



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Monica Wambui Mutuguti (Deceased) (Succession Cause 355 of 2003) [2025] KEHC 13514 (KLR) (30 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 355 OF 2003
HI ONG'UDI, J
SEPTEMBER 30, 2025**

BETWEEN

ODIALO OPEYA PETITIONER

AND

MESHACK GITONGA OBJECTOR

RULING

1. This ruling is in respect of the petition dated 4th October 2021 where the petitioner/applicant seeks the following orders;
 - i. The above-named deceased died domicile in (Gilgil) intestate and letters of administration to her estate were granted by this honourable Court on the 16 January, 2004, to Francis Watako Makokha who on the 11th May, 2005 died leaving part of the said estate unadministered.
 - ii. He sought to be appointed the administrator of the deceased's estate.
2. The petition was heard by way of viva voce evidence.
3. The petitioner/applicant called three witnesses, and testified as PW1 and adopted as his evidence his witness statement dated 14th September 2023 together with the annexures therein (EXB 1-7) as his evidence in chief. He testified that the deceased was married to his brother and he had pre-deceased her. He stated that the deceased had two sons (Peter and Francis) but Francis died before distribution of the estate. Thus, he needed Letters of grant to enable him complete the exercise since the deceased has no other family. He further stated that the objector pretended to be a purchaser though he never went to court over that issue.
4. On cross-examination, he confirmed that he was the deceased's brother in law though he had not produced anything to show that the deceased was married to his brother. He referred to EXB 3 and 4 and stated the he was the next of kin, trustee and the only surviving family member. He confirmed



- that the letter dated 10th July 1998 was written by the deceased's son Peter and he was not aware of any certificate of grant issued in 2005 since no succession cause had been filed. He stated that he had documents showing that the three (3) properties belonged to the deceased. He added that he did not know Meshack Gitonga or whether he had been given any property by Francis.
5. On re-examination, he stated that he had come to court to seek authority to complete distribution of the estate of the deceased and that the objector was not a family member.
 6. PW2, Gabriel Mwendia Kamau a retired senior chief Gilgil adopted his witness statement dated 15th May 2024 as his evidence in chief. He testified that he had worked from June 1990-2018 and he knew the deceased who resided in an estate near his office and had two (2) children (Peter Mutunguti and Francis Makokha). He stated that he did not write the letter demanded by the objector for purposes of succession since he had no documents. He further stated that the deceased died in 1991, Peter on 13th May 2001 and Francis on 11th May 2005. He confirmed that he knew PW1 who was a brother to the deceased's husband and that the letter dated 13th September 2021 was written by chief Akala of Kaudha East Sub-location. Further, that the letters dated 23rd November 2005 and 30th September 2009 were written by him.
 7. Upon cross-examination, he confirmed that he wrote two letters in this succession matter and that PW1 did not need to produce any documents since he was next of kin and the deceased's children had died.
 8. PW3, George Ojeil Odialo son of PW1 adopted his statement dated 22nd July 2024 as his evidence in chief together the supplementary documents dated 8th July 2024 (EXB 8-15). He testified that the deceased was his aunt and he lived in the same plot with her. He stated that PW1 was the brother to the deceased's husband and he was the only who was still alive. He further stated that the deceased's property was yet to be distributed and Francis died on 11th May 2005. He further stated that the objector had claimed ownership over the plot belonging to the deceased but he failed to produce documents confirming the same.
 9. In cross-examination, he confirmed that he had lived on the subject plot since 1997 and he was not aware of any other succession cause since the present succession cause was never finalized. He stated that Francis Makokha was not alive on 27th May 2005 and therefore there was no way he could have been issued with a grant. He further stated that PW1 was next of kin and trustee and the chief wrote them a letter.
 10. The objector did not adduce any evidence.
 11. The court directed that parties file written submissions.

Applicant's submissions

12. These were filed by Mutonyi Mbiyu & Company Advocates on 14th May 2025. Counsel gave a brief introduction of the case and submitted that the applicant was eligible to be appointed as an administrator of the estate of the deceased. He cited section 39 of the *Law of Succession Act* which provides that where there is no higher priority, the estate will devolve to the relatives who are in the nearest degree of consanguinity up to including the sixth grade in equal shares. He stated that the objector was not related to the deceased and therefore has no beneficial interest or priority under the Act.
13. Counsel further submitted that the Objector's claim that he was given carte-blanche authority to take over, manage and reposses Plot No 12 to recover amounts spent sustaining Francis Watako Makokha while he was living with the Applicant on the said land is not plausible. He stated that the objector did



not testify thus the evidence adduced on behalf of the petitioner/ applicant remained uncontroverted. He added that the objector was not claiming the Plot No 12 Section No. Native Loc Gilgil as a beneficiary raising no merit in objecting the appointment of Odialo Opeya as administrator.

14. He placed reliance on the decision in *Re Estate of Stone Kathuli Muinde deceased* [2016] eKLR Hon Justice William Musyoka held that:

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

15. Counsel submitted that the objector filed in court a death certificate for Francis Watako Makokha indicating a date of death of 29th June 2007 instead of 11th May 2005. He has also filed Letters of Allotment indicating that Monica Wambui Mutuguti was allocated the property on 13th April 1992 whereas she died on 19th September 1991 which was misleading. He stated that the objector ought to have filed a civil suit and if a decree in his favour is obtained, then present it in this particular probate Court as was held in the case of *Re Estate of Stone Katindi Muinde (deceased)* supra.
16. He urged the court to appoint Odialo Opeya as administrator to estate of the deceased herein and grant any other relief that this Honorable Court may deem just and fit.

Respondent’s submissions

17. These were filed by Kagwima Karanja & Company Advocates on 9th June 2025. Counsel gave a brief introduction of the case and identified three issues for determination.
18. The first issue is whether the certificate of confirmation of grant issued on 27th May 2005 was obtained fraudulently. Counsel submitted that Francis Watako Makhoha instructed an advocate to prosecute his application on 27th May 2005 and the same was allowed. Thus, the burden of proof shifted to the petitioner/applicant to prove that the grant issued by this court was fraudulent. He placed reliance on sections 107, 108 and 109 of the *Civil Procedure Act* and the decision in *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR where the court held as follows;

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.....”

See also; *Milaw Mahendra Shah v Barclays Bank International Ltd & Another* [1979] eKLR.

19. On the second issue on whether the applicant herein has locus standi to file this instant application, counsel submitted that the petitioner/applicant deposed that he was a beneficiary of the deceased by virtue of being her brother in-law. However, he had not tendered any marriage certificate or evidence to confirm customary marriage rituals undertaken by their family considering he was the immediate blood brother to the alleged husband of the deceased. He placed reliance on the decision in *The estate of the late Francis Andachila Luta, Succession Cause No. 875 of 2012* where court held as follows;

“Intestate succession, the state passes to the kindred of the deceased, that is to say the blood relatives of the deceased, except for the surviving spouse of the deceased. In-laws, be they



parents-in-laws or children-in-law are not blood relatives of their children-in-law or father-in-law. They have no right or entitlement to the estate of their dead in-law. The Law of Succession Act does not recognize them or their rights. Indeed, the Law of Succession Act does not even mention them. They can only claim on behalf of others. A daughter-in-law, for example can only claim the share due to her late husband, otherwise she has no direct right. For her to access the share due to her late husband, she has to obtain representation to his estate first, by way of a grant of letters of administration intestate. Pursuing the interest due to her late husband without first obtaining the grant in his estate would amount to intermeddling, and her activities would run a foul of section 45 of the Law of Succession Act.”

See also Veronica Njoki Wakagoto (deceased) [2013] eKLR.

20. The third issue is whether land reference number I.R Gilgil/Karunga Block 10 (Gathingiri) Plot No. 6 and Gilgil Kikopey Naivasha Waguano Group form part of the estate of the late Monica Wambui Mutuguti. Counsel submitted that Francis Makokha presented only one parcel of land LR No. Plot No. 12 at Bondeni estate Gilgil as the only property that formed part of the estate of his late mother. He stated that no documents had been presented by the petitioner/applicant as evidence that the two additional properties belonged to the deceased or anyone else.
21. In conclusion, he submitted that the petitioner/applicant had approached the court with unclean hands by deliberately mentioning to this Court that he still occupied the Plot No. 12 at Bondeni Estate Gilgil without any authority in Law. Thus, he remains an intermeddler and his application should be dismissed with costs.
Analysis and determination
22. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions by both parties.
23. It is not in dispute that the administrator (Francis Watako Makokha) to the estate of the deceased herein was issued with grant of letters of administration on 16th January 2004. It is also not disputed that the administrator died on 11th May 2005. The petitioner /applicant has prayed to have the letters of administration issued to him on account of the demise of the administrator. The objector has objected to this and claims to have interest in the estate.
24. The petitioner/applicant claims to be the brother in-law to the deceased which has not been disputed. During the hearing of this application he gave sworn testimony and called other two witnesses among them a retired senior chief from their area. He also produced his bundle of documents (EXB 1-7) and the other witnesses equally adopted their statements and the annexures.
25. On his part the objector/respondent did not testify or call any witness but only filed a chief’s letter in support of his interest in the estate of the deceased.
26. It is trite law that any person intending to institute proceedings must have the necessary locus standi in law to do so. Section 39 of the Law of Succession Act, states as follows:-

- “ 1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—
 - a. father; or if dead.
 - b. mother; or if dead.
 - c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none



- d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none.
 - e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
2. Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

27. In the case of *Mercy Njoki Irungu vs. Lucy Wamuyu Maruru* [2016] eKLR the court held as follows: -

“It is a requirement that a party to a probate claim must have ‘interest’ in the estate. The foundation of title to be a party to a probate or administration action is “interest” so that whenever it can be shown that it is competent to the Court to make a decree in a suit for probate or administration, or for the revocation of probate or of administration, which may affect the interest or possible interest of any person such person has a right to be a party to such a suit in the character either of plaintiff, defendant, protestor or intervenerInterested person” or “person interested in an estate” includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, word, or protected individual or a person that has priority for appointment as personal representative and a fiduciary representing an interested person...”

28. Under Section 47 of the Succession Act, the High Court is clothed with necessary jurisdiction to entertain any application and determine any disputes under the Act and to pronounce such decrees and make orders as may be expedient. The Section reads as follows: -

“The High Court shall have jurisdiction to entertain any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient, provided that the High Court may for the purpose of this Section be represented by the Resident Magistrate appointed by the Chief Justice.”

29. Further under Rule 73 of the Probate and Administration Rules it is provides that:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

30. I have carefully perused the evidence on record, and it is not in doubt that indeed the petitioner/ applicant is a relative of the deceased by virtue of the deceased having been married to his brother. However, he does not fall under the list of beneficiaries or dependants under the provisions of section 39 of the *Law of Succession Act*. On the other hand, the objector’s claim on the estate of the deceased was not backed by any evidence. Thus, in my opinion the evidence by the petitioner/ applicant remains uncontroverted. Further, there has been no other claim against the estate of the deceased. This is a very old matter and the same needs to be concluded within the shortest time possible in the interest of justice to avoid wasting away of the deceased’s estate.

31. In view of the above and in exercise of this court’s powers under section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules, I am inclined to issue the petitioner/ applicant



with fresh letters of administration since the person opposing his appointment has produced nothing tangible before this court.

32. Consequently, grant of letters of administration issued to Francis Watako Makokha on 16th January 2004 is hereby revoked and fresh grant of letters of administration shall be issued to Odialo Opeya for the sole purpose of administration of the unadministered assets in the estate of MONICAH WAMBUI MUTUGUTI
33. Each party to bears his own costs.
34. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

