



REPUBLIC OF KENYA



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**Wandera v Opondo (Civil Appeal E006 of 2022)
[2023] KEHC 22744 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E006 OF 2022
WM MUSYOKA, J
SEPTEMBER 28, 2023**

BETWEEN

TERESA RAEL WANDERA APPELLANT

AND

EBBA AGUT OPONDO RESPONDENT

*(an appeal arising from orders made in the ruling of Hon. Mrs. Lucy Ambasi,
Chief Magistrate, CM, in Busia CMCS No. 430 of 2017, of 22nd March 2022)*

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Busia CMCS No 430 of 2017, delivered on March 22, 2022. The grounds of appeal revolve around the application for revocation of grant not meeting the requirements of section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya, and Rule 44 of the *Probate and Administration Rules*; appointment of a total stranger to the estate as administratrix, when she had not even applied for such appointment; failing to properly analyse and evaluate the evidence by the appellant, specifically that showing that the respondent was always married to another man, and that she had always resided at the home of the said man in East Ugenya; lack of adequate proof that the respondent was a widow of the deceased; failure to consider sections 36(c) of the *Law of Succession Act*; the revocation application not being supported by adequate evidence; among others. It was sought that the orders of March 22, 2022 be set aside.
2. An amended memorandum of appeal was filed on August 18, 2022, to introduce 1 more ground, around an amended grant made, when no application had been made/amend it; and to introduce new prayers, that the grant made to the respondent be revoked, and all processes that followed that granting be cancelled, the registration of Dominic Wamkoya Munyanya as proprietor of Bukhayo/ Ebusibwabo/1378 be cancelled, the property and restored to the name of the deceased, and that the grant, as previously made and confirmed, be restored.



3. The impugned ruling was delivered on March 22, 2022. It turned on a Motion for revocation of grant, dated November 6, 2018, filed by the respondent. The respondent sought to have the grant revoked, and injunctive orders to preserve the estate. She averred that the grant had been obtained in 2014, in defective proceedings, by a sister of the deceased, who did not disclose that the widow of the deceased was alive. In her affidavit in support, the respondent asserted that the deceased, Odhiambo Mangoli Masimba, was her husband, having married him in 1977. She averred that they did not have children. After he died, she moved to Kitale to look for employment. She came back after she heard that the appellant had obtained representation to the estate, without disclosing that she was a widow of the deceased. When she went home, she established that her house on the land had fallen doors, whereupon she took up rented premises within Nambale market. She attached several documents to her affidavit, which are wholly illegible.
4. The appellant reacted to that application, by swearing an affidavit, on October 16, 2019. It was argued that the respondent was a stranger to the estate, as she was not a widow of the deceased, but a person hired by her half-siblings. It was averred that the respondent was married elsewhere, where she lived with her children. It was asserted that the deceased was never married, and died childless. It was asserted that the previous administrators were behind the application by the respondent, as they were eyeing the assets of the estate.
5. The appellant filed another replying affidavit, on October 23, 2020. She averred that prior to petitioning for representation, she had approached her half-siblings, who held the documents of the deceased, but they did not cooperate, hence delaying the process. She averred that prior to obtaining the Chief's letter, they held a meeting at the Chief's office, where her half-siblings confirmed that the deceased had no wife. She averred that their late father had 5 wives, and she and the deceased were from the 4th house, which comprised of her, the deceased and the late Florence Nabwire Rael Wandera. She initiated the succession cause in 2014, after which one of her half-siblings, John Alfred Ekesa, sought revocation of the grant made to her. In his application, he did not mention that the deceased had been survived by a widow. During the oral hearing of their revocation application, neither of his half-siblings mentioned any widow of the deceased. She asserted that the estate asset devolved to the deceased on behalf of the 4th house, from the estate of their late father. She averred that in 1977, the year the respondent claimed to have had married the deceased, she, the appellant, was living with the deceased and their late mother, and she never saw the respondent. She averred that she got married after the demise of their mother, leaving the deceased alone at home, and she used to visit often, and never saw the respondent at the home with the deceased after their mother died. She averred that her half-brother, George Maira Mangoli, relocated to Mombasa, and only came back after the deceased had died, and he could not have been party to any dowry ceremony for the deceased and the respondent. She accused her half-siblings of bringing the respondent into the picture in order to disinherit her. She averred that she had done investigations, which had revealed that the respondent hailed from Siaya County, where she was born and married, and lived. She had 4 children with her husband. She said that the document, on a dowry payment ceremony held on June 23, 1984, was a forgery. Regarding Redempta, she averred that she never bought land from the deceased, and it was only her who had verbally offered to sell a portion to her. She appeared to acknowledge an agreement dated November 5, 2014, saying that it was not enforceable for the purchase price was not paid in full, and also because it was contrary to the provisions of the [Land Control Act](#), Cap 302, Laws of Kenya, and section 82 of the [Law of Succession Act](#).
6. The application was canvassed, by *viva voce* evidence.
7. The respondent was the first to testify, on April 27, 2019, as PW1. She said that she was a resident of Bukholo, Siaya. She said that she married the deceased in 1977, and produced a dowry agreement



dated June 23, 1984. They did not have a child together. They lived on Bukhayo/Ebusibwabo/1378. She stated that the deceased died on a year she could not recall. She later learnt that someone had filed for succession to the estate, without seeking her consent. On cross-examination, she stated that she was born in Siaya, and had no children. She said that she was not married to Elijah Owino. She identified John Ekesa as a step-brother-in-law. She said that she lived at Nambale, selling tomatoes and onions at the home of the deceased, which she stopped after the deceased died.

8. PW2, Robert Humphrey Okello, was a nephew of the deceased. He said that his uncle, the late Albert Wandera, had informed him that the respondent was married by the deceased in 1977. He stated that John Ekesa was also his uncle. He stated that the respondent lived at Nambale, on Bukhayo/Ebusibwabo/1378. PW3, Benjamin Wandera Wanjala, was a village elder. He stated that the respondent was a widow of the deceased. He said that he was appointed as village elder in 1994, after the deceased had died in 1986. He stated that the respondent lived on Bukhayo/Ebusibwabo/1378 for some time, before she left to live at Kitale.
9. The case for the appellant opened on February 10, 2022, when she testified as DW1. She said that she first saw the respondent for the first time in court. She asserted that the deceased never married the respondent. During cross-examination, she stated that the respondent was pretending to be married to the deceased. She stated that the respondent was married to an Elijah Owino, and said that she was relying on a letter from a liguru for the area where the respondent was married. DW2, Boaz Ogutu, testified next. He was a village elder in Siaya County, for the area where the respondent was married. He said that the respondent resided in his jurisdiction, and was married. He said that the husband of the respondent was dead, but he had 3 children with the respondent. He stated that the respondent lived at Nambale at some point, but he could not tell with whom. Her husband died in 1996, and it was after that she moved to Nambale. He said the respondent was a member of his family.
10. The Motion, dated November 6, 2018, was determined, in a two-page handwritten ruling, which in typescript would fit in 1 page, delivered on March 22, 2022, in the following terms:

“Teresa Rael Wandera sought to revoke the Grant issued to her on October 9, 2014 praying the same be issued to her and John Alfred Ekesa instead as he was the Deceased’s eldest brother. The Grant was confirmed on October 11, 2017 and distributed to Farusi Khadija, Fredrick Okumu Odhiambo, ROBERT Wafula, Redempta Adhiambo Makokha and Sebastian Sunya Oluoch.

By a notice of motion filed on November 29, 2018, one Ebba Agutu Opondo the wife to the deceased sought to revoke the Grant and to further injunct the Petitioner from executing the Grant and for injunction against Busia Land Registrar Busia County from effecting registration to Bukhayo/Ebusibwabo/1378.

Redempta Adhiambo also sought by a summons filed on November 17, 2017 to revoke the Grant confirmed on October 11, 2017 alleging a purchaser’s interest arguing her acreage was to be determined upon her paying off the balance of the purchase price to the Petitioner, who had no colour of right to sell any portion of the Estate to the purchaser.

Having heard the proceedings herein and having heard the parties, I have no doubts that Ebba was indeed the wife of the late Odhiambo and injunction upheld. It is hereby ordered;

1. Grant to issue to Ebba and ALL previous Grants be revoked.
2. Distribution also revoked and claims by purchaser from Petitioner dismissed.
3. Injunction to Teresa Rael and all purported beneficiaries.



4. Injunctions as prayed.
 5. Grant to Ebba as wife.
 6. Costs to be borne by each party.”
11. The appeal was canvassed by way of written submissions. The appellant was the only party who filed written submissions. I have read through them, and noted the arguments made.
 12. I will deal with the grounds of appeal as set out in the amended memorandum of appeal, dated August 18, 2022.
 13. The first ground is that the application was incompetent, and should not have been entertained. The argument is that it was a Motion, rather than the summons for revocation of grant envisaged under Rule 44 of the *Probate and Administration Rules*. In *Re Estate of Murimi (Deceased)*[2002] eKLR (Khamoni, J) was cited by the appellant to support that contention. I do not think much should turn on this ground. A lot has happened since 2002 when In *Re Estate of Murimi (Deceased)*[2002] eKLR (Khamoni, J) was decided. Sections 1A, 1B and 1C of the *Civil Procedure Act*, Cap 21, Laws of Kenya, were introduced to legislate the oxygen principle, on eschewing technicalities of procedure in favour of substantive justice. Added to that was promulgation of the *Constitution* of Kenya in 2010. Article 159 of that Constitution is of significance, for it echoes sections 1A, 1B and 1C of the *Civil Procedure Act*, to the extent of requiring avoidance of technicalities of procedure, and urging that focus ought to be on substantive justice.
 14. The Motion of November 6, 2018 was, no doubt, not compliant with Rule 44 of the *Probate and Administration Rules*. It was not a summons for revocation of grant. However, the content or substance of that Motion were compliant. It sought revocation of the grant, on grounds of concealment of material facts from the court, and misrepresentation. The Motion was also expressed to be brought under section 76 of the *Law of Succession Act* and Rule 44 of the *Probate and Administration Rules*. Except that it was titled “Motion,” the said process was, for all practical purposes, an application for revocation of grant. It would be elevating rules of procedure to a fetish, to expect that that Motion ought to have been dismissed because of incorrect titling. Dismissal and striking out of processes on technicalities of procedure belongs to a bygone era. Suggesting that the trial court should have struck out the Motion, on that account, is to send Kenya back to that old era.
 15. The second ground argues 2 issues, about the respondent being a stranger to the estate, and the second being that she was granted representation, yet she had not prayed for it. Let me start with the stranger aspect. The argument was that the respondent was not a widow of the deceased, and so she was not entitled to a share in the estate, and to even administer the same. With respect to this issue, I must start by stating that the trial court did not do justice to the matter. It handled the application for revocation of grant in a very casual manner. Such an application cannot possibly be disposed of in a one-page ruling, comprised of just 2 paragraphs setting out the history of the matter, and 1 paragraph carrying the orders made. There was no recital of the pleadings by the appellant and of the respondent, no narration of the oral testimonies of the witnesses, no identification of the issues for determination nor of the applicable law, no analyses of the facts placed before the court, no application of the law to those facts, and no reasons given for the conclusions that the court made on the status of the respondent, nor of the prayers granted. Orders were granted without any basis being laid at all for them. A ruling granting orders that are not justified, in the body of the ruling, at all, would, no doubt, prompt dissatisfaction by the party against whom they are made. I am not surprised, in the circumstances, that an appeal was proffered.



16. The issue before the court was whether the respondent was a spouse of the deceased. The appellant asserted that she was not, and filed documents to support her case, and called witnesses to breathe life to those claims. The respondent asserted that she was a spouse, and filed documents, and called witnesses to support her case. That evidence should have been analysed, before coming to a conclusion one way or the other. The trial court concluded that she was a spouse of the deceased. No reasons were given for that conclusion. No analysis was made of the evidence, from the documents filed and the oral testimonies made in court. That is not the way it should be. All what the court said was “Having heard the proceedings herewith and having heard the parties, I have no doubts that Ebba was indeed the wife of the late Odhiambo and injunction upheld.”
17. Was there material upon which the trial court could conclude so? I have not seen any from the record that is before me. The case by the respondent was that she married the deceased in 1977, and lived with him on Bukhayo/Ebusibwabo/1378 until he died in 1990, whereupon she relocated to Kitale, where she was to remain, until the succession cause was initiated in 2014, by the appellant. The question that should come to mind is why did she not seek representation to the estate between 1990, when the deceased died, and 2018, when she mounted the application for revocation? Why wait for 28 years? It would appear that the half-siblings of the appellant and the deceased are on her side. PW2, a child of one of them, was her witness. When these half-siblings brought challenges against the making of the grant to the appellant, they did not declare to the court that the deceased had a wife, the respondent herein. John Alfred Ekesa, for example, brought a summons for revocation of grant, dated December 2, 2014. He listed individuals, at paragraph 5 of his affidavit of December 3, 2014, who he claimed survived the deceased. The respondent was not one of them. The person listed in there, as survivor of the deceased, from the house of his mother, was the appellant. The said John Alfred Ekesa filed a witness affidavit, on July 4, 2016, sworn on an unknown date, where he averred, at paragraph 3, that the deceased had no wife and children. If indeed, the respondent was a spouse, why was it that the half-siblings of the deceased and the appellant did not disclose her existence to the court, in their filings, when they sought to have the grant made to the appellant revoked?
18. The oral testimonies also point to the respondent not being a spouse of the deceased. When she testified, on April 27, 2019, she informed the court that she was a resident of Bukholo, Siaya, where she was a farmer and a casual labourer. When her witness, PW2, testified on November 18, 2021, he stated that she lived on Bukhayo/Ebusibwabo/1378. Bukhayo/Ebusibwabo/1378 is located at Nambale, Busia County, and not in Siaya County. In the Motion of November 6, 2018, the respondent had averred that she took up a rented residence at Nambale after she returned from Kitale. There was no mention of Bukholo, Siaya, in the application. Clearly, these witnesses were not being truthful. Secondly, whereas the respondent was very clear that she was married in 1977, and had a document to allegedly prove payment of dowry in 1984, she could not recall the more recent and important date, of the demise of the deceased. It is the more important date because it ought to be a defining moment in the life of a spouse, equally with the date of marriage, significantly because succession proceedings are about the death. The fact that she could not recall, off her head, the date when the deceased died, would suggest that she was not with him when he died, and the date of his death was, therefore, of little significance to her.
19. The third consideration should be with the fact of PW2 being a witness in the matter of the marriage of the respondent to the deceased. He was a step-nephew of the deceased and the appellant. He stated that he was born in 1974. The alleged marriage happened in 1977, when he was only 3 years old. He could not authoritatively testify on the same, and, indeed, he conceded that he got information about it from his late uncle, Albert Wandera. It was hearsay evidence. That evidence ought to have been considered alongside the facts deposed in the affidavit sworn by his other uncle, John Alfred Ekesa, on July 4,



- 2016, that the deceased had no wife and no children. His uncle, John Alfred Ekesa, would have known better. Indeed, the half-siblings of the deceased would have been better witnesses for the respondent, than a step-nephew who was just 3 years old when the alleged marriage was happening. An adverse inference could be made that the respondent could not call the half-siblings of the deceased because their testimonies would have been adverse to her case.
20. The appellant maintained all through, that the deceased had no spouse, and that position was supported by John Alfred Ekesa, her half-brother. A nephew, who was a toddler, when the alleged events happened, cannot possibly give superior evidence to that of his uncles and aunts who were of age at the material time. The evidence laid out by the appellant clearly points to a scheme by her half-siblings, to throw a spanner into the works, by introducing a stranger, as a spouse of the deceased, to keep the appellant away from the estate, on account of the fact that she was a married daughter. What I am stating here is borne out by the affidavits on record, sworn by John Alfred Ekesa. The appellant was the blood sister of the deceased. Of all the family members, she would be the most qualified to know whether or not her blood brother was married.
 21. On the second issue, of representation being made to the respondent when she had not sought it, I would say this, without prejudice to what I have stated above, the trial court had concluded that the respondent was the surviving spouse of the deceased. That would have made her the sole immediate survivor, for siblings could only come into play where there was no spouse or children, going by section 39 of the Law of Succession Act. That being the case, she had prior right to administration, going by section 66 of the Law of Succession Act. To the extent that she was seeking revocation of grant, on grounds that she had prior right to inherit, it followed that she had prior right to administer the estate, and the court could exercise discretion to appoint her as administrator, upon concluding that she was a spouse of the deceased.
 22. The third ground is that the trial court had failed to analyse and evaluate the evidence of the appellant. I have dealt with that above. The trial court did not analyse and evaluate any of the evidence presented by either side. I have also stated that no reasons were given for the conclusion that the respondent was a surviving spouse of the deceased. No factual nor legal justification was given by the court for making that decision. The fourth, fifth, sixth, seventh, eighth, ninth and tenth grounds are also along similar lines, and I have exhaustively dealt with them above.
 23. The entire case turned on only that one issue, the marital status of the respondent. If the trial court had analysed and evaluated the evidence, it would have come to the conclusion that the material placed on record was not sufficient to establish, on a balance of probability, that the respondent was a spouse of the deceased. The Motion, dated November 6, 2018, ought to have been dismissed.
 24. The appellant has also raised the issue of failure to consider section 36(c) of the Law of Succession Act. Section 36 of the Law of Succession Act applies to distribution in intestacy, where the deceased was survived by a spouse without children. Section 36 is about distribution. The ruling delivered on March 22, 2022 turned on revocation of grant, and no orders on distribution were made. The trial record indicates that orders on distribution were subsequently made on a confirmation application filed thereafter. The appeal before me is premised on the orders made in the ruling of March 22, 2022, and not on orders made in subsequent rulings. I shall, therefore, confine myself to the ruling of March 22, 2022.
 25. Overall, it is my conclusion that the appeal herein is merited. I allow it. I substitute the order of the trial court, in Busia CMCSC No 430 of 2017, of March 22, 2022, with an order dismissing the Motion, dated November 6, 2018. The consequence of the dismissal order herein should be to revert the matter



to the *status quo* ante the impugned orders, and to vacate all the other orders made on the Motion, dated November 6, 2018. The appellant shall have the costs of the appeal. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS
28THDAY OF.....SEPTEMBER..... 2023**

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Wanyama, instructed by Messrs. Wanyama & Company, Advocates for the appellant.

Mr. Okutta, instructed by Messrs. Ouma Okutta & Company, Advocates for the respondent.

