



REPUBLIC OF KENYA



**In re Estate of Muchele Makenga (Deceased) (Succession Cause
15 of 2013) [2024] KEHC 10449 (KLR) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 15 OF 2013**

DK KEMEL, J

AUGUST 23, 2024

IN THE MATTER OF THE ESTATE OF THE LATE MUCHELE MAKENGA

IN THE MATTER OF

KERESENJA KHISA MUCHELE OBJECTOR

AND

CHARLES MUKHEBI WAFULA 1ST PETITIONER

FREDRICK WANJALA NYONGESA 2ND PETITIONER

AND

JOHN SIMIYU MUJUMA 1ST PROTESTOR

SEBENCIA NAFULA NEKESA 2ND PROTESTOR

RICHARD MAELO MUNJUMA 3RD PROTESTOR

JUDGMENT

1. The grant of letters of administration in respect to the estate of the deceased herein were issued on 15th January 2019. Upon filing of summons for the confirmation of the grant dated 27th January, 2021, the 1st Protestor with the authority of the 2nd and 3rd Protestors herein filed an Affidavit of Protest sworn on 10th May 2022, protesting the confirmation of the grant on the grounds that Munjuma Njiure was a liability to the estate of the deceased herein. According to him, the 1st is the son of the Munjuma Njiure; the 2nd Protestor is the widow to Gordon Waswa Munjuma, son of Munjuma Njiure, and the 3rd Protestor is his grandson. He averred that his father, Munjuma Njiure, purchased 5.5 Ha from land parcel L.R No. E. Bukusu/W. Sang'alo/196 from the deceased in the year 1969 and attached a sale agreement for the sale. He averred that they have lived and used the said 5.5 Ha since his birth and that their late mother was buried on the said parcel. Further, that the mode of distribution as advanced by the Petitioners has failed to make provisions for the estate of Munjuma Njiure.



2. In response, the Objector herein filed her replying affidavit sworn on 14th July 2022, averring that the allegations by the Protestors herein are false and without basis. According to her, she was not aware of any dealings between her late father and one Munjuma Njiure regarding the purchase of any portion from land parcel L.R No. E. Bukusu/W. Sang'alo/196 and if there exists any evidence in writing, it ought to be availed. She dismissed the availed letter from the Chief as the same failed to capture the land description/title, acreage, the amount and the exact date of purchase. She averred that the application by the Protestors is an afterthought and it ought to be dismissed.
3. With the leave of the Court, the 2nd Protestor filed a supplementary affidavit sworn on 9th January 2024 averring that her father-in-law purchased 5.5 acres from the deceased herein and not 5.5 Ha.
4. The affidavit of Protest was canvassed by way of viva voce evidence.
5. PROT-PW1 was John Simiyu Munjuma, who testified that he is the 1st Protestor herein. He relied on his affidavit of Protest dated 10th May 2022 together with the annexures and his witness statement recorded on 6th September 2022 as his evidence-in-chief. He also relied on his list of documents dated 12th September 2022 and further list of documents dated 7th July 2023. According to him, his father bought land from the deceased herein measuring 5.5 acres and that they were not considered in the mode of distribution.

On cross-examination by the Objector, he testified that he was born in 1976 and that the land in question was purchased in 1969 with clan elders as witnesses but who are all dead. He stated that the purchase price was paid in form of animals numbering 13 cows but that the same was not captured in his recorded witness statement. He insisted that the acreage of land purchased was 5 ½ acres and that the cows were handed over to the deceased herein in one meeting. He added that he is not certain if a survey was conducted but he lived on the parcel all his life and that there are boundaries. He testified that his father's remains were buried at the home of his first wife and that they lack a title to the land.

On cross-examination by the Petitioners, he testified that his father moved onto the land in 1972 and that no complaints were registered when their late mother's remains were buried on the land. He insisted that his father purchased 5 ½ acres from the deceased herein and that the family minutes capture their issue over the land.

On re-examination, he stated that he was born in 1976 on the said suit land and that he learnt that the purchase price was 13 cows which were duly paid to the deceased herein. He reiterated that his mother died in 2000 and was buried on the same land without any objections from the deceased and his family. Further, he reiterated that the minutes as availed in his list of documents dealt with the issues of their occupation on the land.

6. PROT.PW2 was Sabencia Nafula Wekesa who testified that he is a clan elder and relied on his recorded statement dated 29th June 2023. He testified that he is in support of the affidavit in Protest and that since he married from the family of the Protestors, he was aware that the land belonged to Munjuma.

On cross-examination by the Objector, he stated that he married from the family of the Munjuma in 1986 and that he was informed by his mother-in-law that they purchased the land in 1969 measuring 5 ½ acres and not hectares. According to him, he learnt that his father-in-law purchased the land with 13 cows but that he does not have the sale agreement. He testified that he does not know much about the demarcation but he is aware of the presence of a boundary. He stated that the remains of his mother-in-law were buried in the said portion in the year 2000 and that four other elders witnessed the transaction but have since passed on. He added that he is a village elder and that he is aware that the law requires agreements be in writing but the transaction in this case was done orally. He testified that he is not aware that the land was registered



On filing a further affidavit sworn on 9th January 2024, which he wished to rely upon as his evidence in chief, this Court gave the Objector and Petitioners a chance to cross examine him on the said document.

On cross-examination by the Objector, he stated that the actual size of the land he speaks of is 5.5 acres and not hectares and that he was not present when the sale agreement occurred.

On cross examination by the 1st Petitioner, he stated that there was an error in the size of the land purchased from the deceased and that the correct size is 5.5 acres.

On re-examination, he stated that the size of land is 5 ½ acres and that the remains of his mother-in-law are buried on the said portion and that the land was sold on basis of trust.

7. PROT.PW3 was Richard Maelo Munjuma who testified that he is the 3rd Protestor herein and relied on his witness statement dated 6th September 2022 as his evidence in chief. According to him, he is opposing the distribution as the same does not cater for them and their rights. He stated that he was born on the 5 ½ acres that his father purchased from the deceased herein. He further relied on the affidavit of the 1st Protestor.

on cross-examination by the Objector, he stated that the land was purchased in 1969 and that he has not seen the sale agreement between the deceased and his grandfather. He recalled that old boundaries were set up by the deceased herein and his grandfather but on a date, he could not recall.

On re-examination, he testified that there was an agreement over the land in which his grandfather purchased with 13 cows from the deceased but subdivision was not effected as it is one parcel.

8. PROT-PW4 was Dominic Barasa who testified that he is the author of the family minutes dated 20th February 2011 which he produced in Court as Prot.Exh. 3. According to him, the Petitioners were present in the meeting which agenda was shelving off 5 ½ acres from LR. No. E/Bukusu/West Sangalo/196 and that the names of the Protestors were listed as they are the children of the deceased purchaser.

On cross-examination, he stated that he was born in 1990 and that he was not aware of when exactly the land was sold. According to him, he participated in the writing of the minutes following the death of one Mike Sululu. He testified that the minutes of 2010 were in regard to the “lufu” ceremony and that he is of the same clan as the deceased herein. He stated that during the meeting there were five family members and a minor and that the said family minutes were signed by the members present. He added that he was not informed about the plot that was sold in 1969, was shown no sale agreement or the price of purchase, and that the said minutes are silent on the same.

On cross-examination by the 1st Petitioner, he stated that the minutes of 2010 relates to the “lufu” ceremony and that he was not the author of the same.

On cross-examination by the 2nd Petitioner, he stated that he the 2nd Petitioner was present during the family meeting of 20th February 2011 but he did not sign the minutes and that the agenda of that meeting was to get the family members to initiate succession proceedings.

On re-examination, he stated that he is the author of the minutes dated 20th February 2011 and that the land in issue was East Bukusu/West Sangalo/196 owned by the deceased herein. He confirmed that the 2nd Petitioner was present during the said meeting and that they discussed about the issue of the purchasers.

9. PROT.PW5 was Wilson Wanyonyi who testified that he knows the family of the deceased herein and that he is the author of the letters dated 6th August 2000, 7th March 2005 and 20th February 2010 respectively. He produced the said letters in Court as Prot. Exhbs 1, 2 and 4 respectively.



On cross-examination by the Objector, he stated that Prot. Exhibit 4 are minutes regarding a deceased called Michael Sululu and not the deceased herein. He concurred that the said minutes show the discussion was with regard to parcel East Bukusu/West Sangalo/196 and that the same do not discuss the deceased by name of Munjuma Njiure. He further testified that the said minutes are not signed with the name of the chairman who conducted the said meeting not indicated. According to him, he prepared Prot. Exhibit 1 as his signature and that name appears on the said document. The document mentions that name of Munjuma Njiure but the minutes do not indicate that Munjuma Njiure had purchased land from the deceased herein. He confirmed to the Court that he never saw the sale agreement between the deceased herein and Munjuma Njiure. He testified that the minutes are with regard to shaving off land by the deceased's six sons. He confirmed that the deceased herein sold part of his land to Munjuma Njiure but does not have the sale agreement to ascertain the same. He stated that he was the clan chairman from 2005 to 2021 but he did not see any sale agreement. He confirmed that the said minutes do not capture the alleged acreage and details of the land purchased nor does it indicate the purchase price. He confirmed that there was a clan chairman when the said purchase occurred and that in 1969 he was 14 years old.

On cross-examination by the 1st Petitioner, he stated that the 1st Petitioner attended the meeting held on 6th August 2000 and that he forgot to sign the minutes. He testified that the agenda of the meeting held of 6th August 2000 was to discuss the inheritance of the deceased's land.

On cross-examination by the 2nd Petitioner, he stated that the family of Munjuma Njiure came to claim the land.

On re-examination, he stated that the deceased's land was purchased by Munjuma who paid 13 cows and that during the meeting their interest of 5.5 acres was considered. He confirmed that both the Objector and Petitioners herein were present in the meeting and that he is the author of the letter dated 7th March 2005.

10. The Protestors thereby closed their case. Next was the Objector's case.

11. OB-PW1 was Keresenja Khisa Muchele who testified that she is the Objector herein. She relied on his replying affidavit dated 14th July 2023 and adopted her recorded statement dated 11th February 2022 as her evidence in chief. She testified that she is only interested in getting her share of her father's estate and that she does not know the Protestors herein.

On cross examination by the Protestors, she testifies that she has never built on land parcel 196 and that she was born in 1962. She stated that the deceased herein died when she was 6 years old and that she never saw any cows being brought to their home. She concurred that the deceased sold land to Munjuma Njiure in 1968 measuring 2 acres and that title was obtained. She confirmed that the late Munjuma and his wife were all buried on the land they bought. She confirmed that the confirmed grant shows the family of Munjuma was catered for but she was never involved in the succession proceedings. She stated that she applied for the revocation of the grant and that she is currently pursuing her own share. She concurred that she did attend the "lufu" ceremony for one Micheal Sululu and that the family of Munjuma raised their claim of 5.5 acres but did not know that the same was to be hived from their family land. She confirmed that she has seen the family minutes dated 20th February 2011, Prot. Exhibit 3 and is not aware who shaved off extra land to Munjuma's family apart from 2 acres.

On re-examination, she stated that her father only sold 2 acres to Munjuma family and not 5.5 acres as alleged. She confirmed that she is yet to see any sale agreement and that she did not witness the sale agreement. She insisted that he is interested in her father's estate as she was not provided with any share.

12. At the close of the Objector's case, the Petitioners case proceeded.



13. PET-PW1 was Charles Mukhebi Wafula who testified that he is the 1st Petitioner herein and relied on his response to both the Objector and Protestor dated 14th July 2022 and his recorded statement dated 11th February 2022 as his evidence in chief. He testified that the Court should allow the Objector's case and previous grant be maintained. He confirmed that the Objector ought to be granted her share of the deceased's estate. He beseeched this Court to dismiss the Protestors case as it is not proved.

On cross-examination by the Objector, he stated that there is no evidence of purchase of 5.5 acres from the deceased by the family of Munjuma as no sale agreement was availed before this Court. He concurred that the Objector only seeks to inherit their father's estate.

On cross-examination by the Protestors, he stated that he is the grandson of the deceased herein and that he was born in 1976 thus could not testify to what occurred in 1969. He stated that as per the grant obtained in 2014, the family of Munjuma was provided for in the deceased's estate but that the same was revoked as the deceased was excluded. He confirmed that he was the one who instituted the succession proceedings and that he included the Protestors as beneficiaries in the grant out of fear and threats which he reported to the chief. He confirmed to have seen the minutes dated 6th August 2000 and that he saw his name, also the minutes of 20th February 2011 but he was not present. He denied the allegations that the Protestors were listed as liabilities of the estate of the deceased in the meeting of 20th February 2011.

14. PET-PW2 was Fredrick Wanjala Nyongesa, testified that he is the 2nd Petitioner herein and he adopted and relied on his affidavits and witness statements filed by his co-Petitioner. He stated that he is aware of the case brought by the Objector and Protestor herein.

On cross-examination by the Objector, he stated that he saw his name on Prot. Exhibit 1 but that there is no signature on the said minutes of 20th February 2000. He insisted that he always signs against his name and that he did not see any sale agreement made by his grandfather and the late Munjuma. He confirmed that the Objector herein is his aunt and that he has no objection to her claim.

On cross examination by the Protestors, he stated that he did not file any affidavits denouncing attending the family meetings and that at the time of the sale, he was not yet born. He stated that he never signed for the grant made in 2014 and was in no position to tell if the Protestors were provided for in the revoked grant. He confirmed that he never filed any response indicating the presence of wrong beneficiaries in the said grant and that he was present in the meeting conducted on 20th February 2010 thus aware of the claim by Munjuma family for 5.5 acres as it was made.

15. I have carefully considered the affidavit in Protest, affidavits in response, statements tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the written submissions, I take the following view of the matter. The issue for determination herein is whether the Protestors prayers are merited.

16. In the case of Johnson Muinde Ngunza & Another vs. Michael Gitau Kiarie & 12 Others (2017) eKLR, the Court stated that:

“The *Law of Succession Act* recognizes the purchaser's rights and in support of these submissions the said (sic) the Law of Succession defines a “Purchaser”. Purchaser according to the Act means a purchaser for money or money's worth.”



17. Similarly, in *Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others* (2017) eKLR, the learned judge observed that:

“This Court's view before distribution of the estate of the deceased under Section 71 of the *Law of Succession Act* Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution.”

18. In this case, the interests of the Protestors were those of persons who had entered into sale agreements with the deceased for the sale of portions of the lands forming part of the deceased's estate. If there were such agreements, then their interests can be legitimately considered in distributing the estate of the deceased. In dealing with a similar matter, Makhandia, J (as he then was) in *Titus Muraguri Warothe & 2 Others vs. Naomi Wanjiru Wachira Nyeri HCSC No. 122 of 2002* held that:

“In the instant case, the applicants are purchasers for value of a portion of the deceased's estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land to the applicants and he had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The respondent who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased, pursuant to the sale agreement and as required by law made an application to the Land Control Board for necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises...Had the applicants been made aware of the application for the confirmation by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of these interests. Further, had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is, therefore, the grant was obtained fraudulently by the making of a false statement and concealment from court of something material to the cause. The respondent knew of the applicants' interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for confirmation of the grant. In her distribution proposal she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with full knowledge of the respondent and since then they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years.”

19. The Court appreciates that in this case, there was evidence that the Protesters herein took possession of the 5.5 acres in question, farmed and even buried the late Munjuma and his wife in the said portion. It is further noted that the sale was vigorously contested by the parties with the Objector alleging that the



deceased only sold to 2 acres to Munjuma but none of the parties availed the requisite sale agreement to prove whether the late Munjuma purchased any land from the deceased herein. The Protestors availed witnesses who testified to holding a meeting where it was agreed that the family of the deceased was to shave off 5.5 acres which was to be given to the family of Munjuma. The burden of proof in a suit or proceeding, lies on that person, who will fail if no evidence at all were given on either side. See also Section 107 of the Evidence Act. The Objectors and Petitioners never availed evidence to dispute the fact that the issue with regard to the 5.5 acres was to be given to the family of Munjuma was not discussed. Petitioner PW1 confirmed that he was the one who instituted the succession proceedings in this matter and that he included the Protestors as beneficiaries in the grant out of fear and threats which he reported to the chief. No such evidence was availed in form of a witness, in this case the chief, to testify to the fact that such a report was made. Despite the minutes not being detailed as to the exact land details and purchase price, it is evident for the minutes availed by the Protestor PW5 and Objector that a meeting was held to discuss the issue of the Munjuma family purchase.

20. On perusal of the Court record, it is elaborate that the introductory letter from the chief listed the Protestors herein as liabilities to the estate of the deceased. The Objector herein in her affidavit is support of the summons for revocation alleged that her deceased father only sold 2 Ha to Munjuma. If this was the case, then the 2Ha could probably be around the 5.5 acres now claimed by the Munjuma family.
21. Based on the minutes availed by Protestor PW5 dated 20th February 2011, it is clear that a family meeting was held by the clan of the deceased's family to strategize the way forward regarding the succession of the estate of the deceased. The 1st Petitioner who attended the meeting brought it to the attention of the clan about the individuals who approached him noting that they had purchased land from the deceased. A list was generated and the names of the Protestors herein were listed. The 1st Petitioner alleged that he did not attend the said meeting thus could not have signed the minutes but he failed to prove that his signature on the said minutes had been forged. There is no evidence that he had ever lodged a complaint with the police over his forged signature.
22. It is presumed that the chief is well familiar with the family of the deceased person and can inform the Court of the beneficiaries left behind by the deceased and any other relevant information that will ease the petitioning process. In this situation, a "lufu" ceremony conducted on 20th February 2010 where a discussion arose with regard to the portion as purchased by Munjuma and it was duly noted that the family of Munjuma claims 5 ½ acres which ought to be factored during the succession process.
23. There was therefore sufficient proof to the required standards. That proof was to come from the Protestors. Justice Mativo (as he was then) in *Hellen Wangari Wangechi v Carumera Muthini Gathua* [2005] eKLR, observed as follows in similar circumstances: "It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. As observed above, the Appellant made allegation in the plaint, hence she was under an obligation to support the allegation. For example, since there was a denial in the defence, it was necessary to adduce evidence to show how the amount of Kshs.316,000/- was arrived at."
24. From the foregoing, it is certain that there was reliable evidence from the Protestors to prove with the necessary degree of certainty required that they were liabilities to the estate of the deceased and that they have a legitimate claim of 5.5 acres which ought to be factored in the mode of distribution schedule for purposes of confirmation of grant. Further, it is noted that in the previous certificate of confirmation of grant issued on 14.5.2014 and which was revoked, some of the Protestor's family had been catered for in the schedule of distribution and hence this puts paid to the Petitioners and Objector's claims that they do not know about the claims by the protestors' family. The Protestors have lived on the land for a long period and that the remains of their parents have been interred thereon. The Petitioners thus



cannot turn a blind eye about their presence on the land. They must now provide for them as they are a liability to the estate with a share of five and half (5.5) acres out of parcel number E. Bukusu/W. Sang'alo/196.

25. In view of the foregoing observations, it is my finding that the Protestors Protest dated 10th May 2022 has merit. The same is allowed. The summons for confirmation of grant dated 27th January, 2021 are hereby allowed subject to the Protestors' family's share of five and half acres (5.5) being factored and which will be held by John Simiyu Munjuma in trust for himself and Protestors' family. A certificate of confirmation is to issue in that regard. Each party to meet their own costs.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF AUGUST 2024.

D. Kemei

Judge

In the presence of :

Simiyu for Alubala for Objector

Charls Mukhebi 1st Petitioner

Fredrick W Nyongesa 2nd Petitioner

No appearance Mbugua for 1st, 2nd and 3rd Protestors

Kizito Court Assistant

