



REPUBLIC OF KENYA



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**Machua & another v Nduta (Civil Appeal 45 of 2019)
[2025] KECA 1814 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1814 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 45 OF 2019
M NGUGI, DK MUSINGA & F TUIYOTT, JJA
NOVEMBER 7, 2025**

BETWEEN

GRACE WAIRIMU MACHUA 1ST APPELLANT

**ANTHONY NG'ANG'A KAMAU (SUING AS SUBSTITUTE IN PLACE OF
ROSEMARY WAMAITHA KAMAU) 2ND APPELLANT**

AND

JACINTA NDUTA RESPONDENT

*(eing an appeal from the judgment of the High Court of Kenya at Nairobi
(R. E. Ougo, J.) dated 9th November 2017 in HCSC No. 2989 of 2004)*

JUDGMENT

1. The core issues for determination in this appeal are whether the High Court dealing with High Court Succession Cause No. 2989 of 2004-in the Matter of the Estate of Muthoni Mungai alias Esther Gathoni (deceased) had jurisdiction to deal with the question whether the deceased held land parcel number Dagoretti/Mutuini/92 (the suit property) in trust for herself and others; and determine the portion of the said property that comprised the deceased's property and was available for distribution to her beneficiaries; while separating therefrom the portions that the appellants had purchased from the beneficiaries of the trust held by the deceased.
2. In its decision on an application by the appellants for revocation and annulment of a grant initially issued to one Samuel Saru and Elizabeth Wambui, the trial court held that as a family court, it had no jurisdiction to deal with the question of whether or not any part of the suit property was held in trust. It accordingly dismissed the application, holding that the issue of trust fell within the jurisdiction of the Environment and Land Court.
3. As with many succession and land matters, the dispute in this matter spans decades and is quite convoluted, with most of the initial protagonists now deceased. What can be gleaned from the record is



that an application for letters of administration intestate to the estate of the deceased, Esther Gathoni, dated 28th September 2004 was made by, and letters of administration issued to, Samuel Saru and Elizabeth Wambui, a daughter and son of the deceased. Elizabeth Wambui, Samuel Saru, Jacinta Nduta and Mary Ng'endo were listed in the petition for letters of administration intestate as having survived the deceased, while one Mercy Gathoni, David Mungai, Nector Ndichu, Teresiah Njeri and Kanja Kamau were listed as dependants.

4. The grant was confirmed on 28th November 2005, with the asset comprising the estate to be distributed among the beneficiaries and dependants. However, by an application for revocation or annulment of grant dated 31st October 2007, Machua Mbugua (deceased), substituted in this appeal by his widow, Grace Machua, and Samuel Kamau Wokabi (now also deceased), initially substituted by his widow, Rosemary Wamaitha Kamau, also deceased and substituted by the 2nd appellant, Anthony Ng'ang'a Kamau, averred that the administrators had failed to disclose in their application for confirmation of grant that the deceased, Esther Gathoni, held the suit property as trustee for herself and her 'sons', Samuel Saru, Kanja Kamau, David Mungai, Nector Ndichu and 'daughter', Jane Mbaire.
5. It was their contention, further, that the administrators did not disclose that the objectors had purchased part of the suit land from the deceased's 'sons' and assumed possession for more than 12 years. It was Machua's contention that he had constructed a semi-permanent house on his plot in 1981 and that he had enjoyed quiet possession of the property for over 12 years. The objectors urged the court to exclude the portion of the land not forming the deceased's free property by reason of trust, and to recognise their purchasers' interests as creditors or otherwise.
6. Upon hearing the objection, the trial court held that whether or not the objectors purchased portions of the suit property and were in possession was not an issue that the trial court could determine in the succession cause; that it was an issue that should be determined in the Environment and Land Court, where the objectors could pursue their claim; that the objectors had filed HCCC No. 273 of 2007 (OS) in respect of the suit property but had not informed the court what the outcome was; that the objectors had not established that the administrators had failed to disclose material facts to the court at the time of obtaining the grant; and that the objection was without merit. It accordingly proceeded to dismiss the objection.
7. The objectors were dissatisfied with the decision and filed the present appeal. By the time the matter came to this Court, the objectors were deceased and were substituted by their widows, Grace Machua, the 1st appellant, and Rosemary Wamaitha Kamau, now also deceased and substituted by Anthony Ng'ang'a Kamau. The original administrators of the estate were also deceased, leaving the respondent, Jacinta Nduta, as the sole administrator.
8. In their Amended Memorandum of Appeal dated 27th March 2025, the appellants contended that the trial court erred in law and fact in: finding that non-disclosure of material facts was not proven despite the fact that land parcel number Dagoretti/Mutuini/92 was only partially owned by the deceased who held most of it in trust for stated beneficiaries; introducing issues of sale and occupation to the suit although admitting that the sellers were all deceased and no legal representatives appeared to contest on their behalf; unilaterally introducing the issue of HCCC No. 273 of 2007 (O.S) despite evidence that the plaintiffs were deceased and without calling for the court file to ascertain the position; finding that the objectors had not satisfied the provision of section 76 of the *Law of Succession Act*; and in finding that it had no jurisdiction to entertain the objectors' claim despite overwhelming evidence to the contrary. The appellants prayed that this Court allows their appeal, sets aside the decision of the trial court and allows their Summons for Revocation of Grant. In the alternative, the appellants ask this Court to allow their appeal and makes its own findings as it deems fit.



9. When the matter came up for hearing before us on 8th April 2025, learned counsel, Mr. Njeru Nyaga, appeared for the 2nd appellant and informed the Court that learned counsel, Mr. J.M. Njenga, was on record for the 1st appellant, though he was not present on the Court's virtual platform. Learned counsel, Mr. Andrew Gatambia, who was present and still on record for the respondent, informed the Court that he had no instructions from the respondent, who had taken her file away, and that it was his intention to withdraw from acting for her. None of the parties had filed submissions, but Mr. Nyaga made oral submissions on behalf of his client, the 2nd appellant. Mr. Gatambia indicated that he would leave the matter to the Court.
10. In his submissions, Mr. Nyaga stated that the issue that the appellants had brought before the trial court related to non-disclosure by the administrators of the estate of the deceased of material facts in respect to the suit property, Dagoretti Mutuini/92. He submitted that as could be discerned from the certificate of official search at page 10 of the record, the property did not belong to the estate of Esther Gathoni; that the said Esther Gathoni was registered as trustee for herself and her sons, Samuel Saru, Kanja Kamau, Jane Mbaire, David Mungai, and Nectar Ndicu; and that the subject of this appeal was the trial court's error in purporting to distribute the property as if it was entirely owned by the deceased. Mr. Nyaga submitted that the appellants had been able to demonstrate in the High Court that two of the persons in trust for whom the deceased held the property had sold their properties to the 2nd appellant, and he had been in occupation for nearly 40 years, farming on the land. Mr. Nyaga informed the Court that the deceased actually attempted to transfer the property to the 2nd appellant but died before she completed the transfer.
11. In response to questions from the Court regarding HCCC No. 273 of 2007 (OS), Mr. Nyaga submitted, first, that it was not an issue before the trial court; that it had been filed by the spouses of the appellants, now deceased, seeking to have the properties transferred to themselves; and that upon their demise, the appellants deemed it unnecessary to pursue the proceedings, seeking instead to rely on the law that the estate of Esther Gathoni would only be restricted to the property she owned, about half of the property; and that the other half belonged to her step-siblings, not her sons, the property having been inherited from their father. Mr. Nyaga submitted further that the matter before us was a succession matter, not a land matter; that the 2nd appellant had purchased the shares of two of those people whose shares were held in trust by the deceased, and the appellants were therefore creditors to the estate.
12. In further response to questions from the Court, Mr. Nyaga confirmed that the appellants' case was that the persons who sold the property to them had an interest on account of a trust; that while he was familiar with jurisprudence to the effect that land disputes should go to the Environmental and Land Court, this was a different scenario; that on the face of it, the suit property is not the property of the deceased; that she only had a share of it; that it was incumbent upon the family court to determine what share the deceased held; and the family court cannot distribute other people's property while distributing an estate of somebody who held the property in trust.
13. Mr. Nyaga submitted that HCCC No. 237 of 2007 had abated, and what the appellants were seeking from this Court was an order remitting the matter to the High Court for determination of what the size of the deceased's estate was as the administrators had ended up distributing half of the suit property which belonged to other people who inherited the property from their father, just as the deceased had; that after the confirmation of grant, the respondent had redistributed the land in a manner inconsistent with the law, increasing the parcels from ten to fourteen, and allocating portions even to individuals who were not family members. The appellants had been removed from their portions of the land, though the 1st appellant's house still stood on one portion, but she had no access to it.



14. Mr. Nyaga urged this Court to remit the matter to the High Court so that proper evidence could be taken with respect to the extent of the share of the deceased's estate; and other claims, such as that of the 2nd appellant, could be considered on the basis of being creditors to the estate of the deceased.
15. We have considered the record of appeal and the oral submissions by learned counsel for the 2nd appellant. As we observed at the start of this judgment, this appeal requires that we determine three issues, these being whether the trial court had the jurisdiction to determine:
 - i. the question whether the deceased held the suit property) in trust for herself and others;
 - ii. what proportion of the suit property comprised the free property of the deceased and was available for distribution to her beneficiaries;
 - iii. the portions that the appellants had purchased from the beneficiaries of the trust held by the deceased and were therefore a liability on the estate of the deceased.
16. In addressing the above issues, we remind ourselves of our duty as a first appellate court as set out in the case of *Selle -vs- Associated Motor Boat Co.*[1968] EA 123, which is to re- evaluate the evidence before the trial court and reach our own conclusions. We note from the record that an application for letters of administration intestate was made on 28th September 2004 in respect of the estate of the deceased, who died on 6th May 1993. Among those indicated as 'other dependents' of her estate in the application for letters of administration intestate were David Mungai, Nector Ndicu, Kanja Kamau and Teresiah Njeri, who were her step brothers and sister respectively.
17. The application, which was made by the deceased's daughter and son, Elizabeth Wambui and Samuel Saru, indicated that the estate of the deceased comprised the suit property and Ministry of Water benefits and death gratuity. However, we note that there is a certificate of official search, number 49/9/2003 dated 18th September 2003, which indicates that the deceased was registered as the proprietor of the suit property, which measures 2.4 acres, 'as trustee for herself and her sons Samuel Saru, Kanja Kamau, Jane Mbaire, David Mungai and Nector Ndicu.' A further perusal of the record indicates that Kanja Kamau, David Mungai and Nector Ndicu were the deceased's step brothers, while Jane Mbaire (deceased) was the deceased's step mother. That being the case, the deceased's free property comprised a proportion of the suit property, not the entire property. This is something that the administrators should have disclosed, and the trial court should have noted, from the documents placed before it.
18. It is indeed correct, as the trial court held, that disputes pertaining to the environment, use and occupation of and title to land fall, as provided under Article 162(2)(b) of *the Constitution*, within the jurisdiction of the Environment and Land Court. However, the *Law of Succession Act* confers wide authority on the High Court, sitting as a probate court, to determine issues relating to the administration of estates. Under section 47, the Act empowers the High Court to entertain any application and determine any dispute under the Act, and to make such orders as may be expedient. Under section 71 of the Act, the court must, while dealing with an application for confirmation of grant, satisfy itself as to the identification of all persons beneficially entitled and the shares due; and in accordance with section 76 of the Act, it may revoke a grant upon demonstration by an applicant that there has been concealment of material facts.
19. In their application for confirmation of grant, the administrators of the estate of the deceased dealt with the suit property as though it was, in its entirety, the free property of the deceased and available for distribution to her beneficiaries. They did not inform the Court, which they had a duty to do, that the deceased was registered as trustee for herself and others, and was therefore entitled, at most, to perhaps



a sixth of the suit property. That being the case, we agree with the appellants that the trial court erred in finding that they had not established non-disclosure of a material fact by the administrators.

20. In its decision, the trial court held that it had no jurisdiction to determine the question whether or not the deceased held the suit property in trust. This issue has been considered by this Court, and the jurisprudence that has emerged from such consideration is that a court seized of a succession matter may determine trust questions that arise when ascertaining the estate's assets where, as in this case, the dispute is inextricably bound with identification of the deceased's free property and of persons beneficially entitled to the said property. In *Bena Nafula Makana & 2 others v Nyaoro Akoth Muka Crescentia & 8 others* [2019] KECA 755 (KLR), this Court held that the High Court erred in dismissing, as in this case, an application for revocation of grant on the basis that the deceased held the suit property in trust for the applicants; and in directing the applicant to pursue the trust claim in a separate suit. The Court stated as follows:

“The Court has special jurisdiction to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders as may be this Court in *Bena Nafula Makana* (supra). The question as to whether the deceased held the property in issue in trust was one that the High Court could have conveniently determined in the succession proceedings. The High Court therefore did not err in assuming jurisdiction and in its determination on the issue of the existence of a trust.”

21. We agree with the holdings by the Court in the above matters.

The trial judge in this case erred in declining to consider and determine the question of trust raised by the appellants in their application for revocation of the grant, and in directing, as it did, that the estate of the deceased should be distributed in accordance with the confirmed grant. This is particularly so in light of the fact that the title to the suit property expressly stated that the deceased was registered as proprietor in trust for herself and five other named persons. The trial court was under a duty to consider what constituted the 'free property' of the deceased, defined in the *Law of Succession Act* as property which the deceased was legally competent freely to dispose of during his lifetime, and in respect of which his interest has not terminated at death.

22. Property held by the deceased as trustee for others does not constitute the deceased's free property, and is not available for distribution to the deceased's heirs. As we have noted above, the certificate of official search indicated that the deceased held the suit property in trust for herself and five others, specifically named on the record. It was therefore not available for distribution to the beneficiaries of her estate until determination of the trust question which, as we have held, the trial court had a duty to determine.
23. In the summons for revocation of grant, the affidavits in support thereof and the annexure thereto, it emerges that the appellants were alleging that they had bought portions of the suit property as far back as 1981. Machua Mbugua (deceased), the husband of the 1st appellant, averred that he had bought his plot, measuring 0.1012 ha, from Kanja Kamau; the 2nd appellant (Sammy Kamau Wokabi) alleged that he had bought a parcel totalling 0.2024 from Nector Ndicu and David Mungai.
24. Kanja Kamau, David Mungai and Nector Ndicu had their shares in the suit property, held in trust by the deceased, Esther Gathoni. In the circumstances, we find that the trial court erred in declining to consider the question of trust; to exclude from the distribution of the estate the shares belonging to the beneficiaries of the trust; and to consider the appellants' interest as purchasers, who were in possession, of plots within the suit property.
25. Needless to say, these are matters that required the taking of evidence by the trial court, as recognised by this Court in *Bena Nafula Makana & 2 others vs. Nyaoro Akoth Muka Crescentia & 8 others* (supra).



26. We accordingly find that the appellants' appeal is merited, and we hereby allow it. We make the following orders consequent to our findings above:

- i. The judgment of Ougo, J. in Nairobi HCSC No. 2989 of 2004 dated 9th November 2017 is hereby set aside;
- ii. The certificate of confirmation of grant issued to Elizabeth Wambui and Samuel Saru (both deceased), later amended to include the respondent, Jacinta Nduta as the sole administrator, is hereby annulled;
- iii. The distribution of the suit property on the basis of the said certificate of confirmation is hereby set aside and any subdivisions and transfers pursuant thereto are hereby cancelled;
- iv. The matter is hereby remitted to the High Court at Nairobi (Family Division) for hearing and determination of the issue of trust and the respective claims of the appellants as purchasers from the beneficiaries of the trust held by the deceased, Esther Gathoni alias Muthoni Mungai;
- v. We direct that any party who may be a beneficiary of the trust be served with the pleadings and notice of the hearing before the High Court pursuant to order iv above.

27. With respect to costs, we direct that each party bears its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

