



REPUBLIC OF KENYA



In re Estate of Muendi Kilonzo alias Lydia Muendi (Deceased) (Succession Appeal E009 of 2024) [2025] KEHC 18154 (KLR) (4 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION APPEAL E009 OF 2024**

EN MAINA, J

DECEMBER 4, 2025

**IN THE MATTER OF THE ESTATE OF MUENDI
KILONZO ALIAS LYDIA MUENDI (DECEASED)**

BETWEEN

KATUNGE MUTUA 1ST APPELLANT

NICHOLAS MULWA MUTUA 2ND APPELLANT

AND

JULIANA KOKI MULEI 1ST RESPONDENT

MARY NTHENYA KILONZO 2ND RESPONDENT

(Being an appeal from the Ruling of Hon Daffline Nyaboke PM delivered on 27th August 2024)

JUDGMENT

1. By summons of confirmation dated 28th June 2022, the administrators sought to have the grant issued on 6th December 2021 confirmed.
2. The appellants filed a protest on 14th November 2022 objecting to the confirmation of the grant on grounds that all the properties under share number 72 held at Kimiti Farmers Cooperative Society, namely Plot 15A, 78B, 119C and 52D, did not form part of the estate of the deceased as they belonged to their late.
3. After hearing and evaluating the evidence adduced by the parties, the learned magistrate dismissed the protest and proceeded to distribute the estate to the beneficiaries of the deceased.



4. Being aggrieved, the Protestors preferred this appeal. The appeal is premised on the following grounds:
- “ a. That the learned Trial Magistrate erred in law and in fact in deciding in favour of the respondents as against the appellants and granting prayers as prayed in the summons for confirmation of grant against the weight of evidence and submissions of the appellants.
 - b. That the learned Trial Magistrate erred in law and in fact in finding that share No 72 held at Kimiti Farmer’s Cooperative Society belongs to the deceased against the weight of material facts and evidence presented before the court by the appellants.
 - c. That the learned Trial Magistrate erred in law and in fact in finding that the deceased herein Muendi Kilonzo owned the following properties and that they formed part of her estate; plot Number 15A, 78B, 119C, 52D, Plot number 28 Kathiani Market, shop number 64 kware market, shop number 220 Ngalalya(Malili) and Shop number 134 Matuu Market.
 - d. That the learned Trial Magistrate erred in law and in fact in directing that the said property herein be subdivided equally amongst the beneficiaries of the deceased when the appellants had presented material facts and evidence to prove that the said property did not belong to the deceased but her son Mutua Kilonzo.
 - e. That the learned Trial Magistrate erred in law and in fact in failing to appreciate the unique circumstances surrounding the disputed property herein and concluding that the document presented by the appellants were false, fake and mere forgeries, yet there was no factual basis for such conclusion.
 - f. That the learned Trial Magistrate failed to adequately evaluate and consider the facts evidence provided by the appellants thereby arriving at a decision unsustainable in law.
 - g. That the learned Trial Magistrate abused her discretion, acted whimsically and in bad faith in relying fully on one sided evidence of the Respondents.
 - h. That the learned Trial Magistrate erred in over relying on the testimony of DW3 the chairman of Kimiti Farmers’ Cooperative society without evaluating the credibility of the witness.
 - i. That the learned Trial Magistrate erred in law and in fact in writing a ruling which was against the weight of evidence and is at variance with precedents.”
5. The Counsel for the parties consented to canvassing the appeal by way of written submissions.

Submissions

6. In submissions dated 28th April 2025, Learned Counsel for the Appellant stated that the respondents failed to demonstrate how the share 72 at Kamiti Farmer’s Cooperative Society was registered in the deceased’s name and have failed to prove acquisition and subsequent ownership of the share No. 72.



7. To support this submission reliance was placed on the case of Republic vs Minister for Transport & Communication & 5 Others Ex parte Waa Ship Garbage Collector and 15 others [2006] e KLR, Alberta Mae Gacci vs Attorney General & 4 Others (2006).
8. Counsel also submitted that this court should exercise its power and order rectification of the register by directing that the registration of the suit property in the name of the deceased be cancelled and the same be amended to read the name of the 1st appellant's husband having proven the case on a balance of probability. Counsel urged this court to allow the appeal.
9. On the other hand, Counsel for the Respondent pointed out that the court lacked jurisdiction to determine a claim on a property whose ownership is disputed. That this being a probate court it is limited to determining issues of distribution of the estates of deceased persons, whereas disputes concerning ownership should be left to the Environment and Land Court which is the court to hear disputes concerning ownership of land. Counsel placed reliance on the case of Kanyua Elijah v M Muriithi M Arimi & 2 others [2020] eKLR and the case of In Re Estate of Mbai Wainaina [2015]. Counsel urged this court to dismiss this appeal with costs.

Determination and Analysis

10. An appeal being in the nature of a retrial, I have reconsidered the evidence adduced in the court below so as to arrive at my own independent findings albeit taking into account that I did not see or hear the witnesses. I have also considered the rival submissions of learned Counsel for the parties, the cases cited and the law.
11. From the analysis of the evidence in the court below, the dispute in this cause revolves around the ownership of share No. 72 at Kimiti Farmers and the plots of land allotted to the shareholder of the impugned share. The Administrators of this estate, now respondents in this appeal contend that the share belonged to the deceased while the appellants who were protestors in the court below hold firmly to the position that it belonged to their late father and that the properties appurtenant to that share ought not to have been distributed to the estate of the deceased.
12. The role of the court in exercise of its jurisdiction under the *Law of Succession Act*, and the Rules made thereunder, is to oversee the administration of the estate of deceased persons to ensure that the same are not wasted and that they are equitably, lawfully and justly distributed to the rightful beneficiaries. The function of the court in the circumstances is to facilitate the collation and preservation of the assets, identification of beneficiaries and dependants, the distribution of the assets and to deal with incidental matters connected thereto as outlined in the preamble of the *Law of Succession Act*.
13. In exercise of its jurisdiction under the act the court is careful to deal solely with those assets that constitute the free estate of the deceased. The duties and responsibilities of the Administrators is more or less to aid the court in arriving at a just distribution of the estate. Where a dispute arises as to whether an asset is the free property of the deceased that dispute must be determined first either by the court having conduct of the cause or otherwise. This is as set out in Rule 41(3), which 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 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.”

14. The procedure for approaching the court where such dispute arises is provided in Rule 41(4). However, we now have the Environment and Land Court and that is where disputes touching on ownership of land are heard and determined. It is my finding that the dispute touching on the ownership of the parcels of land falling under Share No. 72 is one such dispute that needed to be resolved first in order to determine whether they form part of this estate or not. It is also my finding that the dispute could not have been fully determined in the succession proceedings. It is my finding that parties ought to resolve the dispute first and only if the Land Court finds in favour of the estate, can the Administrators go back to the court below for distribution of those particular properties.
15. The administrators are however at liberty to proceed with transmission of the assets which were not contested namely;
 - I. Plot No 28 Kathiani Market.
 - Ii. Shop No 64 Kware Market.
 - Iii. Shop No 220 Ngalalya(malili).
 - Iv. Shop N0 134 Matuu Market.
16. In the premises, the appeal is partially successful and the ruling of the court below is set aside in so far as it purported to distribute the lands falling under share number 72 before its real ownership was determined. I do so find.
17. This being a family dispute parties shall bear their own costs.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 4TH DECEMBER, 2025.

E. N. MAINA

JUDGE

In Presence Of:

Mr. Munguti for Respondent

Mr. Odhiambo for Appellant

Geoffrey – Court Assistant

