

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT SUCCESSION CAUSE NO. 344 OF 2013

IN THE MATTER OF THE ESTATE OF GITHUI MAINA alias

GITHUI S/O MAINA alias ONESMUS GITHUI MAINA

(DECEASED)

HARRISON KABA GITHUI.....
PROTESTOR

VERSUS

AESOP KAGEMA GITHUI
PETER MAINA KIMONDO.....
ADMINISTRATORS

JUDGEMENT

1. Before this Court for determination is the Affidavit of Protest dated **10th October 2023** filed by **HARRISON KABA GITHUI** (the Protestor) challenging the Summons for Confirmation of Grant filed by the Administrators of the estate. The matter was heard by way of Vive voce evidence in open court.

BACKGROUND

2. This succession cause relates to the estate of the late **GITHUI MAINA** (hereinafter '**the Deceased**') who died intestate on **15th November 1990**. A copy of the Death certificate Serial Number **369285** was filed in Court on **16th May 2013**. The Deceased was survived by a widow **NANCY WANJIRU** and several children and Grand-children. At the time of his demise the estate of the Deceased comprised of the following assets.

- (i) 2 acre plot in Nanyuki.
- (ii) 2 plots in Buru Buru Farmers Nairobi.
- (iii) 16 acres of land in Elementaita.
- (iv) Land Title Number Konyu/Baricho Block/781.
- (v) Land Title Number Konyu/Baricho Block/784
- (vi) Land Title Number Konyu/Baricho Block/785
- (vii) Land Title Number Konyu/Baricho Block/794
- (viii) Land Title Number Konyu/Baricho Block/802
- (ix) Land Title Number Gakawa/Kahurura Block/Ichuga.

3. There has been extensive litigation in this matter and on **16th May 2014** Grant of letters of Administration Intestate was made to **DICKSON KIMONDO GITHUI** and **AESOP KAGEMA GITHUI** and **HARRISON KABA GITHUI**. One of the named

Administrators **Dickson Kimondo Githui** later passed away and was replaced by his son **PETER MAINA KIMONDO** (the 2nd Applicant).

4. The Objector **HARRISON KABA GITHUI** who is the first born son of Deceased then filed an Affidavit of Protest dated **14th January 2019** opposing the mode of distribution of the estate as proposed by the Administrators. The objector has in paragraph 11 of his Affidavit of Protest gave an alternative proposal on how the estate ought to be distributed. The matter was referred to mediation but no settlement was reached.
5. The protest was heard by way of Vive Voce evidence. The Administrators/Respondents relied on the Supporting Affidavit dated **21st November 2014** sworn by **AESOP KAGEMA GITHUI DW1**.
6. The Protestor in his Affidavit stated that he is the first born son of the Deceased and is a Co-administrator of the estate. The Protestor stated that the parcel of land known as **LR No. KONYU/BARICHO/802** was ancestral land and that it was the wish of the Deceased that all the beneficiaries should benefit from the same. That before the Deceased passed away he

directed that a common area measuring **0.5 Acres** should not be sold but was to be held by trustees.

7. The Protestor vehemently opposed the proposal that his sisters be allocated land in **Gakawa/Kahurura Block 1/Ichuga/40** as it was predominantly a semi-arid area. He instead proposes that the sisters be allocated a share in **Plot 802** which was the ancestral home as per the wishes of the Deceased.
8. According to the Protestor the parcel of land known as '**Kiamariga 650**' belongs entirely to himself. That the same did not ever belong to the Deceased and **does not** form part of the estate.
9. Finally the Protestor state that in the year 1992 the family met in the presence of the local chief and all agreed that the parcel of land known as **Gakawa/Kahurura/Block 1/Ichuga/40** be subdivided equally amongst all the siblings.
10. The Protestor proposes that the net estate of the Deceased be
distributed in the following manner:-
 - (a) The property known as Title No. **KONYU/BARICHO/802**

measuring approximately 2.0 Ha is to be shared as follows:-

Name of Beneficiary	Acreage
(i) Harrison Kaba Githui	1.275 Acres
(ii) Dickson Kimondo Githui	1.275 Acres
(iii) Aesop Kagema Githui	1.275 Acres
(iv) Trustees (elaborate below)	0.500 Acres
(v) Dorothy Ngima Maina	0.250 Acres
(vi) Purity Wangui Wachira	0.125 Acres
(vii) Mercy Nyaguthii Njoroge	0.125 Acres
(viii) Damaris Wangechi Njoroge	0.125 Acres
Total	4.95 Acres

(b) The property known as Gakawa/Kahurura Block 1/Ichuga/40 to be allocated and shared as follows:-

(ix) Harrison Kaba Githui	-	3.327
Acres		
(x) Dickson Kimondo Githui	-	3.327 Acres
(xi) Aesop Kagema Githui	-	3.327
Acres		

(c) The parcel of land known as LR No. **KONYU/BARICHO 794** to be transferred to PCEA Mathaithi Church as per the wishes of the Deceased.

(d) The parcel of land known as LR NO. **KONYU/BARICHO/785** to be transferred to **JOSEPH WERU BAARU**.

11. **DW 1 Aesop Kagema Githui** testified on behalf of the Respondents and confirmed that he was one of the three (3) administrators of the estate. The witness stated that all the beneficiaries save for the Protessor had agreed on the mode of distribution of the estate and that all (again save for the Protessor) had signed a consent to that effect.
12. According to **DW1** the parcel of land known as LR **RUGURU/KIAMARIGA/650** which is registered in the name of the Protessor ought to have been registered in the name of the Deceased as it was the Deceased who caused the said parcel of land to be registered in the protestors name.
13. **DW1** stated that with the agreement of all the beneficiaries including **NANCY WANJIRU NDEGWA** who is the wife of

Deceased and step-mother to the witness the estate is to be distributed as follows;-

“LR. PARCEL NO. KONYU/BARICHO/802 to be as follows;-

DOROTHY NGIMA GITHUI	-	0.25 ACRES		
PETER MAINA KIMONDO	}			
ROSE WAHU KIMONDO				
WINNIE NJERI MUREITHI				
ONESMUS GITHUI KIMONDO			-	1.875 ACRES
JOINTLY				
HARRISON KABA KIMONDO	}			
LYDIA MBERE KIMONDO				
ESTHER NYANGENDO KIMONDO				
AESOP KAGEMA GITHUI			-	2.375 ACRES
NANCY WANJIRU NDEGWA	}			
ESTHER NYANGENDO GICHUKI				
DAMARIS WANGECHI KARIUKI				
MERCY NYAGUTHII NJOROGE			-	0.5 ACRES
PURITY WNAGUI WACHIRA				
ALICE NDUTA KIGARA				

MARY WAIRIMU MURIUKI

LR. PARCEL NO. GAKAWA/KAHURURA BLOCK 1/ICHUGA/40

to be shared as follows:-

HARRISON KABA GITHUI	-	1.08 ACRES
PETER MAINA KIMONDO		
ROSE WAHU KIMONDO		
WINNIE NJERI MUREITHI		
ONESMUS GITHUI KIMONDO	-	3.20 ACRES JOINTLY
HARRISON KABA KIMONDO		
LYDIA MBERE KIMONDO		
ESTHER NYENGENDO KIMONDO		
AESOP KAGEMA GITHUI	-	2.70 ACRES
PURITY WANGUI WACHIRA	-	1 ACRE
MERCY NYAGUTHII NJOROGE	-	1 ACRE
DAMARIS WANGUI KARIUKI	-	1 ACRE
LR. KONYU/BARICHO/794	-	P.C.E.A MATHAITHI

CHURCH

LR. KONYU/BARICHO/785 - JOSEPH WERU BAARU”

14. At the close of oral evidence the parties were invited to file their written submissions. The Protestor filed the written

submissions dated **26th November 2024** whilst the Respondents relied upon their submissions dated **1st November 2025**.

ANALYSIS AND DETERMINATION

15. I have carefully considered this Affidavit of Protest, the evidence adduced by both parties as well as the written submissions on record. It is not in dispute that the Deceased passed away on **15th November 1990**. Grant of letters of Administration Intestate was on **16th October 2018** issued to **Dickson Kimondo Githui** and **Harrison Kaba Githui**. Following the demise of one of the Administrators **Dickson Kimondo Githui**, his son **Peter Maina Kimondo** replaced him as an Administrator.
16. There appears to be no dispute regarding the identity of the beneficiaries of the estate. The current dispute revolves around the mode of distribution of the estate. At this point it is pertinent to note that all parties including the protestor are in agreement that the parcel of land known as **LR Konyu/Baricho/794** be allocated to **PCEA Mathaithi**

Church in line with the express wishes of the Deceased as communicated to the family during his lifetime.

17. The deceased herein died intestate and left behind a widow **Nancy Wanjiru** and twelve beneficiaries. The deceased left behind various assets to wit:

- a) ½ Acre in Nanyuki 2.
- b) 2 Plots in Buru Buru Farmers – Nairobi.
- c) 16 acres of land in Elementaita Nakuru.
- d) Land Title Number Konyu/Baricho Block/781.
- e) Land Title Number Konyu/Baricho Block/784.
- f) Land Title Number Konyu/Baricho Block/785.
- g) Land Title Number Konyu/Baricho Block/794.
- h) Land Title Number Konyu/Baricho Block/802.
- i) Land Title Number Gakara/Kahurura Block

1/Ichuga/40

18. Of all the assets listed above, only four remain to being Land Title Number **Konyu/Baricho Block/785**, Land Title Number **Konyu/ Baricho Block/794**, Land Title Number **Konyu/Baricho Block/802** and Land Title Number **Gakara/Kahurura Block 1/Ichuga/40**. The parties herein

have no contention over Land Title Number **Konyu/Baricho Block/785**, Land Title Number **Konyu/Baricho Block/794** as all parties agree that they belong to individuals known as **Joseph Weru Baaru** and **PCEA** church **Mathaithi**.

19. The main bone of contention in this matter is the mode of distribution of **LR No. Konyu/Baricho/802** and **LR Number Gakara/Kahurura Block 1/Ichuga 40**.
20. A reading of this file reveals that there has been sale of part of the Deceaseds estate notwithstanding the fact that the Grant is yet to be confirmed. Under cross-examination **DW1** admitted that he and his brother sold LR No. **Konyu/Baricho/785** to one **Joseph Weru Baaru** to enable **DW1** raise funds for his medical treatment due to a spine problem. **DW1** admits that this sale took place when the Grant had not yet been confirmed and attempts to excuse his actions by saying that all the beneficiaries had agreed to said sale. However their agreement notwithstanding any sale of estate property prior to confirmation is illegal. If there was need to sell any part of the estate prior to confirmation of the Grant then the proper procedure would

have been to approach the court seeking authority to dispose of estate property before confirmation of the Grant. This was not done in this case. The act of selling estate property before confirmation of the Grant clearly amounts to intermeddling with the estate contrary to **section 45** of the **Law of Succession Act** which provides as follows;-

“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.....”

21. 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.”

22. Regardless of family consensus in disposing of the majority of the deceased’s estate such that there remains only two properties amounts to intermeddling by the beneficiaries in the estate of the deceased. In **Benson Mutuma Muriungi vs C.E.O Kenya Police Sacco & another [2016] eKLR** where F. Gikonyo J observed that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to

any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession

Act. That is why the law has taken a very firm stance in intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order (s) of protection of the estate against any person.”

23. An administrator is a trustee whose duty is to preserve the estate pending final distribution to the genuine beneficiaries. An administrator cannot treat the estate property as his personal property to do with as he wishes. He has a fiduciary duty to manage, protect and finally distribute the estate upon confirmation of the grant.

24. In the **RE ESTATE OF JULIUS MIMANO (Deceased)** [2019] eKLR the court held as follows:-

“Although the personal representative has the legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will in cases of testate succession and those identified at

confirmation of grant in cases of intestacy. They would also be holding if for the benefit of creditors and any other persons who might have a valid claim against the estate. That would mean that they are trustees of the estate and indeed the Trustee Act Cap 167, Laws of Kenya defines trustees to include executors and administrators. In the circumstances therefore the personal representative would stand in a fiduciary position so far as the property is concerned and owes a duty to the beneficiaries to render an account to them of their handling of the property that they hold in trust for them. The duty to render accounts to beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on behalf of the beneficiaries.”

25. What then is the effect of the purported sale by the Respondent to third parties of estate property? **Section 82**

of the **Law of Succession Act** sets out the powers and duties personal representatives. The proviso to **Section 82(b)** provides that:-

“No immovable property shall be sold before confirmation of the grant.” [Own emphasis]

26. I therefore find that the Respondent had no legal authority to sell any Part of the estate of the Deceased. The purported sale to the said **LR No. Konyu/Baricho/785** was illegal under the terms of **Section 45** of the Act. The so called purchaser **is not** a beneficiary to the estate and has no locus standi in this matter.

27. In **RE ESTATE OF JOHN GAKUNGA NJOROGE [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]

28. I find that in coming to the court to seek confirmation of the Grant the administrators are approaching the court with unclean hands. Their application is merely an attempt to sanitize their actions of intermeddling with the estate. Why seek confirmation of a Grant which by their own admission they have already violated by selling off estate assets. In my view such administrators are not qualified to continue administering estate.
29. The protestor in my view does not fare any better. He too was an administrator of the estate yet he raised no alarm when estate property was being sold off. Both the Respondents and the Protestor have included in their proposed modes of distribution this so called purchaser as

one of the persons to benefit from the estate. A purchaser is an animal not recognized under the law of succession Act and cannot be allocated a share of the estate like a beneficiary.

30. Based on the above I find that neither the Respondents nor the protestor are qualified to continue with the administration of the estate. The fact that they are co-administrators yet cannot agree on the distribution of the estate is equally disturbing. It would appear that the only person who did not participate in illegal disposing of estate property was the 3rd Administrator Peter Maina Kimondo.
31. From the evidence before court it transpires that the widow of the Deceased one **Nancy Wanjiru** is still alive. **Section 35** of the **Law of Succession Act** provides as follows:-

35. Where intestate has left one surviving spouse and child or children (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to -

(a) the personal and household effects of the deceased absolutely; and (b) a life interest in the whole residue of the net intestate estate:
Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

32. Taking into account the fact that this is an old matter, and having noted the fact that the Co-administrators are not able to act in concert with respect to distribution of the estate, I am of the opinion that the Grant issued on **16th May 2014** ought to be revoked. In the premises the **Protest dated**

10th October 2023 is found to be without merit and is dismissed. This court now makes the following orders;-

(i) The Grant of letters of Administration Intestate issued to Harrison Kaba Githui Aesop Kagema Githui and Peter Maina Kimondo on 16th May 2014 be and is hereby revoked.

(ii) The Protest dated 10th October 2023 is hereby dismissed in its entirety.

(iii) The family to agree on and present to court the names of a fresh set of Administrators including at least one (1) from each House to be appointed within seven (7) days.

(iv) This being a family matter each side will

bear

its own costs.

Dated in Nyeri this 17th day of April 2026.

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MAUREEN A. ODERO
JUDGE

ORIGINAL