



REPUBLIC OF KENYA



In re Estate of Mathenge Kimondo alias Mathenge s/o Kimondo (Deceased) (Succession Appeal E024 of 2024) [2026] KEHC 5983 (KLR) (27 April 2026) (Judgment)

Neutral citation: [2026] KEHC 5983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL E024 OF 2024**

DKN MAGARE, J

APRIL 27, 2026

**IN THE MATTER OF THE ESTATE OF MATHENGE
KIMONDO ALIAS MATHENGE S/O KIMONDO (DECEASED)**

BETWEEN

JUSTUS NDIRITU WAHOME 1ST APPELLANT

GRACE WANGECHI MURIITHI 2ND APPELLANT

AND

BLASIOUS NDUNGU MATHENGE RESPONDENT

(Being an appeal from the judgment and decree delivered on 30.09.2024 by the Hon. Faith Munyi, Senior Principal Magistrate in Nyeri CM Succession Cause No. 320 of 2018)

JUDGMENT

1. This is an Appeal from the judgment and decree delivered on 30.09.2024 by the Hon. C.N Ndegwa, Faith Munyi, senior Principal Magistrate in Nyeri CM succession cause no. 320 of 2018.
2. The appellant filed a Memorandum of Appeal dated 22.10.2024 and set out the following Grounds of Appeal:
 - a. The learned magistrate erred in law and fact by not addressing the issue of the input of revocation of the grant, but addressed the issue whether or not the distribution was made.
 - b. The learned magistrate erred in law and fact by finding that there was no concealment of material facts and fraudulent issuance of the grant in spite of the evidence tendered.
 - c. The learned magistrate erred in law and fact by failing to appreciate that what was before the court was revocation, but concentrated on how the estate is to be distributed.



Background

3. The late Mathenge Kimondo died at a ripe old age of 93 years on 13.04.1982. This implied he was born in 1889. He left behind a small parcel of land measuring 3.7 acres known as Tetu/Ichagachiru/499, declared to be valued Ksh. 600,000/=. This is a parcel of land in the Huho-ini location in Giakanja, Tetu. The chief indicated that the first wife died in 1933, and her death was not registered. The house was represented by James Ngari Wahome on behalf of the other grandchildren. The second house had Wangechi Mathenge, who was also deceased. She had a son, Blasius Ndungu Mathenge.
4. The third wife, Grace Muthoni, was also deceased. She left behind a daughter, Monicah Wanjiru. A citation was filed against James Ngari Wahome. He declined to take letters since others were given priority over him.
5. In filing for letters of administration, the following were disclosed as survivors:
 - a. Blasius Ndungu Mathenge -son
 - b. James Ngari Wahome -grandson
 - c. Monicah Wanjiru -daughter
6. The grant was published in the Kenya Gazette on 11.10.2019. Grant of letters of administration was granted on 19.12.2019.
7. The grant was confirmed on 09.09.2021, the same was to be shared equally among the three beneficiaries. The confirmation was in the presence of Blasius Ndungu Mathenge and Monicah Wanjiru.
8. By an application dated 17.06.2022, the respondent sought that the executive officer executes forms LR 9 and 19 on behalf of Justus Ndiritu Wahome, who had declined to sign. The said summons general was dismissed for non-attendance, and an application was filed to have it reinstated.
9. By the summons for revocation of the grant dated 30.06.2023, filed by Grace Wangechi Muriithi, and Justus Ndiritu Wahome, it was alleged that their father and mother, were deceased. They were grandchildren of the deceased. They came to learn of the cause when Justus Ndiritu Wahome was served with the application dated 17.06.2022. They averred that the grant was based on untrue allegations. They stated that they were 11 siblings as follows:
 - a. Justus Ndiritu Wahome,
 - b. Grace Wangechi Muriithi,
 - c. Stephen Ndungu Wahome
 - d. Charles Mwangi Wahome
 - e. Naomi Wamucii Wahome
 - f. Elizabeth Nyawira Wahome
 - g. Charity Wambui Mwangi.
 - h. Joseph Gachau Wahome
 - i. James Ngari Wahome (deceased)
 - j. Caroline Waithira Wahome



10. It should be recalled that James Ngari Wahome was the person who was served with the citation and declined. They, however, averred that if James Ngari Wahome was aware, the rest were not. He stated that the land was to be inherited solely by them, not by the rest. It is not indicated which other parcels others were to inherit.
11. Blasius Ndungu Mathenge filed a response that only the second and third houses have surviving children. He stated that the grandchildren were the children of the firstborn of the first house. The rest of the children of the deceased's first wife were deceased. There were representatives of the surviving wives. The deceased only left one parcel of land, that is, Tetu/Ichagachiru/499. He said when he cited James Ngari Wahome, he refused to take letters. He further stated that on the demise of James Ngari Wahome, he replaced him with Justus Ngari Wahome.
12. He stated that the said Justus Ndiritu Wahome was personally served. It was his case, Justus Ndiritu Wahome, was served. The matter proceeded by way of viva voce evidence. Parties filed copious submissions. The court then made the impugned judgment.
13. Grace Wangechi Muriithi, testified as PW1. She stated that she lived in Nyandarua. She stated that she is the daughter of Silas Wahome Mathenge (deceased). The father was from the first house. The deceased had three wives. On cross-examination, she stated that the deceased had 3 wives who had children as follows:
 - a. The first wife- 4 children.
 - b. The second wife -1 child
 - c. The Third wife- 5 children
14. She stated that the deceased had other parcels of land. No evidence was produced. He stated that Blasius Ndungu Mathenge was from the second house. Cyrus Mathenge lives with his children on the said parcel of land. She was not aware that the subdivision is equal among the three houses. On further cross-examination by Mr. Kimondo, they stated that only they have been cultivating the suit land.
15. The land was given to her father since he was the eldest. She said that James Wahome Ngari was very sick and had died. She was not informed of the letter's issuance by the chief.
16. PW2 was Justus Ndiritu Wahome. He stated that they were 14 in their family, but 11 are alive. He adopted his witness statement.
17. On cross-examination by Ms. Kariuki, he stated that he works in Nakuru. He denied being served. He stated that there are other parcels in the Kieni area, but the advocates are aware of the numbers. He said John Maina was home watching and utilizing the whole land in the Ichagachiru area. He said he did not see the deceased. He was buried in Kieni area. He said the respondent does not live on the land. The other two houses have nothing on the said land.
18. Stephen Ndungu Wahome was PW3. He testified that he is a civil servant. He said that the appellants were his siblings and he is the eldest. He adopted his statement.
19. On cross-examination, he stated that the deceased had three wives. He stated that John Maina utilizes the entire land and has built a house therein. His father's house is there, while the rest of his siblings went to Kieni, where the other brothers are. They said that the grandfather gave the uncles money to buy land and registered it in their names. On cross-examination, he stated that he was not notified. He said the subject land was bought by the deceased.



20. DW1, Blasius Ndungu Mathenge testified that he was a teacher and a supervisor. He adopted his statement. He stated that he is from Ichagachiru. The land in question is Ichagachiru.
21. On cross-examination, he stated that he had cited James Ngari Wahome, who is a son of the stepbrother. He said that once he cited one, all the children were included. The deceased had three wives. Ngari died in 2019, and they sought to replace him with Justus Nderitu.
22. He stated that the sisters lived in various places and he could not have moved looking for them. He stated that Stephen Maina lived in the land. Justus Nderitu replaced James.
23. He said that James Ngari was the oldest son alive in the whole house. His father was buried in Bellevue.
24. DW2 was Mary Wangari, who lived in Ngobit and adopted his statement. She stated that they lived in Ichagachiru from 1956 to 1885 when she was married. She said that she left Ichagachiru in 1964. Their mother and father were not buried on the said land. He stated that the father had stated that the said parcel was to be divided into three portions.
25. The court found the application to be unmerited. It was dismissed.

Impugned Judgment

26. The court found that the land in Kieni- Gatarakwa/Nairutia belonged to the deceased. The court found that the land, which was the only land left for intestate succession, was land parcel number Tetu/Ichagachiru/499.
27. The court found that the administrators had subdivided the said land equally among the three houses. She referred to section 40(1) of the Succession Act. She found that the first wife, Wanjiru, had 4 children. The second wife, Wangechi, had 4 children. The third wife, Grace Muthoni, had three children. She found the distribution to be fair.

Submissions

28. The appellant filed submissions dated 25.08.2025. The appellant submitted that revocation is an opportunity to tender evidence, after revocation. They stated that there was evidence of other parcels and that the sharing of the estate was evidence of fraud. He stated that the issue of all other parcels can be addressed only after revocation. They lamented that the court addressed how the estate was subdivided and that the grant was obtained through concealment. They submitted that there was no dispute on the 11 siblings. He stated that it was wrong not to involve other siblings. He said that the second appellant came to know of the cause when the application dated 22.06.2019 was served. The appellant urged the court to allow the appeal.
29. The respondent filed submissions dated 29.08.2025. He relied on section 76 of the Succession Act. He submitted that all three houses were considered. The respondent went so far as citing James Ngari Wahome. They stated that the appellants failed to prove fraud as required under section 107 of the *Evidence Act*. This was further buttressed through the citation filed.
30. There were further submissions that upon issue of the certificate of confirmation, the court became functus officio as regards distributing the estate. The appellants needed to seek review or appeal as the court was functus officio. reliance was placed on the case of *In re Estate of Kiberenge Mukwa (Deceased)* [2021] KEHC 1392 (KLR), where D. Kemei J stated as follows:

23. I reiterate that the power or discretion granted to the court by sections 76 of the *Law of Succession Act* is for revocation of grants. The ideal situation, where a person is unhappy with the process of



confirmation of grant, for it would appear that that is what the appellant herein is aggrieved about, is not to move the court under section 76 for revocation of grant, as the reasons that I have discussed in the foregoing paragraphs show. What such a person should do instead, is to file an appeal against the orders made by the court on distribution. The court confirming a grant largely becomes *functus officio* so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review.

31. On the question of affirming the mode of distribution, they stated that there was no prayer for altering the mode of distribution. The court heard all witnesses and found that the distribution was fair. They relied on the case of *In re Estate of Mary Taplelei Kilel alias Taplelei w/o Kilel (Deceased)* [2023] KEHC 3506 (KLR), where J.K. Sergon J, held as follows:

Even if the Applicant had filed a formal protest, which she has not, this court became *functus officio* so long as the beneficiaries and the mode of distribution is concerned, being that the summons for Confirmation of Grant was with regards to this court's judgement, which the court arrived at after hearing both parties and therefore this court cannot reopen the matter again.

Analysis

32. The issue for determination is whether the lower court erred in its finding of the summons for confirmation was unmerited and the distribution was fair.

33. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

34. The duty of the first appellate Court discussed by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows:

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

35. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction



to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

36. The duty of the court regarding the findings of the lower court was addressed in the case of Zipporah Wanjiru Mwangi v Zipporah Wanjiru Njoroge [2017] KECA 519 (KLR), the court of appeal [G.B.M. Kariuki, Sichale & Kantai, JJA] held as follows regarding the duty of the court.

As this is a first appeal, we are enjoined to re-evaluate the evidence and come up with our own conclusions and determination in line with the principle articulated by this Court in the case of *Selle v. Associated Motor Boat Co.* [1968] E.A 123 that an appeal to this Court from the High Court is by way of a retrial and this Court is not necessarily bound to follow the trial Judge’s findings of fact if-

“it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence in the case generally.”

The issues before the learned Judge were whether there were grounds for revocation of the grant and whether the suit land was held by the deceased (George Mwangi Njoroge) in trust. The suit land was registered under the Registered *Land Act*, now repealed. Under Section 28 of the said Act, a registered proprietor was not relieved from his obligation as a trustee. The learned Judge made a finding that he preferred the viva voce evidence adduced by the respondent and was not impressed by the affidavit evidence of the appellant which he did not believe.

As long ago as 1986 this Court correctly stated in *Jabane Versus Olenja* (1986) KLR 661, 664 that:

“----- this court has held that it will not lightly differ from the findings of fact of a trial Judge who had the benefit of seeing and hearing all the witnesses and will only interfere with them (findings) if they are based on no evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – See in particular *Ephantus Mwangi Vs. Duncan Mwangi Wambugu* (1982 -88)KAR 278 and *Mwanasokoni Vs. Kenya Bus Services* (1982 – 88) KAR 870”

37. The burden was on the Appellant as appellant to prove that there was concealment of the application and that the grant was obtained fraudulently. 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.”

1. 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.”

39. The appeal is an indication of failure to understand the logical and the organic structure of the succession act. Had this principle been firmly ingrained in their minds, this appeal would not have been filed. Succession, subdivided by the deceased during his lifetime, is a vertical step-by-step process of



disbursement of what the deceased accumulated in his life. Consequently, it is irrelevant what anyone other than the deceased did, except to the very limited extent set out in section 96 of the Law of Succession Act. The said section provides that a sane murderer shall not share in the victim's estate as follows:

- (1) Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though the murderer had died immediately before the murdered person.
- (2) For the purpose of this section, the conviction of a person in criminal proceedings of the crime of murder shall be sufficient evidence of the fact that the person so convicted committed the murder.

40. The question of who was in possession is not a relevant consideration on sharing. It is only considered when locating the parts where there are settlements. For succession, the hardest working and laziest of the children, the born and not born, the deceased and the living, scoundrels and saints are entitled to inherit. Inheritance, thus, is a matter that is value-neutral. Both the son remaining at home, caring for and working with the father, and the prodigal son, wasting away in the city and foreign lands, had equal rights. This, however, does not apply to grandchildren. They must get their shares from their parents or under their parents.
41. Therefore, the question of grandchildren having 11 siblings is irrelevant. James was cited on behalf of the first house. The administrator took steps to serve the available grandchildren. Grandchildren are not direct beneficiaries. The court should not be involved in assigning shares to the grandchildren. In the case of *In re Estate of Mwaniki Kibara (Deceased)* [2025] KEHC 15591 (KLR), E M Muriithi J, stated as follows:

The Court is aware of dicta that the grandchildren have no need to file for administration of the estate of their deceased parents before being able to seek to inherit the share of the deceased 's estate coming to their deceased parent. See (*Musyoka, J*) in *Kakamega Succession Cause No. 661 of 2015 In the Matter of the Estate of Imoli Luhitse Paul (Deceased)*, where the Court ruled as follows:

- “2. I held in *In re Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR (*Musyoka J*), that a grandchild of the deceased was not entitled directly to the estate of their late grandfather in intestacy, so long as their own parents, being children of the deceased, were alive and were taking their rightful share. The argument was that such a grandchild would take indirectly through her own parents. I went on to state that a grandchild would be entitled to inherit directly from the intestate of their grandparent where his or her own parent, the child of the deceased, was dead, and, therefore, not available to take their share directly. In such case, the grandchild would be entitled to take directly by virtue of section 41 of the Law of Succession Act, Cap 160, Laws of Kenya. In *In re Estate of Florence Mukami Kinyua (Deceased)* [2018] eKLR (*T. Matheka J*), the court pronounced a grandchild to be a direct heir to the intestate estate of their grandparent, where his or her own parents have predeceased the grandparent, or, should I add, the parent dies before the estate is distributed. The court asserted that such a grandchild steps into the shoes of the deceased parent so as to take the share that such parent would have taken from the estate of the grandparent's estate. See also *Cleopa Amutala Namayi vs. Judith Were* [2015] eKLR (*Mrima J*).³In the instant case, the



applicant, in the summons for revocation of grant, is a child of a dead son of the deceased herein. The applicant is claiming directly by dint of *In re Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR (Musyoka J) and *In re Estate of Florence Mukami Kinyua (Deceased)* [2018] eKLR (T. Matheka J), and does not require to take out letters of administration to intervene in the estate of her late grandfather, where her own parents are dead. Secondly, apart from case law, the provisions of the *Law of Succession Act* cover these situations. Section 39 of the *Law of Succession Act* makes grandchildren heirs in intestacy, where their own parents, who are biological children of the deceased, are dead. Section 41 of the *Law of Succession Act* is the provision that enables grandchildren to step into the shoes, of their own parents, and to step into those shoes they need not take out letters of administration.⁴I believe that there is a misconception. Grandchildren are not in the same footing with the daughters-in-law or children-in-law of the deceased. Grandchildren would be blood relatives of the deceased. They would be entitled automatically, as blood kin of their grandparent, to take the share due to their own parents, the biological children of the deceased, where such biological children are dead. A surviving spouse of a dead child of the deceased is not a biological kin of the deceased parent-in-law. Such a child-in-law would have no automatic right or entitlement to a share in the estate of her parent-in-law. Whereas statute is clear that grandchildren have a right under sections 39 and 41 of the *Law of Succession Act*, there is not a single provision in the *Law of Succession Act*, or any other statute for that matter, which makes provision for any in-law. Consequently, since in-laws have no rights of inheritance from the estates of their in-laws, they can only approach the court upon obtaining representation to the estates of the persons on whose account they claim. Their claim to a stake in the estate of the parent-in-law would not be in their own right, but rather on behalf of the estate of another, their dead spouse. They can only stake a direct claim to the estate of their late spouse, whose assets include what the dead spouse inherits from the estate of their parents. I must emphasize that grandchildren are not in that boat with such in-laws, and they claim from their grandparent's estate, not on behalf of their dead parents, but directly as grandchildren, children of such dead children, the share that ought to have gone to their parents.”

6. However, this Court takes the view that for good order and so that the Court is confident that the applicant grandchildren who seek to pursue, secure and inherit the share going to their deceased parent with the authority of any other children of the deceased parent, the grant of letters of administration to the estate of their deceased parent is essential.

42. Though there is no legal requirement for a grant, the children of the deceased cannot be expected to know all the grandchildren and where they are at any particular time. service on the grandchildren or citing them to attend was an expression of good faith and evidence that there was nothing to conceal.
43. The appellant complained that not all grandchildren were informed. In this, they themselves did not involve all the grandchildren of the first house. It follows that the nature of the grandchildren's interest is such that they can only claim their parents' share. In this case, all their parents are deceased. There is no comprehensive list of who they are and how they wish to share. It was evidence that three of the first wife's grandchildren had died.



44. There is no mention of the other three children of the first wife and their shares. Consequently, it was proper for the court to give the land to one person in trust for all. They shall, at their own time and pace, share among the 4 children in the first house equally and thereafter in their own house. Unfortunately, the land in question is a piece of postage stamp measuring 3.7 acres. By sharing, each wife was to receive 1.2 acres. The land is not enough for all of them. Therefore, the parties must agree in their houses on how to share.
45. It is not the duty of the administrator to find all grandchildren who, in any case, were able to be represented. By being cited, the respondent completed what he had to do to invite the first house. James's affidavit is self-explanatory and complete in its refusal to participate. The administrator did not conceal any beneficiary.
46. Were there untrue allegations? There are none as far as the record is concerned. The respondent, who appears fairly old, tried to do all that he could do in the circumstances.
47. With regard to concealment of facts, there were no facts concealed. There were no parcels of land shown to exist that deserved to be subject to the succession of the deceased's estate. Allegations of some land in Kieni in the names of the deceased's children cannot be sufficient. If other properties existed, then they should have been pleaded. In the case of *Joyce Ngima Njeru & another v Ann Wambeti Njue* [2012] KECA 61 (KLR), the court of appeal [E.M.Githinji, R.N. Nambuye and D.K. Maraga] stated as follows;

We have revisited the said learned Judges concluding remarks and we are satisfied that it is a correct appreciation of the law as applied to the facts before her, because the central core of the ingredients required to be established under section 76 of the L.S.A. is that it is meant to be used as a vehicle to attack and fault the process of either obtaining the Grant or in active use of the Grant after being lawfully obtained in circumstances where it has become useless. It is not meant to fault the decision on the merits. In the premises, we are satisfied that the learned Judge was right in finding that the appellants evidence was not aimed at faulting the proceedings leading to the issuance of the grant, but at faulting the merits of the decision where by the respondent had been adjudged as a share holder of the share of entitlement which was due to her deceased husband's interest. For this reason we agree that the proper forum to reconsider that finding should have been an appeal court and not the High Court through an application for revocation of Grant.

- (2) With regard to the issue of locus standi, on the part of the respondent to claim a share of the deceased's estate, we are in agreement that since the land in contest had never been registered in the name of the deceased husband of the respondent, it was not necessary for the respondent to obtain a grant of representation to her deceased husbands' estate, claim that land, have it registered in the deceased husbands' name first before transferring it to herself. It was more prudent for her to claim as a direct beneficiary since she was the only claimant to her deceased husband's property.
 - (3) With regard to allegations of the existence of two other properties allegedly belonging to the deceased husband of the respondent, their existence was not proved, nor would their existence operate to oust the respondent's direct claim of entitlement to her deceased husband's share of an admitted ancestral/clan land.
48. There were no parcels of land that were shown to be concealed. Furthermore, the existence of the three houses was disclosed, and properties were shared among them. The appellants were not disinherited. Given the numbers, it is not humanly possible to share 1.2 acres among the myriad of grandchildren.



the extent of sharing is not the purview of revocation. The only question is strictly within section 76 of the *Law of Succession Act*. the said 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. 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.

49. The court was moved under sections 76 1(b) and (c). There was no evidence that the said parcels existed or that the suit land was given as a gift *inter vivos* removing it from succession. In *Re estate of the late Gedion Manthi Nzioka (Deceased)*[2015]eKLR, the court 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.”

50. In this case, I do not see how the estate as allegedly distributed amounted to gifts by the deceased to his sons during his lifetime. The parcel was still in the deceased's name, and if he had intended that it be distributed to his first son, he would have transferred it or executed documents stating so; the fact that some heirs were not occupying the land in question does not make them any less heirs. There is no material relating to the estate that was not disclosed. The respondents were involved, though the citation given that their grandmother was deceased, having died way back in 1933. The chief's letter indicated so. In the end I find no fault in the court's decision.

51. Consequently, I find no basis to fault the reasoning of the power court. The sole property left by the deceased was available for distribution among all his beneficiaries, and equally so, and the court did. The beneficiaries were not the deceased's grandchildren but the deceased's children, most of whom are also deceased. The court finds the appeal to be without merit and is accordingly dismissed.



52. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act, which provides as follows:

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

53. Costs 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.

54. 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.

55. I take comfort that this is the last appeal as provided for under section 50 of the Law of Succession Act. Though the respondent deserves costs, he deserves peace more. He will therefore get nominal costs of Ksh 45,000/= for the appeal.

Determination

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

- i. The appeal is unmerited and is dismissed.
- ii. The respondent shall have costs of Ksh. 45,000/= for the appeal.



iii. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF APRIL, 2026.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

No Appearance for parties

Court Assistant – Michael / Martin

M.D. KIZITO, J.

