



REPUBLIC OF KENYA



**In re Estate of Lotethuror (Deceased) (Succession Appeal E001 of 2025)
[2026] KEHC 2513 (KLR) (Family) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
FAMILY
SUCCESSION APPEAL E001 OF 2025
SC CHIRCHIR, J
FEBRUARY 26, 2026
IN THE MATTER OF THE ESTATE OF MARIA KADONG
LOTETHUROR ALIAS KADONG LOTETHUROR (DECEASED)**

BETWEEN

DOMINIC LORO BORAN PETITIONER

AND

PATRICK KIMAITA EMEKUI RESPONDENT

JUDGMENT

1. On 19th November, 2021, the Respondent herein petitioned for a Grant of Letter of Administration Intestate, in respect to the Estate of Maria Kadong Lotethuror alias Kadong Lotethuror (Deceased). In the petition, he stated that he was the only survivor of the deceased, and that the deceased had no liabilities. He listed the Assets as follows:-
 - a. Plot No. 35 at Archers Post.
 - b. Plot No. 36 at Archers Post.
 - c. Shares at Lusia Group Ranch
 - d. Land Rover KQG 157.
 - e. Funds held at Standard Bank under A/C No. 015129729xxxxx.
2. The Grant was issued on 29/08/2023, and later confirmed on 8/01/2014. At confirmation, all the properties went to him as the sole heir.



3. On 13/06/2019 vide the summons dated 13/06/2019 the Applicant herein moved the court seeking for interalia, revocation of the Grant.

The Pleadings

4. The Applicant describes himself as the Legal Representative of the Estate of one Teresia Apua Poran, (hereafter referred to as Teresia). Teresia was the Applicant's mother and sister to the Respondent. He states that the Respondent failed to disclose that the said Teresia was a child of the deceased and hence a beneficiary of the deceased's Estate. That the Grant was therefore obtained fraudulently in that, there was failure to disclose a material fact.
5. The Applicant further states that the correct position is that the deceased was survived by the Respondent and the said Teresia; That the Grant was taken out in a secretive manner, with the aim of disinheriting his mother.
6. In his Replying Affidavit, the Respondent opposes the Application. The Respondent admits that the deceased had two children; that is Teresia and himself. He further states that the deceased left the following properties:
 - a). Plot No. 35, Archers Post.
 - b). Plot No. 36, Archers Post.
 - c). Plot No. 85, Archers Post.
 - d). Plot No. 213, Archers Post.
 - e). Plot No. 712, Archers Post
 - f). Motor Vehicle Reg. No. KQG 157.
7. He explains that when he petitioned for the Grant he did not include plot Nos. 85, 213 and 712 as the same had been allocated to his Teresia by the deceased. He asserts that the deceased had distributed her property to his children prior to her demise. That the three plots are currently being occupied by Teresia's children. Consequently, he states that plot Nos. 35 and 36 are his.
8. The summons were heard by way of vivavoce evidence.

The Applicant's Case

9. The Applicant was the 1st witness. He relied on the Supporting Affidavit to the summons and a Supplementary one sworn on 22/10/2019. On cross-examination he told the court that his mother Teresa acquired plot Nos. 85, 213 and 752 by way of allocation; that the acquisition took place in the year 1990, but he did not have receipts showing the Allocation. He also told the court that he has carried out some developments on Plot No. 36.
10. Questioned by the court, he stated that plot Nos. 213, 752 and 85 are registered in the names of his sisters Margaret, Carolyne and Nyambura respectively. That the plots were given to the sisters by his mother Teresia during her lifetime.
11. The Applicant's 2nd witness was one John Etano. He stated that he was a tenant in Plot No. 35 and 36. That his Landlord was the Respondent herein until 2019, when the Applicant became his landlord. He knew plot Nos. 35 and 36 to belong to the deceased while 85, 213 and 712 belonged to Teresia.



12. The 3rd witness stated that the deceased was her grandmother, and daughter of Teresia. She testified that plot Nos 85,213 and 712 belonged to her mother Teresia; that in the year 2019 the deceased told her to occupy Plot No. 85, to forestall any repossession. Questioned by the court she stated that Teresia died in 1997 and she developed the plot in year 2009, when the deceased herein was still alive.

The Petitioner's / Respondent's case

13. The Petitioner testified as the 1st witness. He told the court that Plot Nos. 35 and 36 were given to him by his mother; that the deceased had shared out properties between him and his sister, Teresia. He further stated that he was entitled to the money in the Bank, the shares in Lusesia Group Ranch and the vehicle. He admitted that the shares, money in the Bank and plot No 35 and 36 went to him solely, at the point of confirmation of Grant.
14. The hearing was adjourned to allow the Petitioner submit documents. Hearing resumed on 29/4/2024, when the petitioner continued to testify that he had obtained allotment letters for plot Nos. 36 and 35, but he did not get any for plot Nos. 85,213 and 712. That he did not include, Plot Nos 85, 213 and 72 in the petition because they had been transferred to his sister.
15. On further Cross-examination, he stated that Plot No. 35 and 36 were given to him by the deceased during her lifetime. He admitted that he did not disclose the name of his sister at the time he petitioned for the Grant. He further told the court that he used the money at Standard Bank to construct houses in Plot No. 35 and 36.

And that the same plots were allocated to him in the year 2013.

On cross- examination by the court examination he stated that the Bank Account had 1.2 million shillings.

16. PW2 told the court that he was a nephew to the deceased. He knew Applicant and the Respondent as the grandchild, and child of the deceased, respectively. He further stated that Teresia had been given Plot Nos. 84, 213 and 712, while the petitioner was given Plot 35 and 36.
17. PW 3 was one Priscilla Ambeshe Poran a child to Teresia and sister to the Applicant. She told the court that the Petitioner did not involve them when petitioning the grant; That she was not interested in the deceased's Estate, That the Petitioner gave them ½ a half of Plot No. 36 for business purposes only, that the mother was given Plot No. 35 and 36.

Applicant's Submissions.

18. The Applicant reiterates that the petitioner petitioned for the Grant without involving all the beneficiaries; That further during the confirmation proceedings, the deceased's properties ought to have been distributed equally between the beneficiaries, but that the Petitioner allocated all the transferred properties to himself.
19. It is submitted that the petitioning of the grant therefore infringed Section 41, 42 and 66 of the *Law of Succession Act* (The Act) and Rules 7 (7) (b) 26 (1), & (2) and Rule 40 (8) of the Probate and Administration Rules, which require notice of consent of the other survivors, who are equally entitled to take out Letters of Administrations Intestate. It is further submitted that any grant obtained contrary to the above stated Provisions ought to be annulled in terms of Section 76 of the Act. In this regard, The Applicant has relied on several decisions including Elizabeth Wangine Karen vs Leah Wanjiku [2015] eKLR; Racheal Wanjiru Karanja vs Nancy Kamau [2015] e KLR, In the matter of the Estate of M'Mukethia M'twamwari [2013] eKLR.



20. The Applicant finally submits that it is evident that the Respondent has wasted the assets of the Estate, by withdrawing all the funds in the Account, selling the vehicle and is currently in the process of transferring Plot Nos. 35 and 36 to himself.

Respondent's Submissions

21. While pointing out that the Applicant and his siblings can only inherit from their mother's share, the Respondent's submit that there was overwhelming evidence that Teresia had been given Plot Nos. 85, 213 and 712 by the deceased prior to the deceased's demise. That indeed the Applicant's sister's testimony affirmed this position.
22. The Respondent further submits that Plot No. 85 was registered in the Respondent's name contrary to the Applicant's claim, while ownership of plot Nos. 213 and 712 could not be ascertained. It is stated that ownership of Plot 85 is therefore absolute pursuant to the Provisions of Section 24 of the Registered Land Act.
23. In regard to plot Nos. 213 and 712 the Respondent submits that Gift inter vivos cannot be ascertained in the absence of proof of ownership. The Respondent further submits that the Applicant's occupation of Plot No. 36, was all infringement of Section 45 (1) which prohibits intermeddling with the Estate of a deceased's person.
24. In conclusion the Respondent submits that the deceased estate should devolve to the Petitioner as the only surviving child; that the Applicant and his sibling have already benefited; and that the Petitioner is the lawful proprietor of plot No. 85.
25. To buttress his submissions the Respondent has relied on several Authorities, including the following:
- a. Re Estate of Veronica Njoki Wakagoto (Deceased) [2013]eKLR.
 - b. Wreck Motors Enterprises vs Commissioner of Lands & 3 Others [1997] eKLR.
 - c. Trouistik Union International & Ano vs Jane Mbeyu & anor [1993] eKLR.
 - d. Gladys Nkirote vs Julius Majau [2016]eKLR

Analysis and determination

26. I have considered the pleadings, the witness testimonies and the rival submissions of the parties and have identified the following issues for determination:
- a. Whether the Applicant have the right to inherit from the deceased's Estate.
 - b. Whether, the Grant was issued without disclosure of material fact(s).
 - c. What property formed part of the Estate
 - d. Whether there existed any gifts inter vivos.
 - e. What appropriate orders should issue.

Whether the Applicant has the right of inheritance in this case.

27. Certain facts are not disputed in this case. It is not in dispute for instance, that the deceased had two children, namely the Respondent herein, and one Teresia Apua Poran. Teresia was the mother of the



Applicant herein and she predeceased her own mother the deceased. Thus, the issue herein is whether grandchildren are entitled to inherit from their grandparents.

28. The legal position is well settled. Section 41 of the Act provides as follows:
- “Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”(Emphasis Added)
29. The above provisions have been reiterated in many past decisions of Superior Courts. In the case of *Christine Wangari Gachigi v Elizabeth Wanjira Evans & 11 others* [2014] KECA 150 (KLR) the Court stated:- If a child of the intestate has pre-deceased the intestate then that child’s issue alive or en ventre sa mere or that date of the intestate’s death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate’s death.
30. In *Cleopa Amutala Namayi v Judith Were* [2015] KEHC 6000 (KLR) the Judges stated: “..... Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents who died intestate after 01/07/1981 when the Act came into operation. The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of their grandparents. The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren’s own parents are dead. Those grandchildren can now step into the shoes of their parents and take directly the share that ought to have gone to the said parents. Needless to say such grandchildren must hold appropriate representation on behalf of their parents.”(Emphasis added)
31. There is no dispute that Teresia was a child of the deceased. In his replying Affidavit, the respondent not only admitted that much, but he also went on to list Teresia’s 7 children (paragraph 10 of the affidavit). The Applicant was therefore under an obligation to list Teresia’s children and the fact that she left behind issues. In terms of section 41 of the Act and the above cited decision, the Applicant as well as his six siblings were considered survivors for purposes of inheritance . They were entitled to inherit their mother’s share since their mother pre-deceased the deceased.

Whether, the Grant was issued without disclosure of material fact(s).

32. The Applicant’s complaint is that his mother was left out; that the omission constituted non-disclosure of material fact, and for that reason, the grant ought to be revoked.
33. The Respondent has readily admitted to have had a sister, and the sister had children, one of whom is the Applicant . A perusal of the petition shows that he declared himself as the sole survivor of the deceased. The fact that the deceased had another child and that other child had surviving issues was a material fact in terms of section 41 of the Act. Further a perusal of the summons for confirmation of Grant shows that all the properties were allocated to him, an act which ended up disinheriting the Applicant and his siblings.



34. The respondent has stated that he left out Teresia and her children because the deceased had allocated some properties to her. However, if the respondent was acting in good faith, nothing stopped him from listing his sister, while indicating to the court that the deceased had given her some properties as a gift. I notice that the Petitioner was represented by an Advocate right from the time he petitioned for the Grant was filed, and such pleas are not plausible in the face of legal representation.
35. Pursuant to section 76 of the Act, failure to make the above disclosure constituted non- disclosure of material fact within the context of section 76 of the Act, and is a ground for annulment. The section provides as follows:
- “A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d).....
- (e).....”
36. However, I have considered the circumstances of this case. Firstly, this case has been pending in court since the year 2012. Nullification of the grant will require the parties to begin the process a fresh. This in turn means a further delay on the distribution of the Estate, to the detriment of the beneficiaries. Secondly, the Petitioner, as the only surviving child of the deceased, would still need to remain as an Administrator of the estate. Thus, instead of nullifying the grant I will hereafter make appropriate orders, which will hopefully, dispose of this matter quickly, in the interest of the beneficiaries and which will secure the representation of both parties in the Administration process.

What constituted the Estate of the deceased?

37. Section 2 of the Act defines an “estate” as ‘free property of a deceased person’; and “free property” is defined under the same section as “in relation to a deceased person means the property of which that person was legally competent freely to dispose during his lifetime, and in of which his interest has not been terminated by his death”.
38. It was the duty of the petitioner/ Administrator to ascertain the properties that were owned by the deceased and intended beneficiaries and propose to court the sharing ratios of those properties.
39. In Paragraph 6 of the Petition, the petitioner listed the following Assets:
- a. Plot No. 35 at Archers Post.
 - b. Plot No. 36 at Archers Post.
 - c. An Account with Standard chartered Bank
 - d. Shares at Lusia Group Ranch.
 - e. Land Rover KQG 157.



40. I have seen a letter from the County Council of Samburu stating that as 15/10/2012 Plot Nos. 35 and 36 belonged to the deceased. There is also a Bank statement showing that as at 31/12/ 2011 the deceased was the owner of the Bank Account held at standard chartered Bank. However, there is no evidence of ownership of motor vehicle KQG 157 and Shares at Lusia Group Ranch by the deceased.
41. There are 3 plots that were introduced into these proceedings by the Petitioner. These are Plot Nos. 85 (referred elsewhere as 86)), 213, 712 ,all at Archers post. Although the existence of these plots was admitted, ownership was contested, and not proved.
42. It is important to remember that the court can only distribute ‘ free property’ of the deceased ,as defined under section 2 of the Act and whose provisions have been set out under paragraph 37 of this judgment . That is to say that it is that property which the deceased was at liberty to dispose of as at the time of her demise. It follows therefore that any property which was not in the name of the deceased, and hence the deceased could not dispose of it, was not part of free property.
43. In the circumstances, the onus was on the petitioner to submit all documents for all the property he alleges were owned by the deceased. The only ascertainable property of the deceased at this point in time is cash at Standard Chartered A/C No. 015129729xxxxx and Plots Nos. 35 and 36, at Archer Post.

Were there gifts intervivos

44. Related to the above issue of ownership is the issue of gifts intervivos, which has been raised by the petitioner. The petitioner has argued that he did not list plot Nos. 85/86, 213 and 712 for the reason that the deceased had given them to the Applicant’s mother during the deceased’s lifetime. This is what the law refers to as gift intervivos or gifts between living persons. It is enshrined under section 42 of the Law of succession Act. The section provides:

“ Previous benefits to be brought into account

Where—

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.
45. The above concept was further explained in the case of *In re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015]e KLR* where the Judge stated; “For gifts inter vivos , the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 32 to 51.”
 46. In the present case, not only is there no evidence that the above stated three properties had been given to Teresia as gifts , but there is no proof that the properties were owned by the deceased. In this regard, the Petitioner bore the evidential burden of proving not only the existence of the said properties but also



the fact that they had been given to Teresa as gift Inter vivos. Indeed the court has noticed that despite the Respondent's initial assertion in their pleadings that Teresa had benefited from the deceased, in their submissions, their Advocate has submitted that the issue of gift intervivos cannot arise since there is evidence of ownership in the first place.

47. Further, in respect to gifts involving land, there must be documentary proof of transfer or any form of conveyance to the donee, in written form. (see Re Estate of Gideon Manthi(supra)).No such evidence has been availed in this case. Thus, there is no proof that Teresa / her children had benefitted from the estate during the life of the deceased.
48. In his submission, the Respondent has introduced a issue which was not pleaded and was not submitted in evidence;- he has stated that he is the registered owner of plot 85, and his rights as the registered owner are protected by Law. It suffices to state that this the issue, having not arisen in the pleadings or even evidence, the court declines to address itself to it.
49. In respect to the shares at Lusesia Group Ranch and the motor vehicle, these two properties were listed by the petitioner as belonging to the deceased, and there has been no contestation on this issue. The Applicant must therefore submit documentary proof for purposes of distribution
50. In conclusion therefore it is the finding of this court that ;
 - a). The Applicant is entitled to inherit from the deceased on behalf of his deceased's parent.
 - b). The Grant herein was obtained fraudulently in that it was obtained without disclosure of material facts.
 - c). The ascertainable properties of the deceased as at the time of her demise were: Standard Chartered A/C No. 015129729xxxxx and Plots Nos. 35 and 36 at Archer Post
 - d). The Applicant did not receive any gifts intervivos

Final Orders

51. In view of all the foregoing, I finally proceed to make orders as follows:-
 - a. The Applicant Patrick Kimaita Emekui is hereby appointed as a Co-Administrator of the deceased's Estate alongside the Petitioner. An Amended Grant of Letter of Administration Intestate shall issue forthwith.
 - b. The orders of Confirmation of Grant made on 8/01/2024 are hereby set aside and the Certificate of Confirmation of Grant issued on 8/01/2014 is hereby cancelled.
 - c. Any transfers affecting plot No. 35 and 36 arising from the certificate issued on 08/01/2014 is hereby cancelled and property to revert back to the name of the deceased.
 - d. The County Government of Samburu or the Registrar of Lands, Samburu county to effect order (c) above.
 - e. The Petitioners or any of them to file certificates or such other documents of ownership for Motor Vehicle registration number KGG 157, Land Rover and certificate of shares for the shares held at Lusesia Group Ranch.
 - f. The Petitioners or any of them to file fresh Summons for Confirmation of Grant to consider all the Assets and beneficiaries of the deceased.



- g. The matter will be mentioned on a date to be given at the delivery of this Judgment for purposes of confirming compliance of the aforesaid directions

DATED, SIGNED AND DELIVERED AT ISIOLO, THIS 26TH DAY OF FEBRUARY, 2026

S. CHIRCHIR

JUDGE

In the presence of:-

Ismail Abdow -Court Assistant.

Mr. Ondari. B for the Applicant

Mr. Ondari. K for the Respondent

