



**In re Estate of Roman Nasira Sisa (Deceased) (Succession Appeal
E002 of 2022) [2023] KEHC 3058 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E002 OF 2022**

PJO OTIENO, J

MARCH 31, 2023

IN THE MATTER OF ESTATE OF ROMAN NASIRA SISA (DECEASED)

BETWEEN

JOSEPH GODFREY MBAYAKI PETITIONER

AND

PATRICK MBAYAKI MASINDE OBJECTOR

JUDGMENT

1. Before the trial court, both the 1st administrator, Joseph Godfrey Mbayaki Sisa and the 2nd administrator, Patrick Mbayaki Masinde filed applications for confirmation of the grant of letters of administration in relation to the estate of Roman Nasira Sisa who died intestate on 19/12/1997. The 1st petitioner, Joseph Mbayaki filed his summons for Confirmation of the grant dated 24/11/2021 while the second petitioner Patrick Mbayaki Masinde filed his on the day of 17/11/2021. The first petitioner is the son to the deceased while the second petitioner is grandson to the deceased.
2. The appeal was provoked by the decision of the trial court which allowed the application by the 1st administrator in which the 2nd administrator was treated as a protestor. That application was expressed to be brought under the provisions of Rule 71(2) of *Law of Succession Act* and Rule 40(2) of the *Probate and Administration Rules*. The application was supported by the affidavit of the 1st administrator whose gist was that all the sons of the had agreed on the mode of distribution and that it is the 2nd administrator who is obstructing the conclusion of the administration.
3. The second petitioner protested the proposed distribution on the basis that the deceased had expressed his wishes on how the same ought to be shared out, that there had been a decision in CMELCC no E136 of 2021 which had been ignored and lastly that the 1st administrator had included in the scheme of distribution a property that does not belong to the estate.



4. While the joint grant was pending confirmation, one of the deceased sons, Frederick Munyolo Sisa lost his wife and the second petitioner moved to court to restrain the son of the deceased from interring remains of his wife on the land owing to the subject matter of cause. The said matter was heard to conclusion with directions that the estate of the deceased to be distributed first before the court makes finding on where the wife of Fredrick Munyolo ought to be buried.
5. Upon being served with the affidavit of protest the 1st administrator filed a further affidavit and asserted that Plot no 8 Malaha Market had been sold by the deceased prior to his death, was in the process of being transferred and copies of agreements and transfer instrument exhibited to court. It was added that the purchaser thereof had all along been in possession and user of the land ever since yet the second administrator had allocated the plot to himself.
6. On the proposal by the 2nd administrator on Bunyala/Budonga /282, the 1st administrator contend that the same was due to the six sons of the deceased in accordance with the judgment in CMELCC 136/2021 yet the 2nd administrator was insisting on distribution that had since been nullified by the court in SPMCC suit no 913/1994 and CMELCC 136/2021. He added that the 2nd administrators father, one Pius Masinde Sisa was given land parcel no Bunyala/Budonga/277 by the deceased and the 2nd petitioner one terms that one of the sons of the deceased, Francis Murunga Sisa was to get 3 acres while the father to 2nd administrator getting 4 acres, but the 2nd administrator has had the land registered in his name absolutely thus depriving the family of Francis Murunga their share despite the fact that they have always used their known position with clearly marked boundaries. He underscores the fact that the deceased wished had been determined in the land case, that the beneficiaries to the estate have no opposition to his mode of distribution, that each have their boundaries intact and that the 2nd administrators father had benefited inter vivos and the he need not compete with the beneficiaries who are yet to get shares
7. In the determination sought to be challenged in this appeal, the court delivered itself and said: -
 - “ 12. Under Section 76, a grant of representation may be revoked on three general grounds. The first general ground is where there were issues with the manner in which the grant was obtained. It must be demonstrated that the process was defective or deficient in some way. It must also be demonstrated that the process was fraudulent in that there was either misrepresentation of facts or concealment of important facts from the court. The second general ground is, where the grant is obtained properly, but there are deficiencies in the manner the grant-holder goes about the administration of the estate. It would mean maladministration generally, such as where the grant-holder fails to apply for confirmation of their grant within the period allowed in law or fails to proceed diligently with administration of the estate or fails to render accounts as and when required to. The third general ground is where the grant has become useless or inoperative due to subsequent events, such as the death or bankruptcy of a sole administrator.
 13. In the application that was before the trial court, the principal ground for seeking revocation was that the appellant had obtained the grant through a fraudulent process, by concealment of matter from the court, in that not all the survivors of the deceased were disclosed to the court. The respondent is not a child of the deceased. His connection with the deceased is that he is a grandson of the deceased, by virtue of being a son of one of the late sons of the deceased.”



8. It is that decision the appellant, 2nd administrator faults for having ignored his evidence while preferring that by the respondent/1st administrator, for failure to find that a ground for revocation had been established, failed to comment on land Parcel no Bunyala/Budonga/277 thus creating grounds for chaos and for failing to include the appellant as a beneficiary.
9. Both parties filed written submissions in which first administrator asserts that land parcel registration number Bunyala/Budonga/282 which is subject of the cause was registered in the names of the deceased and that prior to his death the deceased had subdivided the land amongst his six sons namely; Andrew Nasira, Charles Mukenya Sisa, Jane Murunga Sisa, Joseph Mbayaki Sisa, Frederick Munyolo Sisa, Mary July Atieno Ochola. He stated that deceased had allocated land parcel registration no Bunyala/Budonga/227 and Bunyala/Budonga/276 to the 2nd petitioner's father, Pius Mbayaki, and Sifirinous Sisa respectively before he died and that the second petitioner was entitled to benefit from his father's share already allocated to him by the deceased. He indicated the presence of well-defined boundaries of planted trees that were acknowledged by all the other deceased's sons that demarcated the land. He affirmed that at the time of taking the letters of administration, it is the chief who issued letters identifying the heirs of the estate of the deceased. It is the six sons listed above who had not been allocated land that were to benefit from land parcel no Bunyala/Budonga/282.
10. With regards to the interests of the deceased on Malaha Market plot no 8, it was reiterated that it was sold by the deceased to Raphael Mumia Olunga *vide* a sale land agreement made on 27/08/1991 annexed and marked, JGMS1(a)&(b) being copies of receipts of the agreement presented before the court. He stated that the deceased died in the process of transferring the said plot to the purchaser before the transfer dully being registered to conclusion. He affirmed that Raphael Mumia Olunga was a liability of the deceased's estate lawfully under the annexed agreement for sale and that he was currently in use and occupation of the said land all the way from 1991. He stated that one of the duties of administrators enshrined under section 79, 82 and 83 of Law of Succession is of ascertaining and paying out all the deceased's debts and then producing a full and accurate inventory of the assets and liabilities of the deceased hence distributing Malaha market plot 8 would amount to illegality as it was a liability. He lays his prayers under section 71(2) of the Law of Succession Act urging the court to adopt his mode of distribution as it is just, fair and in accordance with the wishes of the deceased.
11. For the 2nd administrator, the scope of dispute is limited to ownership of the two properties; Bunyala/Budonga/227 and Plot no 8 at Mahala Market by the deceased as at the date of his death. It is his claim that property no Bunyala/Budonga/227 has never been part of the deceased estate and that it purely belonged to his further Pius Masinde. He then faulted the 1st petitioner for including the property in the cause and giving 3 acres to Jane Murunga Sisa which he terms as unprocedural, illegal and an act amounting abuse of court process. He dismisses the 1st petitioner purported distribution claiming that the court has no jurisdiction to distribute another person's property in a succession cause belonging to different persons.
12. Regarding plot no 8 Malaha Market and the allegation that the same was sold to Raphael Mumia Olunga, the appellant asserted that purchaser as not being one of the deceased's survivors and that he is only entitled to lay his claim to the Environment and Land Court being the sitting Court on succession cause has no jurisdiction to enforce sale of land agreement. It is his claim that the plot which is still in the name of the deceased be given to his daughters as in his proposal for distribution.
13. The appellant supported the proposed distribution of land parcel no Bunyala/Budonga/282 by the 1st administrator captured in his mutation form stating that it is consistent with the wishes of the deceased being he is the one who personally subdivided, shared his land to his sons and even created boundaries separating them.



Analysis and Determination

14. Upon carefully considering the pleadings on record, the written submissions filed by both parties as well as the judgement by the trial court, the single issue that emerge for determination is whether the trial court applied the correct principles in distributing the estate and in finding that the Plot no 8 Malaha market was not available for distribution.
15. The duties of an administrator are imposed by section 83 of the Act to include settlement of debts due to the estate. The law equally requires the administrators, by dint of section 83e, to disclose all liabilities of the estate and to settle same before distributing the net surplus. It is not the duty of the administrators to brood disputes or litigation by asking an obvious liability to go to court as asserted by the appellant.
16. For the foregoing reasons, it is the finding of this court that the trial court was very right in his appreciation of the law when it held that Plot no 8 Malaha was sold by the deceased in his lifetime and thus did not form part of the net estate due for distribution.
17. On whether the appellant as a grandchild of the deceased was a beneficiary and was erroneously excluded, it is the finding of the court that a grand child is not a direct beneficiary, but only claims on the title of the parent. The respondent said, and it was not controverted by the appellant, that the parcel of Land Bunyala/Budonga/277 was given to the appellant's father and another son called Francis by the deceased. Being uncontroverted, the court finds that that property having been demonstrated to be registered in the name of the appellant was not due for distribution in the cause but in terms of section 42 of the Act must be taken into account on distribution. I do take same into account and hold that the appellants father having obtained a benefit from the deceased, he, the appellant is not entitled to claim and be entitled to share in the estate.
18. The coronary and flip side of that finding is that any claim by the family of Francis Murunga Sisa, is a claim in user or title to land and not due for pursuit here but before a court with jurisdiction to handle such disputes.
19. There was then the argument on revocation or annulment of the grant which the court considered to be wholly unnecessary in this appeal. Unnecessary because what the court was to determine was a protest and the determination of a protests results into distribution, as the court may determine, but is never expected to result in a revocation. In any event, the court is bound to determine only a dispute presented to it by parties and not to import, for determination, that which is not sought by parties
20. Having exercised the mandate of a first appellate court, it is thus the holding of the court that the only property of the estate due for distribution is Bunyala/Budonga/282 and that Bunyala/Budonga/277 being not registered in the name of the deceased is not part of the net estate just like Plot no 8 Malaha market.
21. Accordingly, the appeal is allowed to the extent that while Bunyala/Budonga/282 shall be distributed as proposed by the respondent, parcel number Bunyala/Budonga/277 and Plot no 8 Malaha market, shall be excluded from that scheme of distribution. The determination of the trial court is thus adjusted and a certificate of confirmation of grant shall be issued by the trial court in terms of this judgment.
22. Being a family dispute, each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 31ST DAY OF MARCH, 2023

Patrick J O Otieno



Judge

In the presence of: -

Appellant in person

No appearance for Andia Advocate to the respondent

