein:**

**i) Agreement for Sale between Francis Thoya Chengo and Hadija and a party whose name is not legible dated 29.4.93 in respect of 6 acres of Plot No. 569 Mtwapa Settlement Scheme. The agreement provided that the vendor would transfer the said portion as soon as the title was available. The vendor acknowledged payment of Kshs. 82,000/= being the full purchase price.**

**ii) Official search indicating that Plot No. Kilifi/Mtwapa/991 was registered in the names of the deceased and Kahindi.**

**iii) Undated and unregistered transfer of Plot No. Kilifi/Mtwapa/991 from the deceased and Kahindi. The names of the transferees are however not legible.**

**11. As stated earlier, the Respondents did not file any response to the Petitioner's claims regarding the creditors and the portions of Plot No. Kilifi/Mtwapa/991 that each purchased. These claims therefore remain uncontroverted.**

12. The Grant was issued to the Petitioner following the refusal by the Respondents to respond to the citation filed by the Petitioner requiring them to apply for a grant of representation in respect of the estate of the deceased. The duty of the Petitioner as a holder of the Grant are set out in Section 83 of the Law of Succession Act which provides:

*Personal representatives shall have the following duties—*

(a) ...

(b) *to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;*

(c) ...

(d) *to ascertain and pay, out of the estate of the deceased, all his debts;*

(e) ...

(f) *subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;*

(g) ...

13. The Petitioner herein has gotten in all the free property of the deceased. She has also ascertained the debts owed by the deceased and seeks to pay the same. She now seeks to pay off the debts to herself and the other creditors before distribution of the estate to the beneficiaries of the estate.

14. Having taken all factors into account and in exercise of the inherent power of this Court, I do make the following orders which are necessary for the ends of justice:

i) The Grant of letters of administration issued to Tabitha Njeri Njenga on 24.5.16 is hereby confirmed.

ii) The estate of the deceased consisting of Plot No. Kilifi/Mtwapa/991 which has been subdivided shall be distributed as follows:

Kilifi/Mtwapa/1881	0.41 ha	Family of Esther Francis Thoya
Kilifi/Mtwapa/1882	1.20 ha	Aboud Faraj
Kilifi/Mtwapa/1883	0.41 ha	Tabitha Njeri Njenga
Kilifi/Mtwapa/1884	0.37 ha	Family of Esther Francis Thoya
Kilifi/Mtwapa/1885	1.62 ha	Hadija Essajee Bhajjee

iii) The Petitioner and Kahindi Francis Thoya shall within 30 days execute documents necessary for the distribution.

iv) In the event that Kahindi Francis Thoya shall decline to sign the said documents, the Deputy Registrar of this Court shall sign the same in his place.

v) Each party shall bear own costs.

DATED this 26<sup>th</sup> day of February 2020

\_\_\_\_\_  
M. THANDE

JUDGE

SIGNED and DELIVERED in MALINDI this 28<sup>th</sup> day of February 2020

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NJOKI MWANGI

JUDGE

In the presence of: -

..... for the Petitioner

..... for the Respondents

..... for the Creditor

..... Court Assistant