



REPUBLIC OF KENYA



**In re Estate of Daniel Kinyingi Kyeli (Deceased) (Probate & Administration  
515 of 2011) [2024] KEHC 9674 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9674 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
PROBATE & ADMINISTRATION 515 OF 2011**

**MW MUIGAI, J**

**JULY 25, 2024**

**IN THE MATTER OF THE ESTATE OF DANIEL KINYINGI KYELI (DECEASED)**

**BETWEEN**

**ESTHER WANJIRU KINYINGI ..... 1<sup>ST</sup> PETITIONER**

**JOHN MUSYOKI KINYINGI ..... 2<sup>ND</sup> PETITIONER**

**ALEX KIOKO KINYINGI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**JOHN MUSYOKI KINYINGI ..... PROTESTOR**

**JUDGMENT**

1. The Petitioners Esther Wanjiru Kinyingi & John Kinyingi filed Petition on 21/6/2011 and deposed that Daniel Kinyingi Kyeli deceased died on 12/6/1969.
2. The Family of the deceased was/is listed by the Chief of Masii vide letter of 4/5/2011 as consisting of;
  - a. Tabitha Kinyingi
  - b. John Musyoki Kinyingi
  - c. Esther Wanjiru Kinyingi
  - d. Peter Kinyingi
3. On 5/5/2011 An Agreement between John Musyoki Kinyingi ID 5170898 agreed that there was no Objection for 1 side of PLOT 41 sold to Joseph Mwanzia Muli and would be transferred to him and the other side left to Esther Wanjiru Kinyingi. Joseph Mwanzia Muli completed the payment agreed upon. The letter was signed by John Musyoki Kinyingi and witnessed by Chief Masii Location Salome Mutisya.



4. After gazettelement of the Petition on 2/8/2013 on 27/8/2013 the Applicants namely;
  - a. Alex Kioko
  - b. Stanley Kithuka Kanyingi
  - c. Charles Musyoka Tito

filed Objection to issuance of grant of letters of administration on grounds that Petitioners excluded the Objectors and the portion that belonged to the Objectors was sold by the Petitioners to Joseph Mwanzia Muli which was null and void. The Objectors filed under Certificate of Urgency Summons objecting to making of grant.

5. Joseph Mwanzia Muli filed Replying Affidavit on 19/11/2013 and deposed he was tenant to deceased's property; ½ portion of Plot 41 that belonged to Tabitha Kinyingi (1<sup>st</sup> wife of deceased). Tabitha later informed him that Tabitha & Esther had agreed to co-own the said Plot and Tabitha and her children agreed to sell to him part of the said Plot. He paid purchase price in instalments and on completion developed the Plot that has hotel, Pub and rental rooms and spent Ksh 1.080,000/-.
6. John Musyoki Kinyingi filed Replying Affidavit to the Application he denied the sale of the said portion of ½ Plot 41 and the Objector/Purchaser was a tenant and it is not true that he developed the property.
7. There was no consent from family in deceased to develop the property. There was no evidence of Ksh 1,080,000/- and the property cannot be returned to him as there was no grant of letters of administration at the time.
8. The Amended Petition was filed on 1/12/2014 and this time ALL children of the deceased were listed and property and the Grant of letters of administration was issued to Esther Wanjiru Kinyingi, John Musyoki Kinyingi & Alex Kioko Kinyingi as joint Administrators of deceased's estate on 29/3/2017.

#### **Summons For Confirmation Of Grant**

9. The Summons for confirmation of grant are dated 25<sup>th</sup> May 2018 seeking the following orders;
  - a. The grant of probate(on letter of administration intestate or with will annexed issued to John Musyoki Kinyingi, Esther Wanjiru Kinyingi And Alex Kioko Kinyingi be confirmed.
  - b. The costs of this application be provided for.
10. The Summons are supported by a Supporting affidavit dated 25th May 2018 deponed by the 3 Administrators deponed that the beneficiaries to the estate of the deceased are;
  - i. Tabitha Katungulu Kyeli..1<sup>st</sup> Wife(DECEASED)
  - ii. Serah Nduku Mathuku.....daughter
  - iii. Titus Mutisya Kinyingi.....son (DECEASED)
  - iv. John Musyoki Kinyingi ....son
  - v. Esther Wanjiru Kinyingi..2<sup>nd</sup> wife
  - vi. Benard Mutua Kinyingi ..son (Deceased)
  - vii. Mary Mumbua Wambua(Deceased)



- viii. Beatrice Ngina Kinyingi (Deceased)
  - ix. Margaret Murungi Mutuku ... daughter
  - x. Peter Kinyingi...son
  - xi. Joshua Munyoki Kinyingi...son
  - xii. Stanley Kithuka Kinyingi....son
11. They said that the estate of the deceased comprises of the following assets plot No 41 measuring 30ft by 100 ft at Masii ranch to be registered in the name of the administrator to hold in trust for the other beneficiaries. They prayed that the grant be confirmed pursuant to section 71(2) and (4).

### **Affidavit Of Protest**

12. Through an affidavit of protest dated 10<sup>th</sup> July 2018 John Musyoki Kinyingi protested the confirmation in which he deposed that the beneficiaries were not involved in the distribution and thus object the distribution He deposed that he was given a consent to sign with an unknown distribution schedule and that he protest the parcel of land known as plot no.41 Masii Ranch being registered in the names of the administrator to hold in trust for other beneficiaries.
13. He deposed that the said plot should be subdivided into 2 equal shares since the deceased has 2 houses each house getting half a share and the same be registered as follows... 1<sup>st</sup> house be registered in the names of the deceased widow Esther Wanjiru Kinyingi and 2<sup>nd</sup> house John Musyoki Kinyingi.
14. Vide an affidavit of protest dated 16<sup>th</sup> July 2018 sworn by Joseph Mwanzia Muli an interested party who deponed that he was initially a tenant in a portion of the plot No. 41 at Masii Market registered in the name of the deceased.
15. That from the year 1998 to 2008 on diverse date, he entered into a sale agreement of portions of land comprised in the aforementioned portion of land plot No.41 at Masii Market with the 2<sup>nd</sup> Petitioner, his late mother Tabitha Kinyingi and late brother Titus Kinyingi.
16. That the deceased had two wives who had agreed to co-own and already subdivided the aforesaid plot into equal portions and subsequently Tabitha and her children sold their part of the plot which he proceeded to develop over time with the knowledge and consent of all the beneficiaries including the objectors.
17. He deponed that the 1<sup>st</sup> petitioner herein and her co-wife were ready to transfer the portion he had purchased and the remaining half to the interested party and had paid party of the transfer fees
18. He finally deponed that it was only fair and just that the portion he purchased be transferred to him

### **Response To Affidavit Of Protest**

20. The Applicants filed an affidavit in response to the protest in which they deposed that it was not true that all beneficiaries were not involved and provide for in the proposed mode of distribution and that all the beneficiaries were consulted and factored in.
21. They objected the proposed mode of distribution as the same was contrary to section 41 of the [Law of Succession Act](#) and that the correct position of law is that the children of the deceased should be considered as a unit.



22. It was deposed that the interested was intermeddling with the property of the deceased and that his claim can only be ventilated in an Environment And Land Court.
23. The Applicant deposed that the affidavits of protest filed are frivolous in that they do not disclose any reasonable cause of action against the estate of the deceased and have no locus to object to the confirmation of grant.

## **2<sup>nd</sup> Affidavit Of Protest**

24. Joseph Mwanza Muli filed Protest to the Summons for Grant of Administration filed on 17/7/2019 whose gist was from 1998- 2008 he entered into Sale Agreement of portions of land comprised of Plot 41 at Masii Market with 2<sup>nd</sup> Petitioner & Late Tabitha Kinyingi. He attached copies of Sale Agreement in Kikamba language and translated version in English. He spent Ksh. 1,080,000 to develop the part of the said Pot and annexed photos of the hotel pub and rent rooms. The 1<sup>st</sup> Petitioner & Widow of the deceased Tabitha were ready to transfer the portion to him and he paid part of transfer Fees to County Council of Masaku & produced the receipt.
25. The protest was determined by viva voce evidence.

## **Hearing**

### **Protestor's Case**

26. PW1 was Joseph Mwanzia Muli who testified that he was from Masii and a businessman. His protest was of 17/07/2018. He was not the child of the deceased. He had bought a portion at Masii market Plot 41 30ft x100ft at Masii market and has lived there since 1994 and we discussed purchase price in 1998. He bought and paid. On 13/06/2009 he bought another portion and in 2008 when he had bought the whole area as he had started development 3 rooms, latrine and bar.
27. He spent on development Kshs.1,080,000/-. It was sold to him by Tabitha Kinyingi widow of deceased now deceased. The portion of 15 by 100ft was bought with John and from Peter Kinyingi. The other side was sold by Esther Wanjiru Kinyingi and he started to pay rates at County Council of Machakos. The deceased died in 1969 and he had made payments to the parties/family of deceased. He had been invited in the process of administration.
28. On Cross – examination by Advocate for the beneficiaries he stated that the deceased did not sell him any plot and he was not a beneficiary of the estate. Tabitha Titus are deceased now and they sold him the plot and they had not subdivided the land. He had a letter to show that they had subdivided. They had gone to the County Council and were with the beneficiary.
29. He began to live there in 1995 as tenant. In 1988 he started to buy the plot. The court had not appointed the administrators and they went to purchase the land. The Administrators were appointed on 22/2/2017. Musyoki and Esther were Administrators. He was a purchaser and the Administrators did not sell him a plot. He brought them in court so that he could transfer the portion they sold him. The Agreement did not show that the plot was sold to me plot 41 – Agreement was plot 41 size of 15ft by 100ft.They agreed plot 41 and it is the same plot 41A. Tabitha was to give him plot 41A and Esther sold him plot 41B.
30. They referred to 15 by 100ft by Tabitha & 15ft by 100ft by Esther and he got plot 41A & B. When they came to court we were coming to have the grant confirmed and each have to transfer to myself. He spent kshs.1,080,000/- for the club, 3 rooms, latrine etc. but did not carry the receipts.



31. He did not go to City Council to try to change the ownership. He went with Tabitha and Esther Kinyingi and the County Council with this document and the widows were to transfer to him. The Application of plot registrations/Transfer and Extension Form – County Council of Masaku – the plots of Esther Wanjiku and Esther Wanjiru Kinyingi.
32. The rents receipts and payment receipts did not have his name. The 3 Administrators did not sell any plot to him, Alex Kioko Kinyingi was not there as he was sentenced for 18 years in this court. He bought the plot from Tabitha John the father of Titus son denies the amount of the money. John Kinyingi is son to Tabitha Kinyingi. He did not ask them to return the money - wrote the agreement that we made. Alex is not the only one who is the son of the deceased. He was acting for Tabitha, John and Titus Kinyingi whom he bought from the said plot.
33. On Cross – examination by Advocate for 2nd Petitioner he stated that John Kinyingi is son to the deceased and Tabitha is his mother and they sold him the side of the plot and they shall take him to County Council and they would pursue administration and after they got their share it would be transferred to him They sold him their half share of 15ft x 100 ft. The plot is 30ft x100ft. According to kamba customary law the house was given its share equally and he bought the share of the 1<sup>st</sup> Family Tabitha. He was a tenant and has built and lived there since 1995 to date – 2021. The other ½ is rented to shopkeeper. Alex son of Esther Wanjiru Kinyingi rent out the shop.
34. Re-examination by Advocate for the Protestor/Mr. Thiongo he stated that he was to obtain the transfer once they got the beneficial share –“JNM3”.15FT X100 is signed by both wives/widows Esther Wanjiru & Tabitha. The family of deceased has 2 wives Tabitha and Esther and they sold me the share of the 1st house. The rates receipts were in the names of the plot 41A was in response to the 1st wife. Plot 41B.
35. Protestor Witness 2 John Musyoki Kinyingi testified that he was from Masii and was not employed. He had filed witness statement of 1/02/2019 – the deceased Daniel Kinyingi Kyali was his late father and Tabitha Katungulu Kinyingi his mother is deceased. His mother had 2 of them and Titus who is deceased and had a family. His step mother Esther Wanjiru Kinyingi who has many children. His father left a lot of property. Plot 41 – in Masii it is a plot for business – 30ft x100ft- 15 by 100 by his mother & 15 x 100 by his step mother.
36. There are tenants who pay rent and they distribute the rent as follows; ½ is taken to step mother½ to his late mother sold John Mwanzia Muli. He cannot recall the year it was a long time ago. he was asking that the distribution of the plot to remain the same – ½ for them and ½ to the 2nd wife. His later brother also agreed to the distribution of the estate/sale of the plot by my mother.
37. Although he agreed to summons for confirmation but he does not agree to the registration of the administrators. Where they are now each of them got the title of the land. They live in as the 2 widows had divided and each has the mother’s title. Their late mother distributed the proceeds of the sale of the ½ plot 14 to him and his late brother Titus.
38. On Cross –examination by Mr. Kimeu he stated that he had a brother Titus who is deceased. He has a nephew his son Musyoka Titus. His affidavit of protest of 10/07/2019 he said that the plot 14 be divided into 2 - ½ to the widows of the deceased and 1<sup>st</sup> house registered in the names of deceased and 2nd house in my name. The affidavit of Musyoka Titus of 29/11/2019 he had left the children of his brother and his children. The plot was sold his my mother with his late brother’s consent and his in 1998 when it was sold, the court had granted a grant or confirmed grant - My father estate. Plot 14 is in the name of the deceased. The plot was not sold his my father as he was deceased by then and the



- sale did not show the plot that was sold. If the Court is asked to divide the plot 14/41 into 2 houses and he was not alone he was with my late brother and his mother sold the plot.
39. On Cross –examination by Ms Nzilani for Interested party: he stated that his father died in 1969.In 1993 they divided the plot 14/41 amongst 2 houses under Kamba Customary law. His mother sold Joseph Mwanzia - interested party and he and Titus received the money from the sale ½ of the plot. It was Kshs.1,080,000/-.Thereafter Joseph pursued transfer of the property since 2009 and is not completed. The widow of deceased/2nd house knew the ½ share was sold and the transfer was to be signed by Esther Wanjiru Kinyingi of 15/04/2009.In 2009 his father the deceased was not alive and Tabitha his mother signed the Transfer Form. The part of plot 41 that they sold to the interested party they do not collect rent, it was the 2nd family that collects rent proceeds. He was not claiming everything in Tabitha’s share in Plot 41.Titus his late brother was not claiming anything from the 15 by 100ft plot 41 and the family of Titus just like his had no claim to the plot – it was sold. He was asking that plot 41 be divided into 2 and Tabitha’s share in his name be transferred to Joseph Muli.
40. PW.3 Sworn Petro Mutunga Munguti testified that On 16/12/2013, he bought Plot 41 from Tabitha and sons Titus & Musyoki for Kshs.200,000/-. After that they entered into an agreement with Joseph Muli. The Annexure of the Agreement is in the Affidavit of Protest filed on 17/07/2018 annexed to his Affidavit of Protest JMM1(a) & JMM(b). He bought Plot 41 and then sold. Joseph Mwanzia is still using the plot. Joseph Mwanzia has done development he has made and has developed residential and business premises. He bought in 2007 from Tabitha and no one objected and I sold the property in 2008. In 2007the property belonged to Tabitha.
41. Cross – examination by Mr. Kimeu for the Petitioners he was aware that plot 41 belonged to Daniel Kinyingi Kyali – deceased. Tabitha and sons did not show him the confirmed grant that the estate of the deceased was to be distributed. Tabitha and sons sold him the plot 41 but did not bring the sale Agreement. He did not sign any agreement and the said Tabitha & sons did not indicate they sold him the plot. He also said that he sold the plot 41 to Joseph Mwanzia.
42. On Cross – examination by Mr. Kamolo for the Petitioner he stated the Plot 41 belonged to Daniel Kinyingi Kyali (deceased and the said Tabitha & Sons sold to me the Plot 41. He bought ½ of the Plot 41 at the front only and not the whole plot. When he bought the plot he had not consulted the 2 widows of the deceased. He does not know and cannot remember if the plot was divided. He bought the portion brought by Tabitha and sons. He did not find out if the grant was given.
43. PW.4 Sworn Regina Mwongela Mwanzia testified that she is a business lady Masii Market. She recorded a statement filed in court on 16/12/2013. She was in Court because of Joseph Mwanzia Muli her husband. There was plot 41 and she was there and there was an Agreement. Tabitha in 1995 rented them the plot 41 and they paid rent and they bought the back the shop and developed. The agreement of 15/4/2009.They bought the last portion and paid to Peter Munguti kshs.235,000/- They knew the plot belonged to Tabitha. The plot had doors/entrances. They dealt with the part of Tabitha and Esther had the other portion with a separate entrance.
44. On 15/04/2009 they wrote and signed the Agreement and Esther Wanjiru Kinyingi 2nd widow of the deceased also agreed to the sale. No one objected at the time Tabitha and Titus & John her sons were ready to transfer. Tabitha is deceased – she died in 2009.It was after the incident that Alex objected when the grant was gazetted. Joseph bought 15ft x100ft ½ and door and the other 15ft x 100ft left for the 2nd house - Esther Kinyingi mother to Alex. They paid kshs.235,050 and made developments. They built club, office and lived there. They spent kshs.1,080,000/- on the property. There are photographs of the plot where they carry out the business. Photographs 3 of them dated 10/07/2018 – marked JMM2”Transfer Forms – JMM 3” – County Council of Masaku – plot of



- Daniel Kinyingi (deceased) and they went with Tabitha and Esther widows of Daniel Kinyingi – (to await letter of administration of Denel Kinyingi).
45. The sons of deceased Titus and John were involved with their late mother Tabitha were aware and participated in the sale of Plot 41. Daniel Kinyingi (deceased) owns the plot 41 and he did not sell me the plot but was sold to them by his 1st widow Tabitha They have an Agreement of 2009. The agreement of 15/04/2019 that is alleged to be translated there is no Agreement in Kikamba of the same version that is translated. Each of the Agreements were about the plot 41 The written agreement of 15/4/2009 is not signed by Tabitha & sons or myself and Joseph. They have used kshs.1,080,000/- to develop the plot to where it is. She had the documents but not in Court. Daniel Kinyingi deceased had died and it is not true Daniel Kinyingi did not transfer that plot to us but it was sold to us by Daniel but by Tabitha and sons.
46. They sold properties with without the grant/confirmed grant. They divided the property themselves and we paid rent to each of the parties. There was no grant or confirmed grant and we did the sale in the traditional way. They refunded Peter Kivuti and took up the plot and we paid him kshs.235,000/- and there was sub-chief. They have the Agreement in court but we did not produce it with documents. They sat down Tabitha, Esther widows of the deceased and went to County Council of Masaku and obtained the letters from the chief to file the Succession Cause and the Kenya Gazette is when Alex objected.
47. PW.5 Sworn Alex Kioko Kinyingi testified that he was one of Administrators. My statement of 29/11/2019. I have read the protests of: - Joseph Mwanzia Muli and John Musyoki Kinyingi, Reply to Affidavit of Protest filed on 26/09/2018 summons for confirmation of 28/05/2018 and annexures. The deceased Daniel Kinyingi Kyali had 2 houses and 11 children. Letter of 28/08/2013 – plot 41 – Masii market is in the name of Daniel Kinyingi – Joseph Mwanzia Muli came in the plot as tenant and he did not buy the property. As administrators they did not sell the plot. He bought plot 41A and not this one. He did not see the plot being bought. His prayer he is not to be given the plot the same is for the family – both houses 2nd house to have ½ share. 1st house to have ½ share.
48. On Cross – examination by Mr. Kamolo for protestor he stated that John Musyoki Kinyingi is my step brother. From his mother they are 8 of us. His step mother had 3 of them 1 is deceased. Serah Nduku Mathuku plus John Munnyoki Kinyingi. When the petition was filed he did not disclose the 2nd house not Serah Nduku. There is an amended petition of 1/12/2014 includes all beneficiaries. It is not true that Serah had sold ½ plot. He saw sale agreement. They did not sit down and agree on the distribution. The plot 41 was not sold by his mother. The place they lived on is my father's land which was now under His mother's name. Plot 45 – they are on the land ½ each family. The plot 75 we divided into 2 – it is in my (plot 41) mothers name and both families reside on the land on different places. His mother came to court in another matter. He could comment of plot 75 but I have a problem with plot 41. Plot 41 has built part and only small space is left. He did not know who built plot 41 and had no evidence if he is an owner/purchaser. He knew him as a tenant. His late father had built but not that much. The rent of plot 41 was divided into 2 between 2 widows of the deceased. He had a problem they were to have ½ of the plot and other family ½ of the plot. His mother Githe Wayua is Administrator. His mother came to court and now she is sick and is not able to talk. He had raised protest on his behalf and they filed this case together. The protestor went to school and he denied the same He was not asking the court to leave out any beneficiary but to distribute the estate to beneficiaries.
49. On Cross examination by Ms Nzilani for the other petitioners. He stated that John is brother to Titus of 1st house Tabitha. Their father died 1968 – 1969. Plot 41 was the asset remaining. He did not know if the plot 41 was sold by Tabitha plus Titus. Esther his mother opposed before Kemei J.



## Written Submissions

### 1<sup>st</sup> And 2<sup>nd</sup> Petitioner's Submissions

50. The Petitioner's filed submissions dated 30<sup>th</sup> April 2024 wherein they submitted that the interested parties protest has not merit since section 45 of the [Law of Succession Act](#) provides for intermeddling.
51. Reliance was made to the case of Edward Mutuku Mwando (deceased) 2022.
52. It was submitted that the two scenarios that give rise to a claim to be a purported purchaser to estate of the deceased person where the purchaser had entered into a transaction with the deceased but died before completion and this was not the case with the interested party's claim. Reliance was made to the case of the Re estate of Mukhobi Namonya (deceased)[2020].
53. It was submitted that the interested party claim falls under the 2<sup>nd</sup> scenario which arises when subsequent to the death of the deceased but before the estate is distributed some beneficiaries enter into agreement with 3<sup>rd</sup> parties and reliance was made to section 45 of the [law of succession act](#) on intermeddling.
54. Reliance was made to the case of Morris Mwiti Mburugu vs Dennis Kimanthi M'Mburugu [2016] eKLR and the Estate of John Gakunga Njoroge (2015), the case of Re estate of Nzioka Muathi.
55. It was submitted that it was not in dispute that the interested party purchased half the plot from the 1<sup>st</sup> wife and her sons without letters of administration and cannot therefore successfully claim to be a creditor and that should wait until the estate is distributed then claim against the share of the said beneficiaries.
56. On whether the protest of John Kinyingi has merit or not, it was submitted that most of the parties are to the mode of distribution that the plot be subdivided into 2 equal shares or alternatively the estate be distributed equally amongst the surviving children and surviving widow be added as a unit in accordance with section 40 of the [Law of Succession Act](#).
57. They relied on the case of re estate of Elijah Kipketer Misoi (deceased) [2018] eKLR on what mode of distribution entails.
58. The Appellant submitted that her husband was Kavila Mumeo And Not Mulee Kavila And She Is Known As Kavila Mumeo And Not Kanini Kasinzia. As such the attempt by the protestors to link her to the purported eviction orders was without success as the party's names are unrelated, the subject property is not named in the said court order, the order is not certified and have not been authenticated. She denies ever been evicted from her property and knowledge of the court order. The 3<sup>rd</sup> administrator contended that the suit property was registered in her name and that of the deceased in 1984 yet the order was purportedly issued in 1992 and from the certificate of search as at 1984, she was already a co-owner of the property.
59. It was further submitted that the ownership of the 3<sup>rd</sup> Administrator has never been challenged and no evidence exists to show that her ownership has ever been subject of a court or tribunal. The court was asked to dismiss the protest and orders do issue that her share be extracted and registered in her names.

### Interested Party Submissions

60. The interested party filed submissions dated 2<sup>nd</sup> May 2024 in which he submitted that the issues for determination were whether the [law of Succession Act](#) is applicable to the distribution of the Estate herein and whether the interested party was entitled to a portion of the suit property.



61. It was submitted that the deceased died on 12/6/1969 before the commencement of the *law of succession act*. Reliance was made to section 2(2) of the said act. That the distribution of the estate of the deceased is not governed by the LSA but by written laws and customs applying at the time of the death of the deceased. This position was observed in the case of *Re Nduati Mbuthia (deceased) (2015)*.
62. It was submitted that from the evidence adduced the interested party has demonstrated sufficiently that he purchased a portion of the property and that the petitioners have deliberately refused to accept the interested party as a liability to the state.
63. It was his final issue that the court finds merit in the affidavit of protest and finds that the interested party is a creditor to the estate of the deceased.

### **Determination**

64. I have considered the pleadings, oral evidence during the hearing and written submissions on record.
65. Section 107 of the *Evidence Act*, Cap 80 of the Laws of Kenya provides that;

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
66. The Summons for Confirmation of Grant filed on 28/5/2018 lists ALL beneficiaries of the deceased 's estate and seemingly there is no dispute. The Summons also list the Asset(s) that comprise of deceased's estate Plot 41 30ft by 100ft at Masii. What is in dispute arising from pleadings oral hearing and submissions by parties is first the mode of distribution of deceased's estate and secondly whether ½ of the said Plot 41 is available for distribution as evidence by interested Party/Purchaser discloses a sale/purchase, possession, development and occupation with quiet enjoyment over the years.
67. It is not in contention that the deceased Daniel Kinyingi Kyeli died intestate on 12/6/1969. He was survived by two wives Tabitha Kyeli (deceased) and Esther Wanjiku Kinyingi 1<sup>st</sup> and 2<sup>nd</sup> wives respectively.
68. The property in dispute is Plot No 41 at Masii Market. PW1 testified that he bought a portion at Masii market Plot 41 30ft x100ft at Masii market and has lived there since 1994 and he had started development 3 rooms, latrine and bar.
69. He bought for Kshs.1,080,000/-. It was sold by Tabitha Kinyingi widow of deceased now deceased. 15 by 100ft with John and Peter Kinyingi. The other side was sold by Esther Wanjiru Kinyingi and he started to pay rates at County Council of Machakos. The deceased died in 1969 and he had made payments to the parties/family of deceased. He had been invited in the process of administration.
70. PW1 Joseph Mwanzia Mulli testified that he was tenant on Plot 41 since 1995, he purchased a portion in 1998, in 2008 he bought another portion and started development and in 2009 bought more of the said land/plot and developed now with a hotel pub and rent rooms. He relied on the copies of Agreements annexed to affidavit of protest filed on 17/7/2018 to prove purchase of portions of Plot 41 Masii. He gave breakdown of payments by instalments as outlined in his Witness Statement filed on 16/12/2013 as follows;
  - a. 5/4/1998 he paid Ksh 25,000/-
  - b. 13/6/1999 he paid 22,000/-



- c. 2/9/2000 he paid 15,000/-
  - d. 3/10/2000 he paid Ksh 10,000/- for another parcel 10 by 10
  - e. 14/4/2008 he paid Peter Kyunguti Ksh 235,000/- for the front shop
  - f. On 23/4/2009 he went with Tabitha Kinyingi & Esther Wanjiru Kinyingi to fill the transfer on one side of Plot 41 to his name and other ½ Esther Wanjiru Kinyingi
  - g. On 4/5/2011 the Chief wrote letter of sale and transfer
  - h. On 5/5/2011 John Musyoki Kinyingi agreed and signed the Agreement.
71. PW2 John Musyoki Kinyingi testified and agreed that PW1 interested Party/ Purchaser former tenant and relied on his Statement of 1/2/2019 that it is true that PW1 bought from his late mother Tabitha a portion of 15by 100ft and his late brother Titus Mutisya Kinyingi and himself and the Chief witnessed thee sale. The house of Tabitha agreed to sell and sold their portion to Joseph Mwanzia Muli and it should transferred to him. He disowned statement made and filed on 5/2/2015.
72. PW3 Peter Mutunga Munguti stated he bought the front part/shop of Plot 41.PW4 ,PW 1’s wife confirmed that she was present as PW1 and Tabitha 1<sup>st</sup> wife of deceased entered into an Agreement.
73. PW5 Alex Kioko Kinyingi son of deceased objected the alleged sale of ½ Plot 41 to PW1 as it was sold without confirmed grant and the distribution of Plot 41 ought to be equally distributed to each child and his mother’s share.
74. Clearly, from the above outline there is a dispute as to whether Plot 41 is available for distribution and if so how should distribution proceed?
75. According to Petitioners, the deceased did not sell any part/portion of Plot 41 so the interested party / purchaser is not Creditor to the estate of deceased; hence the property is available for distribution. Secondly, Petitioners submitted that deceased died in 1969, before advent of *Law of Succession Act* of 1981 therefore under Section 2 of LSA, Kamba customary law would be applicable. ½ Plot 41 for 1<sup>st</sup> house to be registered in the name of PW2 John Musyoki Kinyingi for 1<sup>st</sup> house including widow & children of Titus Mutisya Kinyingi & ½ to the 2<sup>nd</sup> house to be registered in the name of Esther Wanjiru Kinyingi.
76. In re Estate of Francis Andachila Luta (Deceased) (Succession Cause875 of 2012) [2022] KEHC 16900 (KLR) (23 December 2022) (Judgment)
- “The discretion to confirm grants is provided for under section 71 of the *Law of Succession Act*. The Court confirms the administrators of the estate, if they were properly appointed and had properly administered the estate and would properly administer the estate thereafter. The court also confirms
- the distribution proposed, or orders distribution in accordance with the law. However, the proviso to section 71(2) of the *Law of Succession Act*, as read with Rule 40(4) of the Probate and Administration Rules, is explicit that court should approach the process of confirmation with some degree of caution, for it has to be satisfied that the administrator applying for confirmation of his grant has properly ascertained the persons who are beneficially entitled to a share in the estate, and has also ascertained their respective shares.”
77. The Court is to confirm the grant in terms of Summons of Confirmation filed listing beneficiaries, assets comprising of deceased’s estate and proposed mode of distribution which is challenged by the



- 2 Protests. The Protest by the interested party/Purchaser is based on Affidavits, Witness statements, List of documents attached to pleadings and testimony that he bought portion of Plot 41 from widow 1st wife of deceased and took possession occupied developed and enjoyed quiet enjoyment from 1995 and later developed the property today.
78. However, this Court's mandate is restricted to administration and distribution of deceased's estate under *Law of Succession Act*. In light of the evidence on record of PW1 PW2 & PW3 there was a sale by 1<sup>st</sup> widow to the interested party.
79. The 2<sup>nd</sup> Protestor, PW5 son of deceased in the 2<sup>nd</sup> House, contests the sale as they were not consulted involved not their consent sought. PW5 took the view that PLOT 41 was/is available for distribution and ought to be distributed either between the 2 houses or each child of the deceased gets equal share. Before this Court embarks on distribution, in this case under Section 38 & 40 of LSA, PLOT 41 has to be available for distribution free property of the deceased without encumbrance or other, legal claim. The Protestor's claim of proprietary interest through sale/purchase of the portion of Plot 41 though parties largely agree some dispute the sale and thus precludes the Court from distributing the estate at this stage. The question of ownership title, sale, transfer of the sold portion of PLOT 41 has to be determined first.
80. In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR  
It was stated on matters relating to title ownership and sale of land;  
“The primary source of the jurisdiction of the courts is *the Constitution*. With respect to matters touching on title to and, and occupation of land, the relevant provisions are in Article 162(2) and 165(5). Article 162(2) envisages the establishment of courts to be of equal status with the High Court, to exercise jurisdiction over, among others, occupation of and title to land.”
81. In re Estate of Alice Mumbua Mutua (Deceased) Succession Cause No. 3142 of 2003 [2017] eKLR where Hon.W. Musyoka J. held;  
“Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.” [Emphasis added].
82. The Court has to decide a question of ownership of the said property as between the estate and the Protestor. The 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 Article 162(2) of *the Constitution* & Section 13 of Environment & *Land Act* to be heard and determined by ELC.



83. This Court finds from the evidence on record that the Protestor's claim as purchaser of part of the deceased's estate specifically Plot 41 is a matter outside this Court's jurisdiction.
84. This Court finds that none of the allegations in the protest have been proved as a result of which the protest does not have merit and is dismissed.

### **Disposition**

85. In the circumstances, the orders that commend to be granted are as follows;
  1. The Summons for Confirmation of 28/5/2018 is hereby with held for 90 days/3 months in terms of distribution of deceased's estate to allow facilitate;
  2. The contested sale, title, ownership or transfer of the sold portion of Plot 41 Masii in the name of deceased to be filed, heard and determined by Environment & Land Court;
  3. In the mean-time the current status quo shall be maintained all parties shall remain in situ no demolition hindering access eviction etc of any of the dwelling and business houses on PLOT 41.
  4. In default of filing matter in ELC within 3 months from todote; the PLOT 41 shall be divided/ distributed in to 2 equal parts; ½ registered in the names of 2<sup>nd</sup> widow Esther Wanjiru Kinyingi & Alex Kioko Kinyingi & other ½ in the name of 1<sup>st</sup> house son John Musyoki Kinyingi & Titus Mutisya Kinyingi widow or son for transfer to PW1 buyer Joseph Mwanzia Muli whom PW2 John Musyoki Kinyingi admitted the sale of the said property by his late mother Tabitha Katungulu Kyeli and was a witness thereof.
5. Any aggrieved party is at liberty to apply.
6. Family matter no order as to Costs.

**JUDGMENT DELIVERED SIGNED DATED ON 25/7/2024 IN OPEN COURT IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

In the presence of:

Mr. Kimeu for the Administrators

Geoffrey/Patrick – court Assistant(s)

