



**Mburu v Wakaimba & another (Succession Cause 52 of 1990)
[2022] KEHC 11730 (KLR) (20 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11730 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 52 OF 1990
RN NYAKUNDI, J
MAY 20, 2022**

BETWEEN

DAVID WAKAIMBA MBURU PETITIONER

AND

KEVIN MBURU WAKAIMBA 1ST OBJECTOR

IVAN NJOROGE WAKAIMBA 2ND OBJECTOR

JUDGMENT

1. What is before the court is the application dated 5th June 2019 expressed to be brought under Section 76 of the *Law of Succession act* and Rules 44, 73 and 74 of the *Probate and Administration Rules*. The applicant seeks the following orders;
 - a. Spent
 - b. That a secured provision be made from the estate of Samuel Mburu Wakaimba Alias Sammy Mburu Wakaimba (deceased) to enable the applicants finance tuition, travelling and accommodation for their education.
 - c. That the honourable court do revoke and or annul the grant herein as it was obtained by fraud and concealed material particulars about the widow and the children of the deceased.
 - d. That upon revocation the respondent be ordered to disclose and account for the proceeds of; Settlement of cheque of kshs. 200,000/- as received from capital insurance broker/Provisional Insurance of Kenya Proceeds of sale of L.R Plateau/plateau East Block 2 (uasin Gishu) L.R No. 9510/03 hereinafter operated as Zena Flowers limited measuring 100 acres and sold at a conservative cost of kshs. 350,000/- per acre and being the locus at which the deceased was buried.
 - e. That any other interests the deceased had interest in jointly and severally by the petitioner/ administrator.



- f. That costs of this application be provided for.
2. The application is based on the grounds therein and the affidavit in support of the application. The applicant depones that the deceased was survived by three dependants. Themselves and one Rose Jerono Tiren. Before the demise of the deceased they were minors under 5 years and in custody of their mother. In lodging the succession cause the respondent fraudulently filed the cause in the principal magistrate's court.
 3. The applicants contend that the respondent concealed the following material particulars;
That the widow to the deceased could not be traced.
That the deceased had no surviving children
That no declaration by form P&A 5 was filed
 4. The beneficiaries of the estate have been excluded from accessing the benefits and income of the estate. The following properties were not included in the estate of the deceased;
 - a. L.R Plateau/plateau East Block 2 (uasin Gishu) L.R. No, 9510/3
 - b. Eldoret Municipality Block 6/455
 - C. Eldoret Municipality Block 7/131
 - D. Eldoret Municipality Block 7/132
 - E. Eldoret Municipality Block 7/57
 - F. Eldoret Municipality Block 11/22
 - G. Eldoret Municipality Block 12/115
 - H. Eldoret Municipality Block 12/118
 5. The applicants cited sections 26,27 and 28 of the *Law of Succession act* and the cases of *Elizabeth Kamene Ndolo v George Matata Ndolo* NRB Civil Appeal no. 128 of 1995 (1996) eKLR and *John Gitata Mwangi & 3 others v Jonathan Njuguna Mwangi & 4 others* NBI CA Civil Appeal no. 213 of 1997 (1999) eKLR in support of their submission that they were dependants of the deceased.
 6. The petitioner has not accounted for the estate of the deceased and the dependants are desperate for accommodation and completion of studies.
 7. The respondent opposed the application vide a replying affidavit filed on 11th October 2019 and submissions filed on 4th February 2022.
 8. It is the respondent's case that he has never concealed any material fact. It was established during the hearing that the deceased had no assets. The land parcel claimed to be the estate of the deceased; L.r Plateau/plateau East Block 2 (uasin Gishu) L.r. No, 9510/3 belongs to him and he annexed the copy of transfer as DMW-2. He has never excluded anyone from accessing benefits of the estate. He has been paying fees for the applicants with his own money. He annexed the receipts as DMW-4(a)-(g).
 9. With regards to the kshs. 200,000/- received from the Capital Insurance brokers, it was explained that the petitioner was indicated as the next of kin. At the time the deceased passed they had separated with the 3rd witness.



10. The deceased had no assets and therefore the petitioner cannot be compelled to maintain the objectors from his own assets.
11. He further contended that he owns the parcels mentioned by the applicants and annexed copies of certificates of lease as DMW – 5(a) to (c). He has paid fees for the applicants and has been maintaining them using his own money. He annexed proof of the same as DMW – 6 and DMW – 7. Further, that the applicants have not provided any supporting documents to the properties they claim. The application should be dismissed with costs.

Resolution

12. Upon reading the pleadings and considering the submissions of the parties herein I have identified the following issues for determination;
 - a. Whether there was concealment of material facts
 - b. Whether the court should make secured provisions from the estate to finance the 1st Applicants' education.

Whether There Was Concealment Of Material Facts

13. The applicants contend that there was concealment of material facts in the petition for grant of letters of administration.

Section 76 (b) of the *Law of Succession Act* provides as follows:

“A grant of representation whether or not confirmed may at any time be revoked or annulled at any time if the court decides either on Application by any interested party or of its own motion that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.”

13. The applicants have not provided any documentary evidence that the properties they claim were excluded from the estate belonged to the deceased. The respondent produced a transfer document as DMW – 2 annexed to the replying affidavit. It shows that the property known as L.R Plateau/plateau East Block 2 (uasin Gishu) L.r. No, 9510/3 was transferred to the petitioner in 1970. The deceased passed away in 1980 therefore it is evident that the property has been in possession of the petitioner since the aforementioned period importing a constructive. Further, the applicants have not provided any evidence that any of the properties claimed belonged to the deceased at any one time.
14. It is trite law that he who alleges must prove existence of facts in issue for the court to grant judgment in his/her favour as stipulated under section 107(1) and 108 of the *Evidence Act*.
15. I do note that there is no form P&A 5 in the proceedings annexed by the applicant. However, the court does not have a copy of the proceedings from the Principal Magistrates court and therefore this begs the question; how will the same be determined? The applicants have provided proof that they are dependants of the estate of the deceased by way of a marriage certificate, birth certificates and ID cards annexed as IMW-1. In the absence of the Principal Magistrates court file that was the source of the succession proceedings that resulted in the grant of letters of administration, this particular concealment cannot be determined in its entirety as it is on record that the original file was lost.
16. However, given that there has been no proof that the properties that are claimed to have been part of the estate actually belonged to the deceased, there is no evidence that such fact was concealed. I



find it somewhat difficult to appreciate the grievances raised by the applicant in the whole scheme of distribution of the intestate estate to grant any remedy under the Law of succession.

17. Whether The Court Should Make Secured Provisions From The Estate To Finance The 1st Applicants' Education.
18. The determinant of this issue is underpinned under Section 26 of the *Law of Succession Act* which provides as follows "Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate."
19. The applicants have not proven that there exists any property that was part of the estate of the deceased. Further, the respondent provided proof of ownership of the disputed parcels and that he has been paying the school fees for the applicants on his own.
20. The same applies for the requested accounts of the proceeds of the estate. There is no evidence that any property existed and therefore there can be no accounts for property that did not exist.
21. There is no evidence that the petitioner received the insurance payment of kshs. 200,000/-. Further, it was stated during proceedings that the deceased had included the petitioner as his next of kin therefore he was in the position to receive the same. In the absence of proof of the same, I consider the fact that he has been paying their school fees to the amount of kshs. 5,000,000/- and therefore he can be presumed to have used the money for that purpose.
22. Concealment of material facts must be proven by establishing evidentiary that the concealed matter complained of did occasion prejudice or failure of justice. In the instant application the applicants herein have failed terribly to do the same. Further, the fact that there is no proof that the deceased left behind any property then it will be inconsequential to grant letters of administration afresh.

"A child of the family cannot inherit under the intestacy rules because the deceased is not his or her legal parent, but can make a family provision claim. The court will consider whether reasonable financial provision was made for his or her maintenance, and may order provision from the estate, which is limited to reasonable provision for maintenance. The court is required to take into account what (if any) responsibility the deceased took on to maintain the child of the family, whether the deceased did this knowing that there was not in fact a legal parent-child bond between them, and whether anyone else has a legal duty to maintain the child."
23. My view is that the claim being pursued by the applicant is not tenable under our current law, in any event the standard of provision provided for in favour of the applicant is considered reasonable for his maintenance. This means that the court has no evidence to open the pigeon of financial provisions. Under the intestate rules there is no estate to be administered and therefore it will save judicial time to dismiss the application.
24. In the premises the application is dismissed. Parties to bear their own costs.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 20TH DAY OF MAY, 2022.



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R. NYAKUNDI
JUDGE

