



REPUBLIC OF KENYA



In re Estate of George Watanya Maina (Deceased) (Succession Cause 966 of 2012) [2022] KEHC 14017 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14017 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 966 OF 2012
WM MUSYOKA, J
OCTOBER 21, 2022**

IN THE MATTER OF THE ESTATE OF GEORGE WATENYA MAINA (DECEASED)

RULING

1. I am called upon to determine a Motion, dated July 5, 2021. The application is for confirmation of the grant made on May 19, 2021 and issued on even date. It is at the instance of Ben Mulindi Andanje, one of the administrators appointed under that grant.
2. The applicant has not done a very good job with the application. He lists 7 individuals, and describes them as dependants of the deceased. Yet dependency is defined in sections 26 and 29 of the *Law of Succession Act*, Cap 160, Laws of Kenya, and he has not provided any material to demonstrate that the said 7 had been adjudged by the court to be dependants of the deceased, for whom reasonable provision was supposed to be made, in terms of section 26 of the *Law of Succession Act*. He has not defined how the 7 are related to the deceased, and why provision should be made for them under the Act. That is what is anticipated by the proviso to section 71(2) of the *Act* and rule 40(4) of the *Probate and Administration Rules*. Who are these people, and why should they be provided from the estate?
3. Secondly, the applicant is a not a child of the deceased, but a creditor, who allegedly bought part of the assets from the deceased. He and Albert Walenya Wakhisi. No evidence has been attached to the application, to demonstrate that the 2 bought portions of the land, that is to say South Kabras/ Samitsi/564, from the deceased. However, the applicant has placed a consent letter dated 30th April 2015. That consent, he says, was adopted as an order of the court, and what he should have exhibited is the formal order extracted from the order of the court of April 30, 2015. The letter dated April 30, 2015 is not a court order.
4. The application has been responded to by Rachel Namukuru Ambani. She concedes to the claim by the applicant and Albert Walenya Wakhisi. She states that she was yet to present her proposal on distribution, as it was with the surveyors. She attaches to her affidavit a proposal that the land be distributed amongst BM Andanje, AM Wakhisi, M. Wechuli, W. Efumbi, IM Wafunga, NM Juma, HL Mulanda, BM Watanya, Racheal Ambani, Ruth Watanya, Roscah Watanya, Eddah Watanya, and Sarah L Watanya. Racheal Ambani, Ruth Watanya, Roscah Watanya and Eddah Watanya are to hold



the property in trust for Solomon Adagala Watanya; while Sarah L Watanya and Racheal Ambani are to hold in trust for George Watanya and Thomas Sichangi until they turn 22 years.

5. I have looked at the record. There is a letter from the Chief of Shirugu Location, dated September 3, 2012. It shows that the deceased was survived by 7 individuals, being 4 daughters and 3 sons, namely Racheal Namukuru Ambani, Joshua Shamalla Watanya, Ruth Masitsa Watanya, Solomon Atakala Watanya, Roscah Indombo Watanya, Billington Makuto Watanya and Eddah Namukhosi Watanya. These same individuals are listed in the petition, and in the Motion, dated July 5, 2021. These would be the persons entitled to the intestate estate of the deceased. The estate is said to comprise of South Kabras/Samitsi/564 and Plot No 1 Samitsi Market.
6. The applicant proposes that he and Albert Walenya Wakhisi should be allocated 3 and 2 acres, respectively, out of South Kabras/Samitsi/564, given to them as per the consent order of April 30, 2015. He proposes that the balance of South Kabras/Samitsi/564 and Plot No 1 Samitsi Market should be shared equally between the 7 children of the deceased, or as the said survivors may agree.
7. Rachel Namukuru Ambani proposes a distribution that would involve a circle beyond the 7 children of the deceased and the applicant and Albert Walenya Wakhisi. She has not explained how these other individuals are related to the deceased, and why they should be catered for out of his estate. I am talking about M. Wechuli, W Efumbi, IM Wafunga, NM Juma, HL Mulanda and BM Watanya. Some explanation should be given. The court cannot just give the property making up the estate to total strangers, and it is up to those who propose that they be given shares in the estate to introduce them to the court, in terms of describing who they are to the estate, and what the basis of their entitlement to the estate is.
8. The deceased died in 2011. The initial administratrix was Rachel Namukuru Ambani. She was not keen on distributing the estate, hence her grant was revoked, and the current administrators, who are creditors of the estate were appointed. In her affidavit of April 28, 2022, it would appear that the family is not yet ready with its proposals on distribution. The entitlement of the applicant and Albert Walenya Wakhisi is certain. The 2 do not have to wait for the family to take its sweet time. They should get their share now, to allow them to move on with their lives. The administration of an estate should not last forever. According to the *Law of Succession Act*, administration of an estate should be completed within a year, of the making of a grant of representation. The deceased died in 2011, this cause was initiated in 2012, we are now in 2022. The matter should be brought to a close.
9. The deceased was survived by children, but no spouse. As the deceased died intestate after the *Law of Succession Act* had come into operation in 1981, which would mean that the estate is to be distributed strictly in terms of Part V of the Act. As he was survived by children, but no spouse, the estate share be shared between the said children in terms of section 38, which states as follows:

“Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall ... devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”
10. If turns out that some of the children have since died, then the shares devolved upon them shall be dealt with in succession causes to be initiated in their names, for distribution to whoever survived them or is entitled to them. Should it turn out that some of the children have purported to have sold or assigned their entitlements to third parties, which the law frowns upon, by dint of section 45 of the *Law of Succession Act*, the purported buyers shall pursue their interests from such children after the grant herein has been confirmed, and the shares devolved to them.



11. However, before I make final orders on this matter, there is an issue that the administrators will have to address first. I have seen, from the certificate of official search, dated 31st August 2012, on South Kabras/Samitsi/564, a restriction that was registered against the title on December 28, 1995, to bar dealings on it, until finalization of Kakamega HCCC No. 304 of 1993. Although this restriction still sits in the register, none of the parties have addressed me on it, yet the same is relevant to the distribution of the property, for it restricts any dealings with it, which include transfer or subdivision of the property, that are integral to distribution. This is an encumbrance which makes the property unavailable for distribution, before the same is removed. Even if I were to close my eyes to its existence, and proceed to confirm the grant, the administrators would still encounter difficulties implementing the confirmation orders, so long as the restriction remains in place.
12. I shall accordingly postpone confirmation of the grant, in terms of section 71(2)(d) of the Law of Succession Act, to allow the applicant place on record information on Kakamega HCCC No. 304 of 1993, in terms of the status of that suit, whether it is still pending, what were the final orders made in it, and whether the said orders would have an impact on how South Kabras/Samitsi/564 is distributed. I shall allocate a date for mention of the cause for the purpose of receiving that information.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 21ST DAY OF OCTOBER 2022

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Ms. Luyayi, instructed by Makokha Wattang'a & Luyayi, Advocates for the applicant.

Ms. Janet Anyango, Advocate for Rachel Namukuru Ambani.

