



REPUBLIC OF KENYA



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**In re Estate of Kipsongok Kili Kikatei (Succession Cause 205 of 2012)  
[2025] KEHC 12815 (KLR) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12815 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 205 OF 2012  
JRA WANANDA, J  
SEPTEMBER 19, 2025  
IN THE MATTER OF THE ESTATE OF KIPSONGOK KILI KIKATEI**

**BETWEEN**

**LABAN ESHITERA TSUMA ..... APPLICANT**

**AND**

**ESTHER JEPTUM KILI ..... PETITIONER**

**AND**

**IRENE JEROTICH GERIO ..... PROTESTOR**

**RULING**

1. This decision is in respect to a challenge to a portion of the Rectification of the Grant made herein, which Rectification altered the list of beneficiaries adopted in the distribution of the estate as appeared in initial Confirmed Grant earlier issued herein.
2. The background of the matter is that the deceased, Kipsongok Kili Kikatei, died on 7/10/2007 at the age of 94 years. On 19/07/2012, the Petitioner, applying as his widow, petitioned for Grant of Letters of Administration over his estate. As the sole asset comprising the estate, she listed the parcel of land described as Uasin Gishu/Illula/88 measuring 2.8 Hectares (hereinafter referred to as “the suit land”) to be distributed amongst 5 beneficiaries, who included the Applicant, Laban Eshitera Tsuma. The Petition was then processed and the Grant of Letters of Administration dated 30/07/2013 issued. The Grant was subsequently confirmed on 16/07/2015 as prayed above.
3. However, upon the Petitioner’s subsequent Application, the Confirmed Grant was later rectified on 24/07/2017 to correct the wrong reference number of the parcel of land indicated thereon, and to accommodate an expanded list of beneficiaries which, this time also included the Petitioner. One significant feature of the rectification was that the Protester, Irene Jerotich Gerio, was added as a co-beneficiary of the portion of 0.9 acres initially allocated to the Applicant, as a sole beneficiary.



4. The Rectification swiftly elicited filing of the Notice of Motion the subject hereof, the one dated 4/08/2017 filed by the Applicant through Messrs Gumbo & Associates Advocates, whereof he sought the setting aside and/or review of the portion of the Rectification that allowed inclusion of the Protester as a co-beneficiary of his share. In his Affidavit in support of the Application, he basically urged that the rectification was conducted without his consent and without him being heard, and thus the orders were obtained by fraud.
5. He deponed that he solely purchased the portion from the deceased and termed the Protester as his former wife whom she separated from and who then got married to someone else. He also contended that in any event, even if the Protester had any legitimate claim, then the proper forum to urge her claim is either through a suit filed at the Environment & Land Court (ELC), or in a Matrimonial Property Cause.
6. The Protester then, through Messrs Mukabane & Kagunza & Co. Advocates, filed the Affidavit in Protest which she swore on 16/04/2018 and in which she deponed that she got married to the deceased under customary law sometime in 1994 and were blessed with 3 children. She deponed that during the marriage, they purchased 0.5 acres portion of the suit land from the deceased, to which she made direct contribution and even participated in the execution of the Agreement for Sale, and that a sum of Kshs 60,000/- refunded to her for an aborted purchase of a separate parcel of land was handed over to the Applicant, as her husband, and which was then added for purchase of the 0.5 acres portion. She deponed further that she also took a loan from a bank and also from her mother at an aggregate sum of Kshs 200,000/- which she also gave to the deceased as further part-payment of the purchase price of the 0.5 acres portion. She also deponed that upon execution of the Sale Agreement, she took possession of the portion and started cultivating and later constructed her matrimonial home therein where she stayed with the Applicant and their children until they got estranged but she is still in possession of the portion to date. She deponed that between 2006-2007, the Applicant purchased a further 0.4 acres of the suit land bringing the total to 0.9 acres and that the Applicant is therefore only entitled to such 0.4 acres. She urged that upon the death of the deceased, this Succession Cause was commenced without her knowledge and the Applicant named as the sole beneficiary of the entire 0.9 acres portion contrary to the agreement, that upon learning of this development, she protested in open Court to the Administrator/Petitioner and also to the Applicant and it was then agreed that she, as well as other separate purchasers who had also been omitted, be included. She deponed that it is pursuant thereto, upon the Petitioner's application, the Grant was rectified as aforesaid, and that setting aside of the same will therefore also affect the other purchasers. She referred to the letter from the Chief vindicating her position.
7. The Applicant then filed the Further Affidavit he swore on 5/07/2018, together with 3 other Affidavits sworn on 5/07/2018 and 20/12/2017, respectively, by John Kiprotich Songok, Joel Kiprono Kili and Wifred Kitur, said to be sons of the deceased. The Applicant, in his said Further Affidavit, basically denied the allegations made by the Protester and, instead, reiterated his own allegations made in his Affidavit earlier referred to.
8. The Affidavits sworn by John Kiprotich Songok, Joel Kiprono Kili and Wifred Kitur are identical to each other in content. They all deponed that they are sons of the deceased herein, and the Petitioner/Administrator is their step-mother. They then stated that they witnessed the Sale Agreement for purchase of the said 0.9 acres portion in issue herein between the deceased and the Applicant. According to them, the Protester was only endorsed therein as the Applicant's witness, and that there was no indication that the Protester purchased the land jointly with the Applicant. They further deponed that upon learning of the rectification of the Grant, they approached the Petitioner seeking an explanation thereof and the Petitioner denied any knowledge of the same. According to them,



somebody may have taken advantage of the Petitioner's advanced age and illiteracy to interfere with the already concluded distribution.

9. The matter was then directed to be canvassed by way of viva voce trial upon which the Protester filed Witness Statements.
10. The Petitioner's first Witness Statement was the one by Magdalene Gerio dated 12/07/2018 who stated that she is the Protester's mother, and that the Protester got married to the Applicant in March 1994 and were blessed with 3 children. She added that sometime in December 2005, the Protester informed her that she intended to jointly purchase a portion of land the suit land with her husband (the Applicant) from the deceased but they did not have sufficient money to meet the purchase price. She stated further that she advanced the Protester a sum of Kshs 100,000/- and since the Protester was married, customarily, the husband (the Applicant) was in the forefront in the transaction which was concluded and the Protester and the Applicant therefore became co-owners of the portion. She stated that she personally handed over the Kshs 100,000/- to the deceased. She added that the Protester subsequently divorced the Applicant who then tried to disinherit the Protester during confirmation of the Grant.
11. The Petitioner's 2<sup>nd</sup> Witness Statement was by Emmy Koech, also dated 12/07/2018. She stated she witnessed the signing of the Agreement of Sale relating to the portion of land in issue herein on 28/12/2005, between the deceased on one part, and the Protester and the Applicant on the other. She stated that the Protester contributed the entire purchase price of 0.5 acres through a loan advanced to her by her mother and also by a bank and she, too, contended that since the Protester and the Applicant were husband and wife, customarily the husband (Applicant) was in the forefront during the transaction on behalf of his family. She stated further that upon the purchase, the Protester took possession and she has been cultivating the same to date. According to her, the Protester contributed the entire purchase price on 28/12/2005 while the Applicant contributed the entire purchase of the later purchase portion of 0.4 acres, making the total to 0.9 acres.
12. The matter then proceeded to viva voce trial in which 7 witnesses testified. The Protester and her witnesses testified as PW1, PW2, and PW3, the Petitioner testified as DW1, and the Applicant and his witnesses testified as DW2, DW3 and DW4.

### **Protester's testimony**

13. The Protester, Irene Jerotich Gerio, led by her Counsel, Mr. Kagunza, testified as PW1 before Hon. Lady Justice O. Sewe on 19/07/2021. She adopted her Affidavit of Protest earlier referred to and reiterated the matters deposed therein, including that she was married to the Applicant in 1994 and were blessed with 4 children but they separated in 2008, that she contributed in raising the purchase price for the portion in issue and that she is only pursuing the matter for the interests of her children. Under cross-examination by Mr. Kenei, Counsel for the Applicant, she reiterated the matters stated in her Affidavit but conceded that in the Agreement for Sale dated 28/12/2005, her name is only indicated as a witness, not as a purchaser, although it is her who drafted the Agreement. She also conceded that the Agreement was for purchase of ½ acre, and that only a sum of Kshs 50,000/- is indicated as having been paid to the deceased on that day. She however insisted that she paid Kshs 150,000/- in total (which included Kshs 100,000/- from her mother) on that day, and that it is her who eventually paid the entire Kshs 200,000/-. About the alleged Kshs 40,000/- loan that she claimed to have taken from the bank to add to the amount paid, she also conceded that she did not produce any proof thereof. She also conceded that her name was added in the Agreement much later.



14. When the matter came before me on 3/10/2023 for resumption of the Protester's case, the Protester did not have further witnesses in Court on that day. In the circumstances, to save on further delays, it was agreed that the Petitioner, because of her advanced age, and also because of the age of the case, could commence her case then once her case is closed, and before the Applicant commences his, the Protester would continue with and conclude her case. In the circumstances, the Petitioner took the stand and testified as PW2.

### **Petitioner's testimony**

15. The Petitioner, Esther Jeptum Kili, led by Ms. Tanui, thus testified before me as DW1 on the said 3/10/2023. She adopted her Affidavits filed herein, and stated that the reason she applied for Rectification of the Grant was because the land was wrongly described. She however also agreed that she also sought the rectification to include other beneficiaries who had been left out. She however denied that she added the Protester in the expanded list of beneficiaries and insisted that she does not know who did so. She then stated that she only knows the Applicant as the beneficiary. Under cross-examination by the Protester, she stated that the 1<sup>st</sup> portion was sold by her husband (the deceased) and herself jointly, and the 2<sup>nd</sup> portion she sold alone. She then conceded that she first knew the Protester who later introduced the Applicant after the Protester had already started cultivating the said portion. She stated that she does not know how the Protester and the Applicant raised the purchase price. Under cross-examination by Mr. Kenei, she insisted that the Protester was only a witness to the Agreement for Sale, and not a co-Purchaser. She also pointed out that the Chief's letter she relied on also only refers to the Applicant, and stated that she never had any intention of adding the Protester neither does she know how the Protester was added. Regarding the portion in issue, she reiterated that it belongs to the Applicant. According to her, the Protester should wait for the Applicant to get her share then the two can go and battle it out.
16. At this point, the Petitioner closed her case and the Applicant commenced his.

### **Applicant's witnesses' testimony**

17. The Applicant, Laban Eshitera Tsuma, testified as DW2 on 22/11/2023. Led by his Counsel, Mr. Kenei, he adopted and reiterated the contents of his Supporting Affidavit and Further Affidavit already referred to above. Under cross-examination by Ms. Tanui, now acting for the Petitioner, he reiterated that the Protester was added without his (Applicant's) consent but agreed that he was still living with the Protester when he purchased the portion. Under cross-examination by the Protester, he agreed that all the Protester's children are his and stated that he has been separated from the Protester for 18 years now. He however agreed "separated" is different from "divorced". He insisted that the he has never lived with the Protester in the suit land but agreed that it is the Protester who introduced him to the deceased. He also denied that the portion had already been paid for by the time that he was introduced to the deceased or viewed the same. He denied any knowledge of a part-payment of Kshs 100,000/- made on 28/01/2005 or of any money given by the Protester's mother. He then stated that since purchasing the portion, he has never cultivated it because the Protester has been threatening him, and that although they separated in 2007, the Protester refused to leave the land. He insisted that he purchased the land single-handedly. In re-examination, he reiterated that the Protester is now married to somebody else and that she forcefully continued to occupy the portion and put up structures, even after they separated.
18. DW3 was Wilfred Kitur who also testified on 22/11/2023. He, too, adopted his Affidavit and reiterated that the Petitioner is his step-mother and the deceased his father. In cross-examination by the Protester, he stated that he was a witness in the Agreement for Sale and that there were 8 people present, including



himself, his mother (Petitioner), his father (the deceased), his brother, the Protester, and the Applicant. He denied that the Protester's mother was among them, and confirmed that a part-payment was made on that day but he could not recall the amount. According to him the total amount eventually received as purchase price was Kshs 500,000/- although he only witnessed some part-payment, and that the Agreement was signed in the Applicant's home. He stated that his father (the deceased) had 3 wives. In re-examination, he agreed that the Agreement dated 28/12/2005 only shows the purchase price of Kshs 200,000/-. He then stated that the initial purchase price was Kshs 200,000/- but this increased to Kshs 500,000/- when the acreage sold was increased. He insisted that, to his knowledge, all the money was paid by the Applicant and the Protester's mother played no role in the transaction. He added that the Applicant's house where they met was a rented house, and was not in the suit land. He insisted that the portion in issue belongs to the Applicant.

19. When the matter came up on 17/01/2024 for resumption of the Applicant's case, he did not have in Court on that day the further witnesses he intended to call. In the circumstances, again to save on further delays, it was agreed that the Protester's case, which had also been deferred and her witness (PW1) stood down, could resume as she had her witnesses in Court. In the circumstances, the Protester's second witness took the stand and testified as PW2.

#### **Protester's witnesses' further testimonies (resumed)**

20. In resumption of the Protester's case, her 2<sup>nd</sup> witness, Magdalene Gero, thus testified on the said 17/01/2024 as PW2. She adopted her Statement earlier referred to and reiterated the contents thereof, including that she is the Protester's mother and that she advanced the Protester money for purchase of the portion of land in issue herein. She stated that she witnessed the signing of the Agreement for Sale on 28/12/2005, and that they were 7 people in total, including herself, the Protester, the Applicant, and 3 sons of the deceased. According to her, the deceased was not present at the meeting as he was said to have been unwell, and stated that she gave the Kshs 100,000/- to one of the sons of the deceased by the name Kiprotich who, together with his brothers, counted it, and she (PW2) then handed it over to their mother (the Petitioner) in the presence of all the witnesses, and on the next day she went to the home of the deceased who confirmed that he had received the money and even showed her the land. She then stated that since the Protester and the Applicant subsequently separated, it is the Protester who has been living with the children. Under cross-examination by Ms. Tanui, she stated that the Kshs 100,000/- that she paid for the land was not a loan but simply her assistance to the Protester and the Applicant. Under cross-examination by Mr. Kenei, she conceded that her name does not appear in the Agreement as a witness, and also that it only indicates a payment of Kshs 50,000/- as having been made on 28/12/2005, and that it describes the Protester as a witness, not a co-Purchaser.
21. The Protester's 3<sup>rd</sup> witness was Emmy Koech, who testified on the same 17/01/2024 as PW3. She, too, adopted her Statement to and stated that she was a neighbour of the Protester and the Applicant, and reiterated that on 28/12/2005 she, too, witnessed the signing of the Agreement for Sale at the Applicant's home. She added that the Protester gave a sum of Kshs 50,000/- and the Protester's mother came later and gave Kshs 100,000/- to the Petitioner but no separate or further Agreement was made for this additional Kshs 100,000/-. She, too, stated that after the Protester and the Applicant subsequently separated, it is the Protester who remained with the children and still does to date. Under cross-examination by Ms. Tanui, she stated that she did not know on whose behalf the Protester's mother made the payment of Kshs 100,000/- and neither does she know the purchase price for the portion save that the portion was 0.5 acres. Under cross-examination by Mr. Kenei, she reiterated most of the already stated matters but also stated that the deceased, who was the seller, was not present at the meeting as he was said to have been unwell. She also stated that she had no knowledge whether the names of the Protester and the Applicant were added into the Agreement subsequently, or whether such addition,



if any, was fraudulent. In response to a question from the Court, she stated that at the time of signing the Agreement, the portion had not been developed.

22. At this point, the Protester closed her case. The Applicant's case then resumed on 25/11/2024.

### **Applicant's Further witnesses' testimony (Resumed)**

23. The Applicant's 2<sup>nd</sup> witness was John Kiprotich Songok who testified on 25/11/2024 as DW4. He adopted his Affidavit, and reiterated that the Petitioner is his step-mother and the deceased his father, and that it is the Applicant who purchased the 0.9 portion of land in issue herein out of the suit land measuring approximately 7.9 acres. According to him, there were about 4-5 witnesses to the Agreement for Sale. For his father, he stated that the witnesses present were himself (DW4), his mother (Petitioner), his brother (Wilfred Kitur-DW3) and another brother by the name Joel Kiprono, and for the Applicant, the witnesses were the Protester and one other woman whose name he could not recall. He insisted that the Protester was only a witness to the Agreement, not a co-purchaser. Under cross-examination by Ms. Tanui, he insisted that he did not agree with the changes made in the Grant by rectification and their mother (Petitioner) also told them that she did not give any instructions for the changes to be made. About the other beneficiaries added through the Rectification, he also stated that he never knew about them as no one told him about them. He however agreed that he was aware of the correction of the land reference number. He then stated that he did not know where the purchase price paid by the Protester and the Applicant came from. Under cross-examination by the Protester, he agreed that it is the Protester who was on the ground and who thus negotiated the transaction. When asked why his other brother, Joel Kiprono, was not called as a witness despite swearing an Affidavit, he stated that it was because he is a drunkard and lacks courage, and denied that it is because he would have given a different account had he been called as a witness. He also denied that the Protester's mother (PW2) was present on the date when the Agreement was signed. According to him, the amount received on that date was Kshs 250,000/-, and which was all given by the Applicant, and not Kshs 50,000/-. He then stated that the Applicant first bought 0.5 acres, and later a further 0.4 acres, and that he (DW4) thus signed 2 different Agreements on different dates. When however shown the Agreement, he conceded that it shows that what was paid on 28/12/2005 was Kshs 100,000/-, and not Kshs 250,000/-. According to him, the conflicting figures is because the payments were made in instalments. He insisted that the Protester misled his mother (Petitioner) to add the Protester's name in the Grant. He however conceded that it is his mother who used to pay the Lawyer who drafted the Application for Rectification but stated that the Lawyer may have not known the truth. In re-examination, he stated that the Petitioner told him that she was misled into agreeing to the addition of the Protester's name in the Grant.

24. At this point, the Applicant also closed his case. The entire trial therefore also closed on that 25/11/2024.

25. I then gave the parties leave to file written Submissions within specified timelines, and the Applicant's Advocates were to begin by filing and serving within 14 days. However, when the matter came up on 5/02/2025, more than 1 month later, the Applicant's Advocates did not attend Court and had also not filed Submissions. In view thereof, upon Application by Ms. Tanui for the Petitioner, I locked out the Applicant's Advocates from filing any Submissions as the time granted to them had expired and no explanation had been offered for the failure to file their Submissions within the time specified. I thus gave the Protester and the Petitioner the liberty to file their Submissions. Pursuant thereto, the Protester filed the Submissions dated 4/03/2025, while the Petitioner's Advocates filed the Submissions dated 9/03/2025.



26. I may also state that although the Petitioner's Submissions is filed through Messrs Koech Lelei & Co., and although Ms. Tanui Advocate has been appearing for the Petitioner, I have not come across any Notice of Change of Advocates considering that Messrs Mukabane & Kagunza & Co. was the firm that had been on record for the Petitioner. Similarly, although there are pleadings and correspondence in the Court file from Messrs Kenei & Co. and although Mr. Kenei has been appearing for the Applicant, I have also not come across any Notice of Change of Advocates considering that it is Messrs Gumbo & Co., through Mr. Kenei, that had initially been on record for the Applicant.
27. Further, although I was handed over in Court copies of the said two respective sets of Submissions from the Protester and from the Petitioner, neither appears in the Judiciary Case Tracking System (CTS) online portal.
28. The parties are therefore advised to ensure that their respective Notices of Change or Appointment of Advocates and Submissions, if formally filed, are formally placed on record.

### **Protester's Submissions**

29. The Protester, acting in person as aforesaid, after recounting the witnesses' testimonies and evidence on record, cited Section 74 of the [Law of Succession Act](#), as read with Rules 14(1) and 43 of the Probate and Administration Rules, which govern the issue of Rectification of Grants. She also cited Rule 63 which lists Order 44 of the Civil Procedure Rules as one of the provisions of that Act that may be applied in proceedings under the [Law of Succession Act](#). She then cited the case of *Re The Estate of Mokosio [2000] eKLR*. According to her therefore, the Rectification of the Grant was conducted procedurally and should be upheld.

### **Petitioner's Submissions**

30. I will not recount the Petitioner's Submissions filed as aforesaid through Messrs Koech-Lelei & Co, as it is strikingly similar and identical, both in print and in content, to the Submissions filed by the Protester. This is intriguing since the Petitioner's Submissions seem to now appear to be supporting the Protester's Submissions yet at the trial, the Petitioner and her Counsel, Ms. Tanui, both took a position totally contradictory to the Protester's, and in fact supported the Applicant. I find this really strange. I will however say no more about this loud intuition ringing in my mind regarding the Submissions said to be the Petitioner's.

### **Determination**

31. The issue for determination in this matter is evidently "whether this Court should set aside the orders made herein on 24/07/2017, whereof the Confirmed Grant issued herein was rectified to include the Protester as a co-beneficiary of the Applicant's 0.9 acres share".
32. It is clear that the Protester's basis for "prompting" or "causing" the Rectification of the Grant was based on the allegation that the Petitioner allocated the 0.9 acres portion of the suit land in issue herein entirely to the Applicant as a sole beneficiary thereof, yet the Protester being his ex-wife, contributed to acquisition of the said portion. According to her therefore, her inclusion or addition as such co-beneficiary was proper and justified. The current fight is therefore not within the family of the deceased, but between third parties outside the family.
33. Before I delve into determining the substantive matters before the Court therefore, it is relevant to recall that one of the issues raised by the Applicant was that even if the Protester had any legitimate claim, then the proper forum to urge her claim would be either through a suit filed at the Environment & Land Court (ELC) or in a Matrimonial Property Cause. This is evidently an issue of jurisdiction.



Since determination of this issue has the potential of determining this entire matter at a Preliminary stage, I will analyse it as the first matter.

34. Indeed, in the celebrated case of *The Owners of the Motor Vessel “Lillian’s” -V- Caltex Oil Kenya Ltd* [1989] KLR 1, Nyarangi J.A. held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

35. Similarly, in the case of *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No. 2 of 2011, the Supreme Court held that:

“[68]. A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.”

36. It is true that the mandate of a Probate and Administration Court is to determine the assets of the deceased, identify the rightful beneficiaries of the estate, ascertain their respective shares and finally, distribute the estate accordingly. This has been restated in a plethora of decisions including for instance, the case of *re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, in which W. Musyoka J held that:

“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.”

37. In respect to the issue of separation of jurisdiction, the *Constitution* of Kenya establishes the Environment and Land Court, and clothes it with jurisdiction in Articles 162(2)(b) as follows:

162. (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

- (a) .....; and
- (b) the environment and the use and occupation of, and title to, land.

38. In regard to the High Court, the *Constitution* under Article 165(3)(a) provides as follows:

- (3) Subject to clause (5), the High Court shall have—
  - (a) Unlimited original jurisdiction in criminal and civil matters;



39. On the other hand, Article 165(5) provides the following limitation:

“The High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2).”

40. In the discharge of the obligation placed on it by the Constitution, Parliament then enacted the Environment and Land Court Act, which sets out in detail, the jurisdiction of that Court. Section 13(2) thereof then outlines the jurisdiction of that Court as follows:

- “(1) .....
- (2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court [the ELC] shall have power to hear and determine disputes—
  - (a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - (b) relating to compulsory acquisition of land;
  - (c) relating to land administration and management;
  - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - (e) any other dispute relating to environment and land.
- (3) .....”

41. Questions on ownership of land, unless they are as between or amongst beneficiaries in the distribution of the estate of a deceased person, are therefore generally outside the jurisdiction of the High Court sitting as a Probate Court, as the same is a preserve of the Environment and Land Court (ELC).

42. Regarding the jurisdiction relating to “matrimonial claims”, the preamble to the Matrimonial Property Act No. 49 of 2013 provides that the Act was enacted “to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes”.

43. Section 7 then provides as follows:

“ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, .....”.

44. On its part, Section 17(1) provides that:

- “17. Action for declaration of rights to property
  - (1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
  - (2) .....”

45. In this matter therefore, I also need to satisfy myself that the claims being canvassed are not such that they should be brought in a separate Matrimonial Property Cause before the family Court.



46. Applying the provisions of law and authorities cited above to the facts of this case, I have no hesitation in finding that the Protester's claims or grievances cannot be properly canvassed before this Court. The Petitioner had already presented her list of the beneficiaries to the Court which list comprised of purchasers of different portions of the suit land, which list the Court accepted and adopted in distributing the estate on 16/07/2015. Once the Court confirmed the Grant and distributed the estate, any claims by third parties against individual beneficiaries, such as by their own estranged spouses, cannot after such distribution has been finalized, be again placed before this same Court for determination, but before a different forum. The Application for Rectification allowed on 24/07/2017, insofar as the Applicant did not consent to it, should not therefore have been entertained at all ex parte.
47. By making the above finding, I am not at all contradicting the orders made by Hon. Ogembo J made on 24/07/2017. All I am pointing out is that the above material facts do not seem to have been brought to the Court's attention. A look at the record indicates that only Mr. Kibii, appeared as Counsel for the Petitioner, and the impression given to the Judge was that the Application was consented to by the Applicant. I say so because this is how the proceedings of that day were captured:

Mr. Kibii

This is for the Application dated 28/07/2015 for amendment of grant. Some of the beneficiaries were left out and also the wrong property was captured. We pray for an amendment.

Court

This is an Application for amendment of the grant to include the relevant beneficiaries and also correct the identities of the property. It is not opposed. I allow the Application in terms of prayer (a) of the Application dated 28/07/2015."

48. I am not therefore sitting on appeal on the decision of a Judge of equal jurisdiction but simply sitting in an Application for Review in which I am allowed to make the observation above. It is evident that it was not brought to the Court's attention that the Applicant had not even been served.
49. It is clear the Protester's claim is really not against the Petitioner or the estate of the deceased, but is a totally separate claim against her own husband who simply happens to be one of the beneficiaries. I have no doubt in my mind that such is a matrimonial property dispute between the two of them having nothing to do with the estate of the deceased herein. As aforesaid, the Protester and the Applicant are not even members of the family of the deceased and the dispute between themselves is simply as purchases of a 0.9 acres portion of the suit land. Why then should the estate herein be dragged into their internal matrimonial property dispute? There can be no doubt that the correct forum for canvassing or resolving the Protester's claims against her husband (the Applicant), if any, is either as a suit at the Environment and Land Court, or in a Court constituted to hear a Matrimonial Property Cause.
50. On my above finding, I also cite the case of *In Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR, in which W. Musyoka J, held as follows:

"....., I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the *law of succession Act* is limited. It does not extend to determining issues of ownership of property and determination of trusts. It is not a matter of the probate court being incompetent to deal with such issues but the provisions of the law of succession and the relevant subsidiary legislation do not provide a convenient mechanism for determination of some issues. A party who wishes to have such matters



resolved ought to file a substantive suit to be determined by the Environment and Land court. Consequently, and for the reasons above stated, I wish to find and hold that this court has no mandate to resolve the proprietary interest on land based on the alleged trust”.

51. Similarly, in the case of *In re estate of Solomon Mwangi Waweru (deceased)* (2018) eKLR in which A.K. Ndungu J remarked as follows:

“Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator (s) of the estate and not through an objection like the one before court”

.....

It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land court. The succession court would then proceed with the administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit”.

52. I also refer to another decision by W. Musyoka J in the case of *In the matter of the Estate of Stone Kakhuli Muinde (Deceased)* [2016] eKLR. in which he stated as follows:

“24. The probate process is meant to be largely administrative, where the documents lodged in the cause are scrutinized administratively by court officers before certain instruments are processed and executed by relevant judicial officers before being issued to the parties. It is intended that there be minimal court appearance. The whole process is tailored to be non-contentious, and the only contemplated court appearance is at the stage of the confirmation of the grant of representation. In that scenario then there would be no need to join any person or entity to the succession cause.

25. The cause can and does, as a matter of course, turn contentious. To facilitate distribution of the estate, the court should identify the persons who are entitled to inherit from the estate of the deceased and the assets to be shared out amongst the person entitled. Disputes often arise on those issues. It may become necessary for the court to determine whether a particular person is entitled to a share in the estate of the deceased or not. An issue may also arise whether some asset formed part of the estate of the deceased or not.

26. The Act and the Rules have elaborate provisions on resolving such questions, and to settle them there would be no need to bring in persons who have no direct interest in the matter, especially those who are not family members. Whether a person is entitled to the part of the estate is an issue to be resolved without joining other persons to the matter.

27. With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions



do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

28. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.
29. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place.”
53. I fully associate with the views enunciated in the said cases and I am satisfied that the Protester's claims are matters that are squarely within the province of either the Environment & Lands Court (ELC) or as a suit filed in a Matrimonial Property Cause, not before this Court sitting as a Probate Court, and not as a dispute within the estate of the deceased.
54. Regarding the Rectification of Grant obtained herein, I may comment that the main stipulated manner and/or procedure of amending, altering, or varying the contents of Grants of Letters of Administration or Certificates of Confirmation of Grant is either by way of Rectification, or Revocation/annulment, and in some instances, by way of Review. The choice of the procedure to be invoked is based on the nature of the changes or variations sought.
55. Rectification of Grant is governed by Section 74 of the Law of Succession Act, and Rule 43 of the Probate and Administration Rules, and is applicable where the alterations sought are simple and basically, in respect to errors in names or descriptions, such as typographical mistakes.
56. On its part, Revocation or annulment of Grants is governed by Section 76 of the Law of Succession Act, and applies where there are substantives issues or disputes involved and which affect the legitimacy of the process employed in obtaining the Grant. There are 3 major instances that may necessitate such an Application. The first is where the process of obtaining the Grant was defective, or the person to whom the Grant was issued was not the proper person, or the process was marred by fraud or misrepresentation or concealment of facts. The second ground is where the Administrator, after obtaining the Grant, fails to discharge his duties within the stipulated timelines. The third is where the Grant has become useless and inoperative due to circumstances such as where a sole Administrator has died, or has become incapacitated in one way or another, thus rendering the estate with no Administrator or with one who is unable to discharge his duties.
57. Review, on the other hand, is governed by Rule 63(1) of the Probate and Administration Rules, which specifies the limited provisions of the Civil Procedure Rules that are imported to the Law of Succession Act, and which includes Order 45 of the Civil Procedure Rules relating to Review. Order 45 provides for 3 circumstances under which an order for review can be made. The first one is where the Applicant demonstrates that there has been discovery of new and important matter or evidence. The second is



where there has been a mistake or error apparent on the face of the record, and the third is “for any other sufficient reason”.

58. I note that the Summons for Rectification dated 28/07/2015 and allowed on 24/07/2015 as aforesaid, was filed by the Petitioner then acting in person and was brought under the provisions of Section 74 of the *Law of Succession Act*, and also Rules 43 and 63 of the Probate and Administration Rules. Section 47 of the *Law of Succession Act*, and Rule 73 of the Probate and Administration Rules are however also relevant.

59. Section 47 of the *Law of Succession Act* provides as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

60. Rule 63 (1) of the Probate and Administration Rules provides as follows:

“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

61. On its part, Rule 73 of the Probate and Administration Rules provides that:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

62. It is therefore clear that Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration, are in respect to the High Court’s inherent powers. Rule 63 on the other hand, is in respect to the powers of Review as provided under Order 45 of the Civil Procedure Rules.

63. The rectification obtained herein clearly altered the distribution of the said 0.9 acres portion initially allocated solely to the Applicant in that the Protester was added as a co-beneficiary of the same 0.9 acres portion. This was thus not merely a change in description or a correction of an error, matters in respect which Rectification would be allowed, but essentially, a substantive change in distribution. Alteration of the share of a beneficiary no doubt required his express consent as the affected beneficiary, or at least he ought to be given a hearing before such alteration was made.

64. The Rectification obtained herein on 24/07/2017 was thus a re-distribution of the Applicant’s shares and substantially interfered with the core of the mode of distribution already concluded on 16/07/2015, 2 years earlier. In respect to such far-reaching changes, I cite the decision of Ali-Aroni J (as she then was), made in the case of *In Re estate of George Ragui Karanja (Deceased)* [2016] eKLR, in which she stated as follows:

“..... Redistribution amounts to a revision of the orders made by the court at the confirmation of grant. Such orders should be disturbed only through appeal or review or by the consent of the parties.”



65. Similarly, W. Musyoka J, in the case of *In re estate of Charles Kibe Karanja (deceased)* [2015] eKLR held that:
- “If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would not be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant”
66. In light of all the above, and there being no evidence that the Applicant’s consent was obtained or that he was even served to attend Court for the hearing of the Rectification application, the Rectification fundamentally, but unilaterally, varied the mode of distribution already adopted and brought about unilateral substantial changes to the Grant without the Applicant’s knowledge or approval. The Rectification should not have been done without his involvement.
67. As aforesaid, the Summons for Rectification of Grant dated 28/07/2015 and allowed on 24/07/2017 was filed by the Petitioner herself then acting in person. She, for some reason seems to have sworn and filed two separate Affidavits both on 28/07/2015 in support of the Application. In the Application, she sought correction of the land reference number wrongly indicated in the Grant, and also adoption of an expanded list of beneficiaries, by inclusion of more beneficiaries, including herself, said to have been left out. Among the persons indicated as being among those the Petitioner prayed to be included was the Protester, Irene Jerotich Gerio. This is repeated in her two said Affidavits in support of the Application. A draft of the new schedule to be adopted as the Conformed Grant was also reproduced in one of the two Affidavits. This was what was then adopted by the Court once the Application was allowed.
68. However, at the trial, the Petitioner changed tune and stated that the only nature of Rectification she authorized and knew about was as regards the correction of the land reference number, and the addition of some purchasers who were inadvertently left out. She stated that she does not know who “sneaked in” the part of the prayers which also mentioned the Protester as a co-beneficiary of the 0.9 acres portion allocated to the Applicant. She thus completely disowned that part of the Application. Her sons (step-sons), DW3 and DW4, have urged that somebody must have misled the Petitioner and taken advantage of her advanced age and illiteracy to sneak in the Protester’s name in the Application for Rectification. The Petitioner did not disclose the identity of the person who drafted for her the Application, and none of the Lawyers asked her this question at the trial. However, having been said to be illiterate, and considering the legal expertise apparent in the Application, it is evident that that the Application was drafted for her by a person with some legal training. We may never know therefore know the truth.
69. Be that as it may, for the sole reason that there is no evidence that the Applicant was involved in the Application for Rectification of the Grant yet he was the affected party, his share being the only one that was altered by the addition of the Protester as a co-beneficiary thereto, I find that the process under which the allocation of that share was altered, was irregular and unsustainable. That part of the Rectification cannot therefore be allowed to stand.
70. For the above reason, and also in light of my earlier finding that the Protester’s claims should not have been pursued by way of Rectification of Grant, but rather through a substantive suit filed at



the Environment and Land Court, or by way of a Matrimonial Property Cause, I find that there are sufficient grounds to review the orders made herein on 24/07/2017.

71. I therefore invoke the provisions of Order 45(1) of the Civil Procedure Rules, which under Rule 63(1) of the Probate and Administration Rules, is applicable to proceedings brought under the Law of Succession Act, and Review and set aside the said portion of the orders made herein on 24/07/2017, there being sufficient reason for doing so as.

### **Final Orders**

72. The upshot of my findings is that the Applicant's Notice of Motion dated 4/08/2017 succeeds, and I rule and order as follows:
- i. In respect to the Rectified Certificate of Confirmation of Grant made herein on 24/07/2017 and issued on 1/08/2017, the portion thereof adding and/or including the name of the Protester, Irene Jerotich Gerio, as a co-beneficiary of the 0.9 acres portion of the parcel of land known as Uasin Gishu/Illula/88 allocated to the Applicant, Laban Eshitera Tsuma, is hereby reviewed and set aside.
  - ii. In other words, the name of the Protester, Irene Jeruto Gerio, is hereby struck out and/or removed from the list of beneficiaries appearing in the Rectified Certificate of Confirmation of Grant made herein on 24/07/2017, and issued on 1/08/2017.
  - iii. For avoidance of doubt therefore, the only alteration made in the said Rectified Certificate of Confirmation of Grant made on 24/07/2017 is the striking out and/or removal of the name of the Protester from the list of beneficiaries. The Rectified Certificate of Confirmation of Grant made on 24/07/2017 is therefore upheld and retained on record save for the striking out of removal of the Protester's name as aforesaid.
  - iv. The Protester may consider pursuing her claim or claims before the Environment and Land Court (ELC) or by way of a Matrimonial Property Cause action.
  - v. Each party shall bear his/her own costs of the Application herein.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2025**

.....

**WANANDA JOHN R. ANURO**

**JUDGE**

Delivered in the presence of:

Protester acting in person

N/A for other parties

Court Assistant: Brian Kimathi

