



**In re Estate of Ndegwa Warui (Deceased) (Succession Cause 347 of 2013) [2024] KEHC 791 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 791 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
SUCCESSION CAUSE 347 OF 2013**

**LW GITARI, J**

**FEBRUARY 1, 2024**

**IN THE MATTER OF THE ESTATE OF NDEGWA WARUI (DECEASED)**

**BETWEEN**

**MICHAEL MUTHIKE NDEGWA ..... APPLICANT**

**AND**

**ALFRED WARUI NDEGWA ..... RESPONDENT**

**AND**

**JOHN KAMAU MWANGI ..... INTERESTED PARTY**

**KIRINYAGA COUNTY GOVT ..... INTERESTED PARTY**

**JOSEPH MWANIKI MUCHIRA ..... INTERESTED PARTY**

**ZABLON MAINA NGIRIA ..... INTERESTED PARTY**

**ISMAIL BAKITI, CHAIRMAN WANGURU JAMIA MOSQUE  
COMMITTEE ..... INTERESTED PARTY**

**BARNABAS NDONGA ..... INTERESTED PARTY**

**REGD TRUSTEE CATHOLIC DIOCESE OF MURANG'A INTERESTED PARTY**

**TABITHA MUMBI NJOGU ..... INTERESTED PARTY**

**ALICE WANJIKU THIONGO ..... INTERESTED PARTY**

**ANN NYAGUTHII NGICHIRI ..... INTERESTED PARTY**

**HASSAN KIMANI ..... INTERESTED PARTY**

**REUBEN GIKONYO ..... INTERESTED PARTY**

**MUSA NDERITU ..... INTERESTED PARTY**

**FAITH WAMBUI ..... INTERESTED PARTY**



## JUDGMENT

### Background

1. For avoidance of doubts what is before this court is a succession matter which has a very long history dating back to the year 1999 and is therefore among the oldest matters in the system.

The Succession Cause has over the years escalated to disputes involving Land Parcel No. Mwea/Tebere/B/199 the disputed estate of the late Ndegwa Warui (deceased). The property in dispute is a prime land within Wanguru Township within Kirinyaga County.

2. The matter was initially filed in the Principal Magistrate's Court at Kerugoya as Succession Cause No. 20 of 1999 in the matter of the estate of Ndegwa Warui (deceased) who died intestate on 2/3/1989 as per the death certificate issued on 15/6/1989. According to the Index Card which was filed in court when the Succession Cause was filed in the Senior Resident Magistrate's Court at Kerugoya, the deceased died while domiciled at Ndindiruku/Kiarukungu within the Republic of Kenya. The properties which were listed as forming the estate of the deceased were;

1. Kirinyaga/Gathigiriri/300
2. Kirinyaga/Karurumo/90

A grant of letters of administration intestate were issued to Alfred Warui on 22/2/2000. The grant was later confirmed on 24/10/2000. The estate of the deceased was ordered to be distributed to his beneficiaries. These were :-

Kirinyaga/Karurumo/90 measuring 23 acres and Kirinyaga/Gathigiriri/300 measuring seven acres.

They were distributed as follows:-

1. Kirinyaga /Karurumo/90
  - a. Alfred Warui - 3.5 Acres
  - b. Michael Muthike Ndegwa - 3.5 Acres
  - c. Joseph Karunga Ndegwa - 3.5 Acres
  - d. Simon Ndambiri Ndegwa - 3.5 Acres
  - e. John Gichuru Ndegwa - 4.5 Acres
  - f. Margaret Wanjiku Ndegwa - 1.0 Acres
  - g. Stephene Ngigi Ndegwa - 3.5 Acres
2. Kirinyaga/Gathigiriri/300
  - a. Alfred Warui - 1 Acre
  - b. Michael Muthike Ndegwa - 1 Acre
  - c. Joseph Karunga Ndegwa - 1 Acre
  - d. Simon Ndambiri Ndegwa - 1 Acre



- e. John Gichuru Ndegwa - 1 Acre
- f. Margaret Wanjiku Ndegwa - 1 Acre
- g. Stephene Ngigi Ndegwa - 1 Acre

It is however not clear from the record whether the grant was effected or not as such confirmation is missing from the record. The administrator does not seem to have complied with Section 83(i) of the Law of Succession Act Cap 160 Laws of Kenya with regard to producing to the court a full and accurate account of the completed administration. None of the other members of the family was involved and the respondent filed the cause without a death certificate, chief's letter and without consent of other beneficiaries.

3. Almost ten years after the grant was confirmed the matter resurfaced this time around with a multiplicity of suits which I will list her below:

These are:-

- 1. Civil Case No. 103/2008
- 2. High Court Embu No.123/2009
- 3. Kerugoya Senior Principal Magistrate's Court Criminal Case No.660/2010.
- 4. Embu High Court Misc. Succ. Cause No.75/2011 transferred to High Court Kerugoya which is the present Cause No. 347/2013.

Below is an analysis of these suits:-

- 1. Civil Case No.103/2008

This suit was filed by John Gichuru Ndegwa –v- Kirinyaga County Council in the Magistrate's Court Kerugoya. This suit was struck out for want of jurisdiction on 6/5/2009.

- 2. High Court Embu Succession Cause No.123/2009

This suit was filed by John Gichuru Ndegwa –v- Alfred Warui Ndegwa and 14 Others.

In a ruling on a Pre-liminary Objection, Justice W. Karanja, (as she then was) held that the plaintiff had no locus standi and the suit was time barred. The suit was dismissed.

- 3. Kerugoya Senior Principal Magistrate's Court Criminal Case No. 660/2010.

In the case of Alfred Ndegwa Warui the respondent, was charged with three counts of conspiracy to defraud contrary to Section 317 of the Penal Code and one count of obtaining land registration by false presences contrary to Section 320 of the Penal Code. In summary it was alleged that the accused who is the respondent in this case jointly with others not before the court and with an intent to defraud, they conspired to transfer parcel of Land No. Mwea Tebere/B/199 to Kirinyaga County, Joseph Mwaniki Muchira and John Kamau Mwangi. On these three counts the respondent was acquitted on the grounds that the charges were defective for failure to disclose a certain particulars on the charge sheet. However on the fourth count in which the



respondent was charged with obtaining registration by false presences with intent to defraud by obtaining land Parcel No. Mwea/Tebere/B/199 by falsely pretending that the said land was genuinely transferred by Ndegwa Warui (the deceased) he was found guilty convicted then fined Kshs.20,000/- or in default serve one year imprisonment. The respondent never appealed against the conviction and sentence.

4. High Court Misc. Criminal Case No. 22/2010 Barnabas Ndonga & 3 Others –v-Republic.

This was a Criminal Revision which arose from orders issued by the trial magistrate in Criminal Case No.660/2010 (supra). The trial magistrate had ordered that the tile deeds which were acquired as a result of the fraudulent acts by the respondent be cancelled. In a ruling by Hon. Wanjiru Karanja Judge, (as she then) was ordered that the orders be set aside as they were given without jurisdiction, were unprocedural, illegal and unlawful. The orders were declared null and void and were therefore quashed. The Judge further directed that the District Land Registrar should not interfere with the titles in question if such interference was to be in obedience of the said orders. The Judge did not however interfere with the Judgment of the learned trial magistrate.

5. Embu High Court Misc. Suiccession Cause No.75/2011.

This Misc. Succession Cause was filed in Embu High Court by the Petitioner with the main prayer being revocation of the grant issued in Kerugoya Magistrate’s Court Succession Cause No. 2 of 1999. This was the grant which was issued to the respondent herein in Succession Cause No. 2/1999 on 22/2/2000 in the Estate of the deceased herein. Vide an order issued on 1/4/2011 by Justice M. Warsame, Judge, (as he then was) he ordered that the grant issued in Kerugoya Succession Cause No.21 1999 be revoked and or annulled. The Judge further ordered that a fresh grant of letters of administration be issued to Michael Muthike who is now the Petitioner in these proceedings. The fresh grant which was issued to the Petitioner has never been confirmed.

Upon being transferred to Kerugoya High Court it was registered at Kerugoya High Court as Succession cause No.347/2013.

It is this Misc. Succession Cause No.75/2011 where these orders were issued that was on 21/2/2012 ordered transferred to High Court Kerugoya by Hon. Justice Ong’undi sitting at High Court Embu. It is important to mention here that it is the respondent herein who had filed the succession in the Estate of the Ndegwa Warui (deceased) in Succession Cause No.2/1999 and had deliberately omitted Land Parcel No. Mwea/Tebere/B/199 which he had purported to sell without a grant of letters of administration leading to his being charged and convicted in the Criminal Case No.660/2010.

The Petitioner’s Application

The Petitioner, upon being appointed as the administrator of the estate of the deceased, moved the court with a summons for amendment and rectification of the schedule of assets forming the estate of the deceased which is dated 17/5/2011. The application was expressed to be brought under Section 47, 94



and 95 of the Law of Succession Act Cap 160 Laws of Kenya (hereinafter referred to as “the Act”) and Rule 49 Law of Succession Rules (sic). Presumably, he meant the Probate and Administration Rules.

The applicant was seeking the following orders:-

1. A declaration that Mwea Tebere/B/199 belonged to Ndegwa Warui (deceased) at the time of his death. On 2/3/1989 and the same forms part and parcel of his estate todate.
2. A declaration that the sub-division of LR Mwea/Teber/B/199 by Alfred Warui Ndegwa (a son of Ndegwa Warui (deceased) and subsequent transfer of the Parcels of Land into his own name on 25/5/1993 without the knowledge of the family members and without a grant of letters of Administration on the Estate of Ndegwa Warui was null and void.
3. That the Kirinyaga District Land Registrar be and is hereby ordered to rectify the Lands Register in respect of LR Mwea Teber/B/199.to read the name of Ndegwa Warui as the rightfully registered proprietor and a title deed in his name be issued.
4. That the applicant be granted leave to amend the schedule of the assets in the petition for grant of letters of Administration for the estate of Ndegwa Warui to include Mwea/Teber/B/199 forthwith.
5. That costs be in the cause.

The application is supported by the affidavit of Michael Muthike Ndegwa and is based on the following grounds:-

- a. That Ndegwa Warui (deceased) died on 2/3/1989 and was the registered owner of L.R.Mwea/Teber/B/199.
  - b. That in 1993 Alfred Warui Ndegwa Sub-divided and transferred L.R Mwea/Teber/B/199 to himself without a grant of letters of administration or the knowledge of other family members.
  - c. He later obtained grant of letters of administration in Kerugoya Senior Resident Magistrate’s Court No.2 of 1999 on 22/2/2000 which grant was revoked on 31/3/2011.
  - d. It is in the interest of justice that L.R Mwea/Teber/B/199 be returned to its rightful owner.
4. The Petitioner has relied on several annextures in support of his application. These are-
- i. A copy of the death certificate of the deceased.
  - ii. A copy of certificate of official search for L.R Mwea/Teber/B/199 as at 23/3/2009.



- iii. A grant of Letters of Administration in respect of the deceased's estate that was issued on 1/3/2011.
  - iv. A copy of the order issued on 31/3/2011 in Embu Misc. Succession Cause No. 75/2011 revoking the grant issued to the respondent in Kerugoya SRMCC Succession Cause No.2/1999 and appointing the applicant and the administrator of the subject estate.
  - v. Copies of green cards in respect of LR Mwea/Tebere/B/199 and its purported resultant subdivisions.
  - vi. Copy of the Judgment in Kerugoya Senior Principal Magistrate's Court Criminal Case No.660/2010 Republic –Alfred Warui Ndegwa.
  - vii. Letters from Kerugoya Kirinyaga Land Office and Cadastral Plan.
5. This application involved the Petitioner and the respondent in this case and it is worth stating that the two are blood brothers. The respondent did not oppose this application and consequently on 21/7/2011 Justice Muchelule, (as he then was,) allowed the Petitioner's application in its entirety. The order issued was as follows:-
- “ 1. That LR Mwea/Tebere/B/199 belonged to Ndegwa Warui as at the date of his death on 2/3/1989 and the same forms part and parcel of this estate todate.
  - 2. That the sub-division of LR/Mwea/Tebere/B/199 by Alfred Warui Ndegwa and subsequent transfer of the parcel of land into his own name on 25/5/1993 without the knowledge of the family members and without a grant of letters of administration in the estate of Ndegwa Warui is hereby declared null and void.
  - 3. That the Kirinyaga District Land Registrar be and is hereby ordered to rectify the Lands Register in respect of LR Mwea/Tebere/B/199 to read in the name of Ndegwa Warui as the rightfully registered deed in his name be issued forthwith.
  - 4. That the applicant be and is hereby granted leave to amend the schedule of the assets in the petition for the grant of letters of administration for the estate of Ndegwa Warui to include Mwea/Tebere/B/199 forthwith.”
6. The issuance of this order triggered various applications which are the subject of this Judgment. I proceed to analyse the applications here below.
- 7.
- 1) Application by Ismail Bakiti (5<sup>th</sup> Interested Party)
- The 5<sup>th</sup> Interested Party moved this court with a Notice of Motion dated 3/10/2011 seeking the following substantive orders:
- i. That the court be pleased to stay the orders issued on 26/7/2011 pending hearing and determination of this application (The prayer was granted in the interim)
  - ii. That this court be pleased to review and set aside its orders issued on 26/7/2011 stating inter alia that the property known as LR Mwea/Tebere/B/199 belongs to Ndegwa Warui, deceased.



iii. That this court be pleased to make a declaration that property formerly known as LR Mwea/Tebere/B/199 does not form part of the estate of Ndegwa Warui (deceased) as at the time of his death and consequently is not available for distribution to the beneficiaries of his estate.

iv. That costs be provided for.

8. The 5<sup>th</sup> Interested Party's application is premised on the grounds on the face of it and is supported by the affidavit of the 5<sup>th</sup> Interested Party sworn on 3/10/2011. His main contention is that the orders issued on 26/11/2022 were obtained through concealment of material facts and hence ought to be stayed and reviewed and/or set aside. They contend that the deceased died in 1989 while the suit property had ceased to be the deceased's property in 1974. The 5<sup>th</sup> Interested Party urges the court to find that Justice Wanjiru Karanja had substantively dealt with the matter and hence any proceedings in respect of the said property are res judicata.

It is his contention that the orders should be set aside to allow this court to fully investigate the matter and ascertain any misrepresentations. He further urges the court to find that the Petitioner concealed material facts that there are persons on the suit property who have permanent structures thereon and who are interested parties in the suit and ought to be heard before making of the decision by the court and not to be condemned unheard. He urges the court to find that there is sufficient reason for the review of the orders issued on 26/7/2011. That unless the orders are granted the 5<sup>th</sup> Interested Party stands to suffer irreparable loss. The 5<sup>th</sup> respondent brings the suit as the chairman of Wanguru Jumia Mosque Committee who he avers that he was allocated a portion of the land out of what was formerly known as LR. No. Mwea/Tebere/B/199. The portion was allocated on 5/2/1980 by Kirinyaga County Council. He further deposes that the land in dispute did not belong to the deceased at the time of his death.

9. The Second Application

6<sup>th</sup> & 7<sup>th</sup> Interested Parties Application

These two together with one Geoffrey Kamau filed a similar application by way of Notice of Motion dated 18/10/2011 (2<sup>nd</sup> application) They urged the court to enjoin them in the suit as interested parties and for the court to issue a temporary order of stay of execution of the impugned orders as well as an order for review of the said orders. They urged the court to find that the LR No. Mwea/Tebere/B/199 does not exist and does not form part of the estate of the deceased. They based the application on the grounds that there is an error apparent on the face of the record. That material facts were concealed from the court. The land in question did not exist at the time of the death of the deceased. They contend that they live on a portion which are resultant sub-division of the said land in dispute does not exist. They further contend that they are likely to suffer great and irreparable loss if the orders are not set aside. They claim ownership of LR No. Mwea/Tebere/B/1789 which was allocated to them by Kirinyaga County Council. Vide an order by Justice Ong'udi dated 21/10/2011 they were joined in the suit as interested parties.

10. The respondent opposed the two applications and opted to file a replying affidavit sworn on 8/11/2011 in response to the application by the two interested parties based on the issue of jurisdiction. His contention is that this being a succession cause, it was not the right forum for the applicants to have raised the issues in their respective applications. His contention is that the right forum was to file a separate suit against the administrators of the estate as opposed to filing applications in the present succession cause. He therefor urged the court to dismiss the applications with costs.



11. Kirinyaga County joined the suit as an Interested Party. This followed a ruling by Justice H.I. Ong'udi, Judge, on 21/2/2013 wherein she ordered that the respondent and Kirinyaga County Council be enjoined in the suit. The Kirinyaga County then filed replying affidavits and opposed the application. It is their case that in the 1970's they exercised the powers conferred to the County through the Commissioner of Lands and embarked on the process of expanding all towns in Kirinyaga County and commenced compulsory acquisition of plots surrounding various townships including Wang'uru town. It is the contention by the County that they compulsorily acquired LR Mwea Tebere/B/199 and compensated the deceased with Land Parcel No. Mwea/Marurumo/90. That the 2<sup>nd</sup> Interested Party took possession of the Land Parcel No. Mwea Tebere/B/199 and that due to an oversight the suit property was not registered in the 2<sup>nd</sup> Interested Party's name. The 2<sup>nd</sup> Interested Party conceded that it allotted land to the Interested Parties herein including the 7<sup>th</sup> Interested Party who was allocated land during the lifetime of the deceased in 1976. They subsequently allocated the land to the Muslim Community in 1980. The 2<sup>nd</sup> Interested Party maintained that no member of the estate of the deceased has any claim to the land in dispute. Apart from the respondent and the Kirinyaga County, the court on 20/1/2013 directed that all those other persons that may have an interest in the disputed land and are not known to the applicant be served through an advertisement in the daily newspaper. Several of them came up and filed affidavits.

12. I will now proceed to list the claims by these Interested Parties who are 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, & 10<sup>th</sup> Interested Parties

These parties filed replying affidavits to oppose the summons dated 17/5/2011. These parties claim that they are purchasers for valuable consideration. The Interested Parties rely on the affidavit sworn by John Kamau Mwangi, 1<sup>st</sup> Interested Party on 16/10/2015 and on documents and affidavits which they have filed. The Interested Parties aver that they acquired their respective parcels of land which resulted from the sub-division of Land Parcel No. Mwea/Tebere/B/199 as purchasers for valuable consideration either from the respondent Alfred Warui Ndegwa who is a brother of the applicant Michael Muthike Ndegwa or from persons to whom the respondent had transferred some of the resultant portions and further that they have been in exclusive possession of their respective portions and they have extensively developed the same.

13. One of the interested parties, Tabitha Mumbi Njogu (8<sup>th</sup>) avers that she purchased her plot No.618 Wanguru market from an allottee of the same by the defunct Kirinyaga County Council which plot is part of parcel No. Mwea/Tebere/600 which it had the right to allocate the plot to the person who sold to her. Kirinyaga County purported to rely on the extract of minutes dated 7<sup>th</sup> August 2009 of a meeting held on 4/6/1974 by Agriculture Land and Forest Committee where it was resolved that the allocation of alternative farms to people whose farms had been acquired for the extension of the township be rectified and the name of the deceased was appended as the owner of the disputed land which land was to be acquired for Wanguru Township by Kirinyaga County Council. These minutes referred to Land Parcel No. Mwea/Tebere/B/199. However as of 1974, Land Parcel No. Mwea/Tebere/B/199 was not in existence as I will expound later.

The 15<sup>th</sup> Interested Party's Case:

The 15<sup>th</sup> Interested Party gave a brief background on how he came to have interest in this matter. He contends that upon the Petitioner herein being appointed as the administrator of the estate of the deceased, he approached him with a request that he provides him with cash to settle the debts and the liabilities of Ndegwa Warui. In return, the Petitioner would transfer to him seven (7) acres of his share of his inheritance from the land in dispute. He stated that the agreement is dated 28/9/2011. He stated that he did due diligence and conducted a search at Kirinyaga District Land Registry and it revealed that



Land Parcel No. Mwea/Tebere/B/199 measures approximately thirty acres and is freehold agricultural land which belonged to Ndegwa Warui free of any lien or encumbrance. That he further did a search at Provincial Survey of Kenya Nyeri and it was revealed that the disputed land known as Mwea/Tebere/B/199 is separately shown in the registry index map and is intact. It has not been sub-divided. The 15<sup>th</sup> Interested Party asserted that he is in full support of the petition by the Petitioner dated 17/5/2011 to the effect that the disputed land known as Mwea/Tebere/B/199 belonged to Ndegwa Warui as at the date of his death on 2/3/1989 and the same forms part of his estate.

The Interested Party, Joseph Mwaniki Muchira (DW2) testified that he bought land from Alfred Warui the respondent herein. He bought parcel No. Mwea/Tebere/602 & 603. He testified that he never conducted a search nor did he get a copy of the title deed from the respondent. He sub-divided one of the parcels, Mwea/Tebere/603 into four portions and sold to the Interested Parties.

Zablon Maina Ngira, Tabitha Mumbi Njogu, Alice Wanjiku Thiongo and Anne Nyaguthi Ngichiri, 4, 8, 9 & 10 Interested Parties respectively. He admitted that he later came to realize that the land belonged to the deceased and that the titles issued by Alfred Warui were issued fraudulently.

14. As for DWA Hassan Bhakit representing Jamia Mosque Committee, 5<sup>th</sup> Interested Party. His testimony was that the plot where the Mosque stands was allocated to them by Kirinyaga County Council. He testified that the Mosque stands on the land which is in dispute before this court. He admitted that the Muslim Community did not buy the plot from the deceased.

The plot allocated to them measures five acres. According to him no objection was raised when they acquired the land and proceeded to develop it.

15. For the County, evidence was adduced by Mutai Ngunyi who said he is the Director of Land, Survey and G.I.S (Geospatial Information Systems) of the Kirinyaga County Government. According to him, the County Government can acquire land by way of compulsory acquisition. That the County in exercise of that power acquired Land Parcel No. Mwea/Tebere/B/65 belonging to Ndegwa Warui and he was to be compensated with land at Marurumo. He relied on the extract of Minutes of the County Council dated 4/6/74. Minutes No. AL/F39/74. The Minutes refers to Land Parcel No. Mwea/Tebere/B/65 which belonged to Ndegwa Warui. According to him Ndegwa Warui the deceased was compensated with Land Parcel No. Marurumo Section/90 measuring 23 acres and Kirinyaga/Gathigiriri/300. He avers that Ndegwa Warui moved from the land and re-located to one of the pieces of land which he was allocated. The land was then allocated to the Interested Parties like the Muslim Community and the Catholic Women Association. It is his contention that the land had to change ownership to Kirinyaga County Council. That however did not happen. The land was later sub-divided by Alfred Warui Ndegwa who had no authority to do the sub-division.
16. In cross-examination, the witness admitted that the land was given Parcel No.199 in 1983 and therefore that parcel number did not exist on 4/6/74 when the extract of the Minutes is said to have been issued. The witness admitted that he did not produce the register of the Minutes from which the extract of the Minutes was extracted. He further admitted that the minutes did not bear the stamp of the County Council, only a signature. The witness admitted that he did not know the history of to the land.
17. The witness further admitted that the land in dispute, Mwea/Tebere/B/199 was the resultant sub-division and Mwea/Tebere/200 is a public road. That the County Council did not enter a sale agreement with Ndegwa Warui and that when he was registered on Land Parcel No. Mwea/Tebere/B/65, it was first registration. The witness admitted that there was no agreement of exchange of land between the County Council and Ndegwa Warui for the exchange of his land now in dispute and the land at Marurumo. According to the witness, the land in dispute was subdivided and the resultant parcels were number 600-604. Parcel No.600 was registered in the name of Kirinyaga County Council



as well as No.604 after it purchased from the respondent. He was at pains to explain how the County Council could buy its own land. He admitted that there was no Gazette Notice which was published when the land was acquired. He further admitted that there was no evidence to prove that the land at Marurumo ever belonged to Kirinyaga County Council before being registered in the name of Ndegwa Warui. Finally the witness admitted that Kirinyaga County Council and Kirinyaga County Government have never acquired the title for Mwea/Tebere/199. He further admitted that the County Government has not filed any claim in this matter and did not enter appearance in this matter.

18. On being cross-examined further with regard to the allocation done by the County Government to the Muslim Community, the witness admits that the County Government cannot acquire private land of one person and allocate that private land to another private person or body.
19. With regard to the Registered Trustees of the Catholic Diocese of Murang'a, 7<sup>th</sup> Interested Party evidence was adduced by Jacinta Micere Njoka (DW6). According to her, they applied for a piece of land from Kirinyaga County Council. They were allocated land measuring five (5) acres belonging to Ndegwa Warui as he had been compensated with land parcel No. Mwea/Marurumo/90. In 1976 they took over the land and built a hall which they are using to date.
20. PW7 Daniel Gulu was a Forensic Document examiner who adduced evidence that the sale agreement between Alfred Warui Ndegwa and Joseph Mwaniki Muchira was signed by Alfred Warui, the respondent herein.
21. DW8 Odilia Kitonyi Wambua on her part testified that the Catholic Women Association was allocated the land by the County Council of Kirinyaga. That the land belonged to Ndegwa Warui but he was given land elsewhere and he vacated the land. The witness admitted during cross-examination that the Catholic Women Association does not have a title deed for the land or any other document to proof ownership. She further stated that they were summoned by the County Council to say how they got land as the family of the deceased had lodged a complaint.
22. PW10 Tabitha Mumbi Mutero testified on behalf of Tabitha Mumbi Njogu on the strength of a power of Attorney (this was however not produced in court). Her testimony was that the sister bought a plot from Geoffrey Kamau Gichuhi (now deceased) who had been allocated the plot by Kirinyaga County Council. The witness admitted that the plot had no title deed as the seller had not obtained one and only had a letter of allotment from Kirinyaga County Council.
23. PW11 Barnabas Ndonga is the 6<sup>th</sup> Interested party, testified that he lives on land parcel No. Mwea/Tebere/1700 and has a title deed for the land. He told the court that the plot resulted from the subdivision of Mwea/Tebere/B 199. He further told the court that he purchased the land from Njuguna Gitachu. He confirmed that he was aware that he was holding a fake title deed.

Consequently, the court gave directions which was consented to by the parties that the two applications be heard together. The court further directed that since there were several parties who had settled on the disputed land, leave of the court was granted for service of the application dated 17/5/2011 through an advertisement in the Daily Newspaper. Consequently fifteen (15) Interested Parties filed replying affidavits and were joined in this suit. Directions were given for hearing by way of viva voce evidence. This was in a ruling by Justice Limo dated 7/9/2016 who found the land in dispute belonged to the deceased at the time of his death and the claims by the Interested Parties be heard.

#### **The Evidence:**

24. It was PW1's testimony that Mwea/Tebere B/199, the disputed land herein, was initially L.R. Mwea/Tebere B/65. He stated that in 1978 the government divided the property to pave way for a road.



L.R. Mwea/Tebere B/65 was subsequently divided into two, that is, L.R. Mwea Tebere/199 and L.R. Mwea/Tebere/200. L.R. Mwea/Tebere/200 was turned into a road and he produced a copy of the green card in respect of the same as P.Exhibit 4. According to him, L.R. Mwea Tebere/199 was left for his father, the deceased herein, and he produced the green card in respect of the same as P. Exhibit 5 to support his claim.

25. It was PW1's testimony that the deceased never sold or sub-divided any part of his land during his lifetime. He stated that his brother, the Respondent herein, fraudulently transferred the disputed land to his name before getting a grant of letters of administration and that he was charged and convicted for that offence in Kerugoya Senior Principal Magistrate's Court Criminal Case No. 660 of 2010. PW1 further stated that he was in Nairobi until 2019 before he came back to the suit land and found that people had settled in and were constructing on the said land.
26. On cross-examination, PW1 stated that the deceased was buried on the disputed land and that the family never consented for the Respondent to file Kerugoya SRMCC Case No. 2 of 1999. He stated that he sold 7 acres to the 15<sup>th</sup> Interested Party herein at Kshs. 8 million in 2011.

PW2 was Muthee Kirimu, the District Lands Registrar Kirinyaga County. He confirmed that the disputed land was a part of the subdivision of L.R. Mwea/Tebere B/65 which was registered in the name of the deceased. He confirmed that L.R. Mwea/Tebere B/65 was subdivided into two and that stated that on 25<sup>th</sup> May, 1993 the title in respect of the disputed land was further subdivided to Nos. 600-604. It was his testimony that the deceased could not have subdivided the land in 1993 as he was dead and that the said subdivision was irregularly perpetuated out of an illegality in his office.

### **The Respondent's Case**

27. DW1 was Alfred Warui Ndegwa and the Respondent herein. He maintained that he did not oppose the application dated 17<sup>th</sup> May 2011 by his brother, the Applicant herein. He further stated that he was the first born son of the deceased, who had sought and was granted letters of administration in respect of the deceased's estate in Kerugoya SRMCC Succession Cause No. 2 of 1999 (Estate of Ndegwa Warui – deceased). He conceded that he had indicated that the only properties forming part of the deceased's estate were land parcels Nos. L.R. Kirinyaga/Gathigiriri/300 and L.R. Kirinyaga/Marurumo/90. He also conceded that he had not included the disputed land in the said cause as part of the assets that the deceased owned. He further conceded that he illegally transferred the disputed land to his name sometime in 1993. As it would come out from the court proceedings that followed, the disputed land was subdivided and sold to the interested parties herein on diverse dates. DW1 denied that the deceased was given Kirinyaga/Marurumo/90 in exchange for the disputed land.

Submissions:

For the administrator, it is submitted that this matter relates to the Estate of the late Ndegwa Warui (deceased) who passed away on 2/3/1989. He submits that at the time to his death the deceased left behind the following properties;

LR Mwea/Tebere/B/199LR Kirinyaga/Gathigiriri/300LR Kirinyaga/Marurumo/90

That the eldest son of the deceased, Alfred Warui Ndegwa secretly applied for letters of administration via Kerugoya Succession Cause No.2/1999 in the Estate of Ndegwa Warui.

The grant was later revoked in Succession Cause No.75/2011 on 31/3/2011 and Michel Muthike Ndegwa was appointed as the administrator of the estate of the deceased. The cause was then transferred to this court and given Succession cause No.347/2013. That one of the main reasons why the grant of letters of administration was revoked is because the family discovered that he was intermeddling with the estate by transferring LR Mwea/Tebere/199 fraudulently. As a



consequence, Alfred Ndegwa was charged in Kerugoya Senior Resident Magistrate's Court Criminal Case No.660/2010 and was convicted for obtaining land registration fraudulently contrary to Section 320 of the Penal Code. He was fined Kshs.20,000/-. That based on the above history it became necessary for the administrator to apply to amend the schedule of assets to include Land Parcel No.Mwea/Tebere/199 which had been omitted by Alfred Ndegwa Warui. That other Interested Parties were allowed by Justice Ong'undi to join in the suit on 21/2/2013. That the Interested Parties claimed that Alfred Warui Ndegwa had transferred the subject land to himself; sold the land to them and they were in occupation.

28. The Petitioner submits that the suit land belonged to the deceased at the time of his death and therefore formed part and parcel of his estate as provided under Section 3 of the Law of Succession Act. That this was confirmed by the County Surveyor Kirinyaga County and the Land Registrar who gave evidence before this court as per the Government records officially in their record for L.R. Mwea/Tebere/B/199 which show that as at 2/3/1989 the property was in the name of Ndegwa Warui at the time of his death. That the Land Registrar who compulsorily acquired by the Government of Kenya for the expansion of the Nairobi-Embu road.
29. The Counsel further submitted that the Land Registrar was clear that the subdivision of the land in 1993 by Alfred Warui Ndegwa and the transfer to himself of his father's land was improper, fraudulent and illegal as the land was agricultural land and no consent of the Land Control Board was availed to the Land Registrar for the said sub-division and sub-sequent transfer. Secondly no mutation forms were ever presented and the said sub-divisions and transfer were never registered in the Land Registrar properly. Further that no confirmed grant in the Estate of Ndegwa Warui (deceased) was presented to the Lands Registry by Alfred Ndegwa Warui. That the said transfers were a mere manipulation of records at Lands office by Alfred Warui Ndegwa in collaboration with Rogue Kirinyaga County Officials to try and steal the land of the deceased.
30. The Counsel for the Petitioner therefore submits that the respondent and the interested parties did not produce any evidence to prove that the sub-division and subsequent transfer by the respondent or the County had any legal basis.
31. The Petitioner further submits that the action by Alfred Warui Ndegwa and the Interested Parties were null and void by dint of Section 6(1) of the Land Control Act. He relies on the case of Gatamaiyu Trading Co. Ltd -v- Nyakinyua Mugumo Kiambaa Co. Ltd & 11 others (2019) eKLR where the Court of Appeal held that-

“.....all transactions on agricultural land without Land Control Board consent are null and void unless the transaction is specifically exempted by the President under Section 24 by way of gazette Notice.

The Petitioner submits that the objection to the application dated 17/5/2011 by all the interested parties should be dismissed and the application allowed as prayed.”
32. With regard to the claim by the Kirinyaga County Government, the Petitioner submits the law in force for compulsory acquisition of land was the Land Acquisition Act (Cap 295 Laws of Kenya which came into force on 23/8/1968. That under the Act it was only the Minister of Lands through the Commissioner of Lands who had the power to compulsorily acquire land for Government Projects and this would be commence by way of issuing a Gazette notice to the owners of the affected property who would be given an opportunity to be heard as per Section 11 of the Act. The party would then be compensated. It is his submission that as of 1974 the County Council had no authority to compulsorily acquire land and could therefore not have compulsorily acquired the land belonging to Ndegwa Warui



as claimed by PW5. That PW5 did not produce any evidence to prove that the land was acquired by the Council.

33. The Petitioner further submits that as of 4/6/1974 when Kirinyaga County Council vide Minute No.4/6/1974 at 11.25 a.m. allegedly compulsorily acquired the suit land and compensated Ndegwa Warui (deceased) with another parcel of land known as Mwea/Marurumo/90, the Land (Mwea/Tebere/B/199) was not in existent as it was born on 6/12/1980 when the Minister for Lands compulsorily acquired a portion of the deceased Land Parcel No. Mwea/Tebere/B/65 Nairobi-Embu Road and deceased was compensated with money. The resultant parcels No. Mwea/Tebere/B/200 went to the Government while Mwea/Tebere/B/199 was the new Land Parcel number of the land belonging to the deceased.
34. The Petitioner therefore submits that the Minute No.4/6/1974 is an outright forgery as they could not have talked of land which was not in existent. It is also his submission that Ndewa Warui (the deceased) was registered after adjudication on Land Parcel No. Mwea/Marurumo/90 nd no evidence was produced to prove that it ever belonged to the County Council and the same goes for Mwea/Gathigiriri/300 where deceased was the first owner after adjudication. That Kirinyaga County did not produce any evidence to prove that the land parcels were transferred to Ndegwa Warui by the defunct Kirinyaga County Council.
35. It is further submitted that the County Council bought two parcels from Alfred Warui Ndegwa that is LR No. Mwea/Tebere/B/600 & 604 in 1996 and could therefore not have compulsorily acquired the Land of Ndegwa Warui (deceased as alleged).
36. The Petitioner submits that the claim by 4-14 Interested Parties cannot be sustained as they claim to have been allocated the land by the County Council after it acquired it from Alfred Warui Ndegwa Warui who had obtained the registration fraudulently. He submits that the Interested Parties are inter-meddlers with the estate of the deceased. The Petitioner relies on Machakos High Court Succession Cause No.215/2013 – Francis Musyoki Kilonzo –v- Vincent Mutua Mutiso (2013) eKLR at 2&3 Paragraph 11.

The Petitioner has also urged the court to note the claim by the Interested Parties that they have extensively developed the plots was in violation of court orders issued by this court.

Submissions by the Respondent:

The respondent filed submissions dated 28/1/2022 and filed in court on 2/2/2022. He submits that he is the first born son of the deceased, Ndegwa Warui who died on 2/3/1989. He contends that as at the time of his death, Ndegwa Warui (deceased) was the absolute registered proprietor of Land Parcel No. LR. No. Mwea/Tebere/B/199 as shown on the green card which was produced as Petitioner’s exhibit 5. He contends that the said LR No. Mwea/Tebere/B/199 forms part of the estate of the deceased Ndegwa Warui. He submits that by reason that the late Ndegwa Warui was the absolute registered proprietor of the said LR No. Mwea/Tebere/B/199 free from any lien or encumbrance as shown on the green card he was protected under Section 27(a) of the Registered *Land Act* (Cap 300 Laws of | Kenya) now repealed. The Section provides that-

“The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privilege belonging or appurtenant thereto.”



The respondent submits that this position has been affirmed by Justice Limo in his Ruling in this matter dated 17/9/2016 where he held that the land belonged to the deceased at the time of his death. He submits that the ruling is still valid as there has been no appeal against that ruling. The respondent in his submission has given a background as to how the land was acquired by the deceased as LR Mwea/Tebere/B/65 and after a compulsorily acquisition of part of the land by the Government of Kenya the resultant parcel got new registration as Mwea/Tebere/B/199 in the name of Ndegwa Warui (deceased).

That from the date of the first entry in the register of the land to the date of his death on 2/3/1989 there is no other entry which could have prevented Ndegwa Warui from dealing with his land in his lifetime. The respondent submits that the Land LR. No. Mwea/Tebere/B/199 fits the definition of what constitutes 'free property' as defined under Section 3 of the *Law of Succession Act* (Cap 160 Laws of Kenya) and forms part of the estate of Ndegwa Warui. The Section provides, free property in relation to a deceased person means-

“the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.”

The respondent has therefore urged the court to allow prayer No.1,3, & 4 of the summons dated 17/5/2011 and amend the schedule of assets.

The respondents submits that he secretly sub-divided LR No.Mwea/Tebere/B/199 in LR. Mwea/Tebere/B/6--604 which he transferred into his name without having obtained a grant of letter of Administration in the estate of the deceased. He further submits that this offended Section 45(1) of the *Law of Succession Act*

He further submits that he did not obtain the consent of the Land Control Board as provided under Section 6 of the *Land Control Act*. That consequently he was charged and convicted in Kerugoya Chief Magistrate's Court Case No.660/2010. He further submits that he filed the Succession Cause No.2 /1999 in Kerugoya Senior Principal Magistrate's Court and obtained a grant which unfortunately he could not use to validate the sub-divisions on LR Mwea/Tebere/B/199 in retrospect.

37. The respondent further submits that Kirinyaga County Council did not compulsorily acquire the land in dispute as it had no jurisdiction to do so by dint of Section 114(8) of the Local Government Act (Cap 265 Laws of Kenya) which prohibited County Councils from compulsorily acquiring land. He submits that the County Council could not compulsorily acquire that land as LR. No.Mwea/Tebere/B/199 was not existent in 1974 and only came into being on 18/12/1980 as shown on entry No.1 of the Green Card. He submits that the purported acquisition by Kirinyaga County Council and allocations by the County Council to some of the Interested Parties is a nullity. The respondent further submits that it is a misconception by the Interested Parties that the land in dispute was acquired by Kirinyaga County Council for the purpose of expansion of Wang'uru Township and founded on ignorance of the law relating to expansion of the Townships in Kenya.
38. The respondent further submits that Kirinyaga County Council did not produce any agreement to prove that Ndegwa Warui exchanged the land in dispute with LR.Kirinyaga/Marurumo/90 and the purported exchange was an illegality.
39. The respondent further submits that the claim by the Interested Parties cannot be sustained as they did not produce certificates of official search, did not produce any sale agreement and did not produce



evidence that the transactions were sanctioned by the Land Control Board. Further that the portions are not reflected on the registry Index Map. The respondent submits that the Interested Parties are on the land unlawfully and have proceeded to construct buildings which have not been approved and in blatant ignorance of valid court orders. The respondent submits that the court be pleased to allow the summons by the Petitioner and issue orders to restore the land in dispute to the estate of the deceased.

Submissions by 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Interested Parties:

For these parties, submissions were filed by I.N. Muchiri & Co. Advocates. They strongly oppose the application dated 17/5/2011 and have urged the court to dismiss it with costs. They have relied on their affidavits sworn on various dates. The contention by these Interested Parties is that they acquired their respective parcels of Land which resulted from the sub-division of Parcel No. Mwea/Tebere/B/199 as purchasers for valuable consideration either from the Respondent Alfred Warui Ndegwa or from persons to whom the respondent had transferred some of the resultant portions and they have been in exclusive possession of their respective portions and they have exclusively developed the same.

40. The Interested Parties urge the court to find that the application is misconceived, unmaintainable under any of the provisions of the Law of Succession Act (Cap 160 Laws of Kenya) and rules made thereunder and should be struck out under 'Rule 73 of the Probate and Administration Rules'. This submission is based on the grounds that the application is brought under Section 47, 94 & 95 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules. That the court's jurisdiction is to entertain applications under the Act as donated by Section 47 of the Act. That the jurisdiction is limited to disputes under Section 2 of the Act. He submits that the court lacks jurisdiction as Land Parcel No.LR. Mwea/Tebere/B/199 did not form part of the estate of the deceased at the time of his death and as at the time the application was filed. The disputes concerning the ownership of land are the preserve of the Environment and Land Court. The Interested Parties submit that the grant issued by the lower court was revoked and as such no schedule of assets of the deceased that is capable of amendment of rectification. The Interested Parties further submits that the applicant failed to disclose material facts that the land had long been sub-divided by the respondent and title deeds issued.
41. The Interested parties submit that the deceased held the land in dispute in trust for Kirinyaga County Council and was not the owner. They cite Section 28 of the Registered Land Act (Cap 300 Laws of Kenya) now repealed. The Interested Parties further submits that there was conspiracy between the respondent and the petitioner when they applied for revocation of grant. The Interested Parties aver that the land in dispute did not belong to the deceased at the time of his death as he had exchanged the same with another parcel which exchange had extinguished his interest of ownership of the parcel of land.

Submissions by 6<sup>th</sup> & 12<sup>th</sup> Interested Parties registered trustee of the Catholic Diocese

The party has given a background of Land Disputes in Kirinyaga County arising from land acquisition by the County Council which was not borne out by the evidence before this court that Mwea/Tebere/65 was surrendered to the County Council for purpose of expansion of Wanguru Town what is adduced in evidence is that the land was acquired for expansion of Nairobi-Embu Road and Mwea/Tebere/65 was sub-divided and gave rise to Mwea/Tebere/B/200 the road, Mwea/Tebere/B199 in the name of the deceased Ndegwa Warui. At the time the County purported to acquire LR Mwea/Tebere/B 65 it did not exist. The submissions by the party are erroneous. The 6<sup>th</sup> & 12<sup>th</sup> Interested Parties submit that the land in dispute belonged to the County Council after acquisition and although it remained in the name of the deceased, it was held in trust. They further submit that the officers of the County Council due to incompetency, fraud or otherwise, failed to follow up on the transfer of title in respect to the suit land and the same remained in the name of the deceased till 1980. They contend



that the present application is an attempt by the sons of the deceased to illegally enrich themselves by taking advantage of clear loopholes and fraud of officers of the government. They urge the court to dismiss the application.

Submissions by the 5.11 & 13<sup>th</sup> Interested Parties.

The submissions were filed by Ali % Company Advocates. They have urged the court to consider four issues. These are:-

- a. Does the Doctrine of Res Judicata apply to this matter in respect of Title No. Mwea/Tebere/B199 or does the title form part of the free property of the deceased available to the estate of Ndegwa Warui.
  - b. That by virtue of compensation granted to Ndegwa Warui (deceased) in exchange of Title No.LR Mwea/Teberea/B/199, can his estate make a claim of the property and/or compensation thereof.
  - c. Does this court have jurisdiction o hear and determine this matter.
  - d. Who is to pay costs.
42. On res judicata, the council has given the background of the matters filed in court in relation to the land in dispute and in particular the decision by Wanjiru Karanja Judge (as she then was) that the subject property is not in existence having had been transferred to the interested Parties years back and has urged the court to find that the matter is res judicata. He relies on- Nicholas Mukama Mkali & 253 Others-v- Yahya Mohamed 2019 eKLR.

Mudianga Investments Limited –v- Safaris Unlimited (Africa) Ltd & 2 Others (2009) KLR  
229, Court of Appeal.

43. Interested Parties submit that Ndegwa Warui deceased was compensated by the County Council after his land was acquired for expansion of Wanguru Town and his estate has no propriety claim or any claim over the suit land. He relies-

In Registered Trustee of Africa Independent Pentecostal Church of Africa –v- Jamlick  
Muraya Gatindi & 7 Others (Kerugoya) ELC No.24/2012 (2017) eKLR

44. On the issue of jurisdiction the Counsel submits that the issue is moot as it was heard and determined by Justice Limo.
45. On the issue of costs the Counsel submits that they should be paid by the applicant as he filed this application in bad faith. The Counsel has urged the court to find that the property in dispute does not exist and does not form part of the estate of the deceased. He urges the court to dismiss the application.

Submissions by the 15<sup>th</sup> Interested Party:

The party has given a detailed background of the matter and concurs with the respondent and the Interested Party that the land in dispute belonged to the deceased at the time of his death. He has urged the court to resolve the matter in favour of the Petitioner as prayed in prayer No.1 3 & 4 of the summons dated 17/5/2011.

Analysis and Determination:

What sparked off this matter was a simple question which a Probate and Administration court is called upon to determine, that is, whether a certain property forms the estate of a deceased person available for distribution to his dependants.



I have considered all the evidence adduced by the parties herein. I have also considered the background of this matter and various orders which have been issued by the respective Judges. The Parties in their submissions have raised various issues for determination. I confirm that I have considered these issues and I have collapsed them into the following issues:-

1. Jurisdiction.
2. Does Land Parcel No. LR Mwea/Tebere/B199 form part of the Estate available for distribution to the beneficiaries of his estate.
3. Claims by Interested Parties.
4. Whether this court can review the orders issued on 21/7/2011.

1. Jurisdiction:

As I stated in my opening statement in this Judgment, what is before this court is a succession matter. It is a cardinal principle in the Administration of Justice that jurisdiction of a court is everything a court of law does in respect of a matter before it the moment it holds the opinion that it is without jurisdiction....see owner of Motor Vessel "Lililians" –v- Caltex Oil Kenya Ltd 1989 where it was stated:

“Where a court takes it upon itself to exercise jurisdiction which it does not possess its decision amounts to nothing. Jurisdiction must be acquired before Judgment is given.”

It is therefore pertinent that before a court or a tribunal embarks on dealing with a matter it has to confirm whether it is possessed of the necessary jurisdiction to entertain it. Any action taken without jurisdiction is null and void ab initio.

In the case of Macfoy Limited-v- United Africa Company Ltd (1961) 3 All E.R. 1169 the court stated that-

“If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside.....

You cannot put something on nothing and expect it to stay there.”

See Samuel Kamau Macharia –v- KCB and 2 Others C.A 2 of 2011, Supreme Court of Kenya.

The pre-ambles to [Law of Succession Act](#) states as follows:

“An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons and for purposes connected therewith and incidental thereto.”

This is further expounded under Section 2(1) of the Act which makes provisions for the application of the Act. Section 2 of the [Law of Succession Act](#) provides:

- “(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to,



all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

This is further expounded under Section 2(1) of the Act which makes provision for the Jurisdiction of High Court to deal with matters under Law of Succession Act is donated by Section 47 of the Law of Succession Act which 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.

Provided that the High Court may for the purpose of this section be represented by a Resident Magistrates appointed by the Chief Justice.”

This being a succession matter, the issue of jurisdiction does not arise.

The issue of jurisdiction was determined by my brother Justice Limo in a ruling dated 7/9/2016. He held that since the matter relates to the estate of the deceased, the court with jurisdiction is the Probate and Administration Court.

I need therefore not belabor the point, this being a succession cause under the Law of Succession Act, the Court with jurisdiction is the Probate and Administration Court as provided under Section 47.

The Petitioner seeks an order that this court does declare that the land in dispute LR Mwea/Tebere/B/199 belonged to the deceased as at the date of his death on 2/3/1989. The Court is called upon to determine whether the land in dispute forms part of the deceased’s estate. The “estate” is defined under Section 3 of the Law of Succession Act as follows:-

“Means the free property of a deceased person.”

On the other hand “free property, is defined as follows-

In relation to a deceased person means the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.”

The Court of Appeal in the case of Maxwell Ombogo-v- Standard Chartered Bank & Another the court held that “Free estate” in the Law of Succession Act is property which a person was legally competent freely to dispose off, it connotes not only the personal property of a deceased person but also all the property which was in his possession or control or under his power and the disposal of which would legally have required his authority but for his death.”

I follows that before a court can issue orders concerning any property under the Law of Succession Act it must be satisfied that it forms the free estate of a deceased person.

46. This application is brought under Section 47,94 and 95 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules. Section 94 places a duty on a personal representative to get any



asset of the deceased and goes to the extent of making it an offence for such personal representative to fail to secure the asset of the deceased. It provides that-

“When a personal representative neglects for get in any asset forming part of the estate in respect of which representation has been granted to him or misapplies such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account be liable to make good any loss of damage so occasioned.”

Section 95 of the *Law of Succession Act* provides:-

- “(1) Any personal representative who, as regards the estate in respect of which representation has been granted to him-
- (a) wilfully or recklessly neglects to get in any asset forming part of the estate, misapplies any such asset, or subjects any such asset to loss or damage; or
  - (b) wilfully fails to produce to the court any such inventory or account as is required by the provisions of paragraphs (e) and (g) of section 83; or
  - (c) wilfully or recklessly produces any such inventory or account which is false in any material particular; or
  - (d) knowing or having reason to believe that the estate will prove to be insolvent, continues to administer it without petitioning for administration thereof in bankruptcy, shall be guilty of an offence, and shall be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment.
- (2) Any personal representative who, as regards the estate in respect of which representation has been granted to him if at any time there is a continuing trust and he is the sole surviving administrator, wilfully fails to apply to the court within three months in accordance with section 75A for the appointment of further administrators shall be guilty of an offence and shall be liable to a fine not exceeding five thousand shillings.”

As for Rule 49, of the ‘Probate and Administration Rules,’

It provides for filing of application not provided under the Act. The foregoing provisions show that this court has jurisdiction to entertain the application by the Petitioner. In the case of *Re-Estate of Alice Mumbua Mutua (2017) eKLR* Justice Musyoka stated that-

“The *Law of Succession Act* and 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 assets amongst the survivors of the deceased and the persons with beneficiary interest. 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.”

I am persuaded by this holding and I am in agreement that a probate and administration Court as one of its duties the determination of the assets of the deceased. The property of the estate must be identified. Where the issues of ownership of the property arises, they must be resolved before such property is distributed under Rule 41(3) of the Probate and Administration rules provides that claims which are ‘prima facie’ valid should be determined before the confirmation of the grant. This court was alive to the need of resolving ownership of property before the confirmation of the grant. Thus on 19/2/2015 Justice Limo directed that the application dated 17/5/2011 be fixed for hearing. The Petitioner adduced evidence. The court also heard evidence from the County Land Registrar and the County Surveyor. The interested parties opted to make oral submissions. In the end Justice Limo in the Ruling delivered on 7/9/2016 ruled that the Land Parcel No.LR Mwea/Tebere/B/199 belonged to the deceased at the time of his death. The Judge stated as follows:-

“The uncontested facts are that at the time of his death, he left properties that then comprised the estate

1. Kirinyaga/Marurumo/90
2. Kirinyaga/Gathigiriri/300
3. Mwea/Tebere/B 199.”

This ruling determined two issues, that is whether the summons dated 17/5/2011 was properly before court and whether the Land Parcel No. Mwea/Tebere/B/199 form the estate of the deceased at the time of his death. The ruling affirmed that the application was property before the court and secondly that the land in dispute formed the free estate of the deceased at the time of his death. Ruling further held that the claims by the interested parties be heard on merits.

47. I will now proceed to consider whether the claims by the interested parties can be sustained. I will consider the claims from two perspectives namely;

1. That the land was compulsorily acquired by the defunct Kirinyaga County Council now Kirinyaga County.
2. That the property was sub-divided and sold by the Respondent. By raising these claims the interested parties are contending that the land parcel No. Mwea/Tebere/B/199 does not exists. I will proceed to analyse these two contentions.

- 1) That the land was compulsorily acquired by Kirinyaga County (Formerly Kirinyaga County Council)

For a start the history behind the land in dispute is that the deceased Ndegwa Warui was the first registered owner of LR No.1 Mwea/Tebere/B165 after adjudication. However pursuant to Section 17 of the retired Land Acquisition Act (Cap 295 Laws of Kenya)



the land was compulsorily acquired by the Government of Kenya for the expansion of the Nairobi-Embu road. This saw the land being subdivided into two. The resultant parcels were as follows:-

1. LR Mwea/Tebere/B 199 in the name of Ndegwa Warui.
2. LR. Mwea/Tebere/B 200 (measuring 1.12 Ha) Government of Kenya.

This fact is not in dispute. This is confirmed by the Green Cards of the land parcel exhibits 1&4.

48. Under the repealed Land Acquisition Act (Cap 295 Laws of Kenya), it was only the Minister of Lands who had power to compulsorily acquire land for Government Projects. The County Council had no authority to compulsorily acquire land. See Part II of the Act and Section 3. The sub-division as per the evidence was done in 1980. This was during the lifetime of the deceased. He later died on 2/3/1989 as per the death certificate produced as exhibit -1 between the time the land was sub-divided and the time of deceased's death, no entry was made on the title.
49. The County Government relied on minutes of Kirinyaga County Council for 4/6/1974 at 11.25 a.m. in support of their claim that they acquired LR.Mwea/Tebere/B/199 and he was compensated with another land known as Mwea/Marurumo/90. Nothing much can be said about this minute other than that it is a forgery as far as it purported to acquire land which did not exist in 1974. This court cannot give any weight to this minute. The witness from the County, Mwai Ngunyi admitted that the land became parcel No.199 in 1983 and therefore it did not exist on 14/6/1974 when the minute is purported to have been issued. He also admitted that the register of the minutes did not exist and was not produced in court. He also admitted that the minutes did not bear the stamp of the County Council. In other words he admitted that he had nothing to show that the minute was a genuine document from the County Council. The witness further admitted that the county council did not enter a sale or exchange agreement between the deceased Ndegwa Warui and the County Council of Kirinyaga for the exchange of his land now in dispute.
50. The repealed Local Government Act, (Cap 265 Laws of Kenya) prohibited County Council from compulsory acquisition of land Section 144 of the Local Government Act provided a Local Authority could acquire land for its functions by agreement, purchase, lease exchange or gift. Where land was acquired it could be used for the functions of the Local Authority Section 144 of the Act. The local authority could only acquire land through agreement. No evidence was adduced by the County Council to show that it entered an agreement with the deceased to exchange his land. No letters no correspondence was produced to support its case that there was a follow up on the said minutes. The Land Parcel No. Kirinyaga/Marurumo/90 was registered in the name of deceased after adjudication, it was never owned by the County Council. The evidence by the Council is a sham for the reason that they admitted that they bought two plots from the respondent on 9/7/1996 and 29/7/1996. This puts the County Council in an awkward situation as to how they could buy their own land.

The provision of Section 144 of the repealed Local Government Act was echoing the words of Section-3 of the *law of Contract Act* that dealing in land must be evidenced in writing. The County did not produce any agreement and the minutes which are no doubts a forgery and fraudulent did not mention the deceased. The interested parties referred this court to various authorities. They are urging this court to find that the deceased was registered in trust. I find that the authorities are not relevant as there is no prove that the County Council had compulsorily acquired the land before the deceased died. The green card Mwea/Tebere/B/65 was produced in court as exhibit -1 and that it was in the name of Ndegwa Warui (the deceased). The land was compulsorily acquired by the Government of Kenya (not County Council of Kirinyaga). The resultant parcels were LR No.Mwea/Tebere/B/200 went to the



Government of Kenya Entry No.3- Mwea/Tebere/B/199 was registered in the name of Ndegwa Warui (the deceased). These entries are well documented on the green cards Exhibits – 3- .

The entry was made on 18/12/1980. The title was closed on sub-division. The Government of Kenya got Parcel No.200 on 18/12/1980, see green card exhibit 4. The deceased Ndegwa Warui remains the registered proprietor to date as testified by Muthee Kirimu (PW2). The District Land Registrar Kirinyaga County who was summoned to appear in court and to shed light on Mwea/Tebere/B/199. He told the court that Mwea/Tebere/B/199 was a creation from Parcel No. Mwea/Tebere/B/65. He told the court that the sub-division done by Alfred Ndegwa Warui after the death of the deceased were an illegality. He confirmed that no transfer of land was done to transfer the land to Alfred Warui Ndegwa. PW2 testified that he was not aware of the acquisition of the land by Kirinyaga County Council. According to PW2 the restriction which was put on Mwea/Tebere/B/65 by the Chief Land Registrar was to facilitate the compulsory acquisition of the land and it went after the Government was given plot No.200 for a public utility, which was a public road.

51. On the other hand, Michael Kinuthia (PW3) a Government Surveyor in Kirinyaga County testified that Land Parcel No. Mwea/Mutithi/B/199 is in its original state . He testified that the land is intact and no official subdivision so far as their office is concerned. He produced a copy of the map that is the Registry Index Map (R.I.M). In cross-examination he confirmed that the map (R.I.M) does not show that the parcel has been sub-divided with the resultant new numbers. The witness asserted that the Land Registrar could not have closed the land on sub-division as there was no survey done by the Government Surveyor who issues new numbers. PW1 confirmed that the deceased who is Ndegwa Warui who died on 2/3/1989 could not have sub-divided the land in 1993. He also confirmed that the transfer of the land was not valid because there was no documentation in his file to support the alleged sub-division. From the evidence of PW2 & 3 who are Government Officers who are custodians of the documents relating to the ownership of the land in dispute, it is clear that even as of today the land is intact that is to say it is the name of the decease with no official sub-division or change of Land Registration number. There is therefore no evidence that the land in dispute was ever at any point compulsorily acquired by the County Council of Kirinyaga. It is the property of the deceased Ndegwa Warui and forms part of his estate which is available for distribution to his beneficiaries.

Claims by the Interested Parties:

Under the *Law of Succession Act*, this court has jurisdiction to determine claims by Interested Parties before a grant is made. Section 70 of the Act provides for the powers of the courts. It proves:

“Whether or not there is a dispute as to the grant, a court may, before making a grant of representation-

- (a) examine any applicant on oath or affirmation; or
- (b) call for further evidence as to the due execution or contents of the will or some other will, the making of an oral will, the rights of dependants and of persons claiming interests on intestacy, or any other matter which appears to require further investigation before a grant is made; or
- (c) issue a special citation to any person appearing to have reason to object to the application.”

The claim by the Interested Parties are two fold although like a triangle they have the same line at the bottom and meet at the top of the triangle as I will demonstrate. Some of the Interested Parties based their claim on the fact that they were allocated the land by the County Council. This is claimed by Wanguru Jamia Mosque represented by Ismail Bakiti and the Registered Trustees of the Catholic



Diocese of Muranga. The second group of Interested Parties is the one claiming that the plots were sold to them by the respondent.

52. The other Interested Parties claim to have bought the land from those who bought from the respondent.
53. The Jamia Mosque Committee 5<sup>th</sup> Interested Party and 11&13 claim that they were allocated the land measuring five acres by the Kirinyga County Council. According to Ismail Hassan Bakit they made an application to Kirinyaga County Council in 1983 to be allocated land. The request was approved through Council Minutes. The witness adduced evidence that they have put up development worth thirty (30) million and an acre plot is worth fifteen (15) Million. On this claim of development, let me be quick to say that it was done in contempt of court orders. This is because the issue of developments on the land was brought to the attention of the court and on 21/2/2013 Justice Ong'udi issue an order in the following terms:

“Owing to the acrimony that appears to exist between the parties herein this court directs that pending the hearing interpartes of the application dated 15/7/2011 there shall be no construction going on, on the disputed property.”

See Ruling dated 21/2/2013 by Lady Justice Ong'udi. A further order was issued by Justice Cecilia Githua on 3/12/2013 directing the OCS Wanguru Police Station to enforce the orders.

I will come to this later. The evidence tendered by the 5<sup>th</sup> Interested Party was that the extract of the minute indicated that a part development be made for a suitable site for a Muslim Mosque at Wanguru. They did a part development plan and it was approved by the Director of Physical Planning. The witness testified that they did not receive any objection from any quarter but were later involved in two cases over the property. The minutes which the 5<sup>th</sup> Interested Party referred this court did not specify the land which was allocated to go them. There is however no dispute that they ended up on the land in dispute. In cross-examination the 5<sup>th</sup> Interested Party (DW4) admitted that they were allocated land on Mwea/Tebere/B/199 by Kirinyaga County Council. He admitted that the County bought land which it allocated to the Muslim Community from Alfred Warui. That the minutes which he relies on is for Land Parcel No. Mwea/Tebere/B/199 which did not exist in 1974. The witness also admitted that Justice Muchelule (as the then was) had held that Mwea/Tebere/B/199 belonged to Ndegwa Warui who as at the time of his death and forms part of his estate todate. That the sub-division of Mwea/Tebere/B/199 by Alfred Warui Ndegwa without the knowledge of other family members was null and void. That the Judge also ordered a rectification of the register. That the applicant was granted leave to amend the schedule on the assets of the deceased. The 5<sup>th</sup> Interested party did not file a suit to challenge the orders. He moved to this court to challenge the orders. What is clear from the evidence by the 5<sup>th</sup> Interested Party is that the land which was allocated to them by the County Council was land which the County Council acquired from the Respondent after he had illegally sub-divided the land of his father. The 5<sup>th</sup> Interested Party has no title to the land. As I have already held, the County Council had not acquired the land of the deceased then. As a matter of fact the Council was ordered to join these proceedings after it was served severally. They filed affidavit and are not claiming anything.

I find that the claim by 5<sup>th</sup> Interested Party can not defeat the estate of the deceased as it was as a result of intermeddling with the estate. This was an illegality which was also confirmed by the County Land



Registrar. The remedy for the estate is to trace such properties. Justice William Musyoka in his case book on the Law of Succession page 581 states as follows:-

“Where the assets have been misapplied by personal representation and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such properties.”

The 5<sup>th</sup> Interested Party relies on the allocation. He did not do due diligence at all and despite being restrained by the court from doing construction, they proceeded to do extensive development in contempt of court orders. I find that the 5<sup>th</sup> Interested Party was not a bonafide allottee. The land allocated by the County was ‘hot air’ as the land referred to on the minutes Mwea/Tebere/B/65 did not exist. They were aware that the land belonged to the deceased and went ahead and developed it. Any action taken in contempt of court orders is null and void. Having undertaken extensive developments in contempt of court orders, the 5<sup>th</sup> Interested Party has not come to court in clean hand.

I am aware that the court is supposed to do substantive justice. Rule 73 of the Probate and Administration Rules provides that;

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

The substantive justice under the [Law of Succession Act](#) is to ensure that the dependants of the deceased get their rightful share.

54. As for the seventh (7<sup>th</sup>) Interested Party they contend that they were allocated five acres by Kirinyaga County, the former Kirinyaga County Council. Interestingly the 7<sup>th</sup> Interested Party did not produce any document to show ownership save for the minutes of the County Council dated 16/7/76. This minute allocated Land Parcel No. Mwa/Tebere/B65. I note that the claim by 7<sup>th</sup> Interested Party is similar to that of 5<sup>th</sup> Interested Party and for the same reasoning, it could not supercede the estate of the deceased. I have dealt with the contention that Ndegwa Warui was compensated with land at Marurumo. The contention the deceased relocated to Marurumo does not mean it is because he was compensated. He may have decided to relocate but this does not mean he exchanged his land. This is because the respondent who is son remained on the land and inter-meddled with the estate even selling land to the County. This shows that despite relocating the land remained his.
55. On the claims by the rest of the Interested Parties, they bought land from the respondent from portions No.600-604. The intermeddled with the estate of the deceased. The other Interested Parties claim to have been swindled by John Kamau Mwangi and Joseph Mwaniki Muchira who had no proper title from the respondent. The [Law of Succession Act](#) prohibits intermeddling with the estate of the deceased and makes it an offence punishable under the Act. Section 45 of the [Law of Succession Act](#) provides:-
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
  - (2) Any person who contravenes the provisions of this section shall-
    - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
    - (b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”



As submitted there is a reason why **Section 45 (1) of the Law of Succession Act** was included in the Act and it was meant to safeguard the property of a person after his death and that is why it makes it an offence to intermeddle with a deceased person's property. It is clear from the evidence that the respondent in cahoots with the County and 1<sup>st</sup> & 3<sup>rd</sup> Interested Parties purported to sub-divide the estate of the deceased without letters of administration and without the knowledge of other family members. He intermeddled with the estate of the deceased. All these the respondent did without any letters of administration in the estate of his father. Upon realizing that he could not go far he filed the succession cause in the Magistrate's Court to try and sanitize his actions but realized it could not work. The Interested Parties were not bonafide purchasers. They did not have sale agreement to show what they paid for the purchase of the plots. They also failed to attend the Land Control Board. Furthermore, they developed the plots in contravention of a court order. The interests of a person who buys properties of a deceased from a person who intermeddles with the estate are not protected under the Act. Section 93 protects a person who purchases land from an administrator and the grant is thereafter revoked. The transfers by the respondent were as a result of intermeddling with the estate of his deceased father's without authorities.

The court considers whether the interested Parties were bonafide purchasers. The definition of a bonafide purchaser in the Uganda case of *Katende –v- Haridas & Company Limited* where it was held as follows:

A bonafide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to rely on bonafide doctrine he must prove the following:

He holds a certificate of title, he purchased the property in good faith, he has no knowledge of the fraud. He purchased for valuable consideration.

The vendors have apparent good title. He purchased without notice of any fraud. He was not party to any fraud.”

The Interested Parties in this case do not meet those requirements. They admitted that they are aware that they hold fake title deeds. They also admitted the green cards had not been signed by the Land Registrar. They have not demonstrated that they are bonafide purchasers. It is not controverted that the respondent was charged with the offence of obtaining Registration by False pretenses contrary to Section 320 of the Penal Code (Cap 63 Laws of Kenya).

The particulars of the said charge are as follows:-

Alfred Warui Ndegwa. On the 25<sup>th</sup> day of May 1993 in Kerugoya Township in Kirinyaga District within Central Province with intent to defraud jointly with others not before the court obtained Land Parcel No. Mwea/Teber/B/199 by falsely pretending that the said land was genuinely transferred by Ndegwa Warui.”

The respondent was fined Kshs.20,000/- in default to serve one year in prison. This Judgment is still ‘in situ’ as there was no appeal. The conviction is conclusive evidence that the accused (in this case the respondent was guilty of obtaining the said registration by false pretences. Section 47A of the Evidence Act (Cap 80 Laws of Kenya) provides that;

A final Judgment of a court of competent jurisdiction in any criminal proceedings which declares a person to be guilty of a criminal offence is conclusive evidence that the person so convicted was guilty of that offence as charged.”



This was re-affirmed by the Court of Appeal in the case of Chemolo & Another -v- Kabende (1986) eKLR (cited by the 15<sup>th</sup> Interested Party).

By this Judgment of a competent court, the dice was casted that the purported registrations pursuant to the actions by the respondent were null and void. In addition, the Land Registrar, (PW2) confirmed that in 2010 he wrote a letter dated 15/7/2020 addressed to Kerugoya OCS. That the reason he wrote the letter was that the OCS was investigating whether the land that is, Mwea/Tebere/B/199 was ever transferred to Alfred Warui Ndegwa. The letter confirmed that there was no such transfer. He was emphatic that the office that is District Land Registry Kirinyaga County had no document to support the transfer. He testified that there was no document authorizing transfer to Alfred Warui. He produced the letter as exhibit 10. PW2 confirmed that the land of Ndegwa Warui (the deceased) which was Land Parcel No. Mwea/Tebere/65 was sub-divided to acquire a road and his resultant parcel was Mwea/Tebere/B/199 while Mwea/Tebere/200 went to the Government. That there has never been any valid transfer of LR No.Mwea/Tebere/B/199 as there are no valid documents in his file to support the same. PW2 confirmed that the green cards Exhibit 10 (a-d) were by Alfred Warui Ndegwa who was not the deceased and were therefore not valid.

In cross-examination the Land Registrar was emphatic that there was no legal transfer of the land in dispute to Alfred Ndegwa Warui presented himself as the owner but no transfer was recorded in the register. That the sub-divisions were irregular as the land was not validly transferred to Alfred Ndegwa Warui and no titles were ever issued to him. PW2 admitted that the green cards which were issued by his office were issued through deliberate mistakes by his officer as the land had not been transferred to Alfred Ndegwa Warui. PW2 admitted that all the alleged sub-division and allocations have not been registered against the said title. PW2 told the court that he was not aware that the County Council had acquired the land in dispute and that the County Council had registered their interest over parcels they have claims and LR. Mwea/Tebere/B/199 is not one of them. PW2 Further testified that he was not aware as to how Kirinyaga County Council allotted its parcel.

This is buttressed by the evidence of PW3 a Government Surveyor who testified that the land in dispute Mwea/Tebere/B/199 is in its original form as there were no mutations to sub-divide it. He produced the Registry Index Map (R.I.M) and the land is intact with no official sub-divisions so far as his office is concerned. In short the witness confirmed that there was no official sub-division of the land in dispute.

The County on the other hand in the affidavit sworn by Mwai Ngunyi the director of survey at the Kirinyaga County in his affidavit sworn on 26/11/2018 at Paragraphs 17& 18 stated as follows:

17. “That it later came to the knowledge that of our office that one Alfred Warui Ndegwa sometime in 1993 in collusion with some officers from the Land Registry fraudulently and without colour of light transferred the suit property to himself and proceeded to sub-divide the same into five parcels: 600-604 some of which were further sub-divided to 1699-1702.”
18. “That the 2<sup>nd</sup> Interested Party is categorical that the said sub-division were and remain fraudulent and ever done without its knowledge and or authorization and in any event, the said Alfred had no locus whatsoever to engage in the said transfer as he was not the administrator of the Ndegwa Warui nor was Ndegwa Warui the beneficial owner of the said property.”



I have already dealt with the issue of compulsorily acquisition which I will not repeat here. My finding on these averments is that it proves without any shred of doubt that the County were fully aware that the respondent not being the administrator of the estate of the deceased and through fraudulent means and illegalities purported to sub-divided the land. This notwithstanding the County went ahead and bought land from Alfred Ndegwa Warui which it purported to allocate to the 5<sup>th</sup> Interested Party, 7<sup>th</sup> Interested Party and 8<sup>th</sup> Interested Party. I find that having been aware of the inter-meddling with the estate of the deceased by the respondent they could not purport to have acquired the land lawfully nor could they pass good to the Interested Parties. From the foregoing analysis it is clear that the claims by Interested Parties cannot defeat the claim by the state of the deceased. The land in dispute remains the estate of the deceased as it is registered in his name and no official sub-division of the land has taken place on LR.Mwea/Tebere/B/199. The purported acquisition of it is a sham as the County Council had no authority to compulsorily acquire the land. I have already dealt with this at length. It is trite that a court of law cannot sanction an illegality. The deceased was and still remains the registered owner of the land in dispute and claims by the Interested Parties who acquired the land after the intermeddling by the respondent cannot be sustained. The registered owner acquires an absolute and indefeasible title. This is the case with the deceased who at the time of his death would have dealt with the land as it formed his free property. On the other hand the Mwea/Tebere/B 600-602, 603, 604, 1699, 1704, 1700, 1702, 1788 and 1789 are none existent as confirmed by the Land Registrar and the Surveyor, the title remains in the name of deceased and there are no official sub-divisions. The registration, acquisition of title or compulsory acquisition is a process and if the process was not followed no court of law can uphold such a claim.

On the claim by the 15<sup>th</sup> Interested Party, Tisiano Cosmas Mugo, I find that it is misplaced. He is not a debtor of the estate of the deceased. His claim is not on the estate of the deceased. This court cannot enforce a claim between a beneficiary and a 3<sup>rd</sup> party. Such a claim is a claim for a civil debt which crystalizes upon such a beneficiary getting a share of the estate. The 15<sup>th</sup> Interested Party is basing his claim which I would call “claim in anticipation.” The term Anticipatory is defined as, ‘happening, performed or anticipation of something’. It is characterized. The Collins Dictionary defines Anticipatory as – “An anticipatory feeling or action that you have or do not have because you are expecting something to happen soon.’

It is my view that whether or not the agreement between the 15<sup>th</sup> Interested Party and the administrator is enforceable is not a matter for this court to determine as a probate and administration court. The 15<sup>th</sup> Interested Party is not a debtor to the estate of the deceased. As he rightly submitted while relying on the case of Estate of Musambayi Katumanga (deceased), Cause No.399/2007 he can only enforce the agreement against the beneficiary after he gets his share of the estate. The estate of the deceased can only be applied to settle his debts and liabilities or for the purpose of maintenance of family members who are his lawful dependent who are defined under Section 29 of the *Law of Succession Act*. In any case the grant issued to the Petitioner/Applicant has not been confirmed and he is jumping the gun to ask this court to order a portion to be distributed to him. The claim is misconceived as it is without basis in the estate of the deceased. The claim ought to be struck out.

‘Res Judicata’

The issue raised by the 5<sup>th</sup> Interested Party is whether the doctrine applies in this matter in respect of the Title No. Mwea/Tebere/B/199. The Counsel has referred this court to the Ruling by Hon. Wanjiru Karanja Judge (as she then was) in Embu High Court Civil Case



No.123 of 2009 John Gichuru Ndegwa –v- Alfred Warui Ndegwa & 14 Others: where the Judge held;

It is evident that by then, the parcel of land in question was no longer in existence it having been transferred to some of the defendants in 1993.”

I have considered the ruling. The Civil Suit No.123/2009 was decided on a point of law which was raised at the preliminary stage. The Judge held that the plaintiff had no proper locus standi as he had not obtained letters of administration in the estate of the deceased and the advocate representing him had no practicing certificate. This issue was dealt with in the Ruling by Justice Limo who found that-

I have considered the ruling delivered by Hon. Justice (as she then was) Wanjiru Karanja dated 22/6/2010 vide Embu High Court Civil Suit No.123/2009 and noted that the Hon. Judge made a finding on the capacity or locus standi of the plaintiff in the suit as well as whether the suit was time barred by operation of Section 3- (1) of the *Limitation of Actions Act*. These issues in my view are not the issues raised in the application dated 17/5/2011 now before court. The court cannot therefore say at this stage that the application before court is res judicata. I further do not agree that the doctrine of res judicata does not apply in succession matters because if does apply. It is a universal principal of law that litigation must come to an end.”

I note that in the said ruling that Justice Limo left some matters to be determined upon hearing the case by Interested Parties. Having heard the evidence I find that the ruling was given through misrepresentation of the evidence by the Interested Parties. This was the contention that Land Parcel No. Mwea/Tebere/B/199 does not exist. It has emerged from the evidence that the Land Parcel still exists today and the purported green cards held by the Interested Parties were never entered in the register. The respondent had purported to transfer the land in dispute to himself without a grant of letters of administration to the estate of the deceased. He intermeddled with the estate.

A Judgment entered through a misrepresentation of facts. The court of Appeal in the case of Wambui Ndungu –v- Mwangi & 3 Others Civil Appeal No. 465/2019 (2021) KECA 144 KLR

Upheld the decision of the High Court held that;

No court of law should sanction either the acquisition of title to property in favour of a party (christened crooks by the court) who has acquired such tile from a legally registered innocent proprietor using forgery, deceit or any kind of fraud, not the transfer of title from the person who acquired it through forgery deceit and or fraud from legally registered innocent proprietor to a third party even if it was acquired innocently and for valuable consideration for the reason that the person who had acquired it through forgery deceit and any form of fraud from the legally registered proprietor had no valid or legally acquire title in the property to pass on the land to the 3<sup>rd</sup> party. That a decree founded on procedure fraudulently crafted by a party (ies) thereto can neither be sanctioned by a court of law nor can such a decree form a proper basis for transferring property subject to such decree from one party to another. In law a contrived decree is null and void and therefore of no legal consequences.”



The finding by Wanjiru Karanja J (as she then was) that the title of the deceased did not exist due to subdivision was a result of a false misrepresentation which was null and void. It cannot be sanctioned by this court. Secondly having heard the evidence from the Land Registrar Kirinyaga County and the County Surveyor that the land in dispute is intact and in the name of the deceased and the letter from the Chief land Registrar dated 16/3/2012 produced as exhibit D 15b that the parcel belonged to Ndegwa Warui. That the parcels held by Interested Parties were never surveyed and are none existent in the Lands Office. That the Registry Index Map for the Land shows that the land in dispute has never been sub-divided, the map was produced in court as exhibit 21 and official search showing that the land is the name of deceased. All these facts provide conclusive evidence that the land in dispute has never been sub-divided. The evidence has shed light that no subdivision has been done and no titles were issued. The law recognizes the sanctity of title and a title holder takes precedence over all other alleged equitable rights appurtenant thereto, is also absolute and indefeasible challengeable only on ground of fraud or misrepresentation. I find that the ruling that the land was sub-divided was made per incuriam. The definition of the term ‘Per Incuriam’ is defined in Black’s Law Dictionary 10<sup>th</sup> Edition as-

Of a judicial decision wrongly decided because the Judge or Judges were ill informed about the applicable law.”

Where a Judge is misdirected and ended up holding that the title deed was none existent which was not the case, in view of the evidence by the Land Registrar and Surveyor confirming that the land was intact and in the name of the deceased, this court has residual inherent jurisdiction to vacate its order even on its own motion. See Trident Insurance –v- Bama Hospital LCP (2019) eKLR. The Court of Appeal stated that a court of law is not powerless in the face of an illegality.

For these reasons I find that there 5<sup>th</sup> Interested Party had not pleaded res judicata and this court can now hold authoritatively that there is no proof that the land Parcel No. Mwea/Tebere/B/199 was sub-divided, it is still intact on the register without any restrictions or caveats or cautions, its Registry Index Map is intact with no evidence of sub-division and in the name of the deceased todate. None of the Interested Parties produced mutations forms to support the claim of subdivision. The issue of res judicata fails.

Turning to the prayers. The 5<sup>th</sup> Interested Party was seeking orders that the court reviews. The order issued on 26/7/2011 which had held that LR.Mwea/Tebere/B/199 belongs to Ndegwa Warui. Order 45 Rule 1 Civil Procedure Rules provides:

1.

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of



judgment to the court which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

A party seeking review of an order must demonstrate that he has discovered a new and important matter or evidence which was not within his knowledge or could not have been produced by him at time of making the decree or order, mistake or an error apparent on the face of the record. A party may also seek review for any other sufficient reason.

Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 60 had this to say:-

the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” ..... means a reason sufficiently analogous to those specified in the rule”

Rule 63 of the Probate and Administration Rules provides as follows:-

- (1) 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 Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (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. (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

Under this rule, Review is one of the **Orders in the Civil Procedure Rules** which is imported to the [Law of Succession Act](#) among others. A party to the proceedings can bring an application for review including a beneficiary or any Interested Party. Where a party seeks review the application must meet the substantive requirement which I have discussed above. The 5<sup>th</sup> Interested Party has premised the application on the grounds that the orders issued on 26/7/2011 were obtained through concealment of material facts and ought therefore to be reviewed and set aside.



In his submissions the 5<sup>th</sup> Interested Party has not disclosed the discovery made nor has he pointed any apparent mistake on the face of the record. He submitted that the deceased had exchanged the land in dispute and was compensated. He also raised the issue of res judicata. In this judgment I have given reasons for finding that the land of deceased was never acquired by the then Kirinyaga County Council nor was there proof that the deceased was compensated with another land. Furthermore, this court, Justice Limo directed that this matter be heard by way of ‘viva voce’ evidence in court. The matter was heard in open court and the Interested Parties were given an opportunity to ventilate their case. It was disclosed that the land in dispute was the free estate of the deceased at the time of his death. The land was never sub-divided nor transferred to the Interested Parties. The Government Agencies that is Land Registrar, Chief Land Registrar and Surveyor have all confirmed this fact with the Green Card and the Registry Map as well as certificate of official search. In the light of these I have addressed the ruling by Wanjiru Karanja Judge, (as she then was). The fact that the land in dispute belonged to the deceased at the time of his death and remains the same to date has not been controverted. The question is whether there is any other sufficient reason. In the case of Republic –v- Cabinet Secretary for Interior and co-ordination of National Government Ex-Parte Abduldahi Said Salad (2018) eKLR quoted by Justice W. Musyoka In Re Estate of Simoto Omwenye Isaka (Deceased) (2020) eKLR it was stated.

A court can review a Judgment for any other sufficient reason. In the case of Sadar Mohamed Mohamed –v- Charan Singh & Another it was held that any other sufficient reason for the purpose of review to refer to grounds analogous to the other two (for example error on the face of the record and discovery of new matter.)

‘Mulla in the code of Civil Procedure’ writing on Order 47 Rule 1 of the Civil Procedure Code of India) the equivalent of our Order 45 Rule 1) states that the expression any other sufficient reason means a reason sufficiently analogous to those specified in the rule. Any other attempt to correct an apparent error or an attempt not to base on any ground set out..would amount to the liberty given to the tribunal under the Act to review its Judgment. I also find useful guidance in Tokesi Mambuli –v- Simon Litsanga where they have held as follows:-

In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. Where the application is based on sufficient reason, it is for the court to exercise its discretion.”

Justice Musyoka held that; “It should be noted that the applicant herein filed an application to have the grant issued on the disputed date revoked. The application was heard and determined. He also had the option of appealing against the court orders. He clearly had other remedies available and he has since explored some of them. It is therefore my finding that the applicant has not provided any sufficient reason to warrant grant of the orders.”

In this matter the parties proceeded on a wrong assumption the land in dispute had been acquired by the County Council, had been sub-divided and that the land does not exist. It has emerged that the land existed intact and in the name of the deceased. This is a succession matter and the Interested Party is not a beneficiary nor is he a debtor to the estate. A Probate and



Administration Court deals with ascertaining the beneficiaries of the deceased, identifying the estate property and distribution of the estate. The ruling by Justice Muchelule (as he then was) did exactly that and this was re-affirmed by Justice Limo. What has emerged from the evidence tilts towards confirming that holding and not otherwise. The 5<sup>th</sup> Interested Parties had other options other than review as he has not demonstrated any of the grounds to warrant this court to order a review. I find that the application for review is without merits. On the prayer that the land in dispute did not form the estate of the deceased, and this was the same prayer by Barnabas Ndonga, Geoffrey Kamau Registered Trustee of Murang'a Diocese, I find that the prayer is without merits.

Conclusion:

I find that the Petitioner has proved that the Land Parcel No. Mwea/Teber/B/199 belonged to Ndegwa Warui as at the date of his death on 2/3/1989 and forms part and parcel of his estate to date. The purported sub-division by Alfred Warui Ndegwa the respondent which was intermeddling with the estate is null and void as well as the green cards which in any case did not alter the register of the land in dispute as they were issued fraudulently. The Land Registrar to maintain the Register as it is, reflecting that the land LR Mwea/Teber/B/199 is in the name of Ndegwa Warui the deceased. The land shall be added in the schedule of properties forming the estate of the deceased.

I wish to add that this was a Probate and Administration Cause which spilled from successions cause and involved claims on sub-division of the estate of the deceased. These disputes touched on land belonging to the deceased and as a probate and administration court, this court had jurisdiction. I was also guided by the transition clauses as this matter was pending at the time of the promulgation of the Constitution of Kenya 2010.

The Transitional and Consequential Provisions States

Article 262 of *the Constitution* of Kenya 2010 provides as follows:-

The transitional and consequent provisions set out in the 6<sup>th</sup> schedule shall take effect on effective date. At Part -5- it deals with the Administration of Justice. On judicial proceedings and pending matters at paragraph 22 it states:-

“All Judicial Proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under *the Constitution* or as directed by the Chief Justice or the Registrar of the High Court. As a follow up to this, the Chief Justice issued Practice Directions No.19/2011 vide Gazette Notice No.5178 and directed the court as follows:-

Paragraph 4; “All part-heard cases relating to the environment and use and occupation and title to land pending before the High Court shall continue to be heard and determined by the same court.

Paragraph 6:- “All cases touching on inheritance, succession and distribution of land under the *Law of Succession Act* Cap 160 Laws of Kenya shall continue to be filed and heard in the High Court or the Magistrate’s Courts of competent jurisdiction.”



This matter was pending in 2011 and based on these directions the court had jurisdiction to hear the matter to its logical conclusion.

On the issue of costs, in view of the nature of the dispute I order that each party shall bear its own costs.

Lastly, considering the implications that the Judgment may have, I order that there shall be a stay of execution for a period of thirty days.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 1<sup>ST</sup> DAY OF FEBRUARY 2024.**

**L.W. GITARI**

**JUDGE**

