



REPUBLIC OF KENYA



**In re Estate of Samuel Cheng’eti Nasiuma (Deceased) (Succession Appeal
2 of 2020) [2023] KEHC 20970 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20970 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION APPEAL 2 OF 2020**

DK KEMEL, J

JULY 28, 2023

BETWEEN

PETER CHENG’ETI WALIAULA APPELLANT

AND

FAROS MAKOKHA CHENG’ETI RESPONDENT

*(An appeal from the judgement and decree of Hon. L.N. Kiniale P.M. at Sirisia
Magistrates Court in Succession Cause No.9 of 2019 delivered on 3rd October 2019)*

JUDGMENT

1. The Respondent herein applied for a grant of letters of administration intestate to the estate of the deceased herein who was his father and that the said letters were issued upon the expiry of 30 days after issuance of gazette notice No. 7185 of volume CXVII-No. 103 on 25th September 2015.
2. The Appellant herein, Objector in the lower Court record, filed summons for revocation of grant which was later withdrawn to pave way for the summons for confirmation of grant. The Appellant proceeded to file an affidavit of protest to the confirmation of grant under Rule 40(6) of the Probate and Administration Rules.
3. It was directed that the application for confirmation of grant plus the protest be determined by oral evidence.
4. The Appellant subsequently filed a further affidavit and supplementary affidavit of protest in which he objected to the mode of distribution and particularly the sale of land to one Dankit Naisuma from the portion allotted to Wilson Wapukha and Mary Shiundu as well as Laban Muraya.
5. The grounds of the protests were inter alia; that the Respondent is not a beneficiary to the estate of the deceased and thus he had no authority to deal in and distribute the property of the deceased; that the Respondent and one Laban Muraya had already been given land by the deceased hence had no right



to benefit twice; that the action of selling the property of the deceased to Dankit Naisuma amounts to intermeddling.

6. It was the trial Court's judgement that the only valid objection to the confirmation of the grant was the sale of property in the deceased's estate by the Respondent prior to confirmation of the grant. It proceeded to make an order that the purchasers will have a claim of the estate of the deceased equivalent to the value or amount of money paid if the proceeds were used for the benefit of the estate of the deceased. On distribution, the magistrate held that the distribution done by the Respondent was proper save for a few amendments as follows:
 - a. Laban Muraya-1.6 acres
 - b. Mary Matingi Chengeti-0.5 acres
 - c. Charles Chengeti.2.0 acres
 - d. Kennedy Nasiuma Shiundu-1.1 acres
 - e. Peter Chengeti Waliaula-1.1 acres
 - f. Lazarus Nasiuma Waliaula-1.1 acres
 - g. Godrick Madila Waliaula-1.1 acres
 - h. Claire Nanoni Nasiuma-0.5 acres
 - i. Fracos Makokha Chengeti & Laban Muraya Chengeti (in trust for the estate of Wilson Wapukha)-1 acre

The court proceeded to confirm the grant and ordered each party to bear their costs

7. Aggrieved by the decision of the trial Court, the Appellant preferred this appeal vide a memorandum of appeal dated 7th April 2020 and premised on the following grounds:
 - a. That the learned trial magistrate erred in giving 1.6 acres to Laban when there was evidence that Laban and Faros has been given land elsewhere by the deceased.
 - b. That the learned magistrate erred in not considering that Faros having given up his share in land parcel similar Laban ought to have given up as they were sufficiently provided for.
 - c. That the learned magistrate erred to hold that Wilson had died and left no heirs and hence his portion should have formed part of the estate of the deceased and available for distribution.
 - d. That the learned magistrate erred in failing to hold that to find that each beneficiary had been allocated land with clearly demarcated boundaries.
 - e. That the learned magistrate erred in failing to consider previous minutes held by the clan of Bamusombi that included Faros and Laban themselves to consent that the share of Wilson should be distributed among the sons and grandchildren of the deceased.
 - f. That the learned magistrate erred in having been convinced that the share of Wilson was only one acre and yet it was 2.6 acres since the time of distribution by the deceased.
 - g. That the learned magistrate erred in failing to establish that Laban had 1.6 acres after disposing one acre to Dankit.
 - h. That the learned magistrate erred in ignoring the Objector's evidence and that of his witnesses.



- i. That the ruling by the learned magistrate will cause disturbance during the implementation on the status quo.
The Appellant therefore sought for the following reliefs:
 - i. The appeal herein be allowed and judgement dated 3rd October, 2019 be set aside.
 - ii. The costs be provided for.
8. The Appellant's case is that the Respondent filed succession cause No. 163 of 2014 at Bungoma High Court where he was issued with letters of administration intestate in respect of the estate of Samuel Cheng'eti Naisuma (deceased) on 21st November 2016. The Appellant herein filed an application dated 5th June 2017 for summons for revocation and/or annulment of grant which has already been issued to the Respondent. The Respondent later withdrew his application and the Respondent filed summons for confirmation of grant of letters of administration intestate. This prompted the Appellant herein to file an affidavit in protest sworn on 24th January 2018 in which he objected to the confirmation of grant. The matter was later transferred to Sirisia law courts for determination.
9. By consent of both parties, the applications for confirmation of grant and affidavit in protest were canvassed by way of viva voce evidence.
10. PW1 was Peter Cheng'eti, who testified that the deceased, Samuel Cheng'eti Nasiuma, was his grandfather and he adopted his statement dated 12th March 2019 as his evidence in chief. He testified that the deceased herein had nine children as follows:
 - i. Rachel Bukosi (deceased)
 - ii. Paul Nasiuma (deceased)
 - iii. Laban Muraya (alive)
 - iv. Faros Makokha (alive)
 - v. Margaret Nangoni (deceased)
 - vi. Mary Matingi (deceased)
 - vii. Aggrey Siundu (deceased)
 - viii. Wilson Wapukha (deceased)
 - ix. Acapus Waliaula (deceased)
11. It was his testimony that the deceased had a lot of lands outside and that parcel No. S/Malakisi/s.namwela/189 was duly sub-divided by the deceased amongst some of his dependents and who acquired titles. He told the Court that some of those dependents were: Rachel Bukosi, Paul Nasiuma, Laban Muraya and Faros Makokha. He left some of the dependents to continue occupation of S/Malakisi/s.namwela/189 already subdivided to each with boundaries. They were: Mary Matingi, Aggrey Siundu, Wilson Wapukha and Acapus Waliaula.
12. He told the Court that the inclusion of Laban, Dankit and Claire was wrong and at the expense of the rightful beneficiaries.
13. He claimed that the distribution of the land was dealt with by the clan of Bamusombi but that the Respondent and Laban Muraya defied the same and initiated the succession matter.



14. On cross-examination, he told the Court that he is the grandson of the deceased herein and that his father was Yakohes Waliaula who is also deceased. He testified that the purpose of his objection is due to the fact that the Respondent herein sold a portion of land to one Dankit Nasiuma in the year 2014.
15. On re-examination, he told the Court that the Respondent does not reside on parcel S/Malakisi/s.namwela/189.
16. PW2 was Benson Sango Simiyu, who adopted his statement recorded on 12th March 2019 as his evidence in chief told the Court that he is the step grandson of the deceased herein and that he objected to the Respondent's mode of distribution as the same meant that the rightful beneficiaries will get disinherited.
17. On cross-examination, he told the Court that Laban Nakhanya and Dankit Nasiuma are the reasons for his objection. According to him, the Respondent and Laban both have their own share of land and that he does not know the parcel numbers.
18. PW3 was Patrick Simiyu, who adopted his statement recorded on 22nd January 2019 as his evidence in chief told the Court that prior to the death of the deceased some of the beneficiaries were settled with land outside the S/Malakisi/s.namwela/189 and that he acquired title deeds for them. He left some of the dependents to continue occupation of S/Malakisi/s.namwela/189 already subdivided to each with boundaries. They were: Mary Matingi, Aggrey Siundu, Wilson Wapukha and Acapus Waliaula. He opposed the proposed mode of distribution that includes Laban Nakhanya and Dankit Nasiuma at the expense of the real beneficiaries.
19. On cross-examination, he told the Court that Laban, Dankit and Claire Nasiuma were wrongly added as beneficiaries.
20. PW4 was Simon Wekesa Mandila, who adopted his statement recorded on 22nd January 2019 as his evidence in chief, told the Court that prior to the death of the deceased, some of the beneficiaries were settled with land outside the S/Malakisi/s.namwela/189 and he acquired title deeds for them. He left some of the dependents to continue occupation of S/Malakisi/s.namwela/189 already subdivided to each with boundaries. They were: Mary Matingi, Aggrey Siundu, Wilson Wapukha and Acapus Waliaula. He opposed the proposed mode of distribution that includes Laban Nakhanya and Dankit Nasiuma at the expense of the real beneficiaries.
21. On cross-examination, he told the Court that the deceased herein and his grandmother were siblings and that Laban Muraya and Dankit Nasiuma are not entitled to a portion on S/Malakisi/s.namwela/189. According to him, Laban was settled with land while the deceased was alive as was the trend back then and that Dankit Nasiuma is the son of one Paul who was also settled with his own land when the deceased was alive.
22. On re-examination, he told the Court that he stayed in Malakisi for 15 years.
23. DW 1 was Faros Makokha Cheng'eti who adopted his statement recorded as his evidence in chief. On cross-examination, he told the Court that the grant of letters of administration of the estate of the deceased herein were issued to him on 21st November 2016. According to him, he is the son of the deceased herein and that the Appellant herein is a son of his brother the late Acapus Waliaula Cheng'eti. The deceased died in 1971 and was survived by one wife and nine children namely:
 - i. Rachel Bukosi Cheng'eti
 - ii. Paul Nasiuma Cheng'eti



- iii. Laban Muraya Cheng'eti
 - iv. Faros Makokha Cheng'eti
 - v. Margaret Nangoni Cheng'eti
 - vi. Mary Matingi Cheng'eti
 - vii. Aggrey Siundu Cheng'eti
 - viii. Wilson Wapukha Cheng'eti
 - ix. Acapus Waliaula Cheng'eti
24. On cross-examination, he told the Court that they were six sons to the deceased but only two remain and that it was true that they had already been given land by their father. He stated that Mary was given land by her brother.
25. DW2 was Laban Muraya who testified that he is the son of the deceased herein and adopted his witness statement as his evidence in chief. According to him, he is the son of the deceased herein and that the Appellant herein is a son of his brother the late Acapus Waliaula Cheng'eti. The deceased died in 1971 and was survived by one wife and nine children namely:
- x. Rachel Bukosi Cheng'eti
 - xi. Paul Nasiuma Cheng'eti
 - xii. Laban Muraya Cheng'eti
 - xiii. Faros Makokha Cheng'eti
 - xiv. Margaret Nangoni Cheng'eti
 - xv. Mary Matingi Cheng'eti
 - xvi. Aggrey Siundu Cheng'eti
 - xvii. Wilson Wapukha Cheng'eti
 - xviii. Acapus Waliaula Cheng'eti
26. He told the Court that in 2014, their brother Wilson Wapukha Cheng'eti died and he had no family making it the responsibility of his siblings to bury him. Due to unavailability of resources they decided to sell one of the acres of land where he was staying on in order to raise money to cover the funeral expenses. They sold the land to Dankit Katasi Nasiuma one of their nephews.
27. On cross examination, he told the Court that when Wilson died a fundraising was never conducted. Wilson had two acres and that the same had to be sold.
28. The appeal was canvassed by way of written submissions and that both parties filed and exchanged their respective submissions.
29. Vide undated submissions filed on 15th March 2023, the Appellant in a nutshell submitted that the Respondent did not prove his case in the lower Court to warrant the dismissal of the objection by the Appellant herein.



30. By submissions dated 15/3/2023, the Respondent submitted that the Appellant failed to prove his allegations as per the dictates of section 107 of the Evidence Act to warrant the orders sought in the trial Court. Counsel urged this Court to dismiss this appeal with costs.
31. As it is now settled by the numerous authorities both by this court and the superior Courts, the duty of this Court as the first appellate Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. Further, this Court ought not to ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. (See Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga& Another (1988) KLR 348).
32. The primary duty of this court in the exercise of its jurisdiction as a probate court can be coined in what William Musyoka J, stated In Re Estate of G K K (Deceased) [2017] eKLR that:
- “The primary function of a probate court is distribution of the estate of a dead person.”
33. I have re-evaluated the evidence which was tendered before the trial Court and also perused through the pleadings which were before the learned trial magistrate as can be seen above. The only issue for determination is whether this Court should interfere with the decision of the trial Court.
34. I have perused the Court record and duly established that the Respondent herein had sold a portion of the estate of the deceased prior to him petitioning for grant of letters of administration and confirmation of the same. I find that this was unjustifiable and are in violation of the spirit of Law of Succession Act, Cap 160 Laws of Kenya.
35. Section 45 of the Law of Succession Act provide as follows:
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
36. The deceased’s estate is protected by Section 45(1) of the Law of Succession Act and i place reliance on the case of Onyuka vs. Migwalla (2005) eKLR, where the Court of Appeal held that the absence of a grant of Letters of Administration invalidates a sale agreement in respect of land registered in the name of a deceased person.
37. I associate myself with the opinion of Musyoka, J in Veronica Njoki Wakagoto (Deceased) [2013] eKLR that:
- “The effect of [section 45] ...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate



property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

38. In this case according to the affidavit sworn by the Respondent in support of the summons for confirmation of grant of letters of administration and the witness statement by one Laban Muraya, it is clear that a portion of the deceased’s land was sold to one Dankit Katasi Nasiuma in efforts to raise money to bury Wilson Wapukha Cheng’eti. This happened prior to the Respondent being clothed by this Court with the grant of letters of administration and the confirmation of the same. Even had the same been entered into after the grant but before confirmation, the effect would have been the same since the mere grant of letters of administration does not empower the administrator to dispose of the immovable properties of the deceased before the grant is confirmed. In the premises, the Respondent herein stands on a shaky ground and it may not make any difference that the action was blessed by the clan elders.
39. Having found that the Appellant made his case on intermeddling by the Respondent and Laban Muraya, I wish to proceed with my analysis on whether the decision by the Respondent will amount to revocation of the grant of letters of administration issued on 21st November 2016 suo moto. Revocation of grant is provided for under Section 76 of the *Law of Succession Act*. The grounds upon which the grant may be revoked are well provided therein. The said section provides that revocation can either be at the instance of an applicant or can be by the court suo moto. However, it is a prerequisite that the conditions for revocation as set out under section 76 must be proved. In the case of *Jamleck Maina Njoroge –vs- Mary Wanjiru Mwangi* (2015) eKLR the Court discussed circumstances when a grant can be revoked. The Court observed:

“ 11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

40. The law on revocation or annulment of Grant is captured in Section 76 of the *Law of Succession Act* which states:-

“ 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) that the grant has become useless and inoperative through subsequent circumstances.”

41. In the case of *Tirus Mwaniki Njiru Vs Jane Igandu (2021) eKLR*, Njunguna J. held that:-

“These grounds ought to be proved with evidence as the power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds but not to be exercised whimsically or capriciously.”

42. The parties appear to have agreed to proceed with the issue of distribution of the estate and shelved the issue of revocation of grant. In the present case, the Respondent together with his brother Laban Muraya sold off a portion of the estate of the deceased to one Dankit Katasi Nasiuma in efforts to raise money to bury Wilson Wapukha Cheng’eti. This happened prior to the Respondent being clothed by this Court with the grant of letters of administration and the confirmation of the same. This reveals that the deceased’s property had been intermeddled with prior to this succession suit being filed. The Administrator herein, Faros Makokha Cheng’eti, concealed these facts which were material to this case. The Administrator failed to inform this Court that part of the deceased’s estate had been sold and that the whole of S/Malakisi/s.namwela/189 was not available for Succession as they had portrayed. The Respondent in the trial court tried to explain away his actions by claiming that the portion belonging to Wilson Wapukha was sold so that the funeral and burial of his remains could be carried out. The Appellant and his witnesses claimed that a fundraising was actually conducted and that money was obtained for the exercise. According to the Appellant, the Respondent and his brother Laban had sold the parcel to Dankit Nasiuma but they want to cover it up by claiming that they needed money for the funeral of the late Wilson Wapukha. As the sale took place before the grant was confirmed, the action amounted to intermeddling which is forbidden by section 45 of the [Law of Succession Act](#). Even if the said beneficiary had died without a family, the property must be part of the estate for distribution among the beneficiaries. The Appellant’s proposed mode of distribution majorly captured the portion belonging to Wilson Wapukha measuring 3.1 acres and wished that the same be shared out among the beneficiaries who reside on parcel S. Malakisi/S. Namwela/189 as the others had been settled elsewhere by the deceased prior to his death. The proposal by the Appellant appears in my view to be the appropriate one and which should have been adopted by the trial court. The only omission by the Appellant is the absence of the persons to hold the said parcel in trust for the beneficiaries. I find that the said portion of land measuring 3.1 acres under Wilson Wapukha Cheng’et (Deceased) shall be held in trust by Faros Makokha Chenget on behalf of the whole beneficiaries. To that extent, the protest by the Appellant dated 24/1/2018 and filed on 25/1/2018 has merit. Hence, the summons for confirmation of grant dated 5/1/2018 are allowed. The grant issued on 21st November, 2016 is confirmed and that the estate of the deceased shall be distributed as proposed by the Objectors vide the affidavit of protest sworn on 24/1/2018 vide paragraph 11 thereof.

43. In view of the foregoing observations, it is my finding that the appellant’s appeal has merit. The same is allowed. The trial court’s judgement dated 13/10/2019 is hereby set aside and substituted with an order allowing the Objectors protest and the estate of the deceased be distributed as proposed by



the objector's affidavit vide paragraph 11 of the Objector's affidavit. As the matter involves family members, I order each party to bear their own costs.

Orders accordingly

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

D.KEMEI

JUDGE

In the presence of:

Olonyi for Appellant

Shikali for Khakula for Respondent

Kizito Court Assistant

