

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**SUCCESSION CAUSE NO. 177 OF 2003**

**IN THE MATTER OF THE ESTATE OF THE LATE IBRAHIM**  
**KING'ORI CHANIA alias KING'ORI s/o WACANIA alias**  
**IBRAHIM KING'ORI MAINA (DECEASED)**

**AND**

**CHARLES NDIRANGU KINGORI ..... 1<sup>ST</sup>**  
**APPLICANT**

**PETER MWANGI KINGORI ..... 2<sup>ND</sup>**  
**APPLICANT**

**DUNCAN NDIRANGU KINGORI ..... 3<sup>RD</sup>**  
**APPLICANT**

**ISAAC MACHARIA KINGORI ..... 4<sup>TH</sup>**  
**APPLICANT**

**VERSUS**

**PATRICK GITHUA KING'ORI ..... 4<sup>TH</sup>**  
**RESPONDENT**

**RULING**

**Background**

1. The deceased herein died at a ripe old age of 96 years on 26.08.2002 at *Gitathî- inî*. The chief Mukaro location wrote a letter dated 14.04.2003. This was 23 years less one day to today. He identified the parcels left behind by the deceased and his late wives and 6 sons; 2 from the first house and 4

from the second house. There was an agreement on sharing signed by all the 6 sons covering both parcels.

2. There was annexed to the petition, form 38 signed by the following:

- a. Margaret Wangari Kingori
- b. Charles Ndirangu Kingori
- c. Ephrem Gitonga Kingori
- d. Peter Mwangi Kingori
- e. Duncan Ndirangu Kingori
- f. Isaac Macharia Kingori

3. Patrick Githua Kingori did not sign as he was the petitioner. However, he signed other statutory forms. The petition was published in the Kenya Gazette No. 7833 of 7.11.2003.

4. Charles Ndirangu Kingori, the first applicant, filed an objection and answer to petition on 19.07.2004. He filed a cross-petition dated 12.08.2003. His case was that the petitioner then was not an executor of the will. He annexed a handwritten document, known as the inheritance guide, dated 28.07.2002, which is one month before the deceased's demise.

5. Summons for confirmation were filed on 21.07.2004. On 26.07.2004, the first applicant, Charles Ndirangu Kingori, filed a notice of withdrawal and of cross petition and answer to petition. The same was minuted by the court on the same day. The applicant requested for a hearing date for the summons for confirmation.

6. The grant was confirmed on 18.11.2004 as per the application for confirmation of the grant. Matters rested until 28.11.2021, when Charles Ndirangu Kingori, the first applicant, regurgitated the same application, but now in the form of an application for revocation. He annexed the Form 38 and the purported will, earlier filed with the withdrawn application. They stated that they did not sign Form 38 as the same was forged. He stated that his late brother, Ephrem Gitonga Kingori was not supposed to inherit from the estate.
7. The petitioner filed a reply in an affidavit dated 17.3.2022. He stated that the chief gave an introductory letter, and the beneficiaries sat and agreed on the mode of distribution. The applicants signed a consent and never complained when they stood before the judge. He stated that the purported will was not genuine as the applicant annexed it to the minutes of 2.12.2000. He noted that the applicant filed a cross-petition but withdrew it. He posted that all parties were present when Okwengu J confirmed the grant.
8. He further stated that there were minutes after the confirmation, and there was never any dispute. The estate had only two parcels, which were divided equally among the two houses. Elizabeth Njeri King'ori's house got a lion's share since there were only two sons, Charles Ndirangu Kingori and Ephrem Gitonga Kingori who got Tetu/Muthuaini/1581, measuring 0.106 hectares, and Nyeri/Municipality/Block

VI/384 measuring 0.2752. The titles were issued on 12.05.2006, 20 years ago.

9. The house of Margaret Wangari King'ori got the four sons registered, that is Peter Mwangi Kingori, Patrick Githua Kingori, Duncan Ndirangu Kingori, and Isaac Macharia Kingori who got Tetu/Muthuaini/1580 measuring 0.118 hectares and Nyeri/Municipality/Block VI/385 measuring 0.2752. The titles were issued on 12.05.2006, 20 years ago. He proceeded that after confirmation, there was a meeting where the applicants consented to the subdivision.
10. The parties took control of the parcels after titles came in, the administrator was discharged, and all parties signed. Indeed, there was a discharge signed by all the beneficiaries on 11.11.06. The first applicant has been harassing the family of the late stepbrother and chasing them away.
11. The applicant filed Summons for Revocation, or Annulment of Grant dated 10.09.2021 in respect of the Grant of Letters of Administration Intestate made to the Respondent on 21.01.2004 and confirmed on 18.11.2004. It was alleged that the proceedings to obtain the grant were defective in substance, the grant was fraudulently obtained by the making of a false statement or the concealment from the court of something material to the case and that the grant was obtained by means of an untrue allegation of fact essential in

point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

### Evidence

12. The application was strenuously opposed. Parties proceeded by way of viva voce evidence. The matter proceeded by way of viva voce evidence. This court then took directions for the case to proceed from where it had reached.
13. The proceedings show that on 18.11.2004, the court noted that all parties were present and agreed. The proposal was adopted, save that the measurements were converted into acreage.
14. PW1 testified on 3.06.2024. He adopted his witness statement. He alleged concealment and coercion into signing. This was a departure from the affidavit in support. He laid the blame on his deceased brother and the Respondent. He stated that he filed a cross-petition after receiving information that his two brothers had filed this petition. He stated that he was arrested for allegedly stealing a title deed. He stated that part one of the so-called will was written by the respondent while the second part was written by the witness's son. He stated that Ephraim was given land in Laikipia, the shamba was to be inherited by himself.
15. On cross-examination, he stated that between 2004 and the time of application, he was educating his children. He stated that he had been holding the titles since 2017. He lamented that his daughters did not inherit.

16. On reexamination, he stated that Ephraim had passed on and had land in Muthuaini. While Peter and the applicant stayed in Nyeri Municipality, Isaac stayed at Nkubu.
17. Duncan Ndirangu Kingori was PW2. He stated that Macharia gave him land which was in the name of his mother. He did not sign the succession cause. He stated that the respondent threatened to take them to jail. He stated that he knew Ephraim, who colluded with the respondent to disinherit him. He said each house had its land. He stated that his family stays with that of Patrick.
18. PW3 was Mary Wairimu who adopted her statement. On cross-examination, she stated that the land in issue was bought in 1964. She was born in 1960. Her mother was given land in Muthuaini, while the second wife was taken to the Nyaribo farm. The respondent was given land in Laikipia. The deceased had another parcel in Murukku, which the deceased allowed the respondent to sell with Duncan. She was not asking for any portion of land. On re-examination, she stated that the father bought the land and each wife was given a share.
19. The respondent testified that he is a retired officer, a telecommunications expert in building and construction. The deceased, who is his father, died intestate in 2002. The family members appointed him as an administrator. The matter was taken to the Nyeri High Court, where the two parcels were divided among the two houses. He registered the titles held by the trustees.

20. On cross-examination, he stated that he worked under the Commissioner of Police and retired in 2018. He said he was the administrator and discharged his duties in 2006. There was a meeting in 2003. He did not bulldoze or coerce the applicants. He had sisters from his house and the other house. He did not force any of them to renounce their share. Her sisters are witnesses in the matter. He stated that every son had a share. He has land in Matanya but resides in Nairobi. He stated that his brother resides in the plot in town. The two properties were shared equally among the houses.
21. DW2 was Onesmus Gichohi Gitonga, a son of Abraham Gitonga Kingori. He stated that the two properties were shared among the houses. On cross-examination, he stated that some of his brothers are deceased. The brothers agreed that he represents them. It had been alleged that he was dead. The father was buried in Muthuaini.
22. DW3 was Teresa Wangechi, a daughter of the deceased herein, who stays at Ndaiga. She testified that the deceased had two plots, one in Nyaribo farm and another in Nyeri. Her brother stays in Nyaribo, while a stepsister stays in the other one. She wished to be allowed on the suit land. She stated that each house was to get a portion. She was given a portion to build. The daughters were not given the title deeds, said the applicants, who have not told the court the truth. Her evidence was that the first applicant did not use land at Muthuaini. She continued that Patrick and Peter Mwangi were shown where

to stay at Nyaribo. She said that the land at Matanya does not belong to Patrick and Peter Mwangi.

23. The fourth respondent, Regina Wanja Kingoti of Nyaribo, testified that she is the daughter of the deceased and that there was mediation.

24. She stated that the deceased had not distributed land before his demise. The brothers refused the mode of distribution. She stated that she resided on PW1's portion.

25. PW5 was Margaret Wanjiru Kariuki. She is the daughter of Kingori Wachira. She stated that the father had subdivided the shamba according to houses. On cross-examination, she stated that the deceased had two shambas and the deceased subdivided each equally between the houses. The land at Muthuaini is occupied by Charles, while the one in Nyeri is occupied by Peter Kingori of the second house.

26. DW6 was Samuel Kingori Ndegwa, who knew Abraham Chania, the deceased. The applicants are his cousins. He adopted his statement.

27. On cross-examination, he stated that the deceased had two parcels. The deceased had indicated that the two shambas be subdivided equally. The deceased never informed him that he was putting his intentions in writing.

### Applicant's Submissions

28. The applicant filed submissions dated 7.05.2025. The Applicants' case was that the Respondent petitioned to this honourable court for a grant of letters of administration intestate without involving any other beneficiary of the

deceased, that the Respondent forged the Applicants' signatures on the filed consent to the making of a grant of letters of administration and fabricated the agreement attached to the petition for a grant of letters of administration. He submitted that the discernible wishes of the deceased over the distribution of his estate were that L.R. No. Tetu/Muthuaini/546 would be inherited by the 1st Applicant absolutely, whereas L.R. No. Nyeri/Municipality/Block VI/151 would be shared out equally between the 2nd and 4th Applicants. The Applicants' further contention was that the Respondent and their brother, Ephraim Gitonga Kingori had already been given their share of inheritance during their father's lifetime and were therefore not supposed to inherit any other portion.

29. He further submitted that the Applicants availed copies of the forged consent and agreement, a copy of the impugned grant of representation, a copy of the deceased's Will, a copy of the Certificate of Confirmation of Grant, an Affidavit sworn by Macharia Githua, letter dated 11.01.1999 to the OCS Nanyuki Police Station and a List of OB Numbers. This was supported by the evidence of Mary Wairimu Joseph and Duncan Ndirangu Kingori. They concluded that the Respondent disputed the existence of any Will authored by the deceased and averred that the wishes of the deceased were that his parcels of land be sub-divided equally between his two wives. He further alleged that the mode of distribution

proposed by the Applicants is improper and selfish and claimed that the application is an afterthought.

30. They submitted that Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules, under which the present application is brought, do not set a limit for the making of an application for revocation of grant hence there was no time bar. They relied on the decision of Musyoka J in *In re Estate of Josephine Magdalena Motion* (Deceased) [2016] KEHC 2371 (KLR), where the good Judge posited that Section 76 of the Law of Succession Act does not provide time limits for filing applications envisaged thereunder. He stated as doth:

**11. As indicated above, section 76 of the Law of Succession Act does not provide time limits for filing the applications envisaged by that provision. The office of personal representative is for life. The personal representative can therefore be called to account at any time during his lifetime. The account is not just about rendering a statement about how he has or had gone about managing or administering the estate, it can also about how he or she obtained the grant of representation in the first place, or how he got it confirmed.**

31. They submitted that the fact of transmission having been conducted is also inconsequential, for Section 76 of the Law of Succession Act provides that a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides. This means that, despite the

transmission having been conducted, this court has the power to revoke the Respondent's grant of representation. They have also tendered good and sufficient reasons for their delay in bringing forth their application for revocation of the grant issued to the Respondent, that is, that the Respondent had used his connections to the police department to intimidate his siblings into silence. Further, the applicants were also not given a chance to air their grievances.

32. They further submitted, in a rather cryptic manner, that their case was that they did not voluntarily sign the consent to the making of a grant of letters of administration to the Respondent. They only signed the said consent form under threats of arbitrary detention and torture by police officers at the Respondent's behest. Reliance was placed in the decision of **In re Estate of the late Johana Kariuki Githinji** (Deceased) (Succession Cause 647 of 2015) [2023] KEHC 22695 (KLR), where T. Odera J posited as follows:

On whether the proceedings to obtain the grant were defective in substance, the applicant told this court that the administrators lured him to sign documents by telling him they were for appointment of administrators. 2nd administrator denied this saying the allegation is untrue and that the applicant signed the consent forms voluntarily and was also present in court during confirmation. The 1st administrator responded that they did not intend that the entire land be transmitted to their mother absolutely. The court record of 20.5.16 is clear that all parties were present but the 2<sup>nd</sup> administrator did not testify to

answer to the allegations of applicant that he was duped to believe that the documents he as signing were for obtaining letters of administration. The respondent also did not testify. The evidence of the applicant on this point is not controverted. The applicant was acting in person from the time the matter was filed till it's conclusion. I find that there is evidence that the proceedings to obtain the grant were defective in substance.

33. They submitted that the consent forms to the making of the grant of letters of administration were not voluntarily signed by the Applicants. In the absence of the voluntary consent of all persons entitled to petition for a grant of letters of administration with priority or in equality to the Respondent, the proceedings to obtain the Respondent's grant were defective in substance and the resultant grant, in our respectful view, ought to be revoked.

34. They submitted that the grant was additionally obtained fraudulently by the concealment from the court of something material to the case. This is because the respondent failed to disclose to the court that the deceased had expressed his wishes with regard to the distribution of his estate and that the respondent, the 3rd applicant, and their late brother, Ephraim Gitonga King'ori, had been granted their share of inheritance during the deceased's lifetime.

35. It was submitted that the decision of the court was based on a concocted agreement bearing signatures that do not belong

to any of the Applicants herein. This in itself grossly reeks of fraudulent activity. The purported agreement was also suspiciously and strangely prepared during the deceased's lifetime without his involvement; it was at variance with the ascertainable wishes of the deceased, for it blurred the lines of separating his two houses. The said agreement was therefore unduly taken into consideration.

36. It was further contended that the Respondent indicated that every person having an equal or prior right to a grant of representation had consented to his petition, or had renounced such right, or had been issued with a citation to renounce such right and apply for a grant of representation, and had not done so. This was blatantly untrue, for the consent of the deceased's daughters, who have an equal right to a grant of representation as the Respondent, was not obtained, nor did they renounce their right to petition for a grant of letters of administration. They maintained that the deceased's directive that each of his sons would take care of each of his daughters after his demise did not warrant an exclusion of the daughters of the deceased from these succession proceedings. Reliance was placed on the case of ***In re Estate of Kenneth Ng'ang'a (Deceased)*** (Succession Cause E027 of 2022) [2024] KEHC 16650 (KLR).

37. It was concluded that the Respondent's failure to disclose the existence of an imperfect gift *inter vivos* made by the deceased in his lifetime in favour of his two houses, coupled

with his use of torture, illegal detainment and threats to procure the consent of the persons beneficially entitled to apply to a grant in equality to himself, and failure to obtain and avail the consent of all dependants of the deceased constitute grave transgressions sufficient to warrant a revocation of the grant issued to the Respondent.

38. It was noted that the mode of distribution proposed by the Respondent and adopted by this honourable court was against the wishes of the deceased, and as submitted earlier within these humble submissions, the deceased's action of separating his two households by settling them in two separate parcels of land and permitting them to each build, use and settle on their respective portions amounted to an imperfect gift *inter vivos*, which ought to have been taken into account. They relied on the case of ***In re Estate of Nkurumwa Ole Ntemel*** (Deceased) [2024] KEHC 13805 (KLR)

*In re Estate of the Late Gedion Manthi Nzioka* (Deceased) [2015] eKLR Nyamweya J (as she then was) explained gifts *inter vivos* as follows:

“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. In Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.’

23. Further indents. Halsbury’s Laws of England, 4th edition, volume 20(1) para 70 states that: - The subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift. Thus, if a donor puts the donee into possession of a piece of land and tells him that he has given it to him so that he may build a house on it, and the donee accordingly, and with the donor’s assent, expends

money in building a house, the donee can call on the donor or his representatives to complete the gift.

39. It was stated that the deceased's estate ought to be redistributed, for the mode of distribution proposed by the Respondent and adopted by the court was unequal, for it did not take into consideration that the Respondent, the 3rd Applicant, and their late brother, Ephraim Gitonga Kingori, had inherited their share from the deceased during his lifetime. The Respondent, together with the 3rd Applicant, had been adopted by their uncle, the late Macharia Githua Njukira, from whom they inherited a parcel of land L.R. No. Laikipia/Nanyuki West Timau Block 2/46 (Matanya Marura), where they are settled to date.

40. It was contended that under Rule 73 of the Probate and Administration Rules, the court has the power to cancel titles to land and order their reversion to the estate of the deceased for redistribution on such terms as it deems just. They relied on the inherent powers of the court as addressed in the case of **Munyasya Mulili & 3 others v Sammy Muteti Mulili [2017] KEHC 6180 (KLR)** where P. Nyamweya J, as then she was, held as follows:

**As to whether there are grounds for the Court to exercise these powers in relation to revocation of the 2<sup>nd</sup> Petitioners title to the disputed properties and any other third parties titles arising therefrom, the law that applies as to the disposition of a deceased's person property is section 55 of the Law of Succession Act which provides as follows with regard to**

**disposition of capital assets of a deceased persons estate:**

**“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.**

**(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”**

**This position is reinforced by section 82(b)(ii) of the Act, which provides that no immovable property shall be sold before confirmation of the grant. Any such distribution of the deceased’s properties before confirmation of the grant, whether by way of registration of title or sale, is thus liable to revocation pursuant to the powers granted to this Court by section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.**

41. They prayed that the court revokes all titles over L.R. No. Tetu/Muthuaini/546 and L.R. No. Nyeri/Municipality/Block VI/151 and redistributes the said parcels of land in accordance with the Applicant’s proposal at paragraph 20 of their affidavit in support of Summons for Revocation of Grant.

42. The respondent acting in person filed brief submissions stating that the deceased died and left only two parcels, that is, L.R. No. Tetu/Muthuaini/546 measuring 0.224 hectares and L.R. No. Nyeri/Municipality/Block VI/151 measuring 0.53 hectares. The first and fourth applicants never appeared, while the 3<sup>rd</sup> applicant was calling for mediation. He submitted that the applicant used to beat the deceased. He stated that the medication was set aside on 30.5.2022 despite being signed by all parties. Further, the purported will was withdrawn by the first applicant way back on 26.07.2004. He stated that the family appointed him way back on 10.10.2002. The deceased left behind the following children:

- (i) Efrem Gitonga Kingori
- (ii) Charles Ndirangu Kingori
- (iii) Peter Mwangi King'ori
- (iv) Patrick Githua King'ori
- (v) Dancun Ndirangu King'ori
- (vi) Isaack Macharia King'ori

43. The ladies in both houses agreed that the land be registered in the names of the sons, as per annexure PGK1. The girls in both houses renounced their rights in court on 9.10.2024 and 28.1.2025. All parties appeared before H.M. Okwengu J, as she then was, for confirmation, and no issues were raised. He submitted that the applicant purported that the children of his brothers were dead but turned up in court alive. He prayed for the application to be dismissed with costs.

## Analysis

44. The issue for my determination is whether the application has met the legal threshold for revocation of grant. The matter is fairly straight forward and turns on pleadings.
45. The applicants posited that they did not sign forms 38 and others. However, they proceeded on a different premise, that they were coerced. This is therefore departure from pleadings. That is unfathomable. Parties are bound to plead their cases fully. In the case of **Migore v South Nyanza Sugar Co Ltd [2018] KEHC 5465 (KLR)**, A C Mrima, J, stated as follows:

11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

*.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the*

*averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....*

*...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.*

In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal** stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled The Present Importance of Pleadings published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

*As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to*

*adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....*

*In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.*

46. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017)** **eKLR** found and held as follows in an election petition:

58. In the case of Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anr, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR the Supreme Court of India held that [paragraph 8]:

....

52. Further, the court went on and observed that:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.

47. The court does not therefore find any reason to deal with purported coercion. This is compounded by the fact that the first applicant made an application on the basis of the same will in July 2004. He then withdrew the same and proceeded to confirmation. Having withdrawn the claim over the purported will, he cannot un-withdraw it. These were issues raised in the

cross-petition dated 12.08.2003. They cannot be re-litigated two decades later.

48. Thirdly, the lamentations about shares are basically lamentations. There is no basis for setting aside a certificate of confirmation of grant. Parties attended and agreed on the basis for distribution. Parties who were present did not protest the confirmation of grant. Having not protested, they are nonsuited. Indeed if they were aggrieved they ought to have appealed. Of paramount importance is that they did not protest the discharge of the administrator way back in 2006.

49. The administrator stands discharged and has no more duties to carry out. Administration is not a lifelong career. It is circumscribed in section 83 of the Succession Act. The administrators continue only if there is a continuing trust. Without such a trust, the estate is concluded upon distribution and accounting of the estate. The applicants relied on the decision of Musyoka J in *In re Estate of Josephine Magdalena Motion* (Deceased) [supra]. However, this court holds a different position in light of section 83(i) of the Law of Succession Act which provides as follows:

**Personal representatives shall have the following duties:**

**(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party, the estate, to produce to the court a full and**

**accurate account of the completed administration.**

50. Further, part of the decision in the decision of *In re Estate of Josephine Magdalena* Motion (Deceased) [supra] also *per incurum* the decision of the court of appeal in the case of **Kibunya v Kariuki & another** [2024] KECA 1274 (KLR), where the court of appeal [SG Kairu, FA Ochieng & WK Korir, JJA] posited as follows:

**The position adopted by the learned Judge cannot be faulted. The grant had not only become useless and inoperative as a result of the demise of the 2nd deceased but the purpose for which it had been issued had been achieved by the completion of the succession process. The appointment of new administrators could have only been necessary if the administration of the estate of the 1st deceased had not been concluded at the time of the death of the 2nd deceased.**

51. In essence the administration was completed and there is nothing to revoke. Reading the proceedings, I got an uncanny impression that the main *raison d'être* for filing the application is to disinherit his blood brother's children. It was filed upon the demise of the late Abrahm Gitonga Kingori. The first applicant even alleged that the son of the said brother, was deceased, a fact he knew to be false.

52. Lastly the question of sisters was a red herring. The subdivision was among the houses. The sisters attended court

and did not object to the distribution. They have not withdrawn the renunciation. If they have any claim, it lies elsewhere. They should take time and read the decision of the supreme court in *Kiebia v M'lintari & another (Petition 10 of 2015)[2018] KESC 22 (KLR)*.

53. The net effect is that the application is unmerited and is accordingly dismissed. This leaves the question of costs.

54. This leaves the issue of costs, which are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

**It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.**

55. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR)**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will

bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

56. The respondent was in person. He incurred costs in terms of disbursements attending court multiple times and calling 6 witnesses. A sum of Ksh 30,000/= will suffice.

57. Before departing, it is noted that it came out of the proceedings that the applicants were attempting to evict children of deceased beneficiaries from the suit land. He has no authority to do so. This is fraud and contrary to a confirmed

grant. This being a succession matter, the court noted that the first applicant attempted to remove some of the beneficiaries.

58. The deceased beneficiaries' children and spouse fall into the same position as their parents. The first applicant or any of the applicants has no authority to remove the children of the deceased beneficiaries in particular those of the late Abrahm Gitonga Kingori. Section 41 of the Law of Succession 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.**

59. Therefore, there is hereby issued a perpetual injunction barring any of the applicants from evicting any of the beneficiaries or children/spouses of deceased beneficiaries from their portions of land given pursuant to the grant confirmed on 18.11.2004. If any of the children have been evicted contrary to the grant, a mandatory order is hereby issued reinstating them to their father's share.

60. The deceased beneficiaries' estates are at liberty to pursue succession in respect of their parents shares.

Determination

61. The upshot of the foregoing is that I make the following orders:-

- a) The Summons for revocation of grant dated 10.09.2021 lacks merit and is accordingly dismissed.
- b) The applicants shall bear the respondents costs/disbursements of Ksh. 30,000/=.
- c) 30 days stay of execution in respect of costs only.
- d) The administrator is discharged.
- e) Therefore, there is hereby issued a perpetual injunction barring any of the applicants from evicting any of the beneficiaries or children/spouses of deceased beneficiaries from their portions of land given pursuant to the grant confirmed on 18.11.2004. If any of the children have been evicted contrary to the grant, a mandatory order is hereby issued reinstating them to their father's share.
- f) The deceased beneficiaries' estates are at liberty to pursue succession in respect of their parents shares.
- g) The file is closed.

**DELIVERED, DATED and SIGNED** at **NYERI** on this **13<sup>th</sup>** day of **April, 2026**. Ruling delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of:-**

Mrs. Maina for Ms. Wangechi for the Appellant

Patrick King'ori - Respondent

Court Assistant - Martin/Michael