



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**In re Estate of Alfayo Asirikwa Mugendi (Deceased) (Succession Cause  
157 of 2007) [2025] KEHC 7142 (KLR) (27 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7142 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 157 OF 2007**

**REA OUGO, J**

**MAY 27, 2025**

**IN THE MATTER OF THE ESTATE OF ALFAYO ASIRIKWA MUGENDI ( DECEASED)**

**BETWEEN**

**SOPHIA ABITIKA ASEKA ..... PETITIONER**

**AND**

**RUTH ABIRIKA ASEKA ..... BENEFICIARY**

**AND**

**DIANA MOYI ASEKA ..... APPLICANT**

**RULING**

1. Diana Moyi Aseka( the applicant) seeks the following orders in a application dated 10<sup>th</sup> June 2024;
  - i. That the applicant be granted leave to substitute the beneficiary Ruth Abitika Aseka, out of time
  - ii. That the entry number 6 dated 11.1.2024 on parcel number LR No. East Bukusu/ North Sang'alo 3348 be rectified.
  - iii. That fresh entries be registered to indicate the share allocated to Ruth Abitika Aseka to measure 50ft by 150ft as per the certificate of confirmation of grant dated 26<sup>th</sup> September 2022.
  - iv. That costs be in the cause.
2. The application is supported by the affidavit of Diana Moyi Aseka. She depones as follows: she is a legal representative of the late Ruth Abitika Aseka, a beneficiary, having been issued with letters of administration ad litem in January 2023 vide Bungoma CMCC No. 5 of 2023. In an amended certificate of confirmation of grant dated the 13<sup>th</sup> of July 2023, the court distributed 50ft by 150ft to Ruth Abitika Aseka. The plot comprised a parcel of land they had purchased and had been in



possession for over 30 years. The boundaries of the plots are well-defined on the ground and distinct from the neighbouring plots. When the grant was registered at the Lands Registry, on the 11<sup>th</sup> of January 2024, entry No. 6, did not reflect the correct position as per the grant issued by the court. Ruth or her legal representative were not aware of the subsequent amendment of the grant. The parcel issued to Ruth has been reduced from 50ft by 150ft to 50ft by 100 ft. Consequently, the size of the plot has been reduced on the ground, with part of what they have been in possession of and entitled to be hived off.

3. The application was opposed. Sophia Khavere Mugendi depones as follows in her affidavit dated 25th June 2024: by a copy of the amended certificate for confirmation of grant dated 13th July 2023, the court distributed a 50ft by 100ft parcel of land to Ruth Abitika Aseka and not a 50ft by 150ft one. On or about July 2022, the applicant fenced off her property, and its boundaries have remained intact to this day. The entry made on 11<sup>th</sup> January 2024, entry No. 6, is consistent with the amendment to the confirmation of grant dated 13th July 2023. The applicant had been aware of every step taken in amending the certificate of grant. Ruth did not purchase a parcel of land measuring 50ft by 150ft. In a further affidavit dated 12th October 2024, the petitioner depones that Ruth was entitled to 50 x 100 ha, as evidenced by the application for consent from the Land Control Board and the letter of consent dated 28th July 1988 from the Land Control Board, which approved the subdivision of Land Parcel No. East Bukusu/ North Sang'alo/ 153, belonging to Alfayo Asirikwa Munge'ndi, into five portions measuring 0.05 ha each in the names of the five persons, including the beneficiary (see SKM 1 and SKM 2). She explained that her brother had intermeddled with the free estate of the deceased by causing the subdivision of East Bukusu/ North Sang'alo/ 2782 into parcels numbered East Bukusu/ North Sang'alo/3348 and 3349. She was granted rectification of the certificate of the grant on 13th July 2023, wherein 50ft by 100ft was hived off from parcel number 2782 in favour of the beneficiary. In her bid to distribute the estate, she instituted ELC Case No. E007 of 2023 in the Chief Magistrate's Court decrying the intermeddling. The proceedings culminated in a consent order between her and her brother dated 23rd November 2023 that all new parcel numbers emanating from land Parcel No. East Bukusu/ North Sangalo/ 2782, including the suit property, be registered in the name of the deceased. She proceeded with the consent order attached to the relevant LRA Form to the Land Registrar in order to effect the terms of the said court order, but they were reluctant as one subdivision in parcel number East Bukusu/ North Sangalo/3349 had a charge held by Equity Bank registered against the title in 2016. She seeks that the court directs the Lands Office to restore East Bukusu/ North Sangalo/ 2782. She sold portions of parcel number 2782 to Teresa Nakhangu Wati and Wanambisi Stephen Juma.
4. Parties have filed written submissions. The applicant reiterates the contents of her affidavit in her submissions. She further submits that the documents exhibited indicate her share was 50ft by 150ft. The shares are inconsistent and at variance. If there were amendments, they were made in Ruth's absence, against a deceased party.
5. The respondent, in her submissions, provides a detailed background of the land parcels left by the deceased, specifically land parcels East Bukusu/North Sangalo/2783, 155 and 2782. The respondent identified two issues for consideration: whether the suit property can attract any order from this court, and whether the Land Registrar should restore East Bukusu/North Sangalo/2782. Regarding the first issue, it was submitted that the suit property was found to be a product of intermeddling in CM's Criminal Case No. 103 of 2014. Reliance was placed on section 45 of the *Law of Succession Act*, which addresses intermeddling with the free property of the deceased, as well as sections 55 and 82 of the *Law of Succession Act*, which stipulate that no immovable property of the deceased will be sold before the



confirmation of the grant. Furthermore, reliance was made on the case of *Re Estate of Paul M'Maria (Deceased)* eKLR, where the court held as follows;

“The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the *Law of Succession Act* is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of the *Constitution*. See the claw-back provision of the *Constitution* that:-

40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

What Lord Denning stated in the case of *MCFOY vs. United Africa Co. Ltd* (1961) 3 All ER 1169- is true of this case, 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 here. It will collapse.”

6. It was further submitted that the application of the law and Constitution, particularly the subdivision of parcel number 2872 into the suit property and parcel number 3349, contravened the *Law of Succession Act* and constituted an illegality, thereby preventing the court from making any consequential orders regarding the suit property. Regarding the second issue, reliance was placed on Lord Denning's sentiments in the case of *Mcfoy vs United Africa Co. Ltd* (1961) 3 All ER1169 (supra). The only sensible consequence of the intermeddling is that parcel number 2782 should be restored. Thus, Equity Bank cannot claim to have rights arising from any illegality concerning the suit property. The respondent urged that parcel number 2782 should be restored and that section 73 of the *Probate and Administration Rules* empowers this court with the inherent authority to make such orders as may be necessary for the ends of justice. The court should consider the plight of the purchasers, the intermeddling, and the consent order in making its ruling.

## Determination

7. I have carefully considered the application, as well as the rival affidavits and written submissions. There is no dispute that Ruth A. Aseka purchased land from the deceased, and her interest in the parcel of land was declared a liability to the deceased's estate in the petition filed by the petitioner. It is also undisputed that when the grant was confirmed on 15.10. 2009, her portion was indicated as 50ft by 150ft. Ruth's portion of land was in parcel number E. Bukusu/N. Sangalo/2782, which originated from parcel Number East Bukusu / North Sangalo/153. According to the petitioner, this parcel of land was subdivided into parcels 3348 and 3349 due to intermeddling by her brother. She sued her brother in CM's ELC No. E007 of 2023, and they entered a consent stating that the suit land should be returned to the deceased's name. This has not yet happened, as parcel number 3349 has a charge held by Equity Bank.



8. The applicant seeks to be granted leave to substitute the late Ruth Aseka, her mother. She has exhibited a grant ad litem appointing her as a personal representative of the estate of the deceased Ruth Aseka. This prayer is allowed. The applicant also seeks that entry No. 6, dated 11.1.2024, on parcel number 3348, be rectified and that fresh entries be registered to indicate the share allocated to Ruth Aseka Abitika. In her further replying affidavit, the petitioner exhibited an application for the consent of the land control board on parcel number 153. According to the said application, the subdivision, which included the applicant's parcel of land, was 0.05 hectares, measuring 50 ft by 100 ft. The petitioner sought to have the measurements rectified in her application dated 25.5.2023. This application was granted. In my view, the petitioner corrected an error in the measurements on the parcels of land as indicated in the documentation at the lands office that she has exhibited. The applicant's application lacks merit on prayers 2 and 3.
9. On the consent of the parties in CM's ELC Case No E007 of 2023, the parties must approach the appropriate court for suitable orders. This cannot be achieved through written submissions. I decline to grant prayers 2 and 3 of the application dated 10.6.2024. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27<sup>TH</sup> DAY OF MAY 2025.**

**R.E.OUGO**

**JUDGE**

In the presence of:

Mr. Murunga h/b Mr Were -For the Applicant

Mr. Wangila -For the Respondent

Wilkister - C/A

