



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

P&A NO. 179 OF 1997

IN THE MATTER OF THE ESTATE OF NDOMBI MAKALE (DECEASED

AND

VINCENT WANYAMA NDOMBI.....PETITIONER

VERSUS

FESTO WANYONYI NDOMBI.....1ST OBJECTOR

BOAZ WEKESA WAFULA.....2ND OBJECTOR

JOHN MUKUSI NDOMBI.....3RD OBJECTOR

RULING

The deceased Ndombi Makale died on 12th July 1986 at the age of 82 years. He was survived by 4 sons and one daughter. In January 1994 Vincent Wanyama Ndombi petitioned this court for grant of letters of administration intestate. In Form P&A 5 he indicated the deceased left the following surviving him:

1. Vincent Wanyama Ndombi
2. Patrick Wanyama

His estate comprised of

1. Land parcel Kamukuywa Scheme 110/622/5

After several adjournment since 19.11.1997 when the grant was issued the same was finally confirmed on 18.6.2014 by Mabeya J. In the confirmed grant the property was distributed as here under.

SCHEDULE

Name	Description of Property	Share of Heirs
	<u>L.P KAMUKUYWA SHCEME/LO/6322/5</u>	
	<u>BUNGOMA/KAMAKOIWA/322</u>	
VINCENT WANYAMA NDOMBI		11 ACRES
PATRICK WANJALA NDOMBI		8 ACRES

1.Festo Wanyonyi Ndombi 2. Boaz Wekesa 3. John Mkusi Ndombi the objectors filed the summons dated 10th March 2015 seeking revocation or annulment of the grant under Section 76 of the succession Act Cap 160 and Rule 44 of the Probate and Administration Rules seeking the following orders:

1. (spent)

2. That the grant of letters of administration intestate issued to the petitioner herein and confirmed on 19th day of June 2014 be revoked or annulled by this court.

3. That cost of this application be provided for.

The grounds for the applications are that:

a) The grant was confirmed fraudulently by making false statement or by concealment from the court material facts.

b) The grant was obtained by means of untrue allegations of facts essential in court of law to justify the confirmation of grant.

c) That the administrator did not give out names of all beneficiaries under the estate.

d) That the said mode of distribution has disinherited other family members.

e) It is necessary and in the interest of justice that the said grant be annulled and/or amended to reflect true and fair sharing of the estate.

The application is supported by the supporting affidavit of John Mkusi Ndombi with authority of the other objectors and reiterates the grounds for the application.

On 15.3.2018 Aroni J gave directions as follows:

1. Summons dated 10.3.2015 to be heard by way of viva voce evidence.

2. Parties to file witness statements within 15 days.

3. Documents if any to be exchanged within same period.

4. Hearing on 4th September, 2018.

The matter therefore proceeded by parties giving evidence.

PW1 Yohana Mukusu Ndombi adopted his witness statement dated 3.4.2018 as his evidence in chief. He testified that at time of death the deceased had parcel of land Bungoma/Kamukuywa/322 measuring 8.2 HA (approximately 19 acres). He had the following dependants.

a. Yohana Mukusu Ndombi (aka) John Mukusi Ndombi (myself) -3rd objector.

b. Festo Wanyonyi Ndombi – 1st Objector.

c. Vincent Wanyama Ndombi – the Petitioner herein.

d. Joseph Wafula Ndombi – deceased and the father of Boaz Wekesa Wafula the 2nd objector herein.

e. Patrick Wanjala Ndombi – beneficiary.

He testified that in 2014, the family members decided to take letters of administration to the estate. They however received information that Petitioner and one Patrick had taken out letters of administration and that the same had been confirmed. On receipt of the information and noting that all the beneficiaries of the estate were not involved, they filed the present application. He testified that the deceased died intestate and did not make any will or distribute this property when alive. On other parcels of land, he stated:

a) That the land reference numbers Bungoma/Kabisi/271, Bungoma/Tongaren/298 and Bungoma/Kabuyefwe/223 are not part of the deceased's property and net estate and therefore not worth to be accounted for and administered and confirmed during the confirmation stage as the Petitioner has stated in his affidavit.

b) That he wish to inform the honourable court that land reference number Bungoma/Kabisi/271 belongs to him and he acquired it by virtue of purchase through the settlement scheme fund trustee and he has a title document to it.

c) That land parcel number Bungoma/Kabuyefwe was personally purchased by his late brother Joseph Wafula Ndombi through a loan form settlement fund trustee and he demised before he changed registration and they have a few receipts for payment of the loan for purchase of the said land to support this case.

d) That finally land reference number Bungoma/Tongaren/298 initially referred to as Bungoma/Tongaren/279 was solely

brought by his brother Festo Wanyonyi Ndombi. It is still in the name of the public trustee. He bought it from one Kiptabut Arap Kirembe and there are court proceedings to that effect.

In his opinion the deceased property should be distributed as follows:

a) Yohana Mukusu Ndombi (aka) John Mukusi Ndombi	-	4 acres
b) Festo Wanyonyi Ndombi	-	4 acres
c) Vincent Wanyama Ndombi	-	5 acres
d) Patrick Wanjala Ndombi	-	5 acres
e) Boaz Wekesa Wafula on behalf of the estate of the late Joseph Wafula Ndombi (deceased)	-	1 acre
TOTAL		19 acres.

On being cross-examined by Kundu for the Petitioner he testified that land parcel Bungoma/Kibisi/271 belongs to him as he bought it in 1964 and is not part of the estate. He testified that he currently occupies 4 acres in Bungoma/Kamukuywa/322 along with his other siblings.

PW2 Festo Wanyonyi the 1st Objector who is visually impaired adopted the statement of PW1. He testified that he has land parcel No. Bungoma/Tongaren/279 which belongs to him having bought it from Kaptebus arap Kilemi in 1965. He testified that he stays in the land No. 322 and that the deceased did not distribute his properties before he died.

Vincent Wanyama Ndombi the Petitioner adopted his witness statement dated 23rd April 2018 as his evidence in chief. He stated that the deceased had 5 children. The deceased left parcel NO. Bungoma/Kamukuywa/322 measuring 8.2 HA. That he obtained letters of administration to the estate on 19th June 2014 and registered the land in the names of Vincent Wanyama Ndombi and Patrick Wanjala Ndombi and were to get 11 acres to the petitioner and 8 acres to Patrick making a total of 19 acres.

In respect to the objectors he stated:

a) That the objectors herein Festo Wanyonyi, John Mukusi Ndombi and Joseph Wafula Ndombi (now deceased) were each given 15 acres each from other parcels of lands NO. Bungoma/Kabuyefwe/223 measuring 6.3 Ha.

b) That Festo Wanyonyi was given Land Parcel No. Bungoma/Tongaren/298 measuring 6.4 Ha, John Mukusi Ndombi – Bungoma/Kibisi/271 measuring 6.5 Ha and that the 2nd Objector Boaz Wekesa Wafula is the son of the late Joseph Wafula Ndombi is entitled to his father's share.

c) That the objectors have no interest in parcel of land Bungoma/Kamakoiwa/322 neither do they have any legitimate claim over the same and that their intention is to frustrate him in his quest to distribute the parcel of land left to him by the deceased Ndombi Makale.

On being cross-examined by Mrs. Chunge for the Objectors he stated that the 1st, 3rd objectors are deceased's sons and the 2nd objector Boaz Wekesa is a son of his brother Joseph Wafula (deceased). He admitted that he did not involve them in the succession because they have their own land.

Ms. Chunge for the objectors filed written submissions in support of the application. Counsel submitted that the grant was obtained and confirmed by the Petitioner without the consent of or involvement of the objectors who are brothers of Petitioner and children of the deceased. Counsel submitted that the grant was therefore obtained fraudulently and ought to be revoked.

Mr. Kundu for the Petitioner submitted that the land Bungoma/Kamakoiwa/322 measuring 8.2 HA was allocated to the Petitioner and one Patrick Wanjala Ndombi and Petitioner was to get 11 acres and Patrick 8 acres. That the Objectors had other parcels of land and that the deceased made a will dated 5th April 1986 which clearly shows the distribution of the estate to the beneficiaries. He submitted that the cause was filed in 1997 and the objectors never raised any objection. He submitted that this application for revocation is an afterthought.

This application is brought under the provisions of Sec. 76 of the Law of Succession Act Cap 160 which provides:

76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

a) that the proceedings to obtain the grant were defective in substance;

b) 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;

c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

ii. to proceed diligently with the administration of the estate; or

iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

The Petitioner in form P&A 5 in paragraph 4 indicated that the deceased died intestate and left the following surviving him.

1. Vincent Wanyama Ndombi
2. Patrick Wanjala.

In his evidence in court he testified that 1. Festo wanyonyi, 2. John Mkusi, 3. Joseph Wafula (deceased) represented by son Boaz Wekesa were also his brothers. He gave no explanation why he left them out in the list of the children who survived the deceased.

In an affidavit sworn on 22nd December 2018 in support of the confirmation of grant, the Petitioner deponed

1. A grant of letters of administration of the said Estate of Ndombi Makale was made to me in the matter on 18th April 1986.

Name	Address	Age.
a) Vincent Wanyama Ndombi	P.O Box 410 KIMILILI	65
b) Patrick Wanjala Ndombi	P.O Box 410 KIMILILI	55

2. The deceased did not have other dependants.

3. No application for provision for dependants is pending.

4. The identification and shares of all persons beneficially entitled to the said Estate have been ascertained and determined as follows:-

Name	property	Shares
a) Vincent Wanyama	Bungoma/Kamukuywa/322	11 acres
b) Patrick Wafula Ndombi	Bungoma/Kamukuywa/322	8 acres

In view of the petitioner's evidence it is not true that the deceased did not have other dependants except him and Patrick Wanjala Ndombi.

The Petitioner readily admits that he did not involve them in the succession cause stating in cross-examination.

“Festo Wanyonyi Ndombi, John Makusi are my brother. Boaz Wekesa is the son of Joseph Wafula who was my brother. I did not involve them in the succession. I was given a letter from the chief but it was burnt. This is chief of Naitiri location. I did not see it. I was given grant together with Patrick I have shown that they have their own land”.

It is therefore clear to this court that the petitioner willingly concealed to court that there were other beneficiaries, and that he did not involve them or seek their consent in the application for grant and subsequent confirmation. I find that the grant issued to the petitioner was obtained fraudulently by making false statement and concealing facts which were material in the cause. Consequently, I grant order for revocation of grant issued to Petitioner Vincent Wanyama Ndombi and confirmed on 18th June 2014. The land Title Bungoma/Kamakoiwa/322 do if subdivided such subdivision and transfer is cancelled and the parcel of land revert to the name of Ndombi Makale the deceased.

In view of the revocation of the grant a fresh grant do issue jointly to:

1. Festo Mukusi Ndombi

2. Festo Wanyonyi Ndomabi

3. Vincent Wanyama Ndombi

DATED AT BUNGOMA THIS 19TH DAY OF MAY, 2021.

S.N RIECHI

JUDGE