



Mucheke & another (Suing as legal representatives of the Estate of Festus Mucheke Ngaruni) v Mucheke & another (Environmental and Land Originating Summons 21 of 2021) [2025] KEELC 739 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 739 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 21 OF 2021**

CK YANO, J

FEBRUARY 20, 2025

BETWEEN

**ANNE MARY KAGENDO MUCHEKE & LUCY GATWIRI MUTHAMIA
(SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF FESTUS
MUCHEKE NGARUNI) PLAINTIFF**

AND

TIMOTHY GITARI TIMOTHY GITARI MUCHEKE & DEFENDANT

JUDGMENT

1. By an Originating Summons dated 26th August, 2021, the Plaintiffs filed suit against the Defendants for determination of the following issues:-
 - a. Whether the transfer of Title Igoji/Kinoro/81 to the Respondents on 18-2-1977 is a nullity having been effected in clear contravention of the *Law of Succession Act*.
 - b. Whether the court should cancel/revoke the transfer of Title No. Igoji/Kinoro/81 to the Defendants/Respondents.
 - c. Whether an order should issue directing the District Land Registrar Meru to cancel all entries and title issued as a result of transfer of Title No. Igoji/Kinoro/81 to the Respondents and subsequent sub-division of Title No. Igoji/Kinoro/81 and revert the registration of Title No. Igoji/Kinoro/81 back to the name of the deceased Festus Mucheke Ngaruni for purposes of distribution of his estate as by law provided.
2. The Application was supported by the grounds set out in the joint Affidavit sworn on the same day by Ann Mary Kagendo Mucheke and Lucy Gatwiri Muthamia. They deponed that pursuant to a limited grant issued to them, they are the administrators of the estate of the deceased who was survived by his wife, two daughters being the Applicants herein and two sons who are the Defendants.



- The Deceased left only one asset, which is Title No. Igoji/Kinoro/81 (the suit property herein). They averred that according to the register, the suit property was on 18th February, 1977 illegally/unprocedurally transferred to the Defendants who were minors then. The Plaintiffs deponed that the register shows the transfer was by succession, which is untrue because no succession proceedings on the estate of Festus Mucheke have ever been filed and his assets have to date yet to be distributed. They averred that for the transfer to be valid, the Land Registrar ought to have satisfied himself that the requisite documents had been presented to him, and they had been properly executed.
3. They deponed that the green card of the suit property shows no record that the said documents were presented to the Land Registrar to legally effect the transfer to the Defendants. That there is no mention of who the alleged grant was issued to or when it was issued and confirmed, or who the administrator was. The Plaintiffs averred that on 7th October, 2013, the Defendants partitioned the title into two equal portions of 2.68Ha and registered in their respective names. The plaintiffs averred that since no succession proceedings have ever been filed over the deceased's estate, the transfer to the Defendants and the sub-division are a nullity ab initio, and should be cancelled so the title reverts to the estate of the deceased for distribution. They deponed that as daughters of the deceased, they have an equal right under Article 27 of *the Constitution* to a share of the assets of the deceased.
 4. The 1st Defendant swore an Affidavit on 9th September, 2021 in reply to the Summons. He deponed that there were succession proceedings in Nkubu Law Courts where he was allocated ½ share of the suit property, that was to be held in trust until he turned 18. He explained that he had followed up on a copy of the proceedings, but it was difficult to trace the file since they happened a long time ago. He deponed that under Meru custom, the property of a deceased person is transferred to living sons, and the property was legally transferred to him and his brother. He deponed that the *Law of Succession Act* only applies to persons who died after 1981, but the deceased herein died in 1969. He urged that the provision on the production of a Grant to the Land Registrar thus does not apply. He deponed that the Applicants never challenged the succession proceedings but waited 44 years to do so, and he accused them of laches, with no justifiable reason for the delay. He asserted that Meru Customary law is applicable in the distribution of the deceased's estate. He deponed that the suit is a non-starter, an abuse of court process and should be dismissed with costs to the 1st Defendant.
 5. The Plaintiffs filed another joint Affidavit dated 3rd November, 2021 responding to the 1st Defendant's reply. In it, they deponed that the Defendants cannot have been holding the property in trust yet they divided it between the two of them without consulting. They reiterated that there was never succession proceedings on the estate of their father, and challenged the Defendants to declare the administrator of the estate. They deponed that the suit property was registered under the Registered *Land Act* not held under customary land tenure, and could not therefore be distributed under Meru Customary Law. They deponed that the *Law of Succession Act* applies universally to estates of persons dying either before or after its commencement. The plaintiffs deponed that they are not guilty of laches because succession proceedings have no time limit and can be commenced at any time. They accused the Defendants of entitlement and living in the old days when customs valued sons over daughters, contrary to the court's obligation of justice and gender equality.
 6. The 1st Defendant filed a Further Affidavit dated 19th January, 2023 clarifying that he has never held the suit land in trust as it was wholly registered to him and the 2nd Defendant pursuant to succession proceedings by Joyce Kainyu Mucheke, the deceased's widow and mother of the Plaintiffs. He deponed that the adjudication process had not been concluded when their father died in 1969, and in 1974 his widow was registered as the proprietor of all family land. The suit land was registered in the Defendants' names as the sons of the deceased per customary law on succession, and being minors, the court held that they would be issued with titles on attaining adulthood.



7. The 1st Defendant deponed that he took possession of the land in 1988 and has been residing thereon since. That they indeed subdivided the suit land into Igoji/Kinoro/3561 and 3562, each measuring 2.68 Ha and registered in his name and that of the 2nd Defendant respectively. He deponed that Joyce Kainyu transferred the parcels from her name to the Plaintiffs. The 1st Defendant alleged that the suit property is not the deceased only asset as he had another parcel known as Igoji/Gikui/911, and he accused the Defendant of dishonesty. He further deponed that the Plaintiffs had ganged up against him to take away his land yet he is fully dependent on it. He asked the court to dismiss the Plaintiffs' suit with costs.
8. His averments were denied through the plaintiffs' joint Further Affidavit dated 7th June, 2023 where they reiterated that the land was held in trust for the family, and that no succession proceedings were filed. They averred that Joyce Kainyu acquired her parcels of land procedurally and has every right to deal with her property. The Plaintiffs deponed that they are aware of the existence of Igoji/Gikui/911 and are awaiting restoration of the suit property to the estate so they can institute succession proceedings to distribute the two parcels. Further, that according to the 1st Defendant, the succession was with respect to the suit property only. They averred that they were not trying to take away the 1st Defendant's land, rather, they were pursuing their right to an equal share of the estate as the children of the deceased.
9. The 2nd Defendant filed his Replying Affidavit dated 4th November, 2021 stating that he and the 1st Defendant were registered as proprietors in common of the suit property in trust for the family. He deponed that at the time of the transfer, they were minors and he is not sure how the transfer was effected or whether succession proceedings were filed before the transfer. He admitted that he and the 1st Defendant indeed sub-divided the land and registered the land in their individual names without consulting the family members. He acknowledged that it was an oversight on their part. He deponed that he had no objection to cancellation of his title and for the land to revert back either to their joint names or their late father's name.

Hearing and Evidence;

10. At the hearing, the 1st Plaintiff testified as PW1 and adopted her witness statement filed on 14th July, 2022 as her evidence-in-chief. PW1 also relied on her Affidavit filed on 30th August, 2021 and produced the documents annexed thereto as her exhibits. She further relied on her Affidavit filed on 26th June, 2023 as her evidence and produced the documents annexed therein as her exhibits.
11. PW1 was cross-examined by Ms. Otto and testified that their father died on 1st June, 1969 and had 4 children, who by 1977, were all minors. She testified that she never heard of any succession case filed in 1977. She testified that they discovered in 2019 that there were titles in the names of their brothers.
12. PW1 was cross-examined by Mr. Kaumbi and testified that the 1st Defendant is their half-brother. She testified that from the green card, the property was registered in 1974 to Festus Mucike and transferred to the Defendants in 1977 by succession. She testified that she knew of no other parcel registered in her father's name, and that she is unaware of Igoji/Kinoro/911. PW1 said that no land was transferred to her brothers in 2019 and 2020. She was unaware that her mother transferred parcel no. 973 or any land. She testified that she was not in possession of plot no. 81. Further, that she was unaware that it was subdivided into plot nos. 3561 and 3562. She conceded that she had sought no orders over plot nos. 3561 and 3562. She denied that this suit is a conspiracy as she had even sued her own brother. She further said that she was unaware her claim was time barred.



13. On re-examination, PW1 testified that the parcel of land in court is plot no. 81 which belonged to her father. She reiterated that there was no succession done. She testified that the Defendants are currently in possession of the suit land.
14. Paul Mwitwi Mucheke, the 2nd Defendant, testified under oath as DW1 and adopted his witness statement dated 14th July, 2022 as his evidence, and also relied on his Replying Affidavit sworn on 4th November, 2021. He testified that he was 10 years old in 1977 and he was not aware if succession was done over the suit property. He testified that he found out from the Land Registrar's office in 2014 that the land was registered in his and his brother's name and they proceeded to subdivide it. DW1 testified that the Land Registrar did not ask if they had sisters. That they told them no succession was done and they hoped there would be no complaint. DW1 testified that the subdivision was done in 2014/15. DW1 testified that it is through this case that he learned there was another parcel still in his father's name. He stated that he never heard his mother complain about how they subdivided the land without succession, but now that his sisters had objected, he had accepted.
15. On cross-examination by Ms. Wadegu, DW1 confirmed that he never attended any succession, and that no succession in respect of his father's estate was done. He did not know how his and his brother's names are on the land. He added that when they went to the lands Office to subdivide the land, they assured them that there would be no contest. He had no objection to the land reverting back to his father's estate.
16. DW1 was cross-examined by Mr. Kaumbi and he acknowledged that he and the Plaintiffs herein share the same father and mother, whereas the 1st Defendant has a different mother. He testified that he is also the registered owner of Igoji/Kiangua/973 and 1661 transferred to him by his mother that his sisters had not claimed from him. DW1 testified that at the time of filing suit, there was no title for plot no. 81 as it had been partitioned. He confirmed that entry no. 2 on the green card is written succession. He testified that although he had admitted to being registered as trustee over the suit property, he was the sole beneficiary of his mother's parcels of land. He testified that he was willing to share the suit property with his sisters if they ask.
17. When DW1 was re-examined, he testified that they were all raised by his mother and have never had any dispute. Parcel nos. 3562, 973 and 1661 belonged to his mother. DW1 testified that when they did the transfers, they had no titles and she told him that there were none. Further, that the green card he saw had no writing of the word succession.
18. The 1st Defendant testified under oath as DW2. He testified that their mother wanted to register the suit property in her name, but the court rejected and directed that it be inherited by the 2 sons of the deceased, the Defendants herein, in equal share per Meru customs. DW2 testified that the suit property was registered in his father's name. That other parcels were registered in their mother's name as their father had passed on and were later transferred to the 2nd Defendant in 2020. He testified that their father also owned Igoji/Gikui/911 and Plot No. 21B Kiangua which is currently registered in his mother's name. DW1 further relied on his Affidavit filed on 16th February, 2023 and produced the annexures thereto as his exhibits.
19. Ms. Wadegu cross-examined DW2 and he testified that when his father died on 1st June, 1969 he was 8 years old and was not involved in any land transaction. He explained that he referred to Joyce as his mother as she is the one who brought him up. He testified that he was 16 years old in 1977 when his mother wanted to change the title at Nkubu Law Courts. He affirmed that there was a succession cause in 1977 but he did not bring any document or formal communication from the court. He also testified that he did not file any proceedings to show that there was a succession cause. He confirmed



that Annexure “A” of the Plaintiffs’ Affidavit is a letter from the court indicating that there was no succession file.

20. DW2 testified that the Defendants are currently in possession of plot nos. 3561 and 3562 whose mother title was plot no. 81. DW2 further testified that the land was given to them in 1977 but was in their mother’s custody until they attained the age of majority. He told the court that he did not sign any transfer forms from his father to them. He was unaware of any restriction on the two parcels that came from the suit land. He testified that none of the titles he had mentioned are owned by their sisters. He testified that the Plaintiffs cannot have a share of the suit property since he has developed it.
21. On re-examination, DW2 testified that after 1977, there was no more succession done as the land had been inherited. He testified that they went to court and reiterated that the court directed that the land be divided between the two sons and transferred to them when they turned 18. He explained that he started developing his land in 1988 and that is where his entire investment is.
22. The 1st Defendant then called Eustace Kaburu to testify as DW3. He testified under oath that the Plaintiffs and the Defendants are children of his elder brother. DW3 adopted his witness statement dated 19th January, 2023 as his evidence-in-chief.
23. DW3 was cross-examined by Ms. Wadegu and testified that when his brother died, his children were young about 5-6 years old. He testified that the Defendants were minors in 1977. He testified that he could not recall the magistrate or the succession cause at Nkubu Court. He testified that they followed up and were told that the records were too old, although he had no letter to confirm that, and he was unaware of a letter from Nkubu Law Courts denying that case. He said that the plaintiffs were not given any share in that cause. He explained that the other parcels of land were not mentioned as they had not been adjudicated. DW3 testified that the court ordered that when they attain the age of majority they would go to the Land Registry and have their names registered. He testified that as an uncle, he wished for the land to be shared amongst all the parties in this case.
24. On cross-examination by Ms. Otto, DW3 testified that in the 1977 case, the court stated that the land be transferred to the children. He explained that those who went to court were his father, his mother, his brother and himself. He testified that it was Joyce who filed the cause and she was present when they attended to sign for her to have the land. He explained that when they got there, they said that the children should be registered and the court ordered that the land be given to the Defendants even though they were young. He could not remember the case number and they did not have an advocate. He also testified that they did not take any letter from the chief. DW3 was not re-examined and this marked the close of the Defendant’s case.

Submissions:

Plaintiffs’ Submissions;

25. In the Plaintiffs final submissions dated 8th January, 2024, Counsel for the Plaintiffs submitted that the plaintiffs had established that there were no succession proceedings in the estate of the late Festus Mucheke Ngaruni. Counsel Submitted that the transfer of the suit property was a nullity ab initio and was a result of intermeddling. Counsel relied on Samwel Ariga Bosire vs Abagusii Otemyo Self Help Group (2021) eKLR, Chuka Succession Cause No. 23 of 2018 and Zacharia Wambugu Gathimu & Another vs John Ndungu Maina (2019) eKLR. On the strength of these authorities, Counsel urged the court to declare the transfer of the suit property a nullity. Counsel also submitted that the court should



order the land registrar to cancel/revoke the transfer and subsequent entries over the suit property. Counsel cited *Macfoy vs United Africa Limited* (1961)3 All ER 1172 where it was held that:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

26. Counsel submitted that the transfer happened when the Defendants were minors, yet it is a well-known fact that minors cannot own property in their own names or hold it in trust for other parties. Counsel submitted that no court of competent jurisdiction would have issued orders to have minors own property. Counsel pointed out that the Defendants had failed to show how the suit property was transferred to them. Counsel asserted that the land ought to revert back to the name of the deceased. Counsel also submitted that the Plaintiffs had proved their case and should be awarded costs.

1st Defendant’s Submissions;

27. On the part of the 1st Defendant, Counsel in his submissions dated 4th January, 2024 asked the court to investigate the circumstances under which L.R. Nos. Igoji/Kiangua/973 and 884 were transferred to the 2nd Defendant immediately prior to filing of this suit. Counsel asked the court to take judicial notice of the fact that the *Law of Succession Act* came into force in 1981, prior to which, courts relied on customary norms of inheritance in succession matters. Counsel for the 1st Defendant submitted that the Ameru are a patriarchal society and land devolved to the male offspring. Counsel therefore submitted that one cannot contravene a statute which does not exist and statutes do not apply retrospectively.
28. Counsel further submitted that since the transmission did not contravene any statute, there is no reason to cancel the title deeds. Counsel questioned the Plaintiffs’ motive in claiming only the suit property yet the deceased had plot no. Igoji/Gikua/911 which is still in his name but they expressed no interest in it. Counsel submitted that this suit is an abuse of court process as the siblings had ganged up against him, their half-brother. Counsel submitted that the suit has no merit and is only intended to frustrate the 1st Defendant who relies on the resources invested in the suit land. He asked that the suit be dismissed with costs.

Analysis and Determination:

29. I have carefully considered this Originating summons, the reply filed thereto, the testimonies of the witnesses as well as the written submissions filed by both parties and I am of the considered view that a determination of the following issues will conclusively resolve the issues raised in this suit:-

SUBPARA i.

Whether the transfer of the suit property to the Defendants is a nullity having been effected in contravention of the *Law of Succession Act* and should be cancelled;

SUBPARA ii.

Who shall bear the costs of this suit?



Whether the transfer of the suit property to the Defendants is a nullity having been effected in contravention of the Law of Succession Act and should be cancelled;

30. There is consensus herein that the late Festus Mucheke Ngaruni died on 1st June, 1969 way before the 1st of July 1981, the date of the commencement of the Law of Succession Act. Section 2(2) of the Law of Succession Act provides that:

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless, the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

31. With the regards to the application of the said Section 2(2), in Re Nduati Mbuthia (Deceased) (2015) eKLR, the court observed that:-

“Section 2(2) of the Law of Succession Act defines the application of the Law of Succession Act with respect to persons who died before the said Act commenced on 1st July 1981. The provision is categorical that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. The substantive provisions of the Act are those governing devolution or distribution of the estate of the dead person, whether such person died testate or intestate. These provisions are to be found in Parts II, III, IV, V and VI of the Law of Succession Act. The substantive law of Succession for estates of persons who died before 1st July 1981 is not found in Parts II, III, IV, V and VI of the Law of Succession Act, but in the written laws and customs that applied at the date of the death of the person in question.”

32. Thus, regardless of whether or not the property herein is to be distributed pursuant to the Law of Succession Act, CAP 160 of the Laws of Kenya, the procedure in the said Act applies thereto. One of these procedures is that before dealing with a deceased persons property, a party must first obtain a grant of representation, otherwise any actions done on such property amounts to intermeddling. The meaning of the word intermeddling was given in Benson Mutumamuriungi vs C.E.O. Kenya Police Sacco & Another (2016) eKLR, where the court 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 on 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.”

33. It is an offence under Section 45 of the Law of Succession Act to intermeddle with the property of a deceased person. Section 45 is one of the substantive provisions of the Law of Succession Act as it appears



at Part VII of thereof. It thus is one of the provisions applicable to the estate of the deceased herein, even though he died before the commencement of the Act. It provides as follows:-

- (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; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

34. My understanding of Section 45 was aptly captured by Musyoka, J in Veronica Njoki Wakagoto (Deceased) (2013) eKLR 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 authorised to do so by the 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.”

35. In line with Section 45 of the Law of Succession Act, Courts have said time and again that any person who without the authority of the Law of Succession Act or any other written law or grant of representation, takes possession or disposes of, or otherwise intermeddles with the property of a deceased person is guilty of a criminal offence and is answerable to the rightful executor or administrator to the extent of the assets he has intermeddled with.

36. The plaintiffs and the 1st Defendant have produced a copy of the green card of the suit property. The said record shows that the record of the suit property was opened on 16th August, 1974 in the name of Festus Mucheke, their late father. The second entry is the names of the two Defendants herein, and the Consideration and Remarks column has the word “succession” indicated against their names.

37. It is the 1st Defendant’s case that there were succession proceedings undertaken at the Nkubu Law Courts in 1977. That in those proceedings, the court directed that the suit property be registered in the names of the two sons of the deceased in equal share. The court is alleged to have directed that the land would be held by their mother until they attained the age of majority, upon which they could go to the Land Registrar’s office to be issued with titles. The 1st Defendant told this court that they tried to obtain copies of the succession proceedings from the court, but were informed that the case happened a long time ago so they could not be traced.

38. Annexure “A” of the Plaintiffs’ Affidavit dated 7th June, 2023 is a letter from one James Mugo, the Court Administrator at Nkubu Law Courts. Mr. Mugo indicates in his letter that they had checked their records for the years 1976, 1977 and 1978 but could not trace any succession file in the names of Festus Mucheke Ngaruni as the deceased. This court is a court of record, and any allegation on the existence of a suit must be backed by sufficient evidence thereto. In the circumstances, I am constrained to believe that no succession proceedings have ever been filed with respect to the estate of the late Festus



Mucheke Ngaruni. Accordingly, there is nobody yet with authority to transfer the suit property herein to any person including Defendants.

39. Justice Musyoka in the case of *In re Estate of Barasa Kanenje Manya (Deceased) (2020) eKLR*, held that:-

“ 13. It must be emphasized that the mere fact that a person is a surviving spouse or child of the deceased does not make him or her a personal representative of the deceased. One only becomes a personal representative, usually known as administrator, in the event of intestacy, upon being appointed by the court as such. The property of the intestate would not vest in any person until such person is appointed administrator by the court. Any transaction, entered into with a person who is yet to be appointed administrator, over estate assets, would be null and void, since such assets would not have vested in such a person, and such person would have no standing in law to transact over such property. Section 45 of the *Law of Succession Act* outlaws such dealings, and designates them as amounting to intermeddling with the estate of the deceased ...

16. ... The said sales contravened section 45 and 82 of the *Law of Succession Act*, and there is no possibility that the applicants could have acquired any valid title from the said sales, for the person who purported to sell the property to them had no title to it. He had nothing to sell, and the applicants bought nothing from him.”

40. Accordingly, the transfer by succession to the Defendants was completely in violation of Section 45 of the *Law of Succession Act*, and therefore null and void. I note that the 1st and 2nd Defendants herein were minors in 1977 when they were registered as proprietors of the suit property. I have no doubt in my mind that the Defendants herein cannot have been the persons responsible for the transfer and registration of the suit property in their names. I sympathise with the 1st Respondent, who claimed that he developed his portion obtained from the suit property herein. It is more so sad that he passed on before the determination of this suit. However, this court cannot uphold an action that is a nullity. As was held in *Macfoy vs United Africa Co. Ltd [1961] 3 All E.R. 1169* that:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

41. The fact is that the registration of the Defendants as proprietors of the suit property was done without the authority of the Succession court. Without proof that there were succession proceedings filed, where a grant was issued and duly confirmed by a court of competent jurisdiction, the transfer of the land in favour of the Defendants amounts to intermeddling. For that reason, that transfer by succession must be cancelled and/or nullified and any titles issued pursuant thereto must be revoked.

42. It follows also that any transaction, action or interest arising therefrom must also be nullified, and this includes the subdivision of the suit property into parcel nos. Igoji/Kinoro/3561 and 3562 and the



titles issued thereunder cancelled/revoked. The court does in fact have authority to do so under Section 80(1) of the [Land Registration Act](#), which provides that:-

“

“80. Rectification by order of Court

Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

43. Aside from the cancellation and/or revocation of title, other issues that arose from the trial herein include the applicability of the [Law of Succession Act](#) to the estate of the deceased herein, what properties are comprised in the estate of the late Festus Mucheke Ngaruni and the distribution of those assets amongst the heirs of the deceased. It goes without saying that the Environment and Land Court has no jurisdiction to make determinations relating to these issues. That jurisdiction lies solely with the Family Division of the High Court.

Who shall bear the costs of this suit?

44. Section 27 of the [Civil Procedure Act](#) is instructive on the issue of award of costs. Section 27 provides that that costs follow the cause/event, unless the court, for some good reasons, orders otherwise. The term event ideally refers to the result of any litigation. The award of costs as provided for under section 27 is however not cast in stone, but is at the discretion of the court. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Evrest Enterprises Limited* (2014) eKLR, the court noted that:-

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the [Civil Procedure Act](#) is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

45. A court may therefore exercise its discretion and depart from this general law, but this is only done for good reason. For instance, the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* (2014) eKLR noted that good reason includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. Some other factors that a court may take into consideration when determining the costs of a suit were listed in *Morgan Air Cargo Limited vs Evrest Enterprises Limited* (2014) eKLR to include:

- a. the conduct of the parties
- b. the subject of litigation
- c. the circumstances which led to the institution of the proceedings
- d. the events which eventually led to their termination
- e. the stage at which the proceedings were terminated
- f. the manner in which they were terminated



- g. the relationship between the parties and
 - h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*.
46. A court must therefore be guided not only by the conduct of the parties in the actual litigation, but also other matters including likely consequences of the order for costs. It goes without saying that the plaintiffs have succeeded in this suit. However, as this court has already noted, despite the subdivision complained of herein, the Defendants were not responsible for the transfer of the suit land into their names as they were both minors at the time. Yet it is that action that ultimately has given rise to the suit herein. Furthermore, the Plaintiffs and the Defendants, though not children of the same mother, agree that they were brought up in the same household, by the same mother. Taking the relationship of the parties into consideration herein, and with the aim of fostering reconciliation and good relations between them, if at all that is still possible, even though the Plaintiffs succeeded I will not award them the costs of this suit.

Orders:

47. The upshot is that the issues raised in the Plaintiffs Originating Summons dated 26th August, 2021 are resolved as follows:
- a. The transfer of Title No. Igoji/Kinoro/81 to the Defendants on 18th February, 1977 is a nullity having been effected in clear contravention of the *Law of Succession Act*.
 - b. The transfer of the suit property being Title No. Igoji/Kinoro/81 to the 1st and 2nd Defendants is hereby cancelled and/or revoked.
 - c. An order do and is hereby issued directing the District Land Registrar Meru to cancel all entries and title issued as a result of transfer of title no. Igoji/Kinoro/81 to the Defendants and subsequent sub-division of Title No. Igoji/Kinoro/81 and revert the registration of Title No. Igoji/Kinoro/81 back to the name of the deceased Festus Mucheke Ngaruni.
 - d. Each party shall bear their own costs.
48. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 20TH DAY OF FEBRUARY, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

M/s Wadegu for the plaintiffs & holding brief for Ms. Otto for 2nd Defendant.

No appearance for the 1st Defendant.

Court Assistant – Laban.

