



REPUBLIC OF KENYA



**KENYA LAW**

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**In re Estate of Amwayi Muhalla Mupilo alias Amwayi Muhalia Mulipo Amwai (Deceased)  
(Succession Cause 148 of 2015) [2023] KEHC 26800 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26800 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 148 OF 2015  
SC CHIRCHIR, J  
DECEMBER 19, 2023**

**IN THE MATTER OF THE ESTATE OF AMWAYI MUHALLA  
MUPILO ALIAS AMWAYI MUHALIA MULIPO AMWAI (DECEASED)**

**BETWEEN**

**VINCENT KASIDI AMWAYI ..... 1<sup>ST</sup> PETITIONER**

**GODFREY ANGUSWA KHAKALI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**CHARLES L. MBAKAYA ..... OBJECTOR**

**AND**

**ALEXANDER MUSA LIMISI ..... APPLICANT**

**JUDGMENT**

1. This cause relates to the Estate of the late Amwayi Muhalla Mupilo alias Amwayi Muhalia Mulipo Amwai (deceased) who died on 23<sup>RD</sup> August 2001. Upon his demise, the petitioners herein, Vincent Kasidi Amwayi & Godfrey Anguswa Khakali, petitioned for letter of Administration in respect of his Estate. They described themselves as son and grandson to the deceased. The letters were issued, and confirmed on 20<sup>th</sup> January 2017.
2. During the Application for confirmation of Grant, the petitioners listed the following as the survivors of the deceased:
  1. Vincent Kasidi Amwayi
  2. Godfrey Anguswa Khakali.
  3. Benson Kalini Amwayi.



4. Isaac Mutoko Amwayi .
  5. Richard Musamli Lukaya .
  6. Dennis Ingo .
  7. Wilson Ambeyi.
3. On 27<sup>th</sup> march 2017 the objector herein Charles F.L. Mbakaya (hereinafter referred to as the Applicant) filed summons for revocation of the grant.
  4. He further prayed for a temporary injunction against the Administrators from receiving rent from the tenants of the objector occupying the premises erected on the land parcel No. Isukha/shitoto/1285 (suit property). The orders were granted.
  5. The Applicant's case is that the petitioners were guilty of non- disclosure of material facts. That his father, Andrew Mbakaya Bulinda had purchased parcel No. Isukha/ Shitoto/1285, that they have been in occupation and duly collecting rent from the tenants ; that the petitioners were now demanding Rent from the tenants with threats of eviction in the event of default.
  6. In his supporting affidavit, the Applicant states that his father died on 29<sup>th</sup> may 2015, before the land could be transferred to him; that he was the Administrator of his father's Estate *vide* a grant of letters of administration *ad litem* issued on 6<sup>th</sup> March 2017.
  7. He stated that his father bought land parcel No. isukha/shitoto/1285 measuring 1½ Acres for a consideration of Kshs. 230,000/=from the deceased, and a further portion measuring 40 feet by 42.4 feet from the same parcel. He annexed a sale agreement dated 16<sup>th</sup> October 1993.
  8. He further stated that his father extensively developed the suit property . He was not aware of the current succession proceedings until his tenants were served with a copy of notice to terminate the tenancy by the petitioners.
  9. The 1<sup>st</sup> petitioner/ respondent filed his replying affidavit dated 3<sup>rd</sup> October 2017 . He stated that the deceased was survived by 7 children whose names are as stated in paragrapg 2 of this Judgment. He listed the properties as follows;
    - a. Plot no. 22 Khayega Market (Isukha/Shitoto 1285)
    - b. Land parcel No. Isukha Shitoto /682
    - c. Land parcel No Isukha/Shitoto 1246
  10. He stated that the objector is not a member of the family of the deceased and hence is not entitled to claim in the estate. He avers that all the beneficiaries of the estate have consented to the mode of distribution and that this court had already performed its function.
  11. He claimed that the objector cannot claim ownership to the land parcel since he, the petitioner had already been issued with the title to the land and that he followed all the due process to obtain the title to the suit property. He insists that if the Applicant feels aggrieved he should go to the right forum.
  12. On 4<sup>th</sup> March 2020, the petitioners filled a Notice of preliminary objection on grounds that the application is incompetent and has been overtaken by events since the estate of the late Amwayi Muhalla Mupilo had been distributed by the court ; that all the beneficiaries have been issued with their respective titles and that there is no longer an Estate to distribute. The preliminary objection was heard, and dismissed by Justice Musyoka on 19<sup>th</sup> April 2021.



13. On 15<sup>th</sup> February 2022 Clememt Witabi Limisi and Alexander Limisi ( interested parties) filed the Notice of Motion dated 14<sup>th</sup> February 2022, where they prayed that the plot no.22 at Khayega market be struck from the list of the properties of the Estate on grounds that the deceased had already sold off the plot during his life time and that it changed hands in November 2000 and hence not available for distribution. They further stated that the land has now been subdivided transferred to new owners.
14. The hearing of the cause proceeded by way of *viva voce* evidence.
15. PW1 was the objector herein. He adopted his Affidavit in support of the Application and a written statement. He stated that his father bought the suit property from the deceased and developed it by putting up a two- storeyed building. He said the agreement was witnessed by an Advocate. He denied the assertion that his father was simply a lessee of the land. He denied that there was any criminal conduct on acquisition of the land. He stated that at the time his father died, he had placed a restriction on the Title . He claimed that the transfer of the land was in progress when his father died. He produced a sales Agreement between his late father and the deceased which dated 16.10.1993.
16. On cross examination, he averred that the relationship between the deceased and his father was only that of the seller and a buyer.
17. PW2 adopted his statement of dated 19 .11.2019 as his evidence- in- chief. He told the court that he knew both the petitioner and the Deceased.On cross examination, he testified that he did not sign any document between the deceased and the objector's father.
18. Pw3 adopted his witness statement dated 19/11/2019. On cross examination, testified that he witnessed the agreement between the deceased and the objector's father although he could not recall the date it was signed.
19. DW1 was the 1<sup>st</sup> petitioner. He adopted his witness statement filed on 15/12/22. He produced an an agreement dated 11/7/1989 and a number of receipts for payment of land rent in respect of plot No. 22 at Khayega market.
20. On cross examination he admitted that he knew the objector and his late father and that it was not true that the suit land belonged to the Objector's father. He stated he was not aware about the alleged sale Agreement signed between the deceased and the objector's father; He insisted that the objector's father was merely his father's tenant . However he did not have any Tenancy Agreement or receipts evidencing payment of Rent by the Objector's father. He stated that his father died in 2001 and that the objector entered in the land after their father had died.
21. On cross- examination by the counsel for the interested parties, he told the court that his father bought plot No.22 at khayega from one Mbote Katumanga and that currently the plot is being used by his uncle Alexander Musa Limisi and clement Limisi .
22. He further testified that his father is the one who used to pay rent. He further told the court that he has never visited plot No. 22 and that he does not know if it was sub- divided. He has never paid rates for the said plot and he does not know who has been paying it. He claimed that the interested parties had been given the land to use and not any other purpose.
23. In re-examination, he stated that the objector's father and his late father had a case in court and claimed that the agreement was for rental and not for sale. On plot No.22 he stated that his father never sold the plot. and that his father had a lease Agreement with Clement and Musa Lumisi.
24. DW2, testified that in the year 1983, he was contracted by the deceased to construct shops and Residential units at parcel No.1285 by the deceased. He did not know what happened thereafter.



25. Further on cross- examination he stated that he did not know the parcel number of the land he was constructing on.
26. DW3, adopted his written statement dated 14/12/22. He testified that he was assigned to paint the premises on parcel No 1285 by the deceased after which one shop was leased to the objector's father. Thereafter he left and he does not know the current occupant of the premises.
27. On further cross- examination by the interested party, he told the court that he knew nothing about plot No.22 at Khayega market.
28. The first witness for the interested parties was the 2<sup>nd</sup> interested party. He testified that he appointed to take up his father's place on the suit after his father passed on in the course of these proceedings. He adopted his witness statement dated 6/2/23. He attached 11 exhibits which he produced. The exhibits included a sale agreement for the purchase of plot No. 22, bundle of receipts for land rent and rates, and letters exchanged with the county Government of Kakamega and the alleged owners of plot No. 22
29. He claimed that plot No. 22 was sold to the interested parties during the lifetime of the deceased. He stated that the interested parties are in occupation and are the ones who have been paying rent and rates to the county Government. He further stated that the plot was not in the name of the deceased when the petition was filed and therefore its inclusion amongst the assets of the deceased was erroneous.
30. On cross examination he stated that the agreement dated 28/1/96 showed that the interested parties purchased the land for Kshs.12,000 and produced a receipt for Kshs. 30,000/= as a fee for the development of the plot . He further stated that the plot was divided and his late father bought plot No 22 B and that plot No 22A went to someone else.
31. On re- examination he pointed out that the allotment letter dated 27.2.2018 is in the name of the interested parties. That they are still in occupation.
32. The 2<sup>nd</sup> witness for the interested party was a Revenue officer at the county Government of kakamega, in charge of shinyalu sub- county . He told the court that according to the County Records plot No 22B is registered to Clement Witaba and Alexander Musa.
33. The 3<sup>rd</sup> witness for the interested party was One Machoni Lusenje . He was a committee member of Khayega market at the time of the signing of the Agreement dated 29<sup>th</sup> January 1996. He attested the Agreement in that capacity. He further testified that the plot is currently being occupied by Alexander Limisi and a son of clement.
34. On re- examination he stated that the plot was purchased as one piece but later sub- divided into plot "A" and "B".

### **Objector's submissions**

35. It is the objector's submission that his father had paid for the land in full, that he is in occupation and the petitioner was obliged to disclose this material fact to the court. He has relied on the case of *The Estate of Ndubi Javen* ( 2018) e KLR to support his argument.
36. The objector contends that from the evidence, it is apparent that the petitioner is not contesting the occupation of suit property by the objector or sale to the objector's father, but rather he seems to take issue with the fact that he was not involved in the transaction. To the objector, that was immaterial as the deceased was not under any obligation to involve the petitioner in the sale.
37. The objector further submits that he has produced a sale agreement entered into between the deceased and the objector's father indicating that the land was indeed sold to the objector's father.



38. It is the objector's final submission that whereas the issue of Administration of the Estate is not contested, the mode of distribution is.

#### **Petitioner's submissions**

39. It is the petitioner's submission that the two Applications have been overtaken by events as the property of the Estate have since been distributed; that the Applicants were not the children of the deceased and hence they were not entitled to participate in the succession proceedings.
40. Finally, it is submitted that any claim against the Estate should be determined by the Environment and Land court.

#### **Interested parties' submissions**

41. The interested parties submit that they have provided sufficient evidence to show that plot No.22 at khayega market had been sold to them for a valuable consideration; that the property no longer belonged to the deceased at the time of his demise ; that the inclusion of the plot amongst the deceased's Assets was therefore erroneous and that the asset should be removed from these succession proceedings.

#### **Determination.**

42. The objector had sought for the revocation of Grant. However, from the submission and the line of evidence it is evident that his main concern is the distribution of the Estate. The issue for determination therefore is whether the objector was a liability to the Estate. For the interested party, the only issue is whether plot No.22 at khayega market belonged to the deceased.

#### **Whether the objector was a liability to the Estate**

43. The objector has brought his claim on behalf of his father's Estate whom he contends, had purchased the whole of that parcel of land known as Isukha/ Shitoto/1285 from the deceased. He states that deceased died before the property was transferred. There is a sale Agreement dated 16<sup>th</sup> October 1993 signed between the deceased and the objector's father. Thereafter, there are signed acknowledgments dated 8.1.1994, 19.1.1994, 11.6.1994 an undated one signed in 1997.
44. The objector's family have been in occupation, and the objector's father had placed a caution on the land in question. The caution is reflected in a search certificate dated 19.1.2025, submitted to the court by the petitioners themselves. Thus, the petitioners were aware of the objector's father's claim against the Estate. This is a material fact therefore that the petitioners ought to have disclosed at the time they were petitioning for the Grant. The petitioner's allegation that he was not aware of the objector's father's claim against the Estate is not plausible.
45. The petitioner made another claim to the effect that the objector's father was a tenant but was unable to produce any Tenancy agreement as evidence or payment of Rent by the objector's father.
46. In view of the foregoing am satisfied that the Objector has proved that his father's right against the Estate had crystallised by the time the deceased died and therefore is a claim enforceable against the Estate.
47. Under section 76 of the *Law of succession Act*, a Grant may be revoked where there has been concealment of material facts like it has happened in this case ( sec 76 (b) of the *Act*). However I have taken note of the Objector's indication that he wishes to narrow down his claim to the manner of distribution, as aforesaid, and this court will therefore make such order as to ensure that the objector gets a share the Estate without necessity to revoke the grant.



### **Whether plot No. 22 at Khayega market is part of the Assets of the Estate**

48. The interested parties' case is rather straight forward. It is their contention that, as at the time of his death the deceased had divested himself of plot No. 22 at Khayega market. There is an Agreement dated 29<sup>th</sup> January 1996 showing the deceased had given the plot to the interested parties in exchange of the interested parties settling certain dues to the county Government of Kakamega.
49. The first petitioner also admitted during cross- exam that the interested parties were in occupation of the plot . It also emerged that the petitioner did not know much about the said plot. For example, he did not know if the plot had been sub- divided; he had never visited the plot since the year 1996; he had never paid rates for the plot; he does not know who has been paying the said rates
50. I have also observed that during the petition for the Grant, even though plot No. 22 had been listed among the Assets left behind by the deceased, there was no ownership certificate in whatever form. All the other properties had proof of ownership by the deceased except plot No. 22.
51. I agree with the interested parties that the inclusion of plot No. 22 among the deceased's assets was erroneous as it was not part of the deceased properties as at the time of his demise.
52. In conclusion, I hereby make the following orders:
- a). The order for confirmation made on 25<sup>th</sup> October 2016 is hereby reviewed to the extent that the whole of that Title No. Isukha/ Shitoto/1258 will devolve to the Estate of Andrew Mbakaya Bulinda
  - b). The certificate of confirmation of Grant dated 20<sup>th</sup> January 2017 to be amended to reflect that parcel No. Isukha / shitoto devolves to the Estate of Andrew Mbakaya Bulinda wholly, in place of Vincent Kasidi Amwayi.
  - c). Plot No. 22 at Khayega Market is hereby struck of from the list of the Assets available for distribution and the certificate of confirmation of grant to be amended by removing the said plot from distribution's list.
  - d). Each party to meet their own costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF DECEMBER 2023.**

**S. CHIRCHIR**

**JUDGE**

In the presence of:

E. Zalo- Court Assistant.

