



REPUBLIC OF KENYA



**In re Estate of Charles Gungu Gwiyanga (Deceased) (Succession Cause
44 of 2021) [2022] KEHC 10300 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE 44 OF 2021**

WM MUSYOKA, J

JULY 22, 2022

(FORMERLY KAKAMEGA SUCCESSION CAUSE NO. 243 OF 2013)

IN THE MATTER OF THE ESTATE OF CHARLES GUNGU GWIYANGA – (DECEASED)

RULING

1. This is one of those matter that were being handled by F. Amin J. It was handed over to me on 16th June 2022. It was due for ruling on 20th January 2022.
2. There are 2 applications for determination: dated 17th May 2017 and 20th September 2019.
3. The application dated 17th May 2017 seeks rectification of the certificate of confirmation of grant dated 23rd February 2017, and it is brought at the instance of Seth Livanze Gungu, setting out how the property was to be shared out, as follows; Kakamega/Mabusi/232 to Gladys Kinzi, Kakamega/Mabusi/231 to Seth Livanze Gungu, Kakamega/Mabusi/230 to Patrick Gungu M’Marange, Kakamega/Mabusi/229 to Humphrey M. Abisai, Kakamega/Mabusi/228 to Janet Adolwa and Kakamega/Mabusi/227 to Peter Lung’aho. He averred that the application is intended to reflect the correct numbers as existing on the ground.
4. The application is opposed by Peter Lung’aho who filed an affidavit of protest, sworn on 18th June 2019. He avers that the applicant had initiated the succession proceedings without involving all the parties, as the petitioner had listed only Elias Adulo Ingalava as survivor, yet he was a purchaser and not a son of the deceased. He further avers that the certificate of confirmation of grant does not reflect the subdivision on the ground, he avers that he and the other survivors had sold their portions to third parties. It is averred that Kakamega/Mabusi/229 had been demarcated and given to Humphrey Odali, Mtingu Abisai, who sold it to Catherine Mueni Kilonzo on 22nd July 2008, and Humphrey sold the remaining portion to her on 9th February 2012. Humphrey thereafter moved and settled at Mawe Tatu.
5. The applicant has responded, vide an affidavit sworn on 26th June 2019. He avers that he involved all the children of the deceased in proceedings and all were present on 13th December 2016, where all consented to the mode of distribution and sharing of the estate. He asserts that no one was excluded, and on 30th October 2018 all were present in court at confirmation of grant. Save of Peter Lung’aho who



was absent. He states that at confirmation there was error as the property was not properly matched to the beneficiaries. He asserts that Humphrey Odali sold his share to Catherine Mueni Kilonzo, then it is up to the Catherine to wait until after transmission, and claim from those who sold to her. He avers that Catherine bought property from a person who did not have title vested in him. He avers that Elias Adulo Ingalava bought land directly from the deceased. The land sold was at Maragoli. It is said to be ancestral land, and, therefore, it is not reflected in the certificate of confirmation of grant. He asserts that the respondent acknowledges that these distributions did not reflect the occupation on the ground.

6. The respondent swore an affidavit on 6th July 2019, filed curiously on 4th July 2019, in which he denies that he consented to the mode of distribution at confirmation, he did not attend court on 30th October 2018 and 13th December 2016 and that no one was financing him.
7. The application dated 20th September 2019 seeks joinder of Catherine Mueni Kilonzo as an interested party. She avers to have had bought land from one of the beneficiaries, and had been living on Kakamega/Mabusi/229 since 2008, and had developed the land. She avers that the succession proceedings were initiated in 2013 without involving her. She avers that the distribution on the ground did not reflect the subdivision on the ground and the people staying there. She asserts that the money raised for the sale was used to initiate the succession cause. She states that Kakamega/Mabusi/229 was sold to her by the late Musimbi M. Kavina, and the said seller bought land elsewhere and moved there with her son, Humphrey Odali. She says it is absurd for the beneficiaries who sold land to be benefit from the portions that they sold.
8. She has attached several documents to her affidavit to support her case. There is a sale agreement dated 22nd July, 2008, which allegedly demonstrates that Musimbi M. Kavina sold Plot No. 229 to the applicant and one Soita Wafuke. There is another sale agreement, dated 28th November 2011 which shows that Kellubo Adolwa Gungu sold 1.6 acres of Plot 69 to the applicant, and a second agreement was executed on 28th November 2011, over plot No. 69 between Fredrick Guiyanga Adola and the applicant. There is another agreement dated 9th February 2012, between the applicant and Humphrey Odali over Plot No. 229. There is another agreement dated 18th September 2013 between Kennethy Gungu Adolwa and the applicant over plot No. 69. Another sale agreement is dated 27th July 2015 between Peter Luhang'o Gwayanga and the applicant over the sale of Plot No. 69. Another application is dated 29th March 2018 between the applicant and Kennethy Gungu Adolwa for sale of plot No. 69.
9. The administrator has responded to the application dated 20th September 2019, by his affidavit sworn on 2nd December 2019. He asserts to the sole surviving son of the deceased, and the administrator of the estate of the deceased since 31st March 2015. He says that his grant was confirmed on 13th December 2016, and a certificate of confirmation of grant issued on 23rd February 2017. He describes the applicant as a stranger to the estate, as she was not a survivor of the deceased and a beneficiary of his estate. He states that he was not involved in the sale of land that the applicant is asserting. He avers that if the grandsons of the deceased, who are his nephews, sold portions of estate land to the applicant, then the applicant should wait until the portions sold to her are transmitted to the names of whoever sold the land to her, so that the sellers can then convey what she bought to her. He asserts that no one had a right to dispose of the property of the deceased before the succession proceedings were initiated, and if that happened then the same amounted to intermeddling. He asserts that the applicant acquired no state in the estate, and she was not an innocent purchaser for value without notice. He asserts that the rights of a purchaser should not supercede them of a survivor of the deceased or a beneficiary of the estate.
10. The application dated 17th May 2017 was placed before Njagi J on 30th October 2018. The court was informed that all the beneficiaries were in court except Peter Lung'aho. Njagi J interviewed those



present and they stated that they had no objection to the changes proposed in the application dated 17th May 2017. As Peter Lung'aho was not in attendance, it was directed that he be served with the application. Those in attendance on 30th October 2018 and had no objection were Gladys Kinzi, Patrick Gungu M'Murenge, Humphrey Odali Mtingu Abisai and Janet Kasandi Adolwa. The matter came up before me on 7th May 2019, Peter Lung'aho and Catherine Kilonzo were in attendance, and so were Patrick Gungu, Humphrey Abisai, Seth Luvanze, and Kenneth Gungu Adolwa. Peter Lung'aho was not agreeable to the proposed changes, and I directed him to file his reply to the application dated 17th May 2017. When the matter came up for hearing on 27th June 2019, I directed that the application dated 17th May 2017 be canvassed by way of written submissions. No directions were given on the application dated 20th September 2019, but when both applications were placed before F. Amin J. on 18th November 2021, the administrator indicated that he had filed written submissions, while the Advocate for Peter Lung'aho and Catherine Kilonzo stated that he would rely on the application and the affidavits. The matter was then allocated 20th January 2022 as the date for delivery of ruling on both applications.

11. I will start by determining the application dated 20th September 2019. Catherine seeks to be joined to the proceedings as interested party. Her joinder would be consequential to the determination of the application dated 17th May 2017, so I will determine that last.
12. Catherine seeks joinder on the basis that she had bought an asset of the estate, and asserts a right to participate in these proceedings as a beneficiary of the estate. The question that I will have to answer is whether Catherine is a beneficiary of the estate, sufficient to have her joined to the proceedings? It is common ground that she is not a relative of the deceased. She is not, therefore, a survivor of the deceased, she does not claim as a survivor, and she does not have the right of a survivor. It is also common ground that she did not buy the lands she claims from the deceased. All the sales she asserts happened after the demise of the deceased on 22nd March 1995. To that extent, she did not deal with the deceased. She did not acquire any stake in the estate by dint of any transactions with the estate. As at the time he died on 22nd March 1995, the deceased did not owe Catherine anything, and, therefore, his estate was not indebted to Catherine in any way, and she was not a creditor to it.
13. Catherine dealt with the survivors of the deceased after the demise of the deceased. The question that I will have to answer is whether that constituted her a creditor of the estate, and, therefore, a person beneficially interested in the estate. It is common ground that the persons that Catherine dealt with were not the administrators of the estate of the deceased. Section 45 of the *Law of Succession Act*, Cap 160, Laws of Kenya, outlaws the handling of the property of a dead person without authority, and it makes it an offence for anyone to do so, punishable by a fine or imprisonment or both. Section 79 of the *Law of Succession Act* vests the estate of a dead person in the executors of his will and the administrators of his estate. Section 83(b)(ii) of the *Law of Succession Act* outlaws the sale of immovable property of an intestate before confirmation of the grant.
14. For avoidance of doubt, sections 45, 79 and 82(b)(ii) of the *Law of succession Act* reads as follows: -
 - “ 45 No intermeddling with property of deceased person
 - (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall-



- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration

79 Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

82. powers of personal representatives Personal representatives shall have the following duties-

- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:
 - (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

15. Under Section 45, authority to handle the assets of a dead person emanates from grants of representation to the estate of such dead person. Under section 79 such property only vests in the person who holds the grant of representation, meaning that the person who hold legal title for the property of the dead, and, therefore, the only person who can enter into binding transactions with third parties. Any other person, who does not hold a grant has no authority to deal with the assets of a dead person, and cannot bind the estate, and cannot confer any valid title to any third party that they deal with. Any dealings between a non-holder of a grant, and a third party run afoul of section 45, and amount to intermeddling, are unlawful, and are tainted with criminality.

16. Catherine dealt with individuals who did not hold a grant over the assets of the deceased herein. Their transactions were, therefore, caught up in section 45. They amounted to intermeddling, they were criminal in character and, therefore, unlawful. Secondly, by dint of section 79, the persons who sold the land to her did not have a legal title to the property, as they were not administrators and the assets did not vest in them. They could confer no valid title to her whatsoever. The said sales were founded on lies since the sellers held themselves out as “Owners” of the land they were selling, when infact they did not. Their only interest in the assets was that they had the expectation that at confirmation they would be devolved to them. That expectation is not a certainty since assets can be sold, with leave of court, to settle estate debts, in which case they would be unavailable to the survivors of the deceased



- at confirmation, hence the provisions in section 82(b)(ii) that no immovable property is to be sold before grant is confirmed. The right to inherit the assets sold had not capitalized to the sellers when they purported to sell it to Catherine, and they had nothing, therefore, to sell to her at the time that the alleged sales were done. Consequently, Catherine acquired no interest at the estate to constitute her a beneficiary of the estate, and there would, therefore, be no basis for her to be added to the list of beneficiaries in the cause, nor to be joined to these proceeding as an interested party. The interest she seeks to protect was acquired through a process which section 45 and 82(b)(ii) have declared to be unlawful. A transaction rendered unlawful by statute cannot, subsequently, be protected by the law.
17. The application dated 17th May 2017 is for rectification of the certificate of confirmation of the grant. It is premised on Rule 43(1) of the Probate and Administration Rules, which is itself premised on section 74 of the *Law of Succession Act*. I doubt whether section 74 of and Rule 43(1) are available of rectification of certificate of confirmation grant, for they are specific that they are designed for rectification of grants of representation, whether full or limited. A certificate of confirmation of grant is not a grant of representation, to be rectified under section 74 and Rule 43(1). Anyhow, the intent of the application is clear, and I can deal with it under the inherent powers of the court, saved under Rule 73 of the Probate and Administration Rules.
18. Both sides agree, that the assets, as listed in the original certificate of confirmation of grant, do not reflect what is on the ground. The application seeks to rectify that anomaly. All the beneficiaries named in the certificate agree, save for Peter Lung'aho, yet, Peter, has not given any concrete reason for being so opposed, except that he appears to speak on behalf of Catherine. I see that Kakamega/Mabusi/229 is now being devolved to Humphrey Abisai, the person who allegedly sold it to Catherine. That should take care of her alleged interests. She has no claim to the estate, as stated elsewhere, her claim is against the persons who sold land to her. Once transmission is done, and the titles transferred to the names of the beneficiaries, she should approach the sellers and have them honour their deals with her.
19. In the end, I allow the application dated 17th May, 2017, but disallow that dated 20th September 2019. Each party shall bear their own costs.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 22ND DAY OF JULY 2022.

W.M. MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant

Mr. Abok, Instructed by Abok Odhiambo & company, advocates for Catherine Mueni Kilonzo.

Mr. Osango, instructed by Osango & company Advocates, for the administrators.

