



**In re Estate of the Late Wafula Wepolombia Lumbasi (Deceased) (Succession Cause 195 of 2007) [2024] KEHC 11459 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11459 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 195 OF 2007**

**DK KEMEL, J**

**SEPTEMBER 30, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE  
WAFULA WEPOLOMBIA LUMBASI (DECEASED)**

**BETWEEN**

**RICHARD KHAMALA WAFULA ..... 1<sup>ST</sup> OBJECTOR**

**JOHNSTONE MANDILA WAFULA ..... 2<sup>ND</sup> OBJECTOR**

**DANIEL WEKHANYA WAFULA ..... 3<sup>RD</sup> OBJECTOR**

**AND**

**DISMUS SIFUNA WAFULA ..... PETITIONER**

**AND**

**LINUS WEKESA ..... INTERESTED PARTY**

**JUDGMENT**

1. The deceased herein Wafula Wepolombia Lumbasi died intestate on the 26<sup>th</sup> May 2006 in Bungoma and that he was survived by one wife, 10 sons and 3 daughters. His wife and several of his children are now deceased. The deceased's estate comprised of Land Parcel No. Bungoma/Kiminini/186 as the only asset.
2. The Petitioner herein instituted succession proceedings on the estate of the deceased and that on 6<sup>th</sup> March 2008, he was issued with a grant of letters of administration. He proceeded to file an application for confirmation of grant dated 24<sup>th</sup> April 2011.
3. Vide Summons for Revocation or Annulment of Grant dated 4<sup>th</sup> October 2011, and filed in Court on 4<sup>th</sup> October 2011, the Objectors herein are seeking the revocation/nullification of Grant of Letters of Administration Intestate issued to the Petitioner on 6<sup>th</sup> March 2008 on the grounds that the said Grant



was obtained by concealment of material facts as the Petitioner did not notify the Objectors of the grant making process and that the said grant was obtained fraudulently by making of false statements before the Court.

4. All the applications were eventually abandoned with the parties focusing on the confirmation of grant application dated 24<sup>th</sup> April 2011. Each party filed their respective schedules of mode of distribution for consideration.
5. On 20<sup>th</sup> May 2022, this Court directed the County Surveyor Bungoma to visit Land Parcel No. Bungoma/Kiminini/186 for purposes inter alia: to establish the total acreage on ground; to establish the exact share of each beneficiary on ground and file his respective report in Court.
6. Vide Court directions issued on 18<sup>th</sup> July 2023, the parties opted to proceed with the dispensation of the application for summons for confirmation of grant and protest via viva voce evidence. The matter kicked off for hearing on 13.12.2023.
7. On 13<sup>th</sup> December 2023, OB-PW1, Richard Khamala Wafula testified that the deceased herein was his father. The Court adopted the contents of his sworn affidavit dated 18<sup>th</sup> July 2023 and the annexures as his evidence-in chief. He told the Court that he objected to the Petitioner being the Administrator of his late father's estate and that he has never sold any land to anyone. He told the Court that the Petitioner sold land to the Interested Party. He testified that during the surveyors visit, both the beneficiaries of the deceased and the creditors to the estate of the deceased were present but that the list has not been availed before this Court and those who were present did not sign against their names. He testified that he made his mode of distribution but there was no consent duly executed availed before the Court.

On cross-examination by the Interested Party, he told the Court that he does not know the interested party but that he has developed the portion he purchased from the Petitioner and that he has no problem with the Interested Party's use of portion of land save only for access to his land. He told the Court that the Interested Party is in occupation of the portion he purchased and that he gained access to it after the demise of his mother.

On cross-examination by the Petitioner, he told the Court that he is not aware of when exactly the Petitioner Petitioned the Court with regard to the estate of the deceased herein. He maintained that his mode of distribution is the correct one and that their late father had 10 sons and 3 daughters. He further told the Court that 4 out of the 10 sons plus all the daughters are now deceased.

On re-examination, he told the Court that the Interested Party occupied his portion after the demise of his father and that his dispute with the Interested Party is simply on road of access. He told the Court that the Petitioner and other beneficiaries sold their portions to the Interested Party. He told the Court that he did not sign the list of those who were present at the meeting and that the land in question is still in the name of the deceased. He told the Court that the Petitioner did not avail his mode of distribution.

The Objectors closed their case.

8. INT-PW1, Linus Chesoli Wekesa, testified that he is the Interested Party herein. The Court adopted his affidavit sworn on 20<sup>th</sup> May 2023 and the annexures thereto as his evidence in chief. He told the Court that he does not know the Objectors. He told the Court that the land in question was purchased by his father from the Petitioner and his brother, Patrick. He added that the Petitioner sold two acres while Patrick sold one acre, and that his late father proceeded to build on the said land.



On cross-examination by the Objectors' counsel, he told the Court that he learnt that the land belongs to the deceased herein and that the deceased died much earlier. He told the Court that his late father purchased the portions from the sons of the deceased in 2009. He told the Court that he could not attest to whether the Petitioner had the capacity to sell off the land and that the name of Patrick is not indicated in the said sale agreement but that he sold one acre.

On cross-examination by the Petitioner, he told the Court that his father purchased the said portion from him and Patrick and that at that moment the Petitioner was acting as the Administrator of the estate of the deceased.

On re-examination, he told the Court that Patrick sold to his father one acre and that the signature attests to the same. He told the Court that he is currently using the land and that both the Petitioner and Patrick have not interfered with his occupation and possession, even their siblings.

That marked the close of the interested party's case.

9. PET-PW1, Dismas Sifuna Wafula, testified that he is the Petitioner herein and that he duly filed his mode of distribution. The Court adopted the same as his evidence in chief. He refuted the proposed mode of distribution by the Objectors and urged this Court to adopt his proposed mode of distribution. According to him, the mode of distribution by the Objectors reflects strangers to the estate of the deceased and that the Interested Party is the only true purchaser and has no objection to him occupying his portion as sold to him. He attested to the fact that there are other purchasers who purchased land from his brothers and that he has no problem with them getting their respective portions.

On cross-examination by Objectors' counsel, he told the Court that the asset is still in the name of the deceased and that the deceased had sold his land to six different purchasers, and that his late father died before sub-dividing his land. He told the Court that the Interested Party did not buy the land from the deceased and that he proposed to have two acres which he sold off to the Interested Party. He confirmed that he was present when the surveyor visited the land but that he is yet to see or peruse the surveyors report. He confirmed that he was the seller in the sale agreement on behalf of the deceased and that he never indicated anywhere that he was an administrator in the sale agreement. He confirmed that he sold the land as an administrator to the estate of the deceased and that he had the grant in 2009, and that the same did not authorize him to sell any land. He told the Court that he never wasted the estate of the deceased as alleged as the property is still in the name of the deceased. He told the Court that he made provisions for his late sisters and that he did not file a consent to his proposed mode of distribution. He confirms that he has no share to the land of the deceased as he sold the same to the Interested Party's father.

On cross-examination by the Interested Party, he told the Court that the Objectors failed to list all the family members in their proposed mode of distribution and that he only sold land on behalf of his brothers who wanted to sell. He confirmed that Patrick sold off one acre of his portion and that the 1<sup>st</sup> Objector has no share in the deceased's estate as he was settled in Trans Nzoia. He insisted that his mode of distribution is fair compared to the one raised by the Objectors. He insisted that none of his family members object to the occupation of the Interested Party's portion except the 1<sup>st</sup> Objector. He told the Court that he has no objection to the Interested Party getting his portion and that his mode of distribution does cater for his deceased siblings.

10. PET-PW2, Jairus Juma Wafula, testified that he was the son of the deceased herein. The Court adopted the contents of his affidavit as sworn and filed on 20<sup>th</sup> May 2023 as his evidence in chief. He told the Court that he was allocated five acres by the deceased but has not availed any evidence in that regard.



On cross-examination by Objectors' counsel, he told the Court that he was allocated five acres by the deceased but has not availed any evidence in that regard. He insisted that his father gifted him five acres and that he speaks only the truth. That he does not agree with the surveyor's report wherein he has been allocated only 0.9 Ha

On cross-examination by the Interested Party's counsel, he told the Court that they are 13 children in total and that his father allocated each child land. He confirmed that the father to the Interested Party did purchase land from the Petitioner herein and that his brother Patrick was given one acre. He told the Court that the 1<sup>st</sup> Objector resides on his two acres and that he never left the farm and that he has no objection in the Interested Party getting his portion as purchased.

On re-examination, he told the Court that the 1<sup>st</sup> Objector was given land elsewhere and he later decided to occupy land that is not his and that John Simiyu Wafula was given two acres. He told the Court that he does agree with the surveyor's report which has fixed the problem.

11. PET-PW3, John Simiyu Wafula, testified that he was the son of the deceased herein. The Court adopted the contents of his statement as recorded on 14<sup>th</sup> January, 2024 as his evidence in chief. He told the Court that he knows the Interested Party herein and that the deceased sold his land but he has no sale agreement to attest to the same. He confirmed that he was present during the surveyor's visit.

On cross-examination by the Objectors' counsel, he told the Court that he has one acre as per the report and that the said report is a true reflection of what is on the ground. He told the Court that he does not object to the surveyor's report. He told the Court that the 1<sup>st</sup> Objector resides on the deceased's land but that the other Objectors were settled elsewhere. He wants the 1<sup>st</sup> Objector to move out of the portion he is currently settled on and that he has a stake on that land. He told the Court that only three of them are aggrieved and that the 1<sup>st</sup> Objector should move because he was catered for elsewhere but has no documentation to prove the same.

On cross-examination by the Interested Party's counsel, he told the Court that the Petitioner is his younger brother and that he has no problem with him being an administrator. He told the Court that he is aware that his family owes the Interested Party about three acres from their land and that he is not aware which parcel the administrator should get. He also told the Court that Patrick, his brother sold off one acre of his land. According to him, the deceased gave the Petitioner two acres and who sold them and went to buy five acres elsewhere. He told the Court that the Petitioner is entitled to get two acres and another one acre from the 1<sup>st</sup> Objector and that the same are to be given to the Interested Party.

On re-examination, he told the Court that the deceased lefty behind 13 children but only seven are alive. He insisted that the 1<sup>st</sup> Objector was settled with five acres.

12. At the close of the Petitioner's case, parties were directed to file and serve their respective written submission. Only the Petitioner and Objectors complied with the Court directives.
13. I have duly considered the parties submissions, Affidavits of mode of distributions as fronted, grounds in support of the application and the grounds in opposition thereto. I have also considered the rival evidence of the Petitioner, Objectors and Interested party.
14. Before i get into the substance of the matter before me, it is critical that i deal with the issue of the Interested Party's late father who purchased the portions of the asset of the estate of the deceased from a son of the deceased. Section 79 of the *Law of Succession Act* should be read together with Sections 82 and 83 of the Act, which set out the powers and duties of administrators. Once the assets of the deceased were vested in the administrators, the administrators would then be entitled to exercise the powers conferred upon administrators by Section 82, and that they were subject to the duties that were



imposed by Section 83. The powers included powers to enter into contracts with respect to assets of the estate, to sue and be sued with regard to estate assets, among others. Entering into contracts over estate assets would include converting estate assets by way of sale. However, Section 82(b)(ii) of the Act outlawed the sale of immovable assets of an estate before the grant had been confirmed. That would mean that any such sale would be unlawful and unenforceable unless it happened with the leave of the Court.

15. This simply means that the Interested Party's late father who purchased portions of the deceased's estate post the deceased persons death, 26<sup>th</sup> May 2006, are not creditors of the estate. He would only have a claim against the estate if he had transacted over the land with the deceased owner himself. The transaction in question appeared to have been entered into after the deceased died because as per the availed sale agreement which indicated the date they entered into the transaction as 7<sup>th</sup> August, 2009. The document placed before the Court was the sale agreement signed by the Interested Party's father and the deceased's son who is the Petitioner herein, since it was generated after the deceased had died.
16. The alleged sale of land did not happen during the deceased's lifetime and did not involve the deceased, but after his death, involving one of his surviving sons before he had obtained representation to enable him administer the estate. That would mean, by dint of Section 79 of the Law of Succession Act, that the assets of the estate had not yet vested in the deceased's son. He, therefore, did not have power by dint of Section 82 of the Law of Succession Act, to sell the property. He could not enter into any binding contract with anybody over any of the assets that made up the estate of the deceased.
17. By dint of Section 45 of the Law of Succession Act, any transaction between the Petitioner and the Interested Party's father amounted to intermeddling with the estate of the deceased, and those involved, therefore, would be deemed to have engaged in criminal activity and should have been prosecuted. The sales contravened Sections 45 and 82 of the Law of Succession Act and that there was no possibility that the Interested Party's father could have acquired any valid title from the sales as the person who purported to sell the property to them had no title to it. He had nothing to sell and that the Interested Party's father bought nothing from him.
18. From the Court record, it is clear that the Land Parcel Bungoma/Kiminini/186 measuring 13.7 HA is still registered under the name of the deceased herein. The surveyor's report dated 26<sup>th</sup> February 2023, indicated the true ground acreage of the parcel as 12.93HA and the occupation on the ground.
19. From the Court records, it is clear that the deceased person was survived by:
  - a. Lena Bunyasi Mukelule
  - b. Joyce Monica Nyamu
  - c. Joseph Waswa Wafula
  - d. Daniel Wekhanya Wafula
  - e. John Simiyu Wafula
  - f. Patrick Mukhwana Wafula
  - g. Richard Khamala Wafula
  - h. Bernard Wekesa Nandila
  - i. Henry Wafula Wepolombia
  - j. Dismas Sifuna Wafula



- k. Johnstone Nandila Wafula
  - l. Jairus Juma Wafula
  - m. Margret Khakasa Kachila.
20. Upon perusal of the filed form P & A 5 in Court on 5<sup>th</sup> November 2007, it is clear that the only creditors of the estate of the deceased were: Edward Simiyu and Maurice Wambomba who purchased three and one acres respectively.
21. As earlier captured, this Court noted that the sale of the deceased's portion of land to the Interested Party's father by the Petitioner herein is invalid. When he entered into the sale agreement on 7<sup>th</sup> August 2009, he had not yet been appointed administrator of the estate of the deceased. The property in question, therefore, had not yet vested in him as administrator by virtue of Section 79 of the Law of Succession Act, and therefore he could not exercise the powers of sale over that property given by Section 82 of the Law of Succession Act. He had no title to the property and had no power to sell it.
22. The only remedy available to the buyers, with regard to the transactions, was to pursue the person who purported to sell the property to them, which in this case, as per the evidence of the Petitioner he is very willing to settle him from his respective portion. The Interested Party was not a survivor of the deceased and thus his claim is neither a liability nor creditor of the estate.
23. From the evidence on record, it is alleged that the deceased had gifted some of his sons land prior to his death but no evidence in form of minutes or witnesses was availed in Court to substantiate the same. This simply means that this Court is at liberty to distribute the whole 12.93 HA as none of the parties have been able to reach a consensus on the mode of distribution.
24. Upon perusal of the Petitioner's and Objectors' proposed mode of distribution, it is clear that the Petitioner caters to individuals who are strangers to the estate as they purchased land from him when the property in question, therefore, had not yet vested in him as administrator by virtue of Section 79 of the Law of Succession Act, and therefore he could not exercise the powers of sale over that property given by Section 82 of the Law of Succession Act. He had no title to the property and had no power to sell it. This simply means that they are not creditors or liabilities to the estate of the deceased.
25. In view of the forgoing observations, the following orders are hereby made:
- i. The mode of distribution proposed by Petitioner on parcel number Bungoma/Kiminini/186 lacks merit as the same includes strangers on to the distribution schedule. The same is dismissed.
  - ii. The mode of distribution proposed by the Objectors on parcel number Bungoma/Kiminini/186 lacks merit as the same has been distributed with the wrong actual acreage as per the surveyor's report and includes the Interested Party herein who is a stranger to the estate of the deceased.
  - iii. The deceased's estate land parcel number Bungoma/Kiminini/186 to be distributed as follows;



No.	Name	Acreage (12.93 Ha)
	Lena Bunyasi Mukelule	0.5 HA
	Joyce Monica Nyamu	0.5 HA
	Joseph Waswa Wafula	0.983 HA
	Daniel Wekhanya Wafula	0.983 HA
	John Simiyu Wafula	0.983 HA
	Patrick Mukwaas Wafula	0.983 HA
	Richard Khamala Wafula	0.983 HA
	Bernard Wekesa Nandila	0.983 HA
	Henry Wafula Wepolombia	0.983 HA
	Dismas Sifuna Wafula	0.983 HA
	Johnstone Nandila Wafula	0.983 HA
	Jairus Juma Wafula	0.983 HA
	Margret Khakasa Kachila.	0.5 HA
No.	Creditors	Acreage
	Edward Simiyu	1.21 HA
	Maurice Wambomba	0.40 HA

- iv. That Grant of Letters of Administration made to the Petitioner on the 6<sup>th</sup> March 2008 is hereby confirmed and that the estate of the deceased shall be distributed as directed vide clause (iii) above.
- v. A certificate of confirmation of grant shall issue.
- vi. Each party to meet their own costs.

**DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2024.**

**D. KEMEI**

**JUDGE**

In the presence of :

No appearance Mrs Sifuna Wafula Petitioner

Shikhu for Wamalwa Simiyu for Objectors



Wanjala for Khaminwa for Interested Party

Kizito Court Assistant

