



REPUBLIC OF KENYA



In re Estate of Hezbon Onyango Nyabola (Deceased) (Succession Cause 682 of 2011) [2023] KEHC 24835 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 682 OF 2011**

RE ABURILI, J

OCTOBER 31, 2023

IN THE MATTER OF THE ESTATE OF HEZBON ONYANGO NYABOLA (DECEASED)

IN THE MATTER OF

EVALYNE AWINO OPIYO 1ST PETITIONER

MAURICE JUMA NYABOLA 2ND PETITIONER

RULING

1. The deceased herein Hezbon Onyango Nyabola died intestate on 11th July, 2009. The deceased was survived by the 1st petitioner Evalyne Awino Opiyo as the widow and the 2nd petitioner who stated to be the deceased's brother. The two jointly petitioned for grant of letters of administration and were issued with a joint grant to administer the estate of the deceased on 27th July, 2015.
2. From the Summons for Confirmation of grant dated 10th May 2022 and supported by a joint affidavit sworn by the petitioners on 12th May, 2022, it was proposed that land parcel No. Kisumu/Nyalenda 'A'/1606 which is registered in the name of the deceased Hezbon Onyango Nyabola be held jointly between the petitioners.
3. Subsequently, the parties appeared before the court on 14th November 2022 wherein they could not agree on the proposed mode of distribution with the 1st petitioner disowning the 2nd petitioner and this court therefore directed each party to file their respective affidavits on the proposed mode of distribution of the said estate.
4. The 1st petitioner filed an affidavit in protest to the petition sworn on the 25th November 2022 in which she deposed that she was opposed to the petition dated 20.12.2011 and all the documents in support therein filed in respect to the deceased's estate. She claimed that she was one of two administrators to the deceased's estate having filed a petition in respect of the deceased's estate *vide* Kisumu Chief Magistrates Court Succession Cause No. 338 of 2020 wherein the grant had been confirmed in her favour.



5. The 1st petitioner deposed that she was not aware that the instant petition had been filed and that it was filed without her knowledge, consent and/or authority and that the grant to the deceased's estate having been confirmed and estate distributed, the instant petition was misconceived and an abuse of this court's process.
6. The 1st petitioner reiterated that she did not agree with the 2nd petitioner to file the instant petition as that she did not know about it and that therefore the instant succession cause was fraudulently filed by the 2nd petitioner and her signature purported to be on the petition forms was forged and also that her identity card that is attached to the petition was obtained from another source without her knowledge, consent and/or authority. The 1st petitioner urged that the instant petition should be dismissed.
7. The 2nd petitioner had filed his affidavit sworn on 19th December 2022 in which he deposed that he bought the property subject of this succession cause from one Michael Omondi Marenya (deceased) and the parcel was then created out of subdivision of a bigger parcel No. Kisumu/Nyalenda 'A'/956. That at the time of such purchase, the 2nd petitioner worked in Nairobi and therefore entrusted his brother, the deceased herein, to making the payments on his behalf as regular travelling to and from Nairobi would be costly on his part.
8. The 2nd petitioner deposed that at the time of the purchase, the deceased Hezbon Onyango Nyabola was staying in Nyalenda, Kisumu with their elder sister so that the deponent's desire to purchase the parcel of land was made in their presence. That the purchase price was paid in bits until he cleared and that because of the trust that he had in his now deceased brother, the title was registered in his name although the deponent continued paying for the purchase price even after the demise of his brother.
9. The 2nd petitioner further deposed that together with the 1st petitioner, they sold off the parcel to one Fredrick Oduor Ng'ong'a on 20th December 2011 and that the involvement of the 1st petitioner was to facilitate the devolution of the estate to the purchaser. He deposed that the 1st petitioner skipped a reconciliatory meeting and thereafter clandestinely commenced another succession cause in 2020 during the pendency of this matter.
10. The parties who were legally represented, argued their respective positions by way of Oral Submissions.

The 1st Petitioner's Oral Submissions

11. Mr. Omollo counsel for the 1st petitioner submitted that his client was the widow of the deceased Hezbon Onyango Nyabola and thus ranked in priority in matters succession. It was further submitted that the land parcel No. Kisumu/Nyalenda'A'/1606 was registered in the deceased's name on the 30th December 2008 whereas the deceased passed on in July 2009.
12. The 1st petitioner submitted that she was not aware of the instant petition and that is why she petitioned the court in the Chief Magistrate's court at Kisumu *vide* Succession Cause No. 338 of 2020 where a grant was issued to her and confirmed on 31st May 2022 and that the deceased's estate having been distributed, the instant succession cause should be closed.
13. It was further submitted that the 1st petitioner was not aware of the allegation that the suit land was sold to the third party and that the purported purchaser can pursue his interest in the Environment and Land Court. The 1st petitioner submitted that the 2nd petitioner was calling upon this court to determine the issue of ownership of the suit property, which jurisdiction this court did not have.
14. Regarding the translated agreements adduced by the 2nd petitioner, it was the 1st petitioner's submission that the one dated 13th September 2008 confirms how the deceased purchased the suit property and how the 2nd petitioner was just a witness whereas the one dated 31st September 2008 shows that the



deceased paid Kshs. 110,000 with registration being done on the 31st December 2008. The 1st petitioner submitted that the agreement of 27th February 2010 was after the deceased's death and further that the purpose of the balance from the 2nd petitioner was not indicated, no land parcel was mentioned nor to whom the title was handed and further that the 2nd petitioner signed as seller/landlord. It was submitted that the agreement of 15th October 2011 indicated that the 2nd petitioner was receiving money to hand over the title deed of the land to a buyer but did not feature the 1st petitioner anywhere whereas in the agreement of 20th December 2021, the 2nd petitioner is purporting to pay Kshs. 7,000 to Michael Omondi Marenya though it was not clear what was being sold.

15. It was submitted that the 2nd petitioner or purchaser had no right over the estate of the deceased and that the purported purchase was done from a person who was not an administrator or owner of the land.
16. The 1st petitioner submitted that this court could not revoke the grant that had already been confirmed in another cause without a substantive motion and that since the 2nd petitioner knew about Cause 338 of 2020, he had not applied to revoke the grant.
17. It was submitted that the 2nd petitioner together with the purported purchaser had no recognised interest in the deceased's estate which was already distributed and closed and that any claim should be ventilated in a different forum.

The 2nd Petitioner's Oral Submissions

18. Mr. Orenge counsel for the 2nd petitioner submitted that the 1st petitioner had not disclosed the truth and that if there was any grant to be revoked it was the one in Kisumu CM Succession Cause No. 338 of 2020 and that she had failed to adduce any evidence that her signature as used in the instant petition was a forgery nor had she made any report to the police on the same.
19. It was submitted that the petition in the instant case was gazetted on the 19th October 2012 and the grant issued on the 27th July 2015 while the petition for grant in Cause No. 338 of 2020 was gazetted on 2nd October 2020 and thus the estate should be administered in this cause.
20. It was submitted that both parties herein knew that the suit property belonged to the 2nd petitioner but that he conceded that the suit property was registered in the deceased's name.
21. The 2nd petitioner submitted that this cause was properly filed in this court hence the issues ought to be determined in this court whereas the other cause should be revoked as two grants cannot exist over the same estate.

Analysis & Determination

22. I have considered the petition for letters of administration intestate as filed before this court, the opposing positions by both petitioners herein and their submissions by their respective counsel.
23. In my view, the main issues for determination are:
 - i. Whether there is a violation of the doctrine of sub judice by the existence of two succession causes in two courts in respect of the same estate
 - ii. If the answer in (i) is in the affirmative, Whether the grant issued and confirmed by the Chief Magistrate's Court at Kisumu vide Succession Cause No. 338 of 2020 should to be revoked.
 - iii. Who between the two petitioners is legally entitled to petition for letters of administration intestate in respect of the estate of the deceased Hezbon Onyango Nyabola?



- iv. What orders should this court make?
24. On the first issue of whether the proceedings in Kisumu Chief Magistrate’s Court Succession Cause No. 338 of 2020 violated the doctrine of subjudice, it was the 1st petitioner’s case that she was not aware of the current proceedings before this court and that, that is the reason that she filed the petition in Kisumu Chief Magistrate’s Probate and Administration Cause No. 338 of 2020. The 1st petitioner averred that the 2nd petitioner did not consult her prior to the filing of the instant petition and that the petition was filed without her knowledge, consent and/or authority. The 1st petitioner further averred that her signature as used in the petition forms presented before this court was a forgery and that the 2nd petitioner obtained her Identity Card from other sources.
25. On his part, the 2nd petitioner contended that that he, together with the 1st petitioner, they sold off the suit parcel to one Fredrick Oduor Ng’ong’a on 20th December 2011 and that the involvement of the 1st petitioner in the sale and in this succession cause was to facilitate the devolution of the estate to the purchaser. He deposed that the 1st petitioner skipped a reconciliatory meeting and thereafter clandestinely commenced another succession cause in the lower court in 2020 during the pendency of this Succession Cause.
26. The law on subjudice is set out in Section 6 of the [Civil Procedure Act](#) which provides that:
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
27. The purpose of the sub judice rule is to prevent the filing of multiple suits or proceedings between the same parties or those claiming under the same subject matter so as to avoid an abuse of the court process. For the court to decide whether or not a case falls under Section 6 above, evidence must be laid before it to show that the parties or those claiming under their titles were the same and the matters in issue were the same and that in order to determine whether the rule of sub judice has been offended, the court has to delve into material facts of the case and the Application, call for pleadings, examine and/or interrogate them to help it determine if the facts in issue are similar.
28. I did call for the entire file and I have perused the proceedings in Kisumu Chief Magistrate’s Probate and Administration Cause No. 338 of 2020 and note that the same involved the administration and distribution of the estate of Hezbon Onyango Nyabola who died intestate on 11th July, 2009 and more specifically, the devolution of land parcel No. KISUMU/NYALENDA ‘A’/956. This is the same issue before this court.
29. On the other hand, these proceedings before this court were commenced vide a petition for a grant of letters of administration intestate allegedly filed by the two parties herein on the 21st December 2011. The petition in the instant cause was gazetted on the 19th October 2012 and the two were issued with a joint grant to administer the estate of the deceased on 27th July, 2015.
30. The proceedings in Kisumu Chief Magistrate’s Succession Cause No. 338 of 2020 were commenced vide a petition for a grant of letters of administration intestate filed on the 15th July 2020 and the grant was issued to the 1st petitioner on the 8th June 2021 and confirmed on 31st May 2022. It is therefore clear that the proceedings before this court preceded those in the Chief Magistrate’s Court.



31. The 1st petitioner alleged forgery in the petition presented before this court to the effect that she did not provide her national identity card and that neither did she sign the petition documents.
32. Allegations of fraud must be proved. In the case of *R.G Patel v Lalji Makanji* [1957] EA 314, the former Court of Appeal for Eastern Africa stated thus:
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
33. Further, in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”[emphasis added]
34. In the case of *Ndolo v Ndolo* [2008] 1KLR (G &F) 742, the Court stated that:
- “We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...” “...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
35. Finally, in the case of *Central Bank of Kenya Limited -V- Trust Bank Limited & 4 Others* [1996] eKLR, the court rendered itself as follows:
- “The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case. “
36. Section 109 of the *Evidence Act*, Cap 80, Laws of Kenya, places the burden of proof on the 1st petitioner to prove fraud or forgery of her signature and the section provides that:
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.”
37. In the case of *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR where the court stated that:
- “It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case *Central Bank of Kenya LTD -V- Trust Bank Ltd & 4 Others* [26] the Court of



Appeal in considering standard of proof required where fraud is alleged state that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges.

In Belmont Finance Corporation Ltd -V- Williams Furniture Ltd [27] Buckley L.J said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity.”

38. In the instant cause, the 1st petitioner has not alleged forgery of her signatures but has failed to adduce any evidence before this court to persuade me that her signature was forged or that her Identity Card was obtained fraudulently. An Identity Card is such a personal document that for one to obtain another person’s card fraudulently, some evidence must be present including a report made to the police. Moreso, the 1st petitioner has appeared before this court severally on this court’s demand that she attends court but she never raised the issue of forgery or fraud until this last moment.
39. In the circumstances, I find and hold that the 1st petitioner was well aware of the instant proceedings and that she jointly petitioned for a grant of letters of administration intestate in respect of the estate of the deceased Hezbon Onyango Nyabola who was her husband.
40. This then leads me to determine the second issue. Thus, the 1st petitioner having been aware of the instant proceedings, were her actions substantial to warrant revocation of the grant issued and confirmed by the court in Kisumu Chief Magistrate’s Succession Cause No. 338 of 2020?
41. The circumstances under which a Grant may be revoked are clearly set out in section 74 of the [Law of Succession Act](#) which provides that:
 - “ 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.”

42. Having found that the 1st petitioner was well aware of the proceedings before this court, it is evident that the grant issued by the Chief Magistrates Court in Succession Cause No. 338 of 2020 was obtained by means of an untrue allegation and non-disclosure of material facts being, that the 1st petitioner herein had already been issued with another grant jointly with the second petitioner herein to administer the same estate and what was pending was confirmation of the said grant.
43. Accordingly, the grant issued to the 1st petitioner on the 8th June 2021 and confirmed on 31st May 2022 in Kisumu Chief Magistrate’s Court Succession Cause No. 338 of 2020 was irregularly issued and this court in the circumstances of this case has supervisory jurisdiction over the lower court pursuant to the provisions of Article 165(6),(7) of *the Constitution*, and having called the said lower court into this court and having examined that record, I hereby revoke the grant issued and confirmed therein and quash the said proceedings.
44. Turning to the last issue for determination, this court is confronted with the question of who is entitled to petition for a grant of letters of administration intestate of the estate of Hezbon Onyango Nyabola and therefore to whom does the deceased’s estate devolve?
45. The 1st petitioner averred that she had priority to petition for letters of administration intestate over the deceased’s estate as she was the deceased’s wife. On his part, the 2nd petitioner stated that he bought the suit property land parcel No. KISUMU/NYALENDA ‘A’/956, and that it was registered in the deceased’s name due to the circumstances that it was the deceased who would receive the 2nd petitioner’s money and forward the same to the original owner of the land being the seller.
46. This court had in its earlier ruling of 31st May, 2023 settled the status of the suit property noting that the same formed part of the deceased’s estate as was evident from the title deed and that the same could not pass to a third party prior to confirmation of the grant of administration in view of the provisions of section 45 of the *Law of Succession Act* which prohibits and makes it an offence to intermeddle with the estate of the deceased. The section stipulates 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.”



47. In the said ruling, I found that the 2nd petitioner's assertion that he bought the parcel or that he shared out the proceeds with the 1st petitioner do not guarantee or confer upon him the rights to sell the parcel of land in the absence of a confirmed grant of letters of administration. I therefore found that the purported sale was illegal for all intents and purposes and liable to be declared as such. That ruling is still intact and all parties hereto are very much aware of it and the legal position which was well explained to them.
48. This is a legal position pronounced by courts and settled. In the case of re Estate of Isaac Kaburu Marete (Deceased) [2017] eKLR F. Gikonyo J stated as follows:

“I will restate once again what I stated in the cthe Matter of the Estate of M’Ajogi M’Ikiugu alias Ikiugu Ajogi (Deceased) on sale of estate property before confirmation of grant as follows:-

Sale of estate property before confirmation

Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the *Law of Succession Act*, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the *Law of Succession Act*, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property. It is during confirmation hearing that the court establishes the respective identities and shares of persons beneficially entitled, and when confirmed the grant specifies such persons and their respective shares in the estate. See section 71 of the *Law of Succession Act*. Therefore, before confirmation, the interest of the beneficiary remains amorphous and entangled within the estate; and vested in the administrator or executor as the estate property as by law stated.

- (7) But for completeness of the foregoing discourse, I wish to go two steps up. First, a void transaction is in law a nullity. It is not only bad, but incurably bad. And every proceeding or perceived right which is founded on it is not only bad but incurably bad. On this I can do no better than Lord Denning M.R in the case of *MACFOY V UNITED AFRICA CO. LTD* [1961] 3 All ER 1169 at pg. 1172 that:

“...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.



Second, any acquisition of land in violation of the Law of Succession Act is unlawful and a finding to that effect by a competent court brings the acquisition within the claw-back provisions of article 40(6) of the Constitution which declares that:-

The rights under this Article do not extend to any property that has been found to have been unlawfully acquired

This provision should be understood within the broader sense of the law of ensuring that a person's holdings are just and lawfully acquired having been acquired through original just acquisition, or lawful transfer, or through rectification of injustices or through inheritance. Accordingly, acquisition of land before confirmation of grant is null and void; and does not enjoy property rights in article 40 of the Constitution of Kenya, 2010.

Agreement null and void

- (8) On the basis of the law set out above, the agreement entered into between the protestor and the beneficiaries on 22nd September 2010 is vitiated in law and, is, therefore, null and void for all purposes and intents. I so declare that agreement; it is of no legal effect whatsoever. In any event, the agreement is a manifestation and a product of intermeddling with the estate for which the parties may be cited in a criminal charge under section 45 of the Law of Succession Act. Therefore, the protest is based on an illegality and the protestor cannot legally found a claim whatsoever against the estate. It bears repeating that, all those who signed the agreement herein could be cited for intermeddling- and I think, in appropriate cases, courts should begin to tread that path in order to preserve the estate properties and to vindicate the law by punishing the offending parties. Accordingly, the protest dated 15th April 2013 is dismissed. I will not, however, award costs to the Petitioner because he too is at fault. I will now decide on the distribution.”

49. In addition, section 29 of the Law of Succession Act provides for who ranks in priority as dependants of the estate of a deceased person. The section defines dependants as:

“The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

50. There is no dispute that the deceased was survived by three sons and a daughter.
51. There is no dispute that the deceased in this case was survived by the 1st petitioner and children. She is by law established, together with her children with the deceased, dependants. The 2nd petitioner would only come in at a far off degree of consanguinity.
52. Therefore, on who would be legally entitled to petition for a grant of letters of administration of the estate of the deceased Hezbon Onyango Nyabola, Section 29 as read with Section 66 of the Law of Succession Act comes into place. Under Section 66 of the Act, preference is to be given to certain persons to administer the deceased's estate where the deceased died intestate and provides that the court shall, save as otherwise expressly provided, have final discretion as to the person or persons to whom a grant of



letters of administration shall, in the best interest of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the order of preference as set out in the aforesaid section. Section 66(a)-(d) provides: -

- “ 66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-
- (a) surviving spouse or spouses, with or without association of other beneficiaries;
 - (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
 - (c) the Public Trustee; and
 - (d) creditors”

53. Part VII, dealing with making of grants under Rule 26(1) and (2) of the Probate and Administration Rules provides that:

“ 26.

- (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
- (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

54. In Nairobi Succession Cause No. 2015 of 2012 In the matter of the Estate of Joshua Orwa Ojode (Deceased) discussing the issue of who ought to benefit from the estate of a deceased, Musyoka J opined that:

- “ 6. Going by the above provision, where a deceased person is survived by spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of all the other relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child.”

55. At paragraph 13 of the same judgement, Musyoka J went on to hold that:

- “ 13. This duty to maintain a wife and children extends to protection of widows and orphans following the death of the person who is legally bound to maintain them. The law ensures that widows and orphans are given first priority in terms of access to the property of a dead husband and father. The other relatives,



including parents, are relegated to a secondary position, and only access the property in the event that there is no widow or child, or if they convince the court in a proper application that they were dependent on their dead child or sibling or other relative and that the court should then make provision for them out of the estate of the dead child. These provisions are designed to obviate the possibility of widows and orphaned children being rendered destitute, as they would be if they are forced to share their inheritance with the parents and siblings of the deceased. Quite clearly therefore under succession law, parents are not in the same footing with widows and children.”

56. It is clear that under Part V referred under Section 66(b), the persons given priority over an intestate are the surviving spouse and children. The 2nd petitioner has no right to petition or to insist to be an administrator of the deceased’s estate when the deceased left behind a spouse, the 1st petitioner herein.
57. ON the 2nd petitioner’s claim that he bought the land subject of the estate property and had it registered in the name of the deceased who was his brother, regrettably, that is a beneficial interest which this court is devoid of any jurisdiction to entertain as it falls in the arena of claims for ownership and title to land which is a dispute falling within the jurisdiction of the Environment and Land Court as contemplated in Article 162(2) (b) of *the Constitution* as read with section 13(1) and (7) of the *Environment and Land Court Act*. Furthermore, this court is expressly bared from hearing and determining disputes reserved for the Environment and Land Court, the Employment and Labour Relations Court and the Supreme Court. See Article 165(5) (b) of *the Constitution*. The 2nd petitioner’s claim of the deceased having held the land in trust for him as the purchaser is not a claim this court has jurisdiction to hear and determine.
58. On what orders this Court should make, in view of the above settled legal positions, I and as it has become impossible to administer the estate of the deceased Hezbon Onyango Nyabola owing to wrangles and dispute between the two petitioners herein with the 2nd petitioner having allegedly sold the deceased’s estate property to a third party without legal authority, which sale is a nullity ab initio, and in order to avoid delay in the administration of the said estate, which delay is abhorred by Article 159 of *the Constitution* as it will lead to the grant becoming inoperational and useless, I hereby revoke the grant issued to the two petitioners herein jointly and proceed to reissue the grant in favour of the 1st petitioner Evalyne Awino Opiyo to administer the estate of the deceased in accordance with the law.
59. In other words, I have exercised discretion in accordance with the dictates of section 66 of the Law of Succession and I hereby order that the 2nd petitioner herein Maurice Juma Nyabola is removed from being a co-administrator of the estate of the deceased Hezbon Onyango Nyabola as he is not and has not been acting in the interest of the said estate; and the person purporting to be the purchaser of the land in the said estate property should seek for a refund of his money from whoever sold him the land which belonged to the deceased before the grant was confirmed, contrary to the established law.
60. The 1st petitioner is directed to file summons for confirmation of grant within 30 days of today. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF OCTOBER, 2023

R.E. ABURILI

JUDGE

