



In re Estate of Juma Wanami Bumbo alias Chuma Wanami (Deceased) (Probate & Administration 205 of 2012) [2023] KEHC 21391 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21391 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PROBATE & ADMINISTRATION 205 OF 2012**

DK KEMEL, J

JULY 28, 2023

BETWEEN

FESTUS SIMIYU PETITIONER

AND

ANNE LUCHU WACHANA OBJECTOR

JUDGMENT

Introduction

1. By an application dated 6th February 2021, the 1st Petitioner/ Applicant, Anne Luchu Wachana, sought confirmation of grant of letters of administration intestate made to her and the 2nd Petitioner herein, Festus Simiyu, on 14th July 2019, in respect of the deceased estate in the instant matter and costs of the application be in the cause.
2. The 2nd Petitioner, Festus Simiyu, by an affidavit sworn on 20th December 2021 responded via a Protest on the basis that the application lacks material disclosure and thus is un-meritorious.
3. The application was canvassed by way of viva voce evidence.

2nd Petitioner's Case

4. The 2nd Petitioner/Protester herein through his affidavit of protest sworn on 20th December 2021, averring that the deceased herein was his father and that he had bought 20 acres from the Objector herein, the late David Wachana, his brother in 1966 for a consideration of 25 herds of cattle. He averred that the whole parcel of land East Bukusu/North Kanduyi/210 was registered in the name of his late father in the year 1974. He opposed the 1st Petitioners' mode of distribution and proposed that he be given 12.5 Ha and that the Applicant be given 5 Ha of land.



5. According to him, he has been in occupation of the said land since 1964 when the Applicant and her late husband moved away and that both of them never claimed the same land until the demise of his father in 2011.
6. During the hearing, he tendered his evidence in Court as PET.W1. where he told the Court that the deceased herein was his father and proceeded to adopt his witness statement dated 20th February 2021 as his evidence in chief. He told the Court that land East Bukusu/North Kanduyi/210 belonged to his father and that he proposed that the Applicant/1st Petitioner be given 5 Ha.

On cross-examination, he told the Court that Wanami Bumbo was his grandfather and who is deceased and who had four wives. According to him, his grandmother was the 2nd wife. His grandfather had two sons Martin David Wachana (the Applicant's late husband and objector herein) and Juma Wanami who was his father. He told the Court that the property initially belonged to his grandfather then he learnt that the clan subdivided the same in 1961 amongst the sons of his deceased grandfather. Both late David Martin Wachana and his late father were given a share. He told the Court that the share of the late David Martin Wachana is in parcel number 210.
7. He testified that in 1965, the Applicant's husband sold his portion to his father, the deceased herein, and that their agreement was verbal. He confirmed that his father did not tell him if there were any witnesses but his father's step-brother Mutoke Wasike was present during the sale transaction. He truly believed that his father bought the land.
8. PET. PW2. was Hosea Wafula Juma who adopted his witness statement dated 20th December 2021 as his evidence in chief. He told the Court that the deceased herein was his father and that the 2nd Administrator is his brother.
9. On cross-examination, he told the Court that he knew the late David Martin Wachana, 1st Petitioner's husband, as a he was his father's brother. According to him, parcel 210 belongs to his late father as his father inherited the land from his father. He testified that his father never informed him of the acreage he bought from the late David Martin when he paid him with 25 heads of cattle and that the family started to reside on the same land from 1966. He told the Court that he was not present during the sale transaction but maintained that the late David Martin Wachana sold a portion of his land to his father.

Objector's Case

10. The 1st Petitioner/Objector herein testified as OB. W1. She adopted her statement sworn on 6th May 2022 as her evidence in chief and further relied on her affidavit sworn in support of her summons for confirmation of grant sworn on 6th February 2021. According to her, the previous Objector herein, David Martin Wachana, was her husband and that the deceased herein was her brother-in-law. She testified that according to her proposed mode of distribution, LR No. East Bukusu/North Kanduyi/210 was to be shared so that her family gets 9.5 Ha while the 2nd Petitioner herein gets 8.0 Ha. She refuted the allegations by the 2nd Petitioner that her husband sold land to him and further rubbished his proposal that her family gets 5.0 Ha yet the land had already been subdivided.
11. On cross-examination, she told the Court that her husband left for Uganda in 1962 in search of employment and thus allowed the deceased to occupy their permanent home as caretakers. She told the Court that the deceased was the brother to her late husband and that he secretly registered himself as the owner of the land and that registration of the land took place in 1968. She told the Court that they had resolved issues over the land but she could not recall the date the beacons were fixed and that the land in question measures 43.75 acres.



12. On re-examination, she told the Court that her late husband was still in Kampala when the deceased herein registered that land in his name and that the land had already been subdivided
13. OB. W2. was Charles Wasike who testified that the deceased herein and the late David Martin Wachana were his brothers and that he wished to adopt his statement dated 4th April 2022 as his evidence in chief.
14. On cross examination, he told the Court that he resides on parcel E-Bukusu/Kanduyi/211 and that the clan did sub-divide the land in 1961, and that he was the secretary in-charge of taking minutes. According to him, the land was divided amongst the seven sons and that parcel 210 and 211 do border each other. He testified that his land borders that of the Objector's husband and that it was true the Objector's husband moved to another area in 1965 and left the deceased herein to take care of his house. The deceased proceeded to illegally register himself as the owner of the land while the Objector was away. He confirmed that the deceased had his own portion next to that of the Objector and that he approximated the acreage each son got as 23 acres.
15. On re-examination, he told the Court that their late father had not obtained a title to the land by the time he died and that the family land was one huge block.
16. OB. W3. was Fred Bumbo Wekesa, who testified that he wished to adopt his witness statement dated 4th April 2022 and part of his evidence-in -chief. He told the Court that Wanami Bumbo (deceased) had seven sons namely: Dismas Wekesa Wanami; David Martin Wachana; Wasike Wanami; Charles Wasike Wanami; Juma Wanami; Watela Wanami and Lusabe Wanami. It was his evidence that he is eldest son of the late Dismas Wekesa Wanami and that his grandfather died in 1945 prior to the adjudication process. He testified that in 1961 he participated in the allocation sharing, demarcation and sub-division of Wanami Bumbo's land amongst his seven sons and that each son was given his share with boundaries planted on ground.
17. It was his testimony that, as per his knowledge the portion of land allocated to his father borders parcel No. E. Bukusu/N. Kanduyi/210 on the northern side. He stated that the portions of both Juma and David were separated by one boundary and that David constructed a permanent house on his piece of land settling there for a while before he bought another land at Muanda where he resettled.
18. He told the Court that the adjudication exercise was conducted and registration done when David was working in Uganda.
19. On cross-examination, he told the Court that he confirms that the sub-division of the land occurred in 1961 and that David never sold his portion to the deceased herein who just bought another land and moved there.
20. Parties were thereafter directed to file and exchange submissions. It is only the 1st administrator who complied.
21. The Objector submitted that the grant of letters of administration issued to Anne Luchu Wachana and Festus Simiyu Juma be confirmed and that LR. No. E. Bukusu/Kanduyi/210 be shared as follows: Anne Luchu Wachana -9.50 Ha and Festus Simiyu Juma-8.0 Ha.

Analysis and determination.

22. The application for determination is a summons for confirmation of grant and the protest lodged by the 1st Petitioner. Grants are confirmed under Section 71 of the [Law of Succession Act](#), which states as follows:

“Confirmation of Grants



71. Confirmation of grants

- (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
- (2) Subject to subsection (2A), 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 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or
 - (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
 - (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

23. In confirmation applications, there are two principal factors for the Court to consider namely; appointment of administrators and distribution of the estate. The principal purpose of confirmation is the distribution of the assets left behind by a deceased.

49. From the foregoing evidence of the parties, it is not in dispute that the family land of the late Wanami Bumbo was sub-divided amongst his seven sons and that each son was given his share with boundaries planted on ground. According to the 2nd Petitioner and his witnesses, the late David Martin Wachana sold his portion to his father. Both the 2nd Petitioner’s witnesses very were young to comprehend the deal in the first place at the time. The 2nd Petitioner availed no witness who was present during the sale transaction between his late father and the late David Martin Wachana but my scrutiny of the Court record indicates that the deceased herein is the registered owner of E-Bukusu/Kanduyi/210. The Objector is largely ambivalent about the validity of the ownership of E-Bukusu/Kanduyi/210 by



the deceased and during her evidence in chief, she alluded that her late husband never sold any piece of land to the deceased herein as he simply requested him to take care of his permanent house as he was in another country seeking employment. She did not provide any evidence to indicate her husband's stake on ownership E-Bukusu/Kanduyi/210 and none of her witnesses tendered in any evidence in form of minutes to prove the adjudication/sub-division exercise that they alluded to. That would mean that the Court has to decide a question of ownership of the said property as between the estate and the Objector. Sale of property is about conveyance of title from the seller to the buyer. The dispute, therefore, is at the heart of title and ownership. Ownership or proprietorship of a property revolves about title, and that clearly places the matter squarely under Article 162(2) of the Constitution.

49. The property in question is registered land. Registration of property and transfers of land are governed by land legislation, to be specific the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The two pieces of land legislation have elaborate provisions on sale of registered land, and transfer and registration thereof. A determination of the question as to whether there was a valid sale of the registered land in accordance with the relevant land legislation is an issue that is well outside the jurisdiction of the High Court
49. My understanding, in the context of the matter before me, is that any disputes or questions or issues that require court intervention, which revolve around sale, registration and transfer of land, fall within the jurisdiction of the Environment and Land Court. The Land Registration Act and the Land Act, therefore, confer jurisdiction in the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, the Environment and Land Court and any subordinate court that has been conferred with jurisdiction over the processes the subject of sale, registration and transfer of land is the right forum to adjudicate the matters. All this adds emphasis to the fact that I have no jurisdiction whatsoever to address the matter that the Objector herein, Anne Luchu Wachana, have placed before me. Suffice here to add that she did not avail any documents to support the claims onto the parcel of land. Again, the claim that the deceased held the land in trust for the Objector's late husband David Martin Wachana was not adequately addressed and it is proper that the issue of trust be agitated in the appropriate forum.
24. The Objector, refuted the allegations by the 2nd Petitioner that her husband sold land to him and further rubbished his proposal that her family gets 5.0 Ha yet the land had already been subdivided.
25. On cross-examination, she told the Court that her husband left for Uganda in 1962 in search of employment and thus allowed the deceased to occupy their permanent home as a caretaker and was not selling any land to him. She told the Court that the deceased was the brother to her late husband and that he secretly registered himself as the owner of the land and that registration of the land took place in 1968. She told the Court that they had resolved issues over the land but she could not recall the date the beacons were fixed and that the land in question measures 43.75 acres.
26. On re-examination, she told the Court that her late husband was still in Kampala when the deceased herein registered that land in his name and that the land had already been subdivided.
49. It is noted that despite opposing the Objector's claims, the 2nd petitioner has proposed to give the Objector 5Ha of the land in question as an ex gratia. As advised above, the 1st petitioner/ Objector can as well move to the right forum for redress and still have the 5Ha proposed by her co-petitioner. If the 2nd Petitioner is willing to give the Objector 5 Ha out of the land set to be allocated to him, then that will be within his right. The Objector is therefore advised to pursue the said 2nd Petitioner once the grant is confirmed.
49. In view of the foregoing observations, the following orders are hereby issued:



- a. The protest by the 2nd Petitioner has merit and is upheld.
- b. The summons for confirmation of grant dated 6/2/2021 is allowed and that the grant issued on 14/7/2019 be and is hereby confirmed with the estate of the deceased comprised in LR No. E. Bukusu/S.Kanduyi/210 being distributed as proposed by the 2nd Petitioner vide paragraph 9 of the affidavit of protest sworn on 20/12/2021.
- c. The 1st Petitioner/Objector be at liberty to pursue the balance of her late husband's share in the Environment and Land Court.
- d. Each party to bear their own costs.

50 Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY 2023.

D.KEMEI

JUDGE

In the presence of :

No appearance Kundu for 2nd Petitioner

Murunga for 1st Petitioner

Kizito Court Assistant

