



**In re Estate of Peter Kairu Kiai (Deceased) (Succession Cause
1 of 2017) [2025] KEHC 12626 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 12626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
SUCCESSION CAUSE 1 OF 2017**

GL NZIOKA, J

MAY 19, 2025

IN THE MATTER OF THE ESTATE OF PETER KAIRU KIAI (DECEASED)

BETWEEN

JOSEPH NJOGU KAIRU PETITIONER

AND

MARY WANGUI KAIRU 1ST OBJECTOR

FLORENCE WANJIRU WACHUIRI 2ND OBJECTOR

ANNE NYAMBURA KIAI 3RD OBJECTOR

NANCY WANGUI MAINA 4TH OBJECTOR

JUDGMENT

1. The background facts of this matter are that the deceased died on 17th July, 2006. That after his burial a will dated 15th June, 2005 written by the deceased was read out and the petitioner herein noted to have been named as the Executioner of the will.
2. That subsequently, on 28th September, 2006 the petitioner filed a High Court Succession Cause No. 581 of 2016 at Nakuru seeking for probate of letters of administration.
3. However, on 31st October, 2006, Mary Wangui Kairu (herein “the 1st objector”) filed an objection to the petition, an answer to petition of grant, and a cross-application for grant of probate for letter of administration with the will annexed on the ground that, she is the widow of the deceased, that the petition for probate of letters of administration with will annexed was filed without her information and consent and further the purported will is fraudulent and irregular.



4. The objection was heard by way of viva voce evidence wherein; the 1st objector and 2nd objector and James Munge testified on behalf of the 1st objector, while the petitioner and Stephen Kinyanjui Kibunja, testified in support of the petition.
5. By a judgment delivered on 11th November, 2010 Hon. Justice W. Ouko J (as he then was) held that, the will was valid and that the 1st objector, is a widow of the deceased and thus entitled to a share of his estate.
6. The court further held that no provision had been made for the 1st objector, she was directed to make an appropriate application under section 26 of the Law of Succession Act and Rule 45 of the Probate and Administration Rules for provision.
7. Consequently, a grant of probate of written will was issued to the petitioner on 11th November, 2010.
8. On 19th May, 2014, the 2nd objector filed an application of the even date seeking for order inter alia that; the petitioner be compelled to transfer to her and her daughter the assets bequeathed to them under the will, and account for and release rent collected from the properties bequeathed to them.
9. In the meantime, the petitioner filed a summons dated 16th July, 2014 for confirmation of grant seeking that the grant of probate issued on 11th November, 2012 be confirmed.
10. On the 5th August, 2014, the 1st objector filed an application of the even date seeking that, the petitioner be restrained from intermeddling with the entire estate of the deceased by collecting, utilizing the proceeds of the estate including; plot No(s). 1144/XXX and 436 Naivasha Town, and render an account of all rent collected from the deceased estate; further that the court issues an order for her monthly maintenance allowance of; Kshs. 43,167, provide for her share from deceased's estate and that all documents of ownership of the deceased's properties be declared and delivered into the custody of the court.
11. On 18th September, 2014 the court directed the applications dated 19th May 2014 and 5th August 2014 be heard simultaneously while the application for confirmation of grant dated 16th July, 2014 to await the outcome of the two applications.
12. On 24th June, 2015 the court also ordered the petitioner to avail statements of accounts of the management of the estate within forty-five (45) days. The parties were also directed to go for mediation. By 5th November, 2015 petitioner had not filed the accounts and was granted a further thirty (30) day, the accounts were filed by 28th January 2016.
13. Subsequently the matter was stood over to 19th July, 2016 and ordered to be disposed of by way of written submissions heard. On 18th January 2017, the matter was transferred from Nakuru High Court to Naivasha High Court.
14. On 18th May, 2017, the parties informed the court that they wanted the matter to proceed by way of viva voce evidence, but the court directed the parties to file affidavits and the deponents be cross-examined on the same. Subsequently the matter was heard.
15. The petitioner supported by his affidavits dated; 16th July 2014, 25th November, 2014, 16th October 2017 and 25th November, 2017. He deposed that the application for confirmation of grant was made in faith and that he disclosed all the assets of the estate as per the particulars of the will.
16. That, owing to financial obligations due by the estate and in order to alleviate financial hardship experienced by some of the dependants, he sold the property in Mirema Suswa Framers Ltd compromising of properties known as; Naivasha Mwachiringiri Block 4/X, 4/X and 4/X to Unity



Vision Self Help Group as evidenced by the relevant sale agreements annexed to the affidavit dated 16th July 2014.

17. The petitioner further averred that, the 1st objector cannot be enjoined in the distribution of the estate as she was left out of the will by the deceased. Further, the ruling of the court dated; 11th November 2010 did not specify what benefit did not specify the property to be given to her.
18. That additionally, the 1st objector has been away for fifteen (15) years and did not contribute in any way to the estate neither has produced any record to prove her contribution. Further, when the will was read out on 23rd September 2006, the family members agreed to set aside the parcel known as Naivasha/Maraigushu Block 18/XXX as Kaii's graveyard and thereby affecting the distribution.
19. Furthermore, on or about 5th January 2006 the deceased transferred parcel known as; Naivasha/Maraigushu Block 18/XXX to Peter Kairu Kaii his grandson interfering with the testament therein. The petitioner denied being aware of the existence of parcel known as plot No. XXX Commercial Site and Service Extension and efforts to locate the same have been futile.
20. He argued that the deceased's estate has been well preserved and all the income generated therefrom has been used solely to conserve and develop the estate without any personal benefit.
21. That the particulars of the mode of distribution set out in paragraph 9 of the affidavit in support of summons for confirmation of grant of probate are in line with the particular provisions of the Will and save that the purchasers' interests have been noted against the deceased's estate.
22. The petitioner's case was also supported by the evidence of; James Njoroge Kairu (PW2) a son of the deceased and a brother to the petitioner, who relied on his affidavit dated 16th March 2018 and averred that he is not objecting to or denying the petitioner's mandate as the executor of the deceased's estate.
23. That the petitioner collected rent from LR No. 1144/XXX section 7 Naivasha Town and that James Njoroge Kairu assisted in the distribution and administration of the monies collected. Further, the record and figures showing how the money was distributed in the monthly budget is available for verification and confirmation.
24. The petitioner's case was further supported by Rose Waithira Kairu (PW3) who relied on her affidavit sworn on 16th March 2018, wherein she deposed that she the deceased's daughter and was bequeathed property Naivasha/Mwichiringiri Block 4/X situated at Mirera Suswa, which she willingly sold to Samuel Matheri Gatuhi due to her financial needs and therefore proposes that the property be transferred to the purchaser upon confirmation of grant.
25. That the petitioner is also the legal administrator of their late mother Zipporah Muthoni Kairu and her interest in plot number 1144/XXX section 7 Naivasha Town and Commercial Plot (Industrial) Number XXX.
26. The 1st objector opposed the application for confirmation of grant and relied on her affidavits sworn on 5th August 2014, 1st November 2015, 19th June 2017, and 5th December 2017. She avers that, she was married to the deceased and were blessed with two (2) issues namely; James Njogu Kairu and Alice Nyambura.
27. That, since the death of the deceased, she has been living in total poverty and not benefited from the estate of the deceased despite having contributed her youthful energies to the growth and development of the deceased's estate.
28. Further that the court in the ruling of delivered on 11th November 2010 declared her a beneficiary of the deceased and is therefore entitled to 1/3 of the entire proceeds of the estate. That the distribution of



- the estate between the deceased's wives should take into account the individual needs, contributions to realization, and the past benefits enjoyed by the beneficiaries prior to distribution. Further, the benefits should be backdated at distribution so that she is put in the same status as the ones who have been collecting rents.
29. The 1st objector argues that it would be prudent for the court to ascertain all the assets of the deceased's estate and determine the net value of the fixed and current assets before proceeding to distribute the same.
 30. She further deposes that, the estate of the deceased is comprised of the properties listed in the will and other properties left out of the will. That, the petitioner is holding the title documents of the assets of the estate and ought to disclose the where about of the properties
 31. According to the first objector the estate of the deceased is comprised of the following properties:
 - a. Plot No. xXx Kabati – Naivasha
 - b. Plot No. xxX Commercial Site and Service – Naivasha
 - c. Plot No. B2 (xXx) Moi South Lake Road – Naivasha
 - d. Plot No. xxx Industrial Area – Naivasha
 - e. Plot No. xxx Moi South Lake Road – Naivasha
 - f. Plot No. xxx Moi South Lake Road – Naivasha
 - g. Plot No. xxx Landing Beach – Naivasha
 - h. Plot No. xxx Eleri, Longonot
 - i. Space No. XXX Container Naivasha Gate
 - j. Plot No. xxx New Karate
 - k. Plot No., XXX Industrial Area – Naivasha
 - l. Plot No. 1144/xxx Naivasha
 - m. Plot No. xxx Site & Service – Naivasha
 - n. Plot No. xxx Lakeview Low Density – Naivasha
 - o. Plot No. xxx Lakeview High Density – Naivasha
 - p. Plot No. xxx Kabati – Naivasha
 - q. Plot No. xxx Lakeview High Density – Naivasha
 - r. Plot No. 1144/xxx section 7 – Naivasha Town
 32. That, the said properties comprise of; shops, residential houses and other commercial houses whose rents amount to Kshs. 200,000 per month. That the petitioner has been collecting the rent for his own benefit and as per his affidavit sworn on 2nd October 2007 he declared the earnings of the estate as Kshs. 129,500.
 33. Further, the documents produced by the petitioner in his affidavit sworn on 25th November 2017, to justify the alleged expenditure are uncertified by an accountant, pure fabrication, afterthought and imagination and therefore should be expunged.



34. Furthermore, the expenditure of some items is not realistic, is not supported by invoices, job agreements or acknowledgment of receipts while others are speculative, wasteful and unjustified.
35. That, the acts of the petitioner to incur expenditure is illegal as it was done without the leave of court and therefore the petitioner should be held liable to refund the alleged monies, and/or expenditures and the sales of land be deemed null and void.
36. Further that, the petitioner has poor education background and/or management abilities and does not keep a record of the revenue collected neither does he have a tangible bank account for rents collected and has out rightly mismanaged the estate to her exclusion and some beneficiaries including the 2nd objector. That in the circumstances there is need to appoint a neutral estate agent to manage the deceased's estate and bank in a joint account.
37. The 1st petitioner argued that the petitioner should renders account the total amount he has collected, utilized and/or kept and the court issue an order to preserve the assets of the estate from wastage and properties be reinstated as the sale transaction could be effected before full succession process'
38. The 2nd objector Florence Wanjiru Wachiuri opposed the summons for confirmation of grant vide affidavits sworn; on 1st October 2014 and 7th June 2017 in which she averments that, she is the third wife of the deceased and were blessed with a daughter MaryAnne Nyambura Kairu.
39. That the deceased made provisions for both of them in clause 3(xiv) and 3(vx) of the will respectively. However, the petitioner in his application for confirmation of grant has omitted some of the properties bequeathed to the her in the will being; Naivasha/Maragishu Block 18/XXX and 18/XXX commonly known as Naivasha Unity,
40. Further, the petitioner has omitted to include the 1/3 of the money held in the deceased's bank held at the at the Naivasha branch account of Barclays Bank Kenya Ltd, that was bequeathed her daughter MaryAnne Nyambura Kairu. That, the money was to be placed in a fixed deposit account and held in trust for her daughter by the petitioner and 2nd objector but that has never been done.
41. The 2nd objector averred that, the other properties bequeathed to her in the will consist of rental shops namely; Birds Souvenir Shop/Handcraft Workshop, and Manyatta Curio/Handcraft Workshop, from which the petitioner has been collecting rent since August 2006 but has never accounted for the same or released her for her upkeep despite demand for the same.
42. That, the failure to release the rent has been detrimental as she is not gainfully employed and has been forced to eke out her living as a hawker and that she is in dire need of shelter and money for personal upkeep.
43. Furthermore, the failure to fix her daughter's sum in joint fixed deposit account has rendered her unable to meet her the day to day and school related expenses and it was only upon the insistence of her advocate that the petitioner started paying her daughter's school fees.
44. The 2nd objector denied the averments in the petitioner's affidavit sworn on 2nd October 2007 that, the petitioner gives her part of the Kshs, 129,500 per month collected as rent for her maintenance.
45. Further, she alleged that, the averments by the petitioner in his affidavit filed on 25th November 2014, to wit that the property known as Naivasha/Maraigushu Block 18/XXX bequeathed to her in the will is not available for distribution for reason that the property was given to the petitioner's son as a gift inter vivo and termed it as an afterthought. That the alleged bequeath to the petitioner's son was only pointed out eight (8) years after the will was read and after the petitioner was pressured to accounts for the assets.



46. The 2nd objector joined issue with the 1st objector that there are other properties that have not been accounted for in the will of the deceased but form part of the estate. The 2nd objector urged the court to order the petitioner to furnish an updated schedule all the assets of the deceased.
47. The 3rd objector, described herself as 7th daughter of the deceased's and the late Zipporah Muthoni Kairu and petitioner's sister. She objected to the confirmation of grant vide an affidavit sworn on 10th August 2016 and averred that, her late mother Zipporah had been bequeathed two properties being; Plot No. 1144/XXX Section 7 Naivasha and Industrial commercial plot No. XXX, and two-thirds (2/3) of the money held in the bank account at Barclays Bank Ltd Naivasha Branch.
48. That, the dispositions were never bequeathed to their late mother Zipporah as she passed away before confirmation. Further, the petitioner erroneously listed the properties bequeathed to their late mother Zipporah as being available for distribution and indicated that they are to be bequeathed to the petitioner as the administrator of their late mother.
49. The 3rd objector avers that, the estate of their late mother has not been administered nor has the petitioner been appointed as the administrator and therefore he is an imposter.
50. The 3rd objector averred that, the petitioner has wasted and intermeddled with the properties of the deceased by selling properties before the confirmation of grant. That, he sold off sold off the aforesaid Industrial commercial plot No. XXX before the death of their mother and without following due process. That there were no pressing financial needs to warrant the sale of properties. That in any case only the petitioner benefitted from the proceeds of sale.
51. Further, he sold off Plot No. 4 Lake View High Density that was bequeathed to one Faith Muthoni and which was to be held in trust for her until she attained the age of majority. That the said beneficiary having attained the age of majority the trust ought to be dissolved as per the will.
52. Furthermore, the petitioner intends to bequeath Naivasha Mwachiringi Block 4/X, 4/X and 4/X, defined in the will as Mirema Suswa Farm Limited, to Unity Vision Self Help Group, Kenya Assembly of God Local Church and Samuel Matheri Gatuhi who are strangers to the estate and has included them as beneficiaries in his supporting affidavit sworn on 16th July 2014.
53. The 3rd objector joined issue with other objectors requiring that the petitioner account for rent received from the estate and argued it is in the interest of justice that before confirmation of grant is done, the petitioner be compelled to furnish a full inventory and accounts of how he has administered the estate and utilized and/or applied the said monies since the issue of the grant on 11th November 2011.
54. Further, that the court to declare the purported sales as inoperative, illegal and ineffective and the estate of the deceased be distributed in accordance with the will. That, if the grant is confirmed as proposed, it will amount to disinheriting the intended beneficiaries' contrary to the wishes of the deceased.
55. The 4th objector described herself as the daughter of the deceased and the late Zipporah Muthoni Kairu, the deceased's 1st wife. She objected to confirmation of grant through her affidavit in protest sworn on 27th June 2017 and reiterated the averments an affidavit sworn on 4th August 2016 by the 3rd objector's
56. That the petitioner has failed to faithfully and religiously execute the will of the deceased to the benefit of the beneficiaries. Further he wasted the estate of the deceased by selling a substantive portion of the properties to strangers to the will, who have taken possession and constructed on them. Furthermore he has utilized the proceeds from the purported sales for his own use to the detriment of the estate of the deceased.



57. The 4th objector termed the purported sales are inoperative, illegal and incapable of conferring any legal or equitable interest to any person other than the beneficiaries contemplated in the will. She argued that, in the circumstances the court should declare the purported sales as unlawful and void ab initio, and the petitioner be required to yield vacant possession to the designated beneficiaries
58. The 4th objector argued that, the petitioner has been collecting rent from all the deceased's properties and utilizing it to the exclusion of other beneficiaries and it is only fair that he be compelled to restitutio in integrum to the beneficiaries of the estate of the deceased.
59. Philip Mathew Odida (CW1) the Land Registrar Naivasha Land Office was called as a common witness for all the parties and produced the certified copy of the green card for Naivasha/Maraigushu Block 18/XXX. He averred that, the plot is measuring 0.417 hectares (approximately 1 acre) and is currently registered in the name of Unaitas Sacco Society Limited.
60. That, as at 16th November 2004, the property was registered in the name of the deceased Peter Kairu Kiai and the title deed issued on the same date. That, on 5th January 2006, there was a change of ownership and the title deed was issued to Peter Kairu Kiai, a minor at the time. He produced the title as exhibit (2).
61. However, the witness admitted that there was no document issued such as; a birth certificate or an affidavit to differentiate between the minor and the deceased. He further stated that it is not usual for a title deed to be registered in the name of a minor. That such a title would be held in trust for the minor.
62. Further that there was no transfer form or consent form or receipts for the transaction of 5th January 2006 and he could not confirm if they ever existed or had been misfiled. Furthermore, that, entry 3 on the green card was altered and dated, 13th January 2006.
63. In cross-examination by Mr. Karanja learned counsel for the 2nd objector, the witness stated that, Peter Kairu Kiai holds a national identification card No. 27134345, indicating that he was born on 5th July 1987 which suggests he was nineteen (19) years old and an adult as at 5th January 2006.
64. In further cross-examination by Mr. Ndegwa learned counsel for the 3rd and 4th objector, Mr. Odida testified that, entry No. 3 on the green card that was not clear clear and/or overwritten legally casting doubts.
65. In cross-examination by Mr. Mburu learned counsel for the petitioner, Mr. Odida stated that when a minor attains eighteen (18) years old, the term minor is removed. Furthermore, it is possible that some documents were misplaced.
66. The matter was disposed of vide written submissions. The petitioner in submissions dated; 17th July 2023 argued that, despite the court declaring the 1st objector Mary Wangui Kairu a widow of the deceased as per the ruling of Hon. Justice W. Ouko J (as he then was) dated 11th November 2010, she has failed to file an application for provision under section 26 of the *Law of Succession Act*. That if the 1st objector was to file such application, the court would bound to take into consideration the provisions of section 28 (a), (e) and (g) of the Act
67. That section 28(a) raises the issue of where the objector should obtain property considering that there is no free property and which will cause more conflict as any provision for her would have to come from the bequests of the other beneficiaries. He relied on the case of Nairobi HC Succession Cause No. 2322 of 1995 In the matter of the estate of Humphrey Edward Githuru Kamuyu as cited in the book A Casebook on the Law of Succession by W. M. Musyoka at page 27, 136 and 137 of where



Visram J (as he then was) stated that only the free estate of a deceased was available for purposes of section 26 of the Act.

68. That the 1st objector had the duty to prove her claim that there are other properties that are not included in the summons for confirmation of grant.
69. Further, under section 28 (e) of the Act the court is behooved to consider the conduct of the dependant in relation to the deceased. That, the objector in cross examination stated that, she was not living on any of the deceased's properties and indication that she was estranged and not part of the deceased's family. That being divorced from the deceased, in the circumstances, she should not claim part of the deceased's estate.
70. Furthermore, under section 28(g) of the Act the court should consider the reasons the testator did not make provision for the dependent. That the deceased in his will referred to the 1st objector as a divorced wife but provided for her children James Njogu Kairu and Alice Nyambura Kairu. That, the court should not re-write the will against the wishes of the deceased testator.
71. The petitioner submitted that, the 2nd objector Florence Wanjiru Wachuri has failed to substantiate the claim that part of the money bequeathed to her daughter was un-accounted for. That, vide his further affidavit dated 21st October 2019, he produced the bank statements from Barclays Bank account number 027XXX for the period between July 2010 to May 2016 and that the 2nd objector has not been able to show any misuse of funds.
72. Further, petitioner disputed allegations of fraud in relation to L.R No. Naivasha/Maraigushu Block 18/XXX and argued that despite the deceased bequeathing the property as per the will, he transferred it to his grandson, Peter Kiai Kairu, before his death as confirmed by Philip Mathews Odida the Land Registrar. That, in the circumstances the property was considered and deemed under principle of ademption, meaning it has no effect thus the beneficiary will no longer receive it.
73. The petitioner further argued that, the 2nd objector admitted in her affidavit dated 31st May 2017, that he paid school fees for her daughter which proves that he fulfilled his responsibilities as an executor. That at no time did the 2nd objector approach the court on the issue of school fees and up keep of the minor, implying that she did not have any problems and therefore the issue cannot be raised at this juncture. That in any case, the 2nd objector's daughter is now an adult and can come to court on her own.
74. As regards the 3rd objector and the 4th objector the petitioner submitted that the 3rd and 4th objectors were bequeathed one (1) acre in Murere Suswa Farmers limited each known as Naivasha/Mwichiringiri Block 4/X and Naivasha/Mwichiringiri Block 4/X respectively. However, the 3rd and 4th objector actively participated in the sale of the properties to Unity Vision Self-help Group Kenya Assembly of God Safariland Local Church and Samwel Matheri Gatuhi and signed the sale agreements as witnesses. That, he only facilitated the sale and did not benefit from it.
75. That, the 3rd and 4th objectors have not come to court with clean hands as their objections are a bid to stop the sale process and benefit twice after receiving the proceeds of the sale. Further, the mention of other properties is aimed at muddying the waters since their focus should be on the properties bequeathed to them.
76. The petitioner submitted that as an executor under section 79 of the Act, he acts as the personal representative of the deceased and all the property vests in him and therefore can involve himself with matters concerning the estate and cannot be accused of intermeddling.



77. That although he would have preferred that the grant be confirmed before the sale of any properties but he acquiesced the insistence of some of the beneficiaries and proceeded with the transactions. That, all the beneficiaries who sold their properties including the 3rd and 4th objectors, were involved in the transaction through signing and witnessing of the sale agreements and knew the implications of the said transactions.
78. That, five (5) other beneficiaries have not filed objections a clear indication that the 3rd and 4th objectors are attempting to frustrate the confirmation.
79. The petitioner has mismanaged the property and benefited from the rent of Plot No. 1144/XXX and utilized without a court order the proceeds of sale of property to; Vision Unity Self Help Group, Kenya Assembly of God Church, Unity Vision Self Help Group, Martha Wangari, Samuel Matheri Gachuhi and Eliud Kimeria.
80. The 1st objector relied on the case of; Eldoret High Court succession cause no. 30 of 2017 in the matter of the estate of Kimutai Tiony (Deceased) where the court ordered the Land Registrar to rectify the register of the suit property to revert to the name of the original owner pending proper succession.
81. That pursuant to the aforesaid, the court take 50% of the petitioner's share and allocate it to the widows. Further, the court should factor in the rent the petitioner has been collecting since the demise of the deceased and remit the same in equal shares to the widows, which can be compensated with the properties at clause 3(ii) a, b and c.
82. That in additionally, the amount of Kshs. 354,351 held in the deceased bank account be shared equally between the three widows less the 1/3 share bequeathed to Maryanne Nyambura Kairu.
83. Lastly, the 1st objector submitted that widows have a life interest from the rent and rental house and that the petitioner had no right to take a life interest and leave the 2nd widow destitute. That, in the case of In Tau Kalungi & another Musyoka J stated that under section 35 (i) of the Act, children of the deceased have no right to take life interest in his property.
84. The 2nd objector Florence Wanjiru Wachiuri in her submissions dated 19th June 2023 argued that, the petitioner has failed to act swiftly and realize the objects of the will but has acted as the sole beneficiary.
85. That, the petitioner allegation that L.R. Number Naivasha/Maraigushu Block 18/XXX was given to deceased's his grandson, is an afterthought as it was not brought up at the time of reading the will. That he could not prove how it was given to a minor at the purported time of transfer. That, the title to the said property produced in court had several mutilations and suspect erasure.
86. Further, the Land Registrar, Naivasha stated that he did not know why there were erasures and overwriting on the title document, and was suspicious of the authenticity of the entire transaction as documents in support of the transfer including; receipts of the transaction and stamp duty, transfer, land control board consent, valuation form, identification documents, PIN certificates, photographs, and the original title, were mysteriously unavailable.
87. The 2nd objector submitted that, the fraudulent transfer of L.R. Number Naivasha/Maraigushu Block 18/XXX was irregular and illegal in contravention of section 82 of the *Law of Succession Act* that prohibits the sale of a deceased estate before confirmation of grant and/or probate, appropriation that would adversely affect a specific legacy. The 2nd objector urged the court to annul all transactions arising for the irregular and illegal transfer and
88. The 2nd objector further submitted that, section 82 (d) (i) of the *Law of Succession Act* prohibits the appropriation that adversely affects a specific legacy while (ii) prohibits such appropriation without



- the consent of the person with beneficial or absolute entitlement. That, the petitioner adversely and without her consent appropriated property bequeathed to her for his own benefit, a fact he admitted in cross-examination. That the petitioner admitted to paying school fees for the 2nd objector's daughter on only three occasions despite knowledge that her father died when she was six (6) years old.
89. That, as there are properties that have not been accounted for, the summons for confirmation of grant is an abuse of the court process and ought to be dismissed.
 90. The 3rd and 4th objector in submissions dated 10th May, 2023 stated that under section 79 of the *Law of Succession Act*, an executor to whom representation is granted is the personal representative of the deceased for purposes of the grant and all property vests in him.
 91. Further, under section 82 of the Act, the personal representative is entitled to exercise the statutory powers conferred therein and incurs the duties imposed under section 83 and other statutes such as the *Trustee Act*.
 92. However, contrary to the afore provisions and without a grant of probate made to him and confirmed, the petitioner alienated, sold and mismanaged the assets of the deceased for his own benefit and excluded the objectors from, management of the estate which was inconsistent with the will of the deceased.
 93. The objectors relied on the case of; In Re Estate of Agwang Wasiro (Deceased) [2020] eKLR where the High Court at Kakamega stated that a grant holder is not the absolute owner of the property in question but hold its only for purposes of administration and management with the objective of distributing it to the persons beneficially entitled. That the court further stated that the administrator's powers are limited and cannot sell any property at will except as per the provisions of section 82(b) of the *Law of Succession Act*.
 94. Further, in the case of; Re Estate of Julius Mimano (Deceased) [2019] eKLR the High Court stated that, the effect of section 79 as read with section 82 of the *Law of Succession Act* puts the personal representative on the same footing with the owner in the sense that they exercise the powers the legal owner would have exercised if he was alive. Thus the property although vested in the personal representative in law it is not legally his.
 95. The 3rd and 4th objectors submitted that the petitioner admitted on oath to selling the deceased' estate and annexed the respective sale agreements, acknowledgment notes and memorandum of sales. That his conduct offends the provisions of section 45 of the *Law of Succession Act*.
 96. Further that, the purchasers thereof did not acquire good title from the sales. That the doctrine of nemo dat quod non habet that states one cannot transfer a better title than that which s/he holds. The case of; Diamond Trust Bank Kenya Ltd vs Said Hamad Shamisi & 2 others [2015] eKLR was relied on where the Court of Appeal stated that a person who does not have a title to goods cannot, without the owner's authority or consent, sell and confer a better title in the goods than he has.
 97. Furthermore, in the case of; Virginia Mwari Thurania vs Purity Nkirote Thurania [2017] eKLR the High Court held that the sale agreement therein was null and void for violating section 82 (b) (ii) of the *Law of Succession Act* as letters of administration of the estate of the deceased had not being obtained.
 98. The 3rd and 4th objectors submitted that, a personal representative holds property in trust for the beneficiaries in a will and is therefore a trustee, as defined under the *Trustee Act* (Cap 167) Laws of Kenya to include executors and beneficiaries. In the circumstances the personal representative standing in a fiduciary position owes a duty to the beneficiaries to render a true account of the handling of the estate. They urged that, in view of the afore, the petitioner being accountable for the actions carried



- on the deceased's estate, the court orders him to render a true account of the transactions carried out on the estate and the doctrine of Restitutio in Integrum applies.
99. Finally, the 3rd and 4th objectors prayed that the transactions carried out by the petitioner be rendered null and void, the Land Registrar cancels the transfers and vacant possession be rendered. Further, the grant to be confirmed only to the extent that it conforms with the distribution as per the will dated 15th June, 2005.
100. Upon consideration of the matter, I note that, the subject matter herein is the summons for confirmation of grant dated 16th July 2014. The same seeks to confirm the grant issued to the petitioner on 15th June 2010. From the content of the summons at paragraph 3, the petitioner aver that; "no application for provisions for a dependant is pending."
101. I wish to deal with this issue at this stage. It is noteworthy that, this matter is a subject of a ruling delivered by Hon. Justice W. Ouko (as he then was) on 11th November 2010, wherein he stated inter alia that, he did not make reasonable provision for the 1st objector, Mary Wangui Kairu as the court did not have full details of the estate, in that there were claims by the objector that some of the assets of the estate had either been excluded and are being used by the petitioner/executor.
102. The court further stated that, it had not been moved under section 26 of the Law of Succession Act and Rule 45 of the Probate and Administration Rules to make provisions to the 1st objector. The court finally stated that, to that extent, the "objections succeeds" to the extent of being recognized as the widow of the deceased.
103. At this point I pose the following questions arise: -
- a. Has the petitioner and/objector (s) given the court the full particulars of the assets of the deceased's estate, and/or
 - b. Has the 1st objector; Mary Wambui Kairu who allege that some assets been excluded proved the same?
 - c. Further has the 1st objector moved the court as provided for under section 26 of the Law of Succession Act and Rule 45 of the Probate and Administration Rules? If so where is the application to that effect.
104. If the afore issues have not been resolved. Is it factually correct for the Petitioner to aver in the summons for confirmation of grant that, "there are no proceedings as to the provisions of a dependant?"
105. It also suffices to note that, there is no appeal against the ruling by Hon. Justice Ouko, (as he then was) consequently the finding that the 1st objector is the wife of the deceased, remain valid.
106. To revert back to the summons for confirmation of grant at paragraph 4, the petitioner avers that, he "intends to distribute the estate in accordance with the will save as hereunder stated". The petitioner then proceeds to indicate at paragraph 5, 6 and 7 how the property described in the will as; Mirera Suswa Farm Ltd has since been sold vide various sale agreements to third parties mentioned in the subject paragraphs.
107. Pursuant to the aforesaid the following is noted: -
- a. The petitioner avers that he is the one who signed the agreement dated; 17th September 2012 on behalf of the beneficiaries names at paragraph 7.



- b. He also states that Serah Wambui Kairu and Susan Wanja Kairu signed a similar agreement dated; 17th September 2012
 - c. Whereas the agreements dated 19th December 2013, 25th November 2013 and 20th December 2013 were signed by Hannah Nyambura Kairu, Joseph Njogu Kiai on behalf of Alice Nyambura and Rose Waithera respectively
108. The petitioner then states that, it is his desire that, the purchaser interest be noted as against the deceased's estate and the distribution of the estate be carried out in accordance with annexed schedule. The petitioner at paragraph 9 lists the properties and who is to inherit of the same.
109. From the afore stated there are several questions that arise; -
- a. Did the petitioner have the legal authorities under the law to sign sale agreements on behalf of the beneficiaries; and/or
 - b. Did he have authority from the said beneficiaries to execute the said sale agreements;
 - c. Did the said beneficiaries concede or give the petitioner authority to dispose of their property on their behalf;
 - d. Does the petitioner as an Administrator of the estate have the power or legal capacity to vary the contents of the will?
 - e. Does he have any legal authority to deal with the estate in any other manner than as provided for under the law and in particular dispose of any real property before confirmation of the grant
110. In that regard, I refer to the provisions of section 45 of the Act which prohibits the Administrator taking possession or disposing or otherwise intermeddling with any free property of the deceased, except where it is expressly provided for under the Act or any other written law. In addition, section 82 of the Act prohibits disposal of any property before a grant is confirmed
111. In the instant matter, it is clear from the petitioner's own admission that, he has breached the afore provisions of the law, irrespective of whatever explanation he has for the same. Can the court endorse the irregularity and/or breach of law, by confirming the grant as prayed?
112. Even if the court were to order that, the estate be distributed strictly in accordance with the will and that any third party who dealt with the petitioner, and/or any of the beneficiaries prior to confirmation of grant be at liberty to prosecute their claims against the individual they dealt with. The court finds itself held up by other issues namely:-
- a. The 1st objector Mary Wangui Kairu who is not provided for in the I will not have any provisions. In the absence of whether there is residue property and taking into account that some of the properties have already changed hands, and none of the beneficiaries are ready to relinquish any of their shares, the provisions for the 1st objector will remain unresolved. As already observed herein, this issue would have been resolved had that objector complied with the direction given in the ruling by Hon. Justice W. Ouko to move the court appropriately.
 - b. Further the petitioner admitted in evidence that he cannot be able to tell with precision the properties that comprise of the estate as he is still to trace all of them. The question remains; what then are the assets of the estate of the deceased to be distributed at the stage of confirming the grant. It suffices to note that, despite several opportunities given to the parties by the court to avail the evidence none was forthcoming.



- c. Furthermore, there are allegation that the petitioner has intermeddled with the estate and embezzled the funds collected from the assets of the estate. It is evident that, the petitioner admitted having leased out certain properties. He was required to file statement of accounts. The documents filed unless explained cannot be understood.
 - d. The question that arises is can the summons for confirmation of grant be allowed when all these issues are pending?
113. The manner in which this matter has been prosecuted is very unfortunate. A matter that is otherwise straightforward and which should have been resolved expeditious has been pending in court for nineteen (19) years. All parties in this matter must take full responsibility for such prolonged delay. I say so, because, the petitioner opted to deal with the estate even before the confirmation of grant of probate as confirmed in total violation of the law.
114. On the other part the beneficiaries are said to have acquiesced in the disposal of property in furtherance of that irregularity, and although they dispute signing the said documents, that denial has not been proved, the petitioner has not brought a document examiner report to authenticate his allegations that the objectors signed the sale agreements and neither have the objectors denying their signatures thereon. So who is telling the truth or lying?
115. I believe as a court it is time this matter came to a conclusion. The attempt by this court to refer this matter to medication was resisted. To bring this matter to a closure I give the parties thirty (30) days to avail the following documents to court
- a. An amended summons for confirmation of grant based on the provisions in will of the deceased;
 - b. The application for provision under section 26 of the Act, by the petitioner Mary Wangui Kairu (If she so wish) The objector must indicate the property she alleges is not in the will and propose where her share will come from to enable the other dependent(s) response That application must be filed and served within 7 days of the date of this order
 - c. The petitioner to verify and file evidence to the effect that, the alleged sale agreements were signed by the alleged beneficiaries. In the interest of justice, the beneficiaries affected must cooperate if the document examiners report is necessary. Failure to accord such cooperation will work to the benefit of the petitioner allegation that, they are the ones who signed those documents. The report to that effect be filed within 21 days of the date of this order
 - d. The petitioner is accountable to the beneficiaries of the estate of the funds received. He shall within 14 days of this order render true certified accounts of how he has utilized the funds received from the estate. The same shall be served upon the other parties for response, within 7 days of service. Failure to file the said statements will lead to the conclusion that the estate funds have been embezzled and should be recovered from the properties bequeathed to the petitioner
 - e. If the other parties have any evidence of funds misappropriate they too must file, the same within the period stated
 - f. The issues raised concerning the estate of the deceased wife, can only be canvassed in the Succession Cause filed in respect to that deceased wife.
116. Finally, I direct that the parties only address the issues raised as there is no need to file additional length affidavits/documents requested for, as there are already a lot of materials on the ground.



117. That then are the orders of the court.

DATED, DELIVERED AND SIGNED THIS 19TH DAY OF MAY 2025

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Mburu Kagucia for the petitioner

Mr. Ndegwa H/B for Mr. Kimani for the 1st objector

Mr. Ndegwa H/B for Mr. Karanja for the 2nd objector

Mr. Ndegwa for the 3rd and 4th objector

Ms. Hannah: court assistant

