



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**In re Estate of Francis Andabwa Nabwangu (Deceased) (Succession Cause 20 of 2019) [2022] KEHC 12346 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 12346 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 20 OF 2019**

**WM MUSYOKA, J**

**JUNE 24, 2022**

**IN THE MATTER OF THE ESTATE OF FRANCIS ANDABWA NABWANGU (DECEASED)**

**RULING**

1. In the summons dated October 8, 2021, Pius Nabwangu Andabwa, the applicant, seeks several orders: cancellation of all entries made in the register in respect of Kakamega Municipality/Block 1/163 pursuant to the grant made on November 13, 1991 and confirmed on November 25, 1991 and its restoration to the name of the deceased herein; the Kakamega land registrar be directed to give effect to the said cancellation; the appointment of the applicant and Ezra Andabwa as administrators of the estate; and other or further orders as may be necessary for the implementation of the orders made on August 6, 2021.
2. The grounds upon which it is premised are set out on its face, and in the affidavit sworn in support. The principal prayer is that the parties named therein, as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, that is to say the Public Trustee, Effie Owuor and Beatrice Lwosi Ongoma, had not complied with the orders made on August 6, 2021, especially on Kakamega Municipality/Block 1/163 and appointment of new administrators, yet the said orders had not be reversed on appeal or review, neither have they been stayed. He avers that the land registrar had not effected the order of restoration of Kakamega Municipality/Block 1/163 to the name of the deceased.
3. The response to the application is by Edwin C Koech, the advocate for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, by way of an affidavit sworn on November 1, 2021. He avers that he had received instructions to submit the names of John Nabwangu and Beatrice Lwosi Ongoma as the new administrators, to team up with those to be fronted by the applicants; to submit the names of Kathleen Okatcha and Madeleine Musindi Andabwa as the persons to petition for representation in the estate of Jedidah Lyavule Nabwangu, deceased; and an account to be prepared with respect to Kakamega Municipality/Block 1/163 to be filed in the cause to be initiated in the estate of Jedidah Lyavule Nabwangu, deceased. He states that he drafted the petition to be filed in that cause, and detailed the challenges he faced with fast-tracking it, being the fact that some of the survivors/beneficiaries reside abroad, he fell ill, and lack of a death certificate. He pleaded for extension of time, to enable the respondents to do the needful. He avers that the court did not order cancellation of the title to Kakamega Municipality/Block



- 1/163, and urged the court to accept an account of the sale proceeds of the said property to obviate prejudice to an innocent party who had paid for the property and title was transferred to him. He states that no beneficiaries would be prejudiced. It is asserted that Bernadinah Nabwangu Mutsembi and the applicant were beneficiaries of the estate of Jedidah Lyavule Nabwangu, deceased, and that all the children of the said Jedidah Lyavule Nabwangu were satisfied with the account rendered. He has attached to his affidavit, the account with respect to the disposal of the proceeds of sale of Kakamega Municipality/Block 1/163, and correspondence between him and the advocate for the applicant.
4. The reply provoked a response by the applicant, by way of a supplementary affidavit, sworn on December 17, 2021. The applicant largely accuses the respondents of stonewalling, in an effort to delay the matter. They are further accused of misinterpreting the orders relating to Kakamega Municipality/Block 1/163, and that the interpretation adopted was designed to circumvent the orders, so far as it related to the said property being reverted to the name of the deceased. He further argues that a succession cause in the estate of the late Jedidah Lyavule Nabwangu cannot be initiated to administer sale proceeds that and already been spent illegally. He states that the certificate of confirmation of grant through which Kakamega Municipality/Block 1/163 was transmitted has been nullified, and the third party, if any, has no good title, and the court has no jurisdiction to determine the interests of such an interested party. He asserts that he is a survivor of the deceased, and entitled to a share in the estate of the late Jedidah Lyavule Nabwangu. He further asserts that the late Bernadinah Nabwangu Mutsembi, was a widow of a son of the late Jedidah Lyavule Nabwangu, called Vincent Pabuli Nabwangu, and, therefore, she had a stake in her estate. He states that following her death her children with Vincent Pabuli Nabwangu have a stake in the estate instead. He states that the respondents had obtained a letter from the Chief, which had omitted their names. He says that he and the others were not satisfied with the account, as it shows that they never got the proceeds of the sale of Kakamega Municipality/Block 1/163, and gives notice that they shall challenge the account once filed.
  5. Initially, the parties had indicated that they would file written submissions, and I had given directions in that behalf on November 8, 2021. However, on January 24, 2022, they changed tact, and abandoned that approach.
  6. The application essentially seeks two principal orders. One, the cancellation of the transmission of Kakamega Municipality/Block 1/163, based on the confirmed grant that I cancelled in the ruling of August 6, 2021, and the reversion of the registration to the name of the deceased herein. Two, the appointment of administrators herein to take the place of the Public Trustee.
  7. I will start with the easier task. That of appointing fresh administrators. The deceased herein died in 1988, and representation was made to the Public Trustee, the 1<sup>st</sup> respondent herein, on November 13, 1991, and the grant was confirmed on November 25, 1991. I made a finding, in my ruling of August 6, 2021, that the Public Trustee had failed in her duties as administratrix, for appointment as administrator was done in November 1991, and grant was confirmed the same month, but since November 1991, the administration of the estate remained incomplete, thirty years down the line, and the distribution of the estate remained incomplete, some debts were not yet settled, and some assets were uncollected. It was on that basis that the grant to the Public Trustee was revoked, and it was ordered that fresh administrators be appointed to take her place. I ordered that a maximum of four administrators be appointed, being two men and two women. The applicant and his side in the matter propose Pius Nabwangu Andabwa and Ezra Andabwa; while the respondents propose John Nabwangu and Beatrice Lwosi Ongoma. There is no full compliance with my order, as the parties have proposed only one woman as administrator. I shall, with reluctance, as the proposed appointments are not compliant of article 27 of the *Constitution*, accept the said proposal, for the reason only of moving the matter forward.



8. The second issue is a little controversial. Controversial because I see that the parties are feuding over what the purport of the order relating to Kakamega Municipality/Block 1/163 is. The said order relating to reads as follows:

“That I hereby call the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to account for the disposal of Kakamega Municipality/Block 1/163, and for restoration of the said property, or its value in monetary terms, to the estate, so that the same can be devolved to the estate of the late Jedidah Lyavule for administration and distribution within a cause to be properly initiated in that estate.”

9. The interpretation given to that order by the applicant is that Kakamega Municipality/Block 1/163 ought to be reverted to the estate herein, for the purpose of being transmitted to the estate of the late Jedidah Lyavule Nabwangu. The respondents appear to have understood it to mean rendering an account in shillings and cents only, in terms of how much the property was sold for, and how the sale proceeds were expended. The account placed on record shows that Kakamega Municipality/Block 1/163 was sold to Diten and Niruben Chavda, for Kshs 42,000,000.00. Out of the said amount, Kshs 5,802,271.00 was spent on conveyancing, a family fund, refunds to John and James, and distribution to Ayoti, Ruth and the children of the late Simani. The balance left after those expenses, was said to be Kshs 34,697,729.00. That balance was, thereafter, purportedly, distributed between Effie Owuor, Beatrice Ongoma, Joy Muliro, Madeleine Andabwa and Kathleen Okatcha. Whereas the balance is alleged to be Kshs 34,697,729.00, what was purportedly shared by Effie Owuor, Beatrice Ongoma, Joy Muliro, Madeleine Andabwa and Kathleen Okatcha was more than the balance, for they shared Kshs 36,197,725.00.
10. In my ruling of August 6, 2021, this is what I said, at paragraph 37, about Kakamega Municipality/Block 1/163, and what needed to be done with respect to it, which was the basis of the order that I have recited in paragraph 8 hereabove:

“... The handling of Kakamega Municipality/Block 1/163 outside of a succession process was wrongful, and the applicants are justified in saying that the same denied them a share in that property. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents ought to account for it, for the said property was unprocedurally conveyed to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents by the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent cannot claim that they have nothing to account, for she and the 3<sup>rd</sup> respondent were not administrators of the estate of either the deceased herein nor that the late Jedidah Lyavule, they handled an estate asset in a manner amounting to intermeddling with it, they have an obligation to account for it, to the court and to the other beneficiaries. If it was sold, then the monies raised in that sale ought to be accounted for, and restored to the estate of the deceased herein for devolution to the estate of the late Jedidah Lyavule.”

11. The order with relation to Kakamega Municipality/Block 1/163 was that since the said property was not properly handled, it needed to be restored to the estate, so that it could be devolved to the estate of the late Jedidah Lyavule Nabwangu, where it properly belonged, for administration and distribution in that estate. Restoration of Kakamega Municipality/Block 1/163, according to the order, could take two alternate forms. The first being that should the property be still in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, they should re-convey it back to the estate herein, so that the administrators can transmit it to the estate of the late Jedidah Lyavule Nabwangu. The alternative is, should the property have been sold by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the monetary value of the property should be deposited in court, to enable the administrators herein to devolve the money to the estate of the late Jedidah Lyavule Nabwangu for distribution.



12. In the ruling of August 6, 2021, I had given the said respondents 45 days to render the account, and leave of 28 days to appeal against the orders made in the said ruling. The applicant has come back to court after the respondents failed to appeal and to render the accounts. The applicant is saying that since the respondents have not deposited the monies equivalent to the value of the property, Kakamega Municipality/Block 1/163, then the said property should be reverted to the estate. It would appear that that is what prompted the said respondents to file what they claim to be an account. The rendering of the account is not enough. The order required that the rendering of the account go together with restoration of Kakamega Municipality/Block 1/163 back to the estate by way of re-conveyance or deposit of the equivalent of its value in monetary terms. The said respondents have not done either of those things, they have not done a re-conveyance nor a made a deposit of the money in court. The account rendered is itself inadequate. An account, in cases of this nature, is not just about figures. Figures can lie or be manufactured or plucked from the air. I have pointed out some of the glaring inconsistencies in the figures in the account, at paragraph 9, hereabove, which suggest a lack authenticity of the account. The figures must be supported by documentation: of proof of the alleged sale, the expenses, conveyance, transfer, registration and the distribution. A copy of the sale agreement should have been attached, as proof that, indeed, there was a sale of the property. A document to show payment of the agreed sale price too. Copies of the receipts to support the expenses on the conveyance should have also been made available. A copy of the transfer documents to show registration and conveyance to the buyers, and a copy of the title deed or certificate issued, to show that the property was in fact completely conveyed to the buyers, and was no longer available for re-conveyance to the estate. A person who has been found to have had acted improperly, with respect to property of a dead person, is expected to do more, when it comes to accounting. Such a person is not to be trusted, and must be put to strict proof.
13. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents urge the court to accept the account rendered, to obviate prejudice to an innocent party. I reiterate that the filing of the piece of paper that the respondents claim to be an account is not enough, it has to be accompanied with either a re-conveyance of Kakamega Municipality/Block 1/163 or a deposit in court of the monetary equivalent of the value of Kakamega Municipality/Block 1/163. They have done neither, and they, therefore, have not complied with the orders of August 6, 2021. They urge me not to cancel the title of the innocent parties, who allegedly bought the property, which makes sense. But the court would only be dissuaded from cancelling title so upon their compliance with order of August 6, 2021, by depositing the money in court, which they do not appear to be keen on doing. It is only them who can protect the innocent party by their act of depositing the money in court. I can only have Kakamega Municipality/Block 1/163, or its equivalent in money terms, devolved to the estate of the late Jedidah Lyavule Nabwangu, but not the piece of paper that has been filed in the name of an account.
14. It would appear that the respondents are, by talking of prejudice to an innocent party, arguing that there is protection for the said party under section 93(1) of the *Law of Succession Act*. That provision accords protection, upon revocation of a grant, to purchasers of estate assets, and it provides as follows:
- “A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”
15. Opinion, on the effect of section 93(1) of the *Law of Succession Act*, is rather divided. In *In the Matter of the Estate of Yusuf Mohamed (Deceased)* Mombasa HCP&A No 434 of 1995 (unreported)(Waki J), *In the Matter of the Estate of Eunice Wanjeri Kibia (Deceased)* Nairobi HCSC No 926 of 1997



(unreported)(Osiemo J), *In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (Deceased)* Nairobi HCSC No 935 of 2003 (unreported)(AJ Kamau J), [Philip Wambua Karanja & 3 others v Josephine Muthoni](#) [2011] eKLR, [Rosemary Njeri Njamura v Samuel Kimani Njamura](#) [2017] eKLR (Muigai J) and [Isaac Gathungu Wanjobi v Simon Moloma Nkaru & another](#) [2019] eKLR (Nyakundi J), it was said that section 93 protects the interest of a purchaser of immovable property in the event of the grant is revoked, which is to say that such sales transactions are unaffected by the revocation of the grant. In *In the Matter of the Estate of Anthony Gichigi Wairire (Deceased)* Eldoret HCP&A No 32 of 1992 (unreported)(Nambuye J), [In Re Estate of Salim Islam Saadan \(Deceased\)](#) [2016] eKLR, [Fredrick Kivala Nzuki v Josephine Kathathi Muli](#) [2021] eKLR (Limo J) and [In re Estate of Simon Njogu Gicheni \(Deceased\)](#) [2021] eKLR (Mwongo J), it was stated that, although section 93 is intended to provide protection for transfers done by personal representatives to purchasers, the provision does not make such transfers absolute, as they can still be challenged by beneficiaries. The basis for this latter position was given in [Rebecca Veronica Adela v Prisca Khatambi Kibukosya & another](#) Nairobi HCSC No 2853 of 2003 (unreported)(Rawal J), where it was held that the transfer to a purchaser, if shown to have been either fraudulent or beset by other defects or irregularities, can be invalidated. The court asserted that it would be a very weak or unfair system of law, and against all notions of fairness and justice, to give a *carte blanche* of absolute immunity against challenges to transfer of immovable assets of the estate by a personal representative, and courts ought not to encourage protection of personal representatives, who undertake unethical or illegal actions, prejudicing the interests and rights of beneficiaries of the estate. The court concluded that section 93 does not prohibit the discretion of the court to invalidate a fraudulent action by a personal representative. See also [In Re Estate of Salim Islam Saadan \(Deceased\)](#) [2016] eKLR (Thande J) and [In re Estate of Simon Njogu Gicheni \(Deceased\)](#) [2021] eKLR (Mwongo J).

16. I find the position taken in [Rebecca Veronica Adela v Prisca Khatambi Kibukosya & another](#) Nairobi HCSC No 2853 of 2003 (unreported)(Rawal J), and the related decisions, more persuasive. Section 93 of the [Law of Succession Act](#) should not be applied to protect sales of estate assets in ways that violate or breach the law, or which are irregular or improper or amount to intermeddling with the assets of a dead person. More crucially, the application of that law should not be to the prejudice of the survivors of the deceased or the rightful beneficiaries, whose rights should not be sacrificed at the altar of protection of the purchasers. The survivors of the deceased or the rightful beneficiaries are innocent too, and deserve to be protected from the unfair and underhand acts of the personal representatives and their accomplices. The rights accruing to the survivors of the deceased or beneficiaries of the estate crystallize upon the death of the proprietor of the asset in question, and they should take priority over those of the purchaser, which are created through an irregular or improper or even unlawful transaction, carried out after the rights of the survivors or beneficiaries have accrued or crystallized. The said rights are, no doubt, superior to those of such purchasers, and should be given priority of protection. The persons who irregularly or improperly or unlawfully handle assets of a dead person should bear the burden of their misconduct. In the event of a revocation of the grant, nullification of such transactions should be a natural consequence, and the difficulties to be faced by the purchasers thereafter should be the problem and concern of the persons they dealt with, and not that of the estate or of the survivors or beneficiaries. The purchaser, under those circumstances, should not benefit from an irregular sale of an asset of a dead person, to the detriment of the survivor or beneficiary, and the persons behind such irregular transactions ought not to be encouraged to get away with their folly, they must be made to carry their burdens or their crosses. To let them go scot-free would be to promote abuse of the process and disrespect for the rule of law, and to encourage personal representatives, in collaboration with their cohorts, to abuse their powers as such.



17. A case has been made out for the making of an order to have the registration of Kakamega Municipality/Block 1/163 revert to the name of the deceased herein, through a cancellation of the current registration of the said property, as the respondents herein are clearly not ready and willing to comply with the orders of August 6, 2021, by depositing in court the monetary equivalent of the value of Kakamega Municipality/Block 1/163 in court. It is alleged that the property was sold, but the respondents have not provided any evidence of the said sale. They are obliged to make that disclosure, if they are really interested in protecting the person or persons that they allege to have sold the property to. They appear to be taking this grave issue rather lightly and casually, forgetting that the law, like water, must find its level, and the river must take its course.
18. The parties addressed me on matters relating to what they are doing towards initiating proceedings in the estate of the late Jedidah Lyavule Nabwangu. That issue is not before me in the instant application, as what I am called upon to address is limited to the two issues that I have identified in paragraph 6 hereabove. I shall limit myself to making orders on those two questions.
19. In the end, these are orders that commend themselves to me:
- (a) That I hereby appoint Pius Nabwangu Andabwa, Ezra Andabwa, John Nabwangu and Beatrice Lwosi Ongoma administrators of the estate herein;
  - (b) That a grant of letters of administration with will annexed shall issue to the administrators appointed under (a), above, accordingly;
  - (c) That I hereby direct the Land Registrar, responsible for Kakamega County, to cancel the current registration of Kakamega Municipality/Block 1/163 and revert it to the proprietorship of the deceased herein, Francis Andabwa Nabwangu;
  - (d) That the matter shall be mentioned after forty-five days for compliance and monitoring;
  - (e) That each party shall bear their own costs; and
  - (f) That any party, aggrieved by these orders, has leave of twenty-eight days, to move the Court of Appeal, appropriately.
20. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF JUNE, 2022**

**W M MUSYOKA**

**JUDGE**

Mr Erick Zalo, Court Assistant.

Mr Shivega, instructed by Victor Shivega & Company, Advocates for the applicant.

Mr Koech, instructed by Harit Sheth, Advocates for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

Mr Charles Nabwangu.

Mr Raidon Andabwa.

