



In re Estate of Robert Syuma Kalui (Deceased) (Succession Cause E006 of 2021) [2024] KEHC 11758 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
SUCCESSION CAUSE E006 OF 2021**

RK LIMO, J

SEPTEMBER 30, 2024

**IN THE MATTER OF THE ESTATE OF ROBERT SYUMA KALUI (DECEASED)
IN THE MATTER OF THE CHIEF MAGISTRATE COURT
AT KITUI IN SUCCESSION CAUSE NO 203 OF 2019**

BETWEEN

HENRY NGUMBAU SYUMA PETITIONER

AND

DAMARIS KAVETE SYUMA OBJECTOR

RULING

1. This cause relates to the estate of the late Robert Syuma Kalui (deceased) who died intestate on 22nd March 2005.
2. The petition for letters of administration of his estate was lodged in the lower court vide Kitui CM's court Succession Cause No. 203 of 2019 where a grant was issued to Henry Ngumbau Syuma on 26th January 2020.
3. The appointed administrator, one of the sons of the deceased listed the following as the surviving dependants of the deceased namely;
 - i. Philomena Kyandi
 - ii. Mary Syuma
 - iii. Henry Ngumbau Syuma
 - iv. Dominic Mbutu Syuma
 - v. Philip Syuma



- vi. Museo Syuma
 - vii. Munaniye Syuma
 - viii. Mutanu Syuma
 - ix. Kiseko Syuma
 - x. Mbai Syuma
4. The following dependants were listed as deceased;
- i. Rose Mbalu Syuma (deceased)
 - ii. Caesa Syuma (deceased)
 - iii. Queen Syuma (deceased)
5. The following were listed as the assets;
- i. Kyangwithya/Mutune/154
 - ii. Kyangwithya/Mutune/638
 - iii. Kyangwithya/Mutune/685
 - iv. Yatta B2/Kwavonza/254
6. The following were the listed liabilities of the estate;
- i. ICD Loan for Plot 4096/66 –Kshs. 1,340,000/=
 - ii. Mutiso Loan – Kshs. 450,000/=
 - iii. Christine Museu &
Josephine Mutanu Loan – Kshs. 680,000/=
 - iv. Mary Syuma, Ngumbao Syuma
& Dominic Syuma Loan – Kshs. 3,000,000/=
- Total: Kshs. 4,720,000/=
7. The grant issued to the administrator was confirmed on 9th July 2020 and the estate distributed as follows;
- i. Kyangwithya/Mutune/154
 - a. Dominic Mbutu Syuma
 - b. Philip M. Syuma
 - c. Erick Mbai Syuma Equal shares
 - d. Mary N. Syuma
 - e. Sofia Kizeko Syuma
 - f. Philomina Kyandi
 - ii. Kyangwithya/Mutune/685



- a. Caesar K. Syuma
- b. Efrance Muname Syuma Equal Shares
- iii. Yatta B2/Kwavonza/254
 - a. Henry Ngumau Syuma - Whole
- iv. LR No. 4096/66
 - a. Dominic Mbutu Syuma
 - b. Christine Museo Syuma
 - c. Mary N. Syuma In Equal Shares
 - d. Josephine Muanu Syuma
 - e. Henry Ngumbau Syuma
- v. Kyangwithya/Mutune/638
 - a. Eric Mbai Syuma In Equal Shares
 - b. Henry Ngumbau Syuma
- 8. Damaris Kavete Syuma (now deceased) the applicant herein vide summons for revocation of grant dated 30th August 2021 asked this court to have the grant revoked and her main reason is that she was the second wife to the deceased and that the administrator who is the respondent in this application never involved her and her children. She further deponed that the property known as Plot No. 4096/66 does not form part of the estate and that the property is the subject of a dispute pending in ELC court.
- 9. She further deponed that the estate is in excess of Kshs. 50 Million rendering it beyond the monetary jurisdiction of the lower court.
- 10. In her supporting affidavit sworn on 30th August 2021 the applicant exhibited a marriage certificate showing that her marriage to the deceased was solemnized on 7th January 2001.
- 11. She further averred that her marriage to the deceased was blessed with the following issues of marriage namely;
 - i. Stephen Kinyua Syuma
 - ii. Sellina Kavutha Syuma
 - iii. Benjamin Syuma
 - iv. Priscah Ngina Syuma
- 12. She deponed that the deceased prior to his demise owned Plot No. 45 Kalundu Market & Plot No. 4096/66 – Kitui Township.
- 13. She averred that the deceased transferred Plot No. 45 – Kalundu Market to the first wife Rose Mbalu Syuma while Plot Number 4096/66 was transferred to her.
- 14. She faulted the 1st house for being uncomfortable with that arrangement and she claimed that the deceased put up a matrimonial home for her at Kyangwithya/Malutu/82 where she stated that she cohabited with the deceased peacefully.



15. At the trial, the applicant insisted on oath that she was the 2nd wife of deceased having initially married under Kamba Customary Marriage in 1978 before later solemnizing the marriage in Mulutu Catholic Church.
16. She told this court that the children of her co-wife and the 1st home left her out and her children in the petition for letters of administration of the estate of the deceased and the distribution of the estate thereof.
17. She stated that the cause in the lower court was filed without her knowledge and was only alerted about it by the Area Chief.
18. She maintained that the only claim she has over the estate of the deceased is the property left in the name of the deceased stating that the first wife got a portion where she settled with her children just like she also settled at Mulutu with her children.
19. She further maintained that Plot 66 in Kitui Township was transferred to her lawfully by the deceased when he was alive.
20. The applicant's position was supported by her son Stephen Kinyua Syuma (PW2). He stated that her mother (PW1) transferred Kyangwithia/Mulutu/82 measuring 5 acres to him. He claimed that he got 3 acres while his young brother got 2 acres.
21. Benjamin Syuma (PW3) (who substituted the applicant) also testified and stated that he was a son to the deceased and that the deceased applicant was his mother who brought him up and his siblings in Mulutu. He supported his late mother's claims over the estate insisting that he was a son to the deceased too.
22. In his written submissions done through counsel, the applicant contends that there was concealment in the petition for letter of administration.
23. The applicant points out there was concealment of the fact that the property shown Plot No. 4096/66 Kitui Township was a subject of a dispute in ELC court vide Kitui CM's Court Land Case No. 77 of 2019 (formerly Machakos ELC No. 30 of 2007). The applicant has given a chronology of events and procedures that saw the property change hands from the deceased in this cause to the deceased applicant.
24. The respondent has opposed this application through a replying affidavit sworn on 14th September 2021.
25. The respondent, Henry Ngumbau Syuma, terms the application herein baseless contending that he and siblings are even older in age than the deceased applicant (Damaris Kavete Syuma)
26. The respondent depones that the deceased applicant was not a wife to the deceased but an employee of his late mother in a club known as "Thome wa Mutune" in the late 70s and early 80s.
27. He contests the allegation of concealment stating that he filed everything in the petition for letter of administration.
28. He also contests the claim by the deceased applicant that the property known as Kitui Township No. 4096/66 belongs to her. He claims that the transfer form and other documents filed by the deceased applicant are forgeries.
29. He claims that parcel No. 4096/66 was developed with the efforts of the family of the deceased with total exclusion of the deceased applicant.



30. He denies the deceased applicant's contention that parcel number 45 Kalundu parcel was transferred to his mother claiming that his mother died on 22nd September 2000. He claims the parcel belonged to her and was not gifted to her by the deceased in this cause.
31. He claims that the deceased applicant conducted what he terms "secret wedding" with the deceased in 2001. He claims that his father was unaware that the deceased applicant was married elsewhere when he married her.
32. He contests the claim that the lower court lacked monetary jurisdiction contending that there was no valuation done to establish that the estate of the deceased was valued at Kshs. 50 million. He has however, not stated the actual or approximate value of the estate in this cause.
33. In his oral evidence in court, the respondent stated that the main contest in this matter is in respect to Plot No. 4096/66 at Kitui Township. He testified that the construction or the development of the plot was done by the family adding that a loan from ICDC was taken in 1968 and that the loan was serviced with efforts of his brother Dominic and other siblings.
34. He claimed that the deceased applicant was employed as a bar maid by his late mother and that when she realized that she was having an affair with the deceased, she was chased in 1982 and she "disappeared".
35. He however, conceded that the deceased settled her in Plot No. Kyangwithya/82 in 1985.
36. He denounced the late applicant and her children stating that he does not recognize her and her children.
37. He further conceded that when he filed the petition for letters of administration, he did not disclose that plot number 4096/66 was subject of a land dispute pending at ELC court.
38. Efrance Munanie Syuma (DW2) testified and supported the position taken by respondent (DW1) and denied knowledge that the deceased applicant was a 2nd wife to the deceased.
39. Kimanzi Komu (DW3), testified that he was a neighbour and a clan member to the deceased. He stated that the deceased applicant was a wife to the deceased and that the deceased settled her in Kyanguthya/Mulutu/82 to avoid clashes with the first house.
40. He however, retracted the statement acknowledging that the deceased applicant was married to the deceased. He changed that position and stated that he was not aware of the marriage and claimed that the deceased applicant had been married to someone he did not know.
41. When pressed under cross-examination, he changed the position again stating that the deceased applicant may have been married to the deceased but the dowry was not paid. He conceded that the deceased in this cause lived with the deceased applicant in Mulutu and that the 1st wife had died by that time.
42. In his written submissions through learned counsel M/s Katunga Mbuvi & Co. Advocates, the applicant takes issue with the deceased applicant for filing this application in this court stating that this court no longer enjoys exclusive jurisdiction to entertain the application for revocation of grant. According to the respondent the magistrate's courts also have concurrent jurisdiction to entertain the application for revocation of grant. He points out that Sections 23 & 24 of the *Magistrates Courts Act* as read with Section 49 of *Law of Succession Act* gives the magistrate courts jurisdiction to deal with P & A matters where monetary value is Kshs. 20 million or less.
43. The respondent contends that there was no need for the applicant to come to this court and should have filed this application in the lower court.



44. The respondent contends that this application is improperly placed before this court and that this court lacks original jurisdiction to entertain it.
45. The respondent further contends that the deceased applicant never filed objections when there was a gazette notice dated 6th December 2019 inviting objections. He submits that the applicant was indolent and that to that extent the application before court is incompetent.
46. The respondent contends that he is unaware of the marriage of the applicant by the deceased and that no witnesses were availed to show that Kamba rites were performed to ascertain the marriage.
47. The respondent contends that the deceased had a brief romantic relationship with the deceased applicant and claims that the same came to a halt when the deceased discovered that she was no longer his wife.
48. It is further submitted that the deceased applicant changed her name to “Damaris Kavete Syuma” but failed to produce a deed roll to show or prove the change of name.
49. He contends that it is doubtful if the children of the deceased applicant biologically belong to the deceased in this case. He points out the 1st child was born on 1st January 1978 yet the relationship of the deceased and the deceased applicant began in August 1978.
50. The respondent contests the claims by the children of the deceased applicant that they are children to the deceased. He submits that no DNA tests have been tendered and that the children were even born before 7th January 2001 when the marriage was solemnized.
51. He submits that the mere fact that the children bear the name “Syuma” does not mean that they are children of the deceased arguing that they are many other people using the name Syuma. He relies on the case of *E.M.M v I.G.M & Another* [2014] eKLR to support that contention.
52. He further submits that he did not conceal any material fact because when he filed for the letters of administration, the applicant had parted ways with the deceased.
53. He claims that the deceased applicant was not a wife to the deceased in this cause and that there was no need to seek her consent in the petition for letters of administration. He claims that the paternity of the children of deceased applicant were not ascertained and that is why he left them out.
54. He contests the deceased applicant’s claim over parcel No. 4096/66 submitting that it is part of the estate. He faults the applicant for intermeddling with the said property citing the provisions of Section 45 of *Law of Succession Act*
55. He claims that the applicant has not tabled evidence to prove that the value of the estate herein is Kshs. 50 million. He contends that the applicant had the burden of proof and ought to have proved that the lower court lacked monetary jurisdiction.
56. This court has set out both the applicant’s case and the response made. This is an application for revocation of grant. The applicant has invoked the provisions of Section 76 of *Law of Succession Act* (Cap160 Laws of Kenya). The cited provisions drawn lists the grounds upon which a grant can be revoked. The grounds are;
 - “(a) That the proceedings to obtain the grant were defective in substance,
 - b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case,



- c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently...”

57. The application before me is mainly hinged the grounds of concealment or misrepresentation and want of jurisdiction. The issues in this application therefore are basically two namely;

- i. Whether the subordinate court was seized with the jurisdiction to issue the grant.
- ii. Whether there’s concealment in the petition for grant of letters of administration of the deceased.

58.

(i) Jurisdiction

The question of jurisdiction is two fold because whereas the applicant maintains that the lower court lacked jurisdiction to handle the cause because the monetary value of the estate exceeded Kshs. 20 million, the respondent asserts that there is nothing showing that the estate is over Kshs. 20 million in value and that the summons for revocation of grant should have been filed in the lower court because in his view this court lacks jurisdiction.

59. Let me begin with the question of monetary value of the estate. It is true that the applicant herein stated on oath that the value of the estate is over Kshs. 50 million. There was no valuation presented to court to prove that claim. However, a look at the petition filed in the lower court indicates that the value of the estate is above Kshs. 20 million.

60. To start with, the affidavit of the petitioner sworn on 9th February 2018 (Form P&A 5) shows that the listed assets comprising the estate (a) to (d) are valued at Kshs. 20 million. It is instructive to note that the respondent left out the main asset contested in this cause which is that developed property known as Plot No. 4096/66.

61. The omission in my view was mischievous because when it came to the application for confirmation of grant, that property is included and it appears in the certificate of confirmation as among the assets distributed. This court of course notes that there is a current ownership dispute over the parcel pending in the ELC court but the same does not change the finding of this court that it is more probable than not that the value of the estate of the deceased is over Kshs. 20,000,000/= which is the monetary limit of the jurisdiction of the lower court.

62. The finding of this court is not just informed by the Form P & A 5 but the fact that the lower court was being asked to entertain a cause where value of the estate was obviously beyond Kshs. 20,000,000/=, because the estimated value of the assets without factoring in the value of the contested property was 20 million. The contested property is developed and is located within Kitui town.

63. This court for that reason finds that the applicant has established to the required standard in civil law that the subordinate court lacked the jurisdiction to entertain the matter by the operation of Section 48 of *Law of Succession Act*.

64. The finding above disposes off the 2nd limb of the jurisdiction question raised by the respondent. He avers that this application ought to have been filed in the lower court and not this court but with my finding that the lower court lacked the requisite jurisdiction to entertain the cause in the first place, the provisions of Sections 23 and 24 of *Magistrates Courts Act* do not apply. This means that the



respondent's contention that this court lacks jurisdiction to entertain the application now before court is unmerited and is overruled.

65.

(ii) Concealment & Misrepresentation

This court has considered the allegations made by the deceased applicant who unfortunately passed on before this matter was determined. Her main contention was that she was a 2nd wife to deceased and had 4 children with him. She exhibited a marriage certificate as exhibit DKSIB.

66. The fact of marriage is not so much contested by the respondent because though he denies knowledge of the same, he claims that the deceased and the applicant had separated after the deceased reportedly came to know that she was married to someone else. He however, contradicted himself when he stated that the deceased in fact bought her a parcel known as Kyagwithya/82 and settled her there. This is what he stated in examination in chief. "...in 1985 my father (deceased) stated that he had given property at Muluu to Damaris (deceased applicant) and everyone was given a piece of land. The grant in the lower court reflects my late father's wishes ..." He further stated that he did not find it necessary to include the applicant in the administration of the estate because she had already gotten a share of land from the deceased. This confession by the respondent shows that he was aware of the existence of the applicant and her interest in the estate. There was concealment on his part.

67. Besides the above, he also concedes that he is the one who filed the ELC case in Machakos ELC case No. 30 of 2007 before the same was transferred to Kitui and registered in PM's Court ELC case No. 77 of 2019. He knew that the dispute was pending when lodged the petition for letters of administration in the lower court. He had no qualms in including the same property in dispute in his summons for confirmation of grant dated 17th June 2020. He certainly concealed that material fact to the probate court and he cannot hide from that obvious fact.

68. This court is also not persuaded by the respondent's arguments that the applicant's children should be excluded because they have not tendered DNA results to prove that they are biological children of the deceased. The provisions of Section 29 of *Law of Succession Act* provides the definition of who a dependent is. In any event it is not a pre-requisite that for one to be considered a dependant, DNA results is an imperative. What is required is the evidence that a claimant is either a biological child of the deceased or was catered for by the deceased during his lifetime. The respondent's claim over the estate of the deceased after all is also not based on DNA results. What is good for the goose should be good as well for the gander.

69. Besides the above, this court finds that the evidence of the respondent's own witness Kimanzi Komu (DW1) clearly acknowledges that the applicant lived with the deceased in this cause as man and wife. He was a bit cagey when he found himself at cross roads having admitted in his own affidavit sworn on 8th February 2022 that the deceased was married to the deceased applicant. He tried to retract the same but let the cat out of the bag when he stated "...Syuma was interested in Damaris and the wife (meaning the 1st wife) was not pleased so Syuma bought Muluu/82 to settle Damaris.... I swore an affidavit saying that Damaris was married to Syuma (deceased) but I am saying the dowry was not paid. I confirm that the deceased died living with Damaris..."

70. This court finds that, based on the evidence tendered before this court, the deceased applicant was married to the deceased and the respondent concealed that material fact. Furthermore, aware that there was a suit pending in court involving her over an asset he considered part of the estate, he ought to have disclosed that material fact to the subordinate court but did not.



71. The respondent appeared to belittle the status of the deceased/ applicant in the life of the deceased by stating that he & his siblings are older than her in age but that fact even if it's true cannot be used to disinherit her or her children. They did not just appear from nowhere because they are known by the respondents including their place of abode.

72. This court finds that the application dated 30th August 2021 is merited for the reason aforesaid. The grant issued on 26th January 2020 and confirmed on 9th July 2020 is hereby revoked or annulled.

The properties listed in the certificate of confirmation save Plot No. 4096/66 shall revert back to the name of the deceased pending distribution of the same. The other property No. 4096/66 will await determination of ownership by the ELC court on the question of ownership.

Once ownership is established this court will then determine the issue of distribution if the ELC finds that the property belongs to the deceased.

This court further appoints Henry Ngambau Syuma and Benjamin Syuma as the administrators of the estate of the late Robert Syuma Kakui. I will grant them liberty to apply for confirmation before the expiry of 6 months due to the age of this cause.

To avoid delays or disagreements, I will give liberty to either of them to apply for confirmation of grant and those that may be dissatisfied with proposed mode of distribution can file objections or protests. There is no order as to costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 30TH DAY OF SEPTEMBER 2024

Hon. Justice R. K. Limo

JUDGE

