



**In re Estate of Lukangu Watitwa (Deceased) (Succession Cause
354 of 2001) [2023] KEHC 3884 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 354 OF 2001**

WM MUSYOKA, J

APRIL 28, 2023

IN THE MATTER OF THE ESTATE OF LUKANGU WATITWA (DECEASED)

JUDGMENT

1. There is a mix-up that the registry will need to address in this matter. The deceased herein, according to the death certificate, serial number 393922, is Nicodemus Lukangu Watitwa. The petition was filed in respect of the estate of Lukangu Watitwa. The original court file reads in the matter of the estate of Lukangu Watilwa, then the latest covers indicate that the matter relates to the estate of Emmanuel W. Luteyo and the estate of Emmanuel Luteyo. This needs to be corrected so that there is a correct reflection of the actual position.
2. The deceased herein died on July 13, 1982. The Chief of Etenje Location wrote to court a letter, dated April 26, 2001, indicating that the deceased had been survived by 1 widow and 4 sons. The widow is said to be Flora Ndiri Lukangu, and the sons are Emmanuel Watitwa Lukangu, Stephen Taywa Lukangu, Mourice Indwale Lukangu and John Washiswa Lukangu. Representation to the estate was sought by a petition that was filed herein on January 31, 2001, at the instance of Emmanuel Watitwa Lukangu and Stephen Taywa Lukangu, in their capacities as sons of the deceased. The deceased is said to have been survived by the 5 individuals indicated in the Chief's letter, and to have died possessed of South Wanga/Buchifi/259. Letters of administration intestate were made, on June 7, 2003, to Emmanuel Watitwa Lukangu and Stephen Taywa Lukangu, and a grant was duly issued, dated February 13, 2003. I shall refer to Emmanuel Watitwa Lukangu and Stephen Taywa Lukangu, hereafter, as the administrators.
3. On June 23, 2003, a summons for confirmation, dated June 18, 2003, was lodged herein, by Emmanuel Watitwa Lukangu. He proposes equal distribution of South Wanga/Buchifi/259 between the 4 sons, with each of the sons taking 2 acres each. That application has not been disposed of, and is still pending.
4. On August 18, 2003, a summons for revocation of grant, of even date, was lodged herein, by Patrick Lukangu. In his affidavit in support, sworn on August 18, 2003, he says that he is a son of the deceased, who had died a polygamist, having married 2 wives. He says he was the last-born son from the first house, and he had not been disclosed in the succession. He adds that 2 of the sons disclosed are from



the first house, and the other 2 are from the second house. He says the consents of the survivors was not sought and obtained, and, therefore, material facts had been concealed from the court. I shall refer to Patrick Lukangu, hereafter, as the applicant.

5. Emmanuel Watitwa Lukangu responded to the revocation application, by an affidavit, sworn on September 10, 2003. He avers that the succession proceedings had not been initiated without the knowledge of the applicant, and no facts had been concealed from the court. He explains that the deceased had 2 wives, Teresa Lukangu and Flora Lukangu, and had owned 3 parcels of land, being South Wanga/Buchifi/254, 255 and 259. He further explains that the first house had 3 sons, being Raphael Omollo Lukangu, Mikael Kweyu Lukangu and the applicant, Patrick Watitwa Lukangu. The second house had 4 sons, being Emmanuel Watitwa Lukangu, Stephen Taywa Lukangu, Maurice Indwale Lukangu and John Washiswa Lukangu. He explains that the first house was given South Wanga/Buchifi/254, measuring 10.5 acres, and South Wanga/Buchifi/255, measuring 5.5 acres, which were registered in the names of Raphael Omollo Lukangu and Mikael Kweyu Lukangu, and argues that the applicant was supposed to get his share from those 2 properties. He avers that the second house was supposed to be the beneficiaries of the other assets, South Wanga/Buchifi/259, measuring 8 acres, and those entitled to that property, according to him, are Emmanuel Watitwa Lukangu, Stephen Taywa Lukangu, Maurice Indwale Lukangu and John Washiswa Lukangu. He avers that the other sons in the first house had no issues, and Raphael Omollo Lukangu had already allocated to the applicant a portion of his South Wanga/Buchifi/254, which he currently occupies and utilizes. He avers that there was a matter before the Land Disputes Tribunal on the sharing of the property of the deceased, and there was an order of the Provincial Appeals Committee, which had been adopted by the court, as an order of the court, in Kakamega CMCCC No. 140 of 1997. He states that the effect of that order was that Mikael Kweyu Lukangu retains South Wanga/Buchifi/255, while Raphael Omollo Lukangu surrenders 2 acres out of South Wanga/Buchifi/254 to the applicant, which he asserts has already been done. He avers that after that the applicant allowed the sons in the second house to occupy and utilize South Wanga/Buchifi/259, exclusively. He avers that the instant succession proceedings are only in respect of South Wanga/Buchifi/259, hence limited to members of the second house, and it was unnecessary, in the circumstances, to disclose and include members of the first house.
6. Emmanuel Watitwa Lukangu has attached to his affidavit a number of documents. There is a green card for South Wanga/Buchifi/254, showing that it was originally registered in the name of Raphael Omolo on April 21, 1967, and in 1981 there a correction of name to Raphael Omollo Lukangu. There a copy of green card for South Wanga/Buchifi/255, showing that it was registered on April 21, 1967, in the name of Michail Kweyu, and in 1981 there a correction of name to Mikael Kweyu Lukangu. There is a copy of a search certificate for South Wanga/Buchifi/259, showing that it was registered in the name of the deceased, on April 21, 1967. There is a copy of an order recorded on July 10, 2002, in Kakamega CMCCC No 140 of 1997, showing that the Provincial Land Disputes Appeals Committee had awarded the applicant 2 acres out of South Wanga/Buchifi/254.
7. Going by the proceedings of February 16, 2012, it would appear that the 2 applications, for confirmation of grant and for revocation of the same grant, were to be disposed of simultaneously, by way of oral evidence.
8. The hearing commenced on October 24, 2011, before Thurania Jaden J Emmanuel Watitwa Lukangu was the first on the witness stand. He explained that the deceased had 2 wives. The first wife had 3 sons, while the second wife had 4 sons. The deceased had 3 parcels of land: South Wanga/Buchifi/254, 255 and 259; measuring 10.15 acres, 5.5 and 8 acres, respectively. He explained that prior to his death, the deceased had given South Wanga/Buchifi/254 and 255, to sons in the first house; leaving South Wanga/Buchifi/259 to be shared by the sons in the second house. He asserted that the applicant should



get his share of the estate from South Wanga/Buchifi/254. He urged the court to share out the estate as proposed in his application. Stephen Taywa Lukangu and Peter Tabuche Olale testified along similar lines.

9. The applicant, Patrick Watitwa Lukangu, testified before me on February 14, 2022. He concurred with the administrators, that the deceased had 2 wives. He disclosed that the deceased had daughters too. The first house had 8 children; while the second house had 3 daughters and 2 sons. He said that he was not informed, when the matter was initiated in court. He said that the deceased had shared out South Wanga/Buchifi/259 before he died, between the 2 houses. He said that his share out of South Wanga/Buchifi/259 was 1½ acres, and the second house was to take the other 6½ acres. He said that he was born on South Wanga/Buchifi/259, and was still resident on the property as at the date of his testimony. He said that the deceased was born in 1982, and was buried on South Wanga/Buchifi/259, on the portion meant for him. He said that his mother, the first wife, died in 1987, and was also buried on South Wanga/Buchifi/259, on the portion meant for him. He said that there were daughters in the first house, who were also alive. He said that the second house had 4 sons and 3 daughters. One of them, Angelina Otunga, was said to be alive. He said that the 4 sons in the second house occupied South Wanga/Buchifi/259, and excluded him from the distribution of that property. He referred to proceedings at the lower court, in Mumias ELC No. 51 of 2018, where an order was made for him to move out of South Wanga/Buchifi/259, as succession had been done, and he had been edged out of South Wanga/Buchifi/259. He said that he had nowhere else to go. He asserted that the sons in the second house wanted his brothers in the first house to give him land, yet there was no other land remaining for distribution. He said that it was the deceased who had given his brothers in the first house land, and South Wanga/Buchifi/259 remained undistributed, and that that property ought to be distributed amongst the children, who did not benefit from the inter vivos distribution carried out by the deceased. He denied having a case at the Land Disputes tribunal, where he was allegedly awarded 2 acres out of South Wanga/Buchifi/254. He said that technically South Wanga/Buchifi/259 belonged to his mother, since when the second wife was married she found his mother on that parcel of land.
10. Mikael Kweyu Lukangu followed. He started by stating that he was not claiming anything in the estate. He explained that the deceased had shared out his land amongst his houses, when he was alive. He said that the deceased gave him South Wanga/Buchifi/255 during his lifetime, which measured 5 acres. His brother Raphael was given South Wanga/Buchifi/254, which was 10 acres. He said he was aware of the Tribunal proceedings, which culminated in the final orders in Kakamega CMCCC No 140 of 1997, and which he said involved Raphael. According to him, the Tribunal ruled that each ought to continue holding on to their land. He said that he was not aware that the Tribunal required Raphael to give the applicant 2 acres out of South Wanga/Buchifi/254.
11. Lucia Omolo Malala followed. She was a daughter of the deceased, from the first wife. She said that she was not claiming anything from the estate, but supported the claim by the applicant for 1½ acres out of South Wanga/Buchifi/259. Her case was that being the youngest child from the first house, he should get the land where the parents were buried. Felista Wakhule Opondo was the last witness. She was a daughter of the deceased from the first house. She said that she was not claiming anything from the estate. She asserted that the deceased had shared out the land amongst the houses.
12. At the conclusion of the proceedings, the parties filed written submissions, which I have read through, and noted the arguments made.
13. I am determining 2 applications combined, for confirmation of grant, and for revocation. The 2 can be handled together, as section 71(2)(a)(b)(c) of the *Law of Succession Act*, Cap 160, Laws of Kenya, envisages that the court, at confirmation, considers whether or not the grant was obtained properly, and whether the administrator, upon appointment, administered the estate in accordance with the



law. The same provisions go on to give power to the court to remove the administrator, if not satisfied that he was properly appointed, and had properly administered the estate, confirm the grant, and make a fresh appointment of administrators. That would mean that sections 71(2)(a)(b)(c) are parallel to section 76(a)(b)(c)(d) of the *Law of Succession Act*. At confirmation, the court can exercise the power at section 76 of the *Law of Succession Act*, to revoke the grant on its own motion, if it is not satisfied that the administrator was appointed properly, and if not satisfied that the administrator had administered the estate properly and diligently.

14. For avoidance of doubt, sections 71(2)(a)(b)(c) and 76(a)(b)(c)(d) of the *Law of Succession Act* say as follows:

71.

Confirmation of grants

- (1) ...
- (2) the court to which application is made, or to which any dispute in respect thereof is referred, may –
 - (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
 - (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
 - (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other all assets of the estate then in his hands or under his control; or
 - (d) ...
- (3) ...
- (4) ...”

76.

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) ...”

15. So, were the administrators herein properly appointed? I do not think so. When they sought representation, they disclosed only 1 side of the family, their side. They only disclosed themselves, their mother and their 2 brothers. It emerged from later filings, and the oral hearing, that the deceased had another wife, and other children. The other wife was of course dead by then, but that did not obviate the need to disclose the fact that the deceased had married that 2 times. That was important since the estate herein was due for distribution under section 40, which caters for polygamous situations. I must point out that the deceased died in 1982, after the *Law of Succession Act* had become operational on July 1, 1981. By virtue of section 2(1), the law to apply to distribution of the estate herein was to be Part V of the *Law of Succession Act*, as the deceased had died intestate.
16. Was there justification for the non-disclosure or concealment? The administrators’ case was that they had a good reason for excluding the first house. Why? Because the deceased had distributed his estate during lifetime to the first house, and it was the second house that had not been steered, and it was the second house which was entitled to share the property remaining undistributed, that is South Wanga/Buchifi/259. That sounds like a plausible explanation. However, it has no backing in law. the law that governs applications for representation is section 51 of the *Law of Succession Act*, and it is fairly specific on who ought to be disclosed. Section 51(2)(g) is on who ought to be disclosed in cases of intestacy, and it be specific, all the surviving spouses and surviving children of the deceased. the provision is in mandatory terms. It would require disclosure of the immediate family members of the deceased, whether or not the deceased had done inter vivos distribution. The issue as to whether there were inter vivos distributions should have been raised at confirmation of grant, where the administrators would have excluded members of the first house from benefit, and explained that they were not entitled, by virtue of section 42 of the *Law of Succession Act*, as they had been provided for or steered during the lifetime of the deceased. The approach the administrators adopted in their petition brought them in to conflict with section 52 of the Law of Succession Act, and the nondisclosure and concealment, though seemingly justified, violated those mandatory provisions, and qualified their grant for revocation in terms of section 76(a)(b).



17. To clear any doubts, I hereby cite sections 51(2)(g) and 42 of the *Law of Succession Act*, which say as follows:

“51. Application for grant

- (1) ...
- (2) An application shall include information as to -
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) ...
 - (e) ...
 - (f) ...
 - (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
 - (h) ...
 - (i) ...”

“42. Previous benefits to be brought into account

Where-

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

18. “Children,” as used in the *Law of Succession Act*, is gender neutral. “Child” and “children” should not be construed to mean sons or male children. “Child” and “children,” as used in the *Law of Succession Act*, includes both sons and daughters, male and female, regardless of age and marital status. The administrators disclosed only the sons of the deceased, yet the deceased had daughters. That non-disclosure or concealment of daughters rendered the proceedings unconstitutional and invalid. I say so because Kenya is now under a new constitutional order, effective from 2010, when the current Constitution was promulgated. Of course, these proceedings were initiated before the promulgation of *the Constitution* on August 27, 2010. However, the coming into effect of that supreme law had a profound effect on the legitimacy of ongoing proceedings, founded on discrimination.

19. Article 27 of the *Constitution* provides for equal treatment of men and women, and it clearly outlaws discrimination of women on foundations of gender. Article 2(4) of the *Constitution* renders invalid any law which is discriminatory in practice. The approach adopted in this matter, is no doubt, founded on customary notions that women are not entitled to inherit from their fathers, for their share of



property is through their husbands, upon them getting married. Those notions were thrown overboard by the coming into operation of the new Constitution. In any event, customary law is absolutely of no application for intestate estates of persons resident in Kakamega County, by virtue of section 2(1)(2) of the *Law of Succession Act*. Article 2(4) of the *Constitution* goes on to render any act which is in violation of the *Constitution* a nullity. A discriminatory act violates the *Constitution*, and is invalid and null. The proceedings herein are null and invalid, so long as they are founded on paperwork which creates the impression that the deceased had no daughters, and proceeds to the total exclusion of the daughters.

20. For avoidance of doubt, Articles 2(1)(4) and 27 of the *Constitution*, and section 2(1)(2) of the *Law of Succession Act* provide as follows:

“2. Supremacy of this Constitution

- (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
- (2) ...
- (3) ...
- (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
- (5) ...
- (6) ...”

“27. Equality and freedom from discrimination

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.



- (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

“2. Application of Act

- (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.
- (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

21. The current judicial trend is to trash any proceedings that are carried out in a discriminatory manner. There is a string of decision in probate matters, where wills have been rendered invalid, where the makers or testators had made provisions that were discriminatory of daughters, to the extent that they were either excluded from benefit altogether for being daughters or married, or getting a small share in the estate on that same account. That act of discrimination, would render the will invalid, despite the testator having the freedom, under section 5 of the Law of Succession Act, to will away his property as he pleased. Similarly, the act of filing proceedings that discriminate against daughters, in violation of Article 27 of the Constitution, renders, by virtue of 2(4) of the , illegal and invalid. No orders ought to be made in the matter. For constitutionalism and respect for the law to set in, the parties must do the right thing, so as to bring the proceedings within the Constitution and the Law of Succession Act.

22. Consequently, I do hereby make the following orders:

- a. That I hereby revoke the grant that was made herein on June 7, 2003;
- b. That a fresh appointment of administrators, not more that 4, shall be made, where both houses of the deceased and both sons and daughters of the deceased shall be represented;
- c. That upon the new administrators being appointed, they shall apply for confirmation of their grant, in proceedings that shall involve all the members of the 2 houses of the deceased, be they sons and daughters;
- d. That whosoever shall not be satisfied with the proposals made, shall file affidavits of protest;
- e. That the applications, dated 18th June 2003 and 18th August 2003 are disposed of in those terms; and
- f. That costs shall be in the cause.

23. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 28TH DAY OF APRIL 2023

WM MUSYOKA

JUDGE



Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Akwala, instructed by Akwala & Company, Advocates for the administrator.

Mr. Elung'ata, instructed by Elung'ata & Company, Advocates for the applicant.

