



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Itumo Mbuta (Deceased) (Succession Cause
595 of 2015) [2025] KEHC 2275 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 595 OF 2015**

FR OLEL, J

FEBRUARY 12, 2025

**IN THE MATTER OF THE ESTATE OF ITUMO MBUTA (DECEASED)
IN THE MATTER OF AN APPLICATION FOR
GRANT OF LETTERS OF ADMINISTRATION**

BETWEEN

LABAN NDUVA MASAI PETITIONER

AND

JOSEPH MAKUSA MUTHOKA OBJECTOR

AND

MAILU ITUMO NDUNDA INTERESTED PARTY

RULING

A. Introduction

1. Before the court for determination is the summons for revocation and/or annulment of grant dated 31st May 2021, brought under provisions of sections 76,(a), (b) (c) & (d) of the [Law of Succession Act](#) and Rule 44 (i) of the Probate and Administration Rules. The Interested party/applicant seeks the following orders;
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased for purposes of revocation and/or annulment recall the grant of letters of administration herein issued to the petitioner on the 13th day of July 2017 and confirmed on the 24th day of May 2018.



- d. That upon granting the foregoing prayers, this Honorable court be pleased to make an order that the right persons be appointed to apply for the grant of letters of administration to the estate of the deceased Itumo Mbuta regard being given to the fact that he had three (3) wives.
 - e. That this Honorable court be pleased to visit the petitioner/Respondent herein Laban Nduva Masai with sanctions as per section 52 of the *law of Succession Act* for making willful and reckless statement(s) in applying for grant of letters of administration herein.
2. The Application is supported by the grounds on the face of the said Application and the supporting Affidavit of the interested party dated 31.05.2021. He also filed a further affidavit dated 12.07.2021 in support of his case. This Application was opposed by the petitioner/ Respondent who filed grounds of opposition dated 11.06.2021, a comprehensive replying Affidavit dated 02.07.2021, and supplementary affidavit dated 19.07.2021.
 3. The parties took direction and agreed to have this Application disposed of by way of viva voce evidence.

B. Evidence

4. OW1 Mailu Itumo Ndunda, the interested party herein adopted his witness statement dated 25.07.2023 as his evidence. He stated that the deceased was his father and was a grandfather to the petitioner herein. The deceased had three (3) wives, namely; Wivinya Itumo (1st wife), Ndoti Itumo (2nd wife) and Ngina Itumo (3rd wife). The petitioner's grandmother was the 1st wife and he also noted that all the deceased "wives" had passed on.
5. The deceased was blessed with several children and OW1, only identified the sons of each house. Wivinya Itumo (1st wife) sons were known as Mutetema, Mwilu and Masai, who was the petitioner's father. Ndoti Itumo (2nd wife) sons were known as Muteti Itumo and Ndisya Itumo, while Ngina Itumo (3rd wife) sons were known as Kasyoki Itumo and Mailu Itumo,(the Applicant herein). The Applicant further testified that all of the deceased children/sons had died apart from him and Ndisya Itumo.
6. The deceased had a large parcel of land known as ULU Settlement scheme LR No 28 measuring approximately 15.498 hectares, (hereinafter referred to as the suit parcel of land) which was ancestral land and was to be shared out equally amongst the three (3) houses, with each house getting approximately 5.166 hectares. This was not only according to the Kamba cultural law but also what the court in Kilungu (Succession cause No 1 of 1980) had decreed.
7. Unknown to them, his brother Laban Masai, and the petitioner herein had secretly moved this court and obtained confirmed grant without involving the larger family, and also misled court to believe that the deceased had only one wife, which proposition was not factual as confirmed by the chief's letter dated 9th April 2014, which had listed all the family members.
8. OW1 therefore urged the court to revoke the grant issued as it was obtained based on material misinformation and/or concealment of fact, which rendered the entire process to be a nullity.
9. Under cross-examination he confirmed that he was born and also resided on the suit parcel and his siblings were; Kasyoki Itumo , Muthoka Itumo , Mutetema Itumo, Katumba Itumo, and Ndisya Itumo, the only other surviving Son of the deceased.
10. OW1 further confirmed that after their father had passed on, the whole family was involved in the succession case filed at Kilungu court and after its completion, the decree was taken to the settlement



officer to effect the same. He personally was not at the forefront of that process on behalf of their family as that role was played by his eldest brother Muthoka Itumbo.

11. He further confirmed that he did not know about this cause and had also separately moved to Makueni Chief Magistrate Court; (Makueni Cmfc cause No 3 of 2020), where he applied to be granted letters of administration ad litem, but the said suit was dismissed. He was not aware of the current registered owner of the suit parcel of land nor was he aware if in 1966, his step-siblings Kamene Itumo & Mutetema Itumo purchased the suit parcel of land, but did not believe so.
12. It was also true that he initially resided on LR No 30, within the said settlement scheme, but had eventually settled on the suit parcel of land. His other brother Maweu Itumo also resided on the suit parcel of land with his family and they had legitimate expectations of getting their share. He also confirmed that his other brother Kasuki Itumo, resided on Plot LR No 29.
13. In re-examination, OW1 confirmed that his father worked for a white settler, who owned the land and eventually when the said settler relocated back to Europe, he subdivided the suit parcel of land and shared it amongst his workers. That is how the deceased acquired the said parcel of land. The court proceedings of Kilungu had also affirmed that the suit parcel of land should be subdivided into three portions, for each family and that is what should be upheld.
14. It was also not right for the 1st family to single handedly move court, without involving the other two families and this had prejudiced them and denied them their rightful share of the estate.
15. Owii Loise Kaswii Waema, testified that she was born in 1947 and was a village elder, who knew the deceased and the protagonist herein as they were neighbours back at home. She confirmed that the deceased had three wives, all whom had passed on. She also confirmed that the deceased estate comprised of a huge parcel of land, which ought to be shared amongst the families.
16. Under cross-examination, she reiterated her earlier evidence and confirmed that she knew the deceased well and was not aware of the Kilungu case. She also was not aware of how the suit property was acquired but knew that it belonged to the deceased and that it was a requirement under Kamba tradition to subdivide the estate amongst the surviving wives of the deceased. That is what ought to have happened.
17. The objector did not call any other witness and closed their case.
18. PW1 Laban Nduva Masai stated that he was a businessman based at Salama Market and relied on the replying affidavit dated 02.07.2021 and supplementary affidavit dated 19.07.2021 as his evidence. The annexures attached to the said affidavits as well as the documents attached to the list of documents were all admitted as Exhibit P1 -P19. It was his evidence that the succession file at Kilungu court was, defective as it had been filed by the settlement officer and they had objected to that process.
19. In or about 2015, the Kilungu court file disappeared and as a family they had a meeting and agreed on how the estate would be managed, which process included the interested party. It was his further evidence that his grandfather did not buy the suit property and what had transpired was that, when his grandfather was aged about 91 years, he called a family meeting and inquired amongst his children who could purchase the suit property as he did not have any money to purchase the same.
20. His uncles Mutetema Itumo (eldest son) and Kamene Itumo both from the 1st house, raised money and purchased the suit property around 1966 for Kshs.1250, with each contributing Kshs 650/=. As a token of appreciation, they also gave their father a cow.



21. Later his grandfather decreed that his 2nd wife Ndoti Itumo, would go and reside on Plot 27, within ULU settlement scheme, while his 3rd wife Ngina Itumo family would reside on Plot 29, bought by her son Kasyoki Itumo. His grandmother Wavinya Itumo, also owned Plot 30 within the said scheme bought by her son Mutetema Itumo
22. PW1 further stated that the confusion as to which family owned which property was brought by the settlement office, who did not know, which parcel of land each family owned. The other issue which cropped up in 1977, was that their uncle Muthoka Itumo, who bought Plot 29, went and physically settled on Plot 30. This forced Kasyoki Itumo and his brothers to shift to their uncle's plot, (Plot 29), while Kameme Itumo and Mutetema Itumo, were told to move to Plot 28, which was the parcel of land they were buying.
23. PW1 also urged the court to note that the deceased herein died in 1971, by which time title deeds had not been issued and therefore could not subdivide and give his two brothers their share, but physically on the ground the parties planted live boundaries and resided thereon. Plot 28 therefore exclusively belonged to the first family, and the other families did not have any right to claim any portion thereof.
24. PW1 reiterated, that the succession cause filed at Kilungu court, was a nullity for having been filed by the settlement officer, without involving the entire family, and the proposed distribution as effected by the said court was not valid. The objector, too did not reside within Plot 28 and had moved out and settled on Plot 29.
25. It was also his further evidence that Plot 28 did not exist as, he had sub-divided the same upon getting grant and distributed it amongst other beneficiaries., who were the children of Kameme Itumo and Mutetema Itumo. It was also noteworthy that the it was only the objector, who was claiming a portion of Plot 28 while all other family members were content.
26. PW1 urged the court to dismiss the application to revoke grant/ objection filed.
27. Under cross-examination, PW1 confirmed that the deceased was his grandfather and his grandmother was Wavinya Itumo (the 1st wife). His late grandfather owned Plot 30, and later was allocated Plot 28, which he sold to his sons Kameme Itumo and Mutetema Itumo. He confirmed that when these transactions took place, he was young, and did not attend any family meeting, but knew what transpired through the records which he had obtained.
28. He reiterated that the settlement officer could not file succession on behalf of the family and had no basis for subdividing the suit parcel into three portions. Further, he also had the family authority to file this succession in order to administer the said estate and distribute it amongst the rightful heirs of the said estate. It was also his opinion that each family should settle on the land they were allocated and/ or bought by their sons as settled by the clan in 1977
29. PW2 Ndulu Mwilu, testified that she was 80 years old, and was a farmer based at Salama. She adopted her affidavit dated 07.02.2022 as her witness statement. She was the widow of Mwilu Itumo, a son of the deceased from the 1st house. Before registration of the suit parcel, she used to stay with her mother in law on Plot 30 together with her brother in law, Mutetema Itumo and Kameme Itumo.
30. Her mother-in-law, Wavinya Itumo died in 1975 and was buried in plot 30, which parcel they erroneously believed to have belonged to the deceased herein, but the parties were later directed by a court order issued in civil suit No 4125 of 1977 to move to Plot 28, where the deceased too was eventually buried. She was also aware that Mutetema Itumo, bought Plot 28 from the deceased and paid part of the purchase price by giving him a cow, and also paid Kshs 1,250/= to the settlement scheme to acquire the said parcel of land.



31. Finally, it was also her evidence that she was present in the family meeting of 23.08.2017, where the history of this parcel of land was discussed and the property distributed amongst the beneficiaries of Kameme Itumo and Mutetema Itumo, who were the rightful beneficiaries of the suit parcel of land. The objector and other sons of the deceased to her knowledge had no share in the suit parcel of land.
32. Under cross-examination, PW2, confirmed that her father-in-law owned the suit parcel of land, which was later subdivided to her brother in law's. She confirmed that the deceased had three wives and as per the "Kamba traditional law", he had to equally divide his property to the three families without discrimination.
33. She further confirmed that the deceased worked for a white farmer and was eventually given portions of land to settle his family. Each worker was given shares and it was Kameme Itumo and Mutetema Itumo, who paid for these shares. This was the factual position, which she was aware of having been married into the home by then. PW2 further testified that the deceased did call for a family meeting and asked his children to buy the suit parcel and it is the two aforementioned sons who took up the offer. She also did not have any recorded minutes of the said meeting to back up her evidence.
34. In reexamination, PW2 reiterated her earlier evidence, that the suit parcel belonged to the 1st family.
35. PW3 Joshua Kimeu Muthoka also adopted his affidavit dated 07.02.2022, as his evidence in chief. The deceased was his grandfather, Ngina Itumo his grandmother and his father was Muthoka Itumo , a brother of the Objector. His father the late Muthoka Itumo, never had any interest in the suit parcel and had told him that the same had been bought by Kameme Itumo and Mutetema Itumo.
36. Their parcel of land was Plot 30, where they resided with the objector. Ndisi Itumo, son of Ndoti Itumo was still alive and resided on Plot 27, while the beneficiaries of Mutetema Itumo and Kameme Itumo were the ones who resided on the suit parcel of land. He had no claim on the suit property as it did not belong to their family.
37. Under cross examination, he confirmed that the deceased died before he was born and did not know where he (his grandfather worked). His knowledge as to the history of the land was based on what he had been told by his father Muthoka Itumo, who was categorical that they had no interest in the suit property. He also confirmed that he resides on Plot 30, which belonged to his father Muthoka Itumo.

C. Analysis & Determination

38. I have carefully considered the Summons for revocation of the grant, the Affidavit in support of the summons, and the Respondent's replying and further Affidavit. I have also considered the entire oral evidence presented by the parties, their witnesses, and the submission file by all the parties. The only issue that arises for determination is whether the court should recall the grant of letters of administration issued to the petitioner on the 13th day of July 2018 and confirmed on the 24th day of May 2018.
39. Section 76(a), (b), and (c) of the *Law of Succession Act* provides as hereunder:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;



- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
40. That section provides that a grant of representation may at any time be revoked or annulled as long as the court is satisfied that the facts contemplated under the said section are proved. It is therefore clear that there is no limitation in so far as matters revocation or annulment of grant are concerned. However, it is not in every situation where transgressions are alleged that the grant must be revoked.
41. This position was adopted in the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* [2016] eKLR Succession Cause No 158 of 2000, Mwita J Where it was held that; -
- “Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account the interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”
42. *In Re Estate of Gitau (Deceased)* [2002] 2 KLR 43 Khamoni J while addressing this issue also expressed himself as hereunder:
- “Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the *Law of Succession Act* should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.”
43. The evidence led by both parties confirms that the petitioner is a grandchild of the deceased and did apply for letters of administration, without including the objector/applicant and other siblings from the 2nd and 3rd house of the deceased, on the basis that they were not entitled to a share of Plot 28 ULU settlement scheme. The land search of this property confirmed that it was registered in the name of the deceased and therefore prima facie was estate property.
44. That being so, without doubt, the proceedings to obtain the grant were defective in substance for having been commenced and concluded without involving the entire family of the deceased.
45. The petitioner on the other hand contends that the proceedings undertaken were not defective as the suit property was bought by his uncles Mutetema Itumo and Kameme Itumo , both children of the 1st house and thus the other two houses of the deceased were excluded from claiming any benefit from the estate property.
46. The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate the collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.



47. The evidence lead, calls on this court to determine whether the suit property was held by the deceased in trust of the 1st house exclusively, which would then necessitate the court going into the issue of determining ownership of land, which is an issue for resolution outside of the framework set out in the Law of Succession Act.

48. In Re; Estate of Atibu Oronje Asioma (Deceased) (Succession Cause 312 of 2008) [2022] KEHC 11046 (KLR) (22 July 2022) (Ruling), the Court stated:

“The design of the Law of Succession Act was that the mandate of the probate court was limited to distribution of the assets, and where a dispute arose on ownership of any asset, then the same should be placed in another forum, and not the succession cause, for litigation and determination. That was the spirit of rule 41(3) of the Probate and Administration Rules. Succession proceedings were not appropriate for determining disputes between the estate and third parties over title to or ownership of assets placed before the court for distribution. Besides the provisions of the Law of Succession Act and the Probate and Administration Rules, the applicants had to also contend with the Constitution of Kenya, 2010 (Constitution), so far as the jurisdiction of the High Court was concerned, with respect to disputes over title to land and trusts over land related to title to the land. Article 162(2) of the Constitution envisaged a court with jurisdiction to handle disputes relating to title or ownership of land. Under article 165(5) of the Constitution the High Court should not exercise jurisdiction over the matters to be placed under the court contemplated by article, 162(2). The court envisaged in article 162(2) was subsequently established under the Environment and Land Court Act, to handle the disputes stated in article 162(2). The Land Registration Act and the Land Act identified the Environment and Land Court as the court for the purposes of disputes relating to matters touching on land, including registration, which was at the core of the instant application. Those provisions were in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act. Section 47 of the Law of Succession Act did not grant the High Court elastic jurisdiction to grant such orders as it pleased. It had been equated with section 3A of the Civil Procedure Act as saving the inherent powers of the court. Section 47 of the Law of Succession Act merely stated that the High Court had jurisdiction to deal with applications and determine disputes that arose over matters that were governed by the Law of Succession Act, and pronounce decrees and make orders as could be expedient, in the context of the provisions of the Law of Succession Act. It did not confer jurisdiction to handle disputes and applications that were not provided for under the Law of Succession Act. Inherent power was not saved under section 47 of the Law of Succession Act, but under rule 73 of the Probate and Administration Rules. The High Court could only exercise jurisdiction, according to section 47, with respect to the matters covered by or provided for under the Act. It said no more than that. The Law of Succession Act was divided into 8 parts, and the High Court was limited to handling applications that arose with respect to the matters that were governed in those 8 parts. The jurisdiction of the High Court came out clearly when juxtaposed against that of the Magistrates Courts as set out in section 48(1) of the Law of Succession Act. The jurisdiction of the Magistrate’s Court was not as wide as that of the High Court.”

49. Rule 41(3) of the Probate and Administration Rules also provides that;

Where a question arises as to the identity, share, or estate of any person claiming to be beneficial interested in, or 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 subject 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.

50. Unfortunately, this court, does not have jurisdiction to determine the central issue in contention as to whether the suit property was held by the deceased exclusively in trust for the 1st family or it belonged to him exclusively and therefore open to distribution to the entire family. That is a question that ought to have been determined prior to confirmation of grant and be resolved in the right forum.
51. I also hold and find the proceedings herein were defective in substance, for excluding another family member of the deceased, whose consent were also not sought before distribution was effected.

Disposition

52. In light of the evidence adduced I do find and hold that
- a. LR Machakos/Ulu 28, belonged to the deceased and is subject to distribution amongst his family unless proven otherwise before the Environment and Land court.
 - b. The proceedings to obtain the grant here were defective in substance, for the reason that the petitioner did not include all the deceased family members as provided for in law. Subsequently, the letters of administration intestate issued to the petitioner on the 13th day of July 2018 and confirmed on the 24th day of May 2018 are hereby revoked and cancelled.
 - c. That new letters of administration intestate be issued to three new administrators, appointed from each of the deceased's three (3) houses.
 - d. In the interest of justice and based on provisions of Section 47 of the *Law of Succession Act*, and Rule 73 of the *Probate and Administration Rules*, an order of inhibition is placed on LR Machakos/Ulu 28 and all sub-divided titles arising therefrom pending determination of the issue of ownership of this parcel of land.
 - e. Proceedings to confirm the grant herein will await a determination by the Environment and Land Court, the question as to the rightful owner of LR Machakos/Ulu 28. i.e. Whether it was held in trust for the 1st family of the late Itumo Mbuta or it exclusively belonged to him.
 - f. This being a family dispute, each party will bear their own costs
53. It is so ordered.

READ, SIGNED, AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 12TH DAY OF FEBRUARY, 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 12TH DAY OF FEBRUARY, 2025.

In the presence of: -

No appearance Petitioner

No appearance Objector



I.Jabo Court Assistant

