



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Ibrahim Mwangi Kabugu (Deceased) (Succession Cause
238 of 2012) [2025] KEHC 6647 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6647 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 238 OF 2012**

DKN MAGARE, J

MAY 22, 2025

IN THE MATTER OF THE ESTATE OF IBRAHIM MWANGI KABUGU (DECEASED)

BETWEEN

MARY WAMBUI MWANGI PETITIONER

AND

STEPHEN NDUMIA KIBOI 1ST PROTESTOR

JOSEPHINE WAMBUI NJOGU 2ND PROTESTOR

JUDGMENT

1. The deceased died at a ripe old age of 82 years on 29.10.2011. He had married the petitioner in 1987. This resulted in a hodgepodge of children, being half a dozen sons. Daughters not disclosed or counted. The petitioner, filed a petition indicating the following;
 - a. Mary Wambui Mwangi - Widow
 - b. John Mwangi - Son
 - c. John Kiraguri Mwangi - Son
 - d. Paul Gicheru Mwangi - Son
 - e. James Kibuchi Mwangi - Son
 - f. Francis Kabugi Mwangi - Son
2. The deceased left behind only one parcel of land Nyeri/ Naromoru/748 Measuring 4.38 hectares (10.822 acres). Summons for confirmation of grant dated 15.02.2013, filed on the same day she proposed to have 9 acres to herself and half an acre to one Jesse Kiburi Ngugi. She did not explain the relationship with the deceased. The protestors filed protests indicating that they were purchasers.



The first protestors posited that he bought land in 1986 and paid in full. The second stated that she bought in 1987 paid partly and remained with a balance. I heard the protests and the response by the petitioner. I have no reason to repeat testimony in view of the issues herein.

3. Their testimony was that largely the deceased evicted them from the land. They had a dispute at the Kieni Land Disputes Tribunal. A decision was made on 23.07.2009. This court is not the enforcement agency for the land disputes tribunal. The question whether there was or no valid sale is not a question properly before the court. It is clear that the protestors were not in possession since they bought the land in 1987 and 1986 respectively. The deceased died in 2011, a whopping 25 and 24 years respectively since alleged purchase. The claim in the tribunal was made in 2009, a period of 23 and 22 years after purported purchase. Such stale claims cannot be introduced through backdoor in a succession matter. In *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR it was stated as follows:

“.....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.

27. 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.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows -

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise



after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”

4. However, in this claim, from the evidence, there is no evidence of being a purchaser of the suit land. The duty of the protestors was to prove existence of valid purchases accompanied by completion process or a decree. None was filed. In the case of *Gichari & another v Muchiri* (Environment & Land Case E010 of 2023) [2024] KEELC 1519 (KLR) (20 March 2024) (Ruling), LN Gacheru, J, addressed such stale claims as follows:

The purpose of limitation of actions is to bar stale suits and protect Defendants from unreasonable claims. See the case of *Alba Petroleum Limited v Total Marketing Kenya Limited* (2019) eKLR, where the court held;

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

5. The claims are untenable in this court. They cannot even be referred to the environment and land court given that the claims are time barred by dint of section 7 of the [Limitation of Actions Act](#) as hereunder:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

6. From the nature of the protestors claims, the same cannot succeed. They are untenable and consequently dismissed. Even submissions are tacit on eviction from the deceased's land. The court cannot rewrite a contract between parties or enforce one which the deceased did not find fit to enforce. In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR as follows: -

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of [Fina Bank Limited vs Spares & Industries Limited \(Civil Appeal No 51 of 2000\)](#) (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain”.

7. The net effect is that the court cannot create a contract or revive one which the deceased repudiated by evicting the protestors, or in their words, chasing them away. Therefore, the entire estate belongs to the late deceased and is his free property for distribution.



8. The next question is what to do with the confirmation. The same has been pending since 2017, a period of 8 years. The petitioner has sneaked in a person who is not a beneficiary of the estate, one Jesse Kiburi Ngugi. He is a busy body and not entitled to inherit. Any beneficiary wishing to donate his or her land can do so but not through the court order. Therefore, I decline to confirm the grant in the manner presented. However the court has power to comply with section 35 and 40 of the succession act. Section 35 of the Succession Act provides as follows:

Where intestate has left one surviving spouse and child or children

- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to
 - a. the personal and household effects of the deceased absolutely; and
 - b. a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.
- (2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
- (3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.
- (4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to
 - (a) the nature and amount of the deceased's property;
 - (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;
 - c. the existing and future means and needs of the applicant and the surviving spouse;
 - d. whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
 - e. the conduct of the applicant in relation to the deceased and to the surviving spouse;
 - f. (the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and



- g. the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

9. Therefore, the Letters of administration intestate were issued to the petitioners on 7.09.2012 are confirmed in terms of section 5 of the succession act. This is that Nyeri/Naromoru/748 Measuring 4.38 hectares (10.822 acres) shall be shared equally among the children of the deceased. The children include John Mwangi, John Kiraguri Mwangi, Paul Gicheru Mwangi, James Kibuchi Mwangi and Francis Kabugi Mwangi. The petitioner Mary Wambui Mwangi shall have life interest thereafter it be shared equally between the children. The petitioner shall file a list of her daughters by 26.5.2025.

10. The order herein excludes Jesse Kiburi Ngugi who is not a dependant. He is not a person entitled to priority over the petitioner. He ought to have proved their stake in the pre-existing case if they were beneficiaries. Section 29 of the Law of Succession Act provides the following to be beneficiaries of a deceased person:

For the purposes of this Part, "dependant" means -

- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- b. such of the deceased's parents, step-parents, grand- parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

11. The next question is who is to bear costs. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

“It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

12. 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.

13. The matter is such that there were misunderstandings between the parties over stale claims. In order to close this unfortunate matter, each party should bear their own costs.

Determination

14. In the end, I make the following orders:
- a. The protests are dismissed for lack of merit.
 - b. Therefore, the Letters of administration intestate were issued to the petitioners on 7.09.2012 are confirmed in terms of section 38 of the succession act. This is that Nyeri/Naromoru/748 Measuring 4.38 hectares (10.822 acres) shall be shared equally among the children of the deceased. The children include John Mwangi, John Kiraguri Mwangi, Paul Gicheru Mwangi, James Kibuchi Mwangi and Francis Kabugi Mwangi. The petitioner Mary Wambui Mwangi shall have life interest thereafter it be shared equally between the children. The petitioner shall file a list of the deceased's daughters and other children by 26.5.2025.
 - c. Each party to bear their own costs. Directions on 28.05.2025
 - d. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22ND DAY OF MAY 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Mahugu for the petitioner

Ms. Ndirangu for CN King'ori for the protestor.

Ms. Mutegi for Ann Thungu for the 2nd Protestor

Court Assistant - Michael

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