



REPUBLIC OF KENYA



In re Estate of Namulunda Simiyu alias Namulinda Simiyu (Succession Cause 139 of 2008) [2023] KEHC 26545 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 139 OF 2008
SC CHIRCHIR, J
NOVEMBER 30, 2023**

BETWEEN

MANUEL WERE NAMUHINDA PETITIONER

AND

CHRISTOPHER OLATHO AMAKOBE OBJECTOR

AND

RICHMINISTER CHRISTIAN FOUNDATION INTERESTED PARTY

FANICE NANJALA WERE INTERESTED PARTY

JAELE MULESHE WESONGA INTERESTED PARTY

ZACHARY AROCHI KWENA INTERESTED PARTY

EMILY BENTA ADEMBA INTERESTED PARTY

HASSAN MWANZA INTERESTED PARTY

ALFRED MAKWA GEORGE INTERESTED PARTY

GEORGE MULAMA WESONGA INTERESTED PARTY

BISHOP RICHARD MUKHEBI INTERESTED PARTY

JOSAM KHAOYA WASIKE INTERESTED PARTY

MOSES KIZITO INTERESTED PARTY

PHILIP OSUNDWA AND FAMILY INTERESTED PARTY

IDI MAERO OKUMU INTERESTED PARTY

GABRIEL OTUKO MAKOKHA INTERESTED PARTY

CHARLES OSORE OYUKO INTERESTED PARTY

PIUS KHAEMBA MUKHEBI INTERESTED PARTY



JUDGMENT

1. This cause relates to the Estate of the Namulunda Simiyu alias Namulinda Simiyu, who died on 4/7/1978. The petitioner, Manuel Were Namuhinda is her grandson. The said petitioner applied for letters of Administration intestate to the Deceased's Estate and the same was issued to him on 16th July 2008.
2. Through the summons dated 12th August 2010 and amended on 3rd February 2020 the petitioner sought for confirmation of the Grant. He listed himself as the only dependant, and the only asset of the Estate as Title No. North/ Matungu/923.
3. The Application attracted an objection, a prayer for revocation as well as several protests by a total of 17 protestors, who claim to have purchased portions of land which were sub divisions of the above parcel.
4. The disputes involve these sub- divisions. They are located in the same registration section, that is North wanga/ Matungu. In this Judgment, for purposes of brevity, I intend to make references to the various parcels by citing their Numbers only. Wherever a parcel number is stated therefore, it should be read as "North Wanga/ Matungu No... (parcel No)"
5. On 9th of August 2008, the objector filed summons for revocation of Grant. His claim is that the petitioner failed to disclose material facts; that the petitioner had failed to disclose the fact that he had purchased a portion out of parcel No. 923, and therefore was a beneficiary to the Estate.
6. The objection was later withdrawn, but reinstated at the instance of the objector through his Application dated 17 .9.2012. While reinstating the Application for objection proceedings, Justice Chitembwe, at the same time ordered for the restoration of the Title No. parcel No. 923 which had already been sub- divided. He further cancelled sub- division Nos: 963,964,807 and 808. However, as the search certificate No. 134/08, dated 7.2.2008 and the evidence of DW2 would later show, parcel Nos 807 and 808 did not arise from the sub- division of 923. It is the sub- division of parcel no. 807 that gave rise to parcel No.923. None of the parties has sought to have this anomaly corrected. The anomaly however has no bearing on the determination of parcel No. 923 which is the subject matter of the confirmation and objection proceedings herein.
7. On 28th August 2008, Simiyu Otuko Mukhebi filled an affidavit of protest claiming that the deceased who was is mother left behind two heirs who are himself Mukhembu Simiyu Otuko and Vincent Namuhinda , the petitioner's father. He claimed that the petitioner concealed material evidence from the court by not acknowledging that the deceased was survived by other dependants who were his step sisters and sisters. He stated that the petitioner comes from a big family and if he wanted to inherit from his grandparents then he should include parcel No.671 belonging to Gregory Bukhebi Simiyu who was the elder son to Nekesa Simiyu , parcel No. 672 that belonged to his father Vincent Namuhinda Simiyu parcel No. 679 belonging to Wanyama Osores and LP NO. N/Wanga/Matungu/ 684. However, this particular protestor never appeared in court later to testify.
8. On 30th April 2015, 3 interested parties Gabriel Toto Makokha (14th interested party) applied to the court to be enjoined in the succession cause on behalf of the grandsons of Simiyu Otuko. The other grandsons who sought to be enjoined were Charles osore otuku (15th interested party) and Pius Khahemba Mukhebi,(16th interested party). Their claim is that they too were the grand children of the deceased and had been left out of distribution.



9. On 10th February 2016, Esther Natecho Ogutu (17th interested party) filed an application claiming interest in parcel no.924 . She brought her claim in her capacity as the the administratrix to the estate of her late husband, one Wilson Ogutu Didah who died on 31st October 1997.
10. She states that her deceased husband was the registered owner of the land parcel N/Wanga/ Matungu/924 having purchased it from the Deceased on 19th January 1978.
11. By way of chamber summons application dated 17th May 2018, Rich minister Christian foundation (1st interested party) filed an application claiming that it is the registered owner of parcel No.2376 which is a sub- division of parcel No. 963 which is a sub division of parcel No. 923 and that the order of 8th July , 2014 was erroneous arguing that the Judge did not seem to have understand the history of the land.
12. In his further Affidavit dated 17th February 2017 the petitioner proposes to distribute Land Parcel No. 923 as follows:
 - a). Esther Natecho Oguto- 3 acres
 - b). Mr. Christopher Olatho- 1 acre
 - c). Emily Benta ademba- 10 acres
 - d).Jael Maleshe Wesonga- 3
 - e). Zachary Arochi Kwenu- 10 acres(as per agreement entered in on 9/4/2015)
13. The court directed that the hearing proceeds by way of viva voce evidence.
14. PW1 was the objector. He testified that he did not know the deceased, but knew her son Namuhinda Simiyu, also known as Vincent Namuhinda Simiyu. That the said Vincent sold to him two parcels of land being parcel No. 808 on 13.6.1968, and parcel No. 1964 on 12/4/1981; that On 24.5.1979 he bought another parcel, that is parcel No. 694 from Nyongesa Mutola. He further argues that parcel No. 923 no longer exists as the same has been sub- divided.
15. On cross examination, he asserted that he bought the 3 parcels of land from the Vincent Namuhinda, the petitioner's father. The petitioner was about two years old then. He told the court that he never saw the Title deed for parcel No. 923, and therefore was unable to confirm if the title deed was in the name of the petitioner's father. He claimed that he signed an Agreement for one-acre piece with one Namulinda simiyu. He further stated that he is claiming parcel Nos 964 and 808 which he bought from Naamulinda simiyu. He was aware of the order issued by Justice Chitembwe on 8.4.2014, cancelling the sub- division of parcel No. 923. He admitted that he had never filed an Appeal against the said orders. He further told the court that he bought parcel No. 694 from Nyongesa mutola, he did not know the history of the parcel. He further testified that he went and obtained a consent from mumias Land control Board in 1982.
16. PW2, was Gabriel Toto Makokha.(14th interested party) He told the court that he was the grandchild to the deceased and that the estate in contention belonged to his uncle Namuhinda Simiyu. His Father, who has since died was Mukheshi Simiyu .He further stated that the objector bought land in 1968 from his uncle Vincent Namulinda Simiyu. He admitted that Land parcel No. 672 was in the name of the deceased. He told the court that he had no claim to the Estate.
17. He further testified that his father was the older son of the deceased and was allocated parcel No. 671 while the petitioner's father got parcel No.672. He went further to state that petitioner's father sold parcel No. 672 and this parcel produced sub – divisions 807 and 808. The sub- division of 807



produced 923 and 924. He asserted that the only property that the petitioner should seek to distribute is parcel No. 963, which belonged to his father Vincent Simiyu.

18. On cross examination, he stated that NW/M/923 was in the name of Namulunda Simiyu, their grandmother, who died in May 1977.
19. PW3 was one Fredrick Maloba. He told the court that he did not know the deceased but knew the objector, as he was his neighbour. On the matters before court, he stated that he was told about them, as he was not present.
20. The first witness for the interested parties was Bishop Richard Bukhebi Wasike. He was the representative of the 1st interested party. He told the court that his organization's interest is in respect to parcel No. 2376, which was a sub-division of parcel No. 963. He admitted that the search certificate was in the name of the deceased. He further stated that they bought the land from the petitioner in the year 2011. He undertook the transaction on behalf of the organization. He saw a Title Deed for parcel No. 923, which still bore the name of the deceased. It was on the basis of the said Title that he entered into the transaction. He was not aware of Justice Chitemwe's orders cancelling Title No. 963.
21. Jael Muleshe, the 3rd interested party, testified that she did not know the deceased but laid claim to the land Parcel No. 923 which she bought from the petitioner in 2017. She was however not given the Title Deed, as the petitioner told her that the succession proceedings were still on. She was aware that she could only get the Title deed once the succession proceedings were completed.
22. Alfred Makwa the 7th interested party, told the court that the deceased was his grandmother and the petitioner's father, Vincent Simiyu Namuhinda was his uncle. He stated that he had his own share from his father and laid no claim to the estate of the deceased.
23. The 10th interested party Josam Khaoya told the court that he never saw the deceased but he knew that she was his grandmother. He said he is the chairman of "the family". He had no claim on the deceased's Estate. He further stated that the petitioner's father is the one who sold out the various parcels of land and that this is what is creating problems for many of the buyers. On cross-examination, he admitted that whatever he had told the court is what he heard from other people.
24. Jane Amula Oliono, testified on behalf of her husband, the 12th interested party. They bought land from the petitioner on 16/3/2009 but they had no title to the land. She and her husband knew that the succession proceedings were still on.
25. The next witness was Charles Osore Otuko, the 15th interested party. He told the court that the deceased was her step grandmother and laid claim to the estate of Namulunda. He does not reside on any of the disputed parcels.
26. On cross examination, he stated that he lived in parcel no. 671 but he had not seen the Title to the land.
27. Pius Khaemba Mukhebi the 16th interested party was the next witness. He stated that the deceased was his biological grandmother and that Vincent Simiyu was his uncle. He stated that he had no claim against the Estate. He had his own parcel of land, being parcel No. 2517 which was a sub-division of parcel No. 671. He further stated that parcel No. 671 belonged to his father.
28. The 17th interested party, Esther Ntecho Ogutu, stated that her husband Wilson Ogutu bought his land parcel no 924 from Namulinda Simiyu in the early 1970 and that they got their title in 1978.
29. On cross examination, she claimed that they bought 5 acres of land from Namulunda Simiyu. She had no sales Agreement but she had a Title Deed to prove ownership



30. The 1st defence witness was the petitioner. He testified that the deceased was his grandmother and wife to Simiyu Otuko. She died on 4.7.1978. He stated that his grandmother had two sons Mushembi Simiyu Otuko and Vincent Namulinda Simiyu; that no one had petitioned for letters of Administration to his grandmother's Estate except him. That the deceased left land parcel NW/M/923 and the Title deed for the property was in the custody of his grandfather. He further stated that the original sub- division of land parcel 671 and 672 was done by the deceased. He further stated that his father was away in Uganda when adjudication was going on. He further stated that the purported sale of parcel No. 672 on 13.6.1969 was false as there was no such property by that year. He further stated that the deceased did not sign the alleged agreement; that his father never owned 672. He claimed the agreement, was a forgery as his father, who was illiterate never used to sign documents but made use of a thumb print. He further stated that there is no evidence that his father sought for the sub- division of parcel No. 672 and that the letter dated 19.9.1969 shows that the objector is the one who applied for the sub- division.
31. He further stated that the green card for parcel No. 672 shows that the same was registered in the name of the deceased on 10.7.1970 and certificate was issued on 5.1.1971 and the register for the parcel was closed the same day.
32. He continued to testify that the green card for parcel No. 808 shows that the property was registered in the name of the deceased on 18.3.1971 and on the same date it was transferred to the objector. He claimed that it was initially registered in the name of the deceased and then there was a write- over to change it to the objector's name.
33. On parcel No.807 the search shows that on 18.3.1971 the property was in the name of the Namulinda simiyu. He insisted that he did not know such a person and that the one he knows was Namulunda simiyu. The title was closed upon the property being sub- divided into parcels 923 and 924. He stated that as per the green card the title for parcel No. 923 came out in the name of the deceased. That parcel no. 964 shows that it was a sub- division of parcel No. 923. He insisted that the objector was the author of all these sub- divisions.
34. He further told the court that there was no sale agreement or consent from the land control Board showing that the 17th interested party's husband bought land from the deceased. He admits that she is in occupation. He however did not consent to her occupation of the land.
35. He admitted that he sold two acres to Bishop mukhebi, the 9th interested party.
36. He further pointed out that Title no. 2378 purportedly in the name of the 1st interested party was a sub- division of parcel No. 963; that 963 was still in the name of the deceased as at 11.3.1983; that by the time parcel No. 2378 was purportedly being transferred to the interested party, the deceased had already died.
37. On cross- examination, he admitted that there are indications that parcel No. 924 came out in July 1977 while Title for 963 came out in march 1983. He admitted that he sold land to the 9th interested party, but the said party was to wait for the succession proceedings to be completed. He admitted that he did not include parcel No. 963 in the succession proceedings.
38. Further on cross- examination by the 14th interested party, he stated that prior to the start of succession proceedings, he consulted his uncle (the witnesses' father) but the witness stopped him from participating in the proceedings. ; that he obtained the chief's letter before commencing the succession proceedings. He admitted that he had 3 wives and that when he came out of jail, he found that the



land had been distributed into 3 portions. He admitted there was a land dispute between his father and his uncle.

39. On cross-examination by the 15th interested party, he told the court that the deceased had one grandson and 7 granddaughters; that the 15th and 16th interested parties are the grand children of the deceased. He admitted that when he moved the court, the father of these two was still alive.
40. Under cross-examination by the 16th interested party, he admitted that the 16th interested party was a grandchild of the deceased; that when he applied for succession, his uncle gave him permission to commence the proceedings but later, he stated that the said uncle refused to take part in the proceedings. He said that he will give his uncles' share to his children.
41. On cross-examination by 17th interested party he insisted that the interested party had no evidence to show that she had bought the land from him.
42. The last witness was the Deputy County Land Registrar, Kakamega county. His testimony on the various land parcels under contest went as follows:
 - a). The Green card (Register) for Parcel No. 694 was opened on 10.7.1970, the registered proprietor was Nyongesa Kutola. It was transferred to the objector in August 1979. This parcel has no bearing to parcel No.923.
 - b). For parcel No. 671, the Title was opened on 10.7. 1970.The first owner was one Kiliholi Bucheri- deceased. There is an entry by the 17th interested party claiming beneficial interest. The restriction was to remain until the succession proceedings. The caution was however withdrawn on 22.1.2015 by the cautioners. Another entry was made where the 14th interested party was entered as an Administrator pursuant to succession cause whose particulars are not clear. Upon confirmation of grant the property was divided between Gabriel Toto- the 14th interested party, Pius Khaemba the 16th interested party, Eugene Simiyu Mukhebi, Eunice Ann Osano and Charles Osore (15th interested party). The new numbers from this sub-division ranged from 2516 to 2520. Although Parcel No. 671 has no relevance to these proceedings, it indicates some form of separate inheritance from the deceased by some of the protesters herein.
 - c). parcel No. 672: The register was opened on 10.7.1970, with the first registered owner being the deceased. It was the first registration. It was sub- divided into parcel Nos. 807 and 808
 - d). The register for parcel No. 807 opened on 10.7.1970, the proprietor was Namulinda Simiyu, the deceased. On 21.12.1977 the title was closed and out of it came new Titles, being parcel No. 923 and 924.
 - e). File for parcel No. 923 was opened on 4.7.1977. The first registered owner is Namulinda Simiyu. The 2nd entry is issuance of certificate of Title to Namulinda Simiyu. Entry No. 3 is a caution by the objector herein claiming a purchaser's interest. The objector withdraws the caution on 11.3. 1983. Entry No. 5 is a sub- division of the parcel and the sub- division produced parcel Nos. 963 and 964.
 - f). The witness had a file for parcel No.923. He told the court that he could see a consent to sub- divide and transfer the parcel. The Applicant for the consent was Vincent Namulinda Simiyu (the petitioner's father). The transferee was the objector. He noticed that the National ID numbers for the registered proprietor and the person who had applied for the consent were different. The one for the registered proprietor was ID/K/NN/10273 while the one applying for the consent was 1931675/64. The consent is dated 9.4.1981. An Application to register the



parcel by transmission was made by the petitioner on 17.9.2008. There is no indication that the Application was registered.

g). Parcel no. 963; The first entry on this parcel registers the proprietor, and it was Namulinda simiyu, ID No. 1931675/64 . Entry No. 2 has two names, that of the petitioner and one Salim Osundwa Wesonga. Entry No. 3 is the closure of Title and out came sub- division Numbers 2378 and 2376. There was no document to support the transfer to the petitioner and the said Salim.

h). Later several sub divisions took place. It includes parcel Nos: 2375, 2378, 2737 all in the name of the petitioner.

i). On parcel No.808, he told the court that the register opened on 10.;7.1970 as a sub- division of parcel No. 672. It was in the name of the deceased. Entry No.2, of 18.3.1971 was that of the objector. It is the deceased who transferred the parcel. The ID number for the transferor was indicated as K/NN/10273. There was however no consent to transfer on record. The records did not have any succession documents for both parcel Nos. 808 and 807.

43. On cross – examination, he told the court that parcel No.964 was registered in the name of Namulinda simiyu. Further that the land’s registry did not have records for Namulunda simiyu.

44. On re-examination he told the court that he had the original Title deed for parcel No. 964, it was in the name of the objector. It was transferred to him by vincent Namulunda simiyu. The title was created on 11.3.1983 and was sold to the objector on 12.3.1983.

Objector’s submissions

45. It is the objector’s submissions that he has submitted sufficient documents documents to show that he purchased parcel No. 808 from the petitioner’s father who was then the registered owner of the property. He further submits that he has shown the court a sale’ Agreement dated 12th April 1981. He insists that the petitioner’s father was the duly registered owner of parcel Nos. 923 and 964 and he therefore he acquired his portions lawfully.

2nd interested party’s submissions

46. The 2nd interested party in their submission stated that the orders sought by the petitioner are outside the Jurisdiction of this court as a probate and Administration court, since the property in question had already been sub- divided. He relied on section 2 of the *law of succession Act* as well as article 162 (2) of *the constitution* on the jurisdiction of the *Environment and land court Act*, No. 19 of 2011.

47. He finally submits that it is the petitioner who kept on sub- dividing and selling the land and now when it is depleted he wants to use the court to avoid responsibility for his actions of the same transactions. He prays that the court dismiss the petitioners summons with costs.

Petitioner’s submissions/**

48. It is the petitioner’s submission that the deceased was variously referred to as Namulunda simiyu, Namulinda simiyu or Namuhinda simiyu; that the various versions of her name was a spelling error. The petitioner further submits that there was no evidence that the deceased signed for sub- division of parcel No. 672. That it follows that the subsequent sub- divisions had no legal standing.

49. The petitioner further points out that even after the deceased ‘s demise her land was dealt with without any succession proceedings being undertaken. Further parcel Nos. 2376 was obtained after the demise of the deceased and her son Vincent simiyu



50. The petitioner finally submits that all the sub divisions emerging from parcel No. 672 should all be cancelled.

Determination

51. I have considered the pleadings, the various testimonies, the documentary evidence and the parties' submissions. The testimonies have been long and winding, the pleadings and documents have been many. However I have identified only three key issue for determination. These are :
- a). Whether there were any liabilities to the deceased's Estate
 - b). Whether the Grant should be revoked
 - c). Whether the grant should be confirmed.

Are there any liabilities to the deceased's Estate?

52. In May 2008 the petitioner applied for letters of Administration to the Estate of Namulunda Simiyu alias Namuhunda Simiyu . According to the petitioner the deceased was also referred to as Namuhinda simiyu. The death certificate bears the name Namulunda simiyu. The grant of letters of Administration was issued in the name of Namulunda Simiyu alias Namuhinda Simiyu alias Namulinda simiyu. Neither the objector nor the protestors contested this reference to the deceased by the various names and therefore I have no reason to doubt that all the names refer to the deceased herein.
53. I need to point out from the onset that the petitioner sought for confirmation of the grant and prayed that parcel No. 923 be registered in his name. It is the same parcel that is referred to in the amended summons dated 3rd February 2020. The petitioner's deviation in his submissions to lay his claim to parcel No. 672 is therefore misplaced. In any event, parties are always bound by their pleadings.
54. The deceased died on 4 . 7. 1978 and this is the relevant date for determining the liabilities attached to the deceased's Estate, if any. At the time of her death, parcel no 923 was in the deceased's name. The parcel was a sub- division of parcel No.807, and 807 was a sub- division of parcel No. 672. The registration of parcel 672 was the first registration upon adjudication process. This is according to the evidence of DW2, THE Land Registrar.
55. The sub- division of parcel No.807 took place on 21.12.1977 and this was during the lifetime of the deceased. It was sub- divided into parcel No. 923 and 924 as aforesaid as per the certificate of official search No. 134/08 dated 7.2.2008.
56. On 11.3.1983, parcel no. 923 was sub- divided into two parcels, that is No. 963 and 964. This is as per the search No. 135 dated 7.2.2008. The certificate of search shows that the parcel was still in the name of the deceased and the sub- division was taking place almost 5 years after the deceased had died. According to DW2, , the consent to sub-divide and transfer, which consent was obtained on 9.4.1981 was between Vincent Namulinda simiyu and Christopher Olatho Amukobe. From the witnesses' accounts Vincent Namulinda simiyu was the son of the deceased and the father to the petitioner herein. However, Vincent Simiyu had no Grant of Representation to his mother's Estate. There was nothing either to show that the land in question had been bequeathed to him so as to give him authority to sub- divide and dispose of it.
57. This sub- division, and the many others that followed, as well as the numerous transfers were done after the demise of the deceased, and when no representation had been made to her Estate. Some of the transfers were done by Vincent Namuyinda Simiyu , who is described as the son of the deceased and



- the petitioner's father, but without any Evidence that he had been appointed as a legal representative of his mother's estate and had obtained a certificate to Authorizing him to distribute the property of the Estate. This was therefore an intermeddling and an illegality committed against the deceased' Estate.
58. There was more to come: Vincent died on 2nd may 2003 but the sub- division of the property continued. Evidence show that parcel No.963 which was a sub- division of 923 as aforesaid was transferred to the petitioner and one Salim osundwa wesonga. At the time of the purported transfer to the petitioner and the Osundwa, parcel No.923 was still in the name of the deceased. It is not clear under what circumstances the property was transmitted to these two considering that the grant, herein though obtained in 2008 is yet to be confirmed. The transfer took place on 27.3.2012.
59. On 11.5.2012 parcel 963 was sub- divided to produce parcel Nos. 2376, 2377 and 2378. After the purported sub- division parcel No. 2378 went to the petitioner herein. The same parcel was sub- divided on 16.3.2015 to parcel Nos. 2735 and 2737. Parcel No. 2376 was also registered in the name of the petitioner. He later purported to transfer it to the 1st interested party but the transfer was never registered according to DW2.
60. And the sub- divisions went on and on. What is clearly emerging, is a full spree of land grabbing of the deceased land. A case of unbridled intermeddling with the deceased's property, and the players were her heirs, including the petitioner herein and other individuals. The officials at the Kakamega Land's Registry too were accomplices. It is the work of a Land Registrar to vet the documents presented to his office before making any changes at the Register. The pertinent question is, how did the Land Registrar allow the deceased's land divided, sub- divided and transmitted without evidence any succession to her Estate having been undertaken. I would go further and ask, how did the Registrar know that the owner of the land was even dead, considering that no Grant of representation to her Estate was filed in the Title.
61. Admittedly some of the culprits were gullible buyers who failed to carry out the necessary due diligence and have therefore been sucked in the illegalities committed against the Estate herein.
62. It is dishonest of the petitioner to turn around during his oral testimony and disown these buyers. He sold land to some of these buyers promising them that he would give them their portion upon completing succession proceedings. Indeed in his further affidavit dated 17.12.2017, he indicated his intention to distribute the property to, inter alia, the 17th, the 5th, the 3rd the 4th interested parties, and the objector. It is evident that he sold portions of the suit property when he well knew that he did not have the Authority to do so.
63. However, for the purchasers, unfortunately, their purported claim against the deceased's Estate, is not valid. Their claim is against the petitioner, and as for such claims, this court has no jurisdiction to determine them. That jurisdiction is the preserve of the Environment and Land court pursuant to Article 162(2) (b) of *the constitution* as read with section 13 of the Environment and Land court, No. 19 of 2011.
64. Further In the case of In Alexander Mbaka vs. Royford Muriuki Rauni & 7 Others [2016] eKLR it was held: "It is only where one has an established claim against the estate that has already crystallized that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallized. The right must be shown to have crystallized before the family court can entertain it." Thus, the mandate of a probate and Administration court is to determine those claims that had crystallized as at the time of the deceased's demise only.



65. It is this court finding therefore that the objector and the protestors have failed to establish any liability against the Deceased's Estate.

Should the grant be revoked?//**

66. The grounds for revoking a grant are set out under section 76 of the Act. The grounds include non-disclosure of material facts. The objector's case is that the petitioner failed to disclose the fact that there were other beneficiaries of the Estate, including himself. Under the aforesaid section the Objector has a right to seek for revocation, if indeed his claim was not disclosed. However as stated hereinbefore, I did not find any evidence of disposal of the suit property by the deceased prior to her death. To the extent that there was no evidence of such sale or disposal in any other way by the Deceased, then the petitioner cannot be said to be guilty of non-disclosure of material facts. I have taken note of the fact that some of the protestors are heirs of the deceased. However they have only filed protests, not applications for revocation. There are therefore no valid ground that has been advanced for revocation of the Grant.

Should the grant be confirmed?//**

67. Confirmation of Grants is covered under section 71 of the Act. Before a Grant in an intestate succession is confirmed, the Administrator is required to ascertain the persons who are entitled to a share of the estate and their respective shares. The proviso to section 71(2) provides as follows: "provided that, in cases of intestacy, the grant of letters of Administration shall not be confirmed until the court is satisfied that as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares"

68. In cross-examination, the petitioner admitted that the deceased had one grandson and 7 granddaughters. The petitioner, as a grandchild of the deceased is stepping into his father's shoes in seeking to inherit from the estate, but his siblings too have an equal entitlement. Further, the fact that the deceased was his grandmother follows that petitioner may have cousins who also are entitled to a share of the Estate. Indeed, from the testimonies presented, it is evident that the 15th and 18th interested parties are grandchildren of the deceased and therefore are entitled to a share of the estate on their father's behalf who is reportedly deceased.

69. Under the proviso to section 71 (2) of the *Law of Succession Act*, this court can decline to confirm a grant on account of the petitioner's failure to make a full disclosure of the deceased's dependants, property, or both. I therefore decline to confirm the Grant at this point and direct the petitioner to make a full disclosure of all the properties of the deceased, children and grandchildren and their respective entitlements in the deceased's property.

70. Prayer 3 of the Amended summons for confirmation is res judicata as the same was determined by Justice Chitembwe through the Ruling dated 8.14.2014

71. This court has no jurisdiction to determine matters raised under prayer 4 of the aforesaid summons.

72. In the end I make the following orders:

- a) The Objector's Application for revocation of the grant is hereby dismissed.
- b) The protests by the 1st to the 17th protestors are all dismissed.
- c) The confirmation of the grant is deferred.
- d) The Petitioner to file a supplementary Affidavit, providing a list of all the deceased's properties, children and Grandchildren and a proposed distribution of the Estate.



- e) This matter will be mentioned on a date to be given during the delivery of this Judgment to confirm compliance with sub- paragraph (c) hereof.
- f) Each party to meet own costs
- g) Right of Appeal- 28 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF NOVEMBER 2023.

S. Chirchir

Judge

In the presence of:

E.Zalo- Court Assistant

Mr. Murunga for the Objector

Mr. Namada for the petitioner.

