

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BOMET**  
**SUCCESSION CAUSE NUMBER E037 OF 2022**

**IN THE MATTER OF THE ESTATE OF DAVID CHEPKWONY**  
**ARAP CHEBOIBENY (DECEASED)**

**ALICE CHEPNGENO CHEBIOBENY ..... 1<sup>ST</sup>**  
**PETITIONER**

**JOICE CHEPKOECH ..... 2<sup>ND</sup> PETITIONER**

**VS**

**RICHARD KIPKEMOI KIRUI ..... PROTESTOR**

**RULING**

1. In this matter, the Petitioners as the widow and daughter of the deceased respectively petitioned this court for Letters of Administration Intestate for the deceased's estate on 1<sup>st</sup> July

2022. A Grant was issued in their joint names on 22<sup>nd</sup> September 2022.

2. The Petitioners filed an Application for confirmation of the Grant dated 12<sup>th</sup> April 2023 and attached their preferred mode of distribution of the deceased's estate being KERICHO/NDARAWETTA/1519.

**The Protest.**

3. Through his Affidavit of Protest dated 23<sup>rd</sup> October 2023, the Protestor stated that prior to his demise, the deceased had disposed off the entire KERICHO/NDARAWETTA/1519 to three liabilities being himself, Jackson Kipkemoi Langat and Robert Kiprono Kirui. That he purchased his portion in the year 2000.

4. It was the Protestor's case that the Petitioners had informed them that they wished to conclude the succession cause to enable them get their shares but had concealed from this

court that the deceased's family members were not beneficiaries of the deceased's estate. It was the Protestor's further case that the Petitioners had conspired to deny him and his children their rightful share of KERICHO/NDARAWETTA/1519.

5. Through his written submissions dated 2<sup>nd</sup> October 2025, the Protestor submitted that the deceased had disposed of KERICHO/NDARAWETTA/1519 during his lifetime and he produced evidence such as Sale Agreements, sketch maps and corroborative witness testimony. That upon such disposal, the land ceased to be free property under **section 3 of the Law of Succession Act**. He relied on **re Estate of M'Ngarithi M'Miriti (2017) eKLR, re Estate of M'Marete M'Ntingia et.al.**

6. It was the Petitioner's submission that the Protestor and his co-purchasers were liabilities of the deceased's estate according to **section 82 (b) (ii) of the Law of Succession Act**. He relied on **re Estate of Francis Muriithi Gitau**

**(2016) eKLR.** That the Petitioners having admitted that the deceased sold the subject land in his lifetime could not approbate and reprobate. It was the Petitioner's further submission that the Petitioners were estopped from excluding him as a purchaser. He relied on **re Estate of Mutua (2017) eKLR et.al.**

7. The Petitioner submitted that he was a creditor of the deceased's estate and was thus a rightful beneficiary of the deceased's estate. He relied on **re Estate of Alice Mumbua Mutua (Deceased) (2017) eKLR et.al.** That the Petitioners intermeddled with the deceased's estate by attempting to redistribute land that had already been sold. Reliance was placed on **re Estate of Gitau & 2 others vs Wandai & 5 others (1989) eKLR et.al** and **section 45 of the Law of Succession Act.**

### **Response**

8. Through her Replying Affidavit dated 13<sup>th</sup> November 2024, the 1<sup>st</sup> Petitioner stated that at the time of the deceased's

death, he was the registered owner of KERICH/NDARAWETTA/1519. That the Protestor was not a purchaser for value in the deceased's estate as he did not pay any consideration to have the land transferred to him. The 1<sup>st</sup> Petitioner further stated that the Protestor forcefully took over KERICH/NDARAWETTA/1519 claiming that he had purchased the same from the deceased. That they had not been informed of such a purchase.

9. It was the 1<sup>st</sup> Petitioner's case that the Protestor had not made an effort to have the land transferred to him during the deceased's lifetime. That since the Protestor's claim was that of land ownership, he should have filed his claim in the Environment and Land Court and not this court.

10. Through their written submissions dated 11<sup>th</sup> November 2025, the Petitioners submitted that the Sale Agreements produced by the Protestor were vague, incomplete and unsigned by the deceased and were unenforceable under

the **Law of Contract Act**. The Petitioners further submitted that the Protestor made no effort to have the land transferred to him despite the deceased being alive until 12<sup>th</sup> October 2020. That the Protestor's claim after the deceased's death suggested bad faith.

11. It was the Petitioners' submission that the deceased never sold any portion of land to the Protestor. That the Protestor's claim was of land ownership and it fell within the jurisdiction of the Environmental and Land Court. It was the Petitioners' further submission that the Probate court's mandate was limited to identifying heirs and determining the assets and liabilities of the deceased. That this court lacked the jurisdiction to adjudicate upon the question of land ownership.

12. The Petitioners submitted that the Protestor was neither a beneficiary nor a creditor to the deceased's estate and failure to list him as a beneficiary did not amount to

concealment under **section 76 of the Law of Succession Act.**

13.It was the Petitioners' submission that the Protestor forcefully took over the subject land, chased away the 1<sup>st</sup> Petitioner and her children and this amounted to trespass.

14.I have keenly gone through the record, the Affidavit of Protest dated 23<sup>rd</sup> October 2023, the 1<sup>st</sup> Petitioner's Replying Affidavit dated 13<sup>th</sup> November 2024, the Petitioners' written submissions dated 11<sup>th</sup> November 2025 and the Protestor's written submissions dated 2<sup>nd</sup> October 2025. The only issue for my determination was whether the Protest had merit.

15.It was the Protestor's case that he was a creditor in the deceased's estate by virtue of being a purchaser of the deceased's estate being KERICHO/NDARAWETTA/1519. That alongside two other purchasers, they purchased the said land from the deceased during his lifetime. The Petitioners on the other hand denied the existence of such a transaction

between the deceased and the Protestor. The Petitioners further questioned why the Protestor did not make an effort to have the subject land transferred to him during the deceased's lifetime.

16. Flowing from the above, I am in agreement with the Petitioners that the Protestor's claim is that of land ownership. It is clear that there is a dispute over the ownership of the deceased's estate. This being a Probate Court, my primary duty is to distribute the free estate of a deceased. In the case of **re Estate of Julius Ndubi Javan (Deceased) [2018] KEHC 8523 (KLR)** Gikonyo J. held: -

***"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.”***

17. I am in total alignment with **re Estate of Stone Kathuli Muinde (Deceased) [2016] KEHC 3725 (KLR)** where the court held that: -

***“With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine***

**ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.**

**Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it".** (Emphasis mine)

18. The deceased's estate cannot be a free property for distribution until the issue of ownership is determined. The proper forum for such a determination is the Environmental and Land Court as this court is not clothed with such jurisdiction. I must down my tools.

19. That said, the Protestor is at liberty to approach this court for consideration as beneficiary/creditor of the deceased's estate under **section 66 of the Succession Act** after he has determined or regularized the ownership status of KERICHO/NDARAWETTA/1519.

20. In the end, the Protest dated 23<sup>rd</sup> October 2023 has no merit and is struck out with costs to the Petitioners.

**Ruling delivered, dated and signed at Bomet this 16<sup>th</sup> Day of December, 2025.**

.....  
**HON. JULIUS K. NG'ARNG'AR**  
**JUDGE**

**Ruling Delivered in the presence of;**

**Susan/Siele Court Assistant**

**No appearance for the 1<sup>st</sup> petitioner**

**No appearance for the 2<sup>nd</sup> Petitioner**

**J.K. Koech for the Protestor**

ORIGINAL