



REPUBLIC OF KENYA



**In re Estate of Thomas Mwasame Nyukuri (Deceased) (Probate & Administration
126 of 2011) [2024] KEHC 3873 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3873 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PROBATE & ADMINISTRATION 126 OF 2011**

DK KEMEL, J

APRIL 19, 2024

IN THE MATER OF THE ESTATE OF THOMAS MWASAME NYUKURI (DECEASED)

BETWEEN

RICHARD KUNDU NYUKURI PETITIONER

AND

PETER WAFULA WAFUNAFU OBJECTOR

JUDGMENT

1. This estate involves the land parcel No. Kimilili/Kimilili/534 of the late Thomas Mwasame Nyukuri aka Domascal Mwasame. The deceased got registered as owner on the 10th August 1965 of Kimilili/Kimilili/534 measuring 4.0 Acres as per search certificate. According to the death certificate, the deceased died on 18th February 1995 and was survived by the following:-
 - a. Richard Kundu Nyukuri
 - b. Stephen Wafula
 - c. Joseph Wanyama Mwasame
 - d. Jane Nabangala
 - e. Margret Naswa
 - f. Mary Nekesa
 - g. Florence Mwasame
 - h. Janet N. Mwasame
 - i. Sarah K. Mwasame



2. Vide summons for confirmation of grant dated 21st October 2011 the Petitioner Richard Kundu Nyukuri moved this Court for confirmation of grant issued on 21st July 2011 whereby he excluded the Objector herein Peter Wafula Wafunafu hence the protest to the confirmation of grant dated 1st September 2014.
3. Vide the petitioner's affidavit in support for the summons for confirmation of grant filed on 21st October 2011, the Petitioner averred that the deceased died intestate and left behind land parcel No. Kimilili/Kimilili/534. He averred that the deceased was survived by the following beneficiaries: Richard Kundu Nyukuri; Stephen Wafula; Joseph Wanyama Mwasame; Jane Nabangala; Margret Naswa; Mary Nekesa; Florence Mwasame; Janet N. Mwasame; Sara K. Mwasame.
4. He averred that the identification and distribution of the estate of the deceased was as follows:

No.	Beneficiary	Portion(acres)
1.	Richard Kundu Nyukuri	2.3 Acres
2.	Stephen Wafula	1.0 Acres
3.	Joseph Wanyama Mwasame	1.0 Acres

5. The Objector Peter Wafula Wafunafu obtained limited grant *Ad Litem* in Bungoma HC Succession No. 292 of 2011 in respect of the estate of Wafula Wafunafu (deceased) who was his father. That his late father Joseph Wafula Wafunafu had purchased 3 acres from the deceased Thomas Mwasame Nyukuri in 1965 out of land parcel No. Kimilili/Kimilili/534 and that he took full possession of the 3 acres of land up-to to date with his family developing the said acres.
6. On 14th March 2012, the Objector (Caveator then) lodged a caveat on the estate of the late Thomas Mwasame Nyukuri against the Petitioner's cause instituted on 28th April 2011 over the said land parcel No. Kimilili/Kimilili/534. When the cause came up for confirmation of the grant, the same failed to proceed and it was stood over generally to enable the Objector (Caveator then) file his application for Objection.
7. The Objector (Caveator then) filed an affidavit in support dated 15th August 2013. He averred that in the year 1965 his late father, Joseph Wafula Wafunafu purchased 3 acres out of land parcel No. Kimilili/Kimilili/5344 from the late Thomas Mwasame Nyukuri and that up to date the family is in occupation of the said portions and that they have even constructed permanent houses and developed it by planting both commercial and food crops.
8. He averred that upon realising that he had lodged a caveat against the cause for summons for confirmation of grant, my predecessor instructed him to file his respective application for objection and the cause was stood over generally. Before he was able to file his Objection application as directed by the Court, the Petitioner served him and his family with a claim for eviction from the suit property vide PM Kimilili CC No. 49/2012. Upon perusal of the claim, he noted that the title for land parcel No. Kimilili/Kimilili/534 had already been registered in the Petitioner's name on 15th August 2011 despite the pending cause.
9. He averred that vide letter dated 13th September 2012 that he protested to the Land Registrar Bungoma over the said transfer of land parcel No. Kimilili/Kimilili/534 from the name of the late Thomas



Mwasame Nyukuri to that of the Petitioner prior to the grant being confirmation and a certificate issued.

10. He averred that on 3rd September 2012 a caution was lodged against the said title to protect the interests of his late father and the other beneficiaries.
11. Vide replying affidavit dated 8th January 2014, the Petitioner averred that prior to the demise of the late Thomas Mwasame Nyukuri, who was the sole proprietor of all land parcel No. No. Kimilili/Kimilili/534 and that he availed a certificate of official search marked as PWW-III.
12. He averred that he was duly appointed by his family to petition for the letters of administration intestate and that the interim grant of letters of administration was issued on 21st July 2011.
13. According to him, upon being issued with the letters of administration intestate, he proceeded to the Land Registrar Bungoma, procured the requisite Form R.L. 19, filled the same and it was authorized by the Deputy Registrar Bungoma. The land parcel No. No. Kimilili/Kimilili/534 was later registered in his name to hold in trust for the entire family.
14. He averred that he did not intermeddle with any property and that the Caveator (now Objector) has no legitimate claim in his late father's estate. Further, he averred that the Caveator (now Objector) availed no documentary proof to indicate that his late father purchased any property from the late Thomas Mwasame Nyukuri.
15. He was able to file his affidavit of protest application dated 1st September 2014 on 3rd September 2014 objecting the summons for confirmation of grant by the Petitioner. He averred that his late father purchased 3 acres out of land parcel No. Kimilili/Kimilili/534 and that they have been in occupation of the said portion to date.
16. The Petitioner opposed the Protest application noting that the deceased Thomas Mwasame Nyukuri was the sole proprietor of land parcel No. Kimilili/Kimilili/534 and that the grant that was issued to him on 21st July 2011 ought to be confirmed.
17. The Objector filed a statement wherein he stated that his late father, Joseph Wafula Wafunafu, purchased 3 acres out of the land parcel No. Kimilili/Kimilili/5344 from the late Thomas Mwasame Nyukuri in the year 1965. He stated that to date his family is still in occupation of the same and that includes the family of the late Benson Wanyonyi Wafula.
18. He insisted that his late father, Joseph Wafula Wafunafu, purchased the 3 acres from the land parcel No. Kimilili/Kimilili/5344 from the late Thomas Mwasame Nyukuri in the year 1965 and not 1976 as alleged by the Petitioner.
19. Vide a supplementary affidavit dated 14th February 2020, the Petitioner averred that prior to the demise of the late Thomas Mwasame Nyukuri, the deceased was the sole proprietor of land parcel No. Kimilili/Kimilili/534 and as per the consent of the family members they agreed as follows in terms of distribution of the deceased's property:



No.	Beneficiary	Portion(acres)
1.	Richard Kundu Nyukuri	2.3 Acres
2.	Stephen Wafula	1.0 Acres
3.	Joseph Wanyama Mwasame	1.0 Acres

20. Vide a further affidavit dated 7th December 2020, the Objector averred that as a family they agreed to share the estate over land parcel No. Kimilili/Kimilili/534 measuring 4 acres as follows:

No.	Beneficiary	Portion(acres)
1.	Cathreine N. Wanyonyi	0 Acres
2.	Edwin W. Wafula	0 Acres
3.	Dennis W. Wanyonyi	0 Acres
4.	Lepeter Matala Wafula	0 Acres
5.	Jospeph Wanyonyi Wafula	0 Acres
6.	Geoffrey Maruti Wanyonyi	0 Acres
7.	Eric Won Wanyonyi	3 Acres
8.	Peter Wafula Wafunafu	0 Acres
9.	Richard Kundu Nyukuri	1 Acre

21. On 5th March 2021, my predecessor, S.N Riechi J issued a consent order that directed the parties before me to note that the hearing for the caveat application for the Objector (Caveator then) was scheduled for hearing on 2nd March 2021. He further directed that the County Surveyor Bungoma do visit land parcel No. Kimilili/Kimilili/534 to ascertain the true acreage of the parcel of land, the actual acreage occupied by the Objector and Petitioner and that the Surveyor to file a report before the Court.
22. On 24th September 2021, the County Surveyor Bungoma did file the survey report with regard to the Consent Order dated 2nd March 2021. The Surveyor visited the suit property on 10th September 2021 and both the Petitioner and representative of the Objector and other family members from both sides were in attendance. It was his report that the measurements of the positions occupied by the parties was taken and a sketch map was generated to that effect. He noted that the actual acreage occupied by each party is as follows: Richard Kundu Nyukuri-1.06 Ha or 2.62 Acres and Peter Wafula Wafunafu-1.05 Ha or 2.59 Acres.
23. Vide supplementary affidavit dated 12th October 2021, the Objector averred that he completely concurred with the County Surveyor's report dated 10th September 2021 and that he wished to amend



their mode of distribution to note that the family agreed to share the estate over land parcel No. Kimilili/Kimilili/534 measuring 5.21 acres as follows:

To be jointly awarded 2.59 acres
1. Cathreine Naffula Wanyonyi
2. Edwin Wanyonyi Wafula
3. Dennis Wekesa Wanyonyi
4. Lewin Matala Wanyonyi
5. Joseph Wanyonyi Wafula
6. Geoffrey Maruti Wanyonyi
7. Eric Won Wanyonyi (minor)
To Be Awarded Nil
1. Peter Wafula Wafunafu
To be awarded 2.62 acres
1. Richard Kundu Nyukuri-as per consent marked PW1

25. On 15th November 2021, the Petitioner’s Counsel, Mr. Were, sought 7 days to file his client’s Protest with regard to the County Surveyor’s Report and which was not opposed by the Objector. This Court proceeded to grant the Petitioner two days to file his affidavit of Protest.
26. On 1st December 2021, the Petitioner’s Counsel, Mr. Musumba, after consultation with his client notified the Court that they do not dispute the Surveyor’s Report and wished for the hearing date on distribution to be fixed. Counsel for the Objector, Mr. Wekesa, concurred with the Petitioner and wished for the Court to fix the hearing date.
27. The Court proceeded to fix the cause for hearing on 19th January 2022. Prior to this hearing, on 5th August 2022, the matter was screened and found fit to be referred to mediation for deliberation and settlement. On 7th August 2022, the Mediator filed a report indicating that the parties only attained a partial settlement.
28. On 14th February 2023, this Court issued directions that the Petitioner’s Summons for Confirmation of Grant dated 21st October 2011 and the Objector’s affidavit in protest dated 21st September 2014 be canvassed via *viva voce* evidence.

Hearing

Objector’s Case

29. OB-PW1 testified that he was Peter Wafula Wafunafu and that the deceased herein was his neighbour and a brother-in-law. He told the Court that he wished to rely on and adopt his witness statement



- dated 24th September 2019 and some documents filed on 30th September 2019 which he presented in Court as OB Exh 1-5 (Objector's list of documents dated 24th September 2019) as his evidence in chief.
30. According to him, the deceased herein had sold to his late father Joseph Wafula Wafunafu a portion of his land parcel No. Kimilili/Kimilili/534 and on learning about this cause he lodged a caveat and proceeded to file his Affidavit in Protest dated 1st September 2014 which he also relied on as his evidence in chief. He further wished to rely on his supplementary affidavit filed on 15th October 2021.
 31. He testified that his late father bought portions of the land parcel No. Kimilili/Kimilili/534 in the year 1965 and that they have been residing on the said land to date, and that boundaries were erected with his late brother, Benson Wanyonyi, being buried on the said portion in 2012.
 32. He refuted the Petitioner's claims that the said portion was simply leased by his late father from the deceased herein and was categorical that the late Thomas Mwasame was buried on the portion that he never sold out.
 33. He told the Court that when the land was surveyed, it was established that they were occupying 2.59 acres while the Petitioner and his family occupied the remainder 2.1 acres. He told the Court that as the family of the late Joseph Wafunafu, they were in agreement with the proposal.
 34. He told the Court that he was well versed with the Bukusu culture and that during the "lufu" ceremony the family of the late Joseph Wafunafu was in occupation of the land and as bona fide purchasers, they ought to have been catered for and/or they should have been involved to ensure that their 2.59 acres was set aside.
 35. He testified that the deceased had no problem with his family and that his late brother was also buried on the same 2.59 acres.
 36. On cross-examination, he told the Court that he was born in 1966 and that the sale transaction was done prior to his birth. He told the Court that the late Joseph Wafunafu died in June 2009 and that he was never shown any sale agreement. He told the Court that the remains of his late father were never buried in the purchased 3 acres of land parcel No. Kimilili/Kimilili/534 and that he did not avail any proceedings of the burial of his late brother Benson in 1981.
 37. On re-examination, he reiterated that he did not avail the sale agreement and that the family of his late brother Benson resides on the said 2.59 acres. He told the Court that his late brother was never given the title for the land.
 38. OB-PW2 was Catherine Nafula Wanyonyi who testified that she wished to rely on her witness statement dated 24th September 2019 as her evidence in chief. She told the Court that she is the wife of the late Benson Wanyonyi Wafula who was the son of the late Joseph Wafunafu who had purchased portions from land parcel No. Kimilili/Kimilili/534 belonging to the deceased herein.
 39. On cross examination, she told the Court that her father-in-law died in the year 2010 and that he was buried on his own land and not the one in dispute herein. According to her, she did not witness the sale transaction but she resides in the 2 ½ acres and that there were negotiations with regard to the suit property.
 40. On re-examination, she told the Court that she did not accept the offer of ½ acre but wants the 2 ½ acres.
 41. OB-PW3 was Richard Musuya Wachilonga who testified that he wished to adopt his witness statement dated 16th September 2019 as his evidence in chief. He told the Court that he knew both the deceased herein and the late Joseph Wafunafu and was aware that the two entered into a sale agreement in



1965 whereby the late Joseph Wafunafu purchased 2 ½ acres of land from land parcel No. Kimilili/Kimilili/5344 belonging to the deceased herein. He told the Court that the purchased portion was later occupied by the son of the late Joseph Wafunafu, the late Benson Wanyonyi.

42. On cross-examination, he told the Court that the land sold was 2.58 acres and that he never witnessed any sale agreement as the same was made before the clan elder (Mukasa) and that the agreement was prepared by a clerk working with Mukasa. According to him, the Mukasa was one Joshua Makombe but that he is now deceased.
43. On re-examination, he told the Court that the sale transaction of the 2.58 acres of land parcel No. Kimilili/Kimilili/5344 was done before the clan elder.

Petitioner's case

44. Pet-PW1 was Richard Kundu Nyukuri who testified that he wished to rely on and adopt his affidavit in support of summons for confirmation of grant sworn on 21st October 2011 as well as his witness statement dated 4th February 2018 as part of his evidence in chief. He further relied on his supplementary affidavit sworn on 14th February 2020 and minutes of the “lufu” ceremony which he produced in Court as his evidence in chief.
45. According to him, he is the eldest son of the deceased herein who left behind 8 children, 3 sons and 5 daughters. He told the Court that prior to his demise the deceased was the sole owner of all land parcel No. Kimilili/Kimilili/534 measuring approximately 4.3 Ha and that it was within his knowledge that the deceased was an employee of the late Joseph Wafula Wafunafu, father of the Objector herein.
46. He told the Court around 1976 his father informed him that he had given the late Joseph Wafunafu two acres from his parcel No. Kimilili/Kimilili/534 to plant subsistence crops on friendly basis and free of charge for a period of time and that the late Joseph did the planting venture with his late son Benson Wafula. At the demise of the late Joseph, they had no problem allowing his family to continue growing crops but in 1977 the late Benson proceeded to construct a semi-permanent structure on the land that was only shared for planting crops. In 2012, the Benson Wanyonyi died and there arose a burial dispute between him and one Geoffrey Wanyonyi, Dennis Wanyonyi and Lewin Wanyonyi (Benson's sons) vide Kimilili Snr. Resident Magistrates Case No 19 of 2012. Both families intervened persuading them to settle the matter out of Court leading to the recording of a consent between himself and the family of the late Benson that: the remains of the late Benson be buried within his homestead in land parcel No. Kimilili/Kimilili/534; that the settlement of the suit in this manner shall not affect any right or interests of the parties hereto, agents or representatives in a matter pending to be filed in any other Court and that each party to bear its own costs.
47. He told the Court that the late Joseph Wafunafu never purchased any 3 acres portion as alleged from land parcel No. Kimilili/Kimilili/534 and that during the “lufu” ceremony, that occurred while the late Joseph was alive, he did not make any claim on the deceased's property.
48. On cross-examination, he told the Court that the remains of the late Benson were buried in land parcel No. Kimilili/Kimilili/534 and that his deceased father allowed the late Joseph Wafunafu onto the land. He told the Court that he was born in 1964 and that the late Joseph Wafunafu resided on the land parcel No. Kimilili/Kimilili/534 peacefully without any interruption. He told the Court that he did not dispute the sale transaction.
49. He told the Court that he was present during the “lufu” ceremony that established all creditors and that the family of the late Joseph Wafunafu was not identified but they also did not mention the presence



- of the Late Joseph Wafunafu’s family on the land. He agreed that the widow of the late Benson still resides on the land. He told the Court that he is opposed to the Objector getting their land.
50. On re-examination, he told the Court that during the “lufu” ceremony, the Objector’s family did not lodge any claim against the estate.
 51. Pet-PW2 was Jane Nabangala Wafula, who testified she wished to rely on her witness statement dated 4th February 2019 as her evidence in chief. According to her, she is the eldest daughter of the deceased herein and that she used to see the late Joseph Wafula Wafunafu planting subsistence crops, to be precise maize, on her father’s land. She told the Court that her father once told her that the late Joseph was a great friend and employee whom he allowed to farm on his land free of charge. She denied the Objector’s claim that the late Joseph purchased 3 acres from his father.
 52. On cross-examination, she told the Court that her father died in 1995 and that she knew the late Joseph and her late mother hailed from the same clan. She told the Court that the remains of Benson Wanyonyi were buried on land parcel No. Kimilili/Kimilili/534. She told the Court that the Objector’s family forcefully took the land from them and that she has never sued them. She confirmed that it was her father who allowed Joseph onto his land and that he never witnessed any sale agreement and that all off them as children of the deceased are unhappy with the late Joseph’s family’s occupation of their father’s land.
 53. On re-examination, she told the Court that Wafunafu allowed Benson onto the land in 1977 when her father had already died.
 54. Pet-PW3 was Tom Bisuche who testified that he wished to adopt his witnesses statement dated 17th July 2023 as his evidence in chief. According to him, he acted as the secretary during the “lufu” ceremony following the death of the deceased herein. He presented in Court the minutes as Pet-Exh 1 with translation and certificate.
 55. On cross-examination, he told the Court that the “lufu” ceremony occurred on 22nd February 1995 and that he did write the minutes. According to him, the original copy of the minutes was with the family of the deceased herein and that the copy he is presenting before the Court is not signed by himself and the chairman. He told the Court that “lufu” ceremony minutes ought to be signed by the secretary and the chairman. He admitted that the minutes presented before the Court lacked a date yet the purpose of the “lufu” ceremony was to ascertain accountability of the debts and creditors of the deceased and also his assets.
 56. He told the Court that the deceased herein was an uncle and that he recalls he had leased part of his land to the late Joseph Wafunafu but he did not see the family members of the late Joseph during the “lufu” ceremony. He told the Court that the deceased did not file a suit against the Objector’s family and that he had no dispute with the family of the late Joseph Wafunafu. He told the Court that the minutes as presented failed to capture the names of those who had claims against the estate of the deceased.
 57. On re-examination, he told the Court that no other “lufu” ceremony was conducted apart from the one he participated in and that he was not aware of any other minutes taken during the ceremony. He reiterated that he never saw the Objector’s family during the “lufu” ceremony yet everyone who had a claim against the estate of the deceased was required to be present at the meeting. He told the Court that the deceased did not sue the Objector’s family but made it clear that no land had been sold.
 58. At the close of the parties hearing, parties were directed to file and exchange written submissions. However, it is only the Objector who complied.



59. In a nutshell, Counsel for the Objector submitted under three headings: whether the Objector had capacity to institute the objection, whether the Objector has proved his objection and who is to pay costs.
60. On whether the Objector had the capacity to institute the objection, Counsel submitted that the Objector did produce a Limited Grant issued in Bungoma HC Succ. No. 29 of 2011 which grants him *he locus standi* or capacity in filing his Objection.
61. On whether the Objector has proved his objection, Counsel submitted that as per the evidence of OB-PW1 and all his witnesses there was admission that the Objector's father and the deceased herein had an agreement whereby the Objector's father was permitted to occupy land parcel No. Kimilili/Kimilili/534. Also, it was not disputed that the Petitioner's deceased father clearly demarcated the portion he sold to the Objector's father and as per the survey report it was clear the Objector's family occupied 2.59 acres while the Petitioner's family occupied 2.62 acres. Counsel submitted that the Objector's family was not only occupying the land but also utilizing the same through farming. Counsel submitted that the Objector's family gained access, occupation and use of the land since 1965 and that it was not disputed prior to the demise of the Objector's father that he was in occupation of the parcel with his family including his late son Benson Wanyonyi who was buried on land parcel No. Kimilili/Kimilili/534 upon his demise.
62. Counsel submitted that he had demonstrated the existence of a sale agreement between the late Joseph Wafunafu and the deceased herein and that the allegations that the deceased only allowed the late Joseph Wafunafu to farm on the land should be rejected. He also argued that since 1965 to his demise in 1995 the deceased never had a dispute over the occupation of the parcel by the family of the late Joseph Wafunafu. He submitted that the Objector's family became beneficiaries of the deceased's estate immediately he passed on as a purchaser for value.
63. Counsel submitted that despite failure to avail a sale agreement, the same can be inferred from the conduct of the parties and thus there is no dispute. Counsel relied on the case of *Ali Abdi Mohamed vs Kenya Shell Co. Limited* (2017) eKLR; *Rusu Investments limited vs Kaisugu Limited* (2021) eKLR; *in Re estate of Ephasus Nyambura Nduati (deceased)* (2021) eKLR and *re-Estate of Moses Wachira Kimotho (deceased)* Succession Cause No. 122 of 2002 (2009) eKLR.
64. On costs, Counsel submitted that the Petitioner ought to be ordered to pay costs having deliberately chosen to disinherit the Objector's family while being aware that they occupy 2.59 acres that was sold to them by the deceased.

Analysis and determination.

65. The application for determination is a Summons for Confirmation of Grant. Grants are confirmed under Section 71 of the *Law of Succession Act*, which states as follows:

“Confirmation of Grants

71. Confirmation of grants

- (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.



(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may —

- (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
- (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this *Act*, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or
- (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
- (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

66. In confirmation applications, there are two principal factors for the Court to consider namely; appointment of administrators and distribution of the estate. The principal purpose of confirmation is the distribution of the assets left behind by a deceased.

67. From the foregoing evidence of the parties, it is not in dispute that the deceased had not distributed his property, land parcel No. Kimilili/Kimilili/534, to his family prior to his death. It is also not in dispute that the deceased’s beneficiaries and those of the late Joseph Wafunafu are not in agreement with regard to the 2.59 acres that the family of the late Joseph Wafunafu is occupying. According to the Petitioner, the deceased never sold any land from land parcel land parcel No. Kimilili/Kimilili/534 to the late Joseph Wafunafu as alleged by the Objector. The point of divergence by the parties herein is to do with the 2.59 acre in land parcel No. Kimilili/Kimilili/534 which is in occupation by the family of the late Joseph Wafunafu yet the certificate of official search indicates land parcel land parcel No. Kimilili/Kimilili/534 was registered under the name of the deceased herein upon his demise. I think it is important to point out at this juncture that for as long as parties are not in agreement, it is left to the Court to apply the laid down law and principles to arrive at what the Court would consider to be fair and just in the circumstances of the case.

68. I have considered the averments of the parties, and the mode of distribution of the deceased’s estate that each proposes. I have also considered the submissions of the Objector. In my view, the only issue for determination is Which is the appropriate mode of distribution of the deceased’s estate?



69. This inheritance is by descent. The claims of descent and all existing models and rules are set forth in the [Law of Succession Act](#) covering both real and personal property.
70. The deceased, as evidenced by a certificate of death filed herein, died on 18th February 1995 intestate. It follows that under section 2(1) of the [Law of Succession Act](#) the law applicable is the [Law of Succession Act](#). The deceased died intestate after the [Act](#) came into force on 1st July, 1981.
71. With regard to the contested 2.59 acres of land parcel No. Kimilili/Kimilili/534, the Objector and his witnesses have lamented how their late Joseph Wafunafu purchased the acres from the deceased herein but did not avail any probable evidence before this Court to ascertain his legit claim on the said piece of land. I take liberty to highlight that most of the evidence rendered to prove his allegations was from the evidence of the Petitioner (witness PW1) and the Objectors witnesses with no documentary evidence to support his claims. The official search at the land registry showed the bona fide owner of land parcel No. Kimilili/Kimilili/534 as the deceased, Thomas Mwasame, until the Petitioner was granted letters of administration intestate on 21st July 2011 and he proceeded to transfer the title to his name in trust for the other beneficiaries, thus indicating that the same property falls under the estate of the deceased. It is noted that the Objector failed to produce any sale agreement between his late father and the deceased. His claims that the deceased never interrupted their occupation and use of the said acres in land parcel No. Kimilili/Kimilili/534 does not hold since they did not confront him over the registration of their father as the owner and neither lodged a caution against the title while the deceased was still alive. The evidence was not supported by the clan member OB-PW3 as all his statements were not backed up with any kind of evidence nor did they summon the clerk who was present to witness the sale agreement as Pet-PW3 was very clear that all meetings held by the clan have minutes that are recorded for accountability purposes.
72. Sale of property is about conveyance of title from the seller to the buyer. The dispute, therefore, is at the heart of title and ownership. Ownership or proprietorship of a property revolves about title, and that clearly places the matter squarely under the purview of Article 162(2) of [the Constitution](#).
73. The property in question is registered land. Registration of property and transfers of land are governed by land legislation, to be specific the [Land Registration Act](#), No. 3 of 2012, and the [Land Act](#), No. 6 of 2012. The contested acres on land parcel No. Kimilili/Kimilili/534 are under legislation with elaborate provisions on sale of registered land, and transfer and registration thereof. A determination of the question as to whether there was a valid sale of the registered land in accordance with the relevant land legislation is an issue that is well outside the jurisdiction of the High Court.
74. My understanding, in the context of the matter before me, is that any disputes or questions or issues that require Court intervention, which revolve around sale, registration and transfer of land, fall within the jurisdiction of the Environment and Land Court. The [Land Registration Act](#) and the [Land Act](#), therefore, confer jurisdiction in the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, the Environment and Land Court and any subordinate court that has been conferred with jurisdiction over the processes the subject of sale, registration and transfer of land is the right forum to adjudicate the matters. All this adds emphasis to the fact that i have no jurisdiction whatsoever to address the matter that the Objector has placed before me. Suffice here to add that he failed to avail any documents to support his claims onto the 2.59 acres of land.
75. Consequently, i find the claim by Peter Wafula Wafunafu not proved on a balance of probabilities and is dismissed. I further find that the said property forms part of the free property of the deceased and available for distribution.
76. In view of the forgoing observations, the following orders are hereby made.



- a. The Objector's protest to confirmation of grant is hereby dismissed.
- b. The mode of distribution as proposed by the Petitioner, Richard Kundu Nyukuri, lacks merit and is dismissed as it is discriminatory against the daughters of the deceased.
- c. The land parcel No. Kimilili/Kimilili/534 measuring 5.21 acres to be divided equally among the three sons and 6 daughters of the deceased. If the daughters have no interest in the deceased's estate, they are to present themselves before this Court and confirm the same or file affidavits renouncing claims to the estate.
- d. That grant of letters of administration made to the petitioners on the 21st July 2021 is hereby confirmed and that the estate of the deceased shall be distributed as directed vide clause (b) above.
- e. A certificate of confirmation of grant shall issue to the administrator.
- f. Each party to meet their own costs.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF APRIL, 2024.

D. KEMEI

JUDGE

In the presence of :

Wekesa for Masengeli for Petitioner

Miss Wanyama for Bw' Onchiri Objector

Kizito Court Assistant

