In re Estate of Anthony Gachoki Kariithi (Deceased) (Succession Cause 216 of 2012) [2025] KEHC 15403 (KLR) (28 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15403 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

SUCCESSION CAUSE 216 OF 2012

EM MURIITHI, J

OCTOBER 28, 2025

IN THE MATTER OF THE ESTATE OF ANTHONY GACHOKI KARIITHI (DECEASED)

BETWEEN

ROSE WANGECI MUNENE .... 1ST APPLICANT

JANE KARIIKU MURIUKI .... 2ND APPLICANT

AND

ZIPPORAH WAIRIMU KARIITHI .... 1ST RESPONDENT

CHARLES COSMAS GITHINJI .... 2ND RESPONDENT

EDWIN FREDRICK KINYUA KARIITHI .... 3RD RESPONDENT

PATRICK KARIITHI MWANGI .... 4TH RESPONDENT

WINFRED MERCY NJERI KARIITHI .... 5TH RESPONDENT

RULING

1. By Summons for revocation of grant dated 20/4/2023 under sections 45, 48 and 76 of the *Law of Succession Act*, and Rules 27, 44 and 73 of the Probate and Administration Rules, the Applicants seek that the grant of letters of administration issued and confirmed to the 1st Respondent on 20/12/2017 be revoked, and an inhibition be registered on LR No. Inoi/Kariko/2275.

2. The application is premised on the grounds set out in the application and the supporting affidavit of the 1st Applicant sworn on even date. She avers that she is a sister to the deceased and a beneficiary of the estate property comprising of L.R No. Inoi/Kariko/2275 (hereinafter referred to as the suit land). L.R No. Inoi/Kariko/115 was initially registered in the name of their father, Kariithi Karoya, and when it was subsequently subdivided into L.R Nos. Inoi/Kariko/958 and 959, the deceased, with total disregard to their entitlement to L.R No. Inoi/Kariko/958, which was subdivided into L.R No.

Inoi/Kariko/2275 and 2276, exclusively acquired title thereto. The grant issued to the 1st Respondent was therefore obtained fraudulently by concealment of the material fact that the deceased held the land in trust for the Applicants and their two other sisters, who have since died. The deceased sold L.R No. Inoi/Kariko/2276 to one Christopher Karimi Ndeeri to settle a debt, and assured them that he would transfer the suit land to them. The 1st, 2nd and 3rd Respondents are intermeddling with the suit land, and she is apprehensive that they intend to transfer, sell, charge and/or alienate it to defeat their claim.

3. The 1st Applicant and Esther Wambui Njeru, an aunt to the deceased, filed witness statements dated 2/8/2023 in support of the application.

4. The 1st Respondent swore a replying affidavit on 3/7/2023 in opposition to the application. She avers that the 1st Applicant's protest was heard on merits and dismissed for lack of proof of any existence of trust or dependency. The application is brought in bad faith by a vexatious litigant, and the same ought to be dismissed with costs.

5. The 1st Respondent filed her witness statement dated 10/8/2023 in opposition to the application.

Oral Evidence

6. AW1 Rose Wangechi Munene adopted her statement dated 2/8/2023 and her supplementary affidavit as her evidence in chief. She testified that, "The deceased was my brother. My brother's name is Anthony Gachoki Kariithi and my father is Kariithi Kagwoya. Zipporah names are Zipporah Wairimu Kariithi. In our custom (Kikuyu) a married woman adopts the name of her husband not of her father. Zipporah is Zipporah Kariithi. She did not take deceased to bury him. She had separated from deceased. The mother title for Plot 2275Inoi Kariko was registered under Kariithi Karwoya. My father was Kariithi Karwoya. He had 2 wives. When he died he owned LR 115 which was subdivided into 2 portions one for each wife. The sub-division was determined by the clan elders members. The subdivisions were LR 958 and 959 as shown in RWN 2- Green Card. I can't recall which portion was given to our family. Kariithi Karwoya had two wives. My mother was Wamurana Kariithi. The other wife of my father Belise Guchu Kariithi. The parcel LR 958 was given to us and I the deceased were taking care of it. Parcel 958 was registered in Anthony Gachoki Kariithi. The land was supposed to be held by him on behalf of the family. There are other witnesses who can confirm this Esther Wambui Gathoni Karwoya who is our relative she will testify. I used to plant maize and tea on the land plus nappier grass i.e 2275. Parcel 958 was sub-divided and Anthony Gachoki sold his share. At the time of deceased's deathZipporah was living in Kagio Kiangwaci area. She had separated from Anthony due to disagreements. Anthony (deceased) was buried in Kiangwaci area. He was buried in Parcel 2275 because he had already sold his share of the land. Zipporah got the title for LR 2275 when she noted deceased had died and got a title from the chief to get the title. She even did succession. The grant was obtained fraudulently she, Zipporah got deceased body and buried him without notifying us. I was not put in as a beneficiary in the Petition because Zipporah used fraudulent means to file the Petition. Zipporah married the deceased before my father's death. Zipporah was very aware that deceased held Parcel 2275 in trust for us. Zipporah is the registered owner now. Show RWM 8. This is the chief's letter dated 7/2/2023 in which he said the deceased's property belonged to the family. We went to the chief but Zipporah declined. The chief had a meeting with the family but Zipporah declined to attend. The chief was Rosemary Wambui Njeru. I want the court to give me that parcel 2275 because it belongs to us."

7. On cross examination, she stated that, "I was never involved in the petition by Zipporah, because I was not aware. I never attended court in connection with the deceased's succession. I came to oppose succession at some stage. I did not file a protest in this succession. I came to oppose the succession on Parcel 2275 I did not come to court to say how the land should be distributed. I came to court when there was a lady judge. I did not give any evidence. No judgment was read concerning this land. There

is no such judgment saying I had no right to this land. I recall I had issued a restriction on the land. Zipporah did not take me to court for restricting the land. I am aware my restriction was removed through a court order. Zipporah was deceased's wife, I agree. Zipporah and deceased had children. They were recorded by their mother Zipporah. Zipporah and deceased. Their children are: 1. Charles Githinji 2. Edwin Kinyua 3. Patrick Mwangi 4. Winfred Mercy Njeri. Parcel 115 belonged to my father Kariithi Kagwoya. When he died there was a succession case. Only 2 of my brothers were involved in that succession. I did not go to court in that succession. Before the deceased Gachoki died I did not oppose that succession. After that succession the land was divided into 2 portions LLR 958 and 959. Parcel 958 was given to Anthony Gachoki (deceased). He divided into 2 parcels. 2275 and 2276. He sold parcel 2276. He remained with LR 2275. When he sold 2276 I was not called. 2275 was part of the land. We were in the process of being put in the title before deceased passed on. I have filed 2 letters of chiefs. Show RWM 6 and 8. These are the letters. In RWM 6 the chief did not mention my name and my sisters. In fact were not identified. In RWM 8 the chief is Rosemary Njeri. She is a daughter to my uncle so she is conversant with the land. It is titled in the estate of Kariithi Karwoya not Anthony Gachoki. Kariithi Karwoya has a shamba with his family. She is a chief. It is not because she is related. When succession was done it was for Inoi/Kariko/115. For my deceased father succession was first done – I can't recall when. My father was Kariithi Karwoya. I was not informed when his succession was commenced. Shown supplementary affidavit RMW 2- this is a Green card for Inoi/Kariko/115 shown Entry 2 succession was done in 1976 by Anthony Gachoki and Edward Munene I am aware of this. I have never objected or protested to that succession. The two who were Anthony Gachoki and Edward Munene were given to hold in trust. Shown RWN 4 (b) – Green Card Anthony Gachoki got his title in 1979 16/1/79. He was holding in trust. This is for Inoi/Kariko/958. Shown RWN 4 (a) – This is a subdivision of 958. It was divided into 2275 and 2276. Anthony Gachoki sold 2276 to Christopher Karimi. I was not involved in this. I did not sue Christopher on 2276. Anthony Gachoki died in 2009. We did not take Anthony to court or sue in regard to 2276 since 1979 – 2002. I recall I testified in court and my witness also testified. A judgment was read after that. Zipporah then came back to court. I objected to her proceedings. The court issued judgment in November 2019 and the restriction was removed. I did not appeal because I did not have money. Zipporah got the title in a crooked way. When Zipporah's husband died I took occupation and I use it. Before Zipporah's husband died we used the land. It was not true that we took the land by force. Shown Applicant's list of witnesses page1 This is a Tea Factory delivery book Growers Card. Grower No 199 is my number. I take my tea to Kangaita. That document for Tea delivery does not show the year I took my tea. I normally put my signature by thumb print. This card doesn't have my thumb print. There is no Grower's Name indicated in the card. The title of the land is presently in the name of Zipporah Wairimu Kariithi and her children."

8. In re-examination, she stated that, "There was a letter I was given by the chief. It is not true I had issues with chief. She knows me, Zipporah. Parcel 115 it was divided between Anthony and Edward. It was divided between 2 of them because there were two families. Plot 958 in Anthony's name he subdivided it to 2275; 2276. He sold 2276 to Christopher Nderi. That was his portion. He said that was his portion. On 2275 Anthony said he would subdivide for us. I have filed this revocation. Zipporah took the title and had it improperly. This was after her husband dies. This was fraudulent. Zipporah was working with headman Nahashon K Mwangi to deny us the land. I was using the parcel before Zipporah. Zipporah has never lived on that plot. I produce tea on it and other food. I take the majani to Tea Buying Centre called Block. The Tea Factory is called Kangaita. It doesn't have my name on the card. My Grower No is 199. I did not thumb print because we are required to do so."

9. AW2 Esther Wambui Njeru adopted her statement dated 2/8/2023 as her evidence in chief. She testified that, "I am the wife to James Pius Njeru who was brother to Kariithin Karwoya. I am the auntie to Anthony Gachoki deceased. Rose Wangechi is the sister to Anthony Gachoki. Kariithi's land

was 7 Acres. On his death Anthony Gachoki and Peris Ngunju Kariithi did succession of Plot 115. This death was in 1976. The shamba was divided between Anthony Gachoki (deceased) and Edward Munene. They were to hold on trust. There was a clan meeting. I recall some of them: James Pius Karwoya, Mugo Gacuri and Gichiyo Kimau and Gitari Kimau. At the meeting they discussed how to distribute the land. They agreed that the land be distributed according to the houses of deceased. James Pius Karwoya was my husband he was the last of the elders to die. He died 2021. The Administrators were supposed to sub-divide the land for all family members. Parcel 115 was to be held in trust. Gachoki Anthony was to subdivide to family members: i.e Nyaira Kariithi, Rose Wangechi Munene Kariithi. Zipporah did not know about this she was living in Nairobi. Before death of Anthony, Rose Wangechi Munene was a joint tea account holder with Anthony. She was also growing other crops. Anthony loved his sisters a lot. Before Anthony's death he had built a house Zipporah was not staying there. Since Anthony died Rose and her sisters were not given any portion. Zipporah and Rose had a dispute about the land. In 2021, Zipporah was called by my husband as a family so that she could sub-divide for her family. She refused. Later they were called by the chief. The land case was never resolved. I pray that Rose Wangechi and Zipporah be given this portions due from their father."

10. On cross examination, she stated that, "My husband is James Pius Njeru Karwoya. I signed my statement. My husband is aldo called Gathoni Karwoya. Zipporah is the wife of my kijana – Anthony Gachoki (deceased). Anthony and Zipporah had 3 children. My husband died in 2021. If my husband dies I am the one who should do succession. Zipporah had no fault in doing Anthony's succession. I was at the elders meeting. My husband was there. Shown paragraph 7 of statement, I was present at the Elder's meeting. Anthony died in 1976. Edward Munene had sisters. He did not divide land to his sisters because they did not want. No one from Edward's family is giving testimony. This case is not about them. I am here as their auntie. I know the chief Rosemary Njeru. She is my daughter. She is the one who wrote the letter dated 7/2/2023. I don't know that Rosemary was in court. I am not aware that Rose Wangechi placed a caution which was removed by the court."

11. In re-examination, she stated that, "At the meeting of clan I was there. The meeting was around 1978. The meeting decided that the property be distributed between the two families – each family to get 3.5 Acres. Anthony Gachoki was to hold on trust for his family. Edward Munene was to hold on trust for his family. They were to divide the land thereafter. Edward Munene's family has not been called here because that is a different family."

12. When questioned by the court, she stated that, "Paragraph 5 of her Affidavit, Kariithi Karwoya died in 1972. There were 2 meetings. At …which is where he lived and also at Karaini. I was present at both meetings. The elders were present at those meetings. I was born in 1954."

13. On further cross examination, she stated that, "I was present at the two meetings. I have no minutes to show. In 1978 I was 23. I went because as a young person, I needed to know. There were other wives there. I'm the only survivor of the people at the meeting."

14. On further re-examination, she stated that, "Other than the Elders and I there were others at the meetings; they are all dead. There were minutes of the meeting. I didn't think they would be required."

15. RW1 Zipporah Wairimu Kariithi testified before the Court and produced exhibits as follows:

> I am Zipporah Wairimu Kariithi. I come from Kagio. I am a farmer. The Respondents are my children. The 2nd Respondent is before the Court.
>
> I filed a Replying Affidavit sworn on 3.7.2023. I have the authority to plead dated 3/7/2023. The Replying Affidavit was in response to Summons dated 20.4.2023 for of Revocation of Grant.

List of Documents has annextures:

1. Grant dated 20.12.2017.

2. Judgment delivered on 20.12.17.

3. Title deed dated 20.8.2020 - Inoi/Kariko/2275.

4. Ruling dated 29.11.2019.

5. Order of 12.9.2022.

The documents were in this case. It was the case with Rose Wangeci Munene. She is in her present case. Ruling of 29.11.2019 is on case with Rose and Grace Muthoni Wambu and Jane Kariko Muriuki. Jane Kariko is the same person in the application before the court. The Ruling was on application and the order is No. (5) of documents. It was for removal of restrictions. The order is for several of Restriction.

16. On Cross-examination by Mr. Ngángá for Applicants she said:

> "The parcel of land in dispute is Inoi/Kariko/2275. It is a subdivision for parcel No. 958. It belonged to my husband's father. 958 is subdivision for parcel 115 the original title. Parcel 115 is registered in Kariithi Kamoya. It was divided into 2 portion each given to (2) wives; Antony Kariithi and Edwin Munene – different mothers.
>
> I was married in 1972. I found the deceased alive.
>
> [Meeting of his family?] There was no family and resolution that the land was held in trust.
>
> The meeting said the land belonged to (2) Munene and Kariithi.
>
> [In trust for the sisters?] No. All the sisters were married.
>
> [PW2 Esther Wambui Njeru] She was not there at the meeting. She has not shown documents of the meeting.
>
> [Before your husband died you did not live on the land?]
>
> My husband sold parcel No. 2276.
>
> Plot 2275 – I lived here with my children. Antony Gachoki is not buried on the land. We lived here.
>
> I buried my husband at another parcel of land where we bought. A Kikuyu man are buried on the land that he owns. We had other shamba where we had bought. We decided to bury him there.
>
> [It is his sister who took him to hospital].
>
> Yes. I do not know who took him to mortuary. I was not there.
>
> [Were you separated/divorced]
>
> I was not divorced or separated. We had (2) shambas – I was not on the parcel of land on that date.
>
> [Before your husband died, did his sister cultivate on his land?]
>
> No she did not farm on his land.
>
> [She produced Tea card].

I also have a card. I am the one who was picking the Tea. Antony Gachoki Kariithi is the name of my husband.

[Kariithi is his father's name?]

I do not know. My Identity card indicates the names Zipporah Wairimu Kariithi.

[I do not have an Identity Card].

[Rose said the letter from Chief is fraudulent?]

The Chief is alive. I have not called him as a witness. I followed he correct procedure. I saw the complaint that it is fraudulent. I did not call the Chief as a witness. I did not involve all the beneficiaries.

[Attempt of defrauding the beneficiaries?]

The land belonged to my husband's father. I do not know whether there was agreement that the sons should hold in trust for sisters. I have have my written documents. A female [child] is entitled to inherit her father.

Your husband sold parcel 2276? I have not seen any documents.

17. On Re-examination by Mr. Nyaga, she said:

"I filed succession case on my husband. I had filed succession on my husband's father. I am not aware of meeting. I did not have any minutes of meeting.

A Ex No. 8 – Tea Factory Card. It does not show the parcel of land.

Title deed on parcel of land parcel is No. 2275.

The Chief is not a party to these proceedings.

[Supporting Affidavit paragraph (5).

The applicants agree that I am wife of the deceased and the others are our children.

[Trust on behalf of his sisters].

Rose objected to the succession. Rose said that the land should be distributed> The Judge made a decision. We buried my husband on another Shamba."

Submissions

Applicants' Submissions

18. The Applicants maintained that they produced irrefutable proof that the suit land was held in trust on their behalf, and cited Isack M'inanga Keibia v Isaaya Theuri M'lintari & another (2018) eKLR and Re Estate of Wangigi Kamiti (Deceased) (Succession Cause E001 of 2020) [2022] KEHC 3078 (KLR) (27 June 2022). It was urged that the Respondents had obtained the Grant by concealment of material fact of the existence of a trust in favour of the applicants as follows:

"2. Whether There Was Concealment Of Material Facts By The Respondents?

The Respondents when petitioning this court for letter of administration intestate concealed the fact there had been a meeting held on how the estate of Kariithi Karuoya (deceased) was to be distributed. The Applicants called Mrs Esther Wambui Njeru, an aunt to the Applicants and the 1st Respondent

to testify on the meeting that was held after Mr Kariithi Karuoya death, the father of the Applicants and the father in law of the 1st Respondent respectively. The relationship between the Applicants and the 1st Respondent to Mrs Esther Wambui Njeru is that she is the wife of Gathomi Karuoya the brother of the late Kariithi Karuoya. She gave sworn testimony in open court and averred that, upon the demise of Kariithi Karuoya in the year 1972, sometime that year a meeting was held by the clan elders to discuss how succession of the Estate of Kariithi Karuoya was to be carried out. The said meetings were held at different venues in Mutuma area and another at the Karaini Shopping Centre. The members present in those discussions though currently deceased were Archangelo Mirage Mugo, Gitari wa Mugo, Gitari wa Kamau, Njeru Gathomi Karuoya and Mugo wa Gacere. They discussed and agreed that since Mr Kariithi Karuoya was married to two wives and had two households, they decided the sons from the two households were to be made the administrators of the estate of Kariithi Karuoya. The estate of Kariithi Karuoya was to be subdivided equally between each household and the brothers were to hold their respective portions it in trust of their sisters to be sub divided later and each sister apportioned what they are entitled. After subdivision of Land registration Inoi Kariko 115 (mother title) into land registration Inoi Kariko 958 and 959 respectively, the Applicants' brother Anthony Gachoki Kariithi whose succession is being contested was furnished with land registration number Inoi Kariko 958. He further sub-divided it into land registration number Inoi KARIKI 2275 and land registration number Inoi KARIKI 2276 respectively. He sold land registration number Inoi Kariko 2276 to offset his debt and promised to bequeath the remaining portion to his sisters as he had already sold his portion.

Mrs Esther Wambui Njeru during hearing averred that, she learnt that the property Inoi Kariko 2275 was currently registered in the names of the Respondents which is contrary to what had been agreed upon by the clans' men during the meetings in 1972. She tried mediating with the parties to ensure the Applicants are not disinherited but the same fell on deaf ears. The disagreement escalated to the area chief, she tried to resolve the dispute in question but the Respondents were adamant in their refusal and resolved not to release the property to the Applicants. The 1st Respondent in their document did not dispute the meeting in 1972 happening, she did not dispute knowledge of the clan members named and equally she did not recant the various areas the meetings were held. Equally she did not challenge the assertion by the Applicants witness and she did not call any witness refute and/or controvert what was testified by the Applicants' witness. From the foregoing it is quite evident that the 1st Respondent was privy to this information but she chose to stay quiet while petitioning for grant of letters of administration intestate in a failed attempt to disinherit the Applicants who have equal right to inherit from their father's estate which was held in trust by their brother till his untimely demise.

My Lord if this information was brought out during petitioning for grant letter of administration, the Honourable Court would not have granted the grant to the Respondents."

Respondents' submissions

19. The Respondents urged that the Applicants' father died long before the commencement of the *Law of Succession Act*, and the applicable law was Kikuyu Customary Law, and the ground of trust is unfounded. They contended that the matter was res judicata and urged the court to bring the litigation herein to an end, and citing Pauline Wanjiru Ngigi v Samuel Kamonye Gichane & Another (2014) eKLR, it was urged that-

> " It is clear as analysed above that the history of the deceased's Estate is traced back since 1976 when the succession cause of land parcel No. Inoi/Kariko/115 was done and the land was distributed in accordance with the customary law by sharing the land into two houses with a son from each side. That on 5th August 1978 the land was subdivided and shared equally by the two step brothers and separate title deeds were issued. That the deceased was issued with land parcel No. Inoi/Kariko/958 which the applicants never objected. Consequently, the applicants then never applied for revocation of grant of their father's estate (Kariithi Karuoya). My Lord, the *law of succession Act* Cap 160 laws of Kenya came into force on 1st July 1981 and the law that applied before then was the customary law and being specific the Kikuyu customary law. That under the Kikuyu customary law daughters were not allowed to inherit land but would receive land if they remained unmarried. The record is clear when the protest in this matter was heard that the applicants were all married and the deceased was lawfully registered under the customary law which was prevailing them. My Lord, with the above fact that the applicants father died long before the commencement of *law of succession Act* the applicable law was customary and the ground of trust is unfounded. In the case of Pauline Wanjiru Ngigi versus Samuel Kamonye Gichane & another (2014) Eklr Justice Kimani stated". The deceased in this case died before the *law of succession Act* came into force on 1st July 1981. In the present cause therefore the applicable law is the customs of the Kikuyu community which the deceased belonged". Nevertheless, the 1st applicant had also raised the same issues which were determined by the honourable Judge."

The Judgment of the Court

20. The Judgment of the Court delivered on 20/12/2027 on the 1st Applicant's protest to the application by the 1st Respondent's petition for Grant to the deceased's estate is as follows:

> " Judgment
>
> 1. This cause relates to the estate of Anthony Gachoki Kariithi (deceased). The Petitioner Zipporah Wairimu Kariithi (to be referred to as the 'Petitioner') applied for Letters of Administration intestate in the said estate. Grant of temporary letters of administration was issued and on 24th April, 2012 she filed application seeking to have the grant confirmed. She proposed to distribute the estate which is comprised of Land Parcel No. Inoi/Kariko/2275 among the following:- Zipporah Wairimu Kariithi -wife- Charles Cosmas Githinji - son- Edwin Fredrick Kinyua Kariithi - Son- Patrick Joseph Mwangi Kariithi - son- Winfred Mercy Njeri Kariithi- daughter
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> 2. Aprotest was filed by Rose Wangechi Munene. Her claim is that the deceased herein is her brother. That the deceased was registered as the proprietor of the land which belonged to their late father Kariithi Karuoya on transmission and she is therefore entitled to a share of the estate. The protestor further avers

that their late father Kariithi Karuoya had two wives and the deceased herein was registered on behalf of the house of their mother. The Petitioner has also not provided for the protestor's three sisters. Her proposal is that the land be distributed equally to the Petitioner (deceased's wife) and the four sisters namely:-- Zipporah Wairimu Kariithi- wife- Eunice Nyawira Mugo- sister- Grace Muthoni Wambui- sister- Jane Kariko Muriuki- sister- Rose Wangechi Munene- sister.

3. He Petitioner confirms that indeed land parcel number INOljKarikojl15 was registered in the name of her father in-law Kariithi Karuoya and that it was after Succession that it was given to the two sons from each of the houses as he was polygamous. Thus Land Parcel No. Inoi/Kariko/115 was registered in the name of her father in-law Kariithi Karuoya and that it was after succession that it was given to the two sons from each of the houses as he was polygamous. subdivided Thus Land parcel No. Inoi/Kariko/115 was into two equal portions being Land parcels No. Inoi/Kariko/958 and Inoi/Kariko/959. The deceased herein was registered on Land parcel No. Inoi/Kariko/958 which he subsequently sub-divided into two portions Inoi/Kariko/2275 which is in dispute before this Court.

4. The Petitioner is contending that the protestor has never laid any claim on the land for the last 40 years and that the deceased developed the land.

5. On her part, the protestor avers that herself and her sisters were brought up on the land and assisted in its developments. She contends that the petitioner does not live on the parcel of land but lives on Land Parcel No. Mwerua/Kithimu/559 where the deceased herein is buried.

6. Upon the Court giving directions, the protestor proceeded by way of oral evidence. The foregoing facts are not in dispute. The issues which arise for determination are: ei) (ii) Whether the protestor and her sister were entitled to a share of the estate of their father Kariithi Karuoya comprised in land parcel No. Inoi/Kariko/115. Whether the deceased Inoi/Kariko/2275. herein held land parcel No. On the first issue from the evidence adduced by the parties herein, it is clear that the estate of Kariithi Karuoya was distributed in accordance with the customary law where the estate was shared between the two houses with a son from each house being registered. The green card of the Land Parcel No. Inoi/Kariko/115 which was produced in this Court as exhibit 2 shows upon the death of Kariithi Karuoya succession was done and on 3rd August, 1976 the deceased herein Anthony Gachoki and his step-brother Edward Munene Kariithi were registered as proprietors in common. Thereafter on 5th August, 1978 the land was sub-divided and shared equally by the two step-brothers and separate title deeds were issued. The deceased herein was registered on land parcel No. Inoi/Kariko/958. When all this was happening, the protestor and her sisters did not file an objection. The protestor admitted that she got married in 1973. The petitioner testified that when she got married to the deceased, she did not find the protestor and her sisters in the homestead as they had long been married. The protestor and her sisters did not apply for the revocation of grant which was issued in the estate of their late father Kariithi Karuoya.

7. From the foregoing, it is clear that the late Kariithi Karuoya died before the commencement of the *Law of Succession Act* Cap 160 Laws of Kenya which came into force on 1st July, 1981. It is trite law that the law cannot apply in retrospect. Customary law was applicable to the intestate succession. Under the Kikuyu Customary Law, daughters were not allowed to inherit land but would receive land if they remained unmarried. In this case the protestor and her sisters were all married even before their father died. The estate of their father was governed by the customary law which explains the distribution in accordance with the two houses with a son from each house being registered with equal share. The deceased was lawfully registered under the customary law which was prevailing at the time. The protestor cannot seek to apply the customary law in retrospect. In any case their deceased father died over 30 years ago. The protestor took too long to file this claim. I am of the view that the *Law of Succession Act* does not apply owing to the fact that the protestor's father died long before the *Law of Succession Act* came into force. The High Court in persuasive decisions which I entirely agree with has held that the *Law of Succession Act* does not apply to cause which were before 1st July, 1981as the law applicable was the customary law. In the case of Pauline Wanjiru Ngigi-V Samuel Kamonye Gichane & Another (2014) eKLR Justice Kimaru stated:

   "The deceased in this case died before the *Law of Succession Act* came into force on 1st July, 1981. In the present cause therefore the applicable law is the customs of the Kikuyu Community to which the deceased belonged. "

   Similarly Justice Rawal (as she then was) In the Estate of Josiah Mwangi Kariuki (deceased) (2009) eKLR stated:

   "I just have to reiterate, what I have observed herein before, that the estate in this cause cannot be governed by provisions of *Law of Succession Act* and hereby find so. The Book on Restatement of African law Vol. 2 by Eugene Cotran on pages 12 and 13 specifies the succession of the estate of a Kikuyu married man with two or more wives, sons and daughters. As per the customary law the Land is to be divided equally amongst each house and the rules for distribution within that house is also specified, namely equally amongst male issues. As regards the daughters, it is stated inter alia that: 'Daughters, do not normally share in the inheritance. They live with their mother until they are married. If however, a daughter remains unmarried, she may be allocated a piece of land by the muramati for use during her life time, and if she has illegitimate male children, then they shall inherit her portion, after her death'. The above propositions of customary law does not fit in any of the criteria stipulated in Section 3(2) of the *Judicature Act* namely (1) (a) Repugnant to justice and morality or (b) inconsistent with any written law (the *Law of Succession Act* was not in effect at the time of demise of the deceased). In short, I shall devolve the estate herein as per the Kikuyu Customary Law and on the basis of substantive justice."

8. The protestor and her sisters were not entitled to any inheritance of their father's estate as they had already been married at the time he died and the deceased herein could not have been registered in trust in the circumstances. This brings me to the next issue.

9. Did the deceased hold the land parcel No. Inoi/Kariko/2275 In trust for the protestors. The burden was on the protestor to prove that the deceased herein was registered in trust. In the case of Karanj Wanyihia-V- Duncan Wanyihia & 4 others (2014) eKLR the Court stated: "There was indeed no proper evidence led to demonstrate 'trust' and the magistrate essentially relied on the finding of trust by the elders. Trust is an issue both fact" and law. It is a serious issue and needs to be demonstrated through proper evidence and verification of evidence." The deceased herein was registered as the absolute proprietor on transmission. It was upon the protestor to prove that a customary trust existed as an overriding interest on the title. Where there was no such interest the deceased enjoyed the rights of a sole proprietor as provided under Section 27 of the Registered *Land Act* (now repealed) under which the land was registered. In Aurenzia Gikiri Njeru-V Kimani Kabenge & 2Others (2014) eKLR it was stated:

   "This element of a trust was not registered in the land register. It therefore became a matter of evidence. The respondents who were relying on it had the duty to prove that fact. "He who pleads a fact must prove it".

   The respondents ought to have called much older independent witnesses or even clan elders to explain to the Court how this trust came about. In addition, the court stated:

   "My finding is that though registered as the proprietor, the deceased allowed the 1st and 2nd respondents to live on this land because he knew they were landless Under the peculiar circumstances of this case, I do find that the learned trial magistrate well applied the provisions of Section 27 and Section 29 of the *Law of Succession Act*. The respondents are brothers to the deceased and are covered under Section 29 (b) of the *Law of Succession Act*. The ends of justice will only be served if the 1st and 2nd respondents are apportioned the areas they occupy on the suit land."

10. The protestor failed to adduce evidence to prove the existence of a trust. An issue of fact must be proved by evidence. The protestor did not call witnesses to confirm the existence of trust. I hold that the deceased was registered as absolute proprietor and was free to use the land with the appertaining rights of such a proprietor.

11. The third issue is whether the protestor and her sisters are entitled to inherit the deceased's estate. The protestor had to prove that she was a dependant entitled to the estate of the deceased. The protestor had to prove that she was being maintained by the deceased prior to his death. Section 29 of the *Law of Succession Act* provides: "For the purposes of this Part, "dependant" means (b) such of the deceased's parents, step-parents, grand parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; In Alice Shihundu-V- Michael Chivolo Murunga (2014) eKLR the Court held:

   "The Respondent's claim for dependency is therefore hinged on Section 29(b) of the *Law of Succession Act*. The Respondent was required to establish that the

deceased maintained them immediately prior to her death. It was clear from the evidence adduced that the deceased lived with the Petitioner in Ngong, Kajiado District immediately prior to her death. The co-wives of the deceased and their children meanwhile lived in Kisumu. The Respondent was therefore not able to establish that the deceased maintained them immediately prior to her death to entitle them to be considered as her dependants."

12. The protestor testified that she has been living with her husband for all the time she has been married todate. She was never a dependant of the deceased. She also testified that one of her sisters passed away in 2014 and the others are living where they are married. The protestor did not prove that she was a dependant of the deceased. The petitioner is the wife of the deceased and the proposed mode of distribution is to herself and her children. They rank in priority to the protestor and her sisters.

13. The protestor has not used the land after the death of her father. The deceased sub-divided his share and sold part of it. It is also proved that he used to borrow loans using the land as collateral. There has never been any objection by the protestor nor has he ever put a caveat or a caution on the land during the lifetime of the deceased. The protestor did not prove that she has been using the land. I fail to find any evidence of dependency by the protestor. The case of Alice Shihundu, (supra) have similar facts as the present case. The protestor has failed to bring her claim within the ambit of Section 29 of the Law of Succession which was her only other option after failing to prove that the land was held in trust.

14. In Conclusion:

It was upon the protestor to prove the allegations of the existence of trust and dependency in order for this Court to allow her protest. The protestor has in both cases failed to discharge the burden of proof. The protestor and her sisters have no valid claim in the estate of the deceased. They are excluded as dependants under Section 29 of the *Law of Succession Act* (supra). The protest lacks merits. I dismiss it. I order that the grant issued to the Petitioner be confirmed asdeposed under Paragraph 5 of the supporting affidavit. I make no orders as to costs.

Dated and delivered at Kerugoya this 20th day of December, 2017.

L. Gitari

Judge

Read out in open Court, Protestor present, Petitioner- absent,

court assistant Naomi Murage present this 20th day of December, 2017.

L. Gitari

Judge

20. 12.2017"

Principles of customary law trust

21. In Kiebia v M'lintari & another [2018] KESC 22 (KLR) the Supreme Court laid down general principles as regards Customary Law trust in Land in first registration under the repealed Registered *Land Act* (which applies to the facts of this case) at paragraph 52 as follows:

> " 52. Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:
>
> 1. The land in question was before registration, family, clan or group land.
> 2. The claimant belongs to such family, clan, or group
> 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
> 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
> 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.
>
> 53. We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered *Land Act*, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in Obiero v. Opiyo and Esiroyo v. Esiroyo. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust

to accord them legal sanctity, since they are already recognized by statute as overriding interests."

22. What is the trust proved in this case? The registration of the land herein was not a first registration of land but a distribution of land succession proceedings. The trust alleged in this case is said to be a trust arising from the transmission in succession proceedings of the deceased's property to a son allegedly to hold for his family. This fell to be determined in accordance with applicable customary law of the relevant community as the deceased passed on before the entry into force of the *law of Succession Act*.

23. An procedural issue however arises to whether it is open to this court to deal with the issue of alleged customary trust when another judge of this court (Gitari, J.) has delivered a judgment on the issue.

Res judicata

24. As held by the Supreme Court of Kenya in the leading case on res judicata John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR), while considering the applicability of the principle of res judiata in constitutional litigation guided as follows:

> " 81. We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively. To further bolster our position we borrow from the decision from India in Karam Chand another v Union Of India and others on 24 April, 2014 where it was restated the principles upon which the doctrine of res judicata is founded as follows:
>
> 29. ......it is clear that the rule of res judicata is mandatory in its application and should be invoked in the interest of public policy and finality. The matter which have actually been decided would also apply to the matters which have been impliedly and constructively decided by the court. These principles are to be applied to preserve the doctrine of finality rather than frustrate the same. The doctrine of res judicata is the combined result of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims:
>
> (1) nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.
>
> (2) interest republicae ut sit finis litium: it is in the interest of the State that there should be an end to a litigation; and
>
> (3) res judicata pro veritate occipitur: a judicial decision must be accepted as correct......The doctrine of res judicata is conceived not only in the larger public interest which requires that all litigation

must sooner than later come to an end but is also founded on equity, justice and good conscience."

82. If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of article 159 of *the Constitution* in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further article 50 on right to fair hearing and article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other.

83. However, though the doctrine of res judicata lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the Danyluk Case from Canada the court cited the dissenting opinion of Jackson JA, in Iron v Saskatchewan (Minister of the Environment & Public Safety), 1993 CanLII 6744 (SK CA), [1993] 6 WWR 1 (Sask C A), at p 21 where he stated:

"The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard."

84. Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.

85. In the alternative a litigant must demonstrate special circumstances warranting the court to make an exception."

25. Though not being a constitutional petition, the applicant in this case has not demonstrated any special circumstances as would justify departure from the doctrine of re judicata. The principles of Res Judicata applies to all the issues that the party could have raised, but failed to do so, in the previous suit or proceedings. See section 7 of the *Civil procedure Act* explanation 4 that:

" Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

26. Although the *Law of Succession Act* by section 76 of the Act permits the Court to revoke a grant, whether or not confirmed, on account of the criteria or grounds set out therein, the Court in doing so must satisfy itself that the there are no legal substantive, evidential or procedural bars to relying of the alleged grounds, such as plea of res judicata, where an issue has been previously been determined between the parties by a competent court.

27. The application for revocation in this case relied on alleged concealment of facts being that there was an agreement of trust by the applicants' brother for the sisters. In its judgment of 20/12/2017. this Court (Gitari, J.) found that the applicant had not proved the existence of trust which she had raised in her protest to confirmation of grant. Being res judicata, there is no room for reopening the matter through an application, to the same end, for revocation of the Confirmed Grant.

28. The Court will, consequently, not consider whether there was concealment of material fact to warrant revocation of Grant.

Conclusion

29. The facts are not contested. Two step-brothers, sons of the deceased patriarch Kariithi Karuoya, were registered owners of subdivisions his parcel of land 115 creating new parcels of land 958, the subject of these proceedings, and 959. The applicants are the sisters of the deceased Antony Gachoki, the deceased herein and the respondents are widow and children of the deceased.

30. The sisters assert a customary trust. The respondent set up a bar of res judicata that the issue has been previously decided between the same parties by a competent court.

31. The Judgment of the Court (Gitari J.) delivered on 20/12/2017 upon a Protest by the applicant herein addressed the issue of the deceased holding the land upon trust for the deceased sisters in its conclusion as follows:

> "14. In Conclusion:
>
> It was upon the protestor to prove the allegations of the existence of trust and dependency in order for this Court to allow her protest. The protestor has in both cases failed to discharge the burden of proof. The protestor and her sisters have no valid claim in the estate of the deceased. They are excluded as dependants under Section 29 of the *Law of Succession Act* (supra). The protest lacks merits. I dismiss it. I order that the grant issued to the Petitioner be confirmed asdeposed under Paragraph 5 of the supporting affidavit. I make no orders as to costs."

32. Having failed to call evidence to support her claim in trust, as ruled by the Judgment of 20/12/2017, the applicant could not seek to remedy failure to adduce relevant evidence by reopening the issue through the instrumentality of an application for revocation under section 76 of the *Law of Succession Act*. While the Judgment remained in force, the applicant was obliged to seek its setting aside, either by a competent review application or appeal. It is not clear whether a Record of Appeal was filed in the matter or only the Notice of Appeal has been file and a review could still have been open. See Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited Communications Commission of Kenya & Kenya Broadcasting Corporation [2020] KECA 633 KLR.

33. This Court cannot on the ground of concealment of a material fact on the issue of trust revoke the grant when there is a finding of this Court (Judgment of Gitari, J.) that the trust was not proved in accordance with the law.

34. If the contention of the applicant was that the Court was wrong in its conclusions of law or fact, the course open to the Applicant was to appeal the decision, which she did by filing a Notice of Appeal dated 10/1/2018. There no clarity as to the progress of that appeal.

35. Although it is not expressed, the application suggests that the Court in its determination of the issue of trust was wrong, as the same ground is offered as a concealed fact which entitles the court to revoke the grant pursuant to section 76 of the *Law of Succession Act*. Such an application which is in the nature of

a review is not competent to challenge conclusions of law or fact by a court. The aggrieved party should appeal the decision for a reconsideration of the merits of the matter and correction of any error not being an error on the face of the record. See National Bank of Kenya Limited v Ndungu Njau [1997] KECA 71 (KLR) that –

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.".

36. As regards appeal from the present decision, in terms of the decision in Rhoda Wairimu Karanja & Another v. Mary Wangui Karanja & Another (2014) eKLR, it has been established that there is no right of appeal to the Court of Appeal in succession causes and that leave of the court is required, as follows:

> "We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused, with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."

37. In view of the important question of the entitlement of the daughters in the estate of their father alleged to be held by their brother upon trust, is prima facie a ground which merits serious consideration by the appeal court, and this court will, consequently, give leave of the court to appeal from the decision of this court, as the parties may be advised by their legal advisors.

Orders

38. Accordingly, for the reasons set out above, the Court finds no merit in the application for revocation of the Confirmed Grant and it is dismissed.

39. In the interests of consideration at Court of Appeal level of the applicant's question of alleged family trust, leave to appeal this Ruling to the Court of Appeal is granted.

40. There shall be no orders as to costs in this family succession dispute.

Orders accordingly.

DATED AND DELIVERED THIS 28TH DAY OF OCTOBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Ng'ang'a for the Applicant.

Mr. Nyaga Gitari for the Respondents.