



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL MISC CASE NO.1825 OF 2015**

**IN THE MATTER OF THE ESTATE OF MUNYINYI IGOGO - DECEASED**

**ROBERT WNG'ENDO NDIRU.....APPLICANT**

**-VERSUS**

**1. JAMES WAWERU MUNYINYI.....1<sup>ST</sup> RESPONDENT**

**2. MORRIS NDURANU MUNYINYI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. There are two Applications coming for consideration in this ruling which are as follows;

(i) *The Objector/Applicant's Applicant dated 31.7.2018 amended on 8.11.2018*

(ii) *The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Application dated 6.11.2018 seeking to lift, discharge and/or set aside unconditionally orders issued in the Summons dated 31.7.2018.*

2. The first Application which was dated 31.7.2018 and amended on 8.11.2018 was seeking the following orders;

**1. THAT this Application be certified as urgent.**

**2. THAT the service of the application be dispensed with at the first instance owing to the urgency of the matter.**

**3. THAT this Honorable Court be pleased to suspend/stay the certificate of confirmation issued herein on 16<sup>th</sup> September, 2016.**

**4. THAT this Honorable Court be pleased to strike out the Petition with costs**

**5. THAT this Honorable Court be pleased to revoke the grant herein and to set aside the confirmation herein on 16<sup>th</sup> September 2016.**

**6. THAT Pending the hearing and determination of the Summons herein, the Respondents, James WaweruMunyinyi and Morris NduranuMunyinyi, be restrained whether by themselves, their servants and/or agents from subdividing LR No. KIAMBAA.RUAKA/221 or transferring to any person or charging the same or any part thereof until further orders of this Honorable Court.**

**7. THAT the Respondents, James WaweruMunyinyi and Morris NduranuMunyinyi be restrained whether by themselves, their servants and/or agents from occupying, developing or leasing more than 20% of the said LR No. Kiambaa/Ruaka/221.**

**7B. THAT an inhibition does issue restricting any dealings with the following purported subdivisions of LR. No. Kiambaa/Ruaka/221 by the purported proprietors**

**(i) James WaweruMunyinyi – purported proprietor ofKiambaa/Ruaka/6572**

**(ii) TeresiaWairimuNjenja – purported proprietor of Kiambaa/Ruaka/6495**

- (iii) **Teresia Wairimu Njenja – purported proprietor of Kiambaa/Ruaka/6496**
- (iv) **Morris Nduranu Munyinyi – purported proprietor of Kiambaa/Ruaka/6491**
- (v) **James Waweru Munyinyi – purported proprietor of Kiambaa/Ruaka/6493**
- (vi) **James Waweru Munyinyi – purported proprietor of Kiambaa/Ruaka/6494**
- (vii) **James Waweru Munyinyi – purported proprietor of Kiambaa/Ruaka/6497**
- (viii) **Edward Njenja Rire – purported proprietor of Kiambaa/Ruaka/6492**

**8. THAT the Respondents do account to the Applicant all the rent received from the said LR No. Kiambaa/Ruaka/221 from 24<sup>th</sup> July 1992.**

**9. THAT the Respondents do account to the Applicants Mesne profits in respect of 80% of LR No. KIAMBAA/RUAKA/221 from 24<sup>th</sup> July 1992**

**10. THAT the Costs of this Summons be borne by the Respondents in any event.**

3. The Second Application coming for Consideration which is dated 6<sup>th</sup> November, 2018 seeks the following orders;

- 1. That the Application herein be certified as urgent and a hearing date be given on a priority basis.**
- 2. THAT the Orders issued on 9<sup>th</sup> October, 2018 in the application be stayed pending the hearing and determination of this application inter-parties**
- 3. That the Application herein be heard together with the Summons Application dated 31<sup>st</sup> July, 2018.**
- 4. That the orders issued on 9<sup>th</sup> October 2018 in the application dated 31.7.2018 be lifted, discharged and/or set aside unconditionally forthwith.**
- 5. That costs of the application be provided for by the Respondent**

4. The Parties were directed to file written submissions in the Applications but when the case came for highlights of the submissions on 14.11.2018, the Court directed that the matter proceeds by Viva voce evidence.

5. The Objector/Applicant who testified as Objector's witness No. 1 (OW 1) adopted his affidavit sworn on 30.7.2018 as his evidence in chief and he was cross examined on the same. The objector/Applicant has deposed in the affidavit.

(i) That he is the grandson of the Deceased Munyinyi Igogo who died intestate in 1968.

(ii) That the deceased had 6 wives namely:

- 1. Wanjiru Munyinyi
- 2. Muthii Munyinyi
- 3. Kahaki Munyinyi
- 4. Wangeci Munyinyi
- 5. Nyambura Munyinyi
- 6. Nyandia Munyinyi

(iii) That the Objector/Applicant belongs to the 2<sup>nd</sup> house of Muthii Munyinyi while the Respondents belong to the 4<sup>th</sup> house of Nyambura Munyinyi

(iv) That the Deceased Munyinyi Igogo was registered as the Proprietor of the property known as Kiambaa/Ruaka/221 in 1956 (hereafter referred to as the suit property).

(v) That the Objector/Applicant was advised by his advocates, Messrs Kamau Kuria & Company Advocates, and he believes the same to be true that:-

- (a) When his great grandfather passed on in 1968, Succession to registered land was governed by Section 120 of the repealed Registered Land Act and further that the said section required that the District Magistrate's Court determined the heirs applying customary law of Succession.
- (b) The Law of Succession Act replaced customary law on 1<sup>st</sup> July 1981 and its major change was that daughters and sons inherited equally in all cases of intestate succession.
- (c) If the Law of Succession Act had been applied, the house of Nyandia would have inherited the family land.
- (vi) That the issue of determination of the heirs of the Deceased's Property was referred to the District Magistrate's Court and was **Kiambu Succession Cause No. 14 of 1972.**
- (vii) That the District Magistrate's Court misunderstood the case before it and there were two appeals to the Chief Magistrate's Court against that decision.
- (viii) That the said appeals were **Nos 17 and 18 of 1978.**
- (ix) That the same were heard and allowed on 24<sup>th</sup> July 1992.
- (x) That the Chief Magistrate's Court held that the said property was to be shared equally by the 5 houses which had sons namely **WanjiruMunyinyi, MuthiiMunyinyiKahakiMunyinyi, WanguiMunyinyi and NyamburaMunyinyi.**
- (xi) That the house of NyandiaMunyinyi was not to inherit any portion of that land.
- (xii) That as the Judgment of the Chief Magistrate's Court shows, the 1<sup>st</sup> Respondent and his late brother, David Igogo, were parties to the said two appeals.
- (xiii) That according to the abstract of title, the Respondent's late mother placed a caution against the title of the Deceased's property in 1966.
- (xiv) The he verily believes that the Respondents and their late mother always wanted to dispossess the other 4 houses of their inheritances.
- (xv) That after the Chief Magistrate's Court decided the appeals, the 1<sup>st</sup> Respondent and his late brother filed in the High Court, **Nairobi Civil appeal No. 254 of 1992: David M. Igogo and James Waweru - Vs John IgogoMunyinyi and 18 others.**
- (xvi) That as both the Judgment and the decree show, the 1<sup>st</sup> respondent and his late brother David Igogo, were appellants and consequently, when the 1<sup>st</sup> Respondent filed the Petition herein, he knew that he was acting fraudulently.
- (xvii) That the said **Nairobi Civil Appeal No. 254 of 1992: David M. Igogo & James Waweru vs John IgogoMunyinyi & 18 others** which was made by the sons of Nyambura was dismissed on 4<sup>th</sup> June 2002.
- (xviii) That Hon Justice Amin ordered that the Chief Magistrate's Court at Kiambu executes the Judgment.
- (xix) That in compliance with the said decree, there was filed in **Kiambu Chief Magistrate's Court in Misc Application No. 14 of 1972: John IgogoMunyinyi – Vs David IgogoMunyinyi and James WaweruMunyinyi which** determined how the land was to be shared equally amongst 5 houses.
- (xx) That as the decree referred to shows, he was to be registered as the proprietor of the parcel of land which was to come to the house of his grandmother, MuthiiMunyinyi.
- (xxi) That he is further advised by his said advocates and he verily believe the same to be true that the effect of the decree was to make him the equitable owner as a trustee of his grandmother's house's share of one fifth of Kiambaa/Ruaka/221 and to confer a similar right to the persons who were appointed representatives of their respective houses.
- (xxii) That the 1<sup>st</sup> Respondent claimed to have been aggrieved by that Judgment and Ruling and filed **Nairobi Civil Appeal No. 176 of 2011: David IgogoMunyinyi & James WaweruMunyinyi - Vs John Munyinyi and 18 others.**
- (xxiii) That their appeal was heard and dismissed by Honourable Justice Onyancha on 11<sup>th</sup> December 2014.
- (xxiv) That as the order shows, the appellants were the 1<sup>st</sup> Respondent and his late brother, David M. Igogo, who were also parties to **Civil Appeal Nos. 17 and 18 of 1978.**
- (xxv) That it would appear that they were aggrieved a **third** time by the determinations of the High Court on two occasions and the Chief Magistrate's Court on **two** occasions and instead of appealing to the Court of Appeal against the said decision of Hon. Justice Onyancha, they chose to file the Petition herein fraudulently.

(xxvi) That it was through the ruling posted in the Kenya Law in respect of this Cause that he recently learnt the fact of the existence of this fraudulent cause.

(xxvii) That he was further advised his said advocates and he verily believe the same to be true that:-

a) The Petition herein is barred by the res judicata rule and the Respondents know it.

b) in their Petition herein, they failed to disclose all the suits touching the suit property dating back to 1972.

c) the fraudulent certificate of confirmation has the effect of purporting to nullify the distribution which has been upheld twice by this Honorable Court first by Hon. S. Amin and secondly, by Hon Justice Onyancha and also to nullify two decisions of the Kiambu Chief Magistrate's Court which have delivered Judgments which have been upheld by this Honorable Court twice.

d) this honorable Court has jurisdiction to strike out a petition which has been filed by a Petitioner fraudulently and to order that the lawful distribution takes place.

e) the Probate Court has jurisdiction to make such orders as will prevent beneficiaries of being swindled of their inheritance.

(xxviii) That according to the abstract of title in respect of the said Kiambaa/Ruaka/221 on 13<sup>th</sup> March 2018, the Respondents were registered as the purported proprietors of the suit properties on the basis of the fraudulent certificate of confirmation.

(xxix) That unless they are restrained, the Respondents will now sub-divide the suit property and dispose it off thereby depriving 4 houses of their inheritance.

(xxx) That he has perused this Honorable Court's file in respect of this Cause and made the following discoveries:-

a) that the two Respondents filed a Petition for grant of administration on 22<sup>nd</sup> July 2015 and showed that the only asset of the deceased was Kiambaa/Ruaka/221 which was estimated to be Ksh.1 million.

b) in the supporting affidavit they falsely stated that the deceased was survived by only them and another person called Edward Njenga whilst the truth is that the deceased had six wives and numerous members of those six houses survived him.

c) a grant of representation was issued to them on 4<sup>th</sup> January, 2016.

d) they applied for the confirmation of the grant on 28<sup>th</sup> June 2016.

e) a certification of confirmation was issued to them on 16<sup>th</sup> September 2016.

f) on 20<sup>th</sup> January, 2017, the Respondents applied for removal of cautions, restrictions and prohibitory orders touching Kiambaa/Ruaka/22.

g) their application was heard and a ruling delivered in their favour on 31<sup>st</sup> May 2017.

h) at no time did they disclose to this Honourable Court the fact that the deceased had six wives or that property KIAMBAA/RUAKA/221 was distributed and they were to get a share of it.

6. In Cross examination, the Objector/Applicant said as follows:

(i) That the Administrators were fraudulently dealing with the property of the deceases and that is why he moved to Court to stop their dealings.

(ii) That the matter was before the Magistrate's Court in 1972 and the Magistrate said that the Estate should be divided equally amongst 5 houses and the 6<sup>th</sup> house of Nyandia did not get any land because Nyandia did not have sons.

(iii) The Objector/Applicant said he was supposed to be registered as the trustee for the house of Muthii. He said the deceased was his great grandfather and Muthii was his great grandmother.

(iv) He said the suit property belonged to the deceased and the other properties which are referred to in the 1<sup>st</sup> Respondent's Replying Affidavit were given by the clan and not by the deceased and he said the acreages indicated are wrong.

(v) The Objector/Respondent said the suit property belongs to the deceased and not to the Respondents.

7. The Respondents adopted the Replying Affidavit sworn by James WaweruMunyinyi (the 1<sup>st</sup> Respondent herein) as their evidence in chief. In the said Affidavit sworn on 6<sup>th</sup> November 2018, the 1<sup>st</sup> Respondent deposed as follows:

(i) THAT Honourable Lady Justice Ongeru on 9<sup>th</sup> October 2018 issued orders hinged on the Summons dated 31<sup>st</sup> July, 31<sup>st</sup> July 2018 filed by Robert WangendoNdiru which Orders are very prejudicial to us.

(ii) THAT the orders were obtained based upon a misleading narration of facts which is intended to mislead this Honourable Court into believing that there are some “beneficiaries to our father’s Estate” who were left out or omitted from inheriting our father’s Estate

(iii) THAT the narration of facts is also based upon a false and misleading misrepresentation of facts that there has been any fraudulent act on our part and/or that we have used some fraudulent documents to induce the Court to issue the Orders it made in this matter whereas that allegation is indeed not true, correct and/or accurate.

(iv) THAT nowhere in his pleadings has Robert WangendoNdiru disclosed that he comes from a family that is polygamous and the lineage he comes from had already been sufficiently provided for.

(v) THAT our deceased father, the Late Munyinyi Igogo died in the year 1968 and was survived by only two (2) of his six (6) wives namely; NyamburaMunyinyi and NyandiaMunyinyi.

(vi) THAT on the night of his passing their father summoned his step brother by the name of Kinuthia Igogo (Tuguiyi) who was also a close friend of his in the presence of two of his wives namely Muthoni Kinuthia “Tuguiyi” and Thundu Kinuthia “Tuguiyi” and in the presence of their mother, NyamburaMunyinyi. Their step mother NyandiaMunyinyi and in the presence of his brother Morris Nduranu at around 8.00pm before he passed later at 1.00am that night he expressed his will in regard to the suit property as follows;

(a) Amongst other things he stated as he had made adequate provision of land for all his male children during his life and that the property subject of this case Kiambaa/Ruaka/221 which he was occupying as his home with 5<sup>th</sup> wife their mother, NyamburaMunyinyi and his 6<sup>th</sup> wife being our step-mother NyandiaMunyinyi would inherit 1.5 of an acre for NyandiaMunyinyi and the rest would be inherited by their family the House of NyamburaMunyinyi and to be shared by them both equally.

(vii) THAT the aforesaid expressions of our father’s dying wishes in regards to the suit land Kiambaa/Ruaka/221 is a fact known by many members and the local administration as well.

(viii) THAT their mother, NyamburaMunyinyi died in the year 1975 and their step mother NyandiaMunyinyi died in the year 1990.

(ix) THAT their deceased father acquired properties for all his adult children and assisted in registration of and transfer of the titles in the favour except for the children of his 5<sup>th</sup> wife, NyamburaMunyinyi. The 6<sup>th</sup> wife, NyandiaMunyinyi only had 5 children all got married during the life of their father and provision of land could only be made to their step-mother to ensure that she had a home for her own safe-keeping.

(x) THAT all the previous wives, WanjiruMunyinyi, MuthiiMunyinyi, KahakiMunyinyi and WanguiMunyinyi died before their father died.

(xi) THAT whereas all the other wives were buried on their respective sons’ properties, their father retained L.R. No. Kiambaa/Ruaka/221 as his own portion with his last 2 wives, NyamburaMunyinyi and NyandiaMunyinyi and upon his demise, he was buried on the said parcel of land together with his last 2 wives.

(xii) THAT before their father passed away, he had already settled with his last two wives on L.R. No. Kiambaa/Ruaka/221.

(xiii) THAT their mother the late NyamburaMunyinyi and their step-mother, NyandiaMunyinyi were buried alongside our father on the parcel of land L.R. No. Kiambaa/Ruaka/221.

(xiv) THAT all the male children of the deceased Munyinyi Igogo received sufficient land gifting from their late father during his life with an exception of their brother Morris Nduranu and him who were then young children in the deceased’s 5<sup>th</sup> Household of the late NyamburaMunyinyi and also their step-mother who was the spouse constituted in the 6<sup>th</sup> Household NyandiaMunyinyi who did not have a male child. All the other children of their deceased father received their gifting of land from our father inter vivos as follows:

#### ESTATE OF MUNYINYI IGOGO

##### A. Household of the 1<sup>st</sup> Wife, WanjiruMunyinyi

<u>Name</u>	<u>Title No.</u>	<u>Acreage</u>
IgogoMunyinyi	Kiambaa/Ruaka/440	18 acres
MemiaMunyinyi	Kiambaa/Ruaka/331	3 acres

RufasKinyanjuiMunyinyi	Kiambaa/Ruaka/310	3 acres
MorriseNduranuMunyinyi	Kiambaa/Ruaka/230	9 acres
KinuthiaMunyinyi	Kiambaa/Ruaka/231	6 acres
James GithenyaMunyinyi	Kiambaa/Ruaka/313	8 acres

**B. Household of the 2<sup>nd</sup> Wife, MuthiiMunyinyi**

<u>Name</u>	<u>Title No.</u>	<u>Acreage</u>
JumaMunyinyi	Kiambaa/Ruaka/220	14 acres
BenardNduranuMunyinyi	Kiambaa/Ruaka/220 (out of this land)	7 acres

**C. Household of the 3<sup>rd</sup> Wife, KahakiMunyinyi**

<u>Name</u>	<u>Title No.</u>	<u>Acreage</u>
Kamuiru (Igogo) Munyinyi	Kiambaa/Ruaka/191	10 acres
G. KamauMunyinyi	Kiambaa/Ruaka/190	43 acres
KirugoMunyinyi	Kiambaa/Ruaka/201	12 acres
KinuthiaMunyinyi	Kiambaa/Ruaka/202	14 acres

**D. Household of the 4<sup>th</sup> Wife, WanguiMunyinyi**

<u>Name</u>	<u>Title No.</u>	<u>Acreage</u>
John IgogoMunyinyi	Kiambaa/Ruaka/388	7 acres
MungaMunyinyi	Kiambaa/Ruaka/573	4 acres
KinuthiaMunyinyi	Kiambaa/Ruaka/794	8 acres
KiberiMunyinyi		1 acre
MarimbiMunyinyi		1 acre
GithenyaMunyinyi		1 acre

**E. Household of the 5<sup>th</sup> Wife, NyamburaMunyinyi**

<u>Name</u>	<u>Title No.</u>	<u>Acreage</u>
David IgogoMunyinyi	Kiambaa/Ruaka/222	7 acres
James WaweruMunyinyi	Kiambaa/Ruaka/221	
Morris N. Munyinyi		

**F. Household of the 6<sup>th</sup> Wife, NyandiaMunyinyi**

No male child

(xv) ***THAT*** they have been advised by Counsel on record for them and verily believe this to be true that the provisions of Sections 39 of the Succession Act are expressly applicable to them in that they recognise them to be the only successors alive and surviving the Estate of our deceased father's Estate and thus lawfully and rightfully entitled to claim inheritance from his Estate.

(xvi) ***THAT*** they have been in physical occupation of the suit land with their respective parents since their birth and they do not own any other parcel of land other the ones subdivided and distributed to themselves and to their respective children from the

subject title *Kiambaa/Ruaka/221*.

(xvii) **THAT** it is evident from the family tree attached herewith and marked as “JWM-3” that Robert Wang’endoNdiru has no colour of right to claim any entitlement to any portion of their father’s Estate. His grandfather IgogoMunyinyi (Juma) is our step brother born by the house of MuthiiMunyinyi the 2<sup>nd</sup> wife and his father Fredrick NdiruKamau was born by IgogoMunyinyiJuma and consequently, the Applicant Robert Wang’endoNdiru is a great grandchild of their father and cannot therefore assume the same locus standing as his grandfather. That under Kikuyu Tradition and all laws applicable, the Applicant is a grandson of their father could not under all circumstances of this matter be entitled to claim and/or inherit land belonging to their father.

a) **THAT** under Section 66 of the Succession Act clearly spells out all the persons entitled to get Letters of Administration on preference/priority and the Applicant is not one of them.

b) **THAT** the Applicant has not demonstrated any complaint by any other children of their deceased father in regard to the land distributed under these proceedings and it is evident that the pursuit of their entitlement is clearly intended to derail, disturb and destabilize them and their respective families from their respective homesteads.

c) **THAT** it is evident from the facts narrated herein in the Supporting Affidavit and in the Replying Affidavit filed in Court by the Respondents herein that the Objector/Applicant has mischievously concealed many material and relevant facts which were within his knowledge and which if disclosed to this Honourable Court would have sufficed to inform the Honourable Court to restrain itself from issuing any ex-parte Orders.

(xviii) **THAT** the Respondent herein has known all along the existence of the proceedings herein and ought to have realised from the Gazette Notice published to the whole world and filed objection proceedings on time and his belated application seeking to prohibit the title pin order to revoke the grant and reverse orders of distribution which has already been extracted certified utilised to subdivide and transfer the suit property to other innocent 3<sup>rd</sup> parties is completely untenable.

(xix) **THAT** the subject property, L.R. No. *Kiambaa/Ruaka/221* sought to be prohibited, restricted or otherwise enjoined by the Applicant is no longer in existence in the Registrar of Lands Office and the attempt to litigate over the subject property is in effect asking this Honourable Court to act in vain.

(xx) **THAT** the subject property has been long subdivided and distributed inter-alia to the persons named hereunder as follows;

**i. From the Household of the 5<sup>th</sup> Wife, NyamburaMunyinyi**

(a) James WaweruMunyinyi – *Kiambaa/Ruaka/ 6572*

(b) TeresiaWairimuNjenga – Daughter – *Kiambaa/Ruaka/6495 and 6496*

(c) Morris NduranuMunyinyi – *Kiambaa/Ruaka/6491*

(d) Jointly in the names of James WaweruMunyinyi and Morris NduranuMunyinyi*Kiambaa/Ruaka/6493/ 6494 and /6497*

**ii. From the Household of the 6<sup>th</sup> Wife, NyandiaMunyinyi**

(a) Edward NjengaRire – Our Nephew – *Kiambaa/Ruaka/6492*

(xxi) **THAT** they have been advised by Counsel on record for them and verily believe this to be true, correct and accurate that the various suits being cited by the Protester in his Application did not restrain any of them from commencing proceedings in the current action for Probate and Administration of our deceased father’s Estate as;

(i) The various suits had been marked as settled through Consent Orders recorded between the litigating parties.

(ii) The cases referred to never involved our deceased father or any of his recognized personal representatives or Administrators of his Estate and consequently any orders purported to bind our deceased father’s Estate are null and void ab initio and not capable of being enforced under Law.

(iii) All the suits have since abated as all the Plaintiffs in the said suits have died and were never substituted by any recognized legal representative within one year as expressly stipulated under the applicable Law.

(iv) The Protester herein has no capacity or any color of right to act for any of the Estates of any of deceased persons and has no locus standi to represent any other person other than himself. He has no locus standi in these proceedings and more particularly he has not exhibited any valid Deed of Power of Attorney, no Grant of Letters of Administration and no valid Letter of Appointment or Authority to act for any other person.

8. The 2<sup>nd</sup> Respondent who testified as Respondent’s witness No. 1 (RW 1) was Cross examined orally in Court and he stated as follows:

*(i) THAT he was left on the suit property with the 1<sup>st</sup> Respondent together with the children of his step-sister.*

*(ii) RW1 said they did not include all the children of the deceased because they had been given property by the deceased while he was alive.*

*(iii) RW1 said he knew the case that was filed in 1972. He said the deceased died in 1968*

*(iv) RW1 said the suit property was Kiambaa/Ruaka/221 and not Kiambu/Ruaka/221.*

9. In re-examination, RW 1 said that it was the deceased who gave the land to the others and that he has never heard about the clan giving land. He also said all the cases had lapsed and that the objector has no right to the suit property as it belongs to the Respondents' father (the Deceased)

10. The Parties filed written submissions which they highlighted orally in Court. The Objector/Applicant submitted as follows:

*(i) That this case is res-judicata as the SRM Court in Kiambu had already ruled that the suit property should be divided amongst the 5 houses of the deceased.*

*(ii) That the 1<sup>st</sup> Respondent filed an appeal which was dismissed and both Respondents were aware when they filed the current petition.*

*(iii) That the Respondents did not disclose in the Petition that the deceased had 6 wives or that the suit property was to be distributed amongst all the beneficiaries of the Estate.*

*(iv) The objector urged the Court to revoke the grant herein and to set aside the confirmation as the petition was filed fraudulently and to order lawful distribution of the estate.*

11. The Respondent on their part submitted as follows:

**(i) THAT the objector/Applicant obtained exparte orders from this court without full disclosure of material facts.**

**(ii) THAT the Applicant does not have the authority to argue the Application nor obtain orders on behalf of any party.**

**(iii) THAT the Objector/Applicant is not a party in thee cases referred to and that the same have abated.**

**(iv) THAT the deceased had six wives and he distributed properly to each of the households as gifts interval.**

**(v) THAT the Objector/Applicant as a great grandson does not have locus standi to sue in his great grandfather's estate both under Kikuyu Customary Law and the Succession Act.**

12. I have considered the Affidavits filed in the two applications filed in the two applications filed herein together with the written submissions filed by the parties. I have also taken into account the viva voce evidence adduced by the objector/applicant (OW1 – ROBERT WANGENDO NDIRU) and the 2<sup>nd</sup> Respondent (RW1 – Morris NduranuMunyinyi). My findings are as follows;

**(i) I find that it is not in dispute that the deceased had six wives and that the objector/applicant in the application dated 31.7.2018 amended on 8.11.2018 is the grandson of the deceased and that he belongs to the 2<sup>nd</sup> house of MuthiiMunyinyi while the Respondents herein are the sons of the deceased belonging to the 3<sup>rd</sup> house of NyamburaMunyinyi. (The deceased died on 15<sup>th</sup> May 1968).**

**(ii) There is also no dispute that the deceased was the registered proprietor of the suit property known as Kiambaa/Ruaka/221.**

**(iii) I find that there is no dispute that there was a suit filed in the District Magistrate's Court in Kiambu No. 14 of 1972 where the heirs of the Estate were determined.**

13. The issues for determination in this suit as follows:

**(i) Whether the Petition herein is barred by the res-judicata rule.**

**(ii) Whether the Certificate of confirmation herein was fraudulently obtained.**

**(iii) Whether this Petition should be struck out as having been fraudulently filed.**

**(iv) Whether the Objector/Applicant has the locus stand to raise a claim in the estate of the deceased.**

**(v) Whether the subject matter of this Succession Cause (the suit property) was the only property owned by the deceased to be distributed amongst all his beneficiaries.**

**(vi) Who pays the costs of the Applications?**

14. On the issue as to whether this suit is res-judicata, I find that the Objector/Applicant's evidence is that the suit property was the subject of Succession Cause No. 14 of 1972 at Kiambu Magistrate's Court and the decision reached was that the land was to be shared amongst the five houses of the deceased since the 6<sup>th</sup> house did not have a male child. According to the Objector/Applicant this case is res judicata.

15. However, according to the Respondents, the cases which were filed at Kiambu Court abated and some were marked as settled between the litigating parties and therefore they had to file this Succession Cause.

16. I find that there is no evidence that the Objector/Applicant was a party to any of the suits allegedly filed at Kiambu Court. For a Case to be shown to be res-judicata, the litigating parties must be the same and the subject matter of the suit must also be the same.

17. I also find that it has not been shown that the said Succession causes were determined with finality. I also find that it has not been shown who the administrators of the estate were in the Kiambu Cases and whether the estate was distributed as alleged by the objector/applicant. I therefore find that there is no evidence that this petition is barred by the doctrine of res-judicata.

18. On the issue as to whether the certificate of confirmation issued herein was fraudulently obtained, the Objector/Applicant said the Respondents did not disclose that there were other beneficiaries to the estate of the estate of the deceased.

The Respondents on their part said the deceased had gifted all the other beneficiaries inter vivos except the Respondent who have always lived on the suit property.

The Respondents gave a breakdown of the distribution of the property to the five houses which the Objector/Applicant did not controvert. The Objector/Applicant said the land which was distributed to the other households were given by the clan. The objector/Applicant said the acreages indicated are not accurate.

19. I find that there is evidence that the five wives of the deceased were allocated land while the deceased was still alive. The Objector/Applicant said it is the clan that allocated the said land. The evidence by the Respondents is that it was the deceased who gave the said land. I believe the testimony of Rw1 as he is a son of the deceased and he knew what transpired.

20. I find that it is not disputed that the five wives were allocated land and that the Respondents have been in possession of the suit property for many years. The Respondents are therefore entitled to the suit property as they had been left out in the distribution of the land during the life time of the deceased. I therefore find that they were not under any obligation to include the rest of the beneficiaries in the distribution of the suit property. I also find that the said circumstances, the Certificate of Confirmation issued herein was NOT fraudulently obtained.

21. On the issue as to whether this Petition should be struck out as having been fraudulently filed, I find that the answer is NO in the light of the finding of this Court that the Respondents were under no obligation to involve the rest of the beneficiaries who had been catered for during the life time of the deceased.

22. On the issue as to whether the objector/applicant has the locus standi to raise a claim in the Estate of the deceased, I find that the Objector/Applicant is a great grandson of the deceased and therefore he is not entitled to challenge the petition herein.

23. Section 66 of the Law of Succession Act provides for Preference to be given to certain persons to administer the estate where the deceased died intestate. The order of priority is as follows;

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V; 24.

(c) the Public Trustee; and

(d) creditors;

25. I find that the beneficial interest of the Objector/Applicant is not within the provision of Section 66 (b) as the Objector is a great grandson and part (V) provides for relatives who are in the nearest degree of consanguinity up to and including the 6<sup>th</sup> degree.

26. I therefore find that the Objector/Applicant has no locus standi to raise a claim in the estate of the deceased who was his great grandfather. There is no indication that there are other beneficiaries who are objecting to the Petition herein.

27. Finally on the issue as to whether the suit property was the only property owned by the deceased, I find that the evidence by the Respondent is that the deceased had distributed his property *intervivos* and the said evidence has not been controverted.

There is no evidence that any of the beneficiaries from the five wives were not catered for. There is evidence that the Respondents have been on the suit property all their lives and that they do not have any other property.

28. It is not in dispute that the estate has a history of litigation spanning over 50 years. Litigation must have an end and for that reason, the descendants of the deceased in this Petition should settle on their respective lands.

29. I accordingly dismiss the amended application dated 8.11.2018 and I discharge the interlocutory orders issued therein restraining the Respondents from dealing with the suit property.

30. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Application dated 6.11.2018 seeking to lift, discharge and/or set aside unconditionally orders issued in the Summons dated 31.7.2018 as amended on 8.11.2018 is accordingly allowed.

31. On the issue of costs, I order that each party bears its own costs of the Applications.

Orders to issue accordingly.

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 25<sup>TH</sup> DAY OF JANUARY, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI**