



REPUBLIC OF KENYA



**In re Estate of Ngaywa Oluokwo (Deceased) (Succession Cause  
264 of 1994) [2025] KEHC 8261 (KLR) (11 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8261 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 264 OF 1994**

**AC BETT, J  
JUNE 11, 2025**

**IN THE MATTER OF THE ESTATE OF NGAYWA OLUKWO (DECEASED)**

**BETWEEN**

**JACKSON WABWIRE NGAYWA ..... PETITIONER**

**AND**

**HANNINGTON ODUOR NGAYWA ..... 1<sup>ST</sup> OBJECTOR**

**JOSEPH WASWA NGAYWA ..... 2<sup>ND</sup> OBJECTOR**

**RULING**

1. The application for determination is a Notice of Motion dated 27/8/2024 brought by the Petitioner Jackson Wabwire Ngaywa who seeks the following orders:
  - (a) That this Honourable Court be pleased to grant orders that the County Land Surveyor do visit land parcel No. East/Wanga/Malaha/1574 registered in the name of Jackson Wabwire Ngaywa and confirm the actual acreage as per this court's order dated 21<sup>st</sup> July 2003.
  - (b) That this Honourable Court be pleased to direct the OCS Shianda Police Station to provide security to the County Land Registrar during enforcement of the above stated order.
  - (c) The costs of this application be in the cause.
2. The application is premised on the grounds set out on the face of the application and supported by the 1<sup>st</sup> Objector's affidavit sworn on 27/8/2024. The 1<sup>st</sup> Objector deposed that the court order dated 21/7/2003 was not implemented as directed by court as the Surveyor made an error when he conducted the survey on 17/6/2004 and erroneously failed to follow the court order. He further deposes that the 1<sup>st</sup> Objector, Hannington Oduor Ngaywa is in agreement with the application and the orders are necessary to implement the referenced court order to facilitate the curving out of five (5) acres of land from L.R. No. East/Wanga/Malaha/1574 for Joseph Waswa Ngaywa the 2<sup>nd</sup> Objector.



3. The application was opposed by the 2<sup>nd</sup> Objector who swore an affidavit on 9/10/2024. The 2<sup>nd</sup> Objector avers that survey was done on 17/6/2004 and the Surveyor complied with the court order wherein he got his rightful share of the estate of the deceased and is not complaining. He further depones that L.R. No. East/Wanga/Malaha/1447 was divided among the three parties herein at which point the Petitioner wanted a third party Amuloty Melvyn Dumaris incorporated into the land so as to benefit from the Petitioner's share of land, which was duly done. That subsequently, the land was subdivided into four parcels as follows:-
  - (i) L.R No. East/Wanga/Malaha/1571 comprising 0.62 hectares to Jackson Wabwire Ngaywa.
  - (ii) L.R No. East/Wanga/Malaha/1572 comprising 0.62 hectares to Amulyoto Melvyn Dumaris.
  - (iii) L.R No. East/Wanga/Malaha/1573 comprising 1.20 hectares to Jackson Wabwire Ngaywa.
  - (iv) L.R No. East/Wanga/Malaha/1574 comprising 3.09 hectares to Jackson Wabwire Ngaywa.
4. The 2<sup>nd</sup> Objector annexed certificates of official search in respect of all the aforesaid titles. He also annexed a handwritten agreement dated 11/7/2003 in which the parties agreed to adhere to the boundaries set by the clan elders, and another handwritten agreement dated 4/6/2004 in which the Petitioner was allowed to add another person during mutation.
5. The 2<sup>nd</sup> Objector further deposed that the Petitioner took advantage of his position as the administrator and transferred the land that was meant for him and the 1<sup>st</sup> Objector to himself as evidenced by the copies of official search and hence he had placed a caution on L.R No. East/Wanga/Malaha/1573 claiming a licensee's interest. Further, the 2<sup>nd</sup> Objector averred that there is in existence, Kakamega ELC No. 119 of 2023 where he has sued the Petitioner and that he would wish to prosecute the said suit. The 2<sup>nd</sup> Objector averred that the Petitioner's application is fatally defective and is an abuse of the process of the court, brought with the sole intention of defeating or forestalling the administration of the estate of the deceased. He urged this court to dismiss the Petitioner's application.
6. The 2<sup>nd</sup> Objector filed written submissions in which he urged the court to find that the application is not merited and it was meant to circumvent an order issued by the Environment and Land Court in MCL No. E119 of 2023. He also urged the court to award him costs.
7. The Applicant filed submissions in which he urged the court to find that the Surveyor carried out a survey in contravention of the court order and therefore an order should issue to determine the real issues in controversy and to enable the Surveyor curve out five (5) acres of land in favour of the 2<sup>nd</sup> Objector.
8. The issues for determination are:-
  - (a) Whether the application is merited.
  - (b) Whether the Applicant should be condemned to pay costs.
9. The Applicant who is the Administrator of the Estate of the deceased, confirmed in his affidavit sworn on 27/8/2024 that the Surveyor visited the subject property and undertook survey. From the 2<sup>nd</sup> Objector's affidavit, it is apparent that the title in respect of L.R. No. E/Wanga/Malaha/1447 which was the sole property of the deceased was extinguished after it was closed on a subdivision. Such subdivision could only have been executed under the authority of the Administrator of the Estate. The 2<sup>nd</sup> Objector contends that instead of transferring his rightful share to him, the Applicant registered it in his name despite knowing that the 2<sup>nd</sup> Objector had a beneficial interest thereof. It is the Objector's contention that once he knew of the failure to transfer the property to him, he filed Kakamega ELC



- No. 119 of 2023 seeking that his rightful portion be transferred to him and the said case is pending hearing and determination.
10. What I can deduce from the parties' averments is that the estate of the deceased has been transmitted albeit in the wrong way and to the wrong parties and that in pursuit of his share, the 2<sup>nd</sup> Objector has now proceeded to the Environment and Land Court.
  11. Once the Applicant was issued with Certificate of Confirmation of Grant and he proceed to distribute the estate of the deceased resulting in the extinction of the deceased's title, the court became functus officio. This is because there is no longer any property of the deceased to be administered. The mandate of the court is therefore limited to correcting clerical errors or hearing an application for review. Section 99 of the *Civil Procedure Act* provides for circumstances under which a party can make an application to a court which has made its final pronouncement in a matter and provides:-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”
  12. It appears to me that the Applicant has not come to court with clean hands and that all along, he was complicit in the actions of the Surveyor who surveyed the land prior to the issuance of the new titles. It is only when the Applicant was sued in the Environment and Land Court that he decided to revisit the issue of survey.
  13. In the case of *Jersey Evening Post Limited v AI Thani* [2002] JLR 542 at 550 cited in *Raila Odinga & 2 Others v Electoral and Boundaries Commission & 3 Others* [2013] eKLR, the Supreme Court held as follows:-

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available” [emphasis supplied].
  14. *In re Estate of the late Isbmael Muchiri Nkinyangi (Deceased)* [2021] eKLR (supra) the court found itself to be functus officio once the issue of survey of the land comprising the estate of the deceased had been completed and held that:-

“I am of the view that the matters which the applicants are seeking in the application dated 12/11/2020 are re judicata. This court is functus officio in so far as the issue of the survey of the parcel of land comprising the estate of the deceased is concerned. In deed Justice Limo observed that the conduct of the applicants is aimed at delaying the conclusion of the distribution of the estate of the deceased.

The emerging jurisprudence and the law as laid down in the *constitution* is that disputes ought to be resolved expeditiously. Section 159 (2) (b) of the *constitution* provides that;

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles.

(b) Justice shall not be delayed.”



Finally disputes in the administration of estates of the deceased must be disposed of expeditiously for the good of all the parties. Delay only serves to escalate the dispute and bar parties from enjoying their inheritance. This matter has been pending since 1994. It should come to an end one way or another.”

15. Similarly *in re Estate of Ernest Kerry Komo (Deceased)* [2016] eKLR, the court held that:-

“I have perused the court record. The grant herein was confirmed on 31<sup>st</sup> October 2005. The subject property was indeed devolved to the applicant and the respondent jointly. The applicant alleges that the property was subsequently registered in their joint names. Once a grant is confirmed and the property is distributed, as is the case here, the probate court becomes functus officio. The property in question is no longer estate property. It no longer vests in the administrators. It is no longer subject to the *Law of Succession Act*, Cap 160, Laws of Kenya, from which the probate court draws its authority and jurisdiction.”

16. In the present case, survey was done which ensured that each party was allocated the land in accordance with the boundaries that had been set by the elders. Subsequently, new titles were issued in the year 2004 which is more than 10 years ago. For his own reasons, the Applicant failed to transfer the title to the rightful beneficiary and retained it in his name. He only came to court after being sued by the beneficiary who is the Objector herein. I agree with the 2<sup>nd</sup> Objector that the application was brought in bad faith and in a bid to pre-empt his claim before the Land Court.

17. It is in the interest of justice that litigation comes to an end. Having found that the court is functus officio, it therefore lacks jurisdiction to hear the Applicant’s application. See *Owners of the Motor Vessel “Lillian S” v Caltex Oil (K) Limited* [1989] eKLR.

18. In the end, I find that the application lacks merit. It is therefore dismissed with costs to the 2<sup>nd</sup> Objector.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 11<sup>TH</sup> DAY OF JUNE 2025.**

**A. C. BETT**

**JUDGE**

**In the presence of:**

No appearance for Mr. Migosi for the Petitioner/Applicant

Petitioner present

2<sup>nd</sup> Objector/Respondent present in person

Court Assistant: Polycap

