



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Musa Wesonga Mamira (Deceased) (Succession Cause
162 of 2008) [2024] KEHC 14860 (KLR) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 162 OF 2008**

**WM MUSYOKA, J
NOVEMBER 27, 2024**

IN THE MATTER OF THE ESTATE OF MUSA WESONGA MAMIRA (DECEASED)

RULING

1. This cause relates to the estate of the late MWM, who died on 26th July 2007, according to the certificate of death on record, serial number 955965, dated 1st October 2007. There is a letter, on the record, from the Chief of Bukhayo East Location, dated 27th July 2007, which indicates that the deceased owned Bukhayo/Buyofu/3XX, which he had given out to GWM, who is described as the lawful heir, who should initiate succession to that property.
2. Representation, in intestacy, was sought by GWM, vide a petition filed herein on 16th September 2008, in his purported capacity as nephew of the deceased. The deceased was said to have had died on 26th July 2007, and to have been survived by 6 individuals, all described as nephews, being GWM, TWM, MOM, EBM, OM and LWM. The deceased was said to have died possessed of Bukhayo/Buyofu/18XX. Letters of administration intestate were made, on 6th May 2009, to GWM, and a grant was duly issued on even date. I shall refer to GWM, hereafter, as the administrator.
3. I am tasked with determining a summons for revocation of grant, dated 1st August 2011. It is at the instance of BWS, who I shall refer to hereafter as the applicant. He identifies the deceased as MWM, who died on 10th May 2007, and he has attached a certificate of death, serial number 26230, of 4th September 2008, as proof. He identifies himself as a nephew of the deceased. He avers that the grant was obtained fraudulently, through a false statement or by concealment of matter from the court. It is averred that the deceased had sold a portion of Bukhayo/Buyofu/18XX to a PNM, on 14th November 2006, and a copy of a sale agreement of that date is attached as proof. He avers that the consideration was paid to such close family members as the applicant himself, stepbrothers SNM and AA, and a nephew TOW. He explains that the deceased died without a wife or children of his own. He names the father of the deceased as BS, and his biological brothers as LMS and COS, all deceased. He identifies himself as a son of COS. He states that the deceased had no blood relationship with the deceased. He points out that the administrator had indicated the wrong date as the date when the deceased died,



and that the persons named in his affidavit were not directly related to the deceased. He accuses the administrator of being out to defraud the individuals entitled to the estate.

4. The administrator swore an affidavit, on 14th November 2011, in reply. He concedes that the deceased had sold a portion of Bukhayo/Buyofu/18XX, to PNM, but submits that the said sale became null and void, upon the said buyer failing to complete the sale price, and no consent of the Land Control Board had been obtained. He asserts that her remedy lay with her getting a refund of the purchase money that she had paid. He asserts that the purchase sale agreements executed in 2008 and 2010 were fraudulent, as they were entered into after the deceased had died. He states that the applicant was a nephew like him, but he had not obtained the consent of the other relatives, as a blessing to engage in the succession proceedings. He identifies himself as a nephew of the deceased, on account of his father, SMS, being the eldest brother of the deceased. He complains that the applicant detained the burial permit, preventing him from processing a certificate of death, although he still procured one, without the burial permit, which should explain the anomaly in the dates of the death. He accuses the applicant of being a mouthpiece of PNM, the alleged buyer.
5. Directions were taken on 11th June 2012, for canvassing of the application, by viva voce evidence. The hearings commenced on 19th February 2014, before F. Tuiyott J, and were concluded on 16th July 2024, before me.
6. The applicant, BWS, was the first on the witness stand. His testimony largely breathed life to his filings. He identified the deceased as his uncle. He stated that the administrator had told some untruths, like that the deceased had died on 26th July 2007, which was not true, as he had died on 10th May 2007, and was buried on 15th May 2007. He stated that the deceased had sold land to PNM, but consent of the Land Control Board had not been obtained. He identified his own father as SM, adding that the deceased had not sold any land to him. He said that the deceased had also sold a portion of the land to MO, although he did not have documents to support that sale. He stated that he himself, the applicant, had not bought a portion of the land from the deceased. He said that the family had appointed him, on 3rd September 2008, to seek representation to the estate. He said that in the sale agreement of 3rd September 2008, he was named as a seller to PNM, who he said paid the full purchase price. He said that as at the date of the alleged sale, he had not been appointed the administrator of the estate herein. He further said that some of the relatives who had given him authority were to testify as his witnesses, but conceded that they had not given him written authority. He confirmed that the deceased did not have his own children, although he had 2 brothers, who he named as LMS and COS, who post-deceased the deceased.
7. PNM testified next. She relied entirely on her witness statement, and was not cross-examined. ZWL testified next. He also relied entirely on his witness statement, and was not cross-examined.
8. When the oral hearings resumed before me, on 31st January 2023, the applicant testified afresh, and largely regurgitated his testimony before F. Tuiyott J, of 19th February 2014.
9. Chrispinus Didi Okwara testified next. He was the Assistant Chief for the area where the parties came from. He confirmed that the deceased died on 10th May 2007, and he issued a burial permit on 13th May 2007, for the disposal of his remains. He stated that the deceased had subdivided his land into Bukhayo/Buyofu/18XX and 1815, and that he was buried in Bukhayo/Buyofu/18XX. He stated that the deceased was not survived by a wife or child, and that the applicant was his nephew, being a son of his brother. He stated that he did not know the exact nature of the relationship between the deceased and the administrator, but he confirmed that the 2 were related. He said that the administrator occupied Bukhayo/Buyofu/18XX, where he had lived with the deceased prior to his demise. He referred to a meeting after the deceased passed on, where it was disclosed that he had sold a portion of his land



- to PNM, and it was proposed that additional land be sold to her, out of Bukhayo/Buyofu/18XX, to raise money for the burial. That was done, and he was a witness to that agreement. He said that the administrator did not say anything at that meeting, and he could not explain why the deceased had not transferred Bukhayo/Buyofu/18XX to his name prior to his demise. He said that the administrator kept off the funeral arrangements. He said that the family had settled on the applicant as the proposed administrator of the estate of the deceased.
10. The administrator testified next. He asserted that he was the person entitled to inherit the property. He explained that the deceased had called a clansmen meeting, where he informed them that he was leaving his land to him, to be in charge of the estate. He testified that that was reduced into writing, and he cited a document dated 13th December 2004. He described the deceased as his father, and the applicant as a son of the deceased. He said that he and the applicant shared a grandfather, the father of their respective fathers. Then again he identified his father as SMS, a brother of the father of the applicant and the deceased. He said that the deceased had no children, and that was the reason that he gifted the land to him. He identified PNM as a buyer of land from the deceased, sometime in 2006, prior to the demise of the deceased. He asserted that she did not complete the sale, as she did not pay the full purchase price. He said that he did not recognise the sales conducted in 2008, after the deceased died, as the purported seller was not a personal representative of the deceased at the time. He said that the land in question was Bukhayo/Buyofu/18XX, which he was in occupation of. He acknowledged MO Wambiya as a bona fide purchaser from the deceased, and who was entitled to the 2 acres that he had bought. He also stated that PNM was entitled to the 1 acre that she had bought from the deceased, subject to completing the purchase price, but not the land she allegedly bought after he died.
 11. During cross-examination, he stated that he was born in Uganda, and that he began to reside on Bukhayo/Buyofu/18XX in 2000. He stated that after his mother died her remains were buried on Bukhayo/Buyofu/18XX, after the deceased agreed to that. He explained that there was no written agreement on that. He stated that it was after that burial, that he began to live on Bukhayo/Buyofu/18XX, and he gave the deceased a cow in appreciation, for being received at his home. He said that Bukhayo/Buyofu/18XX was registered in the name of a buyer, MO Wambiya. He said that he and the applicant worked in the same school, as teachers, at the time of the death of the deceased, and that he involved the applicant, when he sought representation to the estate. He denied leaving PNM out as a purchaser, saying that he was yet to seek confirmation of his grant. He said that he did not know where the title deeds in his name and that of MO came from. He said that after the land was given to him by the deceased, he and the deceased began to get the relevant documents, and that was when he established that Bukhayo/Buyofu/3XX was subdivided in 1998, into Bukhayo/Buyofu/18XX and 1815. He said that the deceased and his father were of the same father, but different mothers. He explained that his grandmother was divorced from his grandfather, and she remarried after that. He said that when the family land was shared out his father was in Uganda. He said that he and the applicant were at the same level.
 12. Mikael Wafula Khaunya testified last. He was a neighbour of the parties. He said that the land in question belonged to Bartholomew, the grandfather of the applicant and the administrator. He said that the deceased had sold the land to MO Wambiya and Payilet Nabwire. He said that he was Teso. He was ambivalent about being familiar with Luhya customs. He said that the clan sat, and gave the land to the administrator, during the lifetime of the deceased. He said that happened after the father of the administrator entered the land from Uganda. He said that he was present, and that he signed the documents as a neighbour. When the document was read to him, he conceded that he was not amongst those listed as witnesses.



13. At the end of the oral hearings, both sides filed written submissions, where they have extensively analysed the facts presented in evidence. None of the 2 sides cited case law. I have read the 2 sets of written submissions, and I have noted the arguments made.
14. I trust that the only issue for determination should be whether the grant herein should be revoked.
15. The application, that I am called upon to determine, is for revocation of the grant made to the administrator. The discretion, granted by section 76 of the [Law of Succession Act](#), is for revocation of a grant of representation, along 3 broad themes. See Joyce Ngima Njeru & another vs. Ann Wambeti Njue [2012] eKLR (Githinji, Nambuye & Maraga, JJA) and In re Estate of Luka Modole (Deceased) [2019] eKLR (Musyoka, J).
16. The first is where the process of obtaining the grant was beset by procedural and integrity challenges. See Mwathi vs. Mwathi & another [1995-1998] 1 EA 229 [1996] eKLR (Gicheru, Kwach & Shah, JJA), In Re the Estate of Dr. Arvinder Singh Dhingra (Deceased) [2001] eKLR (Aluoch, J), Musa vs. Musa [2002] 1 EA 182 (Ringera, J), In Re Estate of Naftali (Deceased) [2002] 2 KLR 684 (Waki, J), In Re Estate of James Kiarie Muiruri (Deceased) [2004] eKLR (Koome, J), Patrick Ng'olua M'Mungania vs. Fredrick Kimathi Ng'olua & 8 Others [2013] eKLR (JA Makau, J), Samwel Wafula Wasike vs. Hudson Simiyu Wafula [1993] LLR (Kwach, Omolo & Tunoi, JJA), Yasmin Rashid Ganatra & another (Suing as legal representatives of Rashid Juma Kassam) vs. Gulzar Abdul Wais [2015] eKLR (Waki, Nambuye & Kiage, JJA), Susan Wangithi Muchungu & 6 others vs. James Thurui Mucungu & another [2016] eKLR (Limo, J), In re Estate of Magangi Obuki (Deceased) [2020] eKLR (Wendoh, J), In re Estate of Jeremiah Njoroge (Deceased) [2021] eKLR (Onyiego, J) and Chepkerich vs. Murei & another [2022] KEHC 3115 (KLR)(Ogola, J).
17. The second is where there was failure of administration. See In re Estate of Festo Akwera Kusebe (Deceased) [2019] eKLR (Musyoka, J), In re Estate of Kiruthu Kimiti (Deceased) [2021] eKLR (Mutuku, J), In re Estate of Peter Ngumbi Mulei (Deceased) [2021] eKLR (Odunga, J) and In re Estate of the Late Njonjo Kihiga (Deceased) [2022] eKLR (Chemitei, J). The third is where the grant had become useless and inoperative. See Julia Mutune M'Mboroki vs. John Mugambi M'Mboroki & 3 others [2016] eKLR (Gikonyo, J), In re Estate of Goolamhoosain Manjee Keshavjee (Deceased) [2017] eKLR (Onyiego, J), In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR (Musyoka, J) and In re Estate of Kamatu Kabara (Deceased) [2021] eKLR (Gitari, J).
18. The applicant hinges his case on 1 of those 3 broad themes. His case is that there were integrity issues with the manner the grant was obtained, for there was fraud, evidenced by non-disclosure and concealment of matter from the court. The argument is that the applicant was the closest relative of the deceased, and, therefore, he had prior right to administration, compared with the administrator.
19. Representation is not just granted to anybody who applies for it. Where the deceased died testate, section 60 of the [Law of Succession Act](#) requires that the grant be made to the executor or executors named in the will. See In re Estate of Philip Nthenge Mukonyo (Deceased) [2018] eKLR (Nyamweya, J), In re Estate of Amritlal Vira Shah (Deceased) [2019] eKLR (Achode, J) and In re Estate of Dorcas Omena Binayo (Deceased) [2021] eKLR (Musyoka, J). Where the will does not name an executor, or the executor named has died or renounced probate, sections 63, 64 and 65 of the [Law of Succession Act](#) provide for who may be granted letters of administration with the written will annexed, and such persons include universal or residuary legatees or beneficiaries under the will, personal representatives of a dead residuary legatee, and persons entitled had the deceased died intestate. See In Re Estate of Zipporah Mweru Ndibo (Deceased) [2013] eKLR (Musyoka, J), Mumbua Musyoki & 6 others vs. Mbenya Musyoki [2016] eKLR (Nyamweya, J), Yasmin Alibhai Dennig vs. Shahira Lalani Alibhai [2016] eKLR (Muigai, J) and In re Estate of Goolamhoosain Manjee Keshavjee (Deceased) [2017]



- eKLR (Onyiego, J). Where the deceased died intestate, section 66 of the [Law of Succession Act](#) provides an order of preference of persons who qualify for appointment as administrators, based on their entitlement in intestacy to the estate, guided by or according to Part V of the [Law of Succession Act](#), that is to say sections 35 to 39 thereof. See *In re Estate of Gichia Kabiti (Deceased)* [2004] eKLR (Kooome, J) and *In re Estate of Stephen Saitieu Kaloi (Deceased)* [2021] eKLR (DK Kemei, J).
20. The deceased herein died intestate, and, therefore, the applicable law, on who would qualify to apply for administration of his estate, is section 66 of the [Law of Succession Act](#). As indicated above, the order of preference follows sections 35 to 39 of the Act, dependent on the persons who survived the deceased. See *In re Estate of Aggrey Makanga Wamira (Deceased)* [2000] eKLR (Waki, J). Priority goes to the surviving spouse, if the intestate had one. See *In re Estate of George Muriithi Gitahi (Deceased)* [2019] eKLR (Nyakundi, J). If there was no spouse, either because the deceased never married, or was divorced, or widowed, the next in line would be his or her children. See *In re Estate of Eliza Isigi Asamba (Deceased)* [2020] eKLR (Musyoka, J). If he or she had no children, the next in line would be his or her parents. In the absence of the parents, the next in line would be the siblings of the deceased, being his or her brothers and sisters, and the children of any dead brothers and sisters. In the absence of such relatives, the next in line would be the half-siblings of the deceased, that is to say his or her half-brothers and half-sisters, and the children of any half-sibling then dead. See *In Re: The Estate of Beatrice Amalemba* [2004] eKLR (Kooome, J). Under section 39(1)(e) of the [Law of Succession Act](#), after the half-siblings come other relatives to the nearest degree of consanguinity, up to and including the sixth degree.
21. So, going by the above, who was the closest relative of the deceased, and, therefore, the one with prior right to administration over the other, between the applicant and the administrator. From the material on record, the applicant and the administrator appear to be related. They apparently share a common paternal grandfather, who was the father of their own fathers. Their fathers were not full brothers, for they were of different mothers, which made them step-brothers, according to the administrator. The words stepbrothers and half-brothers do not quite mean the same thing. Half-brothers have a blood relationship; while stepbrothers do not have such common blood relations, for they are brought together by the accident of the marriage of their parents. Be that as it may. There was the curious fact that the grandmother of the administrator was subsequently divorced, and remarried thereafter. The other curious fact is that the father of the administrator did not benefit from allocation of land, from the grandfather of the applicant and the administrator, ostensibly as he was away in Uganda, hence he ended up squatting on the land of the deceased. What is of importance is that the father of the applicant and the deceased were blood brothers, for they were sons of the same mothers. That made the applicant a closer relative to the deceased than the administrator. So, between the 2, the applicant had prior right to administration over the administrator. In other words, the administrator had a lesser entitlement to administration of the estate of the deceased, who was his step-uncle. The applicant and the administrator were, therefore, not at the same level, for the applicant was at a higher plane than the administrator, with regard to their relationship to the deceased.
22. The person with a lesser right or entitlement to administration cannot pass over the persons with prior right to administration, and cannot seek representation or administration without involving them. Under Rules 7(7) and 26 of the Probate and Administration Rules, such a person, with a lesser right or entitlement, is required to either get the consents of the person with prior right, or to get the person with prior right to renounce their entitlement to administration, or to issue citations to such persons with prior right to either renounce or petition for representation. See *Christine Kajuju Mwenda vs. Gervasio M'Rukunga* [2006] eKLR (Lenaola, J), *AKM & another vs. AKA* [2015] eKLR (Mrima, J), *Monica Adhiambo v Maurice Odero Koko* [2016] eKLR (Nagillah, J), *In re Estate of Anthony George Kimanthi (Deceased)* [2019] eKLR (DK Kemei, J), *In re Estate of Reuben Mutuku*



Kiva (Deceased) [2021] eKLR (Odunga, J) and Beatrice Mbeere Njiru vs. Alexander Nyaga Njiru [2022] eKLR (Njuguna, J). Where the consents and renunciations are not forthcoming, for whatever reason, or there are challenges with obtaining or serving citations, Rule 26(2) of the Probate and Administration Rules requires the filing of an affidavit, to explain why the requirements, with regard to consents, renunciations and citations cannot, be complied with. See In re Estate of Peter Alusiola Mulamula (Deceased) [2020] eKLR (Musyoka, J) and In re Estate of Reuben Mutuku Kiva (Deceased) [2021] eKLR (Odunga, J).

23. Did the administrator comply with Rules 7(7) and 26 of the Probate and Administration Rules? I see, from the record, that he filed a consent to the making of the grant to him, on 5th February 2009, dated 4th February 2009, it was signed by 5 individuals, being Timothy W. Musumba, Mark O. Musumba, Emmanuel B. Musumba, OM and Lawrence Musumba. The applicant did not sign the said consent. The administrator has not explained the relationship between him, the deceased and the individuals who signed that consent. The applicant has argued that they were all from the Musumba family, making them siblings of the administrator. As said above, the administrator was a step or half-nephew of the deceased, depending on whether or not there was a blood connection between them, while the applicant was a full nephew of the deceased. That meant that the siblings of the administrator were in a similar position. They had a lesser right to administration compared with the applicant. The consent ought to have come from the applicant and the other children of his father, and his uncle, the late LMS, the blood brothers of the deceased. The administrator did not comply with Rules 7(7) and 26 of the Probate and Administration Rules, and his application for letters of administration, to that extent, was defective.
24. In the petition, the administrator described himself as a nephew of the deceased, and sought administration in that capacity. From what have analysed above, the administrator was not a nephew of the deceased, but either a half-nephew or a step-nephew. The applicant was the full nephew of the deceased. Yet, he was not disclosed, nor involved in the process. That meant that there was misrepresentation, and concealment of matter from the court. See *Musa vs. Musa* [2002] 1 EA 182 (Ringera, J).
25. Other than seeking representation as a nephew, which was misleading, the administrator also asserted that the deceased had given to him the estate asset, and that was what motivated him to apply for representation, without involving the closer relatives of the deceased. If the deceased had made such a gift to the administrator, and the same transpired to be valid, would that elevate his status, to place him at the same or higher level with the applicant? I do not think it does. No authority has been cited to me to justify that. I have seen nothing from the *Law of Succession Act* and the Probate and Administration Rules, which would justify that. The gift notwithstanding, the requirements in section 66 of the *Law of Succession Act* and Rules 7(7) and 26 of the Probate and Administration Rules remained, waiting for compliance. The omission to comply with them rendered the process of obtaining the grant defective.
26. I could go on and on, but I believe I have said enough, to demonstrate that the administrator was not entitled to appointment as administrator of the estate of the deceased herein.
27. The administrator said a lot about the land being gifted to him by the deceased, and placed documents before the court to support that contention. Whether or not a gift of the land was made to him by the deceased is something that is not available for me to determine. It is an issue about title to or ownership of land. It is about the deceased owner of the land ceding title to it to another. The validity of that transaction is not for determination in probate or succession proceedings, where the mandate of the court is limited to distribution of property that is demonstrably the free property of the deceased. That alleged gift is contested by the applicant. The administrator shall have to move the Environment and Land Court, or the empowered subordinate court, for a determination on the validity of the alleged



gift, to justify his being treated as a beneficiary of the estate herein. See *In re Estate of Alice Mumbua Mutua* [2017] eKLR (Musyoka, J), *Mbula Muoki Ndolo & another vs. Kenya Power and Lighting Company Limited* [2017] eKLR (Nyamweya, J) and *Michael Odhiambo Ayimba vs. Peter Otieno Ogutu & another* [2020] eKLR (Aburili, J).

28. The issue that the deceased had sold some portions of the land to various individuals also came up. Some of the sales were recognised by both sides, some were not. It also transpired that there were sales transacted after the demise of the deceased. Those latter sales were contested by some of the parties. Ultimately, the sales that will be contested at confirmation will not be recognised by the probate court, and it may save time for the parties, whose alleged acquisitions are contested to also move to the Environment and Land Court or the enabled subordinate court, to validate the alleged sales or transactions. See *In re Estate of Alice Mumbua Mutua* [2017] eKLR (Musyoka, J), *Mbula Muoki Ndolo & another vs. Kenya Power and Lighting Company Limited* [2017] eKLR (Nyamweya, J) and *Michael Odhiambo Ayimba vs. Peter Otieno Ogutu & another* [2020] eKLR (Aburili, J).
29. My remit was to determine the revocation application. I have established, from the material placed before me, that the process of obtaining representation in this case was marred by defects or flaws, and integrity questions, which I have pointed out above. Consequently, a case has been made out for revocation of the grant made herein on 6th May 2009, to GWM. I shall, accordingly, allow the application, dated 1st August 2011, and revoke the said grant. A fresh grant shall issue to the applicant, BWS. A grant of letters of administration intestate shall issue to him accordingly. He shall file an application for confirmation of his grant, within 90 days, and serve the same on GWM, the alleged buyers of portions of the land from the deceased and others, and all the nephews of the deceased from the houses of LMS and COS. The matter shall be mentioned on 11th March 2025 to confirm filing of the confirmation application, and for further directions.
30. The summons for revocation of grant, dated 1st August 2011, is disposed of in those terms. Each party shall bear its own costs. I hereby grant leave, of 30 days, to whoever may be aggrieved by those orders, to move the Court of Appeal, appropriately. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 27TH DAY OF NOVEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Shihemi, instructed by Maloba & Company, Advocates for the administrator.

Ms. Omar, instructed by R. Omar & Company, Advocates for the applicant.

