



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 699 OF 2011**

**IN THE MATTER OF THE ESTATE OF THE LATE JUMA TSABUKO NYAWANGA (DECEASED)**

**B E T W E E N:**

**MIRICHI LUTA BARASA.....PETITIONER/APPLICANT**

**AND**

**(1) ALI NANGA SIANGA**

**(2) ZAINABU WANGA ALI**

**(3) ISMAEL KEYA TSABUKO**

**(4) ISAAC ALLAN MUKHWANA.....RESPONDENTS**

**RULING**

1. The Court has before it an application by a Notice of Motion brought under *Section 2, 45 and 82* of the *Law of Succession Act* and *Rule 73* of the *Probate Rules*. The Notice of Motion is dated 25<sup>th</sup> January 2016 and filed on 10<sup>th</sup> March 2016. The Applicant is the Administrator of the Estate of JUMA TSABUKO NYAWANGA (Deceased) herein after referred to as the Deceased. The Application seeks the following orders:

i. That the registration of joint names of ALI NAANGA SIANGANI and ZAINABU WANGA ALI as registered proprietors of land parcel number N. WANGA MAYONI/1033 be struck out and the land reverts to the estate of the late JUMA TSABUKO NYAWANGA.

ii. That the registration of ISMAEL KEYA TSABUKO as the registered proprietor of land parcel number S. WANGA/LUREKA/538 be struck out and the land do revert to the estate of the deceased JUMA TSABUKO NYANWANGA.

iii. That the registration of ISAAC ALLAN MUKHWANA as the registered proprietor of land parcel number N.WANGA/MAYONI/1034 be struck out and the registration do revert to the estate of the LATE JUMA TSABUKO NYAWANGA

iv. Costs of the Application be provided”

2. The Grounds relied upon are

“1.That the Respondents have committed a crime of inter meddling with the estate of the late JUMA TSABUKO NYAWANGA

2. That it is only the procedures prescribed in the succession Act which apply to intestate succession and the respondents did not apply the procedures to get registered

3.That the applicant is the administer of the estate of the late JUMA TSABUKO NYWANGA and will like to subject the estate to laid down procedures in the succession Act to distribute the estate legally.

4. The Affidavit of the applicant.

3. The Application is supported by the Affidavit of the Administrator/Applicant. The Affidavit deals with issues of collection in of the Estate as well as distribution, both of which are the functions and duties of an administrator. In paragraph 3 of the Affidavit, the Administrator deposes that the Deceased, at the time of his death, owned the following assets:

- a. N.WANGA/MANYONI/1033 measuring 1.73 Ha
- b. N.WANGA/MAYONI/1034 MEASURING 1.73 Ha
- c. S. WANGA/LUREKO/538.

In support of those assertions, the Applicant exhibits copies of the official land searches relating to those parcels of land. Exhibit marked M1 demonstrates that on 12<sup>th</sup> November the register showed that N/WANGA/MAYONI/1033 was registered in the name of JUMA NSABUKO NYAWANGA. The same applies to the other two parcels. The Deceased passed away on 9<sup>th</sup> April 1991.

4. The Respondents, and each of them oppose the Application, but they do not deny that the land in question was owned by the Deceased before he died. The explanations they give as to how they came to be the registered owners will be dealt with below.

5. According to the Supporting Affidavit, the family of the Deceased comprised the following:

1. Miriam Wekesa – Widow (predeceased but survived by children)
2. Mwajuma Mwanza – Widow – died in 2011 survived by a grandson
3. Mwanaharusi Malala – Widow
4. Fatuma Lukendu – daughter (married)
5. Mwatuma Munyekenye Owangwa – daughter (married)
6. Mwanatena Odoli Mukungu – daughter (married)
7. Alima Schiechisa Makokha -daughter (married)
8. Ali Nganga Siangani – grandson
9. Ramadhan Kanyamu – son
10. Ismael Keya -son
11. Mirichi Lita Barasa – daughter (married).

Exhibited to the Petition is a letter from the Chief Matungu Location dated 5<sup>th</sup> May 2011. It lists the family members as:

1. Mirichi Luta Barasa – daughter
2. Fatuma Lukana Kwalo
3. Mwatuma Mwe owawa
4. Mwatuma Odoli
5. Ramadhan Konyamu Tsabuko
6. .(Illegible) Makokha
7. Ali Nya... Siangani – son

6. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have filed replying Affidavits. The Fourth Respondent filed his Replying Affidavit on 15<sup>th</sup> April 2016. He says that he purchased the parcel of land known as N. Wanga/ Mayoni/1034 from Ali Siangani Nanga and Ramadhan Kanyam Tsabuko “sometimes in 25<sup>th</sup> January 2011”. He has exhibited an agreement of sale between himself as purchaser and Ali Siangani Naanga and Ramadhan Kanyamu Tsabuko as joint vendors. He says he conducted a due diligence by inspecting the title deeds and green card before entering into the sale agreement. He says he was not aware there was a succession dispute in relation to the land and nobody made him so aware. The copy extract of the Land Register exhibit appears to show that the first entry was made on 21<sup>st</sup> February 1991. There was then a supposed transfer to Ramadhan K Tsabuko and Ali Nganga Siangani (a minor on 23<sup>rd</sup> November 2010) for which the title was issued 8 days later with an onward sale and transfer about two months later. The Fourth Respondent asserts that he is an innocent purchaser for value.

7. The Third Respondent has filed a Replying Affidavit on behalf of the First Second and Third Respondents. He says that the Application is incompetent, defective, bad in law, without any legal or factual basis, unprocedural and an abuse of the court process and should be dismissed with costs. He states that he is one of the sons of the Deceased. He confirms that the Deceased passed away on 9<sup>th</sup> April 1991. He lists the members of the family of the Deceased. It appears to be different from the list provided by the administrator. The family are listed as:

- a. Mariam Nechesa – Wife (Deceased)
- b. Mwajuma Mwanza – Wife (Deceased)
- c. Mwanarusi Malala - Wife
- d. Mirichi Lutta – daughter
- e. Fatuma Lukandu – daughter
- f. Mwanatuma Munyekenye – daughter
- g. Mwanatena Odoli – daughter
- h. Alima Sichiechisa – daughter
- i. Mohamed Ooseni Makokha – son (Deceased)
- j. Chukune Tsabuko – son
- k. Amina Namai – daughter
- l. Abraham Kisiangani – son (deceased)
- m. Mwajuma Olukandu - daughter (deceased)
- n. Ramadhan Kanyamu – son
- o. Amina Nechesa – daughter
- p. Mwanatena Murono – daughter (deceased)
- q. Chausiku Mulo – daughter
- r. Adija Chitechchi – daughter (deceased)
- s. Ismael Keya Tsabuko – son
- t. Zainabu Juma – daughter

8. At paragraph 10 of his Replying Affidavit, the Third Respondent states that before the Deceased died, he expressed his will that he intended Land Parcel N. Wanga/Mayoni 1820 to be shared between his two sons namely Abraham Kisiangani and Ramadhan Kanyamu and Land Parcel S. Wanga/Luroeko/538 to be given to the Third Respondent. He goes on to say that the Deceased applied to and attended the Land Control Board in Mumias and obtained consent for the subdivision. That is contradicted by the Administrator who states that during the month of February 1991, the Deceased called a family meeting and told all his children that he had sub-divided his land and wished that we the daughters who belong to his first wife would get land parcel number **N.Wanga/Mayoni/1033** as our inheritance. The Administrator goes on to say that the Deceased was ailing when the meeting took place but he put his wishes into writing and the document was given to Ramadhani for safe keeping.

9. From the Affidavits, it is clear that the First to Third Respondents claim that they received the land directly from the Deceased as an inter vivos gift or transfer. That was challenged by the Administrator and her sisters firstly in the **Mumias Land Disputes Tribunal claim No. 25 of 2010** and then in **Mumias SRM Misc App No. 4 of 2011** when the Tribunal's award was adopted by the Court. The Decision of the Tribunal is also noteworthy in that it records that as at 10<sup>th</sup> December 2010 none of the beneficiaries has petitioned for letters of administration. The Objector was directed to apply within 45 days but he did not.

10. The Third Respondent now asserts that he had applied for and obtained letters of administration before any transfer was done. According to the Letters of Administration exhibited, the Deceased passed away on 10<sup>th</sup> March 2005. **That was in Succession Cause No. 390 of 2009.** Interestingly, when the Administrator filled for Letters of Administration, the Principal Registry in Nairobi certified that **no** letters of administration had been granted for the Estate of Juma Tsabuko.

11. As is clear from the Affidavits – including the Futher Affidavit of Mirchi Luta Barasa, the Application and the Grounds put forward are fiercely contested. In the circumstances, the Court must evaluate the Parties respective cases. The Parties have filed written submissions as directed. The Petitioner/Administrator’s Submissions were filed on 2<sup>nd</sup> October 2018 and the Respondents’ Written Submissions were filed on 21<sup>st</sup> October 2020 (that is two years later).

12. The Court must also evaluate the Parties’ evidence. The Administrator/Applicant relies on **Sections 2, 45 and 82** of the *Law of Succession Act*, as well as **Rule 73** of the **Probate and Administration Rules**. **Rule 73** of the Probate and Administration Rules provides: “*The court shall within one year from the date of any grant of representation give notice to the holder of the grant to apply for confirmation thereof.*”. Therefore, the Administrator is asserting that she has a duty and right to collect in the Estate of the Deceased. She argues that any property that has not been transferred pursuant to a proper procedure as provided by the Law of Succession Act, can and should be reversed. **Section 82(a)** of the Act provides that “*Personal representatives shall subject only to any limitation imposed by the grant, have the following powers..... (a) To enforce, by suit or otherwise, all causes of action which by virtue of any law survive the deceased or arise out of his death for his estate*”. She further argues that the Respondents have been guilty of intermeddling with the Estate which is an offence under **Section 45** of the Act which provides “*(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....*” The examples she relies upon are that the Respondents transferred the entirety of the Estate into their own names thereby excluding other members of the family. In particular, they went against the stated wishes of the Deceased.

13. The Respondents put forward a scenario where their polygamous father made a gift of all his property to his three sons to the exclusion of his surviving widow(s) and his own daughters. In exchange they were to receive one cow each. Even if that was a true reflection of cultural practices and/or the reality, there is no evidence that the daughters received any head of cattle whatsoever. The Court must evaluate the evidence before it.

14. In support of her allegation of an oral/verbal will where the Deceased sub-divided the land in Mayoni so that there were three pieces of land, one to be inherited by each widow and/or her offspring, there is the decision of the Lands Tribunal which received the evidence from the members of the family and/or community who were present at the last family meeting. It is said the Deceased made his wishes known at that meeting in February 1991 and gave his documents of ownership to Ramadhan so that he could put into effect his Father’s wishes.

15. The Decision of the Lands Tribunal notes that the Deceased has three wives. The only surviving wife gave evidence that parcel no 1033 and 1034 were transferred to Ibrahim and Ramadan respectively. Ibrahim passed away and “his share” was given to his minor son Ali. Again there is no mention of any succession cause permitting such sharing/vesting.

16. Also on the Court File is an “Affidavit for Clarification sworn by Ramadhan Kanyamu Tsabuko”. There, he says that he is the eldest son of the Deceased He says that the Deceased owned a parcel of Land “known as NORTH WANGA/MAYONI/820. He says his father subdivided the same into two portions and transferred one half number 1033 to Ali Nyawanga Kisiangani, the son of Ibrahim Kisiangani who had passed away. He fails to mention that in effect that would be transferring ownership to a minor when his mother was alive. He also says that the second half (No 1034) was transferred to him and he sold that onto the Fourth Respondent. He asserts that was all done before the death of the Deceased in April the same year and therefore is excluded from the Estate.

17. The Third Respondent puts forward (on oath) a different version of events. He says that he obtained letters of administration which were confirmed before a further part of the Estate was transferred to him. He asserts that was in **High Court Succession Cause No. 390 of 2009**. The File bearing the quoted number relates to a Joseph Andia Mbinge. The Letters of Administration exhibited to the Replying Affidavit refers to “*all the estate of JUMA TSABUKO AND MUSA MAWANGA*”. The identity of Musa Mawanga and his connection to the Deceased has never been explained. In addition, the Third Respondent depones on oath that his late father passed away in Lureko during April 1991 yet the letters of administration state he died in Mumias 14 years later. Clearly, that document is not reliable evidence. The Certificate of Confirmed grant also bears the name of two unrelated deceased persons. To this Court, that suggests a document that is not verifiable.

18. Also, notably contrary to that version of events, is the confirmation from the Principal Registry that at the time the Petitioner filed her petition, there were no grants of probate, letters of administration or otherwise issued in relation to the estate in question. In addition, the Lands Tribunal records that “No succession cause has ever occurred to any land that belonged to the late Juma Tsabuko Nawanga.

19. The Fourth Respondent asserts repeatedly that he was a bona fida purchaser without notice, however, the “sale agreement” he exhibit,s provides staged payments, at the first stage the buyers were to demonstrate they had title deeds. That suggests far from conducting a due diligence as he now depones, he was fully aware the persons selling the land had **no title deeds**. In fact, they did not have ownership at all, and he knew that. He was only willing to part with his money when they were able to obtain titles for themselves and then him – however that was done.

20. In the circumstances it is clear that the Estate of the Deceased was divested by the Respondents without going through the proper process of probate provided by the **Law of Succession Act** and therefore was unlawful. More particularly, in relation to the Fourth Respondent, not only was he aware of the absence of good title he was complicit and therefore does not come before the Court with clean hands.

21. It is therefore, Ordered and Directed that:

1. All titles issued in relation to the Estate of the Late Juma Tsabuko Nawanga whether it be (i) 1033 (ii) 1034 and/or (iii) South Wanga/Lureko revoked and/or annulled and/or reversed with immediate effect
2. All parcels to vest in the Estate of the Deceased and be available for distribution
3. This Ruling and copies of the Affidavits of the Respondents to be sent to the DCIO and the ODPP to consider whether to prosecute the Respondents for (a) intermeddling, (b) perjury and/or (c) fraud.

**Dated June 2021**

**Order accordingly,**

**FARAH AMIN**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS THE 19<sup>TH</sup> DAY OF NOVEMBER 2021 IN**

**KAKAMEGA**

**Note: Date of Delivery changed because of a bereavement and Covid containment measures**

In the Presence of:

Court Assistant: Dennis Wasilwa

Mr Osango

Mr Momanyi (attended later and was informed of the outcome)

Mr Ramadhan

Mr Isaac Alan Mukhwana