



REPUBLIC OF KENYA



**In re Estate of Paul Muthiani Musau (Deceased) (Succession Cause 51 of 2017) [2025] KEHC 2083 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2083 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 51 OF 2017  
MW MUIGAI, J  
FEBRUARY 5, 2025  
(FORMERLY NAIROBI SUCCESSION CAUSE NO. 667 OF  
1984)  
IN THE MATTER OF THE MATTER OF THE ESTATE OF  
PAUL MUTHIANI MUSAU (DECEASED)**

**BETWEEN**

**PETER MWAKA MUTHIANI ..... ADMINISTRATOR**

**AND**

**BENJAMIN WAMBUA JAMES ..... 1<sup>ST</sup> ADMINISTRATOR**

**JOSEPH KWAINZI MUTHIANI ..... 2<sup>ND</sup> ADMINISTRATOR**

**ANTHONY MUSAU MUTHUSI ..... 3<sup>RD</sup> ADMINISTRATOR**

**RULING**

**Background**

1. On 24.09.2024, this court directed parties to file submissions as per the application of 8.05.2023 on the mode of distribution.
2. The deceased herein died on 18.09.1982.
3. The estate is said to be comprised of three house hold units namely;
  - a. Syokwia Muthiani 1<sup>st</sup> wife
  - b. Katile Muthiani 2<sup>nd</sup> wife
  - c. Esther Mutindi Muthiani 3<sup>rd</sup> wife



4. The beneficiaries of the estate comprise of the children of the deceased as outlined in the judgment of 21.09.2012. It is not in dispute that the estate has the following assets;
  - a. Machakos/Nguluni/774
  - b. Matungulu/Sengani/1158
  - c. Plot 5A & B at Tala Market
  - d. Plot at Katine section, Tala
5. With regard to distribution of the estate, Lady Justice Nambuye in the order dated 21.11.2022 directed as follows;
  - “9. That on the mode of distribution of the estate property in number 7 above, the same is distributed as follows;
    - a) first each plot is to be subdivided into three equal parts
      - i) the first portion to go to the household of Syokwia
      - ii) the second portion to the house of Katile
      - iii) the 3<sup>rd</sup> portion to go to the house of Esther Mutindi
    - b) That the mode of sharing the house hold unit of Syokwia is that the resulting portion will be shared equally between the household of John Muthusi Muthiani, Samwel Musyoki Nyumu and David Kavatu, all deceased.
    - c) That the mode of sharing the house hold unit of Katile is that the resulting portion in favour of this household will be shared equally between the households of Jonathan Nyumu Muthiani and JAMES Maingi Muthiani, all deceased.
    - d) That the mode of sharing the house hold unit of Esther Mutindi is that the resulting portion n favour of this household are to be subdivided into equal protions. The first portion To go to the house of Katuku comprising Joseph Kawinzi Muthiani, Wambua Muthiani, and Muema Muthiani  
That the second resulting portion to go to the hose of Mukii namely Peter Mwaka and Kiiio Mwaka
    - e) That Mary Katoko (Kadogo) do have life interest in share given to Peter Mwaka.”
6. Justice Musyoka issued orders on 11.03.2014 directing inter alia that a Government surveyor be appointed and the estate be divided into three equal portions.
7. In Machakos Criminal Appeal no 94 of 2018, Justice Kemei wherein set aside the conviction and quashed the sentence in a judgment dated 11.11.2019. In this case, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Administrators had been found guilty of making judgment documents without authority c/s 357 of the *Penal Code* and Forgery c/s section 345 and 349 of the *Penal Code* and sentenced too a fine of Kshs 50,000 each and in default two years imprisonment.



8. Subsequently, Justice Kemei in this cause rendered a ruling dated 5.11.2019 wherein he directed that;

“The administrators agree on a mode of distribution of the remaining unutilized land and file an application in that regard detailing the mode of distribution within 60 days from the date hereof failing which the court shall adopt the mode in the judgement issued on 21<sup>st</sup> September 2012.

The administrators are ordered to avail to court a report and inventory of their activities as per the provisions of section 83 of the Law of Succession Act within sixty (60) days from the date hereof..”

9. I note that there is a consent that was adopted before Justice Kimaru on 3.04.2014 in the terms that;

“...each of the parcels shall be divided into three (3) equal portions.”

10. Justice Kemei made reference to the above ruling and that of 21.09.2017 by Lady Justice Nambuye, as she then was and found that the order that the assets are to be shared equally between the three houses is binding. The court stated as follows;

“Parcel number Machakos/Nguluni /774 and parcel number Matungulu/ Senganu/1158 shall be shared equally between the three households of the deceased. The administrators shall ensure that each household is allocated portions containing rocky, sandy and cotton soils so as to bring semblance of equity and fairness.

Plot numbers 15A and 15B Tala Market and plot at Katine section be sold and the proceeds shared equally between the three households.

The administrators are directed to work together and conclude the process of distributing the estate so that the beneficiaries get their rightful entitlement.

....”

11. This court in its judgment delivered on 16.02.2023 gave a history of the file and gave orders inter alia that;

“ 1 ...

2 ....

5. the Surveyor shall file a comprehensive report on the survey and subdivision of the suit properties Machakos/Nguluni/774 and Matungulu/Sengani/1158 confirming measurement, acreage, location, survey/subdivision, which household is on which portion, 3<sup>rd</sup> parties occupation, access and permanent structures. The Report should confirm that survey was by and in the presence and/or representatives of Administrators/Beneficiaries and/or any agreement/grievances raised during the survey.

6. if or when the survey/subdivision is conducted again, if security and safety required the OCS Machakos to oversee the process in Machakos/Nguluni/774 and OCS Matungulu to oversee the process in Matungulu/Sengani/1158.”

12. On record is a Partial Report by the Court Bailiff, Daniel Juma Aliwa filed on 8/3/2024 on site visit of property LR Machakos/Nguluni/774 and Complete Report dated 28/05/2024 during a site visit.



## Submissions

### 4<sup>th</sup> Administrator's Submissions dated 23.10.2024

13. The 4<sup>th</sup> Administrator urged the court to allow the beneficiaries of each house to get their respective shares from the estate of the deceased thereafter if at all any beneficiary who sold any part of the deceased's estate, the said purchaser should line up behind the beneficiary and get his or her share.
14. That in the event the purchasers will not get what they paid for then they will have a recourse in the court of law because 20 of the purchasers are in court in Machakos ELC Cause No 222 of 2017 which is pending determination.
15. According to the 4<sup>th</sup> Administrator, the purchasers herein are trying to litigate in this succession cause what is subject before another case filed at the Environment & Land Court. The purchasers are not parties to this suit and this Court has no jurisdiction to entertain them.
16. The Court was informed that majority of the purchasers of the estate and putting up of structures were undertaken while there were court orders prohibiting such kind of transactions leave alone what the law says about such transactions.
17. As per the reports of the Court bailiff of 4.12.2023, 8.12.2023, 14.02.2024 and 24.05.2024, it is submitted that there is no dispute between the beneficiaries in terms of the shares to be allocated to them save for Land Parcel no Machakos/Nguluni/774 where there is a dispute in distribution and allocation of some portions of land .
18. Vide the survey report dated 26.09.2021, the said land was divided into three portions on the red soil and black soil and adopted by the court with no reviews being preferred. That thereafter the court issued further orders of demarcation, survey and subdivision to various beneficiaries of the three houses, which orders have never been challenged.
19. It was submitted that since the 1<sup>st</sup> and 2<sup>nd</sup> Administrators are now deceased and will not be able to execute necessary paperwork and the estate is not desirous of substituting them or amending the grant and the remaining process should be concluded by the Deputy Registrar as contained in the judgment of Hon Lady Justice Nambuye.
20. In addition, that the 4<sup>th</sup> Administrator is bedridden while the 3<sup>rd</sup> Administrator is in his twilight years. Further, that the beneficiaries have a reservation on the conduct of the 3<sup>rd</sup> Administrator who wants to disinherit the beneficiaries and pass their interest to illegal purchasers of the estate.
21. It was contended that a purchaser for value cannot disinherit the beneficial interest of a beneficiary and if the court allows the purchasers to crowd the court, then the history of their ownership is and will be illegal ab initio since the person selling did not have a grant from the court to pass a clean title nor did they have any validation from the administrators of the estate that indeed the portion sold was an entitlement of a beneficiary.
22. It was contended that the report of 10.07.2023 is the one which should be adopted as all the beneficiaries are in agreement with it and it represents the interest of the beneficiaries of the estate.
23. As regards distribution, it was submitted that land parcel No Matungulu/Sengani/1158 was divided into three equal portions and as regards Land Parcel No Machakos/Nguluni/774, it was submitted that there is an agreement between the three houses on how to divide it.



24. The 4<sup>th</sup> Administrator contends that the purchasers being mentioned by the 3<sup>rd</sup> Administrator do not qualify to rely on the doctrine of bona fide purchasers for value since they have not proved that they hold a certificate of title, purchased the property in good faith, had no knowledge of the fraud, the vendors had apparent valid title, he purchased without notice of any fraud and he was not a party to the fraud. It was submitted that ant sale of part of the deceased's estate is a contravention of the Law of succession Act and any such contract is ex facie illegal. Reliance was placed on the case of Mcfoy vs United Africa Co Ltd (1961) 3All ER 1169.

### **3<sup>rd</sup> Administrator's Submissions dated 22.10.2024**

25. The 3<sup>rd</sup> Administrator Proposed that the beneficiaries of each household should get their unsold share and the sold share to the Purchasers for value who are not disputed. It was submitted that the from the court judgment, orders, ruling, surveyors' report and the court Bailiff's reports;
- a. The estate has three households
  - b. All the assets of the estate ought to be shared between the three households in equal shares
  - c. Plot 15 A & B at Tala Market and plot at Katine Section, Tala should be sold and proceeds shared into there equal amounts among the three households.
  - d. Land Parcel Machakos/Nguluni/774 and Matungulu/Sengani/1158 have already been subdivided into equal portions among the three households and no complaint of any households having gotten a bigger or smaller share than the others.
  - e. The beneficiaries of the estate have heavily and extensively sold some of their shares to purchasers for value.
  - f. Most of the purchasers for value have developed their purchased portions by building permanent houses and others cultivating
26. Secondly, that the beneficiaries who have not sold all their shares to get their unsold shares and the rest to the purchasers for value who are not being disputed and they should be included in the schedule for distribution as directed by Lady Justice Nambuye in her order issued on 5.11.2012.

### **Some Beneficiaries & Intended Interested Parties Submissions dated 31.10.2024**

27. It was submitted that the orders issued by Lady Justice Nambuye on 5.11.2012, Justice Musyoka on 11.3.2014, Justice Kemei on 11.11.2019 and 17.5.2021 are still valid as none has been contested or appealed. It was contended that the mode of distribution is not contested and the only issue is that some beneficiaries have sold more than their shares exposing others who might stand disinherited if the court does not endure that distribution is not only done on paper but the same is also enforced and effected on the ground.
28. It was contended that in the interest of justice, purchasers do claim their shared from the beneficiaries who sold to them and the first in time to buy be given priority over those who bought recently considering the fact that some of the people bought the land when there was an order of status quo, a clear breach of the court order. That some bought the parcels before revocation of grant when there was a valid grant hence their cases should be treated differently.
29. It was submitted that Matungulu/Sengani is fully occupied by purchases and it is not clear who the sellers are as no party would like to address the issue. He denied there being an agreement between the house of Mutindi and Syokwia in relation to 15 acres of cotton soil. Further, that the fact that some



of the purchasers have developed their purchased portions by building permanent houses and others cultivating should not block the court from doing justice to other beneficiaries.

30. Lastly, it was their submission that after each household has gotten its shares, then distribution can be done with the involvement of the Advocates for the parties herein with a report being made to this court and thereafter on the settlement. The court was told that in order to include the purchasers for value in the schedule of distributions directed by Lady Justice Nambuye in her order issued on 5.11.2012, the sellers should be identified to make it viable.

### **Determination**

31. I have considered the submissions of the parties together with the court record and the issue for determination is how the estate property should be divided amongst the beneficiaries.
32. I note that the orders of this court have never been reviewed and or set aside.

### **Beneficiaries**

33. The Beneficiaries comprise of the surviving spouses and children of the deceased as outlined in the judgment of 21/9/2012. where the children are deceased, the grandchildren are entitled only to the share of their parent in the deceased's estate.
34. The 4<sup>th</sup> Administrator in his submissions expounded on the great grandchildren of the deceased from the surviving children of the deceased. There is no dispute as to beneficiaries of the estate of the deceased. The issue is what Administrators did/have done and beneficiaries following Confirmation of Grant as at 9<sup>th</sup> November 2009 where the assets that comprised the estate of the deceased i.e Plot 774 Komarock, LR Matungulu/Senghani 1158 Plot 15 A & B Tala Market & Plot Katine Section Tala were to be distributed amongst 3 houses/wives/widows of deceased as follows;
1. Benjamin Wambua James for Katile House
  2. Joseph Kawinzi Muthiani for Mutindi House
  3. Anthony Musau Muthusi for Syokiwa Muthusi

### **Administration & Distribution**

35. According to 4<sup>th</sup> Administrator's submissions and relying on the Final Surveyor's Report of 10/7/2023 [previously there were 2 one dated 18/4/2023 & the one all beneficiaries agree with of 23/9/2023] each of the 3 houses should have 109 acres each in Machakos/Nguluni/774 and 3 equal portions of 7.13 acres each house in Matungulu /Senghani/1158.
36. A meeting was held on 12/10/2024 to deliberate issues following Court order of 24/9/2024 on the administration distribution & issuance of title deeds and of importance is that it emerged that Administrator No 3 Anthony Musau Muthusi sold 16 acres yet his share is 4.5 acres and Administrator No 2 Joseph Kawinzi Muthiani who died and is yet to be substituted sold more than 36 acres and these are reflected in the Court Bailiff's Reports on the position on the ground.
37. The family of Paul Muthiani Musau unanimously disagree and dismiss submissions that the Surveyor's Report be expunged and that titles be issued to Administrators to in turn distribute to the individual beneficiaries within each house. The 30 beneficiaries appended signatures and ID numbers to this Agreement on mode of distribution.



38. On behalf of Phillip Kilonzo Kawinzi & 11 intended parties filed submissions to the effect Matungulu/ Senghani /1158 is fully occupied by Purchasers and it is not clear who the sellers are yet there are beneficiaries who have not obtained their beneficial interest/share.
39. The 4th Administrator filed written consents of beneficiaries who support administration & distribution of the estate pursuant to Court orders issued on 24/9/2024 and in light of the Comprehensive Surveyor's Report filed in Court.
40. On behalf of 3<sup>rd</sup> Administrator, he proposed that beneficiaries of each household get their unsold shares and the sold shares go to the Purchasers for value where there is no dispute as hereunder and listed beneficiaries in each house and portions sold to 26 Purchasers from Beneficiaries in 1<sup>st</sup> house, for the 2<sup>nd</sup> house 20 Purchasers and in the 3<sup>rd</sup> House & 7 Purchasers.
41. This Court finds the List of Beneficiaries and Purchasers wanting; who of the Beneficiaries sold to the Purchaser? how do you sell what you do not have and are still pursuing? The Court record depicts Administrators as main Sellers not beneficiaries.
42. The duty of this Court is administration and distribution of the estate of the deceased. The detailed Site visit Reports and Photographs depict fast growing settlement of residents and development of property by Purchasers either from Administrators, Beneficiaries or earlier Purchasers.
43. The Court notes that this is an old matter since 1996, and Certificate of Confirmation of grant of 2009, distribution of assets that comprised of deceased's estate were to be divided into 3 households, from then, the beneficiaries included children of the deceased who most are now deceased, grandchildren have stepped in the place of their parents and in other cases great grandchildren too. As this progression took place, the vast land available for distribution to the beneficiaries decreased due to multiple sale of portions to Purchasers depriving ALL beneficiaries their beneficial share first.
44. If beneficiaries are not considered and/or catered for first, with the buzz of activity on the properties they will be disinherited as Purchasers take on establishing their proprietary interest and are included in the filed Amended /Rectified Summons for Confirmation of Grant. I note with concern that Administrators sold chunks of land before distributing to beneficiaries of the estate, some are deceased and others bedridden.
45. The most, fair, just & equitable mode of distribution is to identify each beneficiary in each house currently their individual beneficial interest allocated to them and they consent and have their ID numbers, full names & signatures first to obtain their beneficial interest. Agreement on mode of distribution where the 30 beneficiaries appended signatures and ID numbers and full names maybe considered for Partial /Full Amended/Rectified/Substituted Confirmation of Grant.
46. Therefore, to mitigate imminent loss of the beneficial interest of beneficiaries, the beneficiaries shall be considered first as a matter of priority, the Administrators who are beneficiaries will not have another share as what they sold shall be attributed and included as their share; only if any land remains as surplus can they have a second bite at the cherry, as I said earlier Ruling of 16/2/2023

Suffice is that any Beneficiary /Administrator who sold any part of the deceased's estate shall be deemed to hold the proceeds of the sale in trust for the beneficiaries or the sold portion is to be apportioned as part of the beneficiary/administrator/household of the vendor's portion.'



## Purchasers

47. The 3<sup>rd</sup> Administrator listed Purchasers to suit property Machakos/ Nguluni/774 by beneficiaries w.e.f 2009 to date totaling 73 Purchasers. The 3<sup>rd</sup> Administrator deposed that the said property is settled by almost 100 Purchasers and the same seems true from the Site Visit Reports filed in Court.
48. The Beneficiaries have threatened that once Partial/Amended Certificate of Confirmation is issued they will evict the Purchasers from the property. The 3<sup>rd</sup> parties cannot be wished away or ignored they are in possession and have settled on their portions acquired and developed some have been on the land for 14-15 years now.
49. There is a map attached prepared by Kasyi & Co Ltd Licensed & Consultant Surveyors which shows on the property Machakos/ Nguluni/774, blue colored area, where Administrators did not distribute to beneficiaries. Green colored area Beneficiaries who still hold their portions after distribution and have not yet sold. Attached is Comprehensive Report of 1/5/2023 on Plot No 774 Nguluni Machakos of all beneficiaries their portions and sold portions to Purchasers drawn by Surveyor.
50. The 4<sup>th</sup> Administrator submitted that contrary to Section 55 & 82 of LSA the Administrators/ Beneficiaries sold portions to Purchasers who are joined as interested Parties. This was hotly contested as the dispute resolution is for Land & Environment is ELC Court. The 4<sup>th</sup> Administrator contested if they are innocent bona fide Purchasers, whether Administrators/beneficiary had a good title to pass on before Confirmation of Grant, This is a Succession matter/ cause a Purchaser for value cannot disinherit the beneficial interest of a beneficiary.
51. The 4<sup>th</sup> Administrator objected to submission of 3<sup>rd</sup> Administrator to distribute the said properties of the estate, all beneficiaries will not get their share, as with the 3<sup>rd</sup> parties the 3<sup>rd</sup> Administrator will shortchange beneficiaries. The Purchasers are not party to these proceedings as these are Succession proceedings their claim lies in the ELC Court. If 3<sup>rd</sup> Administrator's recommendation is allowed then parties who sold part of the estate would enrich themselves at the expense of those who have not sold.
52. The facts of this case is that it has been in our Courts for over 30 years and series of events have culminated to competing legal interests on the one hand beneficial interest; the Administrators were to distribute to individual beneficiaries from each house after grant was confirmed in 2009 and that Administrators held in trust for each house.
53. Strangely, as at 2012, 4 Administrators were appointed after grant of 2009 was revoked. Some Administrators distributed to beneficiaries, some of whom, sold their portions and other Administrators sold portions to purchasers without distributing the estate to beneficiaries first. So today, the land is flooded by Purchasers than beneficiaries and there is a possibility of beneficiaries being deprived of their entitled beneficial interest. The Purchasers bought the land for value, took possession, acquired and developed the same and settled on the land. On the other hand, no report was made for their eviction as trespassers.
54. The Purchasers were not privy to the proceedings until their quiet enjoyment was threatened. I am also not convinced by the contention that the Purchasers for value do not know who the sellers are. If parties indeed want a just finding, then they must be honest. Surely, there were agreements involved and monies that changed hands in order for the said purchasers to take possession of the properties. From the report by the court bailiff, it is indicated who purchased what size and from whom.
55. The joining of Purchasers as interested parties in the Succession proceedings was challenged by 4<sup>th</sup> Administrator, as resolution of their dispute is by ELC. This Court included the Purchasers as there



were conceded as Purchasers by certain Administrators and beneficiaries of portions of land that belonged to Administrators and Beneficiaries and sold to the Purchasers. Now the Purchasers were under imminent threat of eviction and trespass by other parties on land they bought, developed and settled on.

56. Article 48 Constitution allows access to justice and Purchasers may obtain interim relief and preserve the subject-matter as the claims are heard & determined in ELC. Therefore, the Court must ensure justice by balancing rights of beneficiaries and 3<sup>rd</sup> Parties pending proving their claim in ELC.

### **Disposition**

1. Distribution of deceased's estate to beneficiaries shall be upon filing Amended Summons for Confirmation by Administrators and Beneficiaries filing respective Consents as required by Section 71 LSA and appearing in Court No 1, physically/virtually to confirm consent on mode of distribution.
2. By virtue of Section 93 LSA the Purchasers shall remain in situ if already purchased, settled acquired and developed land AND pursue the claim in ELC Machakos for hearing & determination. Status quo is maintained till then. The Purchasers may obtain if agreed their portion/title from Administrator or Beneficiary who sold to them once Amended Certificate of Confirmation of Grant is approved / granted.
3. Where Administrators/Beneficiaries sold land exceeding their share, one is not entitled to any other share until beneficiaries obtain beneficial interest what one sold is deemed to be part of one's beneficial share.
4. Any aggrieved party to file Application for hearing & determination.
5. The matter shall be mentioned in Machakos High court No 1 on 12/3/2025.

**RULING DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 5/2/2025.**

**(VIRTUALLY/PHYSICAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

