



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**SUCCESSION APPEAL NO. E006 OF 2024**

**MARIAM NYAPERA SHABANI .....**

**APPELLANT**

**VERSUS**

**DAVID BUKHALA MUTSOTSO .....**

**RESPONDENT**

**(Being an appeal from the Judgement of Hon. J. R. Ndururi delivered  
on 25<sup>th</sup> April 2024 at Kakamega in CM's Court Succession Cause No.  
E651 of 2022)**

**JUDGEMENT**

**Background**

1. This matter arises from *Kakamega CMC Succession Cause No. E651 of 2022*, concerning the estate of the late Shaban Amakobe Omari, whose sole known asset is L.R. No. Isukha/Shirere/4511. The Appellant, Miriam Nyapera Shaban, filed summons for confirmation of grant, proposing to allocate 0.10 hectares from the said parcel to the Respondent, David Bukhala Mutsotso, on the basis of

- a sale agreement executed between the Respondent and the deceased before his death.
2. The Respondent objected to the proposed distribution, claiming entitlement to an additional 0.10 hectares, asserting that he had earlier purchased a similar portion from L.R. No. Isukha/Shirere/4510, owned by the deceased's mother, Amina Mayabi, and that the deceased had agreed to swap the portions between parcels L.R. No. Isukha/Shirere/4510 and L.R. No. Isukha/Shirere/4511. As a result, the Respondent claims 0.20 hectares from L.R. No. Isukha/Shirere/4511.
  3. The dispute centers on whether the additional claim is valid and enforceable within the probate process. The Appellant asserts that the claim arises from ownership and title, which are issues beyond the jurisdiction of the Succession Court and which should instead be litigated in the Environment and Land Court.

### **APPELLANT'S SUBMISSIONS**

**Whether the Respondent entered into a valid agreement with Amina Mayabi to purchase 0.10 hectares from parcel number Isukha/Shirere/451**

4. The Appellant affirms that, vide a sale agreement dated 18th July 2002, the Respondent entered into a transaction with Amina Mayabi to purchase 0.10 hectares out of L.R. No. Isukha/Shirere/451. This parcel, however, does not belong to the deceased herein and therefore does not form part of his estate.

**Whether parcels number Isukha/Shirere/4510 and 4511 are subdivisions of Isukha/Shirere/451.**

5. The Appellant avers that the Respondent did not provide documentary evidence proving that L.R. No. Isukha/Shirere/4510 and L.R. No. Isukha/Shirere/4511 were subdivisions of L.R. No. Isukha/Shirere/451. She asserts that L.R. No. Isukha/Shirere/4510 and L.R. No. Isukha/Shirere/4511 are distinct but adjacent, and L.R. No. Isukha/Shirere/451 no longer exists. She further argues that a review of the 2002 agreement reveals that the land purchased was from L.R. No. Isukha/Shirere/451, not L.R.No. Isukha/Shirere/4510 or L.R. No. Isukha/Shirere/4511, which weakens the claim of shared origin or legal linkage.

**Whether the Respondent is entitled to an additional 0.10 hectares from parcel number**

**Isukha/Shirere/4511 based on a swapping agreement with the deceased**

6. The Appellant submits that the Respondent's claim of entitlement to an additional 0.10 hectares from L.R. No. Isukha/Shirere/4511, arising from an alleged land swap agreement dated 31<sup>st</sup> August 2002 between himself and the deceased, is invalid. She argues that at the time of the purported exchange, Amina Mayabi, who was the registered owner of L.R. No. Isukha/Shirere/4510 did not participate in or sign the exchange agreement.
7. The Appellant, therefore, contends that the deceased lacked legal authority to exchange land he did not own, and the agreement is deemed legally invalid.
8. The Appellant further submits that the Respondent is neither a son nor a relative of the deceased and thus not a dependant under Section 29 of the Law of Succession Act. She posits that the Respondent's claim is limited strictly to the 0.10 hectares he purchased from the deceased, and he may only be recognized as a liability to that extent.
9. The Appellant contends that the Respondent's claim for an additional 0.10 hectares, based on issues of ownership and a flawed exchange agreement, falls outside the

jurisdiction of the Probate Court. Citing Article 162 (2)(b) of the Constitution of Kenya and Section 13 of the Environment and Land Court Act, the Appellant argues that such matters should be determined by the Environment and Land Court. In support of her assertion, the Appellant refers to the case of **Re Estate of Mukhobi Namonya (2020) eKLR**, which emphasized that ownership disputes over immovable property must be handled by the land court, and **Re Estate of Stone Kathuli Muinde (2016) eKLR**, where the court held that Probate Courts cannot adjudicate title disputes involving third parties.

### **Respondent's Submissions**

10. The Respondent argues that the grounds of appeal are repetitive, flimsy, and calculated to suggest that the trial court misdirected itself. The Respondent identifies the single issue for determination as the nature of his interest in the deceased's estate.
11. He further contends that issues concerning L.R. No. Isukha/Shirere/451 are misplaced and irrelevant, as that parcel is neither part of the deceased's estate nor was it

raised before the trial court. The Respondent lists the sole issue for determination as:

**Whether the trial court misdirected itself on the nature of the Respondent's interest in the deceased's estate**

12. The Respondent argues that, despite not being a relative to the deceased, he claims an interest based on sale agreements and long possession. He argues that 2002 Amina Mayabi (the deceased's mother) sold  $\frac{1}{4}$  acre from L.R. No. Isukha/Shirere/4510 to him. He further contends that when a legal dispute affecting L.R. No. Isukha/Shirere/4510 ensued, the deceased offered  $\frac{1}{4}$  acre to the Respondent from L.R. No. Isukha/Shirere/4511, intending to recover the same from the original parcel.
13. The Respondent contends that another sale agreement between him and the deceased, dated 12<sup>th</sup> May 2004, conveyed a further  $\frac{1}{4}$  acre from L.R. No. Isukha/Shirere/4511. The Respondent claims  $\frac{1}{2}$  acre from L.R. No. Isukha/Shirere/4511, a portion he asserts he has practically occupied, developed, and possessed since

- 2002 without any challenge from either the deceased or the Appellant.
14. The Respondent argues that, the Succession Court has jurisdiction to deal with debts and liabilities of the deceased and to further this argument relies on the case of **Re Estate of Alice Mumbua Mutua (2017) eKLR** where Musyoka J. held that Probate Courts determine; assets of the deceased, survivors, and persons with beneficial interests as well as distribution of the estate. He argues that "Beneficial interest" is defined in Black's Law Dictionary (9th ed.), p.885, as a right or expectancy in an estate or trust.
  15. The Respondent argues that, according to Section 83(d) of the Law of Succession Act, before any distribution of inheritance can be made, the personal representative of the dead person shall ascertain and pay debts. The said half-acre is a debt and not just a claim of inheritance. He relies on the case of **Re Estate of Barrack Deya Okul (2018) eKLR**, to buttress his argument, in which the paramount principle was laid down that debts carry precedence over legacies.

16. This being a first appeal, the duty of the court is to re-evaluate and review the evidence on record and draw its independent conclusion while bearing in mind that unlike the trial court it did not have the benefit of observing the witnesses as they testified.

17. **Section 47** of the **Law of Succession Act (Cap 160)** gives the High Court jurisdiction to determine matters of succession. However, this jurisdiction is limited to the administration and distribution of a deceased person's estate. It does not extend to disputes over title or ownership of land, where the dependants of the deceased are disputing a purchaser's claim on a portion of land comprised in the estate. This principle was affirmed in the following cases:-

- **Re Estate of Mukhobi Namonya [2020] eKLR**, where the court held that **“issues of ownership of land are outside the jurisdiction of the Probate Court and must be determined by the Environment and Land Court.”**

- **Re Estate of Stone Kathuli Muinde[ 2016] eKLR,** which emphasized that “**probate courts cannot adjudicate title disputes involving third parties.**”

18. In the present case, the Respondent’s claim to an additional 0.10 hectares is based on an alleged swap agreement and historical transactions involving land not registered in the deceased's name. The Respondent relies on a purported land exchange agreement dated 31<sup>st</sup> August 2002 between himself and the deceased. However, the land in question, L.R. No. Isukha/Shirere/4510, was registered in the name of Amina Mayabi at the time. I have perused the agreement of exchange and established that Amina Mayabi, who is said to have been the proprietor of the land, was not a signatory to the agreement. Moreover, the agreement was not couched in absolute terms. The last paragraph has a proviso as follows: “***This agreement is valid until we as parties split & process the land officially to give each party his own title deed.***” It is my considered opinion that, due to the dispute arising from the exchange agreement, the terms of the agreement call for

interrogation as to whether the same was valid. The fact that the Respondent has had occupation and user of the land for more than 17 years since the exchange does not automatically give rise to a beneficial interest in the estate of the deceased in view of the wording of the exchange agreement.

19. This court has no jurisdiction to determine whether a person who is not the registered owner has the legal authority to transfer or swap land that is not in his name. As held in **Re Estate of John Gikonyo Mbuthia (Deceased) [2021] eKLR**, “**a deceased person cannot bequeath property that was not legally his at the time of death.**” Any claim arising from the exchange agreement cannot be enforced through the succession process. The claim raises issues of title and ownership, which fall within the jurisdiction of the Environment and Land Court, as provided under *Article 162(2)(b)* of the Constitution of Kenya, and *Section 13* of the Environment and Land Court Act.
20. It is common ground that the Respondent purchased  $\frac{1}{4}$  acre or 0.10 hectares from the deceased to be excised

from L.R. No. Isukha/Sherere/4511. His legitimate claim, therefore, arises from the said sale agreement. This transaction is supported by documentation and is not contested by the Appellant.

21. Pursuant to *Section 83(d)* of the Law of Succession Act, the personal representative must ascertain and pay all debts of the deceased before distributing the net estate. The Respondent qualifies as a creditor to the deceased's estate to the extent of the 0.10 hectares he purchased directly from the deceased. This position is fortified by in **Re Estate of Barrack Deya Okul [2018] eKLR**, where the court held that debts owed by the deceased must be settled before any distribution of the estate and In **Re Estate of Alice Mumbua Mutua [2017] eKLR**, where Musyoka J clarified that Probate Courts must identify persons with beneficial interests, including creditors, before confirming distribution. This position was reiterated by the court in **Re Estate of Mukhobi Namonya (Deceased) [2020] KEHC 9045 (KLR)** when the court stated thus:-

**“...After all, creditors of an estate are entitled to have their debts settled. It is for this reason that debts and liabilities are given priority over distribution of the estate. Debts and liabilities ought to be settled first. Distribution is of the net estate, after the debts and liabilities have been met. The administrators have a duty to identify the creditors of the estate and to pay them off before proposing distribution, or to make provision for them at confirmation of grant. Such claimants and creditors have an obligation to place their claims before the administrators, and should the administrators fail to settle the same or acknowledge them, move the Environment and Land Court to prove their claims, since the High Court no longer has jurisdiction to determine questions around ownership of immovable property in view of Articles 162(2) and 165(5) of the Constitution.”**

22. In the end, I find that the appeal has merit. The claim for an additional 0.10 hectares based on the exchange

agreement should have been dismissed as it pertains to land not owned by the deceased and raises issues beyond the jurisdiction of the trial court.

23. The upshot is that the appeal is hereby allowed and the trial court's judgment set aside. I direct that the distribution of the deceased's estate should be as prayed in the Summons for Confirmation of Grant dated 13<sup>th</sup> July 2023.

24. There shall be no order as to costs.

Dated, signed and delivered at Kakamega this 31<sup>st</sup> day of October 2025.

**A. C. BETT**  
**JUDGE**

**In the presence of:**

No appearance for the Appellant

Mr. Getanda for the Respondent

Parties present

Court Assistant: Polycap