



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Pascal Wesamba (Deceased) (Succession Cause
437 of 2001) [2022] KEHC 10366 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 437 OF 2001**

WM MUSYOKA, J

MAY 27, 2022

IN THE MATTER OF THE ESTATE OF PASCAL WESAMBA (DECEASED)

RULING

1. What is for determination is a summons, dated September 17, 2012, which seeks confirmation of the grant herein, made to Charles Mukhwana Wesamba, the administrator, and the applicant in respect of the said application. In the affidavit sworn in support of the application, by the administrator, on September 17, 2012, it is averred that the deceased was survived by five individuals, being four grandsons and one granddaughter, namely Charles Mukhwana Wesamba, Kizito Wesonga Wesamba, John Malala Wesamba, Eric Malala Wesamba and Terry Edith Wesamba. The asset of the estate is listed as North Wanga/Koyonzo/866. It is proposed that North Wanga/Koyonzo/866 be distributed as follows: Charles Mukhwana Wesamba to get 5 acres, Kizito Wesonga Wesamba 4 acres, John Malala Wesamba 2 acres, Eric Malala Wesamba 2 acres and Terry Edith Wesamba 1½ acres. Form 37, which is a requirement under Rule 40(8) of the Probate and Administration Rules, was not filed simultaneously with the application.
2. On August 26, 2014, a document was lodged at the registry, being an affidavit, sworn on even date, by Joseph Wambutsi Shiruma and Christopher Reuben Wambutsi, wherein it is averred that Joseph Wambutsi Shiruma was an objector in this cause, and had grown sickly and unable to continue with the case, and had appointed Christopher Reuben Wambutsi, his son, to represent him in the matter. I have not seen any other document by the objector, by way of reply to the confirmation application, although there is a minute in the proceedings of February 19, 2013 before the Judge indicating that an affidavit of protest had been filed.
3. Directions were given that the confirmation application and the protest to it be disposed of by way of viva voce evidence.
4. The oral hearing commenced on April 2, 2014, with the administrator, Charles Mukhwana Wesamba on the witness stand. He said that he was a grandson of the deceased, in that the deceased was the father of his own father. He stated that the deceased had two sons, being Josephat Musikoyo Wesamba and Gregory Malala Wesamba, the original administrators of the estate, who had since died. The late



Josephat Musikoyo Wesamba was survived by Charles Wesamba, Kizito Wesamba and Terry Edith; while the late Gregory Malala Wesamba was survived by John Malala Wesamba and Eric Wesamba. He died possessed of North Wanga/Koyonzo/866, which he proposed for distribution in the manner indicated in the application. He said the objectors were their neighbours, who were not related in anyway with the deceased, and that they had their own land. He stated that the deceased had a land case with Lubale Omondi at the African Court.

5. The case for the objectors opened on November 25, 2014, with Joseph Wambutsi Shiruma on the witness stand. He stated that his father, Lubale Omondi, died in 1966, whereupon the deceased merged the two adjoining parcels of land. He stated that the deceased took advantage of their age, as they had retreated to their maternal uncles homes after the death of their father. He stated that when they came back, they established that the homestead had turned to bush, which they cleared and established a home. It was then that they established that the deceased had joined the two parcels of land. When they queried him, he said that the land did not belong to them. When this succession cause was initiated, the witness objected. The elders sat and agreed that, his side of the family, were entitled to a portion of the land. He mentioned that his father had a land case at the Mumias Court, No. 25 of 1957, which he won. When an appeal was lodged against that decision, he also won. During cross-examination, he stated that his father and the deceased were neighbours. He stated that they resided on North Wanga/Koyonzo/866, belonging to the deceased. The family of the deceased occupied the upper part, while they occupied the lower part of North Wanga/Koyonzo/866. He stated that North Wanga/Koyonzo/1051 belonged to his father, but asserted that part of it was merged with North Wanga/Koyonzo/866. He said that the deceased was registered as proprietor of North Wanga/Koyonzo/866 after his father, Lubale Omondi died, sometime between 1966 and 1969, after land adjudication. He asserted that that was when fraud was committed against his family. He said that he discovered the fraud in 1966, but he lodged a complaint in 1982, when he came of age. He said that he filed a case. He further stated that his father was registered as proprietor of North Wanga/Koyonzo/1051, and that he collected the title deed in 1975. He said that when they returned from their maternal relatives, they discovered that the deceased had taken part of their land, but they did not go to court. He asserted that his family was entitled to the lower part of North Wanga/Koyonzo/866, which he said was adjacent to North Wanga/Koyonzo/1051. He stated that the Mumias Court case in No. 25 of 1957 was about the boundary between the lower part of North Wanga/Koyonzo/866 and North Wanga/Koyonzo/1051.
6. Christopher Reuben Wambutsi followed. He stated that North Wanga/Koyonzo/866 was meant to be shared between Lubale Omondi, his grandfather, and Pascal Wesamba, the deceased herein. He said that the two portions were separated by a road, splitting into the upper and lower parts. He asserted that the upper part was what belonged to the deceased; while the lower part belonged to his family. He further stated that that lower part of Wanga/Koyonzo/866 was awarded to the Lubale Omondi family by the court in Mumias Case No. 25 of 1957. An appeal was lodged by the deceased and others, in Kakamega HCCA No. 125 of 1957, but the appeal was dismissed. He stated that Lubale Omondi died in 1966, and shortly thereafter land adjudication was done, and the deceased herein was registered as proprietor of Wanga/Koyonzo/866. He stated that his parents returned to Wanga/Koyonzo/866 in 1979, and occupied the 0.26 hectare that they were entitled to. He stated that no one lived on Wanga/Koyonzo/1051. During cross-examination, he stated that his grandfather was not related to the deceased herein. He stated that Wanga/Koyonzo/866 was 14.5 acres, while Wanga/Koyonzo/1051 was 0.26 hectare. He said that the Mumias land case, No. 25 of 1957, was over Wanga/Koyonzo/866.
7. Saverio Khanda Twasi followed. He stated that the family of the deceased had encroached into the land of the family of Lubale Omondi. He said that the dispute was escalated to the court at Mumias, where the family of the deceased lost the case. After that it went to appeal, where they also lost. He stated that during land adjudication in 1966-1967, the deceased was one of the land adjudicators, and it was



- during that exercise that the portion due to the Lubale Omondi family was demarcated, adjudicated and registered as part of Wanga/Koyonzo/866. He said that he got all that information from his father, as he was born in 1955. He said the land registered in the name of the late Lubale Omondi was Wanga/Koyonzo/1051. He conceded that he did not testify in the Mumias case.
8. After the oral hearings closed on November 25, 2014, the objectors asked for summons to issue to the Land Registrar, Kakamega, to come to court to produce documents relating to Wanga/Koyonzo/866 and 1051, being the green cards for the said properties. An order to that effect was made. The land registrar never came to court to testify, and I eventually ruled, on November 11, 2021, that I would decide the matter without evidence from that office. Curiously, although the oral hearings were closed on November 25, 2014, Patrick Makhulo Twasi and Charles Mukwana Wesamba testified on November 26, 2018 and September 29, 2019, respectively. They did not add anything that new to what was already on record, save that it was disclosed that the deceased had daughters, being Turutea Nabwire, Maende Florence, Auma Asha and Awino.
 9. These proceedings relate to the distribution of the intestate estate of the deceased herein. He died in 1972, long before the [Law of Succession Act](#) came into force in 1981. By virtue of section 2(2) of the [Law of Succession Act](#), cap 160, Laws of Kenya, his estate fell for distribution in terms of the customary law that applied as at the date of his death. The parties did not address me on the customary law applicable, but I shall presume that the deceased died a Luhya, and Luhya customary law of succession should apply to his estate. The administrator did not make any effort to address me on the content of the said law.
 10. The law governing applications for confirmation of grant is section 71 of the [Law of Succession Act](#) and Rules 40 and 41 of the [Probate and Administration Rules](#). The proviso to section 71, as read together with Rule 40(4), is that the administrator applying for distribution must satisfy the court that they have properly ascertained the persons beneficially entitled to a share in the estate and have properly ascertained the shares due to such beneficiaries. The effect of it is that the court then incurs a duty to be satisfied, before it confirms the grant, that the administrator asking for confirmation has properly ascertained the persons beneficially entitled to a share in the estate and the shares due to such beneficiaries.
 11. The starting point is with the persons beneficially entitled to a share in the estate. Persons beneficially entitled, in the context of intestate succession, refers to two categories. The first is that of the immediate surviving members of the family of the deceased, often referred to as survivors. These would be the persons, for the purpose of this cause, who would be entitled to the intestate estate of a dead Luhya man. These include the surviving spouse, children, parents, siblings, grandchildren, and other blood relatives of the deceased. The court should be satisfied that these have been ascertained properly, in terms of the administrator properly identifying the persons who have survived the deceased. The second category is that of creditors; they could take the form or character of pure creditors or buyers of the assets of the estate from the deceased. They could be described as liabilities or purchasers also. The general term for both groups is beneficiaries, that is persons who have a beneficial interest in the estate. The beneficial interest of the surviving family members arises naturally from their filial relationship with the deceased, while that of creditors or liabilities has something to do with the transactions that they had had with the deceased.
 12. In the instant case, the category of creditors or claimants against the estate may not be so relevant, as none have come forward, and there is no claim that there are any. I shall, therefore, stick with the category of beneficiaries who are survivors of the deceased, that is to say the widows and children of the deceased. The deceased died in 1972, and it would appear that there is no surviving widow. He had sons and daughters. The sons have since died. The daughters were not involved in the matter, and since section 2(2) of the [Law of Succession Act](#) applies, I shall not consider the position of the daughters. Am



alive to article 27 of the Constitution, but then again, the deceased died a long time ago. The only two sons of the deceased are dead, and they are survived by the grandsons and granddaughter disclosed. I shall take it that the persons listed in the affidavit of the administrator, sworn on 17th September 2012, are the rightful survivors. Therefore, the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules have been complied with.

13. The proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules deal with ascertainment of the persons beneficially entitled as well as their shares. The sharing proposed is uneven. Some survivors get 5 acres, some 4, some 2 and some 1 ½ acres. No explanation has been offered. Yet all the survivors are at par, all being grandchildren of the deceased, who should be entitled equally to a share in the estate. Succession is subject to the law of equity and trusts. One of the cardinal maxims is that equality is equity. No justification has been given as to why some of the grandchildren should be entitled to a share larger than that of the rest. The disparity in the sharing could have perhaps been cured, if the parties had signed the consent in Form 37, binding themselves to the uneven sharing. That they did not do, and, therefore, I am not bound to allow a distribution that is unequal. The proposal comes from the administrator, and he takes the largest share, which is in itself an abuse of his position as administrator, to enrich himself at the expense of the other survivors of the deceased. He has no greater right or entitlement to the property than the rest.
14. Related to the allocation of shares to the persons ascertained as beneficially entitled to a share in the estate, is the question of the assets available for sharing or distribution. The question of the assets is critical, for the sharing is of the assets, and without them the issue of distribution should not even arise, for the deceased would be said to have died without an estate. It is not disputed that the deceased had died possessed of North Wanga/Koyonzo/866.
15. However, there is a contest, mounted by persons who are neither survivors of the deceased nor creditors of the estate. Their case is that a portion of the estate asset, North Wanga/Koyonzo/866, does not belong to the estate, but their family, that of Lubale Omondi. The portion is said to measure 0.26 hectare. The deceased is said to have had encroached on it during land adjudication, and caused it to be merged with North Wanga/Koyonzo/866. The argument then would be that that portion is held by the estate in trust for the family of the late Lubale Omondi, and the proposal appears to be that at distribution, I should not distribute the 0.26 hectare as part of the estate. The certificate of official search, on record, in respect of North Wanga/Koyonzo/866, dated 17th September 2001, indicates the parcel to be 14.5 acres.
16. I was told that there was litigation in the 1950s over the said land, and the same was determined in favour of the estate of the late Lubale Omondi. Some court papers were placed on record, being the decrees/orders and judgment emanating from that process. The documents relate to Mumias District African Court Case No. 25 of 1957 and Kakamega Appeal Court Land Case No. 125 of 1957. I am not able to tell whether these proceedings related to North Wanga/Koyonzo/866 because they were conducted in 1957 and the determinations in both cases were made in 1957. Am told that North Wanga/Koyonzo/866 was registered in 1966/1967. There was no description of the property that was before Mumias District African Court Case No. 25 of 1957 and Kakamega Appeal Court Land Case No. 125 of 1957, and the parties did not do enough to establish that the land the subject of Mumias District African Court Case No. 25 of 1957 and Kakamega Appeal Court Land Case No. 125 of 1957 was the same land as North Wanga/Koyonzo/866. In one of the papers the land is said to be at Esangangwe, but the parties have not addressed me at all on whether North Wanga/Koyonzo/866 was situated at that place.
17. The issue relating to that portion, the 0.26 hectare, revolves around its ownership, occupation and use, and I would have no jurisdiction, sitting as a Judge of the High Court, by virtue of articles 162(2)



and 165(5) of the Constitution, to delve into determining the question as to who, between the estate herein and that of the late Lubale Omondi, is entitled to that portion. The High Court no longer has jurisdiction, by dint of articles 162(2) and 165(5), to determine the ownership of land question, and that jurisdiction properly lies with the Environment and Land Court, or the subordinate courts with jurisdiction. The estate of the late Lubale Omondi is better of tussling with the estate herein over ownership of that portion of 0.26 hectare at the Environment and Land Court.

18. Under Rule 41(3) of the Probate and Administration Rules, where an issue arises, like the instant one, as to ownership of an asset, or a portion or share thereof, that has been placed before the probate court for distribution, the court ought to appropriate the disputed portion and set it aside, for determination of the question of its ownership in separate proceedings, and proceed to distribute the portion of the estate that is not under dispute. That is what I shall proceed to do in this case. See In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR (Gikonyo J), In re Estate of Muthiani Mutule (Deceased) [2017] eKLR (C. Kariuki J), In re Estate of Njagi Njeru (Deceased) [2018] eKLR (Muchemi J), In re Estate of Kimani Kinuthia [2008] eKLR (Ibrahim J) and In re Estate of Mwangi Gikonyo (Deceased) [2017] eKLR (Waweru J).

19. For avoidance of doubt, article 162(2) states as follows:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

- a. employment and labour relations; and
- b. the environment and the use and occupation of, and title to, land.”

20. On the other hand, article 165(5) of the Constitution states as follows:

“The High Court shall not have jurisdiction in respect of matters-

- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- b. falling within the jurisdiction of the courts contemplated in article 162(2).”

21. Rule 41(3) of the Probate and Administration Rules states:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set the particular share or estate or the property comprising it to abide determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

22. The final orders are:

- a. That I do hereby confirm the administrator herein to complete administration of the estate, and I shall proceed to distribute the portion of the estate that is not in dispute;
- b. That I appropriate and set aside the disputed 0.26 hectare, out of North Wanga/Koyonzo/866, by virtue of Rule 41(3) of the Probate and Administration Rules, and direct the parties



to initiate separate proceedings, if they are so minded, before the appropriate court, for determination of the question of ownership thereof;

- c. That the proceedings contemplated in (b), above, ought to be initiated within the next 366 days, failing which the administrator herein shall be at liberty to apply to this probate court in this cause to distribute the 0.26 hectares;
- d. That the balance of North Wanga/Koyonzo/866, after the appropriation and setting aside of the disputed 0.26 hectare, in terms of (b), above, shall be distributed equally between Charles Mukhwana Wesamba, Kizito Wesonga Wesamba, John Malala Wesamba, Eric Malala Wesamba and Terry Edith Wesamba;
- e. That a certificate of confirmation of grant shall issue accordingly;
- f. That the matter shall be mentioned after one year for monitoring and reporting with respect to (c), above;
- g. That each party shall bear their own costs; and
- h. That any party aggrieved by the orders made herein has leave of twenty-eight days to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 27th DAY OF May 2022

W. MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Charles Mukwana Wesamba, administrator.

Joseph Malala Wesamba.

Bernard Wesonga Lubale.

Ethron Omondi Shati.

