



In re Estate of Wellington Muchenje Nalika (Deceased) (Succession Cause 712 of 2006) [2023] KEHC 26544 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26544 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA**

SUCCESSION CAUSE 712 OF 2006

SC CHIRCHIR, J

NOVEMBER 30, 2023

**IN THE MATTER OF THE ESTATE OF WELLINGTON MUCHENJE
NALIKA (DECEASED)**

BETWEEN

WAKIFU MUCHENJE PETITIONER

AND

CHRISTOPHER WANYAM MUCHENJE PROTESTOR

JUDGMENT

1. This cause relates to the distribution of the properties of the Estate of the late Wellington Muchenje Nalika (Deceased) who died on 11th June 1998.
2. On 30th October 2006, Wakifu Muchenje (petitioner) petitioned for Letters of Administration intestate to the Deceased's Estate and listed the following as survivors of the deceased:
 1. Christopher Wanyama Muchenje
 2. John Didimu Muchenje
 3. Wakifu Muchenje
 4. Anthony Simiyu Muchenje
 5. Jotham Muchenje
 6. Peter Lumumba Muchenje.
3. The deceased properties were listed as North Kabras/ Kivavywa/740 measuring 0.04 Ha and North Kabras/ Kivavywa 579. The grant was issued on 11th July 1998.



4. On 18^h October 2007, one of the sons to the deceased, Christopher Wanyama, filed summons for revocation of the grant on grounds that the grant was obtained fraudulently by the petitioner by making a false statement and concealment of material facts from the court. The said Application was compromised by way of a consent in which the parties consented to the revocation of the Grant , and the issuance of a fresh one in the names of the petitioner and the objector herein.
5. It is apparent that the consent was never adopted as an order of the court and thus there was no fresh Grant issued.
6. Summons for confirmation of Grant which had been filed by the petitioner on 23rd march 2016 was listed for hearing. The summons is dated 2nd march 2016. The objector filed an Affidavit , which though the heading does not state so , is an Affidavit of protest to the distribution. In the said Affidavit he proposes he proposes an alternative mode of distribution. These proceedings are in respect to the summons for confirmation of Grant , and the protest by the Respondent.

The Evidence

7. The hearing proceeded by way of *viva voce* evidence.
8. PW1, was the protester herein. He testified that the Deceased was his father and the respondent his brother. He stated that his father left one wife and 13 children . He listed the children as :
 1. Sarah Muchenje
 2. Lena Muchenje
 3. Khakhasa Muchenje,
 4. Loice Muchenje
 5. Agatha Muchenje
 6. Naliaka Muchenje
 7. Christopher Wanyama
 8. John Muchenje
 9. Wakifu Muchenje,
 10. Simiyu Muchenje
 11. Jotham Muchenje
 12. Lumumba Muchenje.
 13. Reuben Nalika (Deceased)- left 4 children
 14. Lois Nalika (Deceased)
 15. Agnetta.
9. He further testified that Reuben Nalika had been given a piece of land by the deceased which Reuben had already developed and obtained the Title to it; that Lois children were given half of an acre; that Naliaka had one child , whose name he could not recall while Agnetta left 3 children.
10. He further told the court that his father left land parcel No.579 measuring about 3 ½ hectares. That parcel No. 740, initially belonged to his father but the father had sold it to him by the time he died.



- He claimed that there was a sale Agreement to that effect, though the Title Deed to the land is still in the name of the deceased. He insisted that he had documents showing that the deceased had sold the plot to him.
11. He further testified that Jonathan Muchenje was not a child of the deceased.
 12. He claimed that his father had distributed the land prior to his demise ; that the sub- divisions have fixed boundaries although none of the sons had title deeds to their respective portions.
 13. John Muchenje was the next witness. He gave unsworn statement. He testified that his father had two parcels of land , namely parcel numbers 975 and 740. He stated that his father had divided parcel No. 975 before he died but the Titles had not been issued. He further stated that parcel No. 740 was not his father's land as his father had sold it to his brother (PW1),who in turn had sold it to someone else. He did not have evidence of such sale.
 14. Anthony Muchenje testified that the deceased had two parcels namely, parcel numbers 579 and 740; that parcel No. 579 should be distributed according to his father's wishes. He stated that the sale Agreement for 740 had already been filed in court.
 15. Jotham Muchenje testified that his father had two parcels of land, that is Parcel No 579 and 740. He further stated that there is no parcel going by number No. 749. He told the court that parcel No. 740 was sold to his brother by the deceased; that there were documents to that effect that were signed. He further testified that parcel No. 579 was distributed by the deceased before his demise. He admitted that the consent of the Land Board was never obtained in respect of the alleged sale.
 16. The court then directed the protestor to bring to court the children of the late Reuben Naliakathe , the late Lois Muchenje and the late Agnetta Muchenji.
 17. Philis Kamlanda was next to testify. She told the court she was one of the three children of Lois Muchenje and she would like to get her mother's share of the Estate.
 18. Lena Nasimiyu told the court that the deceased was her father, and she wants her share of the Estate.
 19. Jane also addressed the court and stated that , she was a daughter of the deceased and wanted to have her share of the Estate.
 20. Sarah Sikolia Muchenji told the court that she was the daughter of the deceased and was claiming her share of the Estate.
 21. DW1, was the petitioner . He testified that the deceased was his father. He told the court that he was relying on his Affidavit dated 5.2.2018 and a statement dated 1.4.2021. In the affidavit of 5.2.2018 he stated that land parcel no. kabras/ kivaywa/579 had been sub divided amongst the deceased's sons and that there are clearly demarcated boundaries between the parcels.
 22. He further stated that parcel No. 579 was only 3.0 hectares and the mode of distribution proposed by the protestor exceeds the acreage available for distribution. He futher told the court that there was a family meeting which was held in which it was agreed that parcel No. 740 was to be divided equally amongst the sons of the deceased. He then annexed minutes of the alleged meeting. He further told the court that the protestor sold his portion to Lucas Mulege Wamtambala , which consisted of one door(sic) but not the whole plot .That the said wellington is a child of one of his Deceased sisters. He stated that his father had 4 parcels of land namely , North Kabras 517, 740,578 and 757. That his father had divided this land and each son had gotten their portion. In his oral testimony, he stated that parcel No. 578 was given to Rueben while parcel No. 757 was given to the church.



23. He denied that parcel No. 740 had been given to the objector and insisted that all the children of the deceased are entitled to equal share of the said plot. He denied knowing wellington simiyu .
24. On cross- examination he stated that the father had distributed the land to the 7 of them, and that each was in occupation of the allocated portion.
25. On cross- examination by the court he stated that there was no one occupying plot No.740 . He admitted that his sisters were not given a share of the land.
26. DW2 was peter mamboleo. He told the court that the deceased was his father. He testified that parcel No. 579 was given to the six of them; while 757 was given to Friends church. He further stated that his father had constructed a shop in parcel No. 740. He was not aware of any sale of the said plot. He is aware that a Lucas was residing in plot 740, but he took up occupation after the demise of his father.
27. On cross- examination , he denied ever signing an agreement in respect of the alleged sale of plot 740; that the land given to the church was given freely. He admitted that his sisters were never given a share of the land.

Determination

28. I have considered the pleadings, the evidence and the submissions of the parties. In my view the following issues arise for determination:
 - a). whether parcel No. North Kabras/Kivavywa/ 740 is part of the Estate of the deceased.
 - b). whether the deceased had distributed his Estate prior to his demise
 - c). Who are entitled to benefit from the Estate
 - d). whether this court should order for redistribution

Whether parcel No. North Kabras/ Kivavywa/ 740 was part of the deceased's Estate

29. The protestor's case is that parcel North Kabras/ Kivavywa/740 was sold to him by the deceased during his lifetime and as such he had the sole ownership of the land . He further stated that he had initiated the sale of the parcel to a third party. He and his witnesses told the court that there was a sale agreement in respect to the said sale , but there was no such agreement produced in court. The protestor's witness further told the court that there was no consent obtained from the land control board in respect to such sale. In effect , there was no documentary evidence that such sale ever took place. Sections 107, 108 and 109 of the *Evidence Act*, cap 80, laws of Kenya places the burden on the protestor to prove the alleged sale. He did not. The objector therefore has failed to prove that the land in question had been sold to him.
30. It is my finding therefore Land Parcel North Kabras/ Kivavywa/740 formed part of the estate of the deceased and is available for distribution amongst the deceased's heirs.

Whether the deceased had distributed his Estate prior to his demise

31. It is both the petitioner's as well as the protestor's evidence that the deceased had distributed parcel No. 579 amongst his sons and that each was now in occupation of his allocated portion. It was the evidence of DW1 that his sisters never got a share; That his sisters had married and he seem to suggest that they were not entitled to a share by virtue of their marital status .



32. Although is an intestate succession , the parties have not produced any document to show that their father had expressed his wishes on how he wanted the Estate to be distributed.
33. – Further, save for a brief mention in the Petitioner’s testimony I did not find any evidence showing that the deceased had bequeathed any land to Reuben Shijenje before he died.
34. Further , none of their sisters indicated their renunciation of their shares in the estate. On the other hand their two sisters , Jane and Lenah told the court that they want her share. Pursuant to the provisions of 39 and 41 of the Law of succession Act, the grand children of the deceased, namely the children of Lois and Agnetta are entitled to benefit from their respective mother’s shares.
35. Going by both parties evidence the distribution which was carried out, if any , clearly locked out the female children of the deceased, apparently on grounds that they are married. However the Act does not discriminate the children of a deceased person on any ground. Sections 35 to 38 of the Act envisages equal distribution regardless of the gender, marital or economic status of the deceased’s children . Section 38 for instance, which is the applicable in the scenario herein provides as follows: “Where an intestate has left a surviving child or children but no spouse, the next intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.” In any event the constitution, under Article 27, forbids such discrimination .
36. Nevertheless , I do not find any evidence of the distribution of the Deceased property prior to his demise and the distribution proposed by the parties herein is discriminative against their sisters and this court rejects them. The children of the deceased are all equally entitled to benefit from the estate pursuant to section 38 of the Act as aforesaid.

Who are beneficially entitled and what should be the distribution

37. From the pleadings and testimonies in court the deceased children were as follows:
 1. Wakifu Wajenje
 2. Christopher Wanyama
 3. John Muchenje
 4. Anthonious Simiyu
 5. Totham Muchenje
 6. Peter Mamboleo Mujenje
 7. Reuben Muchenje (Deceased)
 8. Sarah Muchenje
 9. Lena Muchenje
 10. Khakasa Muchenje
 11. Agneta Muchenje (Deceased)
 12. Naliaka Muchenje (deceased)

Distribution

38. In view of all the foregoing I consequently distribute the Estate as follows:



- a). Land parcel No. North Kabras/ kavaywa /579 shall be distributed to all the children of the Deceased or their respective Estates as listed in paragraph 37 hereof in Equal shares
- b). Land parcel No. North kabras/ Kavaywa/ 740 shall be sold and the proceeds thereof to be distributed to all the children of the deceased or their respective Estates as listed in paragraph 34 hereof, in equal shares
- c). This being a family dispute , each party will meet their own cost.

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

S. CHIRCHIR

JUDGE.

In the presence of:

The Objector- present in person

The petitioner- present in person.

