



REPUBLIC OF KENYA



**In re Estate of Ayub Mungatia Muguna (Deceased) (Succession Cause
570 of 2014) [2024] KEHC 15463 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 570 OF 2014
EM MURIITHI, J
DECEMBER 5, 2024**

IN THE MATTER OF THE ESTATE OF AYUB MUNGATIA MUGUNA (DECEASED)

BETWEEN

EDWIN KOOME MUNGATIA PETITIONER

AND

DAVID K MUGUNA OBJECTOR

JUDGMENT

1. Ayub Mungatia Muguna ('the deceased') died on 16th October, 2012 survived by the following beneficiaries:-
 - a) Magdaline Mukonyanga - widow
 - b) Alice Gakii Munungi - daughter
 - c) Patrick Nteere Mungatia - son
 - d) Dominic Mugambi Mungatia - son
 - e) Edwin Koome Mungatia - son
2. The deceased had 7 parcels of land namely Nyaki/Mulathankari/15, Nyaki/Mulathankari/2203, Nyaki/Thuura/166, Nyaki/Giaki/2372, Nyaki/Giaki/1374, Thimangiri Market Plot NO. 31A and Thimangiri Market Plot NO. 31B.
3. The petitioner was issued with grant of letters of administration intestate on 18/1/2015. He thereafter filed summons for confirmation of grant on 9/10/2015 where at paragraph 5 of his affidavit in support he has proposed how the estate properties should be distributed.



4. In his affidavit of protest dated 2/12/2015, the protestor avers that the deceased had expressed to him that Nyaki/Giaki/2373, 2374 and 2375 ought to devolve to George Murimi S. Muguna, Douglas Kathunkumi Muguna and Geoffrey Kinyua Muguna respectively. Their father (deceased) had transferred all his properties to their brother, the deceased herein, to hold in trust for himself and them. This cause was filed secretly and some of the properties have been left out. He, the deceased herein, Patrick Nteere, Dominic Mungatia contributed funds towards the purchase of L.R No. Nyaki/Mulathankari/2203, which was registered in the name of the deceased. The deceased passed away before he could transfer to him his 48% share of L.R No. Nyaki/Mulathankari/2203. Prior to his death, the deceased had transferred to him L.R No. Nyaki/Giaki/2371 but he had not transferred Nyaki/Giaki/2373, 2374 and 2374 to his other brothers. The deceased was their eldest brother who was like a father to them and their deceased father had entrusted all his property to him to hold in trust for them. He repaid a loan the deceased herein had taken with NtimaNyakiru Sacco, which money was to be refunded after the sale of the shares left by the deceased.

Statements

5. The protestor and his brothers Geoffrey Kinyua Muguna, George Murimi Muguna and Simon Kinoti and their cousin Benson Mwenda Kathunkumi filed statements dated 23/4/2016 rehashing the averments in the affidavit of protest.
6. In his statements dated 22/8/2016 and 14/6/2021, Benson Kirimi Nteere, a grand son of the deceased and a son to Patrick Nteere contends that prior to his death, the deceased had given him L.R No. Nyaki/Giaki/2372 where he resides. The petitioner, despite knowing that he was given the said land by the deceased, has proposed that the same be given to his father Patrick Nteere. His father has inherited other pieces of land from his grandfather, and he stands to suffer great loss unless that land is given to him.
7. The petitioner and his brothers Dominic Mugambi Mung'atia and Patrick Nteere filed their statements dated 11/6/2021 in support of the summons for confirmation of grant. They urge that the deceased was their eldest brother and he had subdivided their grandfather's land to his brothers. Three of their brothers have title deeds for their parcels of land and the deceased bought L.R No. Nyaki/Mulathankari/2203 from Mr. Joshua. They have no problem repaying the purported debt of Ksh. 58,000 if the same is proved. According to the petitioner, the deceased called his children and gave his will verbally which they all accepted. Patrick Nteere maintains that he only allowed Benson Nteere to cultivate and stay on his father's land on humanitarian grounds, despite the fact that he has not been biologically proved to be his son.
8. In rejoinder, Mary Mwitiabi filed her statement dated 22/6/2021 affirming that she and Patrick Nteere are the parents to Benson Kirimi Nteere. She was shown by Simon Kinoti L.R No. Nyaki/Giaki/2372 measuring about 1½ acres which was given to Benson Kirimi by the deceased herein. In 2014, they constructed a house and have been living there ever since.

Oral Evidence

9. OW1 David K. Muguna, the objector/protestor herein testified that, "I refer to my statement dated 23.4.2016. I object to the grant because when my nephew filed the petition they did not inform the members of the family. We paid for title deeds. At time of his death, our father had not transferred to all our brothers. George S. Murimi, Douglas Kathunkumi and Geoffrey Kinyua did get their title deeds. My said brothers should have been included as beneficiaries to the said estate. My said brothers did not have money to pay for processing of the title deeds. If the petitioner had not petitioned in secret I would have paid for the title deeds for my brothers. The three parcels of lands Nyaki/Giaki/2373, 2374 and



2375 were not included in the petition. I therefore brought an objection to the petition so that all the properties are included and the beneficiaries receive their share. There is a shamba I had purchased with my brother but in the petition, I was not included. The land was distributed to (2) people Dominic Mugambi and Patrick Nteere. I claim my share in this parcel of land L.R Mulathankari 2203. I had never been included in the petition for my share in the parcel of land. My brother also had shares in various companies and none of their shares were included. When I asked, the petitioners said it was a difficult task to follow on the shares. I offered to follow up on the shares. I do not wish the shares gets lost. I do not claim any interest in the shares but it should appear in the petition. I objected because my brother had a loan for Ntima Nyakiro Sacco Ksh. 62,000/= (shares 626 shares at 100/=). It was said that they had to pay of the loan before the shares could be taken. There was an attempt to recover assets from the home of my brother on the account of the loan. I paid 18,000/=, 14,000 for the loan and 4,000/= charges. I paid other money subsequently by cheque, Mpesa totaling 58,000/=. I claim the said amount from the estate of my brother. I can supply the documents herein, I pray to supply the statements. I have statement of account from Equity Bank for the period 2006-2008. Account belongs to Ayub Muguna. The statement shows that I deposited the money at the end of the purchase of the land. The sum I deposited was Kshs. 120,000/= on 25.1.2006; (8,000/=); 6.3.2006, Kshs. 6,000/=; 11.5.2006, (7,000/=); 28.11.2006 of Kshs. 40,000/=; 8.3.2007, of Kshs. 15,000/= 23.6.2008, of Kshs. 25,000/=. This totals 101,000/=. There were other deposits that I made but did not relate to the purchase of the land. I made a deposit of 10,000/= with my late brother's account at KCB and I had given him Kshs. 10,000/= through my brother Simon Kinoti Muguna who testified in this court. The total money is 121,000/=. I have not been able to trace the payment of the balance of Kshs. 9,000/= to make a total of Kshs. 130,000/= which I claim to have paid for the parcel of land.”

10. On cross examination, he stated that, “My (3) brothers and I who have title deeds got their title deeds 4.9.2003. The deceased died 16.10.2012. From 2003 is it time the (3) brothers refused to pay for title processing? I am aware that my brother called the other (3) brothers and his wife and said that upon his death, it was for the (3) brothers to take out succession proceedings to get the parcels of land. There was an agreement dated 13.10.2012 three days before my brother died on 16.10.2012. He signed by thumb printing using shoe polish. I was not at Meru but I was given the original former to retain. I was given by one Simon Kinoti. (The agreement of 13.10.2021 is filed together with the petition). [It is put to witness that the agreement was written by the deceased because the brothers had refused to take the title deeds and the purpose of the agreement was to record the events]. The petitioners did not call us to present the petition together. I was not aware of agreement between Joshua and Ayub Mungatia on parcel of land 2203. I have never seen the agreement. I was not part of the agreement because sale was to Ayub. I contributed to the purchase price. The shamba was Kshs. 270,000/= and my brother told me that he had already raised 100,000/=. He said he could pay 40,000/= and he was lacking 13,000/=. I am not aware the shamba cost 280,000/=. I only stated what my brother told me. Each quarter was 90,000/=. Ksh. 58,000/=. It was the amount of money that I used to save the assets of the deceased from armatures on account of loan from Ntima Nyakiro Sacco. Where were the other deposits not related to the purchase. I made the deposits for orange money directly from my shop to the equity bank. The deposits are as follows:- 19.5.2012 of 5,000/= and this is when he was unwell. 7.2.2012 of 10,000/= to assist in medication. 9.11.2011 of 5,000/= medication. I also sent money to the petitioner to help in taking care of my sick brother.”
11. In re-examination, he stated that, “I was the one who processed the title deed for parcel No. 2203. I authorized him to put his name. I was the ongoing shareholder in the purchase of the shamba. I sent him the money for the processing of title. During the period from 2003 – 2008 there was no other present other than the land registrar. There was an earlier in 1997 where there was a piece of land which



was being sold and he asked to buy it and I sent Kshs. 300,000/= and we bought the land and processed the title and brought to me in Nakuru in 1997.”

12. OW2 George Murimi Muguna testified that, “I filed a witness statement dated 23.4.2016. I wish to adopt my statement as my evidence before the court.”
13. On cross examination, he stated that, “It is true that the deceased died before giving my title deed. We were (2) brothers. Some have title deeds. They paid the processing of the titles. (3) of us remained without titles because we were not able to pay for titles. I have lived on the land since 1972. You have not claimed any interest in parcel of land that I occupy. I am aware there was an agreement between the deceased, his wife and my brothers – Josphat Gitonga, Simon Kinoti Muguna and Geoffrey Kinyua. I was not at the meeting. In 2003, my brother got a title deed. It was because we did not get money to pay title deeds. It is not true that we refused to pay. I am aware that the deceased told you that we were troublesome and had refused to pay the title. It was many years before the deceased died from 2003 when the others processed their titles. I did not get to know how much money that I had been asked for money to process title for the land.”
14. In re-examination, he stated that, “We went to the Board on the shamba. Two brothers were ready to pay for the title deeds. Three of us did not have the money to pay for processing of titles. I got to know the deceased died after only a month of sickness. We had no fear about his death.”
15. OW3 Geoffrey Kinyua Muguna testified that, “I have filed a witness statement dated 23.4.2016. I wish the court to adopt this statement as my evidence before the court. I wish to add that I used to live with Ayub Mungatia from 2006 up to 2016 and David Muguna used to come to his place to discuss the purchase of land and after the visit Ayub told me that they were discussing the payment of money. Although he did not tell me how much the money was he told it was money relating to proceed of land.”
16. On cross examination, he stated that, “Ayub told me the money was for payment of shamba. It was not a debt. It was for payment of purchase price for a shamba. Ayub told me that they were buying a piece of land. I lived on a shamba 2375 for 20 years. I inherited from our father. No one has ever come to claim my parcel of land. We have no title deeds. I did not have money for processing of the titles. I had children in school. I am not sure but I heard it was about 10,000/= required for processing of the title deed. I was not able to pay as I had children in school. I came to see my brother in 2006 and I left in 2016. I used to get money from Ayub. My brother Ayub helped me paying school fees. I am aware that my brothers Ayub and David used to help me paying of school fees. I did not get money from Ayub. It was going to paying of school fees for my children. I did not get the money cash. It was going for payment of school fees. When Ayub was unable to pay he called David and they would help me pay the school fees. You used to come and go to Gachia shamba to cultivate. The Gachia shamba had been bought by Ayub. You did not claim any parcel of land. There used to be a family gathering. Has there been any meeting between the children of Ayub and my brothers? No. We only meeting with my brothers when Ayub was alive.”
17. In re-examination, he stated that, “Ayub was supposed to distribute the land to us. Between us, there were those who paid for title processing and those who were not able to pay for the processing fees.”
18. OW4 Simon Kinoti testified that, “I have filed a witness statement. It is dated 23.4.2016. I pray be adopted. I would like to say something about my family. Ayub Mungatia is the 1st born of my family. I am the 2nd born. He was elder than me by 8 years. He completed his schooling and for a job while I was still a child. When I went to school, he stayed with me and started educating me. There was cooperation in his family. He further started to educate everybody in my family without the fee. I got a job and started helping him. Edwin Koome is the last born in the family of Ayub Mungatia and he is named



after me. David K. Muguna is the last born in my family. Edwin is our nephew. We were cooperating very much. About the shamba which was being bought by the children of Ayub Mungatia and David Muguna, Ayub was very much concerned about me because I was second to him and when he had something in his family he would come to me and we would discuss. We would spend a whole day and night discussing the family matters where we each visited each other. On one of his discussions, it was about the shamba that he was buying with his (3) sons. The sons were Mugambi, Koome and Nteere. I knew that they were buying the land. One time he sent for me to go to his home. When I went there, he told me that he was calling me to tell me that the owner of the shamba was planning to change his name and sell his land to someone else because both of the children and his father were unable to raise the balance of the purchase price. He wanted me to help him to pay the balance of the purchase price. By this time, I had children in school so we had to find some way of getting money to save the land. We agree about David Muguna who had no children at school at the time. We telephoned David Muguna to tell him so. We got him in Nairobi. At the time it was right as we told him of the balance. He agreed. He paid Kshs. 120,000/=. I did not know whether there were other balances until my brother Ayub told me that the balance had not been cleared. Afterwards, there was a time I was going to Nakuru to visit David Muguna who was living with my son at the time. Before I went I happened to pass by my brother's home Ayub to tell him that I was going there. When I was coming back from Nakuru, Mr. David Muguna gave me Kshs. 10,000/= and told me that was the balance that remained. When I went to Meru, before I went to my home, I took the money to my brother Ayub. When I went to teach at Garbatura, I took two of Ayub's sons to stay with me while studying at the school. This is to show our cooperation. When David got a job at Nakuru, he took (3) of Ayub's sons and went with them to Nakuru to look for a job and he was able to get jobs for all of them. I also would like to say that my father's property. My father had shambas but he had no title deeds. All titles were registered in my elder brother's name in trust for us so that he could share to us when we grow up. I am aware of a will by my brother Ayub. It is a will dated 13.10.2010. I wish to produce it. It is a photocopy. It is written in Kimeru. It says upon his death his brothers will pay succession fees for processing of title deeds. I asked him why his brothers should pay and he said that those who had not paid money for the transfer of titles were the ones to pay the fees so that they should be included in the succession. The son Edwin went ahead with his succession without the knowledge of the brothers who had not paid for the title processing. This was wrong. By the time David got to know there was succession going on. He objected in this court and we were advised to go and discuss and to how we could write another statement. All of us about (13) people agreed that David will write his succession case and take to them for signing. When he took the statements to the petitioner and his brother, he declined to sign. My brother did not tell him that they would not sign. They went on with case without telling him they would not sign. We consider that the matter had already been concluded by agreement. I see that this case could have been finalized at the beginning if there was good faith. It was taken since Ayub died in 2012. There is something wrong going on."

19. On cross examination, he stated that, "It is true that David paid Kshs. 130,000/=. Ayub paid 140,000/=. Total was 270,000/. I was not there when the money was being given and I do not know how much money he gave them but I know the shamba was for Kshs. 270,000/=. I am not aware of agreement between Ayub and the purchaser. There were (3) brothers who got title deeds. (3) of my brothers did not get title deeds of the places where they lived. The title deeds were not being given on the same date. Our title deeds were not of the same date. As he was transferring title to us, he died before he transferred to all the brothers. I got my title deed. I do not remember when I got my title. Was it deliberate to refuse to pay for title deeds? Ayub's sons who were buying the land was you and from (2) brothers. That is what he told me. No you have proof of payment of Kshs. 120,000/=. It will be produced. (3) sons of Ayub were taken to Nakuru by David? It was you, Koome and Nteere. David even got you a job. Ayub had seen that you would sideline his brothers in the succession. It is true that we did not know that you



had filed the succession. The three parcels of land belonging to the (3) brothers which had not been given titles were not included.”

20. In re-examination, he stated that, “Ayub called me when he was unwell. I am the one who wrote the will. There were witnesses. He told me that he wanted to do the will and he asked me to call the others. I wrote the will by my own hand as one hand was unwell. I wrote the will. I was with Ayub’s wife Magdaline Nyaga, Joseph Gitonga, my brother and Geoffrey Kinyua. All of them signed the will. My brother used a fingerprint as he was not able to sign.”
21. PW1 Edwin Koome Mungatia and the petitioner herein testified that, “We do not agree that the parcel No. Nyaki/2203 which is registered in my late father’s name belongs to Mr. David Muguna. We shall seek to produce the agreement of sale before the vendor Joshua and my late father Ayub. It did not feature my name David Muguna. It is dated 2007. The objector said the land cost 270,000/= while the agreement read 280,000/=. There is a difference of 10,000/=. Being an equal partner in the purchase, he should be aware of the cost of the land. I was not part and parcel of purchase of the land. It was between my two siblings. Dominic Mugambi, Patrick Nteere and our father Ayub Mungatia. There are (3) parcels of land which are still in objection. These are Nyaki/Giaki. 2375, 2374 and 2373. It was disputed that they should have involved my uncles in the discussion and my late father. They have lived on the parcels for over 20 years and (3) days to my father’s demise they had a written agreement that they should pursue their title if my father dies. I did not carry this document. I pray to bring it later. I produce the original. My late father had told us verbally how to distribute the estate. There was no written will. When my uncles (2) years after demise of my father there is no time they told us about their interest. It is only after we filed these proceedings. On asking him they gave different versions. They said one of them said they were to pay Kshs. 10,000/= each while the other gave the figure of 3,000/=. That nobody...some mischief in them. Our father had told us that he knew his brothers well as they had deliberately failed to pay the small amount of Kshs. 3,000/=. They had refused to pay. We could not involve them in the succession because of the agreement of three days before the demise of my father. The objector said that he was required to pay for the (3) brothers to get title deeds. He should have paid money before as he was aware. There were shares that belonged to my late father for several companies. After demise of my father. My late mother sat us down and told us of the shares which my brother tried unsuccessfully tried to follow. We agreed to let go of the shares as we went on to proceed with the succession. Parcel No. 2203 and the claim of my three brothers is the dispute before the court. We have no problem refunding the money. We say so because the land is registered in the sole name of our father.”
22. On cross examination, he stated that, “Kshs. 58,000/= to Nyakiro Cooperative Society to bury my father. It is true that he paid the money which to be refunded the money to you. I did not object to the refund. It is only that it came when the matter was in court. I am ready to do so. It is not true that you took me in class 8. It is my father who sought your assistance to get a school for me. I might have written a letter of thank you for many things that you have done for me. You even assisted me when I finished my form 4. We have no money with the objector and his brothers. Were you aware when the shamba was being bought? I was not part of the shamba registration my brothers were talking about. They did not mention you anywhere. I have just heard of his evidence in court. That your mother called me to come and read the will? I cannot confirm that you were called to read the will. There was no written will. We only had a verbal will. I am aware of you eventually coming to our home. There is a document that you remitted to me that you paid Kshs. 50,000/= to bail out my brother. I do not know what it was meant for. I am not aware of any payment from auctioneers. I do not know that you called me any given time for any auctioneer problem at home. Payment of Kshs. 10,000/=, 3,000/= for processing of title? Does it mean that they should not succession because they were unable to raise the money. They are not beneficiaries. We did not include them because the parcel of land in which they were to get



their shares did not feature in the land. It is only Nyaki/Giaki/2372 that was included. Are you aware your father held the land in trust for his brothers? Yes, I am aware, my dad held the land upon trust. It is only (3) who had not obtained their title deeds but their subdivisions. The parcels belonging to the brothers were not included in the petitioner for grant. They should not have been included because there was an agreement between the brothers and they are already living on the land. It is only the title deeds that were to be obtained. I am not aware that my father should have transferred to them. I saw the document Exh No. 1 immediately after the death of my father. Why did you file the succession yet it was the brothers who were supposed to file? The agreement was for pursuit of title deeds not succession of the estate of my father. It was the brothers to file succession. I do not agree that it was the brothers who should have instituted the succession proceedings. My father told us that he found some mischief in his brothers. He found that they were not paying money for processing of title deeds. That is why he wanted the brothers to have the document so that they should not disturb us later. There is no will in the matter. You did not send me Kshs. 10,000/= to take my father to hospital. No, you did not send me any money on the morning when my father was taken to hospital. It is not true that I called you. I have never seen any will. If you wrote any will, I cannot answer further. It was my brother who went to follow up on the shares. We found he could not access the shares. We resolved that we do leave the shares. We agreed that it had become cumbersome to follow the shares without the succession ground. We are not interested in the shares. Reimbursement of the money in purchase? If you prove that the money deposited into our father's account, we shall reimburse. If you prove to the court that it was for the purchase of the land. The same we shall refund Kshs. 58,000/= for treating out our late mother. Contribution for purchase of land by two brothers? Why did your father not put his land in the names of your brothers who were paying? We were given a bunch of titles belonging to our father. It had the name of our father. I was however aware that my father and (2) brothers were the ones who were buying the land. I did not know any contribution by yourself. Kshs. 160,000/= to help in extend of the witness. The money was refunded back to you. There is no written agreement. It is not true that I lived with you in 1997 and 1998 in Kakamega and Nakuru."

23. In re-examination, he stated that, "I wish to clarify that we have not been at loggerheads with my siblings and our uncles. The only dispute is the piece of land which is registered in the name of my father in which the objector. Our father did not tell us of any partnership. Our uncle did not tell us of his claim until after (3) years. I feel that he has no share in the property."
24. PW2 Patrick Nteere Mungatia adopted his statement dated 11.6.2021 as his evidence in chief. He further testified that, "I am the eldest son of the deceased. It is not true that we filed the succession secretly. I gave the papers to Mr. Muguna who perused them and he saw what we were doing. Parcel No. Nyaki/Mulathankari/2203. It is not true that the objector bought the land in partnership with my father. The idea of buying the land was mine. I am the one who gave my father the ideas to buy because we required a plot of land to construct a house for me and my younger brother Dominic Mugambi Mungatia. My father agreed and we looked for the land and we signed agreement dated 30.5.2003. We agreed and down payment of the transaction at 50,000/= was paid as commitment fee. I am the one who paid the 50,000/=. We paid for the balance later with my brother Dominic Mugambi and later full payment and issue of title deed which was made in the name of my father. My uncles claim of partnership is not true. He was not involved in the transaction in any way. Plot Nyaki/Giaki/2372. The land belonged to my grandfather and my father is the one who was involved in showing the land to his brothers. As children of the deceased, we could include his asset in the succession of our father. Benson Kirimi 2nd objector remained in the land of our father without our permission. I pray that the court issues orders for his eviction as he lives on the land illegally."
25. On cross examination, he stated that, "I gave you the succession papers at Nairobi. David, you compete buying the shamba? No. We inherited with my brother. My father also contributed 80,000/=. I do not



know how much my brother Dominic paid. I have not indicated this information in the statement. I did not indicate the information because I was only giving evidence as a witness. The shamba is my father's estate. We pray to inherit the asset. My father did not put our names as owners of the land as all the other lands are in his name. My brother also contributed in purchasing. He is entitled to inherit. Your father's land is in this E & L Court. It is included in it because our father had married. We only sought the portion of our father not the portion of our uncles. [Title deeds for the shamba is in your father's name?] We did not include the lands belonging to our grandfather. We only were interested with the share belonging to our father. [Copy of your father's will]. Agreement with the deceased's brothers to initiate transfer process. I did not understand the deceased's wish that it was his brothers who had no titles to follow the succession process. We started the transfer process because we wanted to inherit our father's share. Those who did not get their titles should have remained their shares. [Loan from your father] I did not know that you had loaned my father any money. [Did I not call you and told you that there were auctioneers at your home] I did not see call. [Shares in the company – Why did you leave them out?] It is my brother who did the succession. I do not know about the shares. The shares were supposed to be included. I would like to get proceeds of the deceased's shares. I gave you all the papers for succession. Why did you not say some of the shares had not been included. There are included assets. We did not know about the shares.”

Submissions

26. The petitioner urges that he had no obligation to inform his late father's brothers that he was filing this cause. He faults the objector/protestor for failing to claim any part of Nyaki/Mulathankari/2203 during the lifetime of the deceased, and thus the protest ought to be dismissed.
27. The objector/protestor urges that he contributed Ksh.130,000 to the purchase of L.R No. Nyaki/Mulathankari/2203 and he is therefore entitled to a 48% share thereof.

Analysis and Determination

28. The parties herein are in agreement that L.R Nos. Nyaki/Giaki/2371, 2373, 2374 and 2375 do not form part of the estate of the deceased, because they belong to the objector, George Murimi S. Muguna, Douglas Kathunkumi Muguna and Geoffrey Kinyua Muguna respectively. The gravamen of the objector's protest is L.R Nyaki/Mulathankari/2203, which he allegedly purchased together with the deceased, Patrick Nteere Mungatia and Dominic Mugambi Mungatia. The objector urges that he contributed Ksh. 130,000 towards the purchase of the said property and he is therefore entitled to 48% share thereof. The petitioner is adamant that the said parcel wholly belongs to his deceased father, and it should be distributed only to his children.
29. The objector/protestor testified that, “...I therefore brought an objection to the petition so that all the properties are included and the beneficiaries receive their share. There is a shamba I had purchased with my brother but in the petition, I was not included. The land was distributed to (2) people Dominic Mugambi and Patrick Nteere. I claim my share in this parcel of land L.R Mulathankari 2203. I had never been included in the petition for my share in the parcel of land...I objected because my brother had a loan for Ntima Nyakiro Sacco Ksh. 62,000/= (shares 626 shares at 100/=). It was said that they had to pay of the loan before the shares could be taken. There was an attempt to recover assets from the home of my brother on the account of the loan. I paid 18,000/=, 14,000 for the loan and 4,000/= charges. I paid other money subsequently by cheque, Mpesa totaling 58,000/=. I claim the said amount from the estate of my brother...The statement shows that I deposited the money at the end of the purchase of the land. The sum I deposited was Kshs. 120,000/= on 25.1.2006; (8,000/=); 6.3.2006, Kshs. 6,000/=; 11.5.2006, (7,000/=); 28.11.2006 of Kshs. 40,000/=; 8.3.2007, of Kshs. 15,000/= 23.6.2008, of Kshs. 25,000/=. This totals 101,000/=. There were other deposits that I made



- but did not relate to the purchase of the land. I made a deposit of 10,000/= with my late brother's account at KCB and I had given him Kshs. 10,000/= through my brother Simon Kinoti Muguna who testified in this court. The total money is 121,000/=. I have not been able to trace the payment of the balance of Kshs. 9,000/= to make a total of Kshs. 130,000/= which I claim to have paid for the parcel of land."
30. On cross examination, he stated that, "...I contributed to the purchase price. The shamba was Kshs. 270,000/= and my brother told me that he had already raised 100,000/=. He said he could pay 40,000/= and he was lacking 130,000/=".
 31. In re-examination, he stated that, "I was the one who processed the title deed for parcel No. 2203. I authorized him to put his name. I was the ongoing shareholder in the purchase of the shamba. I sent him the money for the processing of title."
 32. OW3 Geoffrey Kinyua Muguna testified that, "...I wish to add that I used to live with Ayub Mungatia from 2006 up to 2016 and David Muguna used to come to his place to discuss the purchase of land and after the visit Ayub told me that they were discussing the payment of money. Although he did not tell me how much the money was he told it was money relating to proceed of land." On cross examination, he stated that, "Ayub told me the money was for payment of shamba. It was not a debt. It was for payment of purchase price for a shamba. Ayub told me that they were buying a piece of land."
 33. OW4 Simon Kinoti testified that, "...About the shamba which was being bought by the children of Ayub Mungatia and David Muguna, Ayub was very much concerned about me because I was second to him and when he had something in his family he would come to me and we would discuss. We would spend a whole day and night discussing the family matters where we each visited each other. On one of his discussions, it was about the shamba that he was buying with his (3) sons. The sons were Mugambi, Koome and Nteere. I knew that they were buying the land. One time he sent for me to go to his home. When I went there, he told me that he was calling me to tell me that the owner of the shamba was planning to change his name and sell his land to someone else because both of the children and his father were unable to raise the balance of the purchase price. He wanted me to help him to pay the balance of the purchase price. By this time, I had children in school so we had to find some way of getting money to save the land. We agree about David Muguna who had no children at school at the time. We telephoned David Muguna to tell him so. At the time it was right as we told him of the balance. He agreed. He paid Kshs. 120,000/=-...When I was coming back from Nakuru, Mr. David Muguna gave me Kshs. 10,000/= and told me that was the balance that remained. When I went to Meru, before I went to my home, I took the money to my brother Ayub."
 34. On cross examination, he stated that, "It is true that David paid Kshs. 130,000/=. Ayub paid 140,000/= . Total was 270,000/=. I was not there when the money was being given and I do not know how much money he gave them but I know the shamba was for Kshs. 270,000/=".
 35. The petitioner testified that, "We do not agree that the parcel No. Nyaki/2203 which is registered in my late father's name belongs to Mr. David Muguna...Parcel No. 2203 and the claim of my three brothers is the dispute before the court. We have no problem refunding the money. We say so because the land is registered in the sole name of our father."
 36. On cross examination, he stated that, "Kshs. 58,000/= to Nyakiro Cooperative Society to bury my father. It is true that he paid the money which to be refunded the money to you. I did not object to the refund. It is only that it came when the matter was in court. I am ready to do so...We did not include them because the parcel of land in which they were to get their shares did not feature in the land. It is only Nyaki/Giaki/2372 that was included. Are you aware your father held the land in trust for his brothers? Yes, I am aware, my dad held the land upon trust. It is only (3) who had not obtained their title



deeds but their subdivisions. The parcels belonging to the brothers were not included in the petitioner for grant. They should not have been included because there was an agreement between the brothers and they are already living on the land...Reimbursement of the money in purchase? If you prove that the money deposited into our father's account, we shall reimburse. If you prove to the court that it was for the purchase of the land. The same we shall refund Kshs. 58,000/= for treating out our late mother. Contribution for purchase of land by two brothers? Why did your father not put his land in the names of your brothers who were paying? We were given a bunch of titles belonging to our father. It had the name of our father. I was however aware that my father and (2) brothers were the ones who were buying the land. I did not know any contribution by yourself.”

37. PW2 Patrick Nteere Mungatia testified that, “...Parcel No. Nyaki/Mulathankari/2203. It is not true that the objector bought the land in partnership with my father. The idea of buying the land was mine. I am the one who gave my father the ideas to buy because we required a plot of land to construct a house for me and my younger brother Dominic Mugambi Mungatia. My father agreed and we looked for the land and we signed agreement dated 30.5.2003. We agreed and down payment of the transaction at 50,000/= was paid as commitment fee. I am the one who paid the 50,000/=. We paid for the balance later with my brother Dominic Mugambi and later full payment and issue of title deed which was made in the name of my father. My uncles claim of partnership is not true. He was not involved in the transaction in any way.”
38. The objector's claim on L.R No. Nyaki/Mulathankari/2203 is hinged on an alleged contribution of Ksh.130,000 towards the purchase thereof. The scope of a succession court is confined to ascertaining the assets of the deceased, the persons beneficially entitled thereto and the corresponding distribution thereof.
39. In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR, the court (W. Musyoka J.) held that:-
- “The *Law of Succession Act*, and the Rules made hereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.
- Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.”
40. In this case, the objector has adduced evidence of contribution to the purchase of the suit property as would entitle him for an order in an Originating Summons under Order 37 of the Civil Procedure Rules filed in that behalf for determination and declaration that he owns a share of the property equal to his contribution to its acquisition. In these circumstances, the Court may properly make an order for the distribution of the part of the suit property owned by the deceased, and for the declaration of the right therein of the Objector.



41. The court finds that the objector has proved on a balance of probabilities that he has a beneficial interest to L.R No. Nyaki/Mulathankari/2203, by dint of his contribution of Ksh.130,000 towards its purchase, and he is entitled to a share thereof, which the Court assess at ½ of the property, the other half going to the deceased's estate. The petitioner has conceded that Ksh.58,000 was paid by the objector to Ntima Nyakiro Sacco, which ought to be equally refunded to him.
42. The court adopts the mode of distribution proposed by the petitioner at paragraph 5 of the affidavit in support of the summons for confirmation of grant save for L.R No. Nyaki/Mulathankari/2203 which will be confirmed to the objector, on the one hand, taking ½ share and the other ½ share is distributed to the beneficiaries of the Deceased Patrick Nteere Mung'atia and Dominic Mugambi Mung'atia in equal shares, on the other hand.

Orders

43. Accordingly, for the reasons set out above, the Court confirms the grant issued to Edwin Koome Mung'atia on 18/1/2015 in the following terms:
 - a. L.R No. Nyaki/Mulathankari/15 to go wholly to Mung'atia Koome Edwin.
 - b. L.R No. Nyaki/Mulathankari/2203 to go to Patrick Nteere Mung'atia, Dominic Mugambi Mung'atia and Mung'atia Koome Edwin taking ½ share thereof, and David Koome Muguna, the objector, taking the other ½ of the property.
 - c. L.R No. Nyaki/Thuura/166 to be distributed as follows:
 - i. Patrick Nteere Mung'atia
 - ii. Dominic Mugambi Mung'atia Equal shares
 - iii. Mung'atia Koome Edwin
 - iv. Alice Gakii Muriungi - 0.80 acres
 - d. L.R No. Nyaki/Giaki/2372 to go to Patrick Nteere Mung'atia, Dominic Mugambi Mung'atia and Mung'atia Koome Edwin in equal shares.
 - e. L.R No. Nyaki/Giaki/1374 to go wholly to Patrick Nteere Mung'atia.
 - f. Thimangiri Market Plot 31A to go wholly to Mung'atia Koome Edwin.
 - g. Thimangiri Market Plot 31B to go to Patrick Nteere Mung'atia, Dominic Mugambi Mung'atia, Alice GAKII Muriungi and Mung'atia Koome Edwin in equal shares.
 - h. Ksh.58,000 due to David Koome Muguna, the objector herein to be reimbursed to him, with interest from the date of judgment at court rates until payment in full.
 - i. Liberty to apply is given to either side in implementation of the order of the Court.

Order accordingly.

DATED AND DELIVERED ON THIS 5TH DAY OF DECEMBER 2024.

EDWARD M. MURIITHI

JUDGE

Appearances



Mr. Edwin Koome Petitioner

Mr. David K. Muguna Protestor

