



**In re Estate of Murungi s/o Ihururu alias Zacharia Murungi Ihururu (Deceased)
(Succession Cause 364 of 2012) [2025] KEHC 4428 (KLR) (7 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 364 OF 2012**

DKN MAGARE, J

APRIL 7, 2025

**IN THE MATTER OF THE ESTATE OF MURUNGI S/O IHURURU
ALIAS ZACHARIA MURUNGI IHURURU (DECEASED)**

BETWEEN

DAVID WANYIRI NDUNGU PETITIONER

AND

RONALD NDUNGU MURUNGI PROTESTOR

JUDGMENT

1. Vide the Summons for Conformation of Grant dated 3.6.2024, the Petitioner applied for an order that the grant of probate or letters of administration intestate (or with will annexed) made to David Wanyiri Ndungu on 8.7.2012 be confirmed.
2. Subsequently, the Protestor opposed the confirmation of the grant vide the Affidavit of Protest sworn on 13.9.2024 as follows:
 - a. All beneficiaries agreed before the chief that land parcel Euasonyiro/Ilpejeta/Block 1/1008 be registered in the name of the Protestor in absolute.
 - b. Land parcel No. Tetu/Kabage/516 was not included in the chief's letter as the same belongs to the Protestor having bought it but registered in the name of the deceased.

Evidence

3. The Protestor testified as PW1. He testified that he was son of the deceased. He was born in 1947. He had 5 children. According to him, the deceased did not have land as he sold the land he had.
4. Further, that it is him who bought LR No. Tetu/Kabage/516 in 1959. He also bought Euasonyiro/Ilpejeta/Block 1/1008 in 1976. He bought LR No. Tetu/Kabage/516 after he obtained the money



from the post office. No one built on the land apart from himself. For Euasonyiro/Ilpejeta/Block 1/1008, he bought it using his own money. He sent the money to his father to buy it. He farmed on the land. From last year, the Protestor moved on the land. The deceased was buried on LR No. Tetu/Kabage/516 while the deceased's mother, was buried at the cemetery.

5. On cross examination, it was his stated case that both parcels were his property. The registration was on 27.9.1959 when he was 12 years. His father was buried on LR No. Tetu/Kabage/516 and his brother Simon Ndirangu was also buried on the land. He was killed by David Kahiga who is also his brother and who disappeared. He had no wife or children. It was his further case that he is the one who planted the trees on the land. He cut and sold the trees. LR Euasonyiro/Ilpejeta/Block 1/1008, was in his father's name and also LR No. Tetu/Kabage/516.
6. PW2 was Arthur Macharia. His case was that the deceased had only one parcel, where he was buried. On cross examination, it was his case that he knew the family of the deceased. He stayed in Ihururu for a short time and moved to Makutano in Kieni.
7. PW3 was John Muriuki. He stated that the land where the Protestor stayed was his portion. He was given by his father. On cross examination, it was his case that he did not know whether the deceased left a will.
8. DW1 was David Wanyiri Ndungu. It was his case that he filed for the summons for confirmation and he relied on the affidavit in support of the summons as well as his witness statement. He also relied on the documents produced in court per the list of documents dated 21.10.2024. He testified on cross examination that he did not claim anything from LR No. Tetu/Kabage/516 but only wanted the land to be distributed. The trees on the land were planted by the deceased. The land was his father's land and not for the Protestor.

Submissions

9. The Petitioner filed submissions dated 16.12.2024 by which it was submitted that the grant should be confirmed as required under Section 71 of the [*Law of Succession Act*](#).
10. It was also submitted that there was no evidence that the property was not property of the deceased or was property of the Protestor. Reliance was placed on Section 107, 108 and 109 of the [*Evidence Act*](#).
11. It was the submission of the Petitioner that the Protestor purported to establish a trust but did not prove it. Reliance was placed inter alia on Susan Gacheri Mugambi v Maureen Florence Kagwiria & 2 Others (2016) eKLR based on which it was submitted that a trust was a matter of fact that should be proved by evidence.
12. The Petitioner also submitted that the Protest raised issue that would be determined outside the succession court by the land court. Reliance was placed on Re Estate of Alice Mumbua Mutua (2017) eKLR.
13. On his part, the Protestor filed submissions dated 17.11.2024. It was submitted that the estate was not free property of the deceased within the meaning of Section 3 of the [*Law of Succession Act*](#).
14. It was also submitted that the deceased was registered owner of the property but to hold in trust for the Protestor. He cited Felista Muthoni Nyaga v Peter Kayo Mugo (2016) eKLR.

Analysis

15. The issue before me for determination is whether the protest is merited and whether to confirm the grant. The grounds upon which the Protestor protested the summons for the confirmation of grant



and sought that it be dismissed was that both LR No. Tetu/Kabage/516 and Euasonyiro/Ilpejeta/Block 1/1008 were his property though registered in his father's names.

16. In essence, the court is to establish any ground upon which the court could have issued the confirmed grant when in fact it ought not to have issued it at all. This is because by dismissing the summons for confirmation of grant, the Administrator will either commence the process afresh or rectify that which is demonstrated to have caused such dismissal. The grounds for revocation or annulment of grant of Letters of Administration are set out in Section 76 of the Law of Succession as follows:

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.

17. However, the Protestor did not object to the confirmation of the grant or the resultant temporary grant that the Petitioner sort to be confirmed. On the other hand, the Petitioner's case is that both properties are in the name of the deceased and constitute the estate of the deceased. That the properties should be shared among the beneficiaries of the deceased as proposed in the affidavit in support of the Summons for Confirmation of the Grant.

18. I understand the case of the Protestor to challenge summons on the premises also that there was an agreement within the family of the deceased that bestowed the entire estate in LR No. Euasonyiro/Ilpejeta/Block 1/1008 to him. The court is alive to the agreement dated 26.12.2011 and the chief's letter dated 17.2.2012 which is juxtaposed by the Agreement dated 3.5.2012. The case of the Petitioner is that the agreement dated 3.5.2012 revoked the agreement dated 26.12.2011.

19. The Protestor is mute on this fact and I consider that the true position is that like LR No. Tetu/Kabage/516, LR No. Euasonyiro/Ilpejeta/Block 1/1008 is the property of the deceased available to all beneficiaries of the deceased. The Protestor has a false sense of entitlement as confirmed by his own admission that he cut down and sold trees on the estate land. This was an act of intermeddling. The law relating to intermeddling is codified in Section 45 of the *Law of Succession Act* Cap 160, Laws of Kenya as follows:



- i. Except so far as expressly authorized by this Act or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - ii. Any person who contravenes the provisions of this section shall –a.be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; andb.be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
20. The property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law. In the case of Veronica Njoki Wakagoto (Deceased) [2013] eKLR: Hon. Justice William Musyoka held:

“The effect of [section 45]... is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

21. The Protestor had no authority to deal with the estate of the deceased as he was not the administrator. Likewise, in *Re Estate of M ‘Ngarithi M’ Miriti* [2017] eKLR it was held that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law Of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order (s) of protection of the estate against any person.”

1. The court also notes that the Protestor failed to establish that he purchased the two properties using his own money and the same do not constitute the estate of the deceased. Even if the Protestor had adduced evidence of purchase, merely that cannot annul the process of confirmation of grant. Rather, that would raise an issue to be determined outside this succession process through the Environment and Land Court or designated courts of similar jurisdiction. Musyoka J, in *re Estate of Andashe Munyeti (Deceased)* [2021] eKLR stated as follows:

5. After a grant is confirmed, and a certificate of confirmation of grant is processed and issued, the next step would be transmission of the property in accordance with the distribution in the



certificate of confirmation of grant. Transmission is not a process under the *Law of Succession Act*, Cap 160, Laws of Kenya. The *Law of Succession Act* does not provide for it. Indeed, the term transmission is not even mentioned in the Act. It is a process which is provided for in the *Land Registration Act*, No. 3 of 2012, and the *Land Act*, No. 6 of 2012. The process has nothing to do with the succession process. The effect of it is that once the court confirms a grant, and issues a certificate of confirmation of grant, its work would be over. The parties ought to move to the next step, of execution of the confirmation orders, which happens at the land registries and at the offices of other land authorities. The application that has been placed before me dwells on matters that have nothing to do with succession, but registration of land, and the parties are better of addressing the issues to the relevant land bodies.

The promulgation of *the Constitution*, 2010, on 27th August 2010, had one critical consequence, the taking away of jurisdiction from the High Court, with respect to matters relating to land. That comes out very clearly from Articles 162(2) and 165(5) of *the Constitution*. Parliament passed a law that established the Environment and Land Court. The *Land Registration Act* and the *Land Act*, which govern transmission and land registration, carry provisions that make it clear that where disputes or questions or the need for certain actions arise, with respect to issues that are regulated or governed by the two statutes, such as transmission and land registration, then the court to address them is the Environment and Land Court and any subordinate court vested with jurisdiction. These provisions are in sections 2 and 101 of the *Land Registration Act* and sections 2 and 150 of the *Land Act*.

23. The court has taken into account interests of all beneficiaries entitled to the deceased's estate and has no doubt that the action taken in the summons for confirmation of grant will be for the interest of justice.
24. There is no basis for the Protestor trying to have all the estate alone to the exclusion of others. I dismiss the assertion by the Protestor that the chief's letter dated 17.2.2012 did not mention property LR No. Tetu/Kabage/516 because it was not estate property. The Chief only listed what came to his attention by disclosure and what matters is the evidence that the property was in the name of the deceased which the Petitioner proved and the Protestor failed to produced controverting evidence. In *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

25. I find no basis upon which to exercise my discretion in favour of the Protestor. There is no evidence that then 4 years old or 12 years when his father came out of detention, the Protestor had any means



to purchase property. He has a false sense of grandeur and misplaced sense of time. The discretion of this court is premised on the law. In animating the discretionary powers of the court in the case of Ramakant Rai vs Madan Rai, Cr Lj 2004 Sc 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains.

26. The Protestor’s evidence reminded me of a decision in *Kioko Peter v Kisakwa Ndolo Kingóku* [2019] eKLR, where Odunga J, as he then was lamented hereunder about this kind of evidence that is collected from the streets without triangulation to its truth in terms of time, space and reality. The Protestor was living in an alternative reality that cannot be gainsaid. The court posited as follows:

In my view such remarkable averments can only be taken to be meant to mislead the court. Parties and Counsel ought to give the court’s some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in *N vs. N* [1991] KLR 685 he expressed himself in the following terms:

“I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.”

5. In the South African case of *Matatiele Municipality & Others vs. President of the Republic of South Africa & others (1)* (CCT73/05) (2006) ZACC 2: 2006 (5) BCLR (CC); 2006(5) SA 47 (CC) it was held that:

“In my view a person who deliberately either by commission or omission misleads the court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonest, in my view, is an Act which is the antithesis to transparency and vice versa...”

27. How the protestor stood in court lying to me without batting an eyelid, is beyond comprehension. He then went ahead and cut trees wantonly, knowing that the day and hour were nigh.
28. On the other hand the Petitioner was honest and candid. He was not interested in the shenanigans the protestor was engaging the court in. I looked at W3 with horror in my eyes as he stood there in the dock lying to me. What he did not know, though he is old now, is that he has not always been old. In 1959 he was barely 10 years. No one speaks to 10-year-old strangers about land. The deceased died at the ripe old age of 78 years in 1987. He was, therefore, 50 years old in 1959. Nothing was placed before me to show any hint of succession. I cannot sign the claim as a claim for trust. It was purely a claim under a false pretense that no one was there among the other 4 beneficiaries. It is pure greed. The Protest fails.



29. On confirmation of the grant, there are five beneficiaries. One was killed by another beneficiary who had no children. The one who killed disappeared. The killer cannot benefit from the estate of the person whom they killed. Though the estate belongs to the father, the killer cannot benefit from the windfall from the killing of the late Simon Ndirangu.
30. The consequence of the foregoing is that I make the following in terms of distribution.
1. Euasonyiro/Ilpejeta/ Block1/1008measuring 1.64 hectares
 - a. Ronald Ndungu Murungi 0.4373 ha
 - b. David Wanjiri Murungi 0.4373 ha
 - c. Mary Mumbi Ndungu 0.4373 ha
 - d. David Kahiga Murungi 0.328 ha
 2. Tetu /Kabage/516 measuring 3.4 acres
 - a. Ronald Ndungu Murungi 0.9066 acres
 - b. David Wanjiri Murungi 0.9066 acres
 - c. Mary Mumbi Ndungu 0.9066 acres
 - d. David Kahiga Murungi- 0.68 acres
31. Having done so, I note that the Protestor has cut down trees while the matter was proceeding. The administrator will cause the appropriate authorities to value the same and report to the court within a month. In the course of subdivision, in the area where trees were cut, the protestor must make good the value thereof, or the same be recovered from his share of the estate.
32. The next question is costs. I am cognizant of the fact that the parties are related. However, the protest was completely unnecessary. There must be consequences for such perilous action. How can a person claim that he won a lottery in the Nakuru Race Course in 1959? He had no idea what goes on in a race course, especially in a colonial Africa.
33. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law,



constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

34. Costs of Ksh 95,000/= to the Petitioner will suffice.

Determination

35. In the upshot, I make the following orders:

- a. The protest dated 13.9.2024 lacks merit and is dismissed with costs of Ksh 95,000/= to the Petitioner.
- b. The grant of representation issued to the Petitioner is confirmed in the following manner:
 1. Euasonyiro/Ilpejeta/ Block1/1008 measuring 1.64 hectares
 - a. Ronald Ndungu Murungi 0.4373 ha
 - b. David Wanjiri Murungi 0.4373 ha
 - c. Mary Mumbi Ndungu 0.4373 ha
 - d. David Kahiga Murungi 0.328 ha
 2. Tetu /Kabage/516 measuring 3.4 acres
 - a. Ronald Ndungu Murungi 0.9066 acres
 - b. David Wanjiri Murungi 0.9066 acres
 - c. Mary Mumbi Ndungu 0.9066 acres
 - d. David Kahiga Murungi- 0.68 acres
 - c. David Kahiga Murungi having killed his brother, he cannot benefit from the share that arise from the said brother's death. His share shall be registered in the petitioner's name.
 - d. Transmission be concluded by 7.11.2025.
 - e. The matter be mentioned before the Deputy Registrar on 9/6/2025 to receive the report of the destruction of part of the estate by cutting of trees and to confirm subdivision.
 - f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 7TH DAY OF APRIL, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Karanja Maina for the Petitioner

Objector present

Mary Mumbi Ndungu present



Court Assistant – Michael

