In re Estate of Githu Ngwenya alias Githu Muriithi (Deceased) (Succession Cause 46 of 2001) [2025] KEHC 5150 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5150 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE 46 OF 2001

DKN MAGARE, J

APRIL 30, 2025

IN THE MATTER OF THE ESTATE OF GITHU NGWENYA

ALIAS GITHU MURIITHI (DECEASED)

BETWEEN

JAMES MAINA MURIITHI ..... PETITIONER

AND

IRENE WAIRIMU MURIITHI ..... PROTESTOR

RULING

1. This ruling concerns the Protest dated 7.2.2019 filed by Irene Wairimu Muriithi against the summons for confirmation of the grant issued in 2018. The matter has gone through cycles, from the children, grandchildren, and almost entering the phase of great-grandchildren. We may need to look at the youngest of the beneficiaries to conceptualize, problematize, and contextualize the utter lack of direction and lethargy that has kept the matter in court. Muriithi Githu was 4 years old when his father died. He died almost 20 years ago, in 2007 at 49. The matter reminds me of the decision in the case of Cleopa Amutala Namayi vs. Judith Were, Migori HCSC No. 457 of 2005, it was observed that:

> " Be that as it may, under Part V of the Act, grandchildren have no automatic right to inherit their grandparents who died intestate after 01/07/1981 when the Act came into operation. The argument behind this position is that such grandchildren should inherit from their own parents. This means that the children can only inherit their grandparents indirectly through their own parents, the children of their grandparents. The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren's own parents are dead. Those grandchildren can now step into the shoes of their parents

and take directly the share that ought to have gone to the said parents. Needless to say, such grandchildren must hold appropriate representation on behalf of their parents."

2. Before proceeding, it is imperative that the court addresses the supervening and intervening issues that the parties have had this case in court since 1982. The litigation concerns two or three batches of earth in the hinterland of Muranga County. The court was tempted to transfer the file to the Murang'a High Court. However, the Principal Judge placed the file before me to deal with the court that had previously handled the same. It was neither prudent nor advisable to do so at the tail end of the case.

3. The matter was originally due for ruling many months ago. The court will thus apologize to the parties for the long delay in concluding the matters. This is, of course, bearing in mind that the file was placed before me on 4.3.2025.

4. The sad part of the case is that the same has been pending before the court for the last 43 years. The deceased died on 10.12.1964, intestate. The estate has not known peace. The majority of the beneficiaries have fallen by the wayside. There were also proceedings relating to purchasers who bought land from some beneficiaries as far back as 1976. The decision may not thus be the end of the imbroglio that has bedeviled the estate. All the mainstream beneficiaries have since died. The remaining beneficiaries are either grandchildren or daughters-in-law. The case appears geared toward concluding over four estates in one matter.

5. One area of traumatic exposure to the court is succession. It is never clear when a matter will end, and there are always echoes of war brewing. A court will always have to read an entire file when a belated application is filed. This is one such matter. Potential estates should declare in advance the known extent of the beneficiaries. The most peculiar question is that the estate herein is not vast. However, parties have been in court through the reign of 4 Kenyan presidents and 13 Chief Justices.

6. The deceased herein, Githu Ngwenya, aka Githu Muriithi (Deceased), died at the turn of the first year after independence, on 10.12.1964. A succession cause was filed on 4.3.1982 as Murang'a Magistrate's Succession Cause Number 67 of 1982. An affidavit was filed stating that registration of death was not compulsory at the time he died. The petitioner therein did not have a death certificate. An affidavit was sworn by Mwangi Maina, who described himself as a son. He confirmed that the deceased was deceased. Whether he was dead or not has not been disputed. He is also now deceased.

7. On 17.09.1997, one John Mung'iru Waithaka filed another succession cause in Kangema Law Courts as Succession Cause Number 56 of 1997. He described himself as a purchaser. Hitherto, he had filed a caution on the estate's asset, Fort Hall Loc 14 Kairu/313, measuring 0.60 hectares [1.4826 acres]. Fort Hall has fallen by the wayside, and the parcel is now described as Loc 14 Kairu/313. The parcel was registered on 26.06.1962 in the name of Githu Ngweya (deceased) as the first registered owner.

8. In this matter, the deceased petitioner declared that the deceased left behind two widows, namely:

    a. Wacuka Githu

    b. Wangari Githu aka Flora Wangari Githu

9. Wilson Muriithi objected to the issuance of the grant to the then-petitioner, Mwangi Maina, stating that the deceased left behind two properties:

    i. Loc/14/Kairo/305 for the 2nd widow, Wangari Githu, and

    ii. an unnamed plot which Wacuka Githu sold.

10. Wacuka Githu and her son Wilson Muriithi Githu appointed an advocate in 1983 to represent them. They objected on 19.08.1983, stating that Loc/14/Kairo/305 was allocated to the first widow, Wacuka Githu. They stated that the petitioner and her mother have their land, which was registered in Mwangi Maina's name. Proceedings were undertaken since 4.3.1982, when the original petitioners and objectors died and were substituted by their sons or widows.

11. Summons for revocation of the grants in the other two files were filed on 6.11.2003, Kangema Succession Cause No. 56 of 1997, and the Muranga matter. This was later transferred to this court in 2001. Then, Murang'a District did not have a High Court. Justice Khamoni, while handling this matter, lamented that three cases were filed regarding the same estate. The court found that the objector had obtained an order as a co-administrator but went to file the case in Kangema. The Kangema matter was struck out.

12. Back to the matter at hand, Irene Wairimu Muriithi protested the summons of confirmation of grant dated 4.12.2018. The current Petitioner's deceased mother, Rebecca Wangui Mwangi, is described as the widow of Wilson Muriithi Githu (deceased). Wilson Muriithi Githu was the son of the deceased herein. On the other hand, Irene Wairimu Muriithi is the daughter-in-law of the deceased herein and the widow of Muriithi Githu, who is also deceased. From the filings, it is noted that the original petitioner, Maina Mwangi, died, leaving two daughters. These were Jane Nyambura Mwangi and Njeri Mwangi. The widow is also deceased.

Evidence

13. The protester, Irene Wairimu Muriithi, relied on the affidavit of protest dated 7.2.2019. She argued that Loc/14/Kairo 14/305 was to be distributed to Josephat and Irene, as James Maina Muriithi had another land, Loc/14/Kairo 14/313, at Kairo.

14. Further, Josephat Macharia and Irene Wairimu (herself) will inherit Loc 14/Kairo/216. It was her further case on cross-examination that the deceased left three parcels: Loc/14/Kairo/305, 9 acres, Loc 14/Kairo/313, 2 acres, and Loc 14/Kairo/305, which was 5 acres. She was opposed to the land parcels being distributed equally among all beneficiaries.

15. The Petitioner was James Maina Muriithi. He filed a summons for confirmation of the grant dated 4.12.2018 and adopted his witness statement filed on 4.8.2022. He stated that Loc/14/Kairo 313 should be given to Josephat Macharia. He did not know the existence of Loc/14/Kairo 216. However, he testified that, if the same existed, the land should be given to Irene Wairimu.

16. On cross-examination, he testified that Loc/14/Kairo 305 should be shared equally. Josephat and Irene stayed on it. Further, he testified that Loc/14/Kairo 305 was given to two houses and that Loc/14/Kairo/216 belonged to Irene and Josephat.

17. Josephat Macharia testified and relied on his witness statement dated 4.8.2022. He argued that Loc/14/Kairo 305 should be subdivided into three portions and shared equally. He stated further that the parties agreed that he should be given Loc/14/Kairo 313. He did not know the existence of Loc/14/Kairo 216.

18. It was common ground that Loc/14/Kairo 313 should be given to Josephat alone or with Irene Wairimu Muriithi. The parties did not categorically state that the divisions were based on the two houses. However, the court noted that the beneficiaries of Maina Mwangi were left out. The court put off the matter to get the details to avoid an injustice.

19. The late Wilson Muriithi Githu was survived by his widow Irene Wairimu Muriithi and five children. These are Samuel Githu Muriithi, Florence Wangari Muriithi, Agnes Kabura Muriithi, James Ngunyi and Lucy Wambui Muriithi.

20. The deceased had two widows and their beneficiaries were as follows:

    a. First house

        i. Wacuka Githu(deceased)

        ii. Muriithi Githu (deceased)

        1. James Maina Muriithi - grandson

            iii. Maina Mwangi (deceased)

        1. Rebecca Wangui Mwangi - Daughter-in-law (Deceased).

            a. Jane Nyambura Mwangi - Granddaughter

            b. Njeri Mwangi - Granddaughter.

            b. Second house

                i. Wangari Githu AKA Flora Wangari Githu

                ii. Wilson Muriithi Githu son (deceased)

        1. Irene Wairimu Muriithi -Daughter-in-law.

        2. Josephat Macharia Githu-son.

Submissions

21. The Petitioner's submissions are dated 14.7.2023. It was submitted that there was no dispute that only three beneficiaries survived the deceased: Josephat Macharia Githu, Rebecca Wangui Mwangi and Irene Wairimu Muriithi.

22. The Petitioner submitted that the property should be distributed per the mode proposed in the certificate of confirmation of grant dated 4.12.2018. He further submitted that only two properties, Loc 14/Kairo/305 and Loc 14/Kairo/313, existed. It was stated that there was no evidence that Loc 14/Kairo/216 existed. They prayed that the Protest be dismissed and the estate be distributed as per the certificate of confirmation of the grant. In reality, it was not a certificate of confirmation but a summons for confirmation.

23. The Protestor filed submissions dated 24.7.2023. It was submitted that the Protestor, as the widow of the deceased's son, deserved a share in the deceased's estate to hold in trust for her children.

24. The Protestor also submitted that the only issue was the distribution of Loc 14/Kairo/305. As the parties had not consented to the mode of distribution, it was her case that the court had jurisdiction to distribute the property. She relied on Re Estate of Jackson M'Mukindia M'Arungu (2018) eKLR. Reliance was also placed on Section 38 of the *Law of Succession Act*, based on which it was submitted that the property should be subdivided equally among the surviving children, as the properties were not shown to be of different values.

25. The difficulty with the proceedings is that there was no actual controversy over the subject matter. The only issues are skullduggery, subterfuge, hyperbole, and dishonesty. Some of the beneficiaries sold

land belonging to the deceased but do not wish to disclose the same. The best cure is to grant such beneficiaries land which they have burdened so that they may, on a later date, face their accusers.

26. For example, the record reflects that during the pendency of the succession, before letters were issued, Josephat Macharia Githu purported to sell parts of the estate, including Loc/14/Kairo 313, measuring 0.6 acres. Whether the sale is proper or not is a question to be dealt with by Josephat Macharia Githu.

Analysis

27. The issue for determination is whether the grant should be confirmed and the terms thereof. The burden of proof is civil standards for matters succession. This is not a criminal trial. It is a civil trial where the court has to find for one party or another on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> "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."

28. This was further enunciated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

29. The first aspect is to settle the property of the deceased. The parties submitted extensively on three parcels of land. The searches indicated only two properties, that is:

a. Loc 14 Kairu/313

b. Loc 14 Kairu/305

30. There is no evidence of land parcel number Loc. 14 Kairu/216. The parties did not provide sufficient evidence to show that it belongs to the deceased person. I therefore decline to distribute the same. It cannot be that since 1964, parties did not find it in their hearts, if any to file a search to show ownership of the said parcel. I equally dismiss the postulations that land parcel number Loc 14 Kairu/962 belonged to the deceased. No evidence was led sufficiently to show it was a gist inter vivos.

31. There are other relatives indicated, but they have no relevance to the case. Though the widows are deceased, they have a share of the estate that shall devolve to their children. The share of the estate will thus be two shares for the first house and two for the second house. If the parties did not disclose their daughters, and they turn up at a relevant time, then claim against the beneficiaries. In Kiebia v M'lintari & another (Petition 10 of 2015) [2018] KESC 22 (KLR) (5 October 2018) (Judgment), the Supreme Court [DK Maraga, CJ & P, MK Ibrahim, JB Ojwang, SC Wanjala & N Ndungu, SCJJ] held as follows:

Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which the registered proprietor is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as the construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence. It is not every claim of right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: 1. The land in question was before registration, family, clan or group land 2. The claimant belongs to such a family, clan, or group 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous. 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances. 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

32. The deceased herein is said to have died in 1964 before the *Law of Succession Act* became operational, and the law applicable to the disposition of the estate herein should be customary law. However, under Section 2(2) of the *Law of Succession Act*, whereas customary law should apply to this estate, the law on administration of the estate remains the *Law of Succession Act*. Part VII of the *Law of Succession Act* provides for the administration of estates, and it applies to all estates, whether subject to the dispositive provisions of the Act, Islamic law, or customary law. Section 2(2) provided thus:

> " 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."

33. Musyoka J, in Re Estate of Zakayo Murwayi Awori (Deceased) (Succession Cause 20 of 2015) [2024] KEHC 743 (KLR) (2 February 2024) (Ruling), when addressing a similar issue, posited as follows in regard to a person who died before the Act became operational. He noted that the law applicable to the disposition of the estate therein should be customary law. He stated as hereunder:

> The deceased herein, no doubt, died before the Act became operational, and the law applicable to the disposition of the estate herein should be customary law. However, under section 2(2) of the *Law of Succession Act*, whereas customary law should apply to this estate, the law on administration of the estate remains the *Law of Succession Act*. Part VII of the

Law of Succession Act provides for the administration of estates, and it applies to all estates, whether subject to the dispositive provisions of the Act, Islamic law, or customary law. See In Re: Kiiru Muhia "A"[2002] eKLR (Rawal, J) and In re Estate of Kageto Gitome (Deceased) [2018] eKLR (Muigai, J).

34. Therefore, where the administration of the estate of an intestate, who died before 1st July 1981 is being administered after that date, Part VII of the *Law of Succession Act* would apply to the administration of such an estate, by dint of Section 2(2) of the said Act, as observed above.

35. Under section 51 of the *Law of Succession Act*, a person seeking to administer the estate of a person who died in 1980 has to comply with section 51(2)(g) of the *Law of Succession Act* and Rule 7(1)(e) of the Probate and Administration Rules, which require disclosure of all the children of the deceased.

36. Regarding the distribution of the Deceased's estate, this court is guided by Sections 40(1) and 42 of the *Law of Succession Act*, Cap 160 Laws of Kenya. Section 40(1) of the *Law of Succession Act* provides that:

'Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.'

37. The Petitioner attempted to group the deceased's beneficiaries into houses and lump the widows of the deceased's heirs with his son as households, constituting three units. This court has no problem with that, but the children of each survivor ought to be clearly stated in terms of their names alongside their mother if they are surviving the deceased. This is because the households would be entitled to equal shares for each beneficiary.

38. The court must ascertain just and fair distribution of the deceased's estate in relation to such household, now that the parties did not consent to fair distribution. In Estate of John Musambayi Katumanga (Deceased) [2014] eKLR, Musyoka J considered the application of Section 40 and stated as follows:

> " Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the *Law of Succession Act*, the children would divide the estate equally amongst themselves."

39. Equal shares are also provided under Section 38 of the *Law of Succession Act*, which provides as follows:

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

40. The Protest is against the summons for confirmation of the grant. The matters in the protest are largely undisputed. There is a dispute as to the existence of land parcel No. Loc/14/Kairo/216. The parties did not file searches with respect to this. The administrator must gather the estate. Thus, a search must be carried out to ascertain the status of the parcel of land. As of now the same does not appear to be part of the estate. It shall be disregarded. Once evidence of the same is found, the court ought to be moved.

However, the Petitioner's position during his testimony was that there is no such property known to him, but if it is there, the same should be given to Irene Wairimu, the Protestor.

41. The Petitioner, as an administrator of the deceased's estate, having succeeded Rebecca Wangui Mwangi, ought not to guess the extent of the deceased's estate. He must collect and protect the entire estate and should know its bounds. He should, as such, be able to tell with certainty whether a particular property is part of the estate. This is crucial to avoid succession disputes reigniting after the distribution of the estate through issues of property or beneficiaries not included.

42. Rebecca Wangui Mwangi is still listed as daughter-in-law when she is since deceased. Irene Wairimu Muriithi, the Protestor herein, also did not sign the consent to the letters of administration to give her consent. The law governing applications for confirmation of grant is Section 71 of the *Law of Succession Act* and Rules 40 and 41 of the Probate and Administration Rules.

43. The proviso to section 71, as read together with Rule 40(4), is that the administrator applying for distribution must satisfy the court that they have properly ascertained the persons beneficially entitled to a share in the estate and have correctly ascertained the shares due to such beneficiaries. The effect is that the court then incurs a duty to be satisfied, before it confirms the grant, that the administrator asking for confirmation has adequately ascertained the persons beneficially entitled to a share in the estate and the shares due to such beneficiaries. The Court of Appeal, in Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat [2015] eKLR, held that: -

> 'From the consideration of sections 35, 40 and 42 of the Act, the broad principle of law which emerges is that where an intestate was polygamous, the estate, in the first instance, should be divided among the houses according to the number of children in each house adding a surviving wife as an additional unit taking into account any previous benefit to any house. Thereafter the estate devolving on any house is, subject to her life interest distributed by the surviving spouse in exercise of her power of appointment to each beneficiary taking into account previous benefit, if any, to any beneficiary. However, in the event that the life interest is terminated either by remarriage or death, then the net interstate estate devolves upon a house is divided among the surviving beneficiates equally subject to any previous benefit to any beneficiary.
>
> [30] Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to adjust the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust.

44. Based on the above disposition, the summons for confirmation of the grant dated 4.12.2018 is inadequate. The administrator should have filed a proper schedule for confirmation of the grant in accordance with the law. The protest is, therefore, allowed to the extent that the summons for confirmation is incomplete.

45. Nevertheless, the estate has remained undistributed for the last 61 years. There appears to be no end in sight. The court shall thus distribute the estate suo moto based on equality among the beneficiaries, having regard to the two deceased beneficiaries, who were widows. The court will thus adopt a ratio for the first and second houses, respectively, at 50:50. However, the parties must respect the current occupation and permanent structures to the largest extent possible.

46. I was invited to exclude the estate of the late Maina Mwangi (deceased). The said beneficiary was the first petitioner. He had not renounced his rights. The allegations that his daughters are married do not hold water. Marriage does not change the status of a son or daughter as a beneficiary.

47. I am also aware that there were some purchasers who objected. The court had hitherto given directions. In any case, the recourse of such purchasers lies elsewhere by virtue of Article 162(2) of *the constitution*.

48. The second house, through Josephat Macharia, has severely compromised the 0.6-hectare land parcel No. Loc/14/Kairo/313. Since the total acreage is 4.56 hectares, each house will have 2.28 hectares. This means each of the four beneficiaries will get 1.14 hectares. However, a party getting split parcels will find them uneconomical. He will have a rounded figure. This works out as follows:

    a. Loc/14/Kairo/313 measuring 0.6 hectares will go to Josephat Macharia Githu.

    b. Josephat Macharia Githu will get 0.6 acres out of Loc/14/Kairo/305.

    c. The estate of the late Maina Mwangi will receive 1.12 hectares out of Loc/14/Kairo/305, which will be registered in the names of Jane Nyambura Mwangi and Njeri Mwangi in trust for their children and other siblings.

    d. Irene Wairimu Muriithi, a daughter-in-law, will have a life interest in 1.12 hectares out of Loc/14/Kairo/305 and hold the same in trust for all the children of the late Wilson Muriiithi Gathu (deceased) equally.

    e. James Maina Muriithi -grandson will get 1.12 hectares out of land parcel number Loc/14/Kairo/305 in trust for his brothers and sisters

49. The County Surveyor shall, therefore, visit the land parcel number Loc/14/Kairo/305 to subdivide as per the order herein and ascertain the position on the ground and indicate settlements and permanent structures

50. Further, the administrator should obtain a copy of the record for land parcel number Loc 14 Kairu/216 within 15 days and file it in court before the court gives further directions.

51. The next question is costs. The matter has been in court largely due to misunderstandings. Parties are fatigued after 43 years of dueling. It is my honest hope that the matter ends here. 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.

52. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, 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, before, during, and subsequent to the actual process of litigation.... 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.

53. To conclude the 61-year journey, it is imperative that each party bear its costs. Parties are to share the costs of transmission pro rata.

Determination

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

    i. The Protest is merited and is partly allowed.

    ii. The grant of letters of administration intestate issued to 4.12.2018 is confirmed as follows:

        a. Loc/14/Kairo/313 measuring 0.6 hectares will go to Josephat Macharia Githu.

        b. Josephat Macharia Githu will get 0.6 hectares out of Loc/14/Kairo/305.

        c. The estate of the late Maina Mwangi will receive 1.12 hectares out of Loc/14/Kairo/305, which will be registered in the names of Jane Nyambura Mwangi and Njeri Mwangi in trust for their children and other siblings.

        d. Irene Wairimu Muriithi, a daughter-in-law, will have a life interest in 1.12 hectares out of Loc/14/Kairo/305 and hold the same in trust for all the children of the late Wilson Muriiithi Gathu (deceased) equally.

        e. James Maina Muriithi to get 1.12 hectares out of land parcel number Loc/14/Kairo/305 in trust for his brothers and sisters.

    iii. The administrator to obtain a copy of the record for land parcel number Loc 14 Kairu/216 before the court gives further directions.

    iv. The County Surveyor shall, therefore, visit the land parcel number Loc/14/Kairo/305 to subdivide as per the order herein and ascertain the position on the ground and indicate settlements and permanent structures.

    v. To conclude the 61-year journey, each party will bear its costs.

vi. Beneficiaries to share the costs of transmission and survey fees pro rata.

vii. The matter be mentioned before the Deputy Registrar on 30.10.2025 to confirm the conclusion of the transmission of the estate.

viii. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF APRIL, 2025. RULING DELIVERED THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Gathiga Mwangi for the Petitioner

Ms. Magua for the Protestor

Beneficiaries present as per the attached list

Court Assistant – Michael