

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO 562 OF 2004

IN THE MATTER OF THE ESTATE OF CLEMENT LIKHANGA SHUMILA
(DECEASED)

JOSEPH SHISUNDI LIKHANGA - DECEASED.....
.....PETITIONER

AND

ROSA KHAKAYI SHISUNDI
APPLICANT

AND

FERDINAND LISUTSA SHIBUKU.....1ST
OBJECTOR

MARY GORETTI INGASO.....2ND
OBJECTOR

RULING

1. Pursuant to the judgment of the Court of Appeal at Kisumu in *Civil Appeal No. 32 of 2016 - Joseph Shisundi Likhanga v Ferdinand Lisutsa Shibuku & another [2019] KECA 589 (KLR)*, this matter was remitted to this court for hearing and determination of the protests, in accordance with Rule 40(6) of the Probate and Administration Rules. The appellate court directed that each objector was to file and serve an affidavit of protest to the application for confirmation of grant.

2. On 20th November 2023, by consent of the parties, Rosa Khakayi and Charles Likhanga were appointed as joint administrators of the estate of Clement Likhanga Shumila (deceased). The protestors were directed to file their affidavits of protest in compliance with the Court of Appeal orders. Mr. Josephat Chibiya, representing the 2nd Objector, was in attendance and was directed to notify all parties of the counterclaim.
3. An affidavit of protest dated 26th February 2024 was subsequently filed by Josephat Isavari Chibiya, who deponed that the deceased left behind three sons: Joseph Shisundi Likhanga, Nicholas Lijodi Likhanga (deceased), and Charles Mutsotso Likhanga. He averred that prior to his demise, Nicholas Lijodi Likhanga, who died unmarried and without issue, sold him a portion of land measuring 40 by 40 metres out of L.R. No. ISUKHA/MUKHONJE/2, on behalf of his daughter Mary Goreti Ingaso, then a minor.
4. The protestor stated that he took possession of the said portion, paid the full purchase price, caused it to be surveyed by Makos Surveyors, and has remained in open occupation thereof. He contended that upon the death of Nicholas, the petitioner became hostile and sought to evict him, despite his long-standing possession. He prays that the portion purchased on behalf of his daughter be recognized and transferred to her as part of Nicholas's share in the estate.
5. When the matter came up for retrial on 28th May 2024, counsels for the parties invited the court to proceed by *viva voce* evidence. However,

the court directed parties to first address it on the question of jurisdiction; whether this succession court is competent to entertain a protest anchored upon an alleged sale of part of the estate property by a beneficiary, who has since died, prior to confirmation.

6. The court directed that the matter be canvassed by way of written submissions. On record are submissions dated 9th April 2025 filed by Mr. Getanda, learned counsel for the petitioner. As at the date of this ruling, no submissions were filed by Ms. Rauto, counsel for the protestor, nor by the other parties.

Petitioner's Submissions

7. Counsel for the petitioner submitted that the protestors claim purchaser's interests based on an alleged sale of a portion of the estate by Nicholas Lijodi Likhanga, a beneficiary who lacked capacity to deal with the estate property, as no grant of representation had been issued to him. Counsel argued that the transaction, having been undertaken in the absence of a grant, constituted intermeddling contrary to section 45 of the Law of Succession Act and was therefore void.
8. It was further submitted that the issues raised by the protestors relate to ownership, title, and occupation of land, which are matters reserved for the Environment and Land Court pursuant to Article 162(2)(b) and 165(5) of the Constitution, and sections 13 of the Environment and Land Court Act and 150 of the Land Act, No. 6 of 2012. Counsel urged

the court to find that it lacks jurisdiction and to strike out the protest, allowing the grant to be confirmed as per the summons dated 18th December 2023.

Analysis and Determination

9. I have considered the pleadings, the affidavit of protest, the annexures thereto and the submissions on record. The issue for determination is whether this court has jurisdiction to entertain the protest which is founded on an alleged sale of part of the estate property by a beneficiary prior to confirmation of grant.
10. The Court of Appeal, in its decision of 27th June 2019, affirmed the revocation of the certificate of confirmation issued on 6th April 2010 but set aside that portion of the High Court judgment which had purported to allocate specific portions of land to the respondents. The appellate court held that the High Court had acted in excess of jurisdiction when it determined questions of sale and ownership without formal affidavits of protest. It directed that the respondents file proper affidavits of protest to be heard and determined by this court in accordance with **Rule 40(6) of the Probate and Administration Rules.**
11. The import of the appellate judgment is that this court is now to determine, within the context of succession law, whether the claim raised by the protestor properly affects confirmation of the grant. The Court of Appeal did not pronounce itself on the validity of the alleged

sale but left that issue to be ventilated before the appropriate forum should it arise.

12. It is trite that the primary duty of a probate court is limited to identifying the rightful heirs and distributing the free property of a deceased person in accordance with the Law of Succession Act. As was held in **In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR**, a succession court does not have jurisdiction to determine questions of ownership of land or enforce contracts of sale; its mandate is confined to administration and distribution of the estate.
13. Section 45(1) of the Law of Succession Act prohibits any person from taking possession of, disposing of, or otherwise intermeddling with the property of a deceased person except under a grant of representation. Any such transaction amounts to intermeddling and is null and void *ab initio*.
14. Moreover, questions touching on the validity of the sale, the passing of title, or the recognition of equitable interests in land fall within the jurisdiction of the Environment and Land Court as established under Article 162(2)(b) of the Constitution and section 13 of the Environment and Land Court Act. Article 165(5) expressly excludes the High Court from exercising jurisdiction in matters reserved for courts established under Article 162(2).
15. The Supreme Court and the Court of Appeal have repeatedly underscored this demarcation. **In Owners of the Motor Vessel**

“Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1, Nyarangi JA

held that jurisdiction is everything, and without it, a court must down its tools the moment it becomes apparent that it lacks authority to proceed.

7. Similarly, Musyoka J in **re Estate of Andashe Munyeti (Deceased) [2021] eKLR** held as follows:

“5. After a grant is confirmed, and a certificate of confirmation of grant is processed and issued, the next step would be transmission of the property in accordance with the distribution in the certificate of confirmation of grant. Transmission is not a process under the Law of Succession Act, Cap 160, Laws of Kenya. The Law of Succession Act does not provide for it. Indeed, the term transmission is not even mentioned in the Act. It is a process which is provided for in the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The process has nothing to do with the succession process. The effect of it is that once the court confirms a grant, and issues a certificate of confirmation of grant, its work would be over. The parties ought to move to the next step, of execution of the confirmation orders, which happens at the land registries and at the offices of other land authorities. The application that has been placed before me dwells on matters that have nothing to do with succession, but

registration of land, and the parties are better of addressing the issues to the relevant land bodies.

The promulgation of the Constitution, 2010, on 27th August 2010, had one critical consequence, the taking away of jurisdiction from the High Court, with respect to matters relating to land. That comes out very clearly from Articles 162(2) and 165(5) of the Constitution. Parliament passed a law that established the Environment and Land Court. The Land Registration Act and the Land Act, which govern transmission and land registration, carry provisions that make it clear that where disputes or questions or the need for certain actions arise, with respect to issues that are regulated or governed by the two statutes, such as transmission and land registration, then the court to address them is the Environment and Land Court and any subordinate court vested with jurisdiction. These provisions are in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.”

16. Accordingly, while the Court of Appeal permitted the filing of protests to enable fair hearing, this court’s jurisdiction does not extend to adjudicating the validity of land sales or enforcing purchaser’s interests. The proper course available to the protestor is to pursue his claim before the Environment and Land Court, which is vested with the requisite jurisdiction to inquire into and determine such matters.

17. Consequently, I find that this court lacks jurisdiction to entertain the protest dated 26th February 2024. The same is therefore struck out.
18. The protestors are at liberty to seek appropriate recourse before the Environment and Land Court, should they wish to pursue their alleged purchaser's interest in the portion of land said to have been sold by the late Nicholas Lijodi Likhanga.
19. Each party shall bear their own costs.
20. Orders accordingly.
21. Right of Appeal 30 days.
22. Mention 9.7.2026 for further directions.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 21st DAY OF OCTOBER, 2025.

**S.MBUNGI
JUDGE**

In the presence of:-

CA: Angong'a

Mr Siro holding brief for Mr Luteshi for the Petitioner present online.

Parties, present.