In re Estate of Paul Osigo Ketsula (Deceased) (Succession Cause 299 of 2011) [2024] KEHC 14836 (KLR) (27 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14836 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 299 OF 2011

WM MUSYOKA, J

NOVEMBER 27, 2024

IN THE MATTER OF THE ESTATE OF PAUL OSIGO KETSULA (DECEASED)

RULING

1. This cause relates to the estate of the late Paul Osigo Ketsula, who died on 11th August 2002, according to the certificate of death on record, serial number 055811, dated 22nd June 2011. There is a letter, on the record, from the Chief of Bunyala North Location, dated 17th August 2011, which indicates that the deceased to have been the only son and heir of the late John Ketsula. The Chief indicated that the family had proposed Vincent Habule Obenzo, to be the administrator of Bunyala/Bulemia/1440, as the land had been awarded to him by the panel of elders, which decision had been endorsed by the court.

2. Representation, in intestacy, was sought by Vincent Habule Obenzo, vide a petition filed herein on 22nd August 2011, in his purported capacity as cousin of the deceased. The deceased was said to have had died on 11th August 2001, and to have been survived by 1 individual, being Vincent Habule Obenzo. The deceased was said to have died possessed of Bunyala/Bulemia/1440. Letters of administration intestate were made, on 13th February 2012, to Vincent Habule Obenzo, and a grant was duly issued on 14th February 2012. I shall refer to Vincent Habule Obenzo, hereafter, as the administrator.

3. The administrator filed a summons for confirmation of grant, dated 18th April 2012. He listed himself as the sole survivor of the deceased, and the sole beneficiary of the estate, with Bunyala/Bulemia/1440 being devolved wholly and absolutely upon him. The confirmation hearing happened on 1st November 2012, ½ of Bunyala/Bulemia/1440 was devolved upon Vincent Habule Obenzo. A certificate of confirmation of grant, in those terms, was issued, on even date.

4. I am tasked with determining a summons for revocation of grant, dated 31st August 2022. It is at the instance of Rophina Nekesa Osigo, who I shall refer to hereafter as the applicant. She claims to be a daughter of the deceased, and that the administrator was a stranger to the estate. She asserts that she ranks higher than the administrator in entitlement to administration of the estate. She explains that the deceased had 2 daughters, being herself and Helena Akinyi Osigo. She avers that the deceased held Bunyala/Bulemia/1440 in equal shares with the late John Ketsula. She complains that

the administrator has caused the ½ share, due to the deceased, to be transmitted to himself, without any regard to her and her sister. She mentions that the administrator has died, and Quentin Joel Onyango has obtained a grant in Busia CMCSC No. E545 of 2021, and he is about to have the same property, the ½ share of Bunyala/Bulemia/1440, devolved to himself. She asserts that Quentin Joel Onyango has no stake in the estate, and that the only purchaser that the family is aware of is Anicetus Willys N. Obuya. She asserts that the grant ought not have been issued to the administrator while she and her sister were alive.

5. The applicant has attached, to her supporting affidavit, a copy of the grant that was issued herein, on 14th February 2012. There is also a certificate of confirmation of grant, issued herein, dated 1st November 2012. There is also a copy of a letter from the Chief of Bunyala North Location, dated 20th September 2021, which indicates that she and Helena Akinyi Osigo, are children of the deceased, born outside wedlock. There is also a copy of a green card for Bunyala/Bulemia/1440, which indicates that that property was registered in the names of the deceased and John Ketsula, on 2nd October 1985; and that on 20th March 2013 the ½ share due to the deceased was transmitted to the administrator, vide orders emanating from this court. Finally, there is a copy of a grant of letters of administration, in respect of the estate of the administrator herein, in Busia CMCSC No. E545 of 2021, appointing Quentin Joel Onyango administrator of that estate.

6. Quentin Joel Onyango swore an affidavit, on 4th December 2023, in reply. I shall refer to him, hereafter, as the respondent. He asserts that the application seeks to have him substituted as administrator, yet he had been granted letters of administration of the estate of the administrator, in Busia CMCSC No. E545 of 2021, on the basis that he was a creditor to that estate, and the relatives of the administrator are alive. He avers that the family of the administrator had lived on the property since 1976, and that the wife of the administrator was aware of the sale, and, at the time of seeking representation, in Busia CMCSC No. E545 of 2021, she had signed an affidavit to support the petition. He avers that the applicant, although she claims to have prior right to administration, in the estate herein, is not cognisant that that property had been sold 35 years prior to the death of the deceased, and that the family of the administrator had been residing on that land continuously for all that time. He further avers that the administrator sold the land to him in 2011, and that his rights as an innocent purchaser cannot be wished away. He asserts that he sought and obtained representation, in Busia CMCSC No. E545 of 2021, after the family of the administrator failed to take action. He claims that, despite that, the applicant intermeddled with Bunyala/Bulemia/1440, by purporting to sell the half share to Anicetus Willys N. Obuya.

7. I will now narrate the various documents annexed to the affidavit in reply. There is a sale agreement, in respect of Bunyala/Bulemia/1440, between the administrator and the respondent, dated 3rd September 2011. There is also a certificate of official search on Bunyala/Bulemia/1440, dated 22nd September 2023, which indicates that the administrator was registered as proprietor on 20th March 2013; and on 18th November 2020, a restriction was registered, pending finalisation of Succession Cause No. 82 of 2018. There are copies of a citation, issued in favour of the respondent, in Busia CMCSC No. 82 of 2018, and of the grant, made to the respondent, in Busia CMCSC No. E545 of 2021.

8. The respondent filed a further affidavit, sworn on 19th April 2024. He cites proceedings of the Budalang'i Division Land Disputes Tribunal, to assert that the deceased had sold his share of Bunyala/Bulemia/1440, to the administrator, and that portion, thereafter, became the property of the administrator. He further avers that there was nothing to prove that the applicant and her sister were daughters of the deceased, whether biological or otherwise.

9. To that further affidavit, he has attached the order of the court in Busia PMC Land Dispute No. 60 of 2005, of 7th February 2006, adopting the decision of the Budalang'i Division Land Disputes Tribunal, a dispute between the administrator and James Ouma Natolio, where the administrator was declared to own Bunyala/Bulemia/1440. There is also a copy of the ruling in Busia PMC Land Dispute No. 60 of 2005, dated 3rd January 2006, which is the basis of the formal order extracted on 7th February 2006. There is also a copy of the proceedings and decision in the Budalang'i Division Land Disputes Tribunal, adopted in Busia PMC Land Dispute No. 60 of 2005. What is, however, curious of these annextures is that they are not endorsed by a Commissioner for Oaths as annextures.

10. The application was canvassed by viva voce evidence. The hearing happened on 23rd May 2024.

11. The applicant, Rophina Nekesa Osigo, was the first on the witness stand. Her testimony largely breathed life to her filings. She identified the deceased as her father, together with Helen Akinyi Osigo. She stated that the administrator was not related to her, and had no entitlement to obtain representation in the estate. She said that she had just discovered that he had inherited the property of the deceased, and she was asking that his name be removed from the register. She further said that she did not know the respondent, and asserted that he had no right to the property of the deceased, as he was not related to the deceased. She asserted that she was entitled to be appointed as the new administrator of the estate of the deceased herein. She said that she did not have a certificate of birth, and her national identity card did not indicate the name of her father. She identified William Oundo Ketsula as her step-uncle. She asserted that she and her sister were born within wedlock. She said that the deceased did not sell land to the administrator.

12. John Maube Natolio testified next. He identified the deceased as his brother, who co-owned Bunyala/Bulemia/1440, with their father, John Ketsula. He stated that he had 2 daughters, being the applicant and her sister. He stated that the deceased had married their mother, they then separated, and the 2 daughters were left under their care. He asserted that the 2 were their children. He stated that their family was not related to the administrator, and if he inherited the property of the deceased, he did so without right, for the persons entitled to that property were the 2 daughters of the deceased. He said that he also did not know the respondent. He stated that he had a case at the Budalang'i Division Land Disputes Tribunal, over Bunyala/Bulemia/133, which did not involve Bunyala/Bulemia/1440. He said that Wilson Oundo Ketsula was not a witness in the Tribunal proceedings. He stated that the deceased did not sell property to the administrator.

13. John Ouma Wanjala testified next. He was the Chief of Bulemia Location. He said that he knew the deceased, well before he became the Chief. He stated that the deceased had children, 2 daughters. He also had land, Bunyala/Bulemia/1440. He also stated that he knew the administrator, and expressed surprise that he was appointed the personal representative of the deceased, for he was not related to the deceased. He asserted that he was not involved in the process of the administrator being appointed as such, emphasising that he was not entitled to the estate. He denied writing a letter to introduce the administrator to the court, for the purpose of the probate proceedings. He supported the idea of the transmission process being reversed, to enable the children of the deceased access the property. He testified that he was unaware that the deceased had sold land to the administrator, nor that there were proceedings before the elders over that land. He stated that he did not know that the late Wilson Oundo testified in those proceedings, and said that the administrator had bought the land from the deceased.

14. Peter Ludasia Makokha followed. He testified for the respondent. He was a maternal uncle of the respondent. He did not know the deceased, and that the person he knew was the administrator. He was party to a land sale agreement between the said administrator and the respondent. He had been informed by a Charles Ndwale that the land belonged to the administrator. He explained that the

respondent gave him the money, he transacted with the administrator, and handed the money over to him. He said that he bought the land on behalf of the respondent, although he did not have a power of attorney, to enable him represent the respondent in the transaction. He said that he bought the land on 3rd September 2011, and he was sure that the land was by then in the name of the administrator.

15. When shown copy of a green card for the property, Bunyala/Bulemia/1440, he conceded that as at 3rd September 2011 the property was not in the name of the administrator, as it was not transferred to his name until 23rd March 2013. He conceded that as at 3rd September 2011, going by the green card, the property was still in the name of the deceased and John Ketsula. He could not tell whether the administrator was related to the deceased. He said that he had no documents to show that money was sent to him by the respondent for the transaction. He described the land as vacant, as no one lived there. He further stated that, whereas the petition herein was filed on 21st August 2011, the grant herein was made on 13th February 2012, and the sale of 3rd September 2011 happened before the administrator was appointed as such. He further stated that he did not know that the deceased had children, adding that if he had any, then they would be entitled to inherit the property of their father.

16. Charles Otieno Ndwale testified next for the respondent. He too did not know the deceased, but knew the administrator. He described the respondent as a son of Peter Makokha. He said that Peter Makokha bought land from the administrator, adding that the administrator had indicated that the land was his. He said that he did not know where the administrator got the land from. He said that he was a witness to the land sale transaction. He said that he did not know that the deceased had children. He said that the sale happened on 3rd September 2011. When shown a green card for Bunyala/Bulemia/1440, he confirmed that the administrator was registered as owner of the property on 23rd March 2013.

17. The respondent testified last. He was the administrator of the estate of the administrator herein. He said that he bought Bunyala/Bulemia/1440 from the administrator herein, who was selling ½ share of that property. He testified that he was represented in the sale transaction by his uncle, Peter Makokha. He said that he sent money to Peter Makokha to transact on his behalf, although he did not have documents, on the money transfer and authority for his uncle to act for him. He said that they used the proceedings of the Budalang'i Division Land Disputes Tribunal, where Wilson Oundo had confirmed that the deceased had sold land to the administrator. He said that the deceased was not party to the Tribunal proceedings, for he was dead by then. He further stated that the name of the deceased did not feature in the proceedings of the Tribunal. He asserted that the green card had the name of the administrator, and that they finalised payment after they saw the name of the administrator on it. He said he conducted a search on the title, and it came up with the name of the administrator. He asserted that he bought land from the owner of the land, and he expected the court to pronounce on the ownership of the land.

18. He conceded, upon being shown the green card, that the land was not in the name of the administrator, as at 3rd September 2011, saying that he entered into the transaction, in the belief that the property was in the name of the administrator. He said that, as at 3rd September 2011, he could not tell who owned Bunyala/Bulemia/1440. He conceded that, as between 2nd October 1985 and 23rd March 2012, the property belonged to the deceased and John Ketsula. He conceded that, when he bought the land on 3rd September 2011, it belonged to a dead man, as the seller was not registered as owner. He also conceded that the administrator, of the estate herein, was not appointed as such, until 13th February 2012, and, therefore, as at 3rd September 2011, he was not an administrator.

19. He asserted that he was an innocent buyer of property, and that the administrator had been on the land since 1984. He said that he only got to hear of the name of the 2 children of the deceased this year, and he had not come across the name of any spouse of the deceased. He conceded that, if the deceased

had biological children, they could be entitled to the property in question. He said that he could have been in Kenya on 19th April 2024, but he could not recall being before a Commissioner for Oaths, at Kisumu, on that date.

20. At the end of the oral hearings, both sides filed written submissions, where they have extensively analysed the facts presented in evidence. I have read the 2 sets of written submissions, and I have noted the arguments made.

21. The applicant has identified 4 issues: whether the respondent was the administrator of the estate of the administrator herein, and should substitute the administrator as such in these proceedings; whether the grant made to the administrator herein, who has since demised, should be revoked; whether the administrator had capacity to sell Bunyala/Bulemia/1440 to the respondent, or to anyone else for that matter; and whether the respondent acquired a good title from the administrator. The applicant has cited sections 39, 45(1), 47, 55, 66, 76, 80(2) and 82(ii) of the *Law of Succession Act*, Cap 160, Laws of Kenya; and *Samwel Wafula Wasike vs. Hudson Simiyu Wafula* [1993] LLR (Kwach, Omolo & Tunoi, JJA), *In the Matter of the Estate of Robert Nafunyi Wangila* Nairobi HCSC No. 2203 of 1999 (Koome, J), Elly Odhiambo Onyuka vs. Ayub Odhiambo Migwala [2005] KECA 275 (KLR) (Omolo, O'Kubasu & Waki, JJA), Peter Ombui Nyangoto vs. Elizabeth Matundura & another [2013] eKLR (Onyango Otieno, Azangalala & Kantai, JJA), Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR (Visram, Koome & Otieno-Odek, JJA), Funzi Development Ltd & others vs. County Council of Kwale [2014] eKLR (Githinji, Karanja & Maraga, JJA) and Dina Management Ltd vs. County Government of Mombasa & 5 others [2023] KESC 30 (KLR)(Mwilu, DCJ & VP, Wanjala, Ndung'u, Lenaola & Ouko, SCJJ).

22. The respondent has not framed issues, but goes by the 4 identified by the applicant. He cites sections 76 and 80(2) of the *Law of Succession Act*.

23. I trust that the only issue for determination should be whether the grant herein should be revoked. Everything else should be secondary.

24. 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).

25. 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 and 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).

26. 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). While 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).

27. The applicant appears to hinge her case on 2 of those broad themes. In the first place, it is argued that the administrator had died, and there was need to have him replaced. It is proposed that he should be replaced by the respondent, who is said to be the administrator of his estate. Secondly, it is argued that the process of obtaining the grant, which is sought to be revoked, was defective, and that that process had been beleaguered by fraud and concealment of matter from the court. It is also argued that the applicant ranks in priority, over the administrator, in terms of entitlement to administration of the estate.

28. The application is a little bit convoluted. The grant sought to be revoked is already inoperative and useless. It was made to an administrator, who had since died, as at the date the application was being conceived. No proof has been provided of the death of the said administrator, but it is common ground, between the applicant and the respondent, that he is no more. So, the sole administrator having died, the grant on record has become useless and inoperative. See Julia Mutune M'Mboroki vs. John Mugambi M'Mboroki & 3 others [2016] eKLR (Gikonyo, J) and In re Estate of Festo Akwera Kusebe (Deceased) [2019] eKLR (Musyoka, J). A grant of representation is issued in personam, rather than in rem. See Florence Okutu Nandwa and another vs. John Atemba Kojwa, Kisumu CACA No. 306 of 1998 (Kwach, Shah & O'Kubasu, JJA)(unreported) and John Karumwa Maina vs. Susan Wanjiru Mwangi [2015] eKLR (Kwach, Shah & O'Kubasu, JJA). It is only for use or utility by the person named in it as administrator, for it confers powers only to that person named there, and imposes duties only on that person, and nobody else can exercise the said powers nor carry out the duties. That effectively makes that grant useless or inoperative, once the grant-holder dies, for it cannot be of use any more. It cannot be transferred to another person. Such a grant should be available for revocation on the ground that it has become useless and inoperative, and there would be no reason to raise the other issues, as to how it was obtained, for that would not be necessary, for the grant sought to be revoked would have become a useless piece of paper, whose revocation should be a formality.

29. However, what I have stated, in the last sentence of the foregoing paragraph, should not restrain a party from leading evidence on how that grant, which has subsequently become useless or inoperative, was obtained, if that party seeks to demonstrate that the whole succession process had been undertaken as an enterprise to defraud the estate, and to deny the rightful heirs of the deceased of what legally should devolve upon them. The arguments, advanced by the applicant, in the application, and the evidence adduced around them, on the process of appointment of the dead administrator as such, should be seen in that context.

30. The other prayer is for appointment of the respondent as administrator, to take the place of the dead administrator. The logic appears to be that the respondent has been appointed the administrator of the estate of the dead administrator, in Busia CMCSC No. E545 of 2021, and, as a consequence, he should step into the shoes of the dead administrator in these proceedings. The respondent obtained those letters, in Busia CMCSC No. E545 of 2021, on the basis that he is entitled to Bunyala/Bulemia/1440, which he had allegedly bought from the administrator herein.

31. The applicant argues that the administrator herein was not entitled to Bunyala/Bulemia/1440, in the first place, for he was not a relative of the deceased, and, therefore, he could not inherit from his estate; neither had he bought the land from the deceased, to justify his intervention as a creditor of the estate. It is on that basis that she argues that the grant made to that administrator should be revoked, for it

was not obtained procedurally. It then makes no sense, to me, for her to ask for the appointment of the respondent, who comes into the picture as a buyer of the estate asset from the dead administrator, as an administrator of the instant estate. I find it curious that the applicant, in her affidavit, argues that the grant should not have been made to the late administrator, given that the deceased had his own children, herself included, who were alive and willing to take up administration. So, if she is alive and willing to take up administration, why should she, at the same time, be proposing that the respondent be appointed administrator in the place of the dead administrator. It would mean that she is not entirely clear on what she is seeking from the court.

32. Be that as it may. The grant herein has become useless and inoperative, following the death of the sole administrator. As that grant is now of no use, it should be revoked, to pave way for appointment of another administrator. The only issue now is who should be appointed administrator in the place of the dead administrator.

33. Before I can consider the issue of who merits appointment, there should be the issue of whether the appointment should be made in the first place. The principal role of the administrator should be to collect and preserve the assets, then settle debts and liabilities, and thereafter distribute the surplus amongst those entitled to a share of the estate. See In re Estate of Festo Akwera Kusebe (Deceased) [2019] eKLR (Musyoka, J). Distribution happens after confirmation. See Pauline Muthoni Kigwe & another vs. Joseph Wathua Kigwe & another [2015] eKLR (Muigai, J), . It would appear that the grant was confirmed, on 1st November 2012. The green card, on record, indicates that the ½ share in Bunyala/Bulemia/1440, due to the deceased, was transmitted on 20th March 2013, to the name of the late administrator. By that deed, the administration of the estate herein was completed, and there is nothing outstanding. See Beatrice Wangui Kamau alias Beatrice Wangui Kagunda vs. John Kariuki Kamau & another [2016] eKLR (Ombwayo, J) and In re Estate of Kiruthu Kimiti (Deceased) [2021] eKLR (Mutuku, J). This cause should have been closed after that. See In re Estate of Wangechi Wangombe [2020] eKLR (Ngaah, J) and In re Estate of Laban Mogire Magogo (Deceased) [2020] eKLR (Ougo, J). There would be nothing for the new administrator to do upon being appointed, to take the place of the dead administrator, for the dead administrator had completed administration.

34. That would be the position, that the cause is effectively exhausted, and there would be no need to appoint an administrator, to replace the dead administrator, were it not that the applicant is arguing that that dead administrator was not entitled to be appointed administrator in the first place, and he was not entitled to inherit from the estate of the deceased, for the deceased had immediate survivors, being his own children. I would have to determine that question first.

35. That question would have 2 strands, whether the deceased had the 2 daughters, and whether he had sold the ½ share to the late administrator. If my finding would be that the deceased did not have children, and that he had sold the ½ share to the administrator, it would follow that there would be nothing to administer, and, therefore, there would be no need to appoint a new administrator, and the cause herein would be closed, and the file moved to the archives. However, should I find that the deceased had children, and had not sold a portion of that property to the late administrator, there would be a case for appointing a fresh administrator, to vacate the confirmation orders, to cancel the certificate of confirmation of grant made on the basis of it, and to reverse the transmission process. I will deal with the 2 issues in turn.

36. Let me start with the first issue, as to whether the deceased had children. The applicant asserts that she and her sister were in fact children of the deceased. What evidence is there to establish that? She has attached a letter from the Chief, to that effect. She availed that Chief, to give evidence on that, who testified that indeed the deceased had children, being the applicant and her sister. In addition, she called a brother of the deceased, who also identified her and her sister as children of the deceased.

The respondent, in his further affidavit, challenges the allegation that the deceased had children, and asserted that there were no such children. Did he provide proof of that? I have not seen any. He presented 2 witnesses, who testified that they did not know the deceased. That would mean that they could not know whether or not he had children. The respondent himself did not know the deceased, and, consequently, he could not authoritatively say that there were no children. When I balance the 2 respective cases on that score, I would believe the applicant, for the family of the deceased, and the government functionaries on the ground, supported her case. I shall find and hold that the applicant and her sister are children of the deceased.

37. On the second issue, whether the deceased had sold his ½ share in Bunyala/Bulemia/1440, to the late administrator, the respondent did not provide any concrete proof. No document, by way of a memorandum of sale of that interest, by the deceased to the late administrator, was presented. Neither were the individuals, who were privy to that alleged sale, presented as witnesses, to testify on what actually transpired.

38. The only piece of evidence relied upon is the proceedings before the Tribunal. Those proceedings were initiated after the demise of the deceased, and part of the dispute related to Bunyala/Bulemia/1440, which the late administrator wished to recover. He told the Tribunal that he had bought Bunyala/Bulemia/1440 from the deceased, and a witness, Wilson Oundo, a brother of the deceased, also testified along similar lines. The respondent has lurched on that testimony, at the Tribunal, as the basis for asserting that the deceased had sold the land to the late administrator.

39. I note that the findings and the ruling by the Tribunal was that the deceased had sold Bunyala/Bulemia/1440 to the late administrator, and, therefore, that land, Bunyala/Bulemia/1440, belonged to the late administrator. That finding of the Tribunal was reduced to a court order, in the order of the court, given on 7th February 2006, and issued on even date. That appears to settle the matter. The deceased, according to the order of the court, in Busia PMC Land Dispute No. 60 of 2005, had sold the land, and it became property belonging to the late administrator.

40. However, that does not appear to quite settle the issue. In the first place, the matter before the Tribunal was on boundaries, and not ownership of the land. Secondly, the deceased was already dead by the time those proceedings were being initiated and maintained, and neither he nor his estate had been named as a party to the proceedings, and determinations, on whether or not he had validly sold the property to the late administrator, could not be properly and legally made in proceedings in which the deceased or his estate were not parties.

41. Thirdly and finally, and more fundamentally, the Tribunal had no jurisdiction, from the law establishing the Land Disputes Tribunals, that is to say the Land Disputes Tribunals Act, Cap 300A, Laws of Kenya, now repealed, to entertain disputes on ownership of property. The pronouncement, on the alleged sale and ownership of Bunyala/Bulemia/1440, was outside the scope and jurisdiction of the Tribunal, and, as a consequence, it was null and void, and of no effect. The adoption of that finding, by the Chief Magistrate's Court, could not give legitimacy, to what was null and void. That would mean that that property was still estate property, as at the date the deceased died, and the family of the deceased should have been involved in the administration process, to be heard on the distribution of the property of their kin.

42. I am not, by any means, making a final determination on the validity or legitimacy of the alleged sale of the land, by the deceased to the late administrator, if at all there was such a sale. Whether or not the deceased sold the property to the late administrator is still a moot point, for the Tribunal never resolved it, for lack of jurisdiction, and I, equally, do not have the requisite jurisdiction to resolve it. That question ought to be placed before the court with the appropriate jurisdiction.

43. That should answer the claim by the respondent to Bunyala/Bulemia/1440. Bunyala/Bulemia/1440 was never transferred to the name of the late administrator, during the lifetime of the deceased. As at 3rd September 2011, when the same was allegedly sold to the respondent, by the late administrator, it was not registered in the name of the late administrator, and the late administrator could not validly sell it to the respondent. It was still in the name of a dead person, the deceased, and representation to his estate had not been obtained, for it was not obtained until the 14th February 2012. It could not be validly sold without such representation being obtained, for it had not vested in anyone, by virtue of section 79 of the *Law of Succession Act*, who could then have the power, under section 82 of the Act, to sell it. More fundamentally, section 82(ii) of the Act outlaws disposal of interests in immovable property before a grant is confirmed. The grant herein was not confirmed until 1st November 2012. Quite clearly, there was no way the respondent could have acquired a valid title to Bunyala/Bulemia/1440, on 3rd September 2011, prior to the events of 14th February 2012 and 1st November 2012.

44. So, what is the net effect of what I have discussed above? The deceased was survived by children. They had a prior right or entitlement to administration of the estate of their dead father, by virtue of section 66 of the *Law of Succession Act*, over a person who was purporting to have bought the land. Such a purported buyer could not obtain representation, without complying with Rules 7(7) and 26 of the Probate and Administration Rules, by way of obtaining the consents of the persons with prior right, or getting them to renounce their right to administration, or causing citations to issue to them to take up or renounce probate. None of that was done, in the instant case. That made the process of obtaining representation herein defective.

45. The argument appears to be that the deceased had sold his entire interest in the land, and that there was nothing to be devolved to his survivors, if he had any. That may well be so, but that does not change the law, to the effect that such survivors would have prior right to administration, and if they are not interested in or are unwilling to take up administration, then any claimant would have to comply with the mandatory requirements in Rules 7(7) and 26 of the Probate and Administration Rules. In addition to that, section 51(2)(g) of the *Law of Succession Act* requires disclosure of all the survivors of the deceased, be they spouses, children, siblings or grandchildren. It would appear that the deceased was survived by siblings, 1 testified in these proceedings, yet his name was not disclosed in the petition, in addition to that of the children of the deceased. I note, from the proceedings of the Tribunal, that the late administrator might have been related to the deceased by blood. Surely, he would have known the survivors of the deceased that ought to have been disclosed in his petition, and to whom citations ought to have been issued.

46. The long and short of it is that the application for revocation is merited, and I hereby allow it. I hereby revoke the grant that was made on 14th February 2012, to Vincent Habule Obenzo, and confirmed on 1st November 2012. I hereby set aside the confirmation orders of 1st November 2012, cancel the certificate of confirmation of grant issued the same day, and cancel and reverse the transmission of Bunyala/Bulemia/1440 to the late administrator, on 20th March 2013 , and order the Busia County Land Registrar to restore the affected ½ share of Bunyala/Bulemia/1440 to the estate of the deceased herein. I hereby appoint the applicant, Rophina Nekesa Osigo, administratrix of the estate herein, and a grant of letters of administration shall issue to her accordingly. She shall apply for confirmation of her grant, in the next 45 days, and the matter shall be mentioned on 22nd January 2025 for compliance. Anyone with a claim to Bunyala/Bulemia/1440, shall have a right to file a protest to confirmation of that grant. The respondent has leave of 30 days, should he be aggrieved, by these orders, to appeal to the Court of Appeal. Each party shall bear their own costs. 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 applicant.

Mr. Okello, instructed by ROW Advocates LLP, Advocates for the respondent.