



REPUBLIC OF KENYA



**In re Estate of Paul Wafula Sakon (Deceased) (Probate & Administration
433 'A' of 2020) [2023] KEHC 22928 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PROBATE & ADMINISTRATION 433 'A' OF 2020**

**DK KEMEL, J
SEPTEMBER 29, 2023**

BETWEEN

**NORAH LUMBASI 1ST PETITIONER
JEREMIAH SAKONG WAFULA 2ND PETITIONER
JANE WAFULA 3RD PETITIONER
MOSES WAFULA 4TH PETITIONER**

AND

ZAINABU MIRIAM WAFULA OBJECTOR

RULING

1. The application dated 11th October 2022 lodged by the Objector/applicant herein seeks an annulment and/or revocation of the certificate of confirmation of grant issued to the Petitioners herein on 4th April 2022 and that on revocation, the Petitioners herein do render an account for the net rent realized from tenants on Plot 138 A and 107 A within Webuye Municipality after the legal statutory deductions so that the same can be duly shared to all beneficiaries on the grounds that;
 - a. The Certificate of Confirmation was issued secretly in the absence of the Objector.
 - b. That the sharing is not based on merit and fairness.
 - c. That the family of the late Recho Namarome Wafula being the 3rd wife of the deceased and especially the Objector's husband one late Aggrey Wakhisi Wafula who was the only son from the said house has not been provided for in the two commercial plots and L.R No. Ndivisi/Muchi/1041.
 - d. That it is in the interest of justice that the application herein be allowed.



2. The application is supported by the grounds on the face of the application and by a supporting affidavit of the Applicant sworn on October 11, 2022. She depones that she is the daughter in law of the deceased and during his lifetime her deceased husband used to collect rent from the commercial plots and share the same with the eight widows. She averred that on September 9, 2022 she was served with a confirmed Grant dated August 5, 2022 and to her surprise the Petitioners had shared and distributed the deceased's estate contrary to the agreement. She claimed that the house of the late Recho Namarome Wafula which included the family of her late husband had not been provided for in the distribution schedule as she anticipated the L.R. No. Ndivisi/Muchi/104 measuring approximately seven acres and the two commercial plots in Webuye town would be shared equally among the eight houses.
3. She depones that her allocation of five acres in L.R Kimilili/Kimilili/1098 was not fair and that the Petitioners who were representing her interests fraudulently without consent failed to advise the court to provide a share from the said two commercial plots in Webuye Town and that the land L.R Kimilili/Kimilili/1098 was a gift from the deceased to her late husband.
4. She depones that on seeking clarification on the irregularities on the Grant which failed to indicate the amount of rent that had been collected from the two plots since March 2007 to date, the Petitioners were not ready to shed light on the issue and on asking on the unfair sharing of the plots, they were not ready to listen to her.
5. She depones that the Petitioners are colluding with 3rd parties especially members and parties to the other houses to defeat the interests of the house of the late Recho Namarome Wafula.
6. Opposing the Application, the Petitioners *vide* Norah Lumbasi swore a replying affidavit on November 7, 2022, wherein she avers that the Applicant was the daughter-in-law of the deceased herein having been married to the late Aggrey Wakhisi Wafula whose mother was the late Recho Namarome Wafula.
7. She depones that the Applicant has used the proceeds from the estate of the late Aggrey Wakhisi Wafula without minding the rest of the family and her co-wives.
8. She depones that the Court decided that the two commercial shops were to be sold and proceeds shared among the seven wives since the late Recho Namarome Wafula died prior to the demise of the deceased herein. She further depones that the Court never held that the shops were to be shared among the children of the deceased herein but the widows.
9. In response to the Petitioner's replying affidavit, the Applicant swore a further supporting affidavit on November 22, 2022, where she depones that her late husband never misappropriated the proceeds from the two shops and that the subject for determination is the net estate of the deceased herein
10. She depones that the signature that is purported to be her signature as it appears on the consent letter is not hers as the same was forged. She insisted that the document is a forgery as the ID numbers and phone numbers of those who attended were not indicated and that the Petitioners have an aim of disinheriting the house of the late Recho Namarome Wafula.
11. *Vide* directions issued on November 24, 2022, the matter proceeded by way of *viva voce* evidence.

Objector/Applicant's case

OB.PW1-Zainabu Miriam Wafula



12. She testified that she is the Objector/Applicant herein and that the deceased herein was her father-in-law. She proceeded to rely on her affidavit in support of the summons for revocation sworn on October 11, 2022 and her witness statement sworn on January 9, 2023 as her evidence in chief.
13. According to her, the house of the late Recho Namarome Wafula which included the family of her late husband had not been provided for in the distribution schedule as she had anticipated. The L.R. No. Ndivisi/Muchi/104 measuring approximately seven acres and the two commercial plots in Webuye town were to be shared equally among the eight houses as per the agreement she had with the Petitioners. She argued that her allocation of five acres in L.R Kimilili/Kimilili/1098 was not fair and that the Petitioners who were representing her interests fraudulently without consent failed to advise the court to provide a share from the said two commercial plots in Webuye Town and that the land L.R Kimilili/Kimilili/1098 was a gift from the deceased to her late husband.
14. On cross-examination by Counsel for the beneficiaries, she told the Court that her late husband had no siblings and that she has the capacity to represent his estate in this matter but did not have the letters of administration over the estate of the late Recho Namarome Wafula and that the late Recho Namarome Wafula was never involved in the distribution of the estate of the deceased. She confirmed that she has seen the Certificate of Confirmation of grant and that the late Recho Namarome's house was given land which she is holding in trust for her grandchildren and that she insists she was not given a share of the commercial plots.
15. On cross-examination by Counsel for the Petitioners, she told the Court that the deceased had two commercial plots in Webuye Township and that he used to collect rent from the same and give it to her. According to her, her husband was a teacher and died prior to the demise of the deceased. She refuted claims that she squandered her husband's death benefits as she has never received such and that she was present during the hearing of the case on distribution up to determination. She did confirm to be present at the home of Zipporah Nandakho Wafula for the meeting that was there, as a family member, but was not involved in the family deliberations. She insisted that she never signed the family minutes. She confirmed that she was present during the distribution of the lands and that her mother-in-law was not included.
16. On re-examination, she told the Court that she was not involved in the distribution of the assets but she never raised her concerns at that time as she trusted her brothers-in-law. She confirmed that she was told that the rent proceeds from the two commercial plots were channeled towards the succession case and that she did not contribute towards the expenses with regard to the case. She confirmed that the proceeds amounted to Kshs. 400,000/= for a period of 15 years and that she prepared no records leading to the said amounts. She testified that the details of the sale of the plots are available but she did not file the documents in Court. she confirmed that her family was given Kshs. 200,000/= and that she did not return back the said money and that she distributed the said amount to her children and that the other widows were paid the sale proceeds. She told the Court that she had no problem with the share of the land as her children were catered for. She told the Court that they went before the clan members in efforts to resolve this issue and that the clan chairman was not in Court.

OB.PW2-Lawrence Asman Wesutsa

17. He testified that he is the brother to the late Recho Namarome Wafula and that the deceased herein was his brother-in-law. He proceeded to adopt his witness statement sworn on January 9, 2023 as his evidence in chief. According to him, the deceased herein had several properties in form of land and had established matrimonial homesteads for his eight wives. He stated that the late Recho Namarome Wafula was blessed with one son, the late Aggrey Wakhisi Wafula, who was the husband of the



Objector/Applicant herein. He stated that the deceased was also a businessman who owned two commercial plots in Webuye Town and which were substantially developed and that his sister did contribute to the developments and that she used to receive the rent from the said plot in equal share from the deceased. He stated that in the interest of justice it would be prudent that her house receives a share of the two said plots within Webuye town.

18. On Cross-examination by Counsel for the beneficiaries, he stated that he did not file for letters of grant over the estate of the deceased Recho Namarome Wafula and could not tell if the Petitioners did so. He testified that the Objector has not filed for letters of grant over the estate of the late Aggrey Wakhisi Wafula. He testified that the deceased operated a busaa den in which the late Recho Namarome Wafula assisted him a lot and that she contributed to the acquisition of the said town plots. He stated that he only had issues with the township plots and that he is aware that the plots were sold. He added that the objector never informed him that she received the sale proceeds and that he is learning at that stage of the trial that she received Kshs. 200,000/=.
19. On cross-examination by Counsel for the Petitioners, he stated that he could not recall the plot numbers within Webuye township.

Submissions

20. Counsel submitted that the Petitioner's were not able to disprove the evidence by the Objector that the signature that was used on the purported consent was a forged one as it was not hers and based on the uncontroverted evidence on record it was clear that the house of the late Recho Namarome Wafula was discriminated against. Counsel urged this Court to revoke the grant and proceed to order that accounts on the rent that the Petitioners collected from the two commercial plots be rendered.

Petitioner's Case

PET.PW1 Norah Khanali Lumbasi

21. She testified that she is the 1st Administrator herein and she proceeded to adopt her statement dated January 12, 2023 and her further statement dated January 26, 2023 as her evidence in chief. According to her, the court had stated that the two plot numbers 138 & 107 were to be taken in the names of the wives and since the late Recho Namarome Wafula had died and no one had taken out letters of administration to her estate, the Applicant could not claim that she was entitled. She told the Court that the Applicant was in Court all through the hearing and determination of the confirmation of grant and never took any step, and that on April 4, 2022 she did not attend Court. She testified that the two plots did not benefit the daughters-in-law or the grandchildren as the money was shared amongst wives as the Court had instructed. She stated that the two plots were sold and the proceeds were shared amongst the wives of the deceased and thus that aspect is overtaken by events.
22. On cross-examination by representative for the Objector, she told the Court that she is the daughter of the deceased from the 1st house and that she does not have any mental problems. According to her, the Objector herein was not excluded from the distribution aspect and that the Objector received Kshs. 200,000/= from the proceeds of the sale of the two township plots.
23. On re-examination, she told the Court that Sofia Nasimiyu was the first wife of the deceased and who initiated the succession cause. She reiterated that the two plots in Webuye township were sold and the proceeds shared amongst the surviving widows.



PET.PW2-Elizabeth Wafula

24. She testified that she is a beneficiary to the estate of the deceased and that she adopted her statement dated 6th January 2023 as her evidence in chief. According to her, the Objector was present on 1st June 2022 when it was agreed by the Petitioners and beneficiaries that plot LR. No. Kimilili/Kimilili/1098 was to be given to her to hold in trust for her children. She stated that nobody forced the Objector to sign the consent.
25. On cross-examination by representative for the Objector, she stated that the Objector was favoured by the deceased and that the late Recho Namarome Wafula was never excluded from the succession case and that the assets of the deceased have been shared equally.
26. On cross-examination by Counsel for the beneficiaries, she stated that the Objector participated in the confirmation proceedings.
27. On re-examination, she told the Court that the Objector participated in the meeting held on 1st June 2022 and duly signed the minutes.

PET.PW3: Jeremiah Wekesa Wakhisi

28. He told the Court that he is the son of the Objector herein and that his father was the late Aggrey Wafula. He adopted his witness statement dated 12th January 2023 as his evidence in Chief. According to him, the Objector was given five acres on parcel No. Kimilili/Kimilili/1098 which she holds in trust for the children of the late Aggrey Wafula. The wives of the deceased were to get proceeds from the shops and the daughters-in-law and grand children were not to get anything. He stated that it was out of the good will of the wives that they were given Kshs. 200,000/= as the family of the late Aggrey Wafula and that he never got any share of that money.
29. On cross-examination by the representative of the Objector, he stated that it was his uncles who have been paying his outstanding bills and that the Objector, his mother, abandoned him. He insisted that he was never given a share from the money paid to his mother. He stated that he is satisfied with the distribution.
30. On cross-examination by Counsel of the beneficiaries, he stated that the Kshs. 200,000/= was part of the proceeds of the sale of the two Webuye Township plots.
31. On re-examination, he stated that the two plots in Webuye townships were sold and his mother was given Kshs. 200,000/=.

Submissions

32. Counsel submitted that only wives who started the succession proceedings are entitled to benefit from the Webuye Township plots and that the Objector was present in Court at the time of reading out of the Confirmation of Grant and was also at the meeting where she gave her consent. Counsel argued that the Objector failed to avail a signature expert to substantiate her claims that the signature on the consent was forged. Counsel urged this Court to dismiss the Objector's application dated 11th October 2022.

Beneficiaries Case

BEN.PW1-Rose Nanjala Waike



33. She testified that she was the wife of the deceased herein and that she objects to the Objector/Applicant's application dated October 11, 2022.
34. On cross-examination by representative for the Objector, she stated that the Objector participated in the confirmation of Grant proceedings and that she is not aware that the deceased sold a plot belonging to the late Aggrey Wafula.
35. On cross-examination by Counsel for the Petitioners, she stated that she was present in the meeting held at the home of Zipporah and that the Objector was also present at the meeting and that she duly signed the consent.
36. On re-examination, she stated that the Objector was granted land from the estate of the deceased as Sophia and Zipporah and that none of them have complained on the shares they got.

submissions

37. Counsel submitted that the applicant has no locus standi to file the application dated 11th October 2022 as she is not a dependent of the deceased with regard to section 29 of the Law of Succession Act as she is only a daughter-in-law. Counsel further submitted that the Objector is not a legal representative of the estate of Aggrey Wafula as she did not obtain letters of administration ad litem to enable her move this Court on behalf of her deceased husband.
38. Counsel further submitted that the Objector's application is asking this honourable Court to sit on appeal from its own decision. He argued that the Objector was aware of the confirmation proceedings and she ought to have appealed against the orders of confirmation and distribution instead of revocation of a grant.
39. On the issue of consent, Counsel submitted that the Objector was only being evasive as she consented to the distribution schedule and that this application does not meet the threshold as set under section 76 of the Law of Succession Act.
40. I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the law on the subject. I find the following issues necessary for determination:
 - a. Whether or not the Objector/Applicant has locus standi to institute these proceedings.
 - b. Whether or not the Objector/Applicant is entitled to the relief sought.
41. The first point for determination is whether or not the Objector/Applicant herein has locus standi to bring this application as contended by the Counsel for the Beneficiaries/Interested Parties in his submissions. His argument is that the Objector/Applicant is the wife of the late son of the deceased and therefore she is not a beneficiary to the suit property. He further argued that she lacked the requisite letters of Administration ad litem to enable her move this Court on behalf of her late husband.
42. *Locus standi* is basically the right to appear or be heard in Court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Objector/Applicant has the requisite *locus standi* to seek relief from the Court to revoke the grant in question that had been issued to the Petitioners. In my view, issues as regards *locus standi* are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.



43. The position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo* [1986-1989] EALR 468, the Court rendered itself thus:

“... An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

44. My understanding of the matter at hand is that the Objector/Applicant herein brought this suit before Court as a beneficiary of the estate of her late husband Aggrey Wafula. The *Law of Succession Act* under section 41 says that the offspring step into the shoes of their dead parent, and take the share that is due to such dead parent. That share should be equal to the shares taken by the surviving children of the deceased. More importantly, Section 41 talks of the offspring of the dead child of the deceased and not the spouse of the dead child. In intestate succession, the state passes to the kindred of the deceased, that is to say the blood relatives of the deceased, except for the surviving spouse of the deceased. In-laws, are not blood relatives of their father-in-law. They have no right or entitlement to the intestate estate of their dead in-law. The *Law of Succession Act* does not recognize them or their rights. Indeed, the *Law of Succession Act* does not even mention them. They can only claim on behalf of others. A daughter-in-law, as in this instant application, can only claim the share due to her late husband, otherwise she has no direct right. For her to access the share due to her late husband, she has to obtain representation to his estate first, by way of a Grant of Letters of Administration intestate. Pursuing the interest due to her late husband without first obtaining the grant in his estate would amount to intermeddling, and her activities would run afoul of section 45 of the *Law of Succession Act*.

45. The Objector/Applicant is not a child of the deceased. She is a daughter-in-law. In terms of rights or entitlement to a share in the estate, she had none at all. She is not in the same caliber with the Petitioners or the wives of the deceased herein. She has zero right or entitlement. It is her children, with her late husband, who have right or entitlement to a share of the estate, by dint of section 41, by way of stepping into the shoes of their late father. It is noted that after the Objector/Applicant's case, the Objector gave a power of Attorney to her daughter, Salome Wafula, a granddaughter. Therefore, in the Court's view as captured above herein, the instant Application is not properly before this Court.

46. On whether the Grant of Letters of Representation issued to the Administrators on 4th April 2022 and a Certificate of Confirmation of Grant dated 5th August 2022 should be revoked, the Objector/Applicant's application failed to capture the precise law it was made under but its elaborate that section 76 of the *Law of Succession Act* provides for revocation and annulment of grant and which provides as follows:

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 has ordered or allowed; 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.”

47. The Applicant made reference of subsection (b) cited above and argued that the Petitioners forged her signature as she did not consent to the proposed mode of distribution in the Confirmation of Grant proceedings. According to her evidence and that of the Petitioners and Beneficiaries/Interested Party, she was involved in the Confirmation of Grant proceedings but she insists that she never consented to the mode of distribution of the estate of the deceased. The burden of proof in a suit or proceeding, lies on that person, who will fail if no evidence at all were given on either side, See also (Section 107 of the *Evidence Act*). The Petitioners availed evidence in form of minutes to show that the Objector/Applicant was involved in the deliberations with regard to the mode of distribution of the estate of the deceased but she never availed evidence to dispute the fact that it was not her who affixed her signature consenting to the proposed mode of distribution. It is clear this is a case of greed on the part of the Objector. From the evidence of record, she is aware that the town plots were sold and that the proceeds from the same were equally shared amongst the widows of the deceased equally as per the court orders. The widows of the deceased still shared with her the sum of Kshs. 200,000/=but she still insists that she was to get equal amounts. This amount was meant for the widows of the estate of the deceased and not the daughters-in-law and grandchildren of the deceased. The fact that she received the said sum is clear proof that she duly signed the consent to the family minutes regarding the distribution of the town plots and hence her turn around is not in good faith. Indeed, her son who testified for the Petitioners castigated her conduct for being untruthful. Again, it is noted that the Applicant herein had participated in the previous proceedings leading to the confirmation of grant and in fact okayed the distribution schedule proposed by the Petitioners. Her turning around and upon realizing that she would be faced by that reality, she gave her daughter a power of attorney to proceed with the matter on her behalf. This did not help matters since the record of the previous proceedings stood like a sore thumb. Further, the Applicant failed to prove the allegations that her signature on the distribution had been forged. There is no evidence that she had ever lodged a complaint with the police over her forged signature.

47. There was therefore no proof to the required standards. That proof was to come from the Objector/Applicant. Justice Mativo (as he was then) in *Hellen Wangari Wangechi v Carumera Muthini Gatbua* [2005] eKLR, observed as follows in similar circumstances:

“It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. As observed above, the Appellant made allegation in the plaint, hence she was under an obligation to support the allegation. For example, since there was a denial in the defence, it was necessary to adduce evidence to show how the amount of Kshs.316,000/- was arrived at.”



There was no reliable evidence from the Objector/Applicant to prove with the necessary degree of certainty required that the Petitioners forged her signature and that she was not involved in the preparation meeting for the mode of distribution schedule for purposes of Confirmation of Grant. Since the burden of proving the same was on her, this Court is justified in finding that the threshold for revocation of the Grant of Letters of Administration confirmed on 5th August 2022 was not duly met by the Objector/Applicant. The Applicant came out as a spoiler despite having accepted to receive the sum of Kshs 200, 000/ as part of the proceeds from the sale of the two town plots and further being aware that her mother in law had pre-deceased the deceased and thus was not among the widows to share in the proceeds. The application herein was thus filed in bad taste by the applicant.

47. In view of the foregoing observations, it is my finding that the objector's application dated October 11, 2022 lacks merit. The same is dismissed with no order as to costs.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF SEPTEMBER 2023.

D.KEMEI

JUDGE

In the presence of:

Miss Adhiambo Nanzushi for Petitioners

Sabwan for Beneficiaries/Interested Parties

Zainabu Miriam Wafula Objector/Applicant

Kizito Court Assistant

