



REPUBLIC OF KENYA



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**In re Estate of M’wongo Kichiu (Deceased) (Succession Cause  
335 of 2014) [2025] KEHC 2958 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2958 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 335 OF 2014  
EM MURIITHI, J  
MARCH 13, 2025**

**IN THE MATTER OF THE ESTATE OF M’MWONGO KICHIU (DECEASED)**

**BETWEEN**

**ROSALIA WAIRIMU MAINA ..... PETITIONER**

**AND**

**DIANA NYANGUTHII MAINA ..... OBJECTOR**

**AND**

**JOSHUA KIRAI INOTI ..... INTERESTED PARTY**

**AND**

**JOSHUA KIRAI INOTI ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. By order of the Court made on 15/10/2024, three applications, respectively dated 22/7/2024, 30/9/2024 and 4/10/2024 were to be heard together by way of submissions and affidavits filed by the parties. This is the second attempt at revocation of the Grant herein made to the petitioner. The first attempt was made by an applicant who claimed a purchaser’s interest under an alleged sale before confirmation of the Grant, and the application was declined by the Court on ground of want of locus standi.
2. The three applications are directed to the same end of revocation of the Confirmed grant herein made on 22/11/2022 by consent of the parties on distribution for different reasons and with different consequential reliefs. The first application dated 27/7/2024 was filed by the Petitioner in person shortly after the dismissal of the first application for revocation at the instance of the alleged purchaser David Ikunda Muguna by ruling of 27/6/2024. The second application dated 30/9/2024 was filed by the



Objector and the Interested Party countering the application the Petitioner's application and seeking removal of the petitioner as administrator, the appointment of the Objector and Interested Party as the administrators and subsequent or in the alternative implementation of the Confirmed Grant of 22/11/2022. The third application dated 4/10/2024 was filed by the petitioner now represented by the Counsel on record who sought to have the application dated 22/7/2024 filed by the petitioner in person withdrawn and hearing proceed on the basis of the new application of 4/10/2024. When the Counsel for the Objector and Interested Party objected to the withdrawal stating that the Court should see the contradictions in the positions taken by the Petitioner in the two applications, the Court directed that the three applications be heard together for the court's final determination.

## Background

3. By way of background, the Court by a ruling dated 27/6/2024, the court declined to grant an application for revocation by a person who claimed to have bought ½ acre of the suit property from the petitioner on the reasoning set out in the ruling that:

“ 16. The Applicant is a total stranger to these proceedings and his purported claim in the suit land is hinged on an alleged purchase of part thereof from the Petitioner way before the grant had been confirmed. Such a dispute is not to be resolved by this court.

17. I respectfully agree with the Court in *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, (W. Musyoka J) held that:-

“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 collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes, of course, do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.”

18. This court finds that the Applicant has no locus standi to file the instant application, and his claim falls outside the ambit of a succession court. How then can the confirmed grant herein be revoked at the instance of such a stranger?”

4. The present application was filed on 22/7/2024 less than a month from the ruling of 27/6/2024 which struck out the Interested Party's case of purchaser for value from the petitioner for want of locus standi, provoking the subsequent applications.



## Chronology of applications

### Application of 22/72024

5. The application dated 22/7/2024 was filed by the Petitioner in person following the decision of the court of 27/6/2024 and it sought relief as follows:

- “1. That this application be certified as urgent and be admitted for hearing forthwith due to the circumstances prevailing and be dispensed with on priority basis.
2. That the honourable court do make an order for expunging the consent dated 18th November,2022 and make its ruling on merits following the discovery that the consent was made by advocates on record in this suit without involving their respective clients.
3. That there be stay of execution of the ruling dated 27th day of July, 2024 pending hearing and determination of this application.
4. Any other order that this Honourable Court may deem fit to grant in the circumstances.
5. That the cost of the Application be provided for.”

6. The Petitioner contended that the consent, which was shown to have been executed by her, was a fraudulent collusion of the objector and their advocates as she could never have consented to disinheriting herself and giving the land to the Objector and the Interested Party and no hare for herself, as deponed in her supporting affidavit of 22/7/2024, as follows:

- “1. That I am a female adult of sound mind and a resident of Meru County within the Republic of Kenya and the Applicant herein and competent to swear this affidavit.
2. That the respondents and the interested party advocates herein conspired and signed consent alluding that I had consented to the mode of distribution over the estate of the Deceased (Annexed and Marked "RW1" is a copy of the consent).
3. That I had earlier objected and/opposed to the alleged consent as per my replying affidavit dated 7th March, 2023 that was filed in court on 03 April, 2023(Annexed and Marked "RW2" is a copy of replying affidavit).
4. That the ruling was delivered in favour of the objector who is a total stranger to me and that I do not know her as my late husband has never told me of her existence.
5. That as a result of falsehood and collusion by the advocates I was convicted for having sold LAND PARCEL NO.NKUENE/NKUMARI/656 to other parties and having disinherited myself.
6. That the new discovery of new evidence that there was a consent filed by the advocates on record in this suit indicating that I had accepted that the estate



of the deceased be distributed as they indicated leaving me without anywhere to be buried.

7. That there is no way that I would have sold the whole parcel of land and leave myself with no space even for my graveyard.
  8. That the applicant in the application that was dismissed was misadvised by my former counsel and that she represented him in the matter herein that was dismissed on the grounds that he did not have locus standi and that his counsel did not seek leave to enjoin him as a party in the matter.
  9. That I am old and illiterate and I did not know anything that was going on unless appending my thumbprint on the papers presented to me.
  10. That I am a senior citizen of this country and that the respondent who is a stranger to me should not take advantage of me and have me incarcerated to jail as I am old sickly and feeble.
  11. That if at all the respondent is my step daughter as alleged then my late husband ought to have told me.
  12. That I reiterate that I recently discovered that the advocates concerned in this matter colluded to sign a consent that I was not consulted about and went along to use it in deciding the matter herein.
  13. That if at all I knew the effect of the alleged consent then I would have not executed the same if at all I did so and that I invite this court to look at the signature on the said consent and my replying affidavit.
  14. That for the interest of justice and fairness the application herein ought to be allowed.”
7. The Objector filed Replying Affidavit sworn on 5/3/2024 expressed to be in reply to the applications dated 22/07/2024 and 04/10/2024. She described herself as Beneficiary, alleging that the applicants have a two acre parcel of land at Nturukuma and confirming instructions to the Interested Party (whom she refers to as the 2<sup>nd</sup> beneficiary) to substantively respond to the application, as follows:
- “2. That I and the 3rd beneficiary have authorized the 2nd Beneficiary to substantively respond to the application and therefore wholly associate ourselves with the responses and submissions. thereof.
  3. That I only wish to inform this honourable court that the applicants and their brother Michael Mwongo Kisio have land in excess of 2 acres at Nturukuma where they settled many years ago, has disclosed in the provision report dated 29.062017 before this court in MERU HCCR NO .62 OF 2016 (Annexed herewith and marked DNM10" is the said provision report.
  4. That it is dishonest for the 1st applicant to purport that she has nowhere to stay, have home or a grave yet she used part of the money they were paid to buy land and settle at Nturukuma just before Nanyuki.
  5. That the applicants do not live on any part of the estate herein having left many years ago.



6. That it is needful that the 1st applicant be removed as an administrator as per our application dated 30.09.2024 to give way for the implementation of the grant.”
8. A Replying Affidavit sworn on 5/11/2024 by Priscilla Gakii Mathenge who was described on the title as Beneficiary was in the same terms as that of Diana Nyakuthii Maina above.
9. The Interested Party opposed the application by a Replying Affidavit on 5<sup>th</sup> November 2024, purportedly on behalf of himself, the Objector and one Gakii Mathenge the legal representative of the estate of Mathenge Muguongo painting out to the Petitioner’s conduct in this case as an abuse of the Court by reason of res judicata at paragraphs 4-15 thereof as follows:
  - “ 4. That I am advised by my advocate, which advice I believe to be true, that the application is incompetent as the same is in violation of section 7 of the Civil Procedure Act in light of the court’s ruling of 27.06.2024. Annexed herewith is the ruling marked "JKI".
  5. That the applicant is a perennial abuser of court's process with frivolous applications.
  6. That as we respond to this application, the applicant has again filed a similar application dated 04.10.2024.
  7. That the instant application seeks to expunge the consent entered on 18.11.2022 and adopted in the presence of the applicant before this honourable court on 23.11.2022.
  8. That the applicant did not only sign the said consent but was present in court when the same was read to all parties and the applicant confirmed the content thereof for adoption.
  9. That the applicant has been using her administrative position to manipulate other beneficiaries in order to extort money from them threatening to frustrate the implementation of the grant.
  10. That sure to her threats the applicant looked for strangers who filed an application dated 20.12.2022 seeking to challenge the grant on the basis that the applicant herein had sold some land to them.
  11. That to demonstrate that the applicant herein was behind the application dated 20.12.2022;
    - i) she filed n replying affidavit on 03.04.2023 which affidavit is sworn on 07.03.2023, where the applicant herein supports the application dated 20.12.2022;
    - ii) she challenges the consent adopted on 23.11.2022 and the grant thereof yet admits she signed it;
    - iii) admittedly she is behind the applicants thereof.
  12. That on 27.06.2024 the honourable court dismissed the application dated 20/12/2022.



13. That the ruling of 27.06.2024 dealt with the issue of the challenge to the consent dated 18.11.2022 and therefore I am advised it cannot be litigated upon again in law especially Section 7 of the *Civil Procedure Act*.
14. That in the instant application, the applicant who admitted being party to the consent dated 18.11.2022, is again seeking to have the same expunged.
15. That the instant application is frivolous, vexatious and an abuse of the court which should be dismissed with costs.”

#### **Application of 30/9/2024**

10. The application by Summons for Revocation of grant dated 30/9/2024 sought the following specific orders:

- “1. THAT the honourable court be pleased to certify this application urgent.
2. That the honourable court be and is hereby pleased to cancel/revoke the grant of administration issued to ROSALIA WAIRIMU MAINA on 25.11.2022 and the same issued to JOSHUA KIRAI INOTI & DIANA NYAGUTHII MAINA.
3. That in the ALTERNATIVE the honourable court be and is hereby pleased to empower and do authorize the Administrator in charge of Meru Law Courts to sign all relevant documents to ensure implementation of the grant herein instead of ROSALIA WAIRIMU MAINA, the administratrix herein.
4. That this honourable court be and is hereby pleased to lift/vacate/remove the caution/restriction/inhibition/injunction registered against the land register of Land Parcel No. NKUENEfNKUMARI/656 the estate herein.
5. That the Land registrar do dispense with the production of the original title deed over LR. NO.NKUENE/NKUMARI/656 the estate herein.
6. That the honourable court do rectify the grant in terms of the name of DIANA NYAGUTHII to read DIANA NYAKUTHII MAINA.
7. That cost be provided for.”

11. The application was supported by the affidavit of the Interested Party setting out the facts relied on as follows:

- “2. That the honourable court issued and confirmed grant in this matter in favour of the administratrix on 25.11.2022. Annexed herewith is a copy of the grant marked "JKL."
3. That since 2022 the respondent has been taking us round in circles.
4. That the administrator has refused to cooperate to implement the grant threatening that unless I and other beneficiaries bribe her with good money she will not implement it.



5. That to demonstrate the respondent's indolence and frustration in implementing the grant despite being present and confirming the mode of distribution by a consent on
  25. 11.2022, the administratrix used her proxies to file in court the application that was dismissed on 27.06.2024. Annexed herewith is the order marked "JK2".
  6. That we say she instigated the application through her proxies because vide her replying affidavit sworn on 07.03.2023 and filed in court on 03.04.2023 the Administratrix expressly supported the application meant to derail the grant. Annexed herewith is the replying affidavit marked "JK3".
  7. That until to date the administratrix has not taken any move to implement the grant but instead is scheming on how to sabotage the implementation and that is why she has filed another application, albeit in abuse of court process, seeking to set aside the grant.
  8. That for the grant to be implemented diligently, the administratrix should be removed as per this application and J and Diana be appointed to administer the estate.
  9. That I went to inquire of the status of the land register over the estate herein LR/NO.NKUENE/NKUMARI/656I found that there are inhibitions/restrictions registered against any dealings pending determination of this cause. Annexed is a certificate of search marked "JK4".
  10. That I am advised that the land registrar require that the inhibition be lifted or vacated by the court to allow any dealings with the land with respect to the grant herein."
12. The Petitioner's Replying Affidavit to the application for revocation of Grant dated 30/9/2024 was sworn on 5/11/2024 setting out her case and legal argument in the matter as follows:
- "2. That I have read and understood the contents of the Applicants Application dated 30/09/2024 together with the Supporting Affidavit filed therewith and it is in response and opposition thereto that I swear this Replying Affidavit.
  3. That I wish to state that the application is an afterthought, cunning, mischievous and attempt to muzzle the Petitioner/Respondent's statutory mandate.
  4. That Joshua Kirai Inoti 1st Applicant is not a beneficiary but a purchaser cum interested party in desperate venture to obtain his portion purchased this 17/05/2017, before confirmation of grant. (Annexed and marked RWM-1(a & b) is a copy of Chiefs letter dated 03/08/1999 and agreement dated 17/05/2017).
  5. That I am advised by the Respondent's advocates whose advice I believe to be sound that 1/17. Pursuant to the provision of Section 71(2)(a) of the Law of Succession Act, it follows that where the deceased died intestate, as is the case here, the grant of letters of administration should not be confirmed until the



court is satisfied about the identities of and shares of all persons beneficially entitled. The Section provides:-

- 2) "Subject to subsection (2A), the court to which application is made or to which any dispute in respect thereof is referred, may-
  - (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant."

(Annexed and marked RWM-2 is a copy of case In re Estate of Kamatu Kabara (Deceased) [2021] eKLR)

6. That the Applicants have opted to overlook the procedures or processes and to hurriedly deprive the rightful beneficiaries of their shares of estate.
7. That it has not been shown whether the deceased had other estate other than Nkuene/Nkumari/656 to warrant the Respondent born on 01/01/1952, aged 72 to be deprived of her respective share. (Annexed and marked RWM-3 is a copy of ID)
8. That whereas the administrator has a duty to the beneficiaries to ensure distribution of the estate within the stipulated time, the Respondent has to act diligently and in the premises, the 1st Applicant is not a beneficiary of the estate to be allocated respective share."

#### **Application of 4/10/2024**

13. The application dated 4/10/2024 was filed by the petitioner and the 2<sup>nd</sup> Objector as applicants and itself sought the revocation of the Confirmed Grant in specific reliefs as follows:

- "1. The Honourable Court do certify this Application of utmost urgency and be heard *ex parte* in the first instance.
2. The Honourable Court be pleased to revoke and/or rectify the Grant dated 25/11/2022 and fresh distribution of the estate be done.
3. The Honourable court be pleased to issue an order of inhibition inhibiting any dealing in respect to the deceased's estate in particular Land Parcel No. Nkuene/Nkumari/656 pending inter partes hearing and determination of this Application.
4. The Honourable court be pleased to grant such other/further orders as the honourable court may deem fit, just and appropriate in the circumstances.
5. Costs of this summons be provided for."

14. It was supported by an affidavit sworn jointly by the applicants ROSALIA WAIRIMU MAINA and RAPHAEL MATHENGE setting out the facts relied on as follows:

- "2. That the 1st Applicant Rosalia Wairimu Maina is the spouse of the deceased's son while the 2nd Applicant Raphael Mathenge is her son or deceased grandson hence rightful beneficiaries.



3. That the 1st Applicant was granted letters of administration on 12/03/2015 and on 25/11/2022 issued with Grant. (Attached and marked RWM 1(a-b) are copies of the letters of administration of Grant and the Certificate of Confirmation of Grant).
4. That the 1st Applicant deny signing Consent dated 18/11/2022 while the 2nd Applicant deny thumb-printing contained in the impugned letter/consent. (Attached and marked RWM-2 is a copy of consent to the making of grant of administration).
5. That the signatures or mode of execution in the "Consent to the making of grant of administration" dated 18/11/2022 and the one in sale agreement dated 17/05/2017 is materially different. (Attached and marked RWM-3 is a copy of a sale agreement dated 17/05/2017)
6. That the Applicants are strangers to the signatures in the said consent as they did not author the same and depone the same to have been forged and/or caused to be forged.
7. That the Petitioner/1st Applicant's sell of an Acre to the Interested Party/ Respondent was purely meant to be a future agreement meant to crystalize after confirmation of grant and any misrepresentation in the sale agreement to the effect that possession would be taken immediately upon execution was not her fault as she is elderly, above 80 year, in need of special protection.
8. That it is interesting to observe without any basis or justification, Consent dated 18/11/2022 was prepared to apportion the Interested party/ Respondent balance of 1.62 acres from LR No. Nkuene/Nkumari/656 - 3.25 acres which was mischievous and amounted to fraud to the Applicants.
9. That the Interested Party/Respondent being a third party or a stranger to the deceased estate, would not in any way have received any share before confirmation of grant as said action is against Law of Succession.
10. That the Applicants have since reported forgeries of their signature to the police. Attached and marked RWM-4 is a copy of the O.B).
11. That the Respondents actions are/were fraudulent and aimed at disinheriting the Applicants herein of deceased ' s estate comprising Land Parcel No. NKUENE/NKUMARI/656.
12. That owing to said fraudulent scheme/s perpetuated by the Respondents herein and/or forgeries manifested in Consent dated 18/11/2022 leading to distribution of estate to a stranger, the Petitioner/Applicant could not have proceeded to distribute the estate. The Court records show that the 1st Applicant objected/prottested to the alleged Consent through her Replying Affidavit depone on 7/3/2023 which was filed in court on 3/4/2023. (Attached and marked RWM-S is a copy of a Replying Affidavit).
13. That the Chief s introductory letter dated 3/8/1999 used herein to file the Succession cause shows deceased's beneficiaries and the Interested Party/ Respondent is a stranger. (Attached and marked RWM-6 is a copy of the Chief's letter dated 3rd August 1999)



14. That based on the propriety of the grant making process to wit, confirmation of grant and distribution of estate to strangers, irregularities and fraud in the mode of distribution, Applicants jointly filed the Application herein to cure the illegalities.
  15. That performance of the agreement between the Petitioner/Applicant and the Interested party/Respondent could not have been actual but future as the former would have contravened the Succession Act which is tinctured with killer poison.
  16. That the proceedings to obtain the Confirmation of Grant herein were substantively defective in nature and substance on account of forgeries, misrepresentation and for exclusion of deceased's beneficiaries and apportionment of estate to third party Interested party/Respondent subject to sale agreement where possession took effect immediately before confirmation of grant was nullity as per paragraph 13-15 of Ruling of Hon. Justice Edward M. Muriithi delivered this 27/06/2024. (Attached and marked RWM-7 is a copy of the Ruling dated 27/06/2024)"
15. For the respondents, the Replying Affidavit to the Petitioner's application of 4/10/2024 is made by the Interested Party, or 2<sup>nd</sup> Beneficiary as referred to by the Objector, is in substantially the same terms as his replying Affidavit to the application of 22/7/2024 set out above, save for the additions from paragraph 18 et seq emphasizing his contention on the Applicant's abuse of court process as follows:
- " 18. That in the instant application, the applicant who admitted being party to the consent dated 18.11.2022 is again seeking challenging the same.
  19. That the instant application is frivolous, vexatious and an abuse of the court which should be dismissed with costs.
  20. That the applicants a consistent liar who will stop at nothing to mislead and abuse the court process because they have participated in this matter from the inception of the cause until conclusion of the same and are now denying their participation.
  21. That the 1st applicant who has admittedly admitted in the application that she uses both signature and thumbprint to execute documents, is again denying that she does not sign hence speaking from both sides of the mouth.
  22. That the pleadings from the inception are awash of the 1pplicants signatures and therefore cannot be heard to deny the obvious after eating their cake and now wants to have it.
  23. That the 1st applicant is peddling lies on oath that she is 80 years old when she just got 70 years old the other day. Annexed herewith is a copy of 1st applicant's identity card marked "JK6".
  24. That as the court record will bear witness the 1st applicant Swore an affidavit on 04.07.2022 ascertain my entitlement in the estate which affidavit was filed in court on 05.07.2022. Annexed herewith is a copy of the affidavit marked "JK7".



25. That to further confirm the fact that the 1st applicant is a liar is the replying affidavit on court record she swore on 16.09.2022, the same filed in court on 19.09.2022 where she again confirmed that I am entitled to her share of the estate thus cannot be heard to deny that fact. Annexed herewith is the replying affidavit marked "JK8".
  26. That on the same day of 04.07.2022 the 2nd applicant who is son to the 1st applicant, made oath and state that himself, his cousin and his brother were arrested and charged of murder and were in dire of someone to bail them out and that is when I was approached by the applicants over this land. Annexed herewith is an affidavit marked "JK9".
  27. That the applicants made unambiguous oath that I have been in occupation, possession and user of my share of the estate hence cannot now turn around to deny that fact.
  28. That the applicants made their respective affidavits evidence in support of my application dated 04.07.2022 which application was heard and ruled upon by this honourable court on 17.08.2022 granting me the right to be party to the proceedings thus making the current application res judicata, bad in law, incompetent and an abuse of the court's process and the same should be dismissed with costs.
  29. That having supported me to be enjoined in the proceedings herein by facts. The applicants are estopped from misleading the honourable court to change what they have already done.
  30. That in light of the foregoing, it is clear there is no fraud, no misrepresentation, no secrecy or concealment of facts that would set aside CI consent order.
  31. That the applicants were present in every discussion and negotiations.  
culminating to the consent dated 18.11.2022 until the same was adopted by this court on 23.11.2022, therefore they are petty litigants who want to enrich themselves by false means.
  32. That the petition documents for this cause and various documents by the applicants all in court's record are CI testament that the applicants are lying on oath and should be held liable of perjury and be committed to civil jail.
  33. That the applicants have always want to steal from the estate of the late Mathenge Muongo represented by Priscilla and deprive them their share which unlawful attempt I objected to and that is why the applicants have ganged up to hinder the implementation of the grant."
16. The Applicant parties did not file any supplementary Affidavits in any of the respective applications.



## Submissions

17. The Petitioner's case was based on a contention of lack of standing on the part of the Interested Party and allegations of fraudulent consent to distribute the estate set out in Submissions dated 13/11/2024, principally as follows:

“ 13) However, the Petitioner/Applicant subsequently discovered, to her profound dismay, that on or around 18th November 2022, a Consent of Confirmation of Grant was allegedly recorded fraudulently in court. This consent, which the Petitioner/ Applicant regards as both fraudulent and frivolous, effectively disinherited her and instead purportedly distributed the entirety of the property-namely, L.R. NO. NKUENF/NKUMARI/656 - to the alleged beneficiaries as follows:

1. Diana Nyakuthii Maina: 0.63 Acres;
2. Mathenge Muguongo: 1 Acre; and
3. Joshua Inoti Kirai: Balance of the remaining land.

14) It is respectfully submitted that the issuance of this fraudulent Consent of Confirmation of Grant represents a violation of the established intentions and directions previously confirmed by the District Commissioner of Meru Central District and is inconsistent with the lawful expectations surrounding the administration of the deceased's estate. Given the circumstances, the actions of the alleged beneficiaries lack the legal grounding required to alter the originally intended distribution of assets, which was formally recognized by both the family and the District Commissioner. The Petitioner/ Applicant thus seeks the Court's intervention to correct this matter, reinforcing that the fraudulent alteration of estate distribution should be rendered null and void.

15) In addition, it is noted that the alleged Beneficiary/Respondent/Interested Party, Joshua Kirai Inoti, entered into an agreement with the Petitioner/ Applicant on 17th May 2017 to purchase half an acre of the suit property, with the understanding that the transfer would be effected only upon successful completion of the succession process. This agreement further underscores the expectation and intent that any transfers or distributions of the property would be conducted in accordance with the lawful administration of the estate.

....

18) The alleged Beneficiary/Respondent, Joshua Kirai Inoti is only a purchaser in the suit land and evidently, the alleged sale between him and the Petitioner/ Applicant was done before the faulty Consent to record Confirmation of Grant on 18th November, 2022 and therefore the purported sale was a nullity and of no legal basis. Faced with this reality, the Petitioner/ Applicant had nothing to sell to the alleged Beneficiary /Respondent/hence the purported sale was void ab initio.

....



20) As illustrated by this Honourable Court in Rosalia Wairimu Maina Vs Diana Nyanguthii Maina, Joshua Kirai Inoti & David Ikunda Muguna Succession Cause No.335 of 2014 where the Petitioner/Applicant had sold a portion of land for future agreement with the prospective buyer, this Honourable Court ruled that the purported sale was only hinged on the alleged purchase way before the confirmation of Grant and such disputes cannot be resolved by the succession court.

....

22) Contrary to the assertions and retrospective claims made by the alleged Beneficiaries/Respondents that the Petitioner/ Applicant is acting as a frivolous litigant, allegedly using her position as Administrator to obstruct the implementation of the Consent dated 18th November 2022, it is noteworthy that the Beneficiaries/Respondents never approached the Petitioner/ Applicant to discuss or initiate the implementation of the Grant prior to her filing of the application dated 22nd July 2024.”

18. The Objector and Interested Party set out their case in Submissions dated 5/11/2024 seeking to portray the Petitioner as an untruthful person on account of previous affidavits filed by her in this matter as follows:

“That at the time of filing this submissions we had not received any reply to the application. We urge the court to treat the application dated 30.09.2024 as unopposed and grant the same with costs. In light of the earlier submissions, it is clear that the administrator will not and is determined not to implement the grant as expected by the law.

IN CONCLUSION.

The law requires that for revocation to be granted, an applicant must prove fraud, misrepresentation, and concealment of fact or any illegality. The applicant has admitted to have been aware of the proceedings in this succession cause. Therefore there is no secrecy or fraud or concealment of anything. The applicant chose to be a by-stander and not participate in the proceedings if at all he had any interest in the estate. He did not. He chose to sleep on his right. Equity aids not the indolent but the vigilant.

We refer the honourable court to the list of interested party's list of documents filed in court on 18.12.2023.

There are various affidavits filed before this honourable court on various dates prior to the conclusion of the matter, which affidavits were filed on 05.07.2022 sworn by Mutwiri Mathenge, on 05.07.2022 sworn by the petitioner, on 05.07.2022 sworn by Raphael Mathenge Maina, on 05.07.2022 sworn by Mathenge Muguongo, on 18.09.2022 by the petitioner. All the said documents which are court's record demonstrate the participation of the applicants in the matter and their evidence before the court.

In this succession court, the applicant's claim cannot be advanced at this point especially when grant has been confirmed and the estate distributed with both applicants' affidavits, consent and presence in court.

This honourable court lacks that jurisdiction and is functus officio having confirmed the grant and distributed the estate with the consent of the applicants.



In light of the foregoing, the application dated 04.10.2024 and 22.07.2024 lack merit in law, are frivolous, malicious, vexatious, an abuse of court's process and the same be dismissed with costs. The application dated 30.09.2024 is unopposed and is merited. The same be allowed with costs.”

19. Ruling was reserved.

### **Determination**

20. At the outset, the objection by the Counsel for the Objector and Interested Party against the withdrawal of the application dated 22/7/2024 was not well taken. The Court has power to permit the withdrawal of an application under Order 25 Rule 1 of the Civil procedure Rules on suits applied mutatis mutandi. What the Respondents to such application may pursue is an order for costs pursuant to Rule 3 thereof.
21. Of course, if the Respondents' concern is for the court to be able to consider affidavits filed in support or reply such a application sought to be withdrawn, it is hardly necessary to object to the withdrawal because affidavits filed in the proceedings are evidence before the court and unless a particular affidavit is expunged from the record, for sufficient reasons, it remains on record and accessible to the Court and the parties. An affidavit cannot be withdrawn. What is withdrawn is the application for the reliefs sought supported by such affidavit evidence, and the applicant may withdraw and bring another application for different reliefs based on the same or other affidavit evidence. The withdrawn application will attract costs on the principle that costs follow the event as provided under section 27 of the *Civil Procedure Act*.
22. The Petitioner's first application dated 22/7/2024 was filed by the party in person, and when Counsel was instructed the Petitioner was advised, and she sought, to withdraw the application and file the one dated 4/10/2024. The withdrawal does not deny the court an opportunity to refer to the affidavits filed in the Cause since filing. The application for withdrawal will be allowed with costs to the Respondents.
23. From the relief sought in the application dated 22/7/2024 that “there be stay of execution of the ruling dated 27th day of June, 2024” it would appear that the Petitioner is aggrieved by the ruling of the Court made on 22/7/2024 dismissing the purchaser's interest therein pursued by David Ikunda Muguna by application dated 20/12/2022 in response to the confirmation of Grant made on 22/11/2022 following the Consent of the partes impugned herein. The said David Ikunda Muguna claimed to have bought ½ acre share of the suit property Nkuene/Nkumari/656 from the petitioner in 2014. From the position taken by the Petitioner in her application of 22/7/2024 the Petitioner supports the said purchaser's claim in the estate as against that of the Objector and the Interested Party.
24. Indeed, in his supporting Affidavit sworn on 20/12/2022, the said Purchaser David Ikunda Muguna alleges fraud against the Petitioner who, allegedly in addition to selling ½ acre to the Muguna who took possession in 2014 and made extensive developments, had sold to many other people, and further at paragraphs 7-15 thereof that:
- “7. That since 2014, I took occupation of part of the suit land, the portion I had bought from petitioner and I have done extensive developments.
  8. That without that knowledge, or consent the petitioner opted to dispose the matter by way of consent to defeat out claims annexed marked DM 2.
  9. That this is serious fraud and misrepresentation of fact since the petitioner needed to inform his advocate and the court about our claim.



10. If indeed it was the issue of purchasers then JOSHUA KIRAI should not be getting anything.
  11. That JOSHUA KIRAI bought part of the suit land much later after us and have colluded with petitioner so as to take our share.
  12. That the petitioner has tactfully not given herself a share of suit land since she knows she has sold land to me and to other people and she would be followed.
  13. That if this grant is going to be executed we shall suffer irreparable loss.
  14. That this grant needs to be set aside, annulled and reviewed so that our claim present our interest in the matter.
  15. That the court should [not] allow the citizens of this country to defraud the others.”
25. It is also probable that the Petitioner had executed the Consent as she says in her supporting affidavit of 22/7/2024 that:

“ 13. That if at all I knew the effect of the alleged consent then I would have not executed the same if at all I did so and that I invite this court to look at the signature on the said consent and my replying affidavit.”

### **Verdict**

26. To be sure, it is not correct that the Court by its ruling of 27/6/2024 determined the issue of the Consent dated 18/11/2022 as to render the issue res judicata. As shown in the said ruling the Court only determined the issue of standing of the applicant purchaser in the application dated 20/12/2022, as follows:

#### “ Analysis and Determination

8. The issues for determination are whether the court can entertain an application filed by an Applicant who was not a party herein, whether the representation of the Applicant by the firm of advocates which formally represented the Petitioner is conflict of interest and whether this is a land issue outside the realm of a succession court.
9. The Applicant is clearly a stranger to these proceedings as he does not have the locus standi to file the instant application.
10. The significance of locus standi in a matter was discussed by the Supreme Court of Kenya in *Law Society of Kenya v Communications Authority of Kenya SC Petition No 8 of 2020 [2023] eKLR*, as follows:

“Therefore, flowing from the constitutional provisions on the jurisdiction of this court, the definition of ‘a person’ seeking to file an appeal only extends to a party who is aggrieved by a decision issued against him by the Court of Appeal and wishes to prefer an appeal to the Supreme Court. The definition does not open the door for any passer-by who is disgruntled with a decision delivered by the appellate court to approach this court. This also extends to matters relating to public interest. Furthermore, there is difficulty in granting



relief at the appellate stage to a party who did not litigate those issues before the superior courts. A person in this context should therefore be a party with locus standi in the matter.”

11. There is a spectre of abuse of the court process by the Applicant and the Petitioner in this matter. The record shows that the firm of M.G. KAUME & Co. Advocates formally represented the Petitioner before shifting midway to represent the Applicant herein. That equally amounts to conflict of interest and may result in breach of confidentiality, as urged by counsel for the Interested Party.
12. The Applicant contends that he purchased ½ acre of the suit land from the Petitioner and took occupation in 2014. The said sale agreement, though said to have been annexed to the instant application and marked DM 1, is not in the court file, and the court therefore does not have the benefit of evaluating its contents. The confirmation herein was done on 25/11/2022 while the Applicant is said to have bought his part of the suit land and taken occupation thereof in 2014. Evidently, the alleged sale of part of the suit land by the Petitioner to the Applicant was done before the confirmation of the grant, and therefore, the purported sale thereof was a nullity and of no legal basis.
13. Faced with this reality and convinced that the Petitioner had nothing to sell to the Applicant because the property in question was not hers, as at that time, this court must find that the purported sale was void ab initio.
14. This court respectfully notes the case of re Estate of M’Ajogi M’Ikiugu (Deceased) [2017] eKLR where the court, (F. Gikonyo J) stated as follows:

“Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the *Law of Succession Act*, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the *Law of Succession Act*, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property.”
15. In *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169 at page 1172, Lord Denning stated that:

“...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”



16. The Applicant is a total stranger to these proceedings and his purported claim in the suit land is hinged on an alleged purchase of part thereof from the Petitioner way before the grant had been confirmed. Such a dispute is not to be resolved by this court.

12. I respectfully agree with the Court in *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, (W. Musyoka J) held that:-

“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 collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes, of course, do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.”

11. This court finds that the Applicant has no locus standi to file the instant application, and his claim falls outside the ambit of a succession court. How then can the confirmed grant herein be revoked at the instance of such a stranger?”

27. The Court did not consider the validity of the Consent dated 18/11/2022 having ruled that the applicant had no locus standi.

28. The Court is similarly not functus officio on the Confirmation of Grant. Section 76 of the *Law of Succession Act* reserves the power to revoke grants even after confirmation on the grounds listed in the provision, as follows:

“76. Revocation or annulment of grant

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;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
  - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or (ii) to proceed diligently with the administration of the estate; or
  - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”.

29. In this case allegations of fraud have been made both by the applicants and the respondents to the respective applications. The Petitioner alleges fraud through the consent order on distribution by the Objector and the Interested Party applicants in the application dated 30/9/2024, who in turn charge that the Petitioner opposes the Consent in order to defraud them of their rightful share of the estate by kinship for the Objector and purchaser by the Interested Party. The Court is also concerned with the query posed by the purchaser David Ikunda Muguna whether it would allow unscrupulous beneficiaries to sell portions of the estate they inherit to multiple buyers and defraud some of them in the process.
30. The Court has noted in reply to the Objector’s objection to the making of Grant dated 27/12/2017 where the Petitioner admitted the sale transactions with the Interested Party in the Replying Affidavit sworn on 16/9/2022 while denying any knowledge of the Objector and denying her right to inherit.
31. In similar terms the Petitioner filed an affidavit entitled “Affidavit Evidence of Rosalia Wairimu Maina” of 4/7/2022 in which she supported the application dated 4/7/2022, a case for the joinder and claim of the Interested Party, as follows:

“AFFIDAVIT EVIDENCE OF ROSALIA WAIRIMU MAINA

I, ROSALIA WAIRIMU MAINA ID/NO.3282897 resident of Nanyuki County C/O P.O BOX 1850 - 60200, MERU do hereby make oath and state as follows:

1. That I am the petitioner herein, well versed with the matters deponed to hereunder hence competent to make and swear this affidavit.
2. That I swear this affidavit in support of the application by the 4th Interested party Joshua Mwiti Kirai.
3. That I am a beneficiary of the estate together with my brother in-law Mathenge Mwangi which by extent also our children benefits.



4. That at first two of my children and one of my brother in-law Mathenge Muguongo were arrested over a murder issue in Meru Hccr No.361 2016.
5. That because bail/bond was needed I and my children agreed that we sell a portion of our share in the estate to be able to bail the two children.
6. That we sold 1 acre to Joshua Mwiti kirai which he took occupation of since 2017 and a matter of fact bought and put up a cabro making machine which he has built up for.
7. That the purchaser has been in possession and actual occupation of the suit land since then.
8. That because of further financial constrains we sold a further 1/2 acre of our share to Joshua Mwiti Kirai who paid us for the same.
9. That because also a son to my brother in-law had also been arrested over the said murder case, he also sold 1/2 acre to enable the family pay bail for the son.
10. That the purchaser took actual possession and occupation of the two acres.
11. That I do not know the objector Diana Nyaguthii Maina, she is an absolute stranger to me because my deceased husband had no second wife.
12. That I therefore pray that the application to be enjoined be allowed as prayed because the applicant is a bona fide purchaser.

....

DRAWN & FILED BY:

THANGICIA M. DAVID & CO.

ADVOCATES

PO BOX 1850 - 60200,

MERU.”

32. The Court has noted that the affidavit of 5/7/2022 in which the Petitioner accepts the Interested Party’s purchaser claim was drawn by the Counsel on record for the Interested Party, M/S Thangicia M. David & Co. Advocates. Why did Counsel for the Interested Party draw for the unrepresented petitioner what is essentially an admission of his client’s case? It does appear that the 70-year old illiterate Petitioner was rail-roaded to confirm and explain the circumstances of the sale in an attempt to confer validity to the Interested Party’s purchaser’s interest despite the transaction having been undertaken before the Confirmation of Grant. The Interested Party would then have succeeded where the previous Interested Party/purchaser David Muguna failed in the application dated 20/12/2022, which the court determined on 27/6/2024. The reference to the Interested Party as a Beneficiary in his application of 30/9/2025 is telling. The Court also notes that while the Objector was represented by M/S Njiru Kithaka & Co Advocates, she was in the present application of 30/9/2024, together with the Interested Party, represented by the same firm of Thangicia M. David Advocates.
33. As noted in paragraph 11 of the Court’s ruling of 27/6/2024, there was “a spectre of abuse of the court process by the Applicant and the Petitioner in this matter. The record shows that the firm of M.G. KAUME & Co. Advocates formally represented the Petitioner before shifting midway to



represent the Applicant herein. That equally amounts to conflict of interest and may result in breach of confidentiality....”

34. These circumstances would lend credence to the petitioner’s assertion of misrepresentation of the true nature of the documents that she signed and her contention that she could never have signed a consent which disinherited her by giving the estate asset to other persons and excluding herself. This would also take away the premium placed by Counsel for the Interested Party herein that the Petitioner had attended court on 25/11/2022, the date the Consent was adopted by Court.
35. There is a serious question to be investigated as to the allegations and counter allegations of fraud and collusion by different parties in the case. The Fraud must be investigated and appropriate action taken against the perpetrators. There is prima facie an arguable case of fraud against made by the parties in this proceedings against each other.
36. There is also, on the substance, the question whether the Interested Parties did validly acquire interests in the estate asset subject of these proceedings. As held in the court’s ruling of 27/6/2024, the Succession Court will not deal with property rights claim by an interested party who claims to have purchased an estate land asset before the Confirmation of the Grant.
37. If the Petitioner is implicated, the successful parties may recover from her share, if any, from the estate whether by enforcement of the determination of beneficial shareholding in the estate or by way of execution of any judgment against the petitioner.
38. If the Interested Party/Parties are decreed to have an interest in the suit asset, then this succession Court will in these proceedings give effect to the determination.
39. In the circumstances, the order that commends itself to the Court is an order for the revocation of the Confirmed Grant to allow for the full determination of the validity of Consent and the interests of the interested parties and any beneficiary to the estate. There is within section 76 of the [Law of Succession Act](#) a clear case “that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant’ that the Interested Party was a beneficiary while he was at best only acknowledged as a purchaser of a portion of the estate asset before the Grant was confirmed. There is also evidence that the Consent of 18/11/2022 was obtained by fraudulent misrepresentation to the Petitioner as to its true nature because it is wholly inconsistent with the positions she had taken as regards the Objector who she categorically denied was an heir of her father in-law’s estate as a child of her husband. It is inconceivable that she would have signed the Consent not only now admitting the Objector as an heir but also disinheriting herself from receiving any share in the estate asset.
40. Order 37 Rule 1 of the Civil Procedure Rules provides for such procedure as follows:

“ORIGINATING SUMMONS

[Order 37, rule 1.] Who may take out originating summons and in respect of what matters.

1. The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination,



without the administration of the estate or trust, of any of the following questions-

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;
- (b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;
- (c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
- (d) the payment into court of any money in the hands of the executors, administrators or trustees;
- (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
- (f) the approval of a sale, purchase, compromise or other transaction;
- (g) the determination of any question arising directly out of the administration of the estate or trust.”

41. There is material to warrant the revocation of the Confirmed Grant of 22/11/2022 which was issued by the Court in reliance of the impugned Consent of the parties within the requirements of section 76 of the *Law of Succession Act*.
42. The effect of this order is to reopen the case for hearing of the objection by the Objector and the interested Parties’ respective claims. While the objection taken by the Objector on the ground that she entitled to inherit the estate of her grandfather may be dealt with in this suit, the claims by the Interested Parties purchasers must be determined in suitable proceedings, as they may be advised by their advocates, by Originating Summons under Order 37 of the Civil Procedure Rules or by a suit in that behalf before the Environment and Land Court. The status quo to the effect that the estate asset shall not be distributed in the meantime must be maintained to await the outcome of such determination.
43. In the meantime, pending the determination of her status as grandchild of the deceased and heir to his estate, and to protect her interest as such, the Objector shall be appointed a co-administrator of the Estate of the Deceased. The final distribution of the Estate shall accord with the determination of the ownership proceedings and the decision of this Court on the objection based on the status of the Objector as an heir.

## Orders

44. Accordingly, for the reasons set out above, the Court makes the following orders:
  1. The Petitioner’s application dated 22/7/2024 is withdrawn with costs to the Respondents.
  2. The Objector and Interested Party’s application dated 30/9/2024 and the Petitioner’s application dated 4/10/2024 are both granted to the extent and upon terms set out below.



3. In the interests of Justice and towards the full and final determination of the issues between the parties, the Court shall revoke the Confirmed Grant for having made upon a consent of parties, prima facie shown to have been improperly obtained by fraudulent misrepresentation and an untrue allegation of a fact as to the status of the Interested Party, which Consent is now subject of criminal investigations for fraud. Consequently, the Court shall revoke the certificate of Confirmation of Grant issued on 25/11/2022.
  4. The allegations of fraud and collusion with regard to the consent to distribute the estate of the deceased herein shall be investigated by the Directorate of Criminal Investigations (DCI) who will report to the Court in sixty (60) days and take such appropriate action as the investigations will reveal.
  5. The ownership claims to portions of the estate asset by sale/purchase or otherwise which is apparently admitted by the Petitioner shall be determined in proceedings to be filed for that purpose in accordance with applicable rules of the Court, or in a suit filed in that behalf in the Environment and Land Court.
  6. In the meantime, the further proceedings in this Succession Cause shall be stayed to await the determination.
  7. Once determined, whether by proceedings under Order 37 of the Civil Procedure Rules or by suit in the Environment and Land Court, the interests of the parties shall be given effect in this Succession Cause in this Court and appropriate order for confirmation of Grant shall issue accordingly.
  8. In the meantime, the Petitioner shall remain the administratrix of the estate and be joined by the Objector Diana Nyakuthii Maina as co-Administratrix.
  9. The inhibitions on the dealings with the estate asset will remain pending the determination of the respective interest of the parties in the estate of the Deceased, or until further orders of the Court.
45. There shall be no order as to costs the applications dated 30/9/2024 and 4/10/2024, which will be costs in the Cause. Order accordingly.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF MARCH, 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. Kithinji for Petitioner/ Applicant.

Mr. Thangicia for the Beneficiaries.

