



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**

**SUCCESSION CAUSE 46 OF 2002**

**GEORGE SUDI.....PETITIONER**

**AND**

**RAPHAEL WEPUKHULU KILONGI.....DECEASED**

**DIRECTIONS**

This succession cause came up for mention before this court on 11th November 2004. Mr. J.S. Khakula, advocate for George Sudi Wepukhulu, the petitioner herein and Mr. Barasa advocate for Cosmas Mukisu Wepukhulu, a beneficiary, applied to this court to peruse the files relating to this cause and thereafter give directions. I granted the orders and proceeded to peruse the relevant material placed before me. I must confess the exercise of combing through the many files was a tedious exercise which needed the patience and time rarely afforded judicial officers.

My journey traversed four files. To begin with, the petitioner sought for letters of administration in respect of the estate of Raphael Wepukhulu Kilongi deceased vide Bungoma S.P.M. Succession cause No. 75 of 1995. A grant was made to him on the 29th day of February 1996. The aforesaid grant was confirmed on 12th March 1996. The temporary grant of representation dated 29th February 1996 indicated that L.R. NO. BOKOLI/MISIKHU/573 would be inherited by the petitioner. The certificate of confirmation did not mention the names and the share of the other beneficiaries.

In a chamber summons dated 22nd March 1996 one Cosmas Mukisu Wepukhulu, a beneficiary to the estate of Raphael Wepukhulu Kilongi (deceased) applied to the senior Resident Magistrate to have the order of distribution by a temporary grant reviewed and set aside. The senior Resident Magistrate saw no merit in the summons and she consequently dismissed it. This action prompted the beneficiary to lodge an appeal against the ruling in Bungoma H.C. Civil Appeal no. 34 of 1996. The appeal was heard before the late Justice C.O. Ong'udi. The honourable Judge allowed the appeal with a resultant order setting aside the dismissal order. The cause was remitted back to the senior Resident Magistrate to determine the shares due to each beneficiary to the estate.

The then senior principal magistrate sitting at Bungoma purported to distribute the estate through Bungoma H.C. Civil appeal No. 34 of 1996 in a ruling dated 1st November 2001. The learned advocates realized that the DR issued orders which he had no jurisdiction to do so and this realization culminated into the consent order dated 19th February 2002 recorded by Lady Justice Ang'awa. The consent order set aside the decision to distribute the estate. The effect of the consent order was to revert back to the position it were as of 17th June 1997, the date of the Judgment in civil appeal no. 34 of 1996.

Pursuant to the provisions of section 76 of the law of succession Act (Cap. 160 Laws of Kenya) Lady Justice Ang'awa gave directions and issued orders suo moto on 20th February 2002 as follows:

*(a) The certificate of confirmation dated 12th March 1996 be revoked.*

*(b) A temporary grant be issued to the petitioner and thereafter the petitioner was directed to file an application for confirmation of the aforesaid grant under rule 40 (3) of the probate and Administration rules.*

*(c) The beneficiary was also directed to file a caveat if he so wished against the making of a confirmation of the grant once the application for confirmation of grant has been made.*

*(d) It was further directed that if the parties were satisfied with the distribution of the estate then the grant should be confirmed and if they are not, the honourable Judge directed protest proceedings to commence.*

*(e) The parties were directed to carefully read the provisions of rules 40 and 41 of the probate and administration rules.*

It would appear the parties influenced the Registry to open Bungoma H.C. Succession cause No. 46 of 2002. This court issued a temporary grant to the petitioner on 10th May 2002. There is no explanation as to how and why the aforesaid file was opened while Bungoma S.P.M. succession cause No. 75 of 1995 was still pending. In pursuit of the directives and orders issued by Lady Justice Mary Ang'awa the beneficiary filed an application dated 22nd May 2002 in which he sought to have the grant issued to the petitioner to be confirmed via this cause. On the other hand the petitioner filed an application dated 3rd July 2002 vide Bungoma S.P.M.

Succession cause no. 75 of 1995 in which he prayed for the grant issued on 29th February 1996 to be confirmed. Each of the above applications contained the schedule of distribution though they were filed in separate files and in respect of different temporary grants. The record in this matter appear to suggest that the parties involved plus their advocates commenced and attempted an out of court settlement but all came to nought.

The parties appeared before Mr. Justice Mitey (now retired) on 18/12/2002 and sought for directions. The honourable Judge directed the petition to proceed by way of viva voce evidence. The parties were further directed to take hearing dates at the registry. It would appear nothing happened until 15th May 2003 when the parties appeared before Mr. Justice Mitey and successfully requested civil Appeal No. 34 of 1996 and Civil appeal No. 72 of 2001 to be brought to court at the hearing of the matter. Nothing substantial happened in the file save for mentions, until 10th November 2004 when the parties appeared before me in which they made a request to me to peruse the entire files with a view of giving further directions.

After carefully perusing the numerous files concerning this succession cause I am now convinced that the parties and their advocates actually needed further directions from this court on the way forward. I can appreciate that they are stuck in a game they started but were unable to wade out of the mud. The effect of the Judgment in Civil appeal No. 34 of 1996 is that the schedule of distribution at the foot of the grant issued on 29th February 1996 was set aside. In essence the grant was not revoked. The record of appeal in civil appeal no.34 of 1996 shows that the beneficiary had applied to have the grant reviewed so that a provision was made for him. When the application was dismissed by the senior Resident magistrate, he appealed to this court.

This court allowed the appeal and directed that the distribution of the estate be undertaken. The parties were supposed to have gone back to the senior Resident magistrate and file an application for the confirmation of the amended grant issued on 29th February 1996. The parties and their advocates appear were not vigilant enough because they proceeded in the civil Appeal file as though the grant was issued through the aforesaid file which gave rise to the ruling of 1st November 2001. This decision was correctly set aside by consent. This meant that the position reverted back to stage of the Judgment of this court on appeal.

It should be pointed out that on appeal the parties did not disclose the fact that the grant had been

confirmed on 12th March 1996. I think this issue must have prompted my sister Lady Justice Ang'awa to revoke suo moto the certificate of confirmation on 20th Feb. 2002, while giving directions and issuing orders. With great respect and without appearing to contradict my learned sister, her directions and orders complicated the matters.

The parties and their advocates did not assist the court either to avoid the confusion. The directions and orders issued on 20th February 2002 have already been set out. This court proceeded on the basis that there was no grant and this gave rise to the grant given on 10th May 2002 through Bungoma H.C. Succession Cause No. 46 of 2002. I have tried to trace the origin of the aforesaid file but all were in vain. This has caused more confusion in that there are two sets of grants issued to the same petitioner in respect of the same estate. It should be noted that the directive to issue a grant was given in Civil Appeal No. 34 of 1996.

There was no order authorizing the opening of a fresh file in this court. In the circumstances of this matter this court has to exercise its inherent power and rise to a higher calling to see that justice is done in the matter and enable the parties to vindicate their case on the merits. In this regard I shall fall back to the provisions of rule 73 of the probate and administration rules which provides:

*“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.”*

In this regard I hereby direct that Bungoma H.C. Succ cause no. 46 of 2002 to be deemed as properly opened. I further direct that Bungoma S.P.M. Succession cause No. 75 of 1995 be withdrawn from the senior principal magistrate's court and transferred to this court and then consolidated with Bungoma H.C. Succession cause No. 46 of 2002. Consequently the chamber summons dated 22nd May 2002 in H.C. succession cause No. 46 of 2002 and the summons for confirmation of grant dated 3rd July 2002 in S.P.M. Succession cause no. 75 of 1995 are hereby ordered consolidated too. The temporary grants issued in both files shall be deemed as although the same were issued on 10th may 2002.

Finally the parties are directed to carefully read, examine and apply the provisions of rules 40 and 41 of the probate and administration rules before listing the matter for hearing. To make sure that the parties do not go to sleep I direct that this cause be placed for mention before this court on 20 June 2005. The purpose of the mention is to ensure that all the necessary preliminary procedures provided for under the Law of Succession Act and the rules embodied therein have been complied with before listing the matter for hearing or before confirming the grant. For clarity purposes proceedings shall be recorded in Bungoma H.C. Succession cause No. 46 of 2002.

It is clear that Bungoma H.C. civil appeal No. 72 of 2001 was withdrawn by a consent order recorded on 8th March 2002. It is also not disputed that Bungoma H.C. Civil appeal No. 34 of 1996 was heard and finalized on 17th June 1997. These files are of no use at the moment in this matter. The aforesaid files should be detached from this succession cause and be taken back to the registry. I direct that they be marked as settled to avoid causing further confusion in the succession cause. I hope my directives and orders have not complicated the dispute. I believe the road is now clear for the parties to move forward to have the dispute heard and concluded.

**DATED AND DELIVERED THIS 8th DAY OF June 2005**

**J.K. SERGON**

**JUDGE**