



REPUBLIC OF KENYA



**In re Estate of Wanyama Saratuki (Deceased) (Succession Cause
19 of 2008) [2023] KEHC 3926 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 19 OF 2008**

REA OUGO, J

APRIL 26, 2023

IN THE MATTER OF THE ESTATE OF WANYAMA SARATUKI (DECEASED)

BETWEEN

YOKABET KHAMALA WANYAMA 1ST PETITIONER

JOHN MUCHAZI WANYAMA 2ND PETITIONER

GERORGE NANDOKHA WANYAMA 3RD PETITIONER

ROBERT WAMBOKA WANYAMA 4TH PETITIONER

AND

FLORENCE KHWAKA WANYAMA OBJECTOR

RULING

1. 2 applications have been filed by the parties in this Succession Cause. The application dated the 21st July 2022 is by Florence Khwaka Wanyama, the Objector. The 4 petitioners are the respondents. The application is brought under Rule 73 and 49 of the [Probate and Administration Rules](#) and Article 48, 50 and 159 of the [Constitution of Kenya](#). The applicant seeks the following orders;
 - i. That the objector be enjoined to the proceedings
 - ii. That upon the enjoiner, the court be pleased to stay execution of the order issued on the 30th June 2022 pending the hearing and determination of the application.
 - iii. That the court be pleased to review , vary or set aside the orders issued on the 8th March 2018 and 15th December 2016 and in particular the order of valuing land parcel No. Bungoma Township/377 and depositing of the proceeds from the said land parcel to the joint account of Situma Advocates and Annet Mumalasi & Co. Advocates.



- iv. That the said Land parcel No. Bungoma Township/377, be expunged from the estate of the deceased and the same revert back to the Applicant and the rental income collected from the said rental premises be released to the Applicant
 - v. That cost of the application be provided for.
 2. The application is supported by the objector's affidavit dated 21st July 2022. The objector in brief avers as follows; she is the 4th widow of the deceased. She allowed her daughter to represent their house during the succession proceedings. LR Bungoma / Township/377 was transferred to her late husband in 1993. She did not surrender her property to the estate. That unknown to her and without her consent the advocates of the petitioners entered into a consent nullifying the will dated 2.2.2006 and included LR Bungoma/ Township/ 377 as part of the estate and ordered a valuation to proceed on the said land. In addition, the advocates entered into a consent to share rental income from the land to be deposited in court purported to belong to the estate of the deceased. That the said property belongs to her and not the estate of the deceased. That the order on the property was made erroneously. That now that the court made an order that the rental income in court be shared by the parties its distribution without her consent will deprive her of her property without a hearing and amounts to a violation of her constitutional rights enshrined in the constitution. That she seeks to be enjoined in the proceedings as objector and to proceed to review and set aside the orders made on the 8th March 2018 and 15th December 2016. That the court should expunge LR Bungoma/ Township/377 from the estate of the deceased. That the rental deposits in court should be released to her as the bona fide owner of the said land parcel.
 3. Christine Sikhyoha Wanyama and George Nandokha Wanyama the administrators of the deceased's estate filed a replying affidavit dated the 29th September 2022. Their response to the Objector's application is as follows; that this court issued a certificate of confirmation of grant on the 26th July 2021. An appeal was lodged against the said ruling and the court of appeal issued orders which have not been set aside. That this court does not have the jurisdiction and powers to reverse, vacate or void the appellate courts orders. That the issue of transfer of the subject land parcel to the objector was determined in Civil Appeal no. 223 of 2019 and was determined by the appellate court. That they have been in court for the last 14 years. that an official denunciation claims of ownership of plot no. 377 Bungoma Township was issued by the Chief Officer Lands County Government of Bungoma. That the court ordered that the amount in Diamond bank be shared by the beneficiaries. That as administrators of the estate they have been unable to execute the conveyance of the estate as reflected in the certificate of confirmation of grant because of the outstanding amounts of Kshs. 394,123/- being arrears of the municipal rates for plot no. 377 owed to Bungoma County and 252000/- being survey fees for agricultural land North Malakisi/ North Wamono 620 and valuation fees of Kshs. 85000/- for plot No. 377.
 4. The 2nd application is dated the 18th August 2022. It is filed by Christine Wanyama Saratuki and George Nandhoka Wanyama. The application is brought under section 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules, Section 3 and 3A of the Civil Procedure Act. The applicants are seeking the followings orders;
 - a. That vesting orders be issued;
 - i. Directing Diamond Trust Bank Bungoma Branch to pay Kshs. 394,123/- to Bungoma County Revenue Office outstanding in arrears of municipal rates for Plot No. 377 Bungoma, Kshs. 252,000/- for Geomatics Services Limited being survey fees for agricultural land North Malakisi/ North Malakisi/ North Wamono 620 and Kshs.



85,000/- to Chrisca Real Estate Valuers being the valuation fees for Plot No. 377 Bungoma

- ii. Compel the Deputy Registrar Bungoma High Court to sign all the transfer documents as directed in the Court ruling issued on 30th June 2022 or in the alternative form, transferring his signatory authority at the discretion of the court.
 - iii. Costs of the application be provided for.
5. The applicants contend that upon confirmation of the grant on the 26th July 2021 the beneficiaries were allocated equal share from the amount of Kshs. 1,200,000/- being the estimated rental collections in account no. 5322314001 at Diamond Trust Bank, Bungoma branch. That they have discovered that the actual amount in the account is Kshs. 988,000/-. That they cannot execute the conveyance of the estate as reflected in the certificate of confirmation of grant issued on the 21.7.2021 unless the amount of Kshs. 394,123/- which is in arrears is paid. That the respondent has not yet signed the documents despite having the documents presented on the 2nd August 2022.
6. The objector filed grounds of opposition to the application dated 18.8.2022, stating that the said application is frivolous, vexatious and an abuse of the due process of this court, that the application cannot be enforced as the title of land parcel No. Bungoma Town/ 377 is in the name of a living person and that the objector has sought to have the said orders set aside as she was not a party to the succession proceedings.
7. Parties filed written submissions on both applications. I have read and considered the said submissions. The issues for determination in the 1st application are; whether the objector should be enjoined in the proceedings and whether the court should review, vary and or set aside the order issued on the 8th March 2018 and 15th December 2016 and in particular the order of valuing land parcel No. Bungoma Township / 377 and depositing of the proceeds from the said land to the joint account and lastly if the said parcel of land should be expunged from the estate of the deceased and the same referred back to the applicant and the rental released to her.
8. The applicant is the 4th widow of the deceased. From inception she has been a party in this cause as a widow and beneficiary of the deceased's estate. She has filed an affidavit of protest prior to this application in May 2008. Caroline Kituyi Wanyama (Caroline) is the representative of the 4th house. The objector does not require an order to be enjoined to the proceedings. The next issue is on the review of the 2 courts orders. I have taken time to go through this file. The order of 8th March 2018 is a consent order. A consent order can only be set aside on the following grounds; fraud, undue influence, duress or mistaken representation. The objector's argument is that her consent was not obtained when the consent was recorded. That this was an error and is a subject for review and that the court should set aside the said order as she is the proprietor of Plot 377. She does not deny that she had a representative from her house and that the said administrator was part of the consent. Caroline is her representative testified that Plot No. 377 belonged to the objector. Justice Riechi in his judgment dated the 15th May 2019 took into account the parties pleading and submissions and made a finding that Plot No. 3777 be distributed equally. Caroline and John Muchasi Wanyama appealed and the Court of appealed pronounced itself a judgment dated 29th January 2021 as follows on the said property;

“Parcel No. Plot No. 377 Bungoma Town was acquired by the deceased many years in 1959/1960 before he was married any of the last 3 widow. Fast forward , according to a copy of certificate of official search dated 7th September 2008, the 4th widow is shown as the sole proprietor. Tracing the basis of that ownership back to the Transfer of Lease dated November, 2000, it is obvious that the deceased was transferring this property from himself



to himself and the 4th widow jointly. We cannot find any explanation how , at the time of registration , it ended up with the 4th widow alone. We only suspect that it was after the death of the deceased and on the basis of the fist will made orally by the deceased, in which it is said that he bequeathed the 2nd and 4th widows with this and another property. In the final written will of 2006 which revoked the previous one, and which is now of no effect as we explain below, the deceased transmitted the property to the last 5 children of the 4th house...

Similarly, having found that there was an error in the application of section 40 in respect to the entire estate, we are minded to interfere with the equal distribution of the estate by setting aside the decision and substitute it with an order distributing half of Plot No. 377 Bungoma Town to the 4th house on account of what we have said regarding the distinction between children in need of upkeep and those who are adult.”

9. From all the above proceedings it clear that the 4th widow was represented not only in the high court during the distribution but also before the Court of Appeal. To argue that there was an error and that she did not consent to the orders of 8.3.2016 and 15.12.2016 is not true. This matter has been in court since 2008 and she has all along raised the issue of the Plot No.377. The high court and court of appeal dealt with the issues that were raised by her on the said plot. I agree with the respondents’ submissions that this court cannot , review , vary and or set aside the orders of the court of appeal. The court of appeal judgment still stands. I find no merit in the objector’s application dated 21.7.2022.
10. I will proceed to consider the 2nd application. The order of 8.3.2018 indicates that the administrators to value property LR No. 377 Bungoma Town and that the funds to be availed from the joint account. In a ruling dated 30th June 2022 Justice Riechi ordered the 2nd and 4th administrators to execute documents of transfer of the properties in issue within 30 days from the date of the ruling and failure of which the documents shall be presented before the Deputy Registrar of this court for execution. The 2nd and 4th administrators were also directed to appear before the Branch Manager, Diamond Trust Bank Bungoma for the distribution of the monies held therein within 30 days from the date of the ruling failure which either party shall be at liberty to apply. The applicants are back to enforce the said order. It is over 14 years from the time the petition was presented in court. The estate has to be wound up. The administrators have a duty under section 83 (i) of the Law of Succession Act Cap 160 to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration. Their request is made so that they can execute the conveyance of the estate reflected in the certificate of confirmation of grant issued by this court. I therefore grant the orders;
 - i. Diamond Trust Bank Bungoma Branch to pay Kshs. 394,123/- to Bungoma County Revenue Office being municipal rates for Plot No. 377 Bungoma, Kshs. 252,000/- to Geomatics Services Limited being survey fees for agricultural land North Malakisi/ North Wamono 620 and Kshs. 85,000/-to Chrisca Real Estate Valuers being valuation fees for Plot 377 Bungoma.
 - ii. The Deputy Registrar shall in compliance with the court order dated 30th June 2022 sign all transfer documents .
 - iii. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF APRIL 2023

R. E. OUGO

JUDGE



In the presence of:

George Wanyama – Present

Christine Wanyama- Present

Florence Wanyama – Absent

Mr. Kituyi - Absent

Wilkister – C/A

