



REPUBLIC OF KENYA



In re Estate of Kapoloni Teba Namukoma (Deceased) (Succession Cause 61 of 2004) [2023] KEHC 22831 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22831 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 61 OF 2004**

**WM MUSYOKA, J
SEPTEMBER 28, 2023**

IN THE MATTER OF THE ESTATE OF KAPOLONI TEBA NAMUKOMA (DECEASED)

RULING

1. The deceased herein died on 20th July 1985. There is a letter from the Chief of Bukhayo West Location, dated 31st May 2004, which indicates that the deceased was survived by only 1 son, Morris Teba Kapoloni.
2. Representation to the intestate estate was sought by Moris Teba Kapoloni, in his capacity as a son of the deceased, through a petition filed herein, on 2nd June 2004. He listed himself, as the sole survivor, and [particulars withheld], as the asset that the deceased died possessed of. Letters of administration intestate were made to him on 28th July 2004, and a grant was duly issued, on even date. I shall refer to him as the administrator. The grant was confirmed on 3rd October 2005, on an undated application, filed herein on 4th April 2005. The estate was devolved wholly upon Antony Mulama Wanambiro. A certificate of confirmation of grant was duly issued, dated 3rd October 2005.
3. I am called upon to determine a summons for revocation of grant, dated 3rd May 2018, brought at the instance of Jeremiah Mukhwana and Gilbert Nanyanga Wanambiro. I shall refer to them as the applicants. They aver that the grant was obtained through a defective process, where facts were concealed and distorted. The 2 applicants swore separate affidavits, that by the 1st applicant on 3rd May 2018, and that by the 2nd applicant on an unknown date. The 1st applicant avers that his father, the late Namaswa Kiboli, had bought 2½ acres out of [particulars withheld], and even obtained a judgment against the administrator in Busia CMCCC No. 207 of 1993. He complains that the administrator had petitioned for representation, without disclosing that he was a beneficiary, and, at confirmation, he did not include him as a beneficiary, and that he instead caused the entire property to be devolved upon Antony Mulama. A copy of the attached judgment, shows that 2½ acres of [particulars withheld] were to be excised and transferred to the 1st applicant. The 2nd applicant avers that he had bought 1 acre from the deceased, who died before he had transferred the property to him. He complains that his name was omitted from the proceedings. He attaches an unclear or blurry copy of a handwritten document,



purported to be that agreement that was purportedly executed between him and the deceased on some unclear date.

4. The administrator replied to the application, vide an affidavit that he swore on 18th June 2018. He avers to be a son of the deceased. He states the 2 applicants resided within [particulars withheld]. He says that the 1st applicant is in occupation the 2½ acres that he bought from the deceased; while the 2nd applicant occupies 2 plots, that he had bought from the deceased, within the same property. He states that he approached Antony Mulama to help him fill out the relevant forms for the purpose of initiating the succession process, but the latter took advantage of his illiteracy, to get him to sign documents, whose effect was to devolve the entire [particulars withheld] to him absolutely. He avers that the land was registered in the name of Antony Mulama in 2013. He made a report to the police, and Antony Mulama was summoned, he attended before the police, and was asked to avail documents to show that he owned the land, but he never brought them. He avers that the said Antony Mulama had rendered him and his family homeless. He supports the revocation application, on grounds that Anthony Mulama lied to him.
5. The application was disposed of orally. Only the 1st applicant and the administrator testified. Jeremiah Mukhwana, the 1st applicant, was the first to take the stand. He stated that he lived on [particulars withheld], having entered the same in 1985, after his father had bought a portion of it from the deceased. He testified that he held a judgment in his favour, for the 2½ acres that he occupied.
6. Moris Teba Kapoloni, the administrator, followed. He was a son of the deceased. He said that he was the one who sold the 2 acres of the land to the father of the 1st applicant, in a year he could not recall. He alleged that he transferred the 2 acres to the name of the father of the 1st applicant, but no title deed was processed. He said that he had a case with the father of the 1st applicant, which was not resolved. He said no judgment was delivered by the court. He conceded that the 1st applicant was in occupation of the land, although he had no title deed. He said the land sold was 2 acres. He said that the grant ought to be revoked so that he could give the 1st applicant his share.
7. The grant herein was confirmed on 3rd October 2005. The land was devolved to Antony Mulama Wanambira. The administrator told the court that he was surrendering all his interest in [particulars withheld] to the said Antony Mulama Wanambira. The administrator even signed the court record to affirm that, and the grant was confirmed after that.
8. For avoidance of doubt, the record of 3rd October 2005 reflects what transpired in open court, when the matter came up for confirmation of grant, as follows:

“ 3/10/05

Coram: JK Sergon J

Musundi CC

Morris Teba Kapoloni: I am the Petitioner herein. I have surrendered all my interest in LR No. [particulars withheld] to Antony Mulama Wanambira.

Signature : Moris

Court: The grant issued to the petitioner is confirmed.

Signed

JK Sergon J”



9. What the administrator told the court on 3rd October 2005 is at variance with what he has deposed in his replying affidavit of 18th June 2018. The devolution to Antony Mulama was not founded on documents that the said Antony Mulama had allegedly duped him into signing, but rather on what the administrator orally told the court, and he even appended his signature to the court record, as confirmation and affirmation of what he had just told the court. It cannot be then that he was conned by the said Antony Mulama, as he now alleges.
10. The revocation sought would have the effect of vacating the confirmation orders of 3rd October 2005, and erasing the devolution that was made in favour of Antony Mulama by the court. I have seen documents on record, indicating that the property was transmitted to the said Antony Mulama, and the administrator has conceded as much.
11. What I find worrisome, is that the applicants did not make the said Antony Mulama a party to the revocation application. His presence, in these revocation proceedings, is more critical than that of the administrator. The property is registered in his name now, for transmission happened. Should revocation of the grant be ordered, the resultant effect would be that his title will be cancelled. Such a course cannot possibly be allowed, without affording him a right to be heard. The administrator made serious allegations against him, which suggest that Antony Mulama Wanambiro committed crimes in the process of getting himself registered, as proprietor of [particulars withheld]. He cannot be condemned unheard on these very serious allegations.
12. Before I determine the summons, dated 3rd May 2018, on its merits, let the same, inclusive of the replying affidavit, be served on Antony Mulama Wanambiro. He shall also be furnished with a certified copy of this ruling. I shall allocate a date when he shall be heard orally, to have him state his own version of what transpired. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 28TH DAY
OF SEPTEMBER 2023**

WM MUSYOKA

JUDGE

