



REPUBLIC OF KENYA



In re Estate of the Late Samuel Waweru Mugo (Deceased) (Succession Cause 231 of 2010) [2024] KEHC 12312 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12312 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 231 OF 2010
RN NYAKUNDI, J
OCTOBER 11, 2024**

IN THE MATTER OF THE ESTATE OF THE LATE SAMUEL WAWERU MUGO (DECEASED)

BETWEEN

**MIRIAM NJOKI WAWERU 1ST PETITIONER
PETER KINYANJUI WAWERU 2ND PETITIONER
MARY WAMBUI GACHAHI 3RD PETITIONER**

AND

**ANN WANJIRU MUREITHI 1ST OBJECTOR
OBADIAH KARURU 2ND OBJECTOR
DAVID GATHURU 3RD OBJECTOR
JOHN WAWERU NJOGU 4TH OBJECTOR**

RULING

1. The cause herein relates to the estate of Samuel Waweru Mugo who died on July 22, 2009. On October 15, 2010, the Petitioners petitioned for a Grant of Letters of Administration Intestate. According to the said Petition, the deceased died and left the following surviving him:
 - a. Miriam Njoki Waweru – widow
 - b. Esther Wanjiku Waweru – daughter
 - c. Monicah Njeri Karanja – daughter
 - d. Hannah Wanjiru Mureithi – daughter
 - e. Mary Wambui Gachahi – daughter



- f. Children of the late Naomi Wamani – (deceased daughter)
- g. Children of the late Rachel Wangui – (deceased daughter)
- h. Alice Njambi Waweru – daughter
- i. Rebecca Wanjira Waweru – daughter
- j. John Njogu Waweru – son
- k. Milcah Wambui Waweru
- l. Peter Kinyanjui Waweru – son
- m. Godfrey Njeja Waweru – son
- n. Beatrice Njoki Waweru – daughter
- o. Children of the late Keziah Wanjiku – (deceased daughter)
- p. Ann Wanjiru Waweru – daughter
- q. Stephen Mugo Waweru – son
- r. John Kinyanjui Waweru – son
- s. Samuel Karanu Waweru – son
- t. Joseph Mburu Waweru – son
- u. Dorcas Wanjiru Waweru – daughter
- v. Ann Njeri Waweru – daughter
- w. David Ndung’u Waweru – Son

2. The Petitioners also listed the assets that form part of the deceased persons as follows:

Immovable Assets

- a. Eldoret Mun. Block 16(kamukunji) 349
- b. Cheptiret/cheplaskei Block 3 (sertwet) 138
- c. Cheptiret/cheplaskei Block 3 (sertwet) 136
- d. Cheptiret/cheplaskei Block 3 (sertwet) 151
- e. Cheptiret/cheplaskei Block 3 (sertwet) 149
- f. Cheptiret/cheplaskei Block 3 (sertwet) 137
- g. Plateau/plateau Block 2 (uasin Gishu) 58
- h. Uasin Gishu/Kimumu/1368
- i. Uasin Gishu/Kimumu/1364
- j. Uasin Gishu/Kimumu/1365
- k. LR 8451/22 Kirathimo



- l. Eldoret Municipality Block2/148 Kihuga Square
 - m. Geneka Plot No.
Movable Assets
 - n. Water Pump
 - o. M/V Reg. No. KXU 110
Shares
Shares 2200 Safaricom
Shares 3310 K.C.B
Shares 300 Kenya Airways.
Bank A/C
Equity Bank Account No. 03001XXXX
Family Bank Account No. 08585XXXX
3. The Objectors were objected to the making of Grant for reasons that they are daughter and sons of the deceased and they did not consent to the Letters of administration being issued to the Petitioner. Further that other dependants have been left out of the list of the dependants. Through Ann Wanjiru Mureithi the Objectors filed a Petition by way of Cross-Application for Grant dated February 8, 2011 seeking to be appointed as an administrator.
 4. In response to the Objection to making of Grant, answers to Petition for a Grant and the proposed Petition by way of cross-application for grant, the Petitioners filed a replying affidavit in which they stated that the purported Objectors namely Obadiah Karuru and David Gathuru are not beneficiaries or rightful heirs to the estate of the deceased person. that within their knowledge, the deceased person had three wives namely:
 - a. Ruth Nyambura Waweru – 1st wife (deceased) – 1st house
 - b. Lucy Nduta Waweru – 2nd wife (deceased) – 2nd house
 - c. Miriam Njoki Waweru – 3rd wife (surviving widow) – 3rd house
 5. According to them, the two Objectors are not members of any of the three houses and therefore they lack capacity to lodge any objection.
 6. To counter the said averments, the objectors filed a further affidavit through the 2nd Objector who deposed as follows:
 - a. That I am the 2nd Objector and I am competent to swear this affidavit for an on my own behalf and on behalf of the 3rd Objector
 - b. That it is true that my mother Mary Wanja was not married to the deceased.
 - c. That I was born out of a relationship between the deceased and my mother.
 - d. That my brother David Gathuru was also born out of a relationship between my mother and the deceased.



- e. That I have been advised by my advocate Mr. Momanyi that being a dependant of the deceased is not predicated upon my mother's marriage to the deceased.
 - f. That throughout the deceased's lifetime he supported me, my brother David Gathuru and my mother Mary Wanja.
 - g. That the deceased treated me as his son during his lifetime.
 - h. That the deceased treated my brother David Gathuru as his son.
 - i. That my sisters and brother who are the Petitioners and dependants in this cause are not strangers to me.
 - j. That I have been attending the family meetings to discuss the affairs of the deceased.
 - k. That my brother David Gathuru has been attending family meetings to discuss the deceased's affairs.
 - l. That it is public knowledge in the family circles that the deceased was my father.
 - m. That it is not for the Petitioners to decide who benefits from the deceased's estate.
 - n. That there is absolutely no legal basis which will deny me the right to participate in these proceedings.
7. Fast forward, the Petitioners filed an application dated September 20, 2011 seeking an order for the benefit of the estate of the late Samuel Waweru Mugo (deceased) be issued in the following terms:
- a. A prohibitory order be issued as against Ann Wanjiru Mureithi, the 1st Objector/Respondent herein prohibiting her from collecting or purporting or continuing to collect rent from the premises known as LR Uasin Gishu/Kimumu/1364, Uasin Gishu Kimumu/1365 and Eldoret Municipality/Block 16 (Kamukunji) 349 or in any other manner interfering or intermeddling with the said assets of the estate.
 - b. An order be issued to compel Ann Wanjiru Mureithi, the 1st Objector/Respondent herein to furnish this Honourable court and the estate of the late Samuel Waweru Mugo (deceased) with a full and true account of all the rent she has collected from the month of January, 2010 to date in respect of Uasin Gishu/Kimumu/1364, Uasin Gishu Kimumu/1365 and that collected from Eldoret Municipality/Block 16 (Kamukunji) 349 from February, 2010 to date.
 - c. Pursuant to the granting of the relief per clause above, the 1st Objector/Respondent be and is hereby ordered to refund to the estate and or to deposit in court all the unauthorized rent that she has collected since January, 2010 to date.
 - d. This Honourable court be pleased to order that henceforth all the rent income accruing in the premises known as Uasin Gishu/Kimumu/1364, Uasin Gishu Kimumu/1365 and Eldoret Municipality/Block 16 (Kamukunji) 349 be collected by Delta Multi Services Ltd and the same be deposited in the Estate Rent account at Family Bank A/C No. 08585062910, Eldoret Branch which account is in the joint names of the Petitioners and such rent to be lawfully utilized or distributed for the benefit of the entire estate.
8. This court considered the said application and delivered its ruling dated September 29, 2015 wherein it was directed that the status quo obtaining in the Estate as shall be preserved and the 1st Objector was directed to render a full and true account of the rents collected over the three suit properties; Uasin Gishu/Kimumu/1364, 1365 and Eldoret Municipality/Block 16 (Kamukunji) 349.



9. The parties subsequently filed their witness statements, laying out the case in their respective view.
10. Starting with the Petitioners, Peter Kinyanjui Waweru stated that on several occasions during the meetings which they used to hold on the 1st day of every January of every year since 2002, the deceased would ask him to stand together with the other first born from each of the wives and he would tell them to obey and listen to his as his preferred leader of the family during his lifetime and after his death. That he was present and personally recorded the minutes of a meeting held on April 21, 2001, convened by the deceased and which meeting was attended by the three wives of the deceased together with their children as well as some invited guests namely Bishop Harun Njoroge, Joseph Gatonye Kimani, Samuel Karanja, John Mureithi, Margaret Wambui and Njoroge Ndoge as witnesses to the proceedings. The second and third objectors were not present in this meeting and he did not recall the deceased mentioning them as his children anywhere in his speech of the day.
11. Francis Mwangi Ndirangu, an electrical contractor also filed a statement in which he stated that he was engaged by the deceased in installing electrical lines and fittings in his dwelling house on the parcel of land known as Uasin Gishu/Kimumu Settlement Scheme/1365. That he got to know the 1st Objector much later and he never received any instructions or payments from her.
12. The 3rd Petitioner equally gave her averments regarding the case and stated that the 1st and 4th Objectors are her siblings from the 1st wife of the deceased and that she is a stranger to the claims by the 1st Objector that she was raised by the 2nd and 3rd Objector's mother as a young child.
13. Deborah Wambui testified as businesswoman dealing with the supply of building materials. She stated that on diverse dates between 2002 and 2006 she was engaged by the deceased herein in supplying various building materials for the construction of a dwelling house on the parcel of land known as Uasin Gishu/Kimumu Settlement Scheme/1365. That she received all the instructions for supply of building materials from the deceased person and not the 1st Objector. That was the same case with Jidraph Muiruri who testified in support of the Petitioners' case.
14. Samuel Karanu Waweru deposed as an Advocate of the High Court. He stated that the 2nd and 3rd Objectors never even once attended the family meetings. He stated that on or about October 24, 1988 the 1st Objector entered into an agreement with the deceased for the purchase of a parcel of an unmarked and unspecified portion of land to be excised out of an unspecified parcel of those owned by the deceased in the Kimumu area. He stated that the sale did not go through and the 1st Objector herein rescinded in writing on November 14, 1995 citing financial problems.
15. The Objectors also filed their witness statements in giving out their account. The 2nd Objector stated that he is a son of the deceased. That the deceased took care of them although he did not marry his mother. That he used to attend family meetings during the lifetime of the deceased. That even after burial, he was given a portion of the money that was realized from the donations towards the burial which was unutilized. The share was given to him in his capacity as his son.
16. Next was the 4th Objector who deposed that she is a daughter of the deceased. She stated that the deceased had sold to her Uasin Gishu/Kimumu 1364 and 1365. That it is the mother of the 2nd and 3rd Objector who took care of her while he was young. She further averred that the deceased had sold the following properties: Uasin Gishu/Kimumu/1364, Uasin Gishu/Kimumu/1365 and Uasin Gishu/Kimumu/1368 was sold to Maryline Chepkosgei & Robert Kiprono and eight (1/8) of an acre and Edwin Kipkosgei an eight (1/8) of an acre. According to her, she ought to be one of the administrators. That Uasin Gishu/Kimumu/1364 and 1365 should be transferred to her.



17. The witness gave evidence that Eldoret Municipality Block 16(Kamukunji) 349 ought to be distributed to the 1st house, Plateau/Plateau Block 2 (Uasin Gishu)/58 ought to go to the 1st House, Kirathimo 8451/22 ought to go to the 2nd house, Cheptiret/Cheplaskei Block 3 (Sertwet) 138, 137, 149 and 151 ought to go to the 3rd house and the rest of the properties should be distributed equally amongst all the beneficiaries.
18. Finally, the 3rd Objector deposed that his mother was not married by the deceased but after her husband died he stayed with the deceased and I was born out of the cohabitation. He stated that together with the 2nd Objector, they ought to be counted as dependents of the estate. That he is the one who settled the hospital/mortuary charges as a son of the deceased.
Petitioners.
19. From the record, I have taken note that the 4th Objector withdrew his objection through a notice dated December 2, 2019. Similarly, on February 6, 2024, the 1st Objector withdrew her Objection and preferred to pursue her claim regarding Uasin Gishu/Kimumu/1364 and 1365 in the Environment and Land Court.
20. The parties filed their rival submissions, which I have taken into consideration.

The Petitioners' Submissions

21. Learned Counsel Mr. Yego filed written submissions dated April 25, 2024. The issues as identified by counsel for determination are:
 - a. Whether the land parcels Uasin Gishu/Kimumu/1364 and Uasin Gishu/Kimumu/1365 form part of the net estate of the late Samuel Waweru Mugo
 - b. Whether the 2nd and 3rd Objectors are the sons and/or dependants of the late Samuel Waweru Mugo.
22. Learned Counsel submitted that the 1st Objector's case has been mutating over the course of the case where she has made claims that she is the owner of two parcels of land known as Uasin Gishu/Kimumu/1364 and Uasin Gishu/Kimumu/1365 on the grounds that:
 - i. She purchased them from the deceased;
 - ii. They were gifts inter vivos from the deceased; and
 - iii. Having testified in the objection proceedings that she bought the two parcels of land, she avoided attending court for further cross examination and orchestrated a scheme that included withdrawing her objection case in the succession case, mischievously having her advocate Mr. Momanyi purport to withdraw from acting for her in the succession case for allegedly lack of instructions while curiously instructing the same advocate now to file a fresh case being Eldoret Hc Elc E002 of 2023 – *Ann Wanjiru Mureithi v Miriam Njoki Waweru & 2 Others* claiming Uasin Gishu/Kimumu/1364 & 1365 under adverse possession.
23. Mr. Yego argued that the withdraw though effective to dispose of her objection case, is mischievous as it was filed 13 years after she filed objections and having wasted the estate of the deceased and having unjustly enriched herself through rent collected from Uasin Gishu/Kimumu/1364 and 1365 for many years in contravention and contempt of the court where she was punished and fined for the said contempt.
24. Notably, counsel called upon the court to observe that:



- a. The alleged agreement is for purchase of ½ an acre of land to be excised from an unidentified land in 1988.
 - b. There was no consent of the Land Control Board sought or obtained;
 - c. There was no transfer prepared or signed by the parties to the agreement;
 - d. The 1st Objector through a letter dated 14th November, 1995 (7 years since the agreement dated October 24, 1988) rescinded the sale agreement and in her own words requested the deceased to take back his land;
 - e. Uasin Gishu/Kimumu/1364 and Uasin Gishu/Kimumu/1365 are two parcels of land with individual title deeds that were issued in 1997 as evidence by the title deeds and the search documents annexed in the Petitioners' bundle of documents.
 - f. There is no evidence that after the title deeds were issued the 1st Objector brought any action against the deceased for registering Uasin Gishu/Kimumu/1364 and 1365 in his name and not hers yet the deceased died 21 years after the alleged sale agreement.
 - g. In the minutes of the meeting convened by the deceased on 21st April, 2001 where he addressed various issues including the identity of who comprised his family and also matters concerning his properties, the deceased clearly repeated the fact that the sale agreement between him and the 1st Objector had been rescinded by the 1st Objector.
 - h. Since the meeting of April 21, 2001, in family meetings held every 1st of January every year, the deceased kept repeating and emphasizing the contents of the minutes cited in paragraph (g) above and asking whether any of his children had any objection to his wishes and the 1st Objector never raised any objection when the deceased was alive.
25. Learned Counsel also noted that through a letter dated February 11, 2010 from Magare & Co. Advocates, the 1st Objector claimed that she was given Uasin Gishu/Kimumu/1364 and 1365 as gifts inter vivos by the deceased. That this is a claim that was made for the first time after the demise of the deceased despite the 1st Objector having claimed that she bought the two parcels of land in 1988.
26. It was submitted for the Petitioners that the 1st Objector never gave any evidence on when she was gifted the parcels, who the witnesses were, any will or documentary evidencing the gift and why for over twenty years since she claimed to have entered the land the deceased never transferred the land to her to perfect the gift. On this, counsel cited the *Halsbury's Laws of England* 4th Edition Volume 20(1). He also relied on the case of *Re Gideon Manthi Nzioka* (deceased), *Rose Re* (1952) *Pelington & another v Waine*, *Re Estate of Godana Songoro Guyo (deceased)* (2020) eKLR.
27. It was the argument of counsel that the deceased did not provide a means for putting the 1st Objector under the full and effective control of the aforesaid property. The evidence before court show that the two properties Uasin Gishu/Kimumu/1364 and 1365 are registered under the name of the deceased hence forming part of the deceased's estate. That the 2nd Petitioner Peter Kinyanjui Waweru adopted his witness statement and testified that at all material times Samuel Waweru Mugo (deceased) is the registered owner of the suit properties. The 1st Objector confirmed in her cross examination that the land rates to the two properties are paid for by the estate of the deceased. Copies of receipts of payment of land rates produced in the Petitioners' supplementary bundle of documents dated October 18, 2019 and filed in court the same day show that they were at all times paid in the name of the deceased.



28. In Counsel's view and the testimony of various witnesses, the properties belong to the estate of the deceased person and that the 1st Objector's claim is a bare claim that only arose after the death of the deceased. No oral or documentary evidence was tendered that the alleged gift has been communicated to any other person. In the minutes of the meeting held on 21st April, 2001 the deceased clearly indicated that the sale agreement between him and the 1st Objector had been rescinded.
29. On the question of the Beneficiaries, it was submitted for the Petitioners' submission that Section 29 of the *Law of Succession Act* sets out the meaning of a dependant. He cited the case of *Beatrice Ciamuta Rugamba v Fredrick Nkari Mutegi & 5 others* (2016). Counsel submitted that the 2nd and 3rd Objectors have made bare claims that the deceased was their father but did not produce any evidence that they were being maintained by the deceased.
30. Counsel noted that during cross-examination the 2nd and 3rd Objectors failed to produce any birth certificate, identification documents or any other evidence that would prove their paternity. They did not produce any documentary evidence to show that the deceased during his lifetime had taken them into his family as his own and paid school fees, medical bills, rent or other bills and generally maintained them as his own.
31. That the evidence adduced by the Petitioners show that the deceased convened a meeting on April 21, 2001 and clarified on who his wives and children were. The list of attendance indicates the three wives and their children and the photos taken which were produced in the Petitioners supplementary list and bundle of documents dated October 18, 2019 do not include the 2nd and 3rd Objectors. Counsel urged the court to find that the 2nd and 3rd Objector do not have any legal right or basis to claim any part of the estate of the deceased and as such, their objection should not be considered in the distribution of the estate.

The 1st, 2nd and 3rd Objectors submissions

32. Learned Counsel Mr. Momanyi for the Objectors filed his submissions on 9th September, 2024 wherein he focused on issues as identified by the Petitioners and added on a proposed model of distribution.
33. As to whether the Land reference Uasin Gishu/Kimumu/1364 and 1365 forms part of the estate of the deceased, counsel's answer was in the negative. He submitted that the parcels belonged to the 1st Objector. That the deceased sold the land parcels to the 1st Objector in 1988. That the 1st Objector has been exclusively utilizing the parcels of land continuously since 1989 to date. Counsel opined that it is the 1st Objector who has made developments thereon and lives thereon. Although she bought the land, the agreements having been defeated by the *Land Control Act* the claim in the land court is premised on adverse possession.
34. Learned counsel put it to the court that the parcels do not form part of the estate of the deceased and that there is an ongoing suit at the Eldoret Environment and Land Court in Case No. E002 of 2023 (OS). The outcome of the case will determine whether or not the foretasted parcels of land are part of the estate. Counsel submitted that Rule 41(3) of the *Probate and Administration Rules* empowers the court before confirmation of a grant to remove a property which is contest from the schedule of assets and have the same determined separately. That if the separated property is found to be part of the estate of the deceased, the same is restored back to the schedule of assets of the deceased's estate available for distribution. On this counsel cited the case of In *Re estate of Francis Peter Njuguna* (2016) eKLR.
35. On the question whether the 2nd & 3rd Objectors are beneficiaries of the estate, it was submitted by counsel that they are sons of the deceased as they were born out wedlock. That they were participating in family meetings and affairs during the deceased's Samuel Waweru Mugo lifetime. According to



counsel, the petitioners are aware of this fact but they chose to conceal the same with the intention of denying the 2nd and 3rd Objectors a share of their late father's estate. He cited the provisions of Section 3(2) and (3) of Law of Succession Act.

36. Finally, on distribution, learned counsel submitted the land reference Plateau/Plateau Block 2 (Uasin Gishu) 58 and Land reference Eldoret Municipality Block 16 (Kamukunji) 349 be distributed to the 1st house, land reference Kirathimo 8451/22 be distributed to the 2nd house and land reference Cheptiret/Cheplaskai Block 3 (Sertwet) 151 to go to the 3rd house.
37. He proposed that the rest of the properties should be distributed equally amongst all the beneficiaries while the issue of whether or not land reference Uasin Gishu/Kimumu/1364 and 1365 is part of the estate to be left for determination in the Environment and Land Court.

Determination.

38. The standard and burden of proof on facts alleged by a party to a litigation is vested in him/her to prove his/her case on a balance of probabilities. The objectors in this case have the burden to prove the facts alleged by themselves in the application by virtue of Section 107, 108 and 109 of the Evidence Act. The bone of contention as it would be seen shortly relates to the question whether the objectors qualify to be children of the deceased in the first degree of the family tree of the deceased under Section 29 of the Law of Succession Act.
39. The court in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 stated as hereunder:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”
40. I have gone through the record and considered the issues that arise themselves for determination. I am called to determine whether Uasin Gishu Kimumu/1364 and Uasin Gishu Kimumu/1365 form part of the estate of the deceased person. Secondly, this court is also required to determine whether the 2nd and 3rd Objectors are beneficiaries of the estate.
41. In *Mpatinga Ole Kamuye v Meliyo Tipango & 2 Others* (2017) eKLR, the Learned Judge observed that:

“This Court’s view before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased’s estate and are available for distribution after settling all liabilities and having the net estate for distribution.”
42. The starting point would be Section 3 of the Law of Succession Act which defines and ‘estate’ as “the free property of a deceased person” while “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.” It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was



legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated.

43. Having stated that, the court is conscious of its duty as a probate court. The primary duty of this court, as a succession court, is to identify the beneficiaries, ascertain the assets and ultimately distribute the deceased estate to the rightful beneficiaries. The court is assisted in that mandate by the parties who provide evidence as to who is a beneficiary and which are the assets and liabilities of the estate. Both issues in the instant case are at cross roads. The parties have not agreed on all the beneficiaries of the estate as well the properties forming part of the estate particularly land parcels Uasin Gishu Kimumu/1364 and Uasin Gishu Kimumu/1365.
44. The 1st Objector led evidence to the effect that she bought the parcels of land in question from the deceased person and there is an agreement to that effect, later on she stated that they were gift inter vivos from the deceased. She is now before the Environment and Land Court claiming the parcels under adverse possession. So that then, a glimpse of her case wholesomely reveals serious gaps that question the authenticity of her averments. On this question of ownership of the two parcels, the evidence before this court clearly points to the deceased person as the registered owner of the two parcels and therefore the properties are rightly before the probate table. I elect not to delve into it given that there are proceedings before the Environment and Land Court. In *Re Estate of Stone Katbuli Muinde (Deceased)* [2016] eKLR W Musyoka J, held: -

“With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it”.

45. Having stated that position, there is no doubt in my mind that the property belongs to the deceased. It is evident that the two parcels are still in the name of the deceased person and not the 1st Objector. The 1st Objector averred that the transfer was not complete as land control board was never sought and that the 1st Objector having rescinded the agreement through the letter dated 14th November, 1995, the parcels known as Uasin Gishu/Kimumu/1364 and Uasin Gishu/Kimumu/1365 became registered in the name of the deceased in 1997.
46. In cases such as this, the court is called upon to determine whether a property in question belongs to the estate of the deceased, the Court must be satisfied that that is the position so as to avoid a possibility of wrongfully incorporating another party’s property into the estate as that may lead to serious consequences. The evidence as adduced by the parties indicates that the deceased person is the registered owner of the properties in question. Therefore, I share the view that the claim already filed at the Environment and Land Court is an afterthought. This court can only use the tangible evidence



before it to make a determination and to this end, I am inclined to find that the parcels in question belong to the deceased person.

47. That said, the issue of beneficiaries equally lies squarely before this court. Are the 2nd and 3rd Objector beneficiaries of this estate? The Petitioners argued that they are not for reasons that they failed to produce a birth certificate, identification documents or any other evidence to prove paternity. Further that they did not produce any documentary evidence to show that the deceased during his lifetime had taken them into his family as his own and paid school fees, medical bills, rent or other bills and generally maintained them as his own. Similarly, that they were never in any of the family meetings.
48. The 2nd and 3rd Objectors on the other hand stated that they are dependents of the estate as the deceased sired them out of wedlock and that they used to attend all the family meetings and they have been all along recognized as children of the deceased.
49. I start by stating that whoever desires any court to give judgment as to any legal right or liability, depending on the existence of fact which he asserts, must prove that those facts exist.
50. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person. See section 107 of the *Evidence Act*.
51. In the case of *Britestone Pte Ltd v Smith & Associates Far East Ltd* (2007) 4 SLR 855 the court had this to say:

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.”

19. It is therefore a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is on the balance of probabilities. In the case of *Miller v Minister of Pensions* (1947) 2 All ER 372, Lord Denning said the following about the standard of proof in civil cases:

“The (Standard of proof) is Well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: ‘we think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.”

52. In the present case, the 2nd and 3rd Objectors had the burden of establishing that they are indeed dependents of the deceased person. They discharged this burden through affidavit evidence, in which they essentially stated that they were children of the deceased born out of wedlock and the fact that they took part in the annual family meetings. For one to be identified as a dependent, the dependency degrees as spelt out under Section 29 of the *Law of Succession Act* need to be proved. A dependant is defined under Section 29 of the *Law of Succession Act* as:

- a. The wife or wives, or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.
- b. Such of the deceased’s parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own,



brothers and sisters and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death.”

53. The duty therefore to establish dependency lay on the Objectors. Besides the affidavit evidence, they did not take a step further to prove their dependency and the court cannot make an assumption as to the veracity of their averments. It is incumbent upon the objectors to firmly establish the fact that they are children of the deceased and as such should draw from the deceased’s estate.
54. In the matter of the In *re Estate of Patrick Mwangi Wathiga- Deceased* [2015], the Objector, in that case, showed up after the deceased’s death and bore the burden of proving that he was a child of the deceased hence a beneficiary of the deceased’s estate. The judge observed:
- “I am clear in my mind that the burden of proof lies on the Objector to prove paternity or his claim to be a beneficiary of the deceased’s estate..... The case becomes even more difficult where no medical evidence is adduced to prove paternity....”
55. Section 3(2) of the *Law of Succession Act* defines a child as follow:
- “... "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”
56. After considering the affidavit evidence of both sides, it has not come out clear whether the 2nd and 3rd Objectors were seen or involved in the family activities. This fact alone even if it were to be true cannot entitle them as beneficiaries. There is need to clearly establish by way of cogent and credible evidence that they fall within the definitive characteristics of a beneficiary under Sections 3(1) & 29 of the *Law of Succession Act*. The assertion of the petitioners being seen within the home and without in various seasons and times does not meet the definition of a dependant as envisaged in the *Succession Act*.
57. It is not strange for claimants posing as beneficiaries to the estate of the deceased person to lodge all manner of claims with only one objective in mind; to be considered as a legitimate beneficiary and be allocated a share of the estate. In my view, without even a shred of evidence, including a birth certificate to prove lineage or biological parentage, the Objectors have failed miserably to discharge the burden of proof vested in each one of them to bring their case within the consanguinity and affinity or bloodline of the deceased. I find that the Objectors’ claim on dependency want of merit. So do they leave this court without a remedy? The answer is in the negative for reason that the viva voce evidence tested under cross examination remains in the realm of suspicion and remote to rightfully rule in their favour as beneficiaries to the estate. I am of the considered view that the objectors if they were fathered by the deceased have a recourse to avail scientific medical evidence in the form of a DNA profile report. I take cognizance this was not one of the prayers in these proceedings. However, the court has to exercise judicial discretion ingrained under Section 1A, 1B, and 3A of the *Civil Procedure Act* as construed under Rule 73 (1) of the *Probate and Administration Rules*. The principles in *MMM v ENW M.A* No. 7 of 2016, which cited with approval the Indian case of *BPs v CS* Civil Appeal No. 6222 – 6223 of 2010 held that: the court must exercise its discretion only after balancing the interest of the parties and on dues consideration whether for a just decision in the matter DNA is eminently needed DNA should not be directed by court as a matter of course or in a routine manner whenever such request is made whether it is not possible for the court to reach the truth without use of such a test.”



58. As I have already mentioned the evidence on record by the Objectors is insufficient to prove with certainty that they are biological children of the deceased. This court in the specifics of this case has to invoke the inherent powers vested in it in ensuring substantive justice is served in the matter in giving due consideration to the welfare and best interest of the child. In our Kenyan Constitutional Imperative Art. 53(2) provides as follows:

“A child’s best interests are of paramount importance in every matter concerning the child.”

59. In the same breadth Section 8 of the *Children’s Act* has incorporated significant provisions on this doctrine as can be deduced as follows:

- “8. In all actions concerning children, whether undertaken by public or
- (1) private social welfare institutions, courts of law, administrative authorities or legislative bodies—
 - (a) the best interests of the child shall be the primary consideration;
 - (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
 - (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
 - (a) safeguard and promote the rights and welfare of the child;
 - (b) conserve and promote the welfare of the child; and
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.”

60. If this court stops at this stage, the objectors who are claiming biological lineage with the deceased will remain stateless with no accrued rights from the family unit. It is evident that the Petitioners have already categorized the objectors as busy bodies with no birth relationship traceable to the deceased whether in the first, second and third degree family lineage. It is in the best interest of this court that their paternity be established and known for they can no longer afford to live in no man’s highland on this earth.

61. For those reasons, the objection proceedings wholly stand dismissed but in the same vein an order be and is hereby made that the objectors submit DNA samples and those of the children birthed of the deceased for the purposes of determining paternity.

- a. That the paternity test shall be conducted by KEMRI Eldoret Branch located at Daima Towers within 30 days from today’s date. That the paternity test report should be submitted to court by November 11, 2024.
- b. The costs of the paternity test shall be met by the estate of the late Samuel Waweru Mugo
- c. In order to safeguard the integrity of the DNA test both parties and respective counsels shall be at liberty to oversight the process from initiation to conclusion
- d. Each party shall bear their own costs of this application



DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF OCTOBER 2024

.....

R. NYAKUNDI

JUDGE

