



REPUBLIC OF KENYA



**In re Estate of Wycliff Nandi Eshitubi (Deceased) (Family Appeal
E001 of 2023) [2025] KEHC 13869 (KLR) (16 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13869 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
FAMILY APPEAL E001 OF 2023
JM OMIDO, J
SEPTEMBER 16, 2025
IN THE MATTER OF THE ESTATE OF WYCLIFF NANDI ESHITUBI**

BETWEEN

PATRICK LUCHERA ESHITUBI APPELLANT

AND

WILSON WILFRED AMABANI OMAMO RESPONDENT

(Being an Appeal from the ruling and order of Hon. L. Akoth Senior Resident Magistrate delivered on 11th November, 2022 in Kisumu CM's Succession Cause No. 428 of 2019)

JUDGMENT

1. The Appellant herein, Patrick Luchera Eshitubi, has brought this appeal, being aggrieved by the ruling and order of Hon. L. Akoth Senior Resident Magistrate delivered on 11th November, 2022 in Kisumu CM's Succession Cause No. 428 of 2019.
2. The Appellant has presented the following grounds of appeal vide the Memorandum of Appeal dated 17th January, 2023:
 1. That the learned Magistrate erred in law and in fact by failing to consider all the issues presented for determination by the Appellant and thereby arriving at erroneous decision.
 2. That the learned Magistrate erred in law and in fact by failing to consider the respective law relating to revocation of grant and thus arrived at her decision based on facts and did not incorporate the provisions of Section 76 of the *Law of Succession Act*.
 3. That the learned Magistrate erred in law and in fact by failing to consider all the evidence presented before her orally, through affidavit and submissions and thereby arriving at an erroneous decision.



4. That the learned Magistrate erred in law and in fact by reaching a decision that implied that John Eshitubi Nandi aka Nandi Eshitubi who went on to have 8 other children after giving birth (sic) to Wycliff Nandi Eshitubi aka Nandi Eshitubi did not desire his 8 children to inherit any of his estate including the suit property.
 5. That the learned Magistrate erred in law and in fact by failing to consider the principle and doctrine of equity and fairness in distribution of estate property.
 6. That the learned Magistrate erred in law and in fact by granting an order of costs to the Respondent despite the fact that the Appellant had not only proven his case by lost (sic) part of his inheritance.
 7. That the learned Magistrate erred in law and in fact by failing to consider the whole or any part of the application by the Appellant and thus failed to consider the prayers thereof.
3. The Appellant proposes that the instant appeal be allowed and that the ruling and order of the trial/lower court be set aside and this court proceeds to substitute the same with an order of revocation and annulment of grant of letters of administration issued on 1st October, 2020 and confirmed on 31st May, 2021.
 4. A brief history of the dispute herein, from the material on record, is that the deceased Wycliff Nandi Eshitubi, who died intestate on 9th December, 2016 was the Appellant's brother and the Respondent's father. The Appellant and the deceased were both sons of Nandi Eshitubi aka John Eshitubi Thadhayo Nandi, who died on 23rd October, 1994.
 5. The Appellant filed in the lower court a summons for revocation or annulment of grant dated 2nd June, 2022 against the Respondent, in which the substantive prayers (4, 5 and 7) sought were:
 4. That this Honourable Court do issue an order of revocation and annulment of the grant of letters of administration issued and confirmed on 1st October, 2020 and 31st May, 2021, respectively.
 5. That this Honourable Court do issue an order directing the Land Registrar Kakamega Land Registry to cancel the transfer of Kisa/Komero/1456 to the name of Wilson Wilfred Ambani Omamo and revert the same back to the estate of Nandi Eshitubi.
 7. That the costs of the application be in the cause.
 6. The application was in precis premised on the grounds that in the succession cause before the lower court, the Respondent wrongly and by misrepresentation included the property known as Kisa/Komero/1456 as being part of the deceased's estate, yet, according to the Appellant, the same was part of the estate of Nandi Eshitubi aka John Eshitubi Thadhayo Nandi, who was the registered owner.
 7. It is discernible from the record that pursuant to the conclusion of the succession cause before the lower court, the said parcel of land was transferred to the Respondent.
 8. On the ground that the said property was wrongly and by misrepresentation included as part of the deceased's estate, the Appellant sought revocation or annulment of the grant that was issued to the Respondent on 1st October, 2020 and subsequently confirmed on 31st May, 2021.
 9. The application was resisted by the Respondent who filed his response to the same.
 10. Upon hearing the summons, the learned trial Magistrate, vide the ruling delivered on 11th November, found the same to be devoid of merit and proceeded to dismiss it with costs. It is that ruling and order



that gives rise to the instant appeal. The learned trial Magistrate, in considering the application, set out the issue for determination to be as follows:

“The issue for determination is who was the registered owner of Kisa/Ikomero/1456; and whether the transfer of the said property to the Respondent was lawful?”

11. On the issue, the learned trial Magistrate proceeded to render herself as follows:

- “11. The suit property Kisa/Ikomero 1456 was registered in the name of Nandi Eshitubi in 15/11/1964 during land demarcation registered in the year 1964 facilitated by John Eshitubi Nandi the father to the deceased and the Applicant herein. According to the Applicant the property was vested in Nandi Eshitubi. His brother was called Wycliffe Nandi Eshitubi and not Nandi Eshitubi as such the property was not his to sell. The property belonged to his father John Eshitubi Nandi.
12. On the other hand, it is the Respondent’s position that Wycliff Nandi Eshitubi and Nandi Eshitubi are the same person. The land was registered in the name of Nandi Eshitubi and was sold to the Respondent. As per the sale agreement it was sold by Wycliff Nandi Eshitubi.
13. I must consider this matter in its entirety. As per the replying affidavit of the Respondent John Eshitubi Nandi registered his parcels of land: Kisa/Ikomero 1489 to Luchera Eshitubi aka Patrick Luchera Eshitubi; Kisa/Ikomero 1456 to Nandi Eshitubi aka Wycliffe Nandi Eshitubi and to himself Kisa/Ikomero 1524 registered in the name of Eshitubi Nandi. During cross examination, the Applicant admitted that Kisa/Ikomero 1489 was registered to him as Luchera Eshitubi and he also goes by the name Patrick Luchera Eshitubi.
14. In this case, it seems as though for one reason or another Christian names were omitted in the land documents i.e. John, Patrick and Wycliffe. No evidence has been placed before this court to strictly prove that Eshitubi Nandi is John Eshitubi Nandi; Luchera Eshitubi is Patrick Luchera Eshitubi; Nandi Eshitubi is Wycliffe Nandi Eshitubi.
15. However this court finds it plausible that Nandi Eshitubi is Wycliffe Nandi Eshitubi. During cross examination, the Applicant admitted that Kisa/Ikomero 1489 was registered in his name as Luchera Eshitubi. As per the affidavit on court record the Applicant goes by the name Patrick Luchera Eshitubi. So Luchera Eshitubi and Patrick Luchera Eshitubi are one and the same person.
16. Furthermore, it is the Applicant’s position that the suit property belonged to his father John Eshitubi Nandi. He did not bequeath the said property to the deceased, Nandi Eshitubi. However, looking at the intentions of John Eshitubi Nandi his intentions were very clear that the properties were to be registered in the name of his sons both the Applicant and the Respondent. John Eshitubi Nandi registered his parcels of land: Kisa/Ikomero 1489 to Luchera Eshitubi aka Patrick Luchera Eshitubi; Kisa/Ikomero 1456 to Nandi Eshitubi aka Wycliffe Nandi Eshitubi and to himself Kisa/Ikomero 1524 registered in the name of Eshitubi Nandi.



17. Drawing inference from this, this court finds that the suit property was registered in the name of Nandi Eshitubi. It was sold by Wycliffe Nandi Eshitubi who is Nandi Eshitubi to the Respondent who had every right to proceed with the succession subsequent to the citation.”
12. With that, the order for dismissal of the summons, with costs, was pronounced by the learned trial Magistrate.
13. This court directed that the appeal proceeded by way of written submissions and both parties filed their respective submissions.
14. In his submissions, the Appellant stated that the evidence that was presented before the trial court was to the effect that the parcel of land Kisa/Komero/1456 was registered in the name Nandi Eshitubi on 15th November, 1964. He stated that the name Nandi Eshitubi referred to the father of both the Appellant and the deceased, who was also known as John Eshitubi Thadayo Nandi. Thus then, the said property did not form part the deceased’s father but was part and parcel of the estate of the father of both the Appellant and the deceased.
15. On his part, the Respondent submitted that the names appearing in the erstwhile title and registration documents as Nandi Eshitubi referred to the deceased, Wycliffe Nandi Eshitubi as the registered owner of the said property.
16. The argument proffered by the Appellant as to why the property in question belonged to his late father and not the deceased was that at the time of the acquisition and registration of the said parcel of land, specifically on 15th November, 1964, the deceased, who was born on 1st January, 1960, was only one and a half months shy of turning five years old and could not in all possibilities have acquired the land at that age and the same could not therefore have been registered in his name as proprietor.
17. In his submissions, the Respondent proffered the position that the deceased was the registered proprietor of the property and that he sold it to the Respondent vide a sale agreement that was executed on 4th October, 2002, well before his demise.
18. The uncontested matters in this appeal are as follows:
- a. That the parcel of land land was registered in 1964 in the name Nandi Eshitubi.
 - b. That at the time of registration in (a) above, the deceased was a minor, aged 4 years old.
 - c. That the parcel of land was acquired by the father of both the Appellant and the deceased.
 - d. That the father of both the Appellant and the deceased, was alive in 1964 and is now deceased.
 - e. That the Respondent now claims that the registration of the land in the name Nandi Eshitubi refers to his father, the deceased, despite the deceased being a minor at the time of registration.
 - f. That the Appellant claims that the name Nandi Eshitubi refers to the father of the Appellant and the deceased and that the parcel of land therefore forms forms part of the estate of their father.
19. The issues that I am now tasked to determine are as follows:
- a. Whether the trial court fell into error by failing to revoke the grant and whether this court should proceed and revoke the grant.
 - b. Whether the property parcel number Kisa/Komero/1456 formed part of the deceased’s estate.



- c. Disposition on the appeal.
 - d. A determination as to costs.
20. A presumption I draw from the context and registration practice in 1964, is that registration procedures were manual and precise, especially under the Registered Land Act, which was then a new regime.
 21. Section 119(1) explicitly dealt with registration in respect of incapacitated persons, including minors. The said Section provided thus:

119(1): Where a person who is registered or is to be registered as the proprietor of any land, lease or charge is a minor, a person of unsound mind or is otherwise under a legal disability, the Registrar shall enter in the register a restriction preventing dealings with the land, lease or charge without the consent of the Registrar.”
 22. Although the above provision in a way suggested that a minor could be registered as proprietor of land, in practice, the Registrar would not normally register land directly in the name of a minor because they lacked legal capacity to contract or deal in land. Instead, land intended for a minor would be held in trust by a parent, guardian or trustee, until the minor came of age.
 23. The position in law in 1964 was therefore that land could not be registered in the name of a minor under the Registered Land Act Cap 300 Laws of Kenya. Under the said Act, land registration was governed by specific provisions that restricted registration to persons legally capable of holding land.
 24. Thus then, a minor could not be registered directly as a proprietor under the Registered Land Act in 1964. Land could be held in trust for a minor, with the trustee registered instead.
 25. In this case, no evidence (such as a trust instrument or declaration) was been presented before the trial court to indicate that the father of both the Appellant and the deceased was registering the land in trust for his son, the deceased.
 26. The burden fell on the Respondent to prove that despite being a minor, the land was registered in his father’s name. No birth certificate or contemporaneous record was presented before the trial court to indicate that the Registrar intended that “Nandi Eshitubi” to refer to the deceased. In fact, the contrary is more likely — that the name referred to his father, who was of full legal capacity and capable of acquiring and holding land.
 27. While in some circumstances a parent may purchase land in the name of a child, raising a presumption of advancement, such a presumption, in my view, does not arise here, where the child was too young to even understand the transaction, and where the name on the register did not reflect the full name or any indication of the minor.
 28. Therefore, it is highly improbable that the Land Registrar would have registered a 4 or 5-year-old child as sole proprietor without appointing a guardian or noting a restriction on the record of the title, none of which was presented before the trial court by the Respondent, who had the duty to demonstrate, on a balance of probabilities, that the parcel of land in question formed part of the deceased’s estate.
 29. What amounts to proof on a balance of probabilities was discussed by Kimaru J. (as he then was) in the case of *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 where he stated thus:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%



as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

30. The available evidence and the position regarding registration of land under the Registered *Land Act* in 1964 does not favour the Respondent. The Respondent did not therefore prove his allegations on a balance of probabilities that the land in question was registered in the deceased’s name.
31. Having considered the record of the trial court, the applicable law and the evidentiary burden, I reach the findings that the land registered in 1964 in the name Nandi Eshitubi was registered in the name of the father of the Appellant (who was also the father of the deceased) and not in the name of the deceased. The deceased being only 4 years old in 1964 could not have been the registered proprietor at that time. The property therefore forms part of the estate of the father of both the Appellant and the deceased.
32. It is then my ultimate finding that the learned trial Magistrate fell into error in reaching the conclusion that the parcel of land Kisa/Komero/1456 formed part of the estate of the deceased. The learned trial Magistrate, as a consequential result, erred in failing to revoke the grant issued to the Respondent.
33. In the result, I allow the present appeal and proceed to set aside the ruling and order of the trial/lower court delivered/issued on 11th November, 2022 and substitute the same with an order revoking the grant of letters of administration issued on 1st October, 2020 and confirmed on 31st May, 2021.
34. As the current registered owner of the land Wilson Wilfred Ambani Omamo is not a party to the present matter, the Appellant is at liberty to move the trial court for any desired orders in respect of the said party.
35. The file of the lower court to be mentioned on before the Chief Magistrate, Kisumu on 22nd October, 2025 for further directions on the further proceedings, which shall be taken before another Magistrate other than Hon. L. Akoth.
36. This being a family matter, I make no order as to costs on the appeal.
37. This file is hereby closed.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 16TH SEPTEMBER, 2025.

JOE M. OMIDO

JUDGE

For The Appellant: Ms. Muhanda.

For The Respondent: Mr. M.m. Omondi For Mr. Ombiro.

Court Assistant: Mr. Ngoge.

Mr. Omondi: I pray for a copy of the judgement. I seek leave to appeal.

Ms. Muhanda: No objection.

Court: Leave to appeal granted. A copy of the judgement to be supplied to the parties upon payment of the requisite court charges.

