



In re Estate of Robert Wekesa Tundo (Deceased) (Succession Cause 344 of 1996) [2024] KEHC 12879 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12879 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 344 OF 1996
S MBUNGI, J
OCTOBER 25, 2024**

IN THE MATTER OF THE ESTATE OF ROBERT WEKESA TUNDO (DECEASED)

BETWEEN

AGGREY WAFULA MATUMBEI OBJECTOR

AND

PATRICK CEASAR MUSIVALE PETITIONER

AND

BARASA PIUS RESPONDENT

RULING

1. The applicant filed an application dated 11.03.2021 under Certificate of Urgency on the following grounds: -
 - a. That the grant in this matter was issued and confirmed in a fraudulent manner.
 - b. That the 1st Respondent misled this Honourable Court into issuing and confirming the Grant in this matter by failing to disclose all the material facts and thus the 1st Respondent ought not to have been granted with the letters of administration in the first place.
 - c. That the 1st Respondent has since gone ahead to subdivide the sole property of the estate being land parcel number N/Kabras/kiliboti/61 to give rise to three parcel numbers namely N/Kabras/kiliboti/1360 and 1361 which is registered in the names of the 1st Respondent and land parcel number N/Kabras/kiliboti/1361 which is registered in the names of the 2nd Respondent.
 - d. That therefore it would be in the interest of justice that the orders sought in the Application filed herewith are granted.



2. The applicant prayed that the application be certified as urgent and be heard ex-parte in the first instance and service of the same be dispensed with. The applicant prayed that pending the hearing and determination of his summons for revocation dated 22.02.2021, an order of inhibition be issued against title of LR Numbers N/Kabras/kiliboti/1360, 1361 and 1362 respectively. Further, he prayed that the respondents pay the costs of this application.
3. The application was supported by an affidavit sworn by the applicant and annexures in support of the applicant's averments.
4. The substance of his averments was that the 1st respondent misled the court by failing to disclose that the deceased was survived by a wife and child, the applicant herein, hence the grant was fraudulently obtained.
5. The petitioner filed a notice of Preliminary Objection dated 06.08.2024 against the application following court orders of 24.07.2024.
6. The Preliminary objection was based on the following grounds: -
 - i. That this Honourable Court's jurisdiction is ousted in view of the fact that the Objector/ Respondent's claim is based on ownership and registration of the original title number N/Kabras/kiliboti/61 that was closed upon sub division and or partition to create new title numbers N/Kabras/kiliboti/1361, 1362 and 1363 respectively and the three new title numbers have subsequently been transferred to third parties hence the Petitioner/ Applicant relinquished his registrable interest over the said title thus this Honourable Court lacks the jurisdiction to hear and entertain the instant application dated 11th March 2021 and the same should be dismissed with costs.
 - ii. That this Honourable Court is *functus officio* is still borne, bad in law, incompetent, fundamentally defective and an abuse of the due process of the court and the Application dated 11th March 2021 should be dismissed with costs.
 - iii. That the Objector/Respondent herein Aggrey Wafula Matumbei is a stranger and not related to the estate of the late Robert Wekeka Tundo (deceased) thus he has no legal capacity and or *locus standi* to institute and or prosecute his current application dated 11th March 2021 and the same should be dismissed with costs.
7. The preliminary objection was to be canvassed by way of written submissions.
8. The petitioner filed submissions but the objector did not.
9. I have looked at the submissions filed by the petitioner and the application by the objector and also statements filed by witnesses.

Brief Background of the matter.

10. The objector says he is a son of the deceased and he filed the objection because he was not involved in the succession of the estate of his father Robert Wekesa Tundo who was the registered owner of the original title N/Kabras/kiliboti/61 which was later closed and other three new titles created N/Kabras/kiliboti/1361, 1362 and 1363.
11. The petitioner in his part says he is an uncle to the deceased and that the deceased during his lifetime on 04.06.1994 sold 2 acres or thereabout of his parcel No. N/Kabras/kiliboti/61 to John Wawire Wanyonyi and that on 25.08.1996 the said John Wawire Wanyonyi after the death of the deceased



- demanded a refund from the father of the deceased Tundo Sisa. Tundo Sisa agreed to refund him the money via an agreement dated 25.08.1996 signed before the area assistant chief.
12. On 26.08.1996 the petitioner agreed to buy the entire piece of land and part of the money paid was used to refund John Wawire Wanyonyi.
 13. The petitioner says that all that time the objector was nowhere and no one objected him (the petitioner) filing the succession cause and the father of the deceased was alive and is the one who gave him the consent to file for initially the land belonged to him and gave it to the deceased who had no wife or children.

Analysis and Determination.

14. The issue of determination is whether the preliminary objection filed meets the threshold.
15. The meaning of what is a Preliminary Objection was defined by The Supreme Court in *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others* when it cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696*, where the Court held as follows:

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
16. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits...”
17. The petitioner says that he bought the land from the deceased’s father who used part of the money to refund John Wawire Wanyonyi who had initially bought 2 acres from the deceased during his lifetime.
18. I have seen on the record numerous sale agreements and copies of title deeds showing how the original land was subdivided.
19. As a succession court, it is not competent to determine whether the deceased actually sold part of his land when he was alive and subsequently his father sold the whole land to the petitioner.
20. Where there is a dispute as to the ownership of land, the matter is first settled before the Environment and Lands Court, then a judgment or a court decree is brought to the succession court for the mandate of a succession court is to distribute free property of a deceased person. There are various authorities which buttress this. In *Re Estate Of Kioko Kituvya Mail (deceased)* (2019) eKLR in which his Lordship



Honourable Justice C Kariuki sitting at Makueni on 24th January 2019 had the following wise words to say:

“.....if there's any dispute as to the ownership of the property title Makueni/Kakusi/1091, this court lacks the proper jurisdiction to adjudicate that dispute. In the case of *Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR, Musyoka J stated that: "Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the *Law of Succession Act* is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court". Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust. In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court. The validity of the title subject can only be impeached in the proceedings in Environment and Land Court as this Court has no jurisdiction to determine the issue as to ownership of the land under art. 165 of the Constitution. Thus the protests herein succeeds to that extent. The Petitioners will be at liberty to impeach title subject herein in ELC court.

21. In *Re Estate Of Alice Mumbua Mutua (deceased)* [2017] eKLR in which his Lordship Justice W Musyoka sitting at Nairobi on 20th January 2017 in his wisdom had this to say:

“...the Court held that when disputes arise after the confirmation of the grant, the same ought to be determined outside the probate court. The court in the case stated as follows: - The *Probate and Administration Rules* recognize that, and that should explain the provision in Rule 41 (3). Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above...”

22. From the above, this court clearly has no jurisdiction for the deceased's estate is not free for distribution.
23. I have seen the argument by the counsel of the petitioner that the objector is a stranger and is not related to the estate of the late Robert Wekesa Tundo thus he has no capacity or locus standi to institute the application for revocation of grant, he cited the cases:
- i. In the *re estate of Kiberenge Mukwa – Deceased* (2021) eKLR



- ii. In the *re estate of Stephen Kimotho Karanja – Deceased* (2022) eKLR
 - iii. In the *re estate of David Kiamba Muli – Deceased* (2021) eKLR.
24. On the issue of whether Aggrey Wafula Matumbei has *locus standi* to file an application for revocation of grant, to me anyone can apply for revocation of a grant so long as has interest in the estate of a deceased person. Section 76 of the *Laws of Succession Act* dictates: - “Revocation or annulment of grant A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
- (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;
 - (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
 - (e) that the grant has become useless and inoperative through subsequent circumstances”
- Rule 44 of the *Probate and Administration Rules* states that Revocation or annulment of grant can be done in the following situations:
- “(1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court...”
25. One does not need to have letters of administration of a deceased’s estate to enable him to apply for revocation of a grant. It is my view that Letters of administration are only required if one wants to legally represent an estate of a deceased person in any legal forum for example; when one wants to sue on behalf of an estate of a deceased person.
26. So long as the objector has interest in the estate of the deceased he has a right to bring the application for revocation. It is during the hearing of the application for revocation when such interest is demonstrable and if he fails to demonstrate such, the grant cannot be revoked. I will therefore allow the objector to prosecute his application for revocation of grant.
27. In the event he succeeds in revoking the grant, and is appointed as the administrator the petitioner herein or any other interested party can raise the objection against the distribution of the estate on grounds raised in the instant preliminary objection.
28. The upshot of the above is that I find the preliminary objection to have the application for revocation of grant struck off prematurely raised.



29. The same is dismissed and since the objector never filed any response to the preliminary objection, each party shall bear its own costs.
30. Right of appeal 30 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF OCTOBER, 2024.

S.N MBUNGI

JUDGE

Objector – absent

Respondents – absent

Counsels for the parties – absent

Court Assistant – Elizabeth Angong'a

