



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of JKW (Deceased) (Succession Cause 308 of 1998)
[2025] KEHC 9874 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9874 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 308 OF 1998**

EN MAINA, J

JULY 3, 2025

BETWEEN

EMK 1ST ADMINISTRATOR

JMK 2ND ADMINISTRATOR

AND

APK PROTESTOR

JUDGMENT

1. These proceedings relate to the estate of Joseph Katiti Wambua, deceased, who died intestate on 13th May 1982. A grant of letters of administration was first issued to Elizabeth Mukenyi Katiti and Jonathan Mutisya Katiti on 12th February 1999 and confirmed on 10th November 2008. However, that grant as well as the confirmed grant were revoked by consent of the parties recorded in court on 23rd May 2017. The title deeds arising from the distribution in the confirmed grant were also cancelled pursuant to that consent and the Administrators were directed to file fresh summons for confirmation of grant to which the objectors were to file a protest if they did not agree. When the summons for confirmation were eventually filed on 19th November 2021, the parties could not agree on the issue of the list of beneficiaries and the mode of distribution hence the Protest dated 24th March 2022.
2. This judgment arises from the summons for confirmation dated 19th November 2021 filed by Albert Phillip Katiti through the firm of B M Mung'ata & Company Advocates and the protest dated 24th March 2022 as well as the preliminary objection filed by Francis Mwanza Mulwa, Interested Party (deceased), who claims to have purchased a property from the Administrators before the revocation of the grant but which sale the protestors claim was fraudulent.
3. The protest was heard through viva voce evidence whereupon learned Counsel for the parties summed up their cases through written submissions.



4. The parties called a total of five witnesses. I shall refer to their evidence in the analysis and determination below. Suffice it to state that the witnesses were all in agreement that the deceased had three wives and that one of them to wit, Nduleve Katiti, left the matrimonial home with four children only to return years later with five other children.
5. In summing up, Counsel for the Administrators submitted that the Protestors had not proved that they were dependents of the deceased as envisaged in Section 29 of the *Law of Succession Act*; that living with the deceased per se did not automatically make them his dependants and further that as they were not his dependants immediately before his death then they did not qualify to be beneficiaries of his estate.
6. On his part, Counsel for the Protestors submitted that as long as one is able to prove that he or she is a child of the deceased as defined in Section 3(2) of the *Law of Succession Act*, then they qualify as dependants under Section 29 of the Act. That Sections 66 and 56(1)(b) act as a guide in respect to who can be appointed as an administrator(s) and hence the administrators of the estate of the deceased should be appointed from the three houses of the deceased. That therefore the children of Nduleve Katiti also qualify to be administrators.

Determination/Analysis.

7. This court has carefully considered the summons for confirmation, the protest, the affidavits filed, the rival submissions of the learned Counsel for the parties, the cases cited and the law. In my view the issues which call for determination are-
 - a. Whether the five children of Nduleve Katiti born out of wedlock were dependants of the deceased and whether they are entitled to a share of his estate.
 - b. Whether this court should appoint additional administrators to represent the house of Nduleve Katiti.
 - c. Whether the sale of LR NO Machakos/ Kiandani X8 to Francis Mwanza Mulwa by Jonathan Mutisya Katiti was a valid or fraudulent sale; whether the sale was affected by the subsequent revocation of the grant and whether or not the asset is available for distribution to the beneficiaries.
 - d. The mode of distribution.

A. Whether the five children of Nduleve Katiti born out of wedlock were dependants of the deceased and whether they are entitled to a share of his estate.

8. It is not in dispute that the deceased had 4 wives and the protestor's mother Nduleve was the 3rd wife. It is also not in dispute that the protestor's mother left the home of the deceased in 1954 when she had only four children only to return with nine children.
9. Relying on a witness statement dated 29th July 2022, Albert Philip Katiti, the protestor, testified that he was the son of the deceased Joseph Katiti Wambua and Nduleve Katiti; that his mother begot nine(9); that his father also married Elizabeth Mukenyi with who he begot eleven(11) children and Saa Katiti and they begot five(5) children; that his mother left the deceased's home in 1954; that the reason for her leaving was maltreatment by Elizabeth Mukenyi who was the second wife; that she first went back to her maiden home before going to Kitale after finding work there. He stated that later his brother Daudi Katiti decided to return home to their father who welcomed him warmly and enrolled him in school. He too returned to the home of the deceased in 1968 and was similarly warmly welcomed



- and enrolled in school. Then in the same year their mother Nduleve returned and went to stay with their grandmother and when their father was informed, he undertook to build her a house, albeit away from the other wives. He contended that the deceased subsequently built Nduleve a house on LR Mumbuni/Kasinga /2X8. He also contended that the deceased took care of him and his siblings and paid their school fees but the others became resentful because too much money was being spent on his fees. He therefore subsequently purchased his own land and settled his mother there as the second wife had evicted them upon the death of the deceased. He listed fourteen (14) assets as comprising the estate of the deceased, including Machakos/Kiandani/X8 and disputed that the same was lawfully sold to the Interested Party. He contended that all his siblings are entitled to a share of the deceased's estate.
10. The protestor called Simon Mutua who testified that the deceased was his uncle; that the deceased had four wives namely Saa Katiti, Mukenyi Katiti and Mary Nduleve and one Nzilani who went away before she got any child. He was brought up in the deceased's home and that the deceased built his 3rd wife Nduleve a house but she was buried at the place she was taking care of her grandchild.
 11. Zaccheus Jimmy Katiti, was the first to testify on behalf of the administrators. He testified that the deceased had 4 wives, Saa Katiti, Mukeli Katiti, Nzilani Katiti and Nduleve Katiti; that he first saw Nduleve in 1969 when she was taken to their home by their grandmother; that her sons Daudi Katiti and Albert had returned in 1968 when he was in class 5. He stated that his father refused to take Nduleve back for she had re-married and given birth to five other children. He stated that his parents alleged that her real reason for leaving was hunger and poverty and that she and her children lived with their grandmother and it was their uncle not the deceased who built them a house. Said she left home due to hunger and also had no property. He further testified that his two elder brothers William Katiti and Jonathan Katiti had fast accumulated wealth through various businesses and it is they who paid fees for the protestors but the deceased caused them to sign an agreement that they had to refund the fees. He contended that the Protestor should not inherit a share of the deceased's estate for reason that they deserted him. He stated that after Albert was employed, he bought land and moved his mother and siblings there. He denied that Albert and his siblings were dependants on the deceased. He conceded that land was sold to the Interested Party by the 2nd Administrator after the grant was confirmed. The other witnesses were Phylis Mululu Katiti and Jacob Wambua and their evidence echoed that of Zacheus.
 12. Section 3 (2) of the *Law of Succession Act* defines a "child" or "children" to include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
 13. In this case it is clear from the evidence that by the time Nduleve left the home of the deceased in 1959 she had given birth to four (4) children. Other than the allegation that they deserted their father and so should not inherit from him, there is no dispute that he sired them. They are therefore his children as defined in Section 3(2) above and as inheritance where the deceased died intestate is not dependent on whether the child was looking after or had neglected the deceased, they are entitled to a share of his estate just like the other of his children.
 14. In regard to the five children born of Nduleve after she left the home of the deceased, there is no dispute that they were born out of wedlock. The only way they could become beneficiaries of his estate would be if it is proved that the deceased expressly recognized or in fact accepted them as his children or voluntarily assumed permanent responsibility over them -Section 3(2)- or if they were his dependants as defined in Section 29 of the *Law of Succession Act*. However, the evidence in this case which evidence I find to be credible, is that the deceased never accepted Nduleve and the five children.



There is evidence that she together with those children stayed with his mother and he did not assume responsibility financial or otherwise over them. Eventually when Nduleve died, she was buried at home of her youngest child. The five were neither children of the deceased nor his dependants and are hence not entitled to a share of his estate.

15. My so saying finds support in the case of *In re Estate of Samuel Kamau Kimui (Deceased)* [2017] KEHC 2885 (KLR) where the court stated:-

“The deceased therefore died leaving two houses that of Violet Wangui Kimui. The protestor who is Marion’s son claims that the deceased adopted them as his children at the time he married their which is represented by the 1st administrator Margaret Wanjiru Ogada and Marion Njeri Kamau. The house of Violet has three surviving children and the house of Marion she has four children mother. That he made an undertaking at the time of paying dowry that he would care for the children. This was the evidence of the protestor’s witnesses. It was upon the protestor to show that the deceased took them in cared for them and assumed their permanent responsibility. From the evidence adduced it did not come out clearly that the four children ever lived with the deceased or that he undertook their education and care or permanent responsibility. What I gather from the evidence is that they lived in Gachie apart from the deceased and Marion and only visited the two in their home. It follows therefore that he never followed up his undertaking to adopt them as his children under the Kikuyu Customary Law for if he did he would have fully taken up their responsibility lived with them educated them and assumed his role as a father to each one of them. In my view merely stating that he took the sons of Marion for circumcision and that some children were named after him is not sufficient to prove that he accepted them as his own having married their mother. Based on the evidence adduced I am unable to declare that they were children of the deceased as provided under Section 3(2) of the [Law of Succession Act](#). There was no evidence to show that the deceased expressly recognized or accepted the four children as his own or that he assumed permanent responsibility.”

B. Whether this court should appoint additional administrators to represent the house of Nduleve Katiti.

16. On this issue learned Counsel for the protestor placed reliance on Section 66 of the [Law of Succession Act](#) and several decided cases. This case is however different from those cases as here the court has already appointed administrators. Further Section 66 merely acts as a guide as the ultimate decision of who should be appointed as administrator lies with the court. The Section states:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- a. Surviving spouse or spouses, with or without association of other beneficiaries;
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided in part v;
- c. The public trustee; and
- d. Creditors.”



17. In my view the insistence that each of the houses of the deceased must be represented by one of them in the administration of the estate is borne from the lack of understanding of the powers and responsibilities of the administrator, both by those appointed and those who are left out. The powers and duties of administrators are spelt out in Sections 82 and 83 of the *Law of Succession Act* and in this case what remains is for the administrators to distribute the estate in the manner as shall be agreed by the beneficiaries or as shall be ordered by the court. The order set out in section 66 is discretionary. I find no reason therefore, to replace the administrators or to appoint additional ones.

C. Whether the sale of LR NO Machakos/ Kiandani X8 to Francis Mwanza Mulwa by Jonathan Mutisya Katiti was a valid or fraudulent sale; whether the sale was affected by the subsequent revocation of the grant and whether or not the asset is available for distribution to the beneficiaries.

18. On what properties are available for distribution, the issue that emerges is whether the property that was sold to Francis Wanza Mulwa (deceased) and transferred to him by the administrators was affected by the revocation of the grant. According to the 2nd Administrator, the property was sold after the grant was confirmed and was valid. The protestor however disputed this and contended that the sale was fraudulent. It is however instructive that his Advocates did not make this an issue in his submissions. It was neither listed as an issue nor was it submitted on. Be that as it may, it was an issue in the pleadings and this court will therefore make a determination on it.

19. Transfers of property by administrators after confirmation of grant which is afterwards revoked are protected by Section 93 of the Act which states-

“(93) Validity of transfer not affected by revocation of representation

1. All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act, by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

- (2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.”

20. The case of *In Re Estate of Christopher Jude Adela (Deceased)*

[2009]eKLR, K.H. Rawal, J (as she then was) had this to say in reference to Section 93 of the *Law of Succession Act* and I agree-

“The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a Carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected



even while undertaking unethical or illegal action prejudicing the interests and rights or right beneficiaries of the estate.

In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.”

21. In this case, I find that it was not proved that the Interested Party was aware of the concealment of the other beneficiaries, by the administrators which led to the revocation of the grant. Neither was he involved in any fraudulent conduct in regard to the estate. It is only therefore, fair and just that the interest of his estate in the property that he purchased be protected as provided in Section 93. In any event this issue was abandoned by the Protestor’s advocate. In the premises I find and hold that the property LR NO Machakos/Kiandani/X8 is no longer part of the estate of the deceased and is not therefore available for distribution to the beneficiaries.

D. The mode of distribution.

22. On distribution of the estate, so as to foster family unity, this court prefers that the beneficiaries come to an agreement on the mode of distribution and only should they fail to agree will the matter revert to court for distribution. In that regard the issue of distribution shall be referred to the Court Annexed Mediation.
23. As regards the costs of these proceedings, this being a family issue, the order that best commends itself is that parties shall bear their own costs.

Disposition.

- i. That the four children of Nduleve Katiti sired by the deceased are entitled to a share of the estate of the deceased.
- ii. That the five children of Nduleve Katiti born out of wedlock are not entitled to a share of the estate of the deceased.
- iii. That the administrators appointed by the court on 12th February 1999 shall continue with the administration of the estate and no additional ones shall be appointed. If one is dead their powers and duties shall devolve upon the administrator who is still alive.
- iv. That property LR NO Machakos/Kiandani/X8 was lawfully sold to Francis Mwanza Mulwa (deceased), by the administrators of the estate and hence is no longer available for distribution to the beneficiaries. The same shall be devolved to the Estate of Francis Mwanza Mulwa (deceased).
- v. That the issue of distribution of the estate is referred to the Court Annexed Mediation.
- vi. That parties shall bear their own costs.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 3RD DAY OF JULY 2025.

E. N. MAINA

JUDGE

IN PRESENCE OF:

Mr Muema Advocate for the Protestor.

Ms Kyalo HB for Mr. Kithuka for the Administrators.



Jimmy Katiti.

Morris Katiti.

Daniel Moi David.

