



In re Estate of Wellington Nyangule Mulama (Deceased) (Succession Cause 649 of 2009) [2023] KEHC 26797 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26797 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 649 OF 2009
SC CHIRCHIR, J
DECEMBER 19, 2023**

IN THE MATTER OF THE ESTATE OF WELLINGTON NYANGULE MULAMA (DECEASED)

BETWEEN

WILKISTER SHIUNDU MALILO PETITIONER

AND

SARAH NYANGALA MUKOLWE 1ST OBJECTOR

BENSON MILLER SAKWA WAKHULE 2ND OBJECTOR

JUDGMENT

1. This cause relates to the Estate of Wellington Nyangule Mulama (Deceased). When the deceased died on 14th June 2006, his brother Wilberforce Orata Mulama applied for letters of Administration intestate to the Deceased's Estate and the Grant was issued to him on 18th October 2010.
2. The Grant was confirmed on 29.09.2010 and the only property of the Estate, being Land parcel No. Marama/ Shinamwenyuli/1225 (parcel No.1225) went to him wholly.
3. On 23rd November 2010, summons for revocation and/or annulment of the grant was filed by one Wilkista shiundu Malilo who described herself as the child of the deceased.
4. By an order of the court dated 7th February 2013, the grant was revoked and a fresh one was issued to the said Wilkister(now the petitioner herein). Land parcel No.1225 also went to her wholly.
5. Further, through an order issued on 24th October 2013 the court directed that Land parcels Nos. Marama/Shinamwenyuli /2144 (parcel No. 2144) and Marama/ Shinamwenyuli/2145 (parcel No.2145) resulting from sub- division of parcel No. 1225 and to be reverted to the original parcel No.1225 and the same to be registered in the name of the petitioner



6. On 6th March 2015, the 1st Applicant/ Objector herein Sarah Nyangila Mukolwe describing herself as an interested party, filed an Application the Application dated 6.3.2015 seeking for the following orders:
 - i. Spent
 - ii. That pending the hearing and determination of this Application, there be a conservatory order preserving the Title of No. Marama/ Shinamweyu/1225
 - iii. That the Grant of letters of Administration in respect of the Estate of the deceased issued herein and confirmed to wilkister Shiundu Malilo be revoked or annulled together with all the consequential orders.
 - iv. That costs be provided for.
7. The application was supported by her own Affidavit and the grounds appearing on the face of the Application.
8. On 24th June 2019, the 2nd Applicant filled an application seeking the court to review and set aside the order dated 24/10/2013 cancelling the sub-division of parcel No. 1225 parcel 2144 and parcel No. 2145.
9. In a Ruling delivered on 6th August 2021, Justice musyoka directed that the issues touching on parcel No. 2144 as raised in the Application dated 24th June 2019 will be heard and determined with the Application dated 6.3.2015, while parcel No. 2145 will be dealt with under another ongoing suit , being Kakamega HCCC No. 95 0F 2005.
10. Directions were taken for the hearing of these objection proceedings to proceed by way of oral evidence
11. The 1st objector was the first to testify. she adopted her statement dated 24.9.2014. She stated that she is the owner of, and is in physical occupation of land parcel number Marama/Shinamwenyuli/2473 (parcel No. 2473) measuring 0.47 ha. She further states that the said parcel was a subdivision of marama/shinamwennyuli/2154 (parcel No. 2154) which was in turn a subdivision of parcel No.2144. She further sated that parcel No. 2144 was in turn a sub- division of parcel No. 1225.
12. She acknowledged that the land parcel 1225 belonged to the deceased, the father to the petitioner. She further stated that she purchased 3 acres of land from the deceased in 1996. She produced a copy of a sale agreement and acknowledgment of the payments by the Deceased.
13. She went on to state that the original land parcel 1225 was subdivided into two portions being parcel No.1244 and 2145, during the life time of the deceased. That parcel number 2144 was further subdivided to create parcel Nos. 2153 and 2154. She became the registered owner of 2154 upon the deceased signing the transfer form.
14. The Applicant further states that she later sub- divided parcel No. 2154 to give rise to parcels Nos. 2473,2474 and 2475. She retained 2473 while she sold the other two parcels to other parties.
15. In her oral testimony, she added that it was her mother, one Martha Shitawa who purchased parcel no. 2154 from the deceased but the land was registered in her name. The other two parcels were sold to Asman Alende Kweyu and Emmanuel Malala Amakobe. she produced the Title deed for parcel No. 2473, which indicate that the said parcel was in her name. She also produced a copy of the Agreement dated 12.11.1996.



16. On cross- examination, she admitted that the first sub- division of parcel No. 1225 occurred in 2001 while the Title deed for 2473 was obtained in 2009. she stated that the title deed for parcel No. 2154 was obtained during the life time of the deceased.
17. PW2 was the mother of the 1st objector (PW1). She told the court that she bought the land from the deceased in 1996; that the 1st objector was her daughter and she caused the property to be registered in her name. She further stated that the 2nd objector also bought his land during the lifetime of the deceased. The land she bought was a sub- division of parcel No. 1225. It was sub- divided into 2145 and 2144; that 2144 was to remain in the name of the deceased. She bought 2154 as a sub- division of 2144(sic). That 2154 has since been sub- divided into parcel Nos 2473, 2474 and 2475. She remained with parcel No. 2473 while she has sold the other two.
18. On cross- examination, she stated that she signed the agreement with the deceased; that the deceased died on 14 .6.2006; that she registered the land in the name of PW1. She was not aware of the succession proceedings, and that she only came to know about them when she was served with the Notice to vacate the land.
19. PW3 and PW4 testified that they were witnesses to the transaction between the deceased and PW2 and that they knew both the deceased and PW2.
20. PW5 was Khakula Advocate, who told the court that he carried out the transaction during the sale of Title No. 1225. During cross- examination he stated that he did not attest the documents personally but was done by another Advocate in his office. He did confirm however that the transaction was carried out in his office.
21. PW6 was the 2nd objector herein. He told the court that he was relying on his Affidavit in support of his Application dated 24th June 2019 and a further Affidavit sworn on 19.2.2022
22. In the supporting Affidavit sworn on 24th June 2019, he stated that he bought 3 acres from the deceased out of parcel No. 1225. He annexed a sale Agreement dated 17.9.2001; that parcel No. 1225 was sub- divided into 2144 and 2145. That parcel No. 2145 was transferred to him by the deceased.
23. He further stated that later, the deceased offered him a portion out of of parcel No. 2144. That was in the year 2003. The deceased sub- divided 2144 to 2153 and 2154, and 2153 was transferred to him. He attached a copy of the title deed for 2153; that the petitioner was a witness to the transaction between him and her deceased father.
24. On cross- examination, he told the court that he was aware that parcel No. 2145 was a subject of court proceedings in Kakamega HCCC No. 95 of 2005, though he has not been served with any court documents. He further stated that his father was the one undertaking transaction on his behalf. In respect to 2145, he stated that his father signed the transaction documents on his behalf.
25. DW1 was the petitioner. She adopted her statement dated 25.11.2020. In the written statement, she stated that she never witnessed any sale between the deceased and any 3rd parties
26. In her Evidence -in – chief, she stated that she did not know if her father sold land; that she heard that her father sold land but that he never told her; that she never visited any office to sign an agreement, including the office of khakula Advocate; that the agreements that have been submitted to court are all forgeries. She insisted that she is the only occupant in parcel No. 1225.
27. Further on cross- examination, she denied that the land was sub- divided in the year 2001; She was not aware of any sub- division that has been carried out in parcel No. 1225. She admitted that the last time she used the land was before her father died. She does not use the land but only visits to check on it.



She insisted that there is no one residing in the land. She stated that there is no proof that the finger prints on the agreements that she allegedly signed are hers.

28. DW2 was one Donald Munias Salisi. He stated that the petitioner is his niece and his land neighbours the petitioner's land. He stated that there are no developments on the land and that the land has not been sub- divided.
29. On cross- examination, he admitted that parcel No.1225 is now registered in his name. He claimed that the registration was done after the succession proceedings. He however admitted that his name does not appear in the green card for parcel No. 1225. He further stated that he and the petitioner were charged in Butere court in relation to the finger prints but the case was dismissed.

Objectors' submissions

1st Applicant's submissions

30. The 1st Applicant proposes three issues for determination that is;
 - a. whether parcel Nos. 2144 and 2145 form part of the Deceased's Estate.
 - b. Whether the court had the jurisdiction to nullify and cancel the subdivisions Nos. 2144 and 2145.
 - c. Whether the petitioner complied with section 71 of the *law of succession Act* before being registered as the proprietor of parcel No. 1255.
31. On the first issue, she submitted that the petitioner failed to disclose to the court that the sub-division of parcel No. 1225 was made during the lifetime of the deceased. She points out that from the petitioner's affidavit dated 17/7/2015 she stated that the subdivision were done in 2011 yet a perusal of the land register for the said parcel at Entry no. 4 shows the sub- division was done on 28/11/2001. She submits that there was therefore no evidence of fraud on the sub- division of parcel No. 1225.
32. On the second issue on jurisdiction, the objector submitted that legitimacy and cancellation of titles were the preserve of the Environment and land court. Consequently, this court had no jurisdiction to cancel parcel Nos. 2144 and 2145.
33. On whether the petitioner had complied with section 71 of the *law of succession act* as the registered proprietor of the parcel No. 1255, it is her submission that as the legally recognized administrator she ought to have filed summons for confirmation of the grant, before the property could be registered in her name. According to the Applicant, this was not done. She further submits that the petitioner transferred the land before the Grant was confirmed.
34. In conclusion, the Applicant submits that the petitioner failed to disclose material facts to the court when applying for the confirmation of the grant.

Petitioner's submissions

35. The petitioner's submission in a nutshell, is that and this being a succession court, it lacks the prerequisite jurisdiction to determine issues on ownership and consolidation of titles, which to her is what this case is all about. She has relied on the case of *Alice Mumbua Mutua (deceased)* 2017 EKL in this regard.



Determination

36. In the course of these proceedings counsel for both parties entered into a consent to the effect that the Grant that had been issued to the petitioner will remain in force and that the matter will proceed on the aspect of revocation of grant of the certificate of Grant. I will take this to have meant the setting aside of certificate of confirmation of grant as the term “revocation” is only applicable to the Grant , not the Certificate of confirmation. The consent was recorded before Justice Mrima on 20th July 2015 and adopted as an order of the court. Consequently, the issue of revocation of the grant has been spent.
37. Secondly, pursuant to the directions given by Justice Musyoka as aforesaid , parcel No. Marama / Shinamwenyuli/2145 will not be the subject matter of this judgment.
38. The following issues arise for determination :
- a). whether the 1st and 2nd Applicants herein had purchased parcel Nos. 2473 and 2153, respectively from the deceased and hence considered as liabilities to the Estate.
 - b). Whether orders for confirmation of Grant should be set aside.
 - c). The court will then have to decide if orders of 24th October 2013 , which effectively gave the entire property of the deceased Estate to the petitioner, should be set aside.

Whether the Applicants are liabilities to the Estate

39. The objectors’ case is that they purchased land from the deceased. Any transaction that took place during the lifetime of the deceased is a liability to the Estate and the Administrator is therefore under an obligation to declare their interest for purposes of distribution. They fall under the category of beneficiaries. The work of ascertaining whether such liabilities did exist is the responsibility of a probate court. To that extent therefore this court does have jurisdiction.
40. The Respondent contests the sale of the properties. She insists that the alleged sale Agreements were forged. She denies attesting to deceased’s signature in the said Agreements.
41. In respect to the 1st objector, I note that the Agreement that eventually gave her ownership of parcel no. 2473 was signed between her mother, one other person going by the name Ramadhani Kongani Murunga on one hand and the deceased on the other. The Agreement is dated 16th July 1996. The agreement was in relation to a portion of parcel No. 1225. The 1st objector’s mother says that though she signed the agreement, the land was registered in the name of the 1st objector. However, on perusing the agreement, I notice that it did not include any reference to the property being registered in the name of a nominee of the purchaser.
42. The Agreement is also signed by one Ramadhani Kongani Murunga as a Co- purchaser but there is no explanation on how the property ended up being registered in the name of the 1st Objector alone. These gaps and anomalies raise questions on whether the 1st Applicant had purchased any property from the deceased.
43. Further the Green card for the original Title No. 1225 shows that the land was sub- divided on 28.11. 2001 to produce parcel Nos. 2144 and 2145. That was during the lifetime of the deceased and presumably the sub- division was done by the deceased. However, few years down the line , that is in the year 2009, the 1st objector gets her title for parcel No. 2473. This parcel is expressed as a sub- division of parcel No. 2154 and according to the 1st objector, parcel No. 2154 was a sub- division of 2144.



44. Although the 1st objector in her testimony explained how that parcel came to be, there were no documents in support. For instance, in whose name was Title number 2144 issued? When was it sub- divided into parcel Nos 2153 and 2154? The “ when “ would give an indication on whether the deceased could have affected the sub- division. The 1st Objector alleges that the deceased is the one who sub- divided 2144 into 2153 and 2154 but there is no evidence in support of this assertion The Register for parcel No. 2144 would have aided the court on who and when was the sub- division effected, but the register was not produced.
45. The deceased died on 14.6.2006. It is only those claims that had been established as at that date that are enforceable against the Estate.
46. In effect the 1st objector has failed, on a balance of probability, to prove that she obtained ownership of her parcel during the lifetime of the deceased.
47. Further considering that, what was allegedly sold by the deceased (i.e parcel No.1225) had undergone several sub- divisions, it was imperative upon the first objector to, not only testify to , but also demonstrate to the court, by way of a transfer document for instance , that the deceased indeed signed for the transfer of the property.
48. Turning into parcel No. 2153 being claimed by the 2nd objector, the petitioner’s response is that , that too was a forgery. The Respondent questions the attestation of the sale Agreement arguing that her Father knew how to write and could not have a thumb- print his signature.
49. The acknowledgment of payments dated 17th February 2003 and 5th July 2003 refer to an Agreement dated 2nd November 2002, but the said Agreement was not produced.
50. Further the validity of the 2nd objector’s claim to parcel No. 2153 also goes back to the ownership of 2144, for both parcel No. 2153 and 2154 are allegedly sub- divisions of 2144.
51. To the extent that the objectors have failed to prove the ownership and sub- division of parcel No. 2144, then they have failed to prove, on a balance of probability, that they had claims against the Estate which had crystallized by the time of the deceased’s demise. For it is only those claims which had crystallized, that a probate and Administration court has jurisdiction to determine. Any other claims against the Estate belongs to the jurisdiction of the Environment and land court.

Whether the confirmation the orders for confirmation of Grant should be set aside.

52. To the extent that the Applicants have failed to establish that they had any claims that had crystallized at the time of the demise of the deceased, then there is no reason to set aside the confirmation of grant as such an order will not only be unnecessary but will not be helpful to the Applicants in any way.

Whether the orders of 24th October 2013 should be set aside

53. To address the last issue, again to the extent that the Applicants have failed to prove that their claims constituted liabilities to the Estate then there are no valid grounds for a review Justice Chitembwe’s order of 24th October 2013
54. The Application dated 24th June 2019 and the summons dated 6th march are hereby dismissed.
55. Each party to meet their own costs.
56. Right of Appeal- 28 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF DECEMBER 2023.



S. CHIRCHIR
JUDGE.

