



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
SUCCESSION CAUSE NO. 211 OF 2015
IN THE MATTER OF THE ESTATE OF JAMES NJENGA MATHU
(DECEASED)

DAVID KINYANJUI NJENGA1st OBJECTOR/2ND ADMINISTRATOR
DAVID KINYANJUI MATHU.....2nd OBJECTOR
MARGRET WANGECI MBURU
MARY WANJIRU KARIUKI &
GRACE NJERI NJENGA.....3rd OBJECTOR

-VERSUS-

MONICA WANGUI NJENGA1ST ADMINISTRATOR
JOYCE NYAMBURA NJENGA3RD ADMINISTRATOR
FRECIA WANJIKU GATHOGO4TH ADMINISTRATOR

JUDGMENT

Introduction

1. The Deceased passed away on the 18th August 2011 without leaving a will and as such his vast estate shall be subject to the Law of Succession.

2. This judgment in a small way contributes in the exorcising the ghosts of harmful cultural practice of discrimination on the basis of gender and exaggerated patriarchal entitlement in succession.
3. A petition for an issuance of grant of letters of administration intestate was filed on the 10th April 2015 in the name of the 1st Administrator and 1st Objector/ 2nd Administrator and on the 7th July 2015 a grant was made to the 1st Administrator and 1st Objector/ 2nd Administrator who ultimately in a summons of confirmation dated 27th January 2016 which Application was contested before hearing.
4. On the 2nd August, 2018 the 1st Administrator widow of the deceased, the 3rd Administrator and 4th Administrator both daughters of the deceased moved the court by summons for revocation of grant on the basis that the grant obtained by the 1st Objector/ 2nd Administrator was fraudulent with material concealment and non-disclosure of the full inventory of the assets of the deceased and the parties by consent agreed to add two more administrators the 3rd and 4th Administrators the 1st, 3rd, and 4th Administrators were directed to move court and other parties were granted leave to file affidavits of protest and the consent paved way for this instant protest hearing.
5. It is noteworthy that, the 1st Administrator died towards the end of 2021 before the hearing and the on the 20th November 2022 the 1st, 3rd, and 4th Administrators filed an amended proposed schedule for distribution of the assets of the deceased.
6. The Protest was heard by way of viva voce evidence and **David Kinyanjui Mathu** the 2nd Objector was the 1st Objectors witness (PrW1)

approaching the court seeking to secure the share due to his late father, **George Njenga Mathu** for and on behalf of his other siblings namely;

- (a) James Njenga Mathu
- (b) Monica Wangui Mathu
- (c) Samuel Gateri Mathu
- (d) Elizabeth Wairimu Mathu.

7. The 2nd Objector sided with the 1st, 3rd and 4th Administrators maintaining that the 1st Objector/2nd Administrator had fraudulently transferred assets of the deceased to Njemoni Limited to deprive off entitlement the other beneficiaries as the deceased was not a shareholder.

8. His evidence of protest was that the undisputed and free property for distribution of the late James Njenga Mathu is as follows: -

- (a) Half share in L.R. 8654 (I.R. 18944).
- (b) Nakuru Municipality Block 1/120.
- (c) Nairobi L.R. No.10060/11.
- (d) Nairobi L.R. 10060/13.
- (e) Nairobi L.R. 10060/14.
- (f) 150 Shares in Dandora Millers Limited.
- (g) Standard Chartered Bank Account No.010205231300 domiciled in Nakuru Branch.
- (h) Standard Chartered Bank Account No.0102053655900 domiciled in Nakuru Branch.

9. That, the disputed assets of the late James Njenga Mathu (Deceased) are;

- a. Nakuru Municipality Block 10/176.**

- b. Nakuru L.R. 451/2055 (previously Nakuru Municipality Block 6/120).**
- c. Nakuru Municipality Block 5/56.**
- d. Nakuru Municipality Block 5/194.**

10. The 2nd Objector formulated the following four issues to be considered:

- a. Whether ownership of the properties listed in 8 above were unlawfully transferred from the late James Njenga Mathu to Njemoni Limited by the 2nd Administrator/1st Objector David Kinyanjui Njenga.*
- b. Whether this court has jurisdiction to order for cancellation of titles listed in paragraph 8 above should the transfers of ownership made to Njemoni Limited be found to be unlawful.*
- c. Whether the court should order for rendering of accounts the by the 2nd Administrator in regard to income generated from the assets of the late Njenga Mathu.*

11. With regards to registration of ownership of **Nakuru Block 10/176** the witness exhibited a copy of the green card indicating property was jointly registered to **James Njenga Mathu** (Deceased) and his wife **Monica Wangui Njenga** (Deceased) on the 15th November, 1984. The Land was charged to Barclays Bank on 10th August, 1984 and further charged to the same bank on the 14th September, 1990.

12. That the property was allegedly discharged on the 4th July, 2004 and a certificate of lease issued to Njemoni Limited on the same day.

13. That during hearing of viva-voce evidence the 2nd Administrator/1st Objector, **David Kinyanjui Njenga** testified to the effect that the property was transferred by the late **Njenga Mathu** to Njemoni Limited by way of sale. The said objector being a director and shareholder of Njemoni Limited did not produce any sale agreement, transfer instrument, stamp duty receipt or consent to transfer in support of transfer of ownership.
14. That, the Nakuru Land Registrar summoned to shade light on the register of **Nakuru Municipality Block 10/176** confirmed that the parcel is currently registered to Njemoni Limited as per the White Card. Equally, she confirmed the Nakuru Land Registry did not have documents evidencing transfer, stamp duty payment, discharge of charge or consent to transfer .
15. That she also confirmed on oath that it was not lawful or legally possible to transfer land while it was still charged as was the case with the alleged transfer to Njemoni Limited which occurred while the property was still charged. She confirmed the Nakuru Land Registry did not have the discharge of charge for the property from Barclays Bank.
16. With regards to registration of ownership of **Nakuru Municipality Block 5/56**, that the 2nd Administrator /1st Objector testified that the property is currently owned by Njemoni Limited where he is currently a director and shareholder.
17. The 2nd Objector in his protest dated 3rd March, 2021 exhibited a copy of green card for the property, demonstrating that;

- (a) The property was registered to Njenga Mathu (Deceased) on the 28th October, 1983.
- (b) The property was charged to Barclays Bank on 28th October, 1983 and further charged on 13th September, 1988. The property was discharged on 11th July, 2002 and subsequently transferred to Njemoni Limited on 4th July, 2004.
18. That the Land Registrar **Emmah Sitienei** testified that the Nakuru Land Registry had a parcel file for the property containing only the White Card which demonstrated that the property is currently owned by Njemoni Limited. Equally, she confirmed the Nakuru Land Registry did not have documents evidencing transfer from the late **Njenga Mathu**, stamp duty payment, discharge of charge or consent to transfer.
19. With regards to registration of ownership of of **Nakuru Municipality Block 5/194** it was the evidence by **David Kinyanjui Mathu** in Affidavit of Protest dated 3rd March, 2021, that the property was registered to **Njenga Mathu** on 18th September, 1984 and thereafter charged to Kenya Commercial Bank on 6th September, 1988 and a discharge done on 26th May, 2009.
20. That, the 2nd Administrator/1st Objector affirmed ownership of the property by Njemoni Limited. On cross-examination, he could not produce any land purchase agreement, discharge of charge, consent to transfer, land transfer forms, stamp duty receipts to substantiate transfer from Njenga Mathu (Deceased) to Njemoni Limited.

21. That, the Lands Registrar summoned by court to produce the register for the property confirmed on oath that the Nakuru Land Registry only had the White Card for the property without any documentation to support transfer of ownership in the parcel file from Njenga Mathu to Njemoni Limited. She confirmed that it was not possible for the property to have been transferred to Njemoni Limited on the 4th July, 2004 while still charged to KCB Bank as of that date.
22. With regards to registration of ownership of **Nakuru L.R. No.451/2055** previously **Nakuru Municipality Block 6/120**, it was **David Mathu** exhibiting a Land Search for the property conducted in the year 2017 with the following entries:-
- (a) Entry Number 1 – Registration of title to Njenga Mathu on 26/5/79
 - (b) Entry Number 2 – Charge to Industrial and Commercial Development Corporation for Kshs.554, 000/=.
 - (c) Entry Number 3-Further Charge to Industrial Development Corporation for Kshs.2, 000, 000/=
 - (d) Entry Number 4- Discharge of Entry, 2 and 3 above on 4/9/95.
23. That the 2nd Objector in his protest evidenced a copy of an official search conducted on 16th October, 2019 with the following entries: -
- (a) Entry Number 1 – Registration of title to Njenga Mathu 26/5/79
 - (b) Entry Number 2 – Charge to Industrial and Commercial Development Corporation for Kshs.554, 000/=.

(c) Entry Number 3-Further Charge to Industrial Development Corporation for Kshs.2, 000, 000/=.

(d) Entry Number 4-Discharge of Entry, 2 and 3 above on a search 4/9/95.

(e) Entry Number 5 – transfer to Njemoni Limited for Kshs.60, 000, 000/= on 14th April, 2004.

(f) Entry Number 6 – Charge to Consolidated Bank of Kenya Limited for Kshs.25, 000, 000/= on 18th December, 2018.

24. That it is mind-boggling if not magic that, a search conducted in the year 2017 did not have an entry for transfer of ownership to Njemoni Limited done in the year 2004 but suddenly a search done in the year 2019 has an entry for a transfer to Njemoni Limited done in the year 2004.

25. The 2nd Objector invites the court to see through the fraud clear as day where entries have been manufactured to create a transfer of ownership.

26. That, at the hearing, the 1st objector did not have any proof of the Entry Number 5 in the search done in the year 2019 where Njemoni Limited bought the property for Kshs.60, 000, 000/= be it by way of land sale agreement, consent to transfer, stamp duty for transfer and the transfer forms.

27. That a transaction for Kshs.60, 000, 000/= cannot be by way of cash. The 1st Objector did not produce any proof of transfer of funds for the purchase.

28. That at the filing of the instant intestacy proceedings, the 2nd Administrator/1st Objector filed form P&A 80 (Petition for letters of Administration Intestate) and on the face of the said form there is a court assessment of filing fees for land searches assessed at Kshs.225.

- i. 1st search – Nakuru/Municipality Block 5/56 was done on 25th January, 2015 and it shows the land parcel was registered to Njenga Mathu
- ii. 2nd Search – Nakuru Municipality Block 5/194 done on 28th January, 2015 shows it is registered to Njenga Mathu.

29. That, on the P&A Form 5 being the Affidavit in Support of Petition for Letters of Administration the 1st Objector/2nd Administrator lists the following properties as assets of the late **Njenga Mathu:-**

- i. Nakuru Municipality Block 5/56.
- ii. Nakuru Municipality Block 5/194.
- iii. Nakuru Municipality Block 6/120.
- iv. Nakuru Municipality Block 10/176.
- v. Nakuru Municipality Block 1/120.
- vi. L.R. 8654(I.R. 18944).
- vii. L.R. 10060/12.
- viii. LR. 10060/13.
- ix. L.R. 100600/8.
- x. Dandora Millers Shares.
- xi. Bank Account number 0102053655900-Standard Bank, Nakuru Branch.
- xii. Bank Account number 010205231300-Standard Bank, Nakuru Branch.

30. That it is without doubt that, the 2nd Administrator/1st Objector complied with **Section 51 2(h)** and **Rule 7(1) (d)** of the **Probate and Administration Rules** by listing the full inventory of assets of the late Njenga Mathu complete with searches in support of ownership of the land parcels.
31. That, all the properties allegedly owned by Njemoni Limited currently have been shown to be have been registered to deceased at the filing of the intestacy proceedings.
32. That all the contested properties at paragraph 8 are alleged to have been transferred to Njemoni Limited in the year 2004 was meant to create an impression that they were transferred during the lifetime of Njenga Mathu thus falling outside the scope of inheritance. The 2nd Administrator/1st objector put up a fight that the contested properties are owned Njemoni Limited having been bought in the year 2004 but the Petition he presented to court paints a different picture where he personally conducted and filed searches for all the contested properties that showed they were owned by Njenga Mathu at the time of filing the instant cause in the year 2015. The said objector cannot approbate and reprobate on the ownership of the contested properties and hide behind ignorance of the law.
33. That the 1st Objector has from the onset perpetuated fraud where he forged signatures of his siblings and mother at the point of filing the instant cause as is exhibited by the 3rd and 4th Administrators trial bundle an Exhibit Memo from the Director of Criminal Investigation demonstrating how the 1st Objector forged signatures of the

beneficiaries of the estate of Njenga Mathu when petitioning for letters of administration and the subsequent summons for confirmation of grant.

34. That, it is no coincidence that, the registers for the contested properties as testified to by the Nakuru Land Registrar are either missing or altered. All the beneficiaries save for the 1st Objector confirmed that the contested properties were owned by **Njenga Mathu** in his lifetime.
35. That with regards to the registrations under contest, the 1st Objector in asserting confirms that properties in paragraph 8 above are owned by Njemoni Limited failed to discharge the burden of proof of how the said company came to own the properties.
36. That **Section 3(3)** of the **Law of Contract Act** read together with **Section 38** of the **Land Act, 2012** which is replicated under **Section 38** of the **Land Act, 2012** require that contracts for disposition of interests in land to be in writing, signed by all parties thereto and such signature be attested to by a witness present when the contract was being signed.
37. That **Section 3(3)** of the **Law of Contract**:
*“No suit shall be brought upon a contract for the disposition of an interest in land unless—
(a)the contract upon which the suit is founded—(i)is in writing;(ii)is signed by all the parties thereto; and(b)the signature of each party signing has been attested by a*

witness who is present when the contract was signed by such party”

38. That it is trite law that, it is not enough to dangle the instrument of ownership when claiming ownership of land. The owner of land must proof how he or she came to acquire ownership. This position was pronounced in the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR** as follows;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

39. That it thus follows that, the 1st Objector had a burden to establish how Njemoni Limited bought the contested properties by way of sale agreements and further produce the transfer instruments, consents to transfer and stamp duty payments.

40. Reference is made to the case of **Samuel Chege Kamunge v Josphat Chege & 8 others [2022] eKLR** which illustrated how a valid transfer of land should be done as follows;

“The law is very specific on how transfer of registered land should be done. Section 37 (2) of the Land Registration Act

provides that a transfer shall be completed by filing the instrument of transfer followed by registration of the transferee as proprietor of the land. Even prior to its presentation at the registry, the law takes a keen interest on how a transfer is prepared. Section 44 of the Land Registration Act provides that every instrument shall be executed by each of the parties consenting to it and that the transferee shall in addition to executing the instrument attach copies his identity card or passport, Personal Identification Number certificate, passport size photographs, among other documents. In other words, for a transfer to be valid it has to be shown that the registered proprietor of land has fully authorised it both through signature and availing his supporting documents.”

41. That the **Law of Succession Act** under **Section 47** and **Rule 73** of the **Probate and Administration Rules** grants the Succession Court inherent powers including to cancellation of title deeds obtained through fraud or where there has been an abuse of the process of the court process.
42. Reference is made to the case of **In re Estate of Charles Mwaniki Kamara (Deceased) [2021] eKLR** where Lady Justice F.Muchemi in ordering for cancellation of titles unlawfully transferred from the deceased relied on the holding in **Santuzza Billiot alias Mei Santuzza (Deceased) vs- Gian Carlo Falasconi[2014]eKLR** where the court held:-

“...the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased’s property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before a grant is confirmed.”

43. That is the submission of the 2nd Objector that, he has demonstrated in his affidavit of protest dated 3rd March, 2021 that all the properties alleged to be owned by Njemoni Limited are all properties that were unlawfully transferred from the late **Njenga Mathu**.

44. That all properties listed at paragraph 8 above should revert to the estate of Njenga Mathu to be fairly distributed to the rightful beneficiaries and further the 2nd Administrator/1st Objector should be ordered to account for all the proceeds generated from all the assets of the late Njenga Mathu from the year 2015 when the instant cause was filed as all the evidence adduced points to him as the custodian of all titles and the person in exclusive control of all the properties.

The 1st Objectors Case

45. In his submissions dated 8th May 2025 the 1st Objector, **Davis Kinyanjui Njenga** filed his affidavit of protest and deposed *inter alia* that the properties in contest were registered in the names of a company known as **Njemoni Limited** and/or **Dandora Millers Limited** and they did not form part of the free property of the deceased as

envisaged in the Law of Succession Act. Besides seeking the exclusion of the above properties, he set out in his affidavit of protest his preferred mode of distribution of the properties which legally formed part of the net estate.

46. That all the Objectors filed their respective affidavits setting out what they considered as part of the net estate and how the net estate would be distributed. What came out of all the affidavits of protest by all the Objectors except **Davis Kinyanjui Njenga**, was the claim that the registration of the parcels of land set out above in the names of Njemoni Ltd was procured through fraud and that the court should revoke the certificates of title and have them revert to the names of the deceased for distribution.

47. The 1st Objector distilled the following three issues in submissions;

- i. Whether Nakuru Municipality block 10/176, Nakuru Municipality block 5/56, Nakuru Municipality block 5/194, L.R 451/2055 and L.R 10453/1 form part of the free property of the deceased?*
- ii. whether the court can cancel the certificate of title for the said properties and distribute them as part of free property of the deceased and*
- iii. how should the court distribute the free property of the deceased?*

48. That the probate jurisdiction of this court is limited to free property of the deceased as defined under **Section 2** of the **Law of Succession Act**. The section defines free property of the deceased as follows:-

“In relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death”.

49. That the section has been the subject matter of several judicial pronouncements. In the matter of **the estate of Job Ndunda Muthike (deceased) Succession Cause no. 112 of 2014**. The court observed that:-

“It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime, and in respect of which his interest had been terminated by his death cannot form part of his estate and cannot be the subject of an application for confirmation of grant”.

50. That the same position was upheld in **re Estate of Lucy Muthoni Obat (Deceased) [2021] eKLR**. Which held;

“Whether any property forms the free estate of the deceased is an issue of evidence. In respect to land, production of the original ownership documents and/or the register from the lands office is conclusive proof on the status of such parcels of land. But in the course of determination of succession contested questions of fact often arise on whether property forms part of the net intestate estate. Such questions ought to be resolved before the property is distributed”.

51. That **Rule 41(3)** of the **Probate And Administration Rules** contemplates such situations and it provides as follows:-

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under the Civil Procedure Rules”.

52. That the provisions of rule 41(3) proceeds from the appreciation that the jurisdiction of the High Court in exercise of its probate jurisdiction is clearly delineated. Disputes involving third parties are outside the purview of the court’s jurisdiction.

53. Reference is made to the case of **Estate of Alice Mumbua Mutua (deceased) succession cause No. 3142 of 2003** considered the interplay between the probate jurisdiction of the court in situation where part of the property is land and its ownership is in dispute. The court stated thus: -

“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”.

54. That the court concluded that disputes involving third parties cannot be determined within the succession cause. The probate and administration rules provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table.

55. That the same position was upheld **In re Estate of Lucy Muthoni Obat (Deceased) [2021] eKLR(supra)** The position taken by the court in the above matter is in sync with the provisions of the Constitution. Article 165(5) excludes the high court’s jurisdiction in matters falling within the jurisdiction of the courts contemplated in Article 162(2). Article 162(2)(b) bestows exclusive jurisdiction in use and occupation of, and title to, land to the Environment and Land court. In the case of **In re Estate of Atibu Oronje Asioma (Deceased) (Succession Cause 312 of 2008)** where the court had a chance to consider the provisions of the Rule 41(3) of the Probate and Administration rules in the context of the high court’s

constitutional jurisdiction. The court, citing the case of **Re estate of Kimani Kimithia [2008] eKLR** observed that:

“Succession proceedings were not the appropriate way to challenge the title of the deceased to assets said to comprise his estate. Such claims ought to be subjected to different proceedings. The court clearly delineated the jurisdictional scope of the probate court and stated thus:- Under article 165(5) of the Constitution, it is asserted, in no uncertain terms, that the High Court shall exercise no jurisdiction over the matters to be placed under the court contemplated by article, 162(2). The court envisaged in article 162(2) was subsequently established under the Environment and Land Court Act, No 9 of 2011, to handle the disputes stated in article 162(2) The Land Registration Act No 3 of 2012 and the Land Act No 6 of 2012 identify the Environment and Land Court as the court for the purposes of disputes relating to matters touching on land, including registration.

56. That the court in that matter further considered the scope of **Section 47** of the **Act** and **Rule 73** of the **Probate and Administration Rules**. It dismissed the motion that, the said provisions of the law are elastic enough to confer the probate court with the jurisdiction specifically bestowed on the environment and land court. the court stated thus:-

‘Section 47 merely states that the High Court has jurisdiction to deal with applications and determine

disputes that arise over matters that are governed by the Law of Succession Act, and pronounce decrees and make orders as may be expedient, in the context of the provisions of the Law of Succession Act. It does not confer jurisdiction to handle disputes and applications that are not provided for under the Law of Succession Act. Inherent power is not saved under section 47 of Law of Succession Act, but under rule 73 of the Probate and Administration Rule. The High Court can only exercise jurisdiction, according to section 47, with respect to the matters covered by or provided for under the Act”.

57. The same position was upheld In **The Matter of the Estate of Njagi Njeru alias Mbuchi Baragu (deceased) Succession No. 161 of 2014** and **In re Estate of Okisai Kiroge (Deceased) (Probate & Administration 153 of 1998)**. In the latter case the court observed that questions of title affecting third parties cannot be resolved by the probate court. We submit the question of the jurisdiction of the probate court is settled.

58. That, a Bulk of the contest between the parties was the registration status of four properties namely;

- a. **Nakuru Municipality Block 10/176**
- b. **Nakuru Municipality block 5/56**
- c. **Nakuru Municipality block 5/194**
- d. **L.R 451/2055**

e. L.R 10453/1.

59. The 1st Objector swore in his affidavit that the properties were registered in the names of Njemoni Limited and they did not form part of the net estate. He produced copies of white cards in respect of Nakuru Municipality Block 10/176, Nakuru Municipality Block 5/56 and Nakuru Municipality Block 5/194.
60. That the 1st Objector further showed the court the original certificates of lease for the above parcels of land as well as L.R 451/2055 and L.R 10453/1. We refer the court to the copy of certificate o. All the documents showed that the parcels of land were registered in the names of Njemoni Limited.
61. The 2nd Objector, in his protest and the administrators, Monica Wangui Njenga, Joyce Nyambura Njenga and Frecia Wanjiku Gathogo took robust approach. In respect to the parcel of land known as Nakuru Municipality Block 5/194, David Kinyanjui Mathu deposed that it was registered in the names of Njemoni Limited in 2004 while there was a pending charge as at 2009. His position was that the transfer was illegal.
62. In respect to Nakuru Municipality Block 10/176, Nakuru Municipality Block 5/56 the 1st Objector deposed that the parcels of land were discharged on 4th July 2004 and transferred in the same date. He stated that his attempt to obtain records from the lands office in Nakuru were futile. He pleaded that there were official searches which were conducted in 2017 which indicated that the parcel of land were

registered in the names of the deceased but as at the time of the hearing, that situation had changed.

63. On their part, **Monica Wangui Njenga, Joyce Nyambura Njenga and Frecia Wanjiku Gathogo** took the same position and attached a report from a document examiner to demonstrate that the 1st objector had forged their signatures at the time of filing the petition and that he had the propensity to engage in forgery. However, the document examiner was never called as a witness. Since the report of the document examiner is in the nature of opinion evidence, by failing to call the document examiner as a witness, the reports lack probative value.
64. They prayed that the titles in the names of Njemoni Limited be revoked and they revert to the estate of the deceased and they be distributed as per their respective proposals in the affidavit of protest. It is the 1st Objectors Written Submission that the prayer for revocation of the certificates of lease is legally untenable due to lack of jurisdiction and want of pleadings. With regards to the issue of legality of transfer of Nakuru Municipality block 5/194 which was subject of a charge.
65. That the parcel of land known as Nakuru Municipality Block 5/194 was transferred to Njemoni Limited on 4th July 2004 during the lifetime of the deceased and a certificate of lease was issued to that effect. The 1st Objector produced a white card to confirm that fact. At the time of the transfer, the certificate of lease was charged to KCB Bank to secure a loan in the sum of Kshs. 755,000/= and the entry was

endorsed in the white card. The 2nd, 3rd and 4th Objectors and the land registrar took the position that the transfer when there was a charge was illegal. We submit that their position is legally misplaced.

66. That the transfer of charge is governed by **Land Act** and the **Land Registration Act. Section 86** of the Land Act provides as follow:-

1) A chargor or any person referred to in subsection (2) may, at any time, other than a time when the chargee is in possession of the charged land, in writing, request the chargee to transfer the charge to a person named in the request. (2) Subject to the consent of the chargor which shall not be unreasonably withheld.....

67. That the side note reads “transfer of charge” *Prima facie* transfer of land which is subject to a charge is permitted under the law. Such a transfer is subject to the consent of the chargee if the charge prohibits such a transfer and payment of money if the discharge of charge was made under **Section 102** of the **Land Act**.

68. Further **Section 59** of the **Land Registration Act** provides that consent of the chargee ought to be sought where the charge provides as much.

69. The position that a transfer of a charged property is illegal is therefore legally inaccurate. It is one thing to say that transfer is prohibited by law and it is another thing to say that the legal requirements for that transaction were never met. A transaction which is prohibited by the law ought not to be registered at all. A transaction in which the law sets out clear requirements can be registered once the legal requirements are

met. In cross examination, the land registrar confirmed that all transactions are registered upon confirmation that all procedures have been undertaken. At any rate, if the position of the 2nd -4th Objector was that the legal requirement for consent of chargee was not met, they ought to have summoned officials from KCB Bank.

70. It was the position of the 2nd – 4th Objectors that searches had been conducted in or around 2017 and they indicated that impugned certificates of lease and/or certificates of title were in the names of the deceased. In this regard they produced photocopies of the official searches. But on cross examination, the 2nd Objector and the land registrar confirmed that the information contained in the official search is derived from the white card. The white card is the source document while the search is the derivative. Where there is conflict between the two, the white card prevails. The land registrar identified the white cards which were produced in court indicating that they showed that the impugned parcels of land were owned by Njemoni Limited. She stated that, she could not comment on the official searches since they were photocopies. We submit that the said parcels are not free property of the deceased and they are not available for distribution.

71. That the 2nd – 4th Objectors took the position that the contested certificates of lease and certificates of title ought to be cancelled and reverted back to the estate of the late James Njenga Mathu, they claimed fraud as the sole basis for such a prayer. The 1st Objector/2nd Administrator submit that this position is legally untenable that they had demonstrated above the jurisdictional scope of the succession court.

Rule 41(3) of the **Probate and Administration Rules** is the procedural derivative of **Articles 165(5)** of the Constitution. Whether the contested parcels of land are part of the estate of the deceased is a question which cannot be determined by this court. It involves a question of title to land which falls within the jurisdiction of the ELC Court.

72. That in acknowledgment of this fact, the late **Monica Wangui Njenga** filed **Nakuru ELC 153 of 2019** where she pleaded that the disputed parcels of land were the property of Njemoni Limited. She pleaded that the transfer to Njemoni Limited was done fraudulently and she prayed that the transfers be revoked and titles revert back to the estate of the deceased. Which suit was struck out for want of *locus standi*. Further, **Monica Wangui Njenga** filed **Nakuru HCCC 25 of 2020** and in an affidavit in support of an interlocutory application and the notice of motion; she stated that the contested parcels of land were the property of Njemoni Limited.

73. That the filing of the two suits is an acknowledgment that there were contested questions of fact on the ownership of the parcels of land and the determination of the question of title to the contested properties ought to be determined by the ELC Court. Further, it was a tacit admission that Njemoni Limited was the proper defendant to the suits since the impugned titles were registered in its names.

74. Therefore, from a jurisdictional standpoint, the question of title to the parcels of land herein can only be determined by ELC Court and not this court. It is a question involving the administrators of the estate and

Njemoni Limited. This court cannot determine that question as part of the distribution of the free property of the estate.

75. That the 2nd - 4th Objectors' position is that the registration of the certificates of titles in the names of Njemoni Limited was through fraud. It is not in dispute that Njemoni Limited is a company with independent juridical character. In fact, the 2nd Objector produced a copy of CR12 suggesting that the 2nd to 4th Objectors were shareholders in Njemoni Limited. Furthermore, in the affidavit of protest of **David Kinyanjui Mathu**. Cancellation of certificates of title which are in the names of Njemoni Limited can only be possible under two scenarios.

(a) First, and subject to the legitimacy of the 2nd - 4th objectors/Objectors shareholding, they can call for meeting of Njemoni limited where the revocation of the transfer of the impugned parcels of land can be deliberated and resolutions passed.

(b) Secondly, they may take out proceedings against Njemoni Limited and where fraud is specifically pleaded, particularised and proved reliance being placed on the case of **Evans Kidero v Speaker of Nairobi City County Assembly & another [20158] eKLR** and **Kibiro Wagoro Makumi v Francis Nduati Macharia & another [2018] eKLR**.

76. That Njemoni Limited as a corporate entity has a right to be heard under **Article 50** of the Constitution before its property rights are affected. Further, the court cannot make a finding on fraud where the same is neither pleaded nor proved. Depositions in an affidavit of

protest are not a pleading of fraud since an affidavit is evidence and not a pleading. That Section 2 of the Civil Procedure Act defines a pleading as- Pleading includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.

77. Reliance is placed on the case of **Eurobank Limited (In Liquidation) V Riveton Investments Limited & 2 others [2007] eKLR** observed that:-

Although the said definition is inclusive rather exclusive, I would agree with the advocate for the 2nd and 3rd defendants that affidavits do not fall within the category of documents which constitute pleadings. Affidavits are constituted of evidentiary statements, made under oath. Whilst pleadings constitute no more than allegations or assertions made by either a plaintiff or a defendant, or by a party to litigation; in which such party is laying out, in broad terms, its case.

78. That Pleadings are central to the determination of disputes. They inform the adverse party the case that is up against and defines the limits of the court's determination. The court cannot frame issues outside what has been pleaded by the party. Similarly, a party cannot expand the scope of its case by way of evidence which is contrary to pleadings. On this proposition, the case of **Levi Simiyu Makali v Koyi John Waluke & 2 others [2018] e-KLR** In that case the court, citing with approval the

position of the Supreme Court in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) e-KLR** underscored the importance of pleadings and stated as follow:-

In absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

79. That the effect of the position taken by the Supreme Court is to depart from the principle in **Odd Jobs –vs- Mubia [1970] EA 476**. This court is bound by the decision of the Supreme Court.

80. As regards unpleaded issues, the principle is well settled that a court, even when it has jurisdiction, will not base its decision on unpleaded issues because the issues determined by the court must flow from pleadings. It is the pleadings which guide the litigation and succinctly inform the parties and the court what is in dispute. A summons for confirmation of grant is not a pleading. It is an application filed under

Section 71 of the **Law of Succession Act** and **Rule 40** of the **Probate and Administration Rules** as part of the process of distribution of the net estate.

81. Therefore, the prayer that the certificates of title to the contested properties, which are in the names of Njemoni Limited, should be revoked is not a question which is properly before this court. Fraud has not been pleaded and particularized. The proper defendant has not been sued. From a pleading's standpoint, the matter is not properly before the court and it ought to be dismissed.

82. That the 3rd and 4th administrator submitted that the 1st Objector, had intermeddled with the estate and that the transfer of the contested parcels of land and in particular, the transfer of the parcel of land known as L.R. 451/2055, but the 1st Objector demonstrated that all the contested properties were transferred to Njemoni limited during the lifetime of the deceased. The 3rd and 4th administrators made sensational remarks of forgery. But they never called the document examiner to produce his reports. The Respondent further claimed that the 1st Objector had illegally allotted himself shares in Njemoni limited. This issue is *res sub judice*. It is the subject matter of Nakuru HCCC 27 of 2020 which had been consolidated with Nakuru HCCC 25 of 2020.

83. That the 3rd and 4th Objectors submitted that, a transfer of charge was not possible without a discharge. This submission is legally inaccurate as **Section 86** of the **Land Act** is a complete answer to that issue.

84. That the 3rd and 4th administrators submitted that the 1st Objector ought to render an account of the proceeds accruing from the net estate. The 1st Objector contends the properties from which they demanded an account are the contested properties and it has been demonstrated that they lawfully belong to Njemoni Limited. That submission therefore lacks merit.

85. That the petitioners proposed that the parcel of land known as L.R. 10453/1 (Kabatini) be shared jointly between **David Kinyanjui Njenga** and **Monica Wangui Njenga**. That property was transferred by the deceased to Njemoni limited in 1992 and the same is not available for distribution as is exhibited by the 1st Objector.

86. That the same position applies for the parcels of land known as L.R. 10060/4, 10060/3 and 10060/6. The said parcels of land are in the names of Njemoni limited and they are not available for distribution as is exhibited by the 1st Objector and the 3rd and 4th administrators.

87. That the parcels of land known L.R. 10060/5 and L.R. 10060/9 are in the names of the 1st Objector, as is exhibited by the 1st Objector while the parcel of land known as L.R. 10060/1 is in the names of Dandora Millers Limited, an independent legal entity as is exhibited by the 1st Objectors and 3rd and 4th administrators.

88. That the parcel of land known as **L.R. 10060/8** is in the names of **Grace Njeri Njenga** while the parcel of land known as L.R. 10060/12 is in the names of the late **Monica Wangui Njenga**. These parcels of land do not form part of the free property of the deceased.

89. That the petitioners/administrators proposed that. the shares in Dandora Millers Limited and shares in Njemoni Limited be given to Monica Wangui Njenga. It was demonstrated during the hearing that the deceased never held any shares in Njemoni Limited. The company had two shareholders, **Monica Wangui Njenga** and **Davis Kinyanjui Njenga** Shares in those companies do not form part of the free property of the deceased.

90. That the deceased had 150 shares in Dandora Millers limited and they may be distributed as proposed by the applicants.

91. The parcel of land known as L.R. 10060/14 was registered in the names of the deceased and the same may be sold and the proceeds distributed. Further any money in Standard Chartered Bank may be shared equally among all the beneficiaries.

The 3rd Objectors-Margaret Wangeci Mburu, Mary Wanjiru Kariuki & Grace Njeri Njenga Case

92. That the 3rd Objectors are the daughters of the Deceased and the 1st Administrator (Deceased) and hence are beneficiaries and that, they filed the Affidavit sworn on 26th February 2019 and the Further Affidavit sworn on 8th February 2021 and two Lists of Documents dated 15th March 2024 and 27th May 2024 respectively. During the hearing the witness for the 3rd Objectors, Margaret Wangeci Mburu, clarified the context in which the Affidavit sworn on 26th February 2019 was prepaid, sworn and filed. She clarified that she wished to abandon it at the hearing and would not rely on it as part of her evidence.

93. That the 3rd Objectors distilled the following solo issue for consideration;

Whether the 2nd Administrator has intermeddled with the Estate of the Deceased and if so, whether properties known as LR Number 451/2055, Title Number NAKURU MUNICIPALITY BLOCK 5/ 56, Title Number NAKURU: MUNICIPALITY BLOCK 5/194 and Title Number NAKURU MUNICIPALITY BLOCK 10/176 are part of the Estate of the Deceased?

94. That It is common ground that the 3rd Objectors, the 2nd 3rd and 4th Administrators and Rose Wairimu are children of the Deceased and the 1st Administrator while the 2nd Objector is a grandson of the Deceased representing the interests of his father, the Late George Mathu Njenga, who was a son of the Deceased. The 2nd Objector acts on his own behalf and on behalf of James Njenga Mathu, Monica Wanjiru Mathu, Samuel Gatei Mathu and Elizabeth Wairigu Mathu.

95. That, the 2nd Administrator has held and maintained a stranglehold on the Estate of the Deceased since his demise on 18th August 2011. The evidence put forth in court confirms that 2nd Administrator petitioned for letters of Administration in 2015 without involving the rest of the beneficiaries, including the 1st Administrator (Deceased), who was the widow of the Deceased. A Forensic Document investigation carried out on the signatures appended on the initial Petition and accompanying documentation confirmed that the no other party or beneficiary signed the said documents. This fact was confirmed in the testimony in court by the 4th Administrator and Margaret Wangeci Mburu, who stated that the

other beneficiaries were not involved in presentation of the Petition, except the 2nd Administrator/ 1st Objector.

96. The 3rd Objector relies on the decision in **Benson Mutuma Muriungi v C.E.O. Kenya Police Sacco & Another [2016] KEHC 7145 (KLR)** to define what constitutes intermeddling with the estate of the Deceased where the court held that:-

“There is no specific definition of the term intermeddling provided in the Law of Succession Act. The Act simply prohibits taking possession of or disposing of, or otherwise intermeddling with, any free property of a deceased person by any person unless with the express authority of the Act, any other written law or a grant of representation under the Act. But in my understanding, the use of wide and general terms such as: "for any purpose" and "or otherwise intermeddle with" in the Act portends that the category of the offensive acts which would amount to intermeddling is not heretically closed or limited to taking possession and disposing of the property of the deceased. I would include in that category such acts as; taking possession, or occupation of, disposing of, transferring, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with existing lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act or any other written law. I do not pretend to close the list either or make it exhaustive. The

list could be long. However, any act or acts which will dissipate or diminish or put at risk the free property of the deceased are acts of intermeddling in law'

97. That there are four contested assets of the estate are LR Number 451/2055, Title Number NAKURU MUNICIPALITY BLOCK 5/56, Title Number NAKURU MUNICIPALITY BLOCK 5/194 and Title Number NAKURU MUNICIPALITY BLOCK 10/176.

98. With regard to Title Number NAKURU MUNICIPALITY BLOCK 5/194, the witness for the 3rd Objectors confirmed that the said title was charged to KCB Bank Ltd on account of monies owed to the bank by her husband, **Jack Kago Mburu**. The said title was charged together and simultaneously with Title Number NAKURU MUNICIPALITY BLOCK 1/120 and Title Number NAKURU MUNICIPALITY BLOCK 1/185 which was owned by **Jack Mburu Kago**.

(a) That the dispute between KCB Bank Ltd and Jack Mburu Kago was the subject of two courts cases, being Nakuru **HCCC 56 of 1988 (KCB Bank Ltd vs. Jack Mburu Kago)**, in which a consent was recorded on 24th March 1988.

(b) The Defendant in that Suit (Jack Mburu Kago) agreed to provide security for the money owed to the Bank; **and Nakuru HCCC 149 of 1991 (Njenga Mathu & Jack Kago Mburu vs. KCB Bank Ltd)**, whose Judgment was delivered on 9th October 2008 At Page 5 of the said Judgement, the court held that 'upon payment of the said interest to it the defendant shall, at the plaintiff's expense, immediately discharge the charged properties and released the Title Deeds to the first Plaintiff.

99. That it is clear from the Judgment that as at 9th October 2008, the title deed for Title Number NAKURU MUNICIPALITY BLOCK 5/194 and Title Number NAKURU MUNICIPALITY BLOCK 1/120 were still registered in the names of the 1st Defendant in that Suit, who is the Deceased in this Cause and were in the custody of KCB Bank Ltd.
100. That, the title for Title Number NAKURU MUNICIPALITY BLOCK 1/120 remains in the name of the Deceased, the title for Title Number NAKURU MUNICIPALITY BLOCK 5/194 was curiously transferred purportedly on 4th July 2004 to NJEMONI LTD, before the aforesaid Judgment.
101. That, the 2nd Administrator/1st Objector, who insists and claims the validity of the transfer, and who is also a Director of NJEMONI LTD failed to provide any documents in support of the validity of the alleged land transaction or transfer, including copies of the transfer, the Agreement for Sale in writing, evidence of consents by the Commissioner of Lands to transfer of leasehold property, payment of stamp duty, spousal consent of the 1st Administrator to transfer the property and clearance Certificate for rates to assist the transfer.
102. These are documents, copies of which are in the sole custody and control, of the 2nd Administrator and should have been presented as evidence in court by the 2nd Administrator once the 2nd and 3rd Objectors and the 3rd and 4th Administrators questioned when and how the alleged transactions were carried out.

103. The 3rd Objector relies on **Section 112** of the **Evidence Act** that states in civil proceedings, where any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. Further, being the party in possession of all the documents, the 2nd Administrator should have adduced them in court for examination and scrutiny.

104. The 3rd Objector urges the court to draw an adverse inference against the 2nd Administrator in regard to the purported ownership of the Property by NJEMONI LTD. We rely on the Court of Appeal Judgment in the case of **Chase Bank (Kenya) Limited v Cannon Assurance (K) Limited [2019] KECA 313 (KLR)** where the court held that:-

'Again, the court is at liberty to conclude from such omission, an adverse inference by weighing the evidence before it. Where the court has ordered for production of certain documents, and the party so ordered fails to produce the documents, the court can permit the leading of secondary evidence. It is further open to the court to draw adverse inference as provided under Section 119 of the Evidence Act which states:

"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

This provision in our Evidence Act embodies the doctrine of spoliation or suppression of evidence. Under this doctrine, it is generally the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy. Where such material is withheld, the court may draw adverse inference. (See Woodroffe's Law of Evidence, 9th Edition at Page 811-816).

In the case of Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others [2012] eKLR, the learned Judge rightly stated that:-

"Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party."

In the present case, it has been established that the appellant bank had custody of the respondent's documents for over five (5) years as at the time of filing the application in the trial court. However, it has failed to produce or explain the whereabouts of the said documents. The fact that there is no proof of return of the documents as alleged, leads us to conclude that the documents are still in the appellant's possession. Moreover, the admission by the appellant's employee, Mr. James Mwaura, that if the documents were not returned to the respondent, they could be in the bank's archive, shows

that due diligence in locating the requested documents was not exercised.

As stated earlier, discovery is a tool requiring an adverse party to disclose information that is essential for the preparation of the requesting party's case and/or to ascertain the existence of information that may be introduced as evidence at trial. The respondent was well within its rights to request the return of documents given to the appellant, presumably with the intent to introduce the documents as evidence at the trial which was yet to begin.

105. That the claim that the Properties are owned by or were lawfully transferred to NJEMONI LTD during the lifetime of the Deceased are mere unproven allegations that were not supported with evidence by the 2nd Administrator beyond display of the title documents. The 2nd Administrator should have presented evidence to trace the root of the title and not merely dangle a copy of the title deed. The suspicions of underhand dealing is further buttressed by the coincidental misplacement and/ or loss of documents from the Land Registry relating to the same Properties. Even the Land Registrar testified that she was not ascertain the ownership status of the three Properties registered in Nakuru, She testified that crucial supporting documents were missing from the Parcel Files and that the three files had been placed in the safe custody due to the missing documents and possible threat of interference.

106. That the 2nd Administrator confirmed that he has always been in possession of title deeds relating to the estate since the demise of the Deceased. The search for Title Number NAKURU MUNICIPALITY BLOCK 5/194 filed at the commencement of the Cause by the 2nd Administrator confirm that the Property was owned by the Deceased at the time of filing the Petition, it is submitted that the 2nd Administrator / 1st Objector would have immediately detected any contradiction between the Search and the Title Document before filing the Search in court.

107. With regard to LR Number 451/2055, a search carried out in 2017 by the 2nd Objector confirmed that the Property was owned by the Deceased. Subsequent entries were inserted claiming the transfer to NJEMONI LTD and a Charge to Consolidated Bank of Kenya Ltd. The 2nd Administrator did not produce any documents to prove the alleged transfer.

108. With regard to Title Number NAKURU MUNICIPALITY BLOCK 5/ 56, submitted that the Property was owned by the Deceased prior to his demise as demonstrated by the first search carried out by the 2nd Administrator at the time he filed the Cause.

109. Lastly, with regard to Title Number NAKURU MUNICIPALITY BLOCK 10/176 was owned by the Deceased and the 1st Administrator before it was curiously but illegally and irregularly transferred to NJEMONI LTD subsequent the filing of this Cause.

110. That the common denominators in the four land transactions that are challenged are the searches carried out by the 2nd Administrator at the time of filing the case confirmed that the properties were owned by the Deceased.

- i. The 2nd Administrator / 1st Objector is the custodian of the titles to the Properties and hence any search that was not in conformance with the contents of the title deed should have been easily been detected and isolated.
- ii. An application for a search must be accompanied by a copy of the Title to the Property being searched. The contents of the Certificate of Official Search are derived from the Green Card. It is highly unlikely that wrong contents were reproduced in the Certificates of Official Search for all the four Properties whose searches were conducted in 2015.
- iii. All the transfers were coincidentally backdated to 2004, with three transfers being effected on 4th July 2004 while one was effected on 14th April 2004.
- iv. Transfer of Title Number NAKURU MUNICIPALITY BLOCK 5/194 was effected when the Property was still charged and when Nakuru HCCC 149 of 1991 (Njenga Mathu & Jack Kago Mburu vs. KCB Bank Ltd), was still pending hearing and determination. Firstly, the 2nd Administrator has not adduced the relevant documents to consent by the Bank to transfer the Property pending the discharge. Secondly, it is implausible that one of three properties charged at the same time and for the same outstanding funds was discharged

while the other two titles remained charged. Thirdly, if the transfer had already been effected with the consent of the Bank in 2004, the reference about discharging the Properties in the Judgment dated 9th October 2008 would not have arisen, noting that NJEMONI LTD was not a party to the Suit. It is clear that the Discharge of Charge was registered on 26th May 2009 after the delivery of the said Judgment.

- v. The four properties form the key income generating assets of the Estate. The 2nd Administrator has retained control of the said assets and failed to account to the other administrators. While the four properties are located on prime areas and developed with structures which rented out to tenants, the remaining assets are vacant parcels of land of lesser value.
- vi. Further, the 1st Administrator confirmed in her filings in this matter that she was not aware of the alleged transfers despite being a director and majority shareholder of NJEMONI LTD.
- vii. The said assets having been unlawfully and fraudulently transferred from the Deceased to NJEMONI LTD by the 2nd Administrator/ 1st Objector remain assets of the Estate of the Deceased. The Court has jurisdiction to cancel the unlawful transfers that constitute intermeddling with the Estate of the Deceased. The court should thereafter distribute the said assets to the beneficiaries.

111. As to whether the 2nd Administrators benefitted from gifts inter vivos from the person Deceased during his lifetime that should be considered and/or reckoned in the distribution of the Estate? It is submitted that the Deceased transferred two large farms in Mau Narok and Kabatini measuring 1200 acres and 70 acres respectively to the 2nd Administrator, including extensive farm machinery, during his lifetime. While the two Properties are not part of the estate of the Deceased, the 2nd Administrator is the only beneficiary of the Deceased who benefited from the gifts made by the Deceased inter vivos.

112. The 3rd Objector submitted that assets should be considered and/or reckoned by the Court while distributing the Estate. The two assets transferred by the Deceased to the 2nd Administrator are highly valuable and income generating assets and formed the core assets of the Estate. It is significant that the 2nd Administrator confirmed that he has never worked for any other employer except working with the Deceased.

113. Reliance is placed on the provisions of section 42 of the Law of Succession Act which states that Where an intestate has, during his life time or by will, paid, given or settled any property to or for the benefit of a child, grand child or house that property shall be taken into account in determining the share of the not estate finally accruing to the child, grand child or house.

114. Reliance is placed on the holding in **re Estate of Chepkwony Arap Rotich [2016] KEHC 5774 (KLR)** where the Court held that-

"A consideration of the properties allegedly gifted to the sons of the 1st house shows a very wide disparity in the size of the properties that each son has. One son has 7.6 ha or 18.78 acres, while another has 2.7 acres. The Law of Succession Act requires that the property of a deceased person be distributed equally between the beneficiaries of a deceased person. There should thus not be such wide disparity in the distribution that would work an injustice on some beneficiaries, which is what would result from the mode of distribution proposed by the protestor".

115. The 3rd Objectors submit that from the significant benefit that the 2nd Administrator has derived from the Estate prior to the demise of the Deceased, he should be excluded from benefitting from the remainder of the Estate.

116. As to Whether the 2nd Administrator should render an account of the earnings of the Estate from the date of demise of the Deceased?

117. That, it is common ground that the 2nd Administrator has been collecting and keeping rent from LR Number 451/2055, Title Number NAKURU MUNICIPALITY BLOCK 5/ 56. Title Number NAKURU MUNICIPALITY BLOCK 5/194 and Title Number NAKURU MUNICIPALITY BLOCK 10/176 and all other assets of the Estate of the Deceased since his demise in 2011 to date to exclusion of all other beneficiaries.

118. The 2nd Administrator/ 1st Objector has been in exclusive control of the assets of the Estate since the demise of the Deceased to the exclusion of all other beneficiaries. The Court should compel him to render of account for all monies generated and collected on behalf of the Estate.

119. The 2nd Administrator/ 1st Objector has sought to unjustly enrich himself from the estate to the exclusion of all other beneficiaries. The failure to provide the accounts to court is intended to delay the distribution of the estate and to hold all the beneficiaries hostage while he continues to benefit from the prevailing status quo.

120. The 3rd Objector urges the Court to issue an order that the 2nd Administrator/ 1st Objector renders an account of all the income of the estate of the Deceased from the date of his demise.

121. The 3rd Objectors submit that the appropriate sequential orders are-
- a. The Honourable Court be pleased to order the 2nd Administrator to provide an account of the income, proceeds and collections received from the estate of the Deceased to the exclusion of all other beneficiaries and surrender such collections to the 3rd and 4th Administrators for distribution from the date of his demise in 2011.
 - b. The Honourable Court be pleased to grant a declaration that the Properties known as LR Number 451/2055, Title Number NAKURU MUNICIPALITY BLOCK 5/56, Title Number NAKURU MUNICIPALITY BLOCK 5/194 and Title Number NAKURU

MUNICIPALITY BLOCK 10/176 form part of the Estate of the Deceased and grant an order to revert the said Properties to the Estate of the Deceased

- c. That 2nd Administrator to be excluded from benefiting from the Estate of the Deceased on account of significant assets vested in him inter vivos during the lifetime of the Deceased
- d. That the Estate to be distributed to all other beneficiaries, excluding the 2nd Administrator, equally in accordance with the Amended Schedule of Distribution dated March 2024.

Analysis and Determination

122. The 1st Objector and Njemoni limited had a burden proof to demonstrate how Njemoni Limited acquired Nakuru Municipality Block 10/176, Nakuru Municipality Block 5/56, Nakuru Municipality Block 5/194, L.R 451/2055 and L.R 10453/1 by way of sale agreements and further produce the transfer instruments, consents to transfer and stamp duty payments.

123. With the 1st objector relying on the sanctity of title argument without tendering evidence in support of the alleged acquisition by Njemoni Limited, this court shall make adverse inference that the 1st Objector could have presented transfer instruments consents, proof of consideration and proof of payment of stamp duty if such existed and having failed to present the same do not exist.

124. Njemoni Limited is described as a holding company with no other business activities then one wonders what company resources were expended in the acquisition of the contested properties and the evidence in support.

125. Significant shares in Njemoni Limited are held by the 1st Objector and as such it has had full knowledge of the existence of the proceedings but stood by the fence for ten (10) without participating and then the 1st Objector cannot be heard to argue that Njemoni limited has not been afforded a hearing.

126. As things stand it is only the 1st Objector/2nd Administrator who doubles up as a shareholder of Njemoni Limited who claims that the properties listed as such do not form part of the estate of the deceased. He is a majority shareholder of Njemoni Limited with access to company records and even in the absence of Njemoni Limited participating directly in these proceedings, the 1st Objector had a duty to avail proof just as he had produced the copies leases in favour of Njemoni Limited

127. While the 1st Objector argues that section 84 of the Land Act enables transfer of a charge, he failed to prove that, the deceased had requested the transfer of a charge, and that the (chargor) bank authorized the transfer of the charge, these requirements are fortified in law.

128. Legal jingoism and multilayering of complex catch-22 scenarios protracting an otherwise straight forward succession is viewed in the lens of the court as the underlying problem that has made this

succession a seven (7) year old back-log and the sprinkled patriarchal undertones reeks of discrimination on the basis of gender and the patriarchal entitlement in succession matters.

129. In other words, the 1st Objector is the sole surviving son of the deceased pitied against his late mother and sisters who are supported by the family of their deceased brother. Basically, a majority of the bloodline of the deceased **Joseph Njenga Mathu** and his now deceased widow argue that the 1st Objector is dishonest with ultimate intention of dispossessing them. This is the crux of the matter and it matters not whether we have a company now registered owner of assets previously belonging to the deceased. It cannot be that almost the entire family of the deceased would gang up against one member of its family.

130. The 1st Objector enjoys his position as Co-administrator by virtue of a grant and as such should at all times be accountable, with all the forthcomings the court shall not move him as an administrator as urged but shall expect him to perform his duties inline with the law as subjected to by the court.

131. In the case of **Daudi Kiptugen –vs- Commissioner of lands & 4 others (2015) eKLR**, the court emphasized that,

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were the position then all one would need to do is to

manufacture a lease or a certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

132. This court further notes, the 1st Objectors admission on record that the two companies were essentially to be special purpose vehicles for holding assets, however this court finds the transfers and ownership presented by the 1st Objector to be insufficient in asserting ownership, in fact the Registrar of lands concurred with the court that in the absence of a green card together with all documentations supporting the respective transactions of transfer to njemoni limited. this court is thus inclined to find that the following assets constitute part of the estate of the deceased and shall be subject to succession.

a) Nakuru Municipality Block 10/176.

b) Nakuru L.R. 451/2055 (previously Nakuru Municipality Block 6/120).

c) Nakuru Municipality Block 5/56.

d) Nakuru Municipality Block 5/194.

133. The 1st Objector has challenged the jurisdiction of this court to order cancellation of titles. It is his argument that such an order may only be granted by the Environment and Land Court. This court respectfully disagrees and holds that, the High Court bears jurisdiction to order cancellation of titles since it is the only way to give effect to its judgment this is in line with the holding in the case of **Santuzza Bilioti alias Mei Santuzza (Deceased) v Giancarlo Falasconi [2014] eKLR** **the court held:**

“.....the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of a title deed if a deceased's property is being fraudulently taken away by no-beneficiaries such as where the property is being sold before a grant is confirmed.”

134. This court is unsatisfied by the 1st Objector's evidence of ownership by Njemoni Limited and as such finds that **Nakuru Municipality Block 10/176, Nakuru L.R. 451/2055** (previously **Nakuru Municipality Block 6/120**), **Nakuru Municipality Block 5/56** and in **Nakuru Municipality Block 5/194** form part of the estate of the deceased.

135. This court considers the mode proposed for distributing **Nakuru L.R. 451/2055** (previously Nakuru Municipality Block 6/120) noting that it is proposed to be jointly registered in the names of Nine (9) Beneficiaries, this is untenable in law with maximum numbers in practice being capped at four names on a certificate of lease. I shall thus propose for its liquidation with the proceeds being equally shared amongst the proposed beneficiaries.

136. With regard to any disputes around shareholding of Dandora Millers Limited the same can only be subject before a court with competent jurisdiction as a company's court. Assets of this company including incomes from subleases such as the KPLC and Safaricom subleases cannot be subjected to a succession and only the deceased shares in

the company may be subjected to succession, the proposal by the 3rd and 4th Administrators is untenable in law, general in nature and without specifics as to shareholding proposed.

137. With regards to Njemoni Limited and its ownership structure or dispute, the same is misplaced as the deceased had no share thereon and as such the estate of the 1st Administrator shall pursue the same in the companies' court.

138. The deceased shares in Dandora Millers Limited shall be subjected to succession once the shareholding dispute as alleged by the 3rd and 4th Administrators is resolved and the actual shares of the deceased are determined and disclosed.

139. Having found that the assets in dispute form part of the estate of the deceased, I am thus to partially confirm the grant made on 7th July 2015, and is thus called upon to determine the proposals for distribution and make a partial order for distribution while awaiting presentation of the assets not yet presented.

140. This Court thus allows partial confirmation of grant herein and of the following assets determined to be free assets of the deceased to be forthwith distributed as follows;

Property Description	Names of beneficiaries	Shares
Nakuru Municipality Block 10/176	1. Joyce Nyambura Njenga 2. Grace Njeri Njenga.	Deceased's half (1/2) share jointly in

(owned jointly by deceased & the late Monicah Wangui Njenga)	3. David Kinyanjui Njenga	equal shares
LR. No. 8654 (I.R. 18944) (Owned jointly by deceased and the late George Mathu Njenga)	Grace Njeri Njenga	Deceased's half (1/2) share Absolutely
Nakuru Municipality Block 1/120 (Langa Langa)	Mary Wanjiku Kariuki	Absolutely
LR. NO. 451/2055	1. Mary Wanjiru Kariuki 2. James Njenga Mathu, Monicah Wangui Mathu, Samuel Gateri Mathu, Elizabeth Wairimu Mathu, David Kinyanjul Mathu (children of the late George Mathu Njenga). 3. Margaret Wangeci Mburu 4. David Kinyanjui Njenga 5. Frecia Wanjiku Gathogo	To be sold and the proceeds be shared equally
Nakuru Municipality Block. 5/56	David Kinyanjui Njenga	Absolutely
Nakuru Municipality		

Block. 5/194	Rose Wairimu Njenga	Absolutely
Nairobi LR. No. 10060/11	Joyce Nyambura Njenga	Absolutely
Nairobi LR. No. 10060/13	Margaret Wangeci Mburu	Absolutely
Nairobi LR. No. 10060/14	Frecia Wanjiku Gathogo	Absolutely

141. The 1st Objector/2nd Administrator is hereby ordered to within the next 45 days prepare and file a detailed statement of account of all proceeds received from the assets of the deceased in his control.

142. An Order is hereby issued to the Land Registrar Nakuru County to forthwith cancel, revoke, and/or nullify the transfers and certificates of lease issued in **Nakuru Municipality Block 10/176, Nakuru L.R. 451/2055 (previously Nakuru Municipality Block 6/120), Nakuru Municipality Block 5/56 and in Nakuru Municipality Block 5/194** in the name of Njemoni Limited dated 14th April 2004 and 4th July 2004 and to rectify the register to revert registration back to **Joseph Njenga Mathu** the as the registered proprietors of the suit properties.

143. The Administrators are at liberty to present a detailed mode of distribution of funds in various bank accounts with clearly assigned share to each beneficiary.

144. Parties shall bear their own respective costs this being a family affair.

145. Any Party aggrieved by this judgment is hereby granted leave to appeal within the next 45 days which period shall act as stay of execution.

It is So Ordered.

**Signed, Dated and Delivered at Nakuru
on this 7th Day of October 2025.**

**Justice Mohochi S.M
JUDGE**