



REPUBLIC OF KENYA



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**In re Estate of Lusila Wairu Waweru (Deceased) (Succession Cause
172 of 2016) [2025] KEHC 10359 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
SUCCESSION CAUSE 172 OF 2016**

M THANDE, J

JULY 18, 2025

IN THE MATTER OF THE ESTATE OF ESTATE OF LUSILA WAIRU WAWERU (DECEASED)

RULING

1. The proceedings herein relate to the estate of Lusila Wairu Waweru (the deceased) who died on 15.10.15. A grant of probate of written will was issued to Agusta Rwamba Thumbi, a daughter of the deceased on 1.4.19. The dispute relating to the distribution of the deceased's estate has been raging and is yet to be settled. The Executor filed a summons for confirmation of grant dated 12.1.25 which has been opposed by some of the children of the deceased. Emmanuel Julius Nyota (Emmanuel) filed an affidavit of protest sworn on 27.1.25 while Peter Waweru Wairu, Hellen Wanjiru and Wilbert Njuki Thumbi filed their affidavit of protest sworn on 28.1.25 in opposition to the summons for confirmation.
2. Joakim Thumbi Ileri (Joakim), one of the sons of the deceased filed an affidavit sworn on 26.2.25 in opposition to the protests. He subsequently filed a notice to produce dated 17.3.25 which is the subject of this ruling. The notice requires Emmanuel to produce for inspection, original email correspondence addressed to him from the firm of Gikera & Vadgama in relation to lack of certificate of clean title to subdivision No. MN/III/8103 (Plot 8103) emanating from land parcel MN/III/2960 (Plot 2960).
3. Emmanuel opposed the notice vide his replying affidavit sworn on 16.5.25. He averred that Joakim appears to seek the email communication as evidence concerning the ownership of Plot 8103. He contends that the notice is barred by the doctrine of res judicata as the question of the ownership of Plot 8103 has been conclusively determined by this Court which in its rulings of 25.6.2020 and 11.5.23 found that the same does not belong to the estate of the deceased. The Court found that Plot 8103 had been transferred to him by the deceased in her lifetime on 11.6.12. As such, the matter cannot be reopened.
4. Emmanuel further stated that the email sought is confidential communication between him and his advocates and is protected by advocate/client privilege. He further said that he has not waived this privilege and that under Section 134 of the *Evidence Act*, neither him nor his advocates can be compelled to produce communication exchanged for the purpose of legal advice. Additionally, that



the email in question is not relevant to any live issue before the Court relating to the succession cause herein.

5. It is Emmanuel's contention that the notice is a mere fishing expedition intended to divert and delay the proceedings herein. Further that he is not able to produce the said email as he does not have the same in his possession.
6. In his notice to produce, Joakim has indicated that he has moved the Court under Section 69 of the [Evidence Act](#) and Section 22 of the [Civil Procedure Act](#).
7. Section 69 of the [Evidence Act](#) makes provision for notice to produce a document as follows:

Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice

as the court considers reasonable in the circumstances of the case:

8. Section 22 of the [Civil Procedure Act](#) provides for the power to order discovery and the like as follows:

Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

- a. make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
- b. issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
- c. order any fact to be proved by affidavit.

9. The above provisions are legal avenues to have documents availed to aid a party's case.
10. In his affidavit in opposition to the protests to confirmation, Joakim averred that he and Peter Waweru Wairu had lodged a caveat on Plot 2960 on 6.5.10, which was still in place as at 5.1.17 when he obtained a copy of the title. He thus contends that the subdivision of Plot 2960 was fraudulent. He stated:

7. That in the foregoing any purported subdivision to land parcel number MN/III/2960 was unlawful and/or fraudulent. As a matter of fact there is email correspondence between the 1st Applicant herein and the firm of Gikera & Vadgama Advocates confirming the same; we shall move the court at the appropriate time to compel production of the same by the 1st Applicant. (Annexed hereto and marked as "JTI-3" is a copy of the email correspondence by the firm of Gikera & Vadgama Advocates.

11. As a follow up to this averment, Joakim filed the notice to produce now under consideration.
12. On his part, Emmanuel pleaded advocate/client privilege and cited Section 134 of the [Evidence Act](#) which provides:

(1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the



purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

- (a) any communication made in furtherance of any illegal purpose;
- (b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

13. An advocate is forbidden to disclose any communication made to him by or on behalf of his client in the course of representing such client. Any disclosure may only be made with the consent of his client. Under the proviso to Section 134, this nondisclosure privilege does not apply where the communication is made in furtherance of any illegal purpose or where the advocate notes that a crime or fraud has been committed.
14. It is noted that the notice to produce has not been issued to the advocates in question but to Emmanuel. As such, the more relevant provision is Section 137 which provides:

No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his advocate unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.
15. This provision also protects communication between a person and his advocate. However, where a person offers himself as a witness, he may be compelled to disclose any communication that appears to the court to be necessary in order to explain any evidence he has given.
16. Emmanuel is a witness in this matter. The email correspondence in respect of which notice has been issued, is between Emmanuel and his advocates. The email relates to Plot 2960 and Plot 8103 which was excised therefrom. In the email, the advocates informed Emmanuel that they found no record of the consent of the land control board in respect of the subdivision of Plot 2960 or the transfer of Plot 8103 to him. They further stated that in light of that, they could not issue a certificate of clean title. It would appear that Joakim seeks to use this email to challenge the subdivision of Plot 2960 and transfer of Plot 8103 to Emmanuel. This Court albeit differently constituted, has already pronounced itself on the issue of the transfer of Plot 8103 in Civil Case No. 25 of 2016 (OS).
17. In the said judgment dated 25.6.2020, in Nyakundi, J. stated as follows regarding Plot 8103
 - (f). That certificate of title comprised of and subdivided parcels of land transferred in the name Emmanuel Julius Nyota surveyed subdivision referred as 8103 shall be transmitted under the grant of probate to the rightful owner.



18. On his part, Githinji, J. in his ruling of 11.5.23 in allowing an application for review of the said judgment, stated:

Given the above reasons, I do find that the land parcel number MN/III/8103 which was transferred on June 11, 2012 during the lifetime of the deceased does not form part of the estate of the deceased. Notably, is that the 1st respondent even having raised a P.O did not oppose the averments contained in the Notice of Motion in respect of this said plot. This to me is a mistake on the record and a regrettable error that deserves correction. Plot MN/111/8104 is the one which should be included in the will.

19. By dint of the doctrine of res judicata set out in Section 7 of the *Civil Procedure Act*, this Court cannot reopen the matter to receive any document to explain an issue in respect of which it has pronounced itself. Additionally, Article 165(6) of *the Constitution* bars this Court from supervising a superior court. A Judge of the High Court cannot review the decision of a fellow Judge of the Court. In this regard, I am guided by the holding in *Bellevue Development Company Ltd v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties) (Civil Appeal 239 of 2018) [2018] KECA 330 (KLR) (21 September 2018) (Judgment)* where Kiage, JA. stated:

I have no difficulty upholding the learned Judge's holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status. That much is plain common sense. It has, moreover, been expressly stated in Article 165(6) of *the Constitution* in these terms;

“The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi judicial function, but not over a superior court.” (Our emphasis)

20. In light of the foregoing, it is clear that the purpose for which the privileged communication between Emmanuel and his advocates is sought by Joakim, does not fall within the exemption contemplated in Section 137 of the *Evidence Act*. Further any attempt to reopen the matter to receive and consider evidence relating to Plot 8103, is to tread on forbidden ground thus defying the constitutional hierarchy of the courts.
21. I accordingly find no basis to compel Emmanuel to comply with the notice to produce dated 17.3.25 and the prayer is declined.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 18TH DAY OF JULY 2025

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M. THANDE

JUDGE

