

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE NO. 578 OF 2011

IN THE MATTER OF THE ESTATE OF MARY WABIRI
MATHENGE (DECEASED)

NANCY WAMBUI MATHENGE.....
APPLICANT

VERSUS

SERAH NYAKIERE MATHENGE.....1ST
RESPONDENT

EVANS MWARIRI MATHENGE..... 2ND RESPONDENT
/PROTESTOR

JUDGMENT

1. The Applicant lodged the Summons for Confirmation of Grant dated 10.9.2024 by which they sought to confirm the grant dated 19.2.2024.
2. The deceased had left the Applicant and Protestor as children and beneficiaries and the 1st Respondent was step mother to the Applicant and Protestor. The 1st Respondent has no horse in this race as she was sorted elsewhere. The Applicant proposed the disputed property, namely LR No. Iriaini/Gatundu/299, stated to be measuring approximately

11.9 acres to be shared equally between the Applicant and her brother, the Protestor.

3. The Protestor filed an affidavit of protest dated 11.3.2025 by which it was deposed as follows;

(a) LR No. Iriaini/Gatundu/299 did not form part of the estate of the deceased as the same is registered in the name of the protestor absolutely pursuant to a court issued by Karatina SRMC in Civil Appeal No. 19/1975.

(b) The deceased had only a life interest over LR No. Iriaini/Gatundu/299.

Evidence

4. PW1 was Evans Mwariri Mathenge. He relied on his affidavit of protest dated 11.3.2025. On cross examination, it was his case that the petitioner was his sister. His other sisters were not interested in the succession. The petitioner was married but she came back. She did not have any other property. The land was her father's.

5. DW1 was Nancy Wambui Mathenge. She knew the land belonged to her father. Her father died in 1974. She used the land. She was not married.

6. DW2 was Esther Wanjiru. She was eldest daughter of the deceased; she was not interested in the land. She testified

that the land should be divided into two for the Applicant and the protestor. The protestor had his own land.

7. DW3 was Pauline Njoki Mundia. The Applicant was her younger sister. According to her, the protestor had his own portion. The land should be divided into two for the Applicant and the protestor. She testified that she had no interest in the land.

Submissions

8. The Protestors filed submissions dated 25.8.2025. It was submitted that LR No. Iriaini/Gatundu/299 did not form part of the estate of the deceased and the court order that granted the same to the Protestor had never been appealed. The protestor cited Section 7 of the Civil Procedure Act.

9. It was also submitted that the deceased only held a life interest in the property while ownership thereof rested with the protestor.

10. The Applicant on the other hand filed submissions dated 22.8.2025. It was submitted that the issue before Court was simple and straightforward under section 38 of the Law of Succession Act requiring that all the children of the Deceased share their parent's estate equally.

11. It was submitted that allowing the Protestor to have all the said 12-acre land alone would be to disinherit his siblings and

a mockery of justice, defeating the purpose of the Law of Succession Act.

12. The Chief's letter-cum-beneficiary list is on record and the Protestor was lucky their siblings who testified herein are not interested in the land.

Analysis

13. The Protestor questioned the Confirmation of Grant. It was his case that the property sought to be distributed, LR No. Iriaini/Gatundu/299 was not part of the estate of the deceased.
14. The issue for determination is whether the protest should be allowed and the mode of distribution suggested by the Applicant set aside. Section 51 of the Law of Succession Act, requires a person seeking to administer the estate of a person who died in 1980 has to comply with section 51(2)(g) of the Law of Succession Act and Rule 7(1)(e) of the Probate and Administration Rules, which require disclosure of all the children of the deceased.
15. A perusal of the summons for confirmation of grant dated 10.9.2024 reveals that the Applicant proposed the suit property to devolve to herself and the protestor in equal shares. It was common position of the parties that other sisters of the Applicant and protestor were unwilling to get a share in the estate.

16. That said, it was imperative for the Protestor to prove that the property, LR No. Iriaini/Gatundu/299 was not available having devolved to him prior to the demise of the deceased. Only one property, that is, L.R. No. Iriaini/ Kiaguthu/291 was contested. In **Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

17. A perusal of the determination in Karatina SRM Appeal No. 19 of 1975 on which the protestor relied to assert that the property was not available as part of the estate reveals that the same arose from a consent of the parties. The parties were the deceased, the 1st Respondent and the protestor herein. The consent was recorded on 9.10.1975 by JL Njeru, SRM. The relevant part of the said consent was that LR No. Iriaini/Gatundu/299 be registered in the name of the protestor with the deceased holding a life interest thereon.

18. The protestor was thus expected to demonstrate on a balance of probabilities that the assertions in the affidavit of protest were such that they shifted the scales of justice towards adopting his mode of distribution as opposed to the Applicant's suggested mode of distribution. This would be by finding that the property was his sole property. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J in William Kabogo Gitau -vs- George Thuo & 2 Others [2010] 1 KLE 526** stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

19. Nonetheless, this court has to establish a basis to revoke the grant and interfere with the mode of distribution proposed in the certificate of confirmation of grant as urged by the Protestors. The grounds for revocation or annulment of grant of Letters of Administration are set out in Section 76 of the Law of Succession 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) That the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) To proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) That the grant has become useless and inoperative through subsequent circumstances.

20. The ground advanced by the protestor though not stated was that the Applicant did not disclose that the said property, LR No. Iriaini/Gatundu/299 was not available as part of the estate of the deceased. The law governing applications for confirmation of grant is section 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules. The proviso to section 71, as read together with Rule 40(4), is that the administrator applying for distribution must satisfy the court that they have properly ascertained the persons beneficially entitled to a share in the estate and have properly ascertained the shares due to such beneficiaries. The effect of it is that the court then incurs a duty to be satisfied, before it confirms the grant, that the administrator asking for confirmation, has properly ascertained the persons beneficially entitled to a share in the estate and the shares due to such beneficiaries.

21. This succession related to the estate of the deceased Mary Wabiri Mathenge. The protestor alluded to the estate as having been of his deceased father. Nothing can be far from the truth that we are dealing with the estate of the protestor's mother and not his father. The issue of a life interest is therefore not a proper issue before this court. The court's attention is on whether the property was registered in the name of the deceased or had changed hands during her lifetime, pursuant to a court order.

22. In respect of the distribution of the Deceased's estate, this court is guided by Sections 38 of the Law of Succession Act, Cap 160, Laws of Kenya. Section 38 of the Law of Succession Act provides that:

38. Where intestate has left a surviving child or children but no spouse Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42 , devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

23. The court notes that although LR No. Iriaini/Gatundu/299 was granted to the Applicant by the consent order of 9.10.1975, there ought to have been evidence that the land was subsequently registered in the name of the protestor prior to the demise of the deceased who held title at the time of the said order. It was one thing to be given land and another different thing for the said land to be registered in your name.

24. A finding that an estate or part thereof had devolved to a beneficiary or dependant during the lifetime of the deceased whether by the deceased's action or by action of a court order was a finding that the said property was gifted to the said beneficiary or dependant and was therefore unavailable as part of the net estate. In relation to whether the alleged gifts could amount to gifts *inter vivos*, the Court in **Re Estate of**

The Late Gedion Manthi Nzioka (Deceased)[2015]eKLR stated that:

“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. 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.”

25. In **Naomi Wanjiru Njoroge & 2 others v Winston Benson Thiru [2018] eKLR**, the court stated as follows:

In law, gifts are of two types. There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortis causa*). The assets that are the subject of a gift do not form part of the estate and such assets pass directly to the donee as provided for by **Section 31 of the Law of Succession Act** as follows;

“A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if-

(a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and

(b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and

(c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and

(d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and

(e) the person making that gift dies from any cause without having survived that illness or danger; and

(f) the intended beneficiary survives the person who made the gift to him:

Provided that-

i. no gift made in contemplation of death shall be valid if the death is caused by suicide;

ii. the person making the gift may, at any time before his death, lawfully request its return. the person making the gift may, at any time before his death, lawfully request its return.

26. In this case, I do not see how LR No. Iriaini/Gatundu/299 passed to or was delivered to the protestor during the lifetime of the deceased. The parcel was still in the name of the deceased and if she had intended to comply with the consent by having it registered in the name of the protestor, she should have initiated the transfer or actually transferred the land accordingly. There was no reason given why there was no registered title that was in the name of the protestor in respect of LR No. Iriaini/Gatundu/299. The copy of the green card that the protestor adduced through his affidavit of protest related to a different property, that is, Iriainiu/Kiaguthi/291.

In re Estate of Godana Songoro Guyo (Deceased)[2020] eKLR, the court stated thus:

It may be noted that the concept of gifts is divided into two categories. First gifts *intervivos* and gifts *causa mortis*. Gifts *intervivos* as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death. In any event the

person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of *intervivos* the gift must go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee....

Therefore, the Law requires of the beneficiary that the deceased relinquished dominion over the title to land reference **Kilifi/Ngerenyi / 443** in their favour. The evidence must also show that the deceased intended to make the gift of this particular property by taking steps to perfect delivery of it to the sons in exclusion of anyone else. Sometimes looked at from customary Law perspective the father as the head of the family under parental executive order can permit any of his children use of the Land, without the necessity of giving up the title to pass to the user. The mere delivery for use is therefore not sufficient to qualify the property as a gift *causa mortis* or gift *intervivos*.

27. Adherence to the rule based-model on transfer of immovable property involves an inquiry on the Law of gifts *inter vivos* or *causa mortis* featuring in **Odunga's Digest on Civil Case Law and Procedure Vol (III) Page 2417 at paragraph 5484 (d) e - 1** thus:

“Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in Re Fry Deceased {1946} CH 312 Rose: and Trustee Company Ltd v Rose {1949} CL 78 Re: Rose v Inland Revenue Commissioners {1952} CH 499 Pennington v Wulfe {2002} 1WLR 2075 Maledo v Beatrice Stroud {1922} AC 330 Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the otherhand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it is held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise a gift of registered land becomes effective upon execution and delivery of the

transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor. (See Shell's Equity 29ED Page 122 paragraph 3)"

28. Therefore, I consider that there was no gift made and LR No. Iriaini/Gatundu/299 was not transferred to the protestor and the court cannot fathom a consent recorded and adopted by court on 9.10.1975 that was not acted upon by the parties and whose reason for inaction has not been stated for consideration. The only lawful way is what the Applicant proposed and which is in consonance with section 38 of the Law of Succession Act.

29. Based on the above disposition, the affidavit of protest is not merited. The mode of distribution proposed in the summons for confirmation of the grant is right and just, and I adopt it, *pari materia*.

Determination

30. In the upshot, I make the following orders:

- (i) The Protest dated 10.9.2024 is not merited and is disallowed.
- (ii) A Certificate of Confirmation of Grant be and is hereby issued in terms of paragraph 5 of the supporting affidavit to the summons for confirmation of grant dated 10.9.2024 as follows:

- a. Nancy Wambui Mathenge LR No.
Iriaini/Gatundu/299 - 50%
- b. Evans Mwariri Mathenge LR No.
Iriaini/Gatundu/299 - 50%

(iii) Each party to bear their own costs.

DELIVERED, DATED and SIGNED at **NYERI** on this **18th** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Mr. Peter Muthoni for the Applicant

Mr. Muchiri Wa Gathoni present

Court Assistant - Michael/Martin