



REPUBLIC OF KENYA



KENYA LAW

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Changulo v Changulo & 2 others; Wafula & another (Applicant) (Probate & Administration 43 of 2005) [2023] KEHC 3784 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PROBATE & ADMINISTRATION 43 OF 2005**

DK KEMEL, J

APRIL 27, 2023

BETWEEN

RONALD KONGANI CHANGULO PETITIONER

AND

JOSEPHINE N CHANGULO 1ST OBJECTOR

FRED WANJALA CHANGULO 2ND OBJECTOR

HARON WEKESA CHANGULO 3RD OBJECTOR

AND

CHYRILA NAKHUMICHA WAFULA APPLICANT

EVERLYNE NAFULA CHANGULO APPLICANT

RULING

1. The two objectors/applicants herein Chyrila Nakhumicha Wafula and Everlyne Nafula Changulo each filed the applications dated October 17, 2022 and November 11, 2022 respectively both seeking similar reliefs namely;
 - i) Spent
 - ii) That pending the hearing of this application interpartes, an inhibition order be issued inhibiting any dealings on LR E Bukusu/ E Sangalo/1342 and or any other number created thereto to wit: LR No E Bukusu /E Sangalo/4231 to 4247 and or any other further number created thereto and the occupation on the ground to remain intact as it was before confirmation of the grant herein and inhibition orders be placed on all new numbers created thereto.



- iii) That pending the hearing and determination of this application, an inhibition order be issued inhibiting any dealing on LR No E Bukusu/E Sangalo/4231 to 4247 and or any other further number created thereto and the occupation on the ground do remain intact as it was before confirmation of the grant herein an inhibition order be placed on all new numbers created thereto.
 - iv) That the grant of letters of administration issued on October 10, 2017 and confirmed on October 19, 2017 be revoked and or annulled
 - v) That all transfers affected pursuant to the aforesaid grant to wit: E Bukusu/E Sangalo/ 4231 to 4247 or any further numbers be revoked and or cancelled and the property do revert back in the name of the deceased Andrew Changulo Kongani.
 - vi) Costs be provided for
2. The applications are supported by the grounds set out on the face of the applications as well as affidavits of the applicants on even dates. The applicants gravamen is *inter alia*; that the deceased herein held the suit property namely LR E Bukusu/E Sangalo/1342 in trust for other dependants who were his brothers but who have since died; that the petitioners did not involve the applicants in the succession as they concealed material facts from the court; that the beneficiaries named on the certificate of confirmation of grant are now harassing the applicants with a view to evicting them from their homes yet they have lived there for many years; that the orders sought are necessary in order to protect the rights of the applicants who stand to be disinherited.
 3. Ronald Kongani Changulo, one of the administrators swore an affidavit dated November 11, 2022 wherein he agreed with the applicants concerns that the grant should be annulled and title deeds cancelled so that the succession may start afresh and nobody should be left out.
 4. Josephine N. Changulo, one of the administrators swore affidavits dated October 29, 2022 and December 6, 2022 wherein she vehemently opposed both applications and deposed *inter alia*; that a grant was issued by this court on October 10, 2017 after objection proceedings were heard and a judgement delivered; that pursuant to issuance of certificate of confirmation of grant ,new titles were issued to the beneficiaries; that the applicants herein had been aware of the succession proceedings from the beginning; that the orders sought cannot be granted since this court is already *functus officio* as the matter or issue had already been settled by Githinji J *vide* the judgement dated October 9, 2017.
 5. The two applications were canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
 6. Vide submissions dated March 1, 2023, learned counsel for the applicants submitted that the deceased herein had held the suit land in trust for his brothers and that the applicants herein are sister in law and sister to the deceased and that there is evidence that the deceased herein had prior to his death shared out the land to his brothers whose families should be allowed to enjoy vacant possession of those parcels of land. It was also submitted that this court is not *functus officio* as claimed by one the administrators and that in any case this court has inherent powers under rule 73 of the *Probate and Administration Rules* to make orders to meet the ends of justice. It was finally submitted that in view of the concealment of material facts by the administrators in which they left out the applicants who are *bonafide* beneficiaries of the estate, then the grant should be revoked and titles already issued be cancelled and the property do revert back in the name of the deceased Andrew Changulo Kongani.
 7. Vide submissions dated March 8, 2023, learned counsel for the respondents submitted that the applicants concerns were dealt with *vide* the judgments of Githinji J delivered on October 9, 2017



where it was held that the brothers of the deceased did not fall within the scope of section 29(b) of the Law of Succession Act as dependants and as such, the wives of the said brothers of the deceased cannot claim to be dependants in anyway. It was also submitted that this court on February 7, 2019 directed that a surveyor visits the land to carry out the subdivision of the property among the beneficiaries as there was no appeal lodged against the judgement of Githinji J dated October 9, 2017. It was finally submitted that the two applications are an abuse of the court process and should be dismissed with costs.

8. I have given due consideration to the applications, rival affidavits and the submissions tendered. It is not in dispute that objection proceedings to the grant were conducted herein leading to the judgement by Githinji J dated October 9, 2017 and that this court on February 7, 2019 upon establishing that no appeal had been preferred against the judgement dated October 9, 2017, ordered a surveyor to visit the land and establish the boundaries for the beneficiaries. It is also not in dispute that there has been no appeal lodged against the judgement of this court dated October 9, 2017 to date. It is also not in dispute that this court on the February 16, 2023 issued directions to the effect that it was not appropriate for the parties to start another set *viva voce* evidence yet such proceeding had been conducted and a judgement rendered on October 9, 2017 and that the parties were to be cognizant of this fact and to find ways and means of addressing themselves to the judgement already on record. That being the position, I find the only issue for determination is whether the two applications have merit.
9. It is noted that the two applications seek for revocation of grant and cancellation of new titles if already issued on the grounds that the applicants have been left out in the distribution of the estate of the deceased herein. Pursuant to the judgement of Githinji dated October 9, 2017, it became clear that the alleged brothers and sisters of the deceased were not his dependants and hence they did not come within the ambit of section 29 of the Law of Succession Act. Indeed, objection proceedings were conducted *viva voce* leading to the judgement dated October 9, 2017 and view of the sentiments of Justice Githinji that the brothers and sisters of the deceased were not dependants within the meaning of section 29 of the Law Of Succession Act, the status of the applicants appear to fall under that category and therefore starting another set of *viva voce* objection proceeding would be an exercise in vain. Clearly, this court is already *functus officio*. The only avenue is for the applicants to pursue an appeal against the judgement dated October 9, 2017.
10. It is also noted that the applicants have not even sought for an order of review or setting aside the judgement dated October 9, 2017 in order to enable them ventilate their case against the administrators of the estate. As the applicants have neither lodged an appeal or review against the judgement dated October 9, 2017, the present applications are a non-starter and an abuse of the court process.
11. Finally, if the applicants intend to bring an argument that the deceased held the land in trust for his siblings including the applicants, then the right forum should have been the Environment and Land Court by dint of article 162 of the Constitution and section 13 of the Environment and Land Court Act.
12. In view of the foregoing observations, it is my finding that the applicant's applications dated October 17, 2022 and November 11, 2022 are devoid of merit. They are dismissed with no order as to costs.

DATED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF APRIL 2023

D.KEMEI

JUDGE

In the presence of :

Wamalwa for Objector/Applicants



Ronald Kongani Changulo Petitioner

No appearance Kweyu for Objectors

Kizito Court Assistant

