

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT PROBATE AND ADMINISTRATION CASE NO.

532 OF 1999

IN THE MATTER OF THE ESTATE OF WAIGWA KIMITI

(DECEASED)

NJERI KIMITI NDIRANGU.....PROTESTOR

VERSUS

PATRICK NDIRANGU MACHARIA.....

.....RESPONDENT

JUDGEMENT

1. Before this Court for Determination is the Protest **7th March 2022** filed by one **NJERI KIMITI NDIRANGU** (hereinafter '**the Protestor**')
2. The Respondent/Administrator **PATRICK NDIRANGU MACHARIA** opposed the said Protest. The matter was heard by way of oral evidence in open court.

BACKGROUND

3. This Succession cause relates to the estate of the late **WAIGWA KIMITI** (hereinafter '**the Deceased**') who died intestate on **28th August 1978**. A copy of the Death Certificate Serial Number **271549** was filed in court.
4. The Deceased had a wife named **JOYCE GATHONI WAKWA** (who is also Deceased) but the couple had no children. The Deceased however had a brother named **MACHARIA KIMITI** (also Deceased). According to the chief's letter dated **28th October 1993** the rightful heirs to the estate of the Deceased were the children of his late brother namely:-
 - 1) **KIMITI NDIRANGU**
 - 2) **PATRICK NDIRANGU MACHARIA**
 - 3) **MUCHURA KARIUKI**
 - 4) **FRANCIS MAINGI JOHNSON**
5. The estate of Deceased comprised of one asset a parcel of land known as Title Number **MUHITO/NJIRUINI/18** measuring approximately five (5) acres. (hereinafter referred to as the "**suit land**")
6. Following the demise of the Deceased a temporary Grant of letters of Administration was on **25th June 1996** issued

jointly to **Kimiti Ndirangu, Patrick Ndirangu Macharia, Muchura Kariuki** and **Francis Mwangi Johnson**.

7. On **23rd December 2021** one of the Administrators **Patrick Ndirangu Macharia** (the Respondent herein) filed a Summons for confirmation of Grant. In that Summons it was proposed that the estate of the Deceased be distributed as follows:-

NAME	DESCRIPTION OF PROPERTIES	SHARE OF HEIRS
GAITHUMBI NURSERY SCHOOL	LAND TITLE NUMBER MUHITO/NJIRUINI/18 CHARLES KARINGA NGERA To Hold in Trust for Gaithumbi Nursery School	0.5 ACRES
JOSEPH KARIUKI MUCHURA	Land Title Number MUHITO/NJIRUINI/18	0.5 ACRES
GERALD MURAGURI MAINA	Land Title Number MUHITO/NJIRUINI/18	2.0 ACRES
DAVID MWAI BURI	Land Title Number MUHITO/NJIRUINI/18	1.0 ACRES
M. NJERI KIMITI	Land Title Number MUHITO/NJIRUINI/18	1.0 ACRE S

8. The Protestor who is the widow of **Kimiti Ndirangu** a nephew of the Deceased and one of the beneficiaries of the

estate opposed the proposed mode of distribution and filed the Affidavit of protest dated **7th March 2022**.

9. The dispute was referred to Court Annexed Mediation but the parties were unable to reach a settlement. Therefore the court did direct that the protest would be heard by way of Vive Voce evidence.

THE EVIDENCE

10. The Protestor **NJERI KIMITI MBUGUA** told the Court that she is the widow of **KIMITI NDIRANGU** alias **KIMITI NDIRANGU NDIRANGU** who was a nephew to the Deceased and a beneficiary to his estate. The protestor stated that her husband was one of the lawfully appointed administrators of the estate vide the temporary grant issued on **25th June 1996**. However her husband unfortunately passed away on **5th January 1999**. (Annexed to the Affidavit of Protest dated **7th March 2022** is the Death Certificate Serial No. 896609 proving his demise).
11. Following the demise of her husband the Protestor states that she did not receive any information from the surviving administrators regarding the progression of the succession

cause. She states that instead she was abruptly served with the Summons for confirmation of Grant dated **23rd December 2021** which summons included a proposal on how the estate was to be distributed.

12. The Protestor objects to the mode of distribution as proposed by the Respondent because she states that the same names strangers to the estate as beneficiaries.
13. The Protestor indicates that she has no objection whatsoever to the allocation of 0.5 acres of the land to **Gaithumbi Nursery School**. However she opposes the mode of distribution of the remaining **four (4) acres** for the following reasons. The Protestor explained that the Deceased herein **Waigwa Kimiti** and his wife **Gathoni** bore no children. That the brother of the Deceased **Macharia Kimiti** had two wives named **Nyandia** and **Wambui**. That the Protestors late husband is from the 1st House of **Nyandia** whilst the Respondent is a son to **Wambui** (2nd House). According to the Protestor her late husband was given two (2) acres of the suit land by the Deceased during his lifetime.

14. The Protestor also complains that two of the Administrators i.e the Respondent and one **David Maina** proceeded to sell off portions of the estate without the knowledge and/or consent of the other beneficiaries. For the above reasons the Protestor opposes the Summons for confirmation of the Grant which she laments grants to the 2nd house of **Wambui** a larger share of the estate. The protestor demands that the two (2) acre share of the estate which was due to her late husband be allocated to her.
15. **PW2 WANGUI GITHAIGA** and **PW3 MARY WANJIKU MWANGI** told the Court that they were neighbours of the Deceased. They both state that the Deceased during his lifetime allocated two (2) acres of his land to **Kimiti** (Protestors late husband) and also gave two (2) acres to one **David Maina** from the house of '**Wambui**'.
16. The Respondent/Administrator **PATRICK NDIRANGU MACHARIA** in his evidence confirmed that he is the only surviving administrator of the estate. The Respondent also confirms that he is a nephew of the Deceased being the son of **KIMITI MACHARIA** and his wife **Wambui**.

17. The Respondent defends the proposed mode of distribution of the estate arguing that during his lifetime the Deceased had indicated before elders his intention to bequeath two (2) acres out of the suit land to one **David Maina** a nephew who was named after the Deceased. That further the Deceased indicated that the remaining two (2) acres of land was to be given to the two wives of his brother to share with each house getting one (1) acre each.
18. The Respondent admits that part of the land was sold to third parties whose names he has included as beneficiaries in the summons for confirmation of Grant. He defends this action by stating that since the question of distribution had been agreed upon he was at liberty to sell off part of the estate notwithstanding the fact that the Grant had not been confirmed. Finally the Respondents confirms that **0.5. acres** of the land was to be allocated to a local nursery school.
19. **DW2 JOHN MWANGI GATHENJI** was a neighbour to the Deceased whilst **DW3 HARRISON MUCHERU MACHARIA** was a nephew to the Deceased. They both state that during

his lifetime the Deceased had indicated that two (2) acres of his land was to go to his nephew **DAVID MAINA** who had been named after the Deceased. That the remaining two (2) acres was to be shared between the two wives of the Deceased's late brother. **DW2** confirms that 0.5 acres of the land was to be allocated to a local nursery school. **DW2** admits that he and the Respondent sold to a third party one (1) acre share allocated to the house of 'Wambui' **before** the Grant had been confirmed.

20. Upon conclusion of oral evidence parties were invited to file their written submissions. The protestor filed the written submissions dated **23rd June 2025** whilst the Respondent relied upon his written submissions dated **14th October 2025**.

ANALYSIS AND DETERMINATION

21. I have carefully considered this Protest, the evidence adduced before the Court as well as the written submissions filed by both parties. It is not in dispute that this cause relates to the estate of the late **WAIGWA KIMITI** who died having no wife or child surviving him. It is further common

ground that the Deceased was survived by a brother **Macharia Kimiti** who is also Deceased. That the said brother to the Deceased had two wives namely **Nyandia** (1st House) and **Wambui** (2nd House). Both **Nyandia** and **Wambui** are now Deceased.

22. It is also agreed between the parties that the Protestor is the widow of **Kimiti Ndirangu** the son of **Nyandia** (from the 1st House) whilst the Respondent is the son of **Wambui** (from the 2nd House).
23. There is likewise no dispute that the estate of the Deceased comprised of the parcel of land known as **Title Number Muhito/Njiruini/18** measuring approximately five (5) acres (the suit land). The bone of contention is the mode of distribution of this land.
24. The following are the issues which arise for determination;-
 - (1) Did the Deceased die Intestate.
 - (2) Who has locus standi in this succession cause.
 - (3) How should the estate be distributed.

(1) Did the Deceased die Intestate?

25. The Respondent and his witnesses have made reference to certain alleged utterances of the Deceased to the effect that two (2) acres of his land was to be allocated to a nephew **David Maina** who was named after the Deceased. The said **David Maina** did not testify in this case at all. The Deceased did not leave behind a written will detailing any intention to bequeath two (2) acres of his land to this nephew.

26. The Respondent and his witnesses allege that the Deceased made these utterances before the elders. The court is not told when the said utterances were made. Whilst courts in Kenya will recognize and give effect to an oral will the terms upon which such oral will is to be proved are clearly set out in **Section 9 of Succession Act Cap 160 Laws of Kenya** which provides that

“9(1) No oral will shall be valid unless

(a) It is made before two or more competent witnesses

and

(b) the testator dies within a period of three months from the date of making the will”

27. In this case the Court was not told the date when the Deceased allegedly made the utterances in question. Thus the court is unable to determine whether the Deceased died within three (3) months of making those utterances.

28. Secondly the Respondent has not called two (2) witnesses who heard the Deceased make this statement. According to the Respondent the Deceased made the statement before elders. He did not name those elders. **DW2 John Mwangi Gathenji** who was an elderly gentleman gave the court a contrary version. In his evidence **DW2** stated as follows;-

“Since Deceased had no child he said that his brother’s son named after him will get his land - the person was David Maina Macharia. The Deceased said his brothers would not inherit his land.....”

29. This statement implied that the Deceased was bequeathing his entire estate to this **David Maina**. Later in his evidence

DW2 stated that this **David Maina** was to get only two (2) acres and the remaining two (2) acres was to be divided between the two wives of his late brother.

30. I was able to see and hear **DW2** as he testified. As stated earlier he was an elderly gentleman. He appeared confused and clearly had trouble recollecting facts. I would not consider him to be a reliable witness and certainly his evidence did not prove the existence of an oral will.
31. I find that the Deceased did not leave a written nor an oral will. I find no evidence to prove that the Deceased bequeathed **two (2) acres** of his land to **David Maina Macharia**. Finally I find that the Deceased died intestate as evidenced by the fact that the Administrators applied for a grant intestate. Therefore the estate of the Deceased is subject to distribution under the laws of Intestacy.

(ii) Locus Standi

32. The next question that requires determination is how has proper locus standi in this succession cause. The Protestor told the court that she is the widow of the late **Kimiti Ndirangu** who was a nephew to the Deceased. This is

readily conceded by the Respondent. The Protestor is therefore representing the estate of her late husband who was one of the beneficiaries to the estate of the Deceased. As such I am satisfied that the Protestor has proper locus standi in this succession cause.

33. The Protestor did aver in her Affidavit of Protest that some of the persons who were allocated portions of the estate were not genuine beneficiaries to the estate but were strangers. These were **Gerald Muraguri Maina** who was to be allocated 2.0 acres out of the suit land and **David Mwai Buri** who was to be allocated 1.0 acres.
34. The Protestor accused the Respondent of having sold portions of the estate to third parties before the Grant had been confirmed. The protestor annexed to her further statement dated **28th September 2022** a copy of a sale Agreement dated **12th May 2011** entered into between **David Maina Macharia** (as Vendor) and **Gerald Muraguri Maina** (as purchaser) for the sale of the Vendors 1.9 acre share of the Suit land for a price of **Kshs. 525,000/=**.

35. The Protestor also annexed a copy of a second Agreement for sale of land entered into between **Patrick Ndirangu Macharia** (the Respondent herein) and one **David Mwai Buri** for the sale of **0.975 acres** out of **LR NO. Muhito/Njiruini/18** for a price of **Kshs. 470,000**. It is these two purported purchasers whose names the Respondent included in the distribution of the estate to inherit the portions allegedly purchased.
36. The Respondent in his evidence admits that he did sell portions of the estate before the Grant had been confirmed. Under cross-examination the Respondent admits that
- “we have sold the land before the succession cause was determined. We had all agreed so we proceeded to sell. I sold one acre to one David Mwai. I sold the land before the Grant was confirmed.....” [Own emphasis]**
- The Protestor goes on to admit that his own name does not appear in the schedule for distribution. Instead he has written the name of this purported buyer ‘**David Mwai Buri**’.

37. Similarly **DW3 Harrison Mucheru** who is a nephew to the Deceased in his evidence confirms that his brother **David Maina** sold land to a third party. This **David Maina** did not appear to give evidence in this matter. Under cross-examination **DW3** says

“The family of Wambui sold our 1 acre share. Myself and Patrick [the Respondent] sold the land to one Mr. Mwai.....”

Therefore there is a clear admission by the Respondent and his witness that they were busy selling off portions of the estate before the Grant had been confirmed.

38. Firstly it was wrong, unprocedural and in fact illegal for the Respondent to purport to sell off estate property before having the Grant confirmed. An administrator holds estate property in trust for the other beneficiaries and has no right to deal in or sell estate property to his benefit before having the Grant confirmed.

39. The Respondent claims that he went ahead to sell the land notwithstanding the fact that the grant was yet to be confirmed because all the beneficiaries had agreed on the distribution and that he only sold the portion allocated to the 2nd House. Firstly the fact that this dispute is in court is a clear indication that not all the beneficiaries had agreed to the mode of distribution of the estate. Secondly despite **DW3** claiming that the other beneficiaries had consented to the sale of part of the estate no written consent signed by the other beneficiaries was produced as an exhibit.
40. Thirdly the suit property is still registered in the name of the Deceased. The land did not belong to the Respondent and was not his to sell. **Section 45** of the **Law of Succession Act** provides that
- “45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.**

(2) Any person who contravenes the provisions of this Section shall -

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.....”

41. In **RE ESTATE OF VERONICA NJOKI WAKAGOTO (Deceased) [2013] eKLR Hon Justice William Musyoka** stated that:-

“The effect of Section 45 is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

42. It is quite obvious that the Respondent's action in selling estate property before confirmation of grant makes him guilty of intermeddling with the estate an offence which carries criminal sanction. The actions of the Respondent are even more unfortunate given that he is an administrator whose duty was to preserve the estate until final distribution.

43. What then is the effect of this purported sale by the Respondent to third parties of estate property? The Respondent was an administrator of the estate. **Section 82** of the **Law of Succession Act** sets out the powers and duties personal representatives. The proviso to **section 82 (b)** provides that:-

“(11) No immovable property shall be sold before confirmation of the grant.”

44. In **RE ESTATE OF JOHN GAKUNGA NJOROGI [2015]** eKLR the Court stated as follows:-

“For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of

Administration to them and before the confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the law of succession Act. Even if the sale transactions were by the administrators the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representative under Section 82(b) proviso (ii) which provides that “no immovable property shall be sold before confirmation of the Grant.” [Own emphasis]

45. In the case of **MORRIS MWITI BURUGU -VS- DENIS KIMANTHI M. M BURUGU [2016] eKLR**, the court held that

“.....where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the Court. The transaction is

subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same.”

46. I therefore find that the Respondent had no legal authority to sell any

Part of the estate of the Deceased. The purported sale to third parties was illegal under the terms of **Section 45** of the Act. The so called purchasers **are not** beneficiaries to the estate and have no locus standi in this matter.

(3) How should the estate be distributed

47. The Respondent had in the summons for confirmation of Grant dated **23rd December 2021** annexed a schedule containing his proposed mode of distribution of the estate. In that proposal the Respondent included the 2 alleged purchasers as beneficiaries of the estate.

48. At no time can a purchaser be deemed to be a beneficiary of an estate. These so-called purchasers have no relationship to the Deceased and have no valid claim over estate

property. They are at best intermeddlers and have no right to be included in the distribution schedule of distribution.

49. The Respondent tried to justify his proposed mode of distribution by claiming that the Deceased had intended to bequeath two (2) acres of his land to his nephew **David Maina**. This has been debunked by the court. According to the Respondents proposal the 2nd house of **Wambui** which included **David Maina** would then be allocated three (3) acres of the land i.e 2 acres to **David Maina** and 1 acre out of the remaining of 2 acres to be shared between the two houses.
50. This is clearly a proposal which is unfair and is skewed in favour of the 2nd House. Indeed it is quite obvious that the Respondent came up with the skewed mode of distribution in order to accommodate his illegal action of selling estate property before the Grant had been confirmed. The court rejects the mode of distribution proposed by the Respondent.
51. All the beneficiaries consent to the allocation of **0.5 acres** of the suit land to **Gaithumbi Nursery School**. The contest is

over the distribution of the remaining **four (4)** acres. There are two Houses of **Nyandia** and **Wambui**. In order to be equitable I direct that the remaining four (4) acres be distributed between the 2 houses **equally** with **each House** receiving two (2) acres of the land.

52. Finally I dismiss the Summons for confirmation of Grant dated **23rd December 2021**. I direct that the Administrator file a fresh summons for Confirmation of Grant to comply with the mode of distribution as set out by this court.
53. Each party to bear their own costs for this protest.

Dated in Nyeri this 6th day of March 2026

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MAUREEN A. ODERO
JUDGE

ORIGINAL