



**In re Estate of Mbalu Nzunza Ndambo alias Mbaluka Nzunza (Deceased) (Succession Cause 767 of 2007) [2024] KEHC 13991 (KLR) (11 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13991 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 767 OF 2007**

**FR OLEL, J**

**NOVEMBER 11, 2024**

**IN THE MATTER OF THE ESTATE OF MBALU NZUNZA  
NDAMBO ALIAS MBALUKA NZUNZA (DECEASED)**

**BETWEEN**

**SAMUEL KARANG'OI MWANGI ..... PROTESTOR**

**AND**

**DAVID NDAMBO MBALU ..... 1<sup>ST</sup> PETITIONER**

**JOHN NZUNZA MBALU ..... 2<sup>ND</sup> PETITIONER**

**ALICE NZISA MBALU ..... 3<sup>RD</sup> PETITIONER**

**RULING**

**A. Introduction**

1. Before the court for determination is the protest filed by SAMUEL KARANG'OI MWANGI (the Protestor) through his Affidavit of protest dated 20<sup>th</sup> November 2020 and the summons for revocation of grant dated 1<sup>st</sup> October 2020 filed by AGNES NDUKU MUANGI a beneficiary of the Estate through the second family. The parties herein exchange trial bundles and by consent agree to have both protest and objection disposed of by way of viva voice evidence.

**B. Evidence**

**i. Protestors case**

2. The protestor relied entirely on his Affidavit of protest dated 30<sup>th</sup> November 2020 and his witness statement dated 15<sup>th</sup> June 2021. It was his evidence that in March 2015, he entered into an agreement with Agnes Nduku Muangi (the objector) and Francis Mbatha Mbalu (her son) to purchase a portion



- of the estate property bequeathed to them, known as L.R No. Militini 1193/27 with water resources. The portion bought measured about 30 acres, which the vendor's family agreed to hive off and sell.
3. Before purchasing the said property, he did visit the suit parcel of land which he intended to use for agricultural purposes, and extensively engaged the 3<sup>rd</sup> petitioner's and objector's family in negotiations before settling to purchase the said parcel of land at a sum of ksh.160,000/= per acre. The total purchase price was agreed at Kshs.4,800,000/= for the 30 acres.
  4. They subsequently met in Nairobi at his Advocates office, where they formally entered into an agreement with assurance from the 3<sup>rd</sup> petitioner and the Objector that they as a family had consented to sell the said portion of land. He paid a deposit of 10% of the purchase price, ksh.480,000/= on signing the agreement and was given vacant possession. In 2016 while constructing a water pan on his portion of land, he was accosted and violently evicted therefrom by the 2<sup>nd</sup> Administrator – John Nzunza Mbalu, who invaded his farm while accompanied by violent youth/goons and proceeded to destroy the materials he had placed on the ground. He had to get help from Militini police post to stop the marauding youth from burning the hired equipment he was using to dig the water pan.
  5. The protestor confirmed that by the time he was being stopped from occupying his land, he had already paid the 3<sup>rd</sup> Respondent and objector a sum of Ksh.3,520,000/= and prayed that he be allocated 30 acres being a portion of L.R. No Militani/11931/27 and that the particular place which has the waterfront be surveyed and coordinates be placed on the ground.
  6. Upon cross-examination by the Petitioners/Respondents advocate, the protestor reiterated that he was violently evicted from the suit parcel yet he was entitled to the 30 acres of land which he had bought from the 3<sup>rd</sup> Respondent/ the objector and her children after the grant had been confirmed on 09.02.2014. The whole parcel of land was about 1050 acres, but his claim was only restricted to the 30 acres bought. The sale agreement had described the suit parcel as L.R no. 11931/276 which was to be hived off all that parcel of land known as L.R no.11931/6. He further confirmed that the term “water resources’ was not included in the said Agreement.
  7. The protestor also admitted that his Exhibit SKM2 (proposed sub-division plan) was drawn by his surveyor and it had not been signed by the 2<sup>nd</sup> Respondent. Further, he had also not pursued any criminal charges against the 2<sup>nd</sup> petitioner who had led a gang to evict him from the suit parcel.
  8. On further cross-examination by the counsel of the objector, the protestor confirmed that the 3<sup>rd</sup> respondent and/or the objector did not evict him from the parcel of land bought. As per the schedule of money paid, and attached to his list of documents, the amounts recorded therein totaled ksh.1,455,000/=. He also confirmed that by the time he entered into an agreement with the 3<sup>rd</sup> Respondent, she was one of the administrators of the estate and had the legal capacity to sell the said portion of land to him. His primary interest was to get land in proximity to Masinga dam to enable him to carry out commercial farming.
  9. PTW2 Eunice Wanjiru Njenga confirmed that PW1 was her husband and relied on her witness statement dated 15.06.2021 as her evidence in chief. She had been present all along when the transaction to buy the portion of land started and severally accompanied her husband to visit the suit parcel of land. Once the agreement was signed, they began excavation works to create a water pan, but could not complete the same as one member of the deceased family forcefully evicted them from the parcel of land, they had bought. In cross-examination, PW2 confirmed that when the agreement was signed, she was not present but was present during the initial negotiations carried out.
  10. The protestor, closed his case and the objector took the witness stand.



## ii. Objectors case

11. OW1 Agnes Nduku Muangi relied on her witness statement dated 26.03.2021 and her bundle of documents was admitted as Exhibit 1-27. She confirmed that she was the 4<sup>th</sup> wife of the deceased Mbalu Nzunza Ndambo, having been married under Kamba customary law and they had been blessed with 6 children. After her husband died, the co-petitioners started to disturb her by insisting that she was not a family member with the ulterior aim of disinheriting her from her rightful share of the estate. She reiterated that they undertook kamba customary marriage ceremony with her deceased husband in 1984 and were blessed with two children while she came into the marriage with four children (minors by then) and they all grew up knowing that the deceased was their father.
12. Upon cross-examination by the respondent's counsel, OW1 confirmed that her problems with other family members started during distribution of the estate but she was generally satisfied with the parcels of land she had received. She was clustered with the 3<sup>rd</sup> petitioner during distribution of the estate, and they had gone to the lands office and effected the transfer of the estate property received. Further, she was aware of all the properties the 2<sup>nd</sup> family had received and did not have a problem with most of the parcels of land bequeathed to them.
13. The parcels of land she had issues with were the parcels of land in Wamunyu, 2 plots in Matuu, and plot 52 Muthetheni. They had sold the plots at Wamunyu and also sold the plots at Muthetheni. Further, they had also been bequeathed two plots at Ngara Estate in Nairobi and had sold one of the said properties. As regards ancestral land, she had revived a total of 350 acres and sold about 30 acres to the Protestor Mr. Samuel Mwangi, and other portions to different purchasers.
14. The objector confirmed that she came into the home of the deceased through the deceased 2<sup>nd</sup> wife (Sabina Koki) who married her under Kamba women-to-women marriage (iweto). They had undertaken all land transactions after confirmation of grant, and there was no demand from any purchaser seeking a refund of the purchase price paid. She asserted that she had come to court to get her rightful share of land in Militani, which should be bequeathed to her and Alice Nzisa Mbalu (the 3<sup>rd</sup> petitioner).
15. OW1 under further cross-examination confirmed that she was aware that the protestor was demanding his share of the property bought and she had absolutely no problem with him being given his 30 acres of land being part of Militani farm, LR 11931/27. As per the confirmed grant issued by the court, she and 3<sup>rd</sup> petitioner had received their share of this property and had shown the protestor the portion he was to buy. The said portion had a waterfront.
16. In re-examination OW1 confirmed that she was invited into the home by the deceased and his 2<sup>nd</sup> wife Sabina Koki, before she eventually also became a wife of the deceased. Her issue was that the proposed distribution as effected was unfair and her prayer was that she be given her share in her joint name with the 3<sup>rd</sup> Respondent. If that was done, she would be satisfied.
17. OW2 Nduto Kioko adopted his witness statement dated 23.04.2021. He stated that he knew OW1 when she was married by the late Mbalu Nzunza in 1983. He was amongst her family delegation who received 5 goats and slaughtered one as customarily required. Later on, the late Mbalu Nzunza added 10 goats and after some time added another 20 goats. OW1 was therefore a lawful wife of the deceased and never divorced her husband. Under cross-examination, OW2 reiterated his earlier evidence and confirmed that to his knowledge OW1 had never previously contracted any other marriage. Her relationship with the deceased was good and she had never complained of any challenges at her home.



18. OW3 Peter Kaseli Kimani adopted his witness statement dated 26.03.2021. He confirmed that OW1 was a lawful wife of the deceased having solemnized their Marriage under Kamba customary marriage ceremony. Upon cross-examination, OW3 confirmed that the deceased originally came from Muthetheni but came and settled in Militani. He (the deceased) had four wives (Ndulo, Koki, Kavuva and Agnes) and he was present when the deceased took dowry to OW1's home. Accumulatively the deceased had taken 24 goats to OW1 parents. He further confirmed that it did not matter whether a man married a woman or a woman-to-woman dowry ceremony was undertaken as per Kamba custom. All the said marriages were valid.
19. Initially they took 5 goats and one male goat, which was slaughtered while the rest were counted as bride price. He reiterated that OW1 was lawfully married to the deceased and urged the court to so hold.
20. OW4 Rick Muia Wambua confirmed that he resided at Matungulu within Militini and knew the deceased family well given that they were neighbors. OW1 Agnes Nduku was the wife of the deceased and she had resided within his "Boma" from about 1984. OW5 Daniel Kiio Mbithi too adopted his witness statement dated 26.03.2021. He confirmed he was the area assistant chief of Kiatiani sub-location and knew as a fact that OW1 was the fourth (4) wife of the deceased while Sabina Koki, was also the deceased 2<sup>nd</sup> wife.
21. The objector resided within one compound with Sabina Koki, who was elderly and needed help. The family had resided peacefully within the deceased compound but problems arose after the deceased had passed on, which problems stemmed from the fact that some family members did not consider the objector as a lawful wife of the deceased, disagreements over the distribution of the estate property between family members had arisen and finally, the 2<sup>nd</sup> respondent had also objected to the sale of land to the Protestor.
22. Upon cross-examination OW5 confirmed that the 2<sup>nd</sup> petitioner had stopped the protestor from working on the portion of land he had bought and had denied him possession thereof.
23. OW6 Kyalo Mbalu Fredrick stated that he was the first-born child of the Objector herein, but overall was her third-born child. He adopted his witness statement dated 26.03.2021 and confirmed that they had sold some of the Estate properties bequeathed to them and he had witnessed some of the land sale agreements. He confirmed that they had sold land parcels Muthetheni 164,115,120 and 149 totaling 23 acres for a consideration of kshs.5,700,000/=, Muthetheni 153 and 164 to James Titus Kisia for an aggregate sum of Kshs 1,823,000/= and two parcels of land in Nairobi known as L.R No 209/282/28 and 209/282/29 for Kshs 15,000,000/= (each), which sum was settled in full and he received his share thereof.
24. OW6 further confirmed that his mother and the 3<sup>rd</sup> Respondent had sold land to the protestor and they had shared monies paid by the protestor as a family. He did not have any problem with any of the properties sold in Muthetheni and/or Mitilini but claimed an extra 50 acres from the estate. It was his wish, that redistribution ought to consider this aspect of his claim. On further cross-examination by the protestor's advocate, OW6 confirmed that they had sold to the protestor, their portion of land and he did not have any issue with him taking possession. The portion sold was near the water source and it was the 2<sup>nd</sup> respondent who was opposed to this sale, yet he had no claim whatsoever over their family share of the Estate.
25. OW7 Florence Mthenya Mbaki stated that she was the last-born daughter to Agnes Nduku Muangi, the Objector herein, and the estate in contest belonged to her father. She adopted her witness statement dated 26.03.2021 as her evidence in chief and further stated that the grant herein had been confirmed on 22.05.2020 and the 3<sup>rd</sup> respondent and the objector had been placed under one family unit (2<sup>nd</sup>



- family). The 3<sup>rd</sup> Respondent was the only child of the late Selina Koki, who was unable to bear more children and therefore brought in the objector, to her Militani home and her family became bigger.
26. Initially after confirmation of the grant they did not have any problem as to how distribution was effected, but recently that changed when the respondent's counsel called her mother and wanted her to renounce her share in some of the properties bequeathed/allocated to her, especially L.R No 209/2820/29, and Plot 29 Wamunyu, which proposition they were totally against.
  27. OW7 confirmed that they had sold 30 acres of land to the Protestor and the Plot in Nairobi (L.R No 209/2820/29) to Titus Kisia. Plot 43 and 55 at Wamunyu Market had been bequeathed to their family, she and Elizabeth (daughter to 3<sup>rd</sup> Respondent) were collecting rent therefrom but later realized that the said properties had been illegally transferred to John Nzunza (the 2<sup>nd</sup> respondent) and one Naomi Nzambili Kavemba, who was not a family member. On 27.10.2020, the 2<sup>nd</sup> respondent had written letters to their tenants directing them to pay rent to the accounts of Greenfield Agencies, which proposition they did not agree with and therefore filed the objection before the court.
  28. As regards the other properties sold, they had no problem with the sale effected nor did they have any problem with any of the buyers. It was to be noted that the first confirmed grant had given their family 52 acres of land in Muthetheni, part of which was sold to Mr. Kisia but subsequently when the said grant was reviewed their portion of land in Muthetheni was reduced by some acreage. She requested that this be corrected and the original acreage returned.
  29. It was her further testimony that they were satisfied with the 350 acres of land given to them at Militini. Initially, they did not have a waterfront but exchanged land with the 1<sup>st</sup> family by giving them Plot 134 at Thika town and in exchange they got a further 72 acres of land at Militani which now included the waterfront. She also confirmed that the 3<sup>rd</sup> family got 291 acres with water resources of 50 acres while the 1<sup>st</sup> family got 277 acres with 28 acres of water resources.
  30. Accumulatively when all the acreage was calculated, the first family got 474 acres, the second family got 518 acres and the third family got 496.8 acres. The family had not subdivided the Militini or Muthetheni land as the distribution process was not complete. For the Nairobi property, as per the agreements they had filed in their list of documents, it was indicated that they had sold two properties, which was not the case, as the only property sold was parcel L.R No 209/2820/29. The first agreement attached had not been effected, and it was an error attaching it.
  31. Upon cross-examination by the respondent's counsel, OW7 confirmed that her mum (OW1) had consented to confirmation of the grant but believed that the estate properties ought to be fairly distributed and the certificate of grant should specify beneficiary interest. The 2<sup>nd</sup> family had been bequeathed Plot 43 and 55 at Wamunyu Market, but the same was not indicated in the confirmed grant. she was also not aware if the deceased had sold Plot 43 Wamunyu before he died.
  32. She reiterated that they as a family were comfortable with the 350 acres and extra 72 acres given at Militini. They had also received 17.7 acres at Muthetheni and was not aware if it was available as she had not visited the said parcel from 2017. No sub-division had been effected on the estate property, either at Militini or Muthetheni as distribution of the estate had been put on hold due to the pending dispute. As for the Nairobi property sold, they had not handed over possession to the purchaser and would do so once the distribution process had been completed. Currently, she was collecting rent on behalf of their family and forwarding the same to the 3<sup>rd</sup> respondent and the objector.
  33. OW7 was shown an acknowledgment signed for Plot 55 Wamunyu Market and confirmed that the same had been sold and they had received Kshs.1,400,000/=. Her prayer was that the confirmed grant be amended and the objector's share be specified therein. Upon cross-examination by the protestor's



counsel, OW7 confirmed that they had sold 30 acres of land next to Masinga Dam to the protestor, which was part of the 72 acres awarded to them under the grant issued in May 2020, and she had no objection to him getting his share. She further affirmed that the 72 acres of land was available on the ground and she could identify the portion sold.

34. In re-examination, OW7 confirmed that Plot 29 Wamunyu was sold to James Kisia and urged the court to find that the objector's family was entitled to get plot L.R No 209/2820/29 Nairobi, Plot 6303 Matuu, 52 acres in Muthetheni and also to retain 350 acres and 72 acres with water resources at Militini. She also urged the court to stop the 2<sup>nd</sup> respondent from interfering with their share of the Estate.

### iii. Respondents Case

35. The 1<sup>st</sup> respondent PW1 David Ndemo Mbulu relied on his witness statement as his evidence in chief and further admitted into evidence all documents attached to his list of documents dated 20.09.2021. He confirmed that the deceased herein Mbalu Nzunza was his father and he had three families/wives. He was a child of Kakuvi Mbalu (the third wife) who died in 2021.
36. The court had confirmed the grant in this matter and the three families/houses of the late Mbalu Nzunza had sub-divided the estate properties equitably. This had been effected based on prior discussions held by the family and the subsequent consent on distribution filed in court before confirmation of the grant.
37. Their family (third house) was satisfied as to how distribution was effected and they had no problem. He denied forging the Objector's signature on the consent filed in court and confirmed that they did not leave out any beneficiary during the distribution process. It was his opinion that the said distribution as proposed should not be disturbed. As regards the property bought by the protestor, the land sold to him belonged to the Ndulu Mbalu (1<sup>st</sup> wife) and he was not present when the said parcel of land was sold.
38. Upon cross-examination by the protestor's advocate, the 1<sup>st</sup> Petitioner/Respondent re-confirmed that he was not involved in the said sale but when they sat down as a clan, it had been agreed that the protestor be given his land by the 2<sup>nd</sup> family, based on the fact that, it was the said family that had sold to him the parcel of land in dispute.
39. Under cross-examination by the objector's counsel, the 1<sup>st</sup> Respondent confirmed that he was one of the administrators of the estate and had known the Objector since 1985 when he saw her at the home of Koki Mbulu at Militini. By then he was an adult aged around 25 years. He asked his father who she was and he responded by saying that "Agnes was a wife to Koki". He further admitted that under kamba culture this arrangement was allowed and a lady who could not sire children for one reason or another could bring a woman, who then could sire children with her husband.
40. When the Objector joined their family, she came with other children and eventually also sired children with his father. In total the Objector had six children raised at their home and he was not disputing that they are not his father's children. Though they had not mentioned the Objector's name in the distribution schedule, it was agreed that the 3<sup>rd</sup> Respondent Alice Nzisa Mbulu who was a daughter of Selina Koki (2<sup>nd</sup> wife) was to give the objector and her children their share in line with the Rulings of Hon. L.J Nyamweya's and Hon. Justice E. Ogolla dated 22.02.2016 and 22.02.2017 respectively.
41. Two plots within Wamunyu Market were given to the 2<sup>nd</sup> family and the said parcels of land were sold by the 3<sup>rd</sup> petitioner/respondent herein, while his deceased father had before his death sold Plot 43 Wamunyu to one Mr. Kathambwa. In the same area, the 2<sup>nd</sup> family was given Seventeen (17) acres and they sent a surveyor who came and demarcated the parcel of land. His family ( 3<sup>rd</sup> family ) had



no objection to them occupying the said parcel of land or any other property given to them as part of their estate share. He reiterated that he had no problem with the protestor buying land from the 2<sup>nd</sup> family, but his issue was that on the ground the protestor wanted to take possession of land which belong to the first family.

42. PW2 Alice Nzisa Mbolu stated that she was a daughter of the deceased and her mother was Sabina Koki Mbalu (2<sup>nd</sup> wife). She knew the objector and confirmed that she was married to her mum under kamba tradition (women-to-women marriage) and the objector's children were considered to be her mother's children. It was not true that the grant herein had been procured by way of fraud as they had sat as a family and agreed on the administration and distribution of the entire estate.
43. Concerning the share they received from the estate (2<sup>nd</sup> family share), she had ensured that the same was distributed equally between her and the Objector's family. This fact too was captured in the consent on distribution dated 12.12.2019, filed in court. Further, the Objector and her children resided on her share/portion of land, which he was not interested in, and had not disturbed and/or interfered with their possession thereof. She had a daughter known as Elizabeth Zauni Mbalu, and it was not true that she wanted all shares of the 2<sup>nd</sup> house to go to her daughter. She reiterated that the objector was entitled to equal distribution of the 2<sup>nd</sup> family share in the estate, and on her part, she was at peace with how distribution had been effected. Likewise, the Objector too had not interfered with her share of estate property.
44. PW3 further stated that she was aware that after the distribution of the estate had been effected, the protestor had bought 30 acres of land from her and the Objector but had only paid for 22 acres. The problem that arose was that the portion sold to him belonged to the 1<sup>st</sup> family, but personally, she did not have any problem if the protestor was given the portion of land he had bought.
45. Upon cross-examination by the protestor's advocate, PW2 confirmed that each family got a share of land where they had physically settled and by the time a portion of the suit was sold to the protestor, the families had already shared out their portion and each family knew the boundaries of their parcels of land. Be that as it may, the portion of land sold to the protestor belonged to the 1<sup>st</sup> family. What had triggered this sale was that the objector's son had been arrested and was given high bond terms, which they needed to raise and that is why they decided to dispose of part of their share of Militini land to the Protestor.
46. As per the confirmed grant dated 21.05.2020, Militani farm L.R no. 11931/27 measured 277 acres. The 1<sup>st</sup> family was given 28 acres with waterfront, 2<sup>nd</sup> family was given 72 acres with waterfront. Previously, under the initial grant issued on 17.12. 2013 each family had been located 50 acres each with water resources. This was subsequently reviewed by the consent file in court dated 12.12.2019, which indicated that the first family would get 28 acres of land, while the 2<sup>nd</sup> family would get 72 acres of land with water resources. Despite agreeing in court, they did not get their portion on the ground as the 1<sup>st</sup> family encroached on their share, thereby causing this dispute. Her position was that the Protestor be given land which had a waterfront.
47. Upon, further cross-examination by the objector's advocate, she reaffirmed that the Objector had been married to her mum and her children were part of their family. She also confirmed that the deceased went and paid dowry "Ntheo" for the Objector. She was referred to the court Ruling of 22.02.2016 by Hon L.J Nyamweya and she confirmed that the Honourable Judge had directed that all of the Objector's children be included as beneficiaries to the estate. She reiterated that she was not opposed to equal distribution of the estate so long as every family could get their rightful share. She was also shown the Objector's signature appended on the family meeting minutes of 09.03.2020, where the



- family agreed to appoint Mr Mutuku Mbithi Advocate as their family advocate, and the objector's signature in the distribution consent forms and she opined that the said signatures differed.
48. In re-examination PW2 confirmed that the Objector's son (Fredrick Kyalo) had been arrested for land fraud and taken to court in Nairobi and that's why they had to sell land to the protestor to help secure his release. She also confirmed that her father had paid dowry of the Objector after her mother had died and that was normal.
  49. PW3 John Nzunza Mbalu testified that he was a son of the deceased from the 1<sup>st</sup> house and was also the 2<sup>nd</sup> administrator herein. He relied on his Replying Affidavit filed in opposition to the Objection and produced documents listed on his list of documents as exhibits to support his case. He denied forging the object's signature during confirmation of grant proceedings and it was to be noted that no complainant had been filed before the police or DCI in that respect. It was also not true that the 3<sup>rd</sup> Respondent had taken the Objector's share of the property bequeathed to the 2<sup>nd</sup> house. To his knowledge, the 3<sup>rd</sup> Respondent had shared the 2<sup>nd</sup> house portion of the estate equally with the Objector.
  50. He maintained that they had distributed the Estate as per the confirmed grant dated 21.05.2020, and to his mind, the same was fair and equitable as the 1<sup>st</sup> house got 474 acres of land, the 2<sup>nd</sup> house got 518 acres of land, while the 3<sup>rd</sup> house got 496 acres of land. Going by the acreage received, the 2<sup>nd</sup> house had gotten the largest share of the estate, which the 3<sup>rd</sup> Respondent and Objector shared equally. It was also his observation that the objector and 3<sup>rd</sup> Respondent had sold most of their land way before distribution was effected and the disputes arising herein were being fueled by various purchasers who were sponsoring frivolous objections to prevent sub-division of the land.
  51. As an administrator of the estate, he had not sold any parcel of land, but the 2<sup>nd</sup> family had sold their property in Nairobi (L.R No 209/2820/29), Plots 55 Wamunyu Market had been bequeathed to the 2<sup>nd</sup> house but Plot 43 Wamunyu was not part of the Estate, Muthetheni/Ngumbu/82 & 155 also did not belong to the 2<sup>nd</sup> house, but property known as Muthethini/Ngamba/164 was subdivided equally amongst the three households and each family received 17.709 acres of land
  52. PW3 further confirmed that the Objector was married by his stepmother "Selina Koki" and strictly speaking she was not the deceased wife but be that as it may, she was still entitled to an equal share of the 518 acres of land, which the 2<sup>nd</sup> family had received and he had no issue whatsoever as to how they divided their share. He also knew that the protestor had bought land from the 2<sup>nd</sup> family but the problem was that where they had purported to sell to him belonged to the 1<sup>st</sup> house and he should have been given his portion of land within the 2<sup>nd</sup> house share. The waterfront was already subdivided and demarcated. He also urged the court to note that the Objector's son Fredrick Kyalo had been arrested for attempting to murder him and was charged at Thika Law Courts. Further, the 2<sup>nd</sup> family had a family property in Nairobi which was being managed by the Objector's daughter (Florence) for their benefit.
  53. Upon cross-examination by the protestor's advocate he confirmed that when the protestor was shown the physical land he was buying, he was not present as it was the 3<sup>rd</sup> Respondent/Petitioner and Objector who were selling land to him, but they should have should confirmed which portion of land they had sold to the protestor to avoid the dispute arising.
  54. Upon further cross-examination by the objector's counsel PW3 confirmed that the Objector and her children had a right to benefit from the estate and would get their share from the 2<sup>nd</sup> house because the Objector was married by his stepmother 'Selina Koki' under Kamba traditional woman to woman marriage. He was referred to the earlier Ruling by Hon. L.J Nyamweya and Hon. Justice Ogolla both



of whom had directed that the objector's children be listed/included as beneficiaries and confirmed that he was okay with that proportion as long as they got their share from the 2<sup>nd</sup> house.

55. Plot 43 Wamunyu was registered under his name for the reason that the Objector had failed to pay her Advocates fee and she had sold this plot to him to raise money, while Plot 55 Wamunyu was registered under the name of Naomi Nzambali who had bought the said plot from his deceased father before he died. It was not true that she was his proxy nor had he any claim to the said parcel of land. PW3 also confirmed that he had no interest in the Nairobi land but it should be jointly owned by the 3<sup>rd</sup> Respondent and the objector in equal shares as it belonged to the 2<sup>nd</sup> family.
56. Further PW3 confirmed that on 09.03.2020 they had met as a family at Kithimani market and later during a separate family meeting held on 12.12.2019 they consented to the distribution of the estate property, which consent was signed by all parties including the Objector. A comparison of the objector's signature in the minutes of 09.03.2020 and 12.12.2019 differed but as far as he was concerned it was the objector who signed both documents as probably had two signatures. He reiterated that the objector was not forced to sign the consent dated 12.12.2019 nor did they forge her signature.
57. In re-examination, PW3 confirmed the Objector signed the consent attached to the summons for confirmation of grant, and at no time had she made any report to the DCI or police that her signature was forged. The Objector and her children were beneficiaries of the estate under the 2<sup>nd</sup> house and their interest had been catered for. He also had no problem with the protestor getting the property he bought from the 2<sup>nd</sup> family as long as they did not encroach onto the 1<sup>st</sup> family's portion of land.

### **C. Determination**

58. I have considered all the pleadings filed concerning the protest and summons for revocation of grant dated 1<sup>st</sup> October 2020, the documents admitted into evidence, the previous proceedings held herein, and submissions filed by the parties in support and opposition to the aforesaid pleadings. While the parties went to great lengths to defend their respective position, which cannot be faulted, the issues that arise, are relatively straightforward;
- (a) Whether the Protestor has established that he has a valid claim to a portion of land measuring 30 acres with water resources, being part of L.R. No Militani/11931/27 sold to him by the Objector and the 3<sup>rd</sup> petitioner/respondent herein and whether the same should be hived off and given to him.
  - (b) Whether the Objector has established proper grounds under Section 76 of the Succession Act, to warrant cancellation of the Grant of Letters of Administration issued to DAVID NDAMBO MBALU, JOHN NZUNZA MBALU & ALICE NZISA MBALU issued on the 22<sup>nd</sup> May 2020 be revoked.

### **A. The Protest**

59. The protestor, vide his Affidavit of Protest dated 20<sup>th</sup> November 2020, explained at length why he was entitled to get 30 acres of land being part of L.R No Militani/11931/27, having bought it from the deceased 2<sup>nd</sup> family, whose members included the 3<sup>rd</sup> respondent, the Objector, and her children. His evidence was corroborated by his wife PW2 Eunice Wanjiru Njenga, the objector, her son Fredrick Mbalu Fredrick (OW6, the objector's daughter Florence Mthenya Mbaki (OW7), who all confirmed that the Protestor had indeed bought the portion of land claimed and was entitled to quiet and peaceful possession thereof.



60. All the respondents (PW1 to PW3) too confirmed the protestor's contention, that he had bought land from the deceased 2<sup>nd</sup> family, and were in principle not opposed to the said sale. Their contention was that the portion pointed out/ given to the protestor on the ground belonged to the deceased 1<sup>st</sup> family and therefore, he needed to be given space within the deceased, 2<sup>nd</sup> family portion.
61. Further evidence also confirmed that initially when the certificate of grant was issued on 17.12.2013, each family had been allocated 50 acres, with waterfront of parcel L.R No Militini Farm L.R No 11931/27. This was subsequently reviewed under the consent filed in court dated 12.12. 2019, and the 1<sup>st</sup> family portion was reduced to 28 acres of land with water resources, while the acreage of the 2<sup>nd</sup> family increased to 72 acres with water resources. According to the uncontroverted evidence of OW7 Florence Nthenya, this increase in acreage was occasioned by the 2<sup>nd</sup> family ceding their interest in Plot 134 Thika town to the 1<sup>st</sup> family, and in exchange, they got an extra 22 acres with waterfront in parcel L.R No Militini Farm L.R No 11931/27.
62. PW1 to PW3 all did contend that their only issue, with the protestor, was that the portion of land he was shown on the ground, belonged to the 1<sup>st</sup> family and that is why PW3, violently chased the protester away from the said parcel of land. This proposition, may or may not be true, but is a matter, which could simply be resolved by all parties calling in government/private surveyors to demarcate the families' boundaries within the said parcel of land.
63. The 3<sup>rd</sup> respondent and the objector being representatives of the deceased 2<sup>nd</sup> family were bequeathed part of Militini Farm L.R. No 11931/27- initially measuring 50 acres and later increased to measuring 72 acres (with water resource frontage) in both the certificate of confirmation of Grant dated 17<sup>th</sup> December 2013, and the Amended certificate of confirmation of Grant dated 22<sup>nd</sup> May 2020. The land sale agreement dated 12<sup>th</sup> March 2015, is therefore valid having been executed by parties who had the locus to do so.
64. I do find and hold as a fact that the Protestor has indeed proved beyond reasonable doubt that he is entitled to be awarded 30 acres of land with water resources being a portion of L.R No Militini Farm L.R No 11931/27, being land bought from the 2<sup>nd</sup> family of the deceased herein. The Machakos County Government surveyor, in the presence of the parties' private surveyors, will establish boundaries of each of the deceased family portions, within the said parcel of land, and upon demarcation, the petitioner will be bequeathed his portion of 30 acres from the 2<sup>nd</sup> family 72 acres held therein.

## **B. The Objection**

65. After the grant herein had been confirmed, the Objector filed her summons for revocation and annulment of grant dated 1<sup>st</sup> October 2020, seeking to revoke grant issued to DAVID NDAMBO MBALU, JOHN NZUNZA MBALU & ALICE NZISA MBALU on the 22<sup>nd</sup> May 2020. She contended that the same had been obtained fraudulently and through material non-disclosure of all the beneficiaries. She further deponed that her signature to the consent for distribution was forged as she had never signed the said consent form and it was an issue she had taken up with the office of DCIO-Machakos County.
66. She further, faulted the administrators for failing to list her children as beneficiaries of the estate, yet they were children of the deceased. The 3<sup>rd</sup> respondent, Alice Nzisa Mbalu also wanted to disinherit her and take sole control of all the shares given to the 2<sup>nd</sup> family of the deceased, which would be to her loss and detriment, unless revisited. Finally, the objector also did aver that some of the properties allocated to the 1<sup>st</sup> family had already been disposed of to third parties and the alteration done to the



distribution list would leave her exposed and put her at war with third parties, who had bought part of the estate and would demand a refund.

67. The objector in her evidence-in-chief, gave evidence contrary to the pleadings filed. Some of the respondents had become hostile and insisted that she was not a family member, which was not true, but that aside, she was generally satisfied with how the estate was distributed, and did not have a problem with most of the properties given to the 2<sup>nd</sup> family. The parcels of land she had issues with were the parcels of land at Wamunyu, two plots at Matuu, and Plot 52 Muthetheni.
68. OW6, Fredrick Kyalo Mbalu, the objector's son confirmed that they had sold several estate properties and shared proceeds thereof as a family (between the 3<sup>rd</sup> respondent and their family). His only request was that the 2<sup>nd</sup> family be added 50 acres of land. OW7 Florence Nthenya Mbaki, the Objector's daughter, was able to explain her mother's position at length. She confirmed that under the grant confirmed on 22<sup>nd</sup> May 2020, her mother and the 3<sup>rd</sup> respondent had been placed under one family unit. ( the 2<sup>nd</sup> family) initially, after the grant had been confirmed, they did not have a problem but recently her mother had been summoned by the respondent counsel, and they wanted her to renounce part of her share to other parties, which proposition they did not agree with.
69. They had sold several properties to the protestor, one Titus Kisia, and other purchasers, with whom they did not have a problem. Accumulatively, when all the acreage was calculated, the 1<sup>st</sup> family got 474 acres of estate land, the 2<sup>nd</sup> family got 518 acres of estate land and the 3<sup>rd</sup> family got 496.8 acres of estate land. In conclusion, she urged the court to find that their family was entitled to L.R. No 209/2820/29, Plot 6303 Matuu, 52 acres in Muththeni, and they were also entitled to retain 350 acres of land and 72 acres of land with water resources at Militini. She also urged the court to stop the 2<sup>nd</sup> respondent from interfering with their share of the Estate.
70. All the respondents denied the averments pleaded by the objector and in their evidence emphasized that they were not interested in the property bequeathed to the 2<sup>nd</sup> family. It was clear from the grant issued that all of the properties belonging to the said family had been jointly awarded to the 3<sup>rd</sup> respondent and the objector. The 2<sup>nd</sup> respondent further testified that the Objector had sold to him Plot 43 Wamunyu Market, while Plot 55 at the said market was registered under the names of one Naomi Nzambali, who had bought the same from their deceased father.
71. It should also be noted that all the family members who testified confirmed that the Objector was married to Sabina Koki (PW2 Alice Nzisa Mbolu) mother, under Kamba tradition women to women marriage, and the objector's children were considered as her children. PW2, the 2<sup>nd</sup> respondent was categorical that all the property bequeathed to the 2<sup>nd</sup> family was shared equally between her and the Objector family. She had not favored her daughter Elizabeth Zauni Mbalu as alleged.
72. Section 76(a), (b) and (c) of the *Law of Succession Act* provides as hereunder:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;



73. That section provides that a grant of representation may at any time be revoked or annulled as long as the court is satisfied that the facts contemplated under the said section are proved. It is therefore clear that there is no limitation in so far as matters revocation or annulment of grant are concerned. However, it is not in every situation where transgressions are alleged that the grant must be revoked.
74. This position was adopted in the case of *Albert Imbuga Kisigwa vs. Recho Kawai Kisigwa* [2016] eKLR Succession Cause No.158 of 2000, Mwita Where it was held that:-
- “Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”
75. Similarly, in *Re The Estate of the Late Suleman Kusundwa* [1965] EA 247, it was held that:
- “The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased’s property as he was entitled to dispose of by will under the applicable law of inheritance.”
76. This position was also clearly appreciated by Khamoni, J in *Re Estate of Gitau (Deceased)* [2002] 2 KLR 430 where he expressed himself as hereunder:
- “Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the *Law of Succession Act* should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.”
77. Having keenly gone through the responses filed, documents produced, and the evidence of all the parties herein, especially the evidence of , the objector herself, OW6, Fredrick Kyalo Mbalu, the objector's son, OW7 Florence Nthenya Mbaki, the objector’s daughter and all the three petitioners/ respondents, I do find as a fact that the Objector has not established that the proceedings leading to confirmation of grant, were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.
78. It is ironical for the objector to allege that her signature on the consent form was forged, but gave evidence that she was largely satisfied with how the estate property had been distributed. She is proved to be busy selling estate property and enjoying the sweet fruits borne therefrom with her children.



Secondly, the Objector merely alleged that her signature was forged, but did not lead any evidence to prove the same. That allegation therefore remained unproved.

79. OW6 asked that they be awarded an extra 50 acres, while OW7 also confirmed that initially, they had no problem with distribution as done, but that changed when the respondent's advocate wanted the objector to sign off properties assigned to her to third parties. At the end of her evidence, she also listed down the properties to which she believed they were entitled to. It is clear that the Objectors case, though couched as an objection was geared toward having re-distribution of the estate done. As was stated clearly by Khamoni, J in *Re Estate of Gitau (Deceased)* [2002] 2 KLR 430 (Supra)

While section 76 of the *Law of Succession Act* should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only

80. Further accumulatively if the total acreage of each family is considered, the 2<sup>nd</sup> family got a larger share of the estate as compared to the other two families of the deceased and must hold their peace. The only properties which they did make out a case was Plot 55 Wamunyu, which was bequeathed to them but is in the name of one Naomi Nzambili, but the right forum to pursue that interest is in the ELC court.

### **C. Disposition.**

81. Having arrived at the above finding, the orders that commend themselves herein and also considering the court's powers under Section 47 of the *Law of Succession Act*, and Rule 73 of the Probate & Administration rules are as follows;
- a. The protest of SAMUEL KARANG'OI MWANGI filed through his affidavit of protest dated 20th November 2020 succeeds. I do find and hold that the Protestor has a valid and enforceable interest in 30 acres of land with water resources being a portion of L.R No Militini Farm L.R No 11931/27, land bought from the 2<sup>nd</sup> family of the deceased herein and he is awarded the said portion of land, but with a rider that completion of payment of the purchase price will be done as agreed with the 2<sup>nd</sup> family of the deceased.
  - b. The Machakos County Government surveyor is directed within the next 60 days to go and establish the boundaries of each of the deceased family portions, within the said parcel of land,( L.R No Militini Farm L.R No 11931/27), as earlier awarded in this cause and upon demarcation he shall placing permanent beacons to distinguish the boundary of each family.
  - c. The protestor will be bequeathed his portion of 30 acres from the 72 acres held by the deceased 2<sup>nd</sup> family and his portion, will also be hived off and demarcated by placing permanent beacons.
  - d. The Objector and respondents and/or their authorized representatives will be given sufficient notice before this exercise is held. A notice of 10 to 14 days will suffice, and they shall be at liberty to have their private surveyors to be present during this exercise.
  - e. The official notice of this exercise will be served upon the local administration, being the Area chief and assistant chief, plus the OCS of the area police station who shall provide reasonable security during this exercise.
  - f. The Protestor will pay the Machakos Government county surveyor the gazette fee, and reasonable transport expenses to facilitate this process, which amount will be recovered from the outstanding purchase price still unpaid and owned to the 2<sup>nd</sup> family. Further, the official police security fee too will be paid by the Protestor and recovered from the 2<sup>nd</sup> deceased family.



- g. The report of the survey works done shall be filed in this court, within 7 days after the said exercise has been undertaken.
82. The Certificate of confirmation of grant dated 22<sup>nd</sup> May 2020, will be amended in the section dealing with the deceased 2<sup>nd</sup> family share, to include the 30 acres interest of the Protestor in L.R No Militini Farm L.R No 11931/27, with corresponding reduction of the 2<sup>nd</sup> family share from 72 acres to 42 acres.
83. The Objector's summons of revocation of grant dated 1<sup>st</sup> October 2020, lacks merit, and the same is dismissed with no orders as to costs.
84. It would be in the interest of Justice to have distribution effected in this estate and three (3) administrators/respondents are directed to ensure they comply with section 84 of the *law of Succession Act* to ensure sub-division is done and distribution is effected within the next six (6) months.
85. It is so ordered.
86. Mention on 17/2/2025 to confirm compliance.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Team this 11<sup>th</sup> day of November, 2024

In the presence o

Mr. Wandeto for Protestor

Mr. Mutuku for Petitioner/Respondent

Mr. Loki for Objector

Sam/Susan Court Assistant

