



REPUBLIC OF KENYA



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In re Estate of Kakunia Mukeku Nthei alias Mukeku Nthei (Deceased) (Succession Cause 195 of 2017) [2025] KEHC 17274 (KLR) (24 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
SUCCESSION CAUSE 195 OF 2017
TM MATHEKA, J
NOVEMBER 24, 2025
IN THE ESTATE OF THE ESTATE OF KAKUNIA MUKEKU
NTHEI ALIAS MUKEKU NTHEI –(DECEASED**

BETWEEN

ANNASTASIA MBULA KAKUNIA 1ST ADMINISTRATOR

JOSEPH MUTHAMA KAKUNI 2ND ADMINISTRATOR

AND

URBANUS MUTUNGA MAINGI RESPONDENT

RULING

1. Kakunia Mukeku Nthei died on 13 12 1995 .
2. According to form P & A 6 filed with the Petition for letters for grant of letters of administration on 20 2 2013 he was survived by 19 persons listed to include nephews, daughters, sons and wives .
3. His estate consisted of LR Nzau Nziu 70 which from the record was registered in his name on 31 8 74 and title deed issued on 19 6 85.
4. On 6 12 2017 a grant of letters of Administration of Estate Intestate was made to Anastasia Mbula Kakunia and Joseph Muthama Kakunia.
5. On 7 2 2019, the Summons for Confirmation of Grant as filed by the Administrators.
6. On 27 2 2019 Urbanus Mutunga Maingi filed an Affidavit of Protest under Rule 40(6) of the P&A Rules on the grounds inter alia:
 1. “That the deceased in this matter is my uncle.
 2. That my late father is a younger brother of the deceased hereofhat.



3. That by virtue of being the first born in the family of Mukeku Nthei (Protestor's grandfather), the deceased (Kakunia Mukeku) was to hold the said parcel of land in trust for the greater family of Mukeku Nthei.
4. That my father being a blood brother of the deceased hereof, he stood to inherit his share of title number Nzau Nziu 70 which share I am pursuing so that my father's house can be factored in during distribution of the estate.
5. That title number Nzau Nziu 70 should be divided into two portions pursuant to the decision of the clan (see annexure "UMM 2")."
7. He deponed that the chief Nziu Location had written a letter dated 24 1 2013 declaring him a beneficiary of the said estate; that his mother and step mother had sued the deceased in MKS HCCC 32 1987, from where the matter was referred to the Atangwa clan, who ruled in their favour, he attached the Ruling of the Atangwa Clan; that the deceased had even signed an application form for consent to the Land Control Board – showing that he acknowledged his family's share of the land but died before he could do it; he annexed the Land Control Board application, decision of the clan and some document from the Machakos Court case.
8. In response to the Affidavit of Protest, the 2nd Administrator filed an affidavit on 26 7 2019 in which he gave the history of his family - moving from ancestral land in Mwea, then to Mwala, where he was born and later to Makueni where his father settled on this parcel of land. He denied that the land was ancestral land deponing that his father acquired it for having been the 1st person to settle there – that the father of the protestor never settled on this land but died and was buried at the ancestral land in Mwea. That if it was ancestral land then all his father's brothers would also be settled there but, that was not the case. That the attempts by the protestor to acquire a share of his father's estate through the clan were rejected by his father.
9. I heard the protest by way of viva voce evidence.
10. The protestor's case is quite straight forward : that his deceased uncle was registered to hold the land in trust for himself and his brother (the protestor's) father.
11. On cross-examination he said he could not recall when his father died but his mother died in 2000.
12. He said he did not know where his father was buried. He confirmed that he did not have letters of administration for his father and his father's estate. He denied any knowledge of any place known as Mwea.
13. The petitioner testified and reiterated the contents of his replying affidavit. Shown the letter from the chief he said he knew some of the names in the letter. He denied that the land belonged jointly to the father of the protestor and his father(the deceased).
14. On further cross-examination he said he did not know the documents brought in the Machakos case or from the clan. He said that mother of protestor was buried on that land - that some of his cousins were also cultivating his father's land.
15. He said he was born in Mwea- but they left when he was a child. He said his father had three brothers and if this was ancestral land, they would all be there.
16. PW2 Samson Ngalatu testified that he was a neighbour of the deceased. At the time of hearing, he was 87 years old. He denied participating as one of the decision makers in the dispute that was placed before the Atangwa clan in 1992. He denied having been in the clan meeting as a decision maker.



17. Parties filed written submission which I have perused. The issue for determination is whether the protest has merit.
18. To lead to that determination the administrator raised three issues:-Whether this court has jurisdiction to determine the issue that arose.Whether the protester has locus standi to bring this protest.
19. On the issue of Jurisdiction, it is submitted that Jurisdiction is everything and the moment it is raised the court has the duty to determine the issue. It goes without saying that without jurisdiction anything the court does amounts to nothing.
20. I have carefully considered the evidence placed before me by the Protester together with his counsel's detailed submissions.The protester's claim to the estate stands out as based on the answer to the question whether or not there was a customary trust created when the deceased was registered as the proprietor of the land herein.
21. Counsel for the protester submitted in great detail on this issue. He began by citing Ngugi -VS- Kamau & Another (Environment & Land Case 36 of 2020) (2022) KE ELC 2261 (KLR) (23 June (2022) (Judgment), where the Judge held

(42.) "Therefore, it follows that registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another customary trust is an encumbrance on land. These are non-registrable rights which run with the land. They are overriding. They subsist on the land. In the case of Kanyi vs Muthiora Court stated that:

"The registration of the land in the name of the appellant under the Registered *akn ke act 2012 6 Land Act* (Cap 300) did not extinguish the respondents' rights under Kikuyu Customary Law and neither did it relieve the appellant of her duties or obligations under section 28 as trustee. The trustees referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under customary Law, if the Act had intended to exclude customary law rights it would have been clearly so stated."

22. I have place emphasis on the registration and the creation of a customary trust, it being an overriding interest, an encumbrance : Issues that are about ownership of land
23. Counsel cited the Supreme Court in Kiebia Vs M'Lintari & another (Civil Case No. 10 of 2015) (2018 KESC 22 KLR (5 10 18) judgement on the rights to land that subsist a first registration where the court had this to say;

(58) "What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered *akn ke act 2012 6 Land Act* (now replaced), in Section 25 of the *akn ke act 2012 3 Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30(g) of the Registered *akn ke act 2012 6 Land Act*, have now been subsumed in the "customary trusts" under Section 25 (b) of the *akn ke act 2012 3 Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the (fact of rightful possession or actual occupation of the land."



24. The issues that stand out here are about the actual possession of, or use of land, a person laying claim under a customary trust would have to prove that by demonstration use, occupation of land
25. He also cites the Court of Appeal in *Mbui Mukangu Vs Gerald Mutwiri* (A No. 281 2000 where it was held; “That customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations”. The Court also held that possession and occupation are key elements in determining the existence of a customary trust.
26. *Justus Maina Muruku Vs Jane Waithira Mwangi* [2018] eKLR where it was held;

“That the registration of the Plaintiff’s father Muruku Mwangi as the owner of Loc. 10 Gatheru 656 was encumbered by customary trust and the subsequent registration of the Plaintiff as the proprietor of the suit land did not in any way affect or dissolve the trust”
27. On the foregoing submissions the court is urged to find that the protestor is beneficially entitled to ½ the estate of the deceased.
28. For the petitioners it is argued that issue of customary trust is not for determination by this court but by the Environment and Land Court, and the duty of this court sitting as a P&A court was described in *Priscilla Ndubi & Zipporah Mutiga Vs Gershorn Gatubu Mbui*

The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.
29. It is submitted that as clearly evidenced by the testimony and evidence of the protestor and the tone of the submissions by counsel, the real dispute is the ownership of the parcel of land. This dispute was the subject of the case in *Machakos*. It was not resolved. It went to the clan elders; a certain resolution was made but the deceased appears not to have complied with that and the matter ought to have been pursued to its logical conclusion in that court.
30. The Protestor’s claim is based on an alleged encumbrance. This needed to be settled outside the succession court so that the court would only be dealing with what share would be going to his father’s state. It was argued that the issue here is not even succession inheritance but ownership and ought to have been determined elsewhere – not here.
31. I have considered the evidence before me and the entire record.
32. Rule 40(6) of the P&A Rules states

Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.
33. The applicant’s grounds are that the deceased (*Kakunia Mukeku*) was the first born of the family and was registered proprietor of *Nzau Nziu 70* in trust for the greater family of *Mukeku Nthei*. That by virtue of that his own father, a son of *Mukeku Nthei* was entitled to inherit a share of *Nzau Nziu 70*. That this share was a half of the land as per the determination of the *Atangwa Clan*. His pursuit in the protest was this half share.



34. Rule 41 (3) of the same Rules states;

Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.

35. Article 162(2) of *akn ke act 2010 constitution the Constitution* provides inter alia that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) ...; and

(b) the environment and the use and occupation of, and title to, land.

36. It is not in dispute that the father of the Protester is a brother to the deceased. Neither is there any question to the fact that the title is in the name of the deceased. It is also on record that there was a dispute over the ownership and occupation of the land that went to the High Court and later to the clan even before the deceased died. All these are facts on the record.

37. By the time the deceased died the issue as to whether the father to the protester was the owner of half the land had not been settled with finality. Hence the claim by the protester under customary trust.

38. He avers that the deceased was registered to hold the land in trust for the larger family of his grand father. The irony is that no other member of the larger family of his grandfather is seeking a share of this land. He claims that his father is entitled to half the land .

39. have no doubt in my mind that what the Protester is presenting before me is a claim to ownership of half the property as of right under a customary trust.

40. The alleged customary trust is a matter subject for determination by the ELC court. Upon the determination of that issue then the protester would have a specific claim against the estate since matters ownership, use, occupation of land are not within the purview of the jurisdiction of the High Court. The High Court as a Probate and Administration Court can only distribute what is determined as the estate of the deceased person, and since the establishment of the ELC court issues related to the use and ownership of land are no longer within the purview of the High Court.

41. The Protester has demonstrated on the evidence and submissions before me that he is not before me as a dependant of his deceased uncle or the estate , but as a claimant of his father's right under what he says is a customary trust, to half the property . It is not that he is entitled to inherit from the deceased or the deceased's estate – but that there has been a long-standing land dispute – that went to the High Court, then to the clan – where he claims the clan found that the 2 brothers owned the land in equal shares. That is his claim – that in the years gone by there was a suit for ½ the land – that the suit culminated in their favour and that the deceased even applied for Land Control Board consent.

42. This is clear evidence of the processes of settling a dispute over ownership of the land; Counsel's submissions on the customary trust, the authorities cited all point to the protester's claim based on alleged customary trust. This is supported by the authorities that demonstrate that this claim on land is based on occupation and possession of the land and not as a beneficiary.



43. I am inclined to agree with the petitioner that the protest is based on a claim to ownership, occupation of land and not inheritance. That itself takes the matter out of the jurisdiction of this court. The issue of the customary trust needed to be settled before the protest was filed. Without the customary trust the protest has no leg to stand on as that is the basis of the claim.
44. That brings me to the issue of locus. The protester is pursuing the share of his father who is deceased. To do so he is not before me as a beneficiary of the estate of the deceased, but claiming his father's ½ share of the land flowing from the previous land disputes . That means that he ought to be administrator of his father's estate.
45. The protester though representing his father's estate did not present the authority to do so, the grant of letter of administration appointing him as the personal representative of his father's estate. Evidently he lacked the locus to bring this claim on behalf of his father.
46. Having said the foregoing I find and hold that the protest cannot stand for want of jurisdiction, also for having been brought by a person without locus standi.
47. Accordingly, the Protest is hereby struck out
48. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIA CTS ON 24TH NOVEMBER 2025

MUMBUA T. MATHEKA

JUDGE

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