



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Agustino Wamukoya Wakungwi (Deceased) (Succession Cause 318 of 2013) [2025] KEHC 8183 (KLR) (11 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 318 OF 2013**

**AC BETT, J
JUNE 11, 2025**

BETWEEN

DAYANA WAMUKOYA NALIANYA PETITIONER

AND

PAMPHYLUS NALIANYA WAMUKOYA & 11 OTHERS PROTESTOR

RULING

1. By a petition filed on 15th May 2013, the Petitioner who described herself as a daughter to the deceased petitioned for Grant of Letters of Administration Intestate in respect of the estate of the above named. She disclosed that the deceased was survived by four (4) widows and further listed seventeen (17) children of the deceased as his dependents.
2. On 5th December 2013, the Petitioner was issued with a Grant of Letters of Administration and by an application dated 11th March 2013, she sought confirmation of the Grant. Vide a further affidavit sworn on 30th April 2015, the Petitioner detailed how the estate of the deceased should be distributed to the beneficiaries.
3. On 1st December 2016, the 1st Protestor filed an affidavit of protest on his behalf and on behalf of his co-protestors. Since then, the protest has been pending hearing and on 26th September 2024, directions were issued that the matter do proceed to hearing by viva voce evidence.
4. In her Summons for Confirmation of Grant, the Petitioner deponed that the assets of the estate of the deceased comprised two parcels of land being L.R No. EAST/WANGA/MALAHHA/2XX2 measuring 3.53 hectares and LR No. EAST/WANGA/MALAHHA/2XX3 measuring 3.6 hectares. She further averred that during his lifetime, the deceased had given all his interest in L.R No. EAST/WANGA/MALAHHA/2XX1 measuring 3.57 hectares to his wife Robai Wanguta Wamukoya to hold for herself and his children. The Petitioner then proposed that the remaining beneficiaries being twelve (12) in number be given equal shares from the two parcels of land wherefore each one of them would get a



share of 1.4 acres. The said beneficiaries were, Dayana Nahanja Wamukoya, Gerald Many Wamukoya, Pamphil Nahanja Wamukoya, Peter Wakungwi Wamukoya, Dismas Ongweko Wamukoya, James Wakulo Wamukoya, Roselyne Makotswe Wamukoya, Caroline Wesonga Wasike, Esther Masokhwe Mulwa wife of Maurice Mulwa Wamukoya (deceased) and Priscas Owino wife of John Eshikwati Wamukoya (deceased). The other beneficiaries proposed were two of the widows of the deceased, namely Agnes Nakholo Wamukoya and Rosa Atieno Wamukoya. The Petitioner did not state from which parcel of land each beneficiary would get their respective share.

5. In protest, the 1st Protestor deponed that the estate of the deceased was originally comprised in all that title previously known as LR. No. EAST/WANGA/MALAHHA/X2 which they learnt upon being served with Summons for Confirmation of Grant was no longer in existence as it had been closed on subdivision after the deceased's death. The 1st Protestor further averred that they learnt that Nicholas Wakungonu Wamukoya from the 2nd house had secretly subdivided the land a month after the death of their father and given each of the three resultant portions to three houses on 2nd June 2000. According to the protestor, the said Nicholas then transferred parcel Number 2XX1 to his own mother Robayi while retaining the remaining two parcels in the deceased's name.
6. The 1st Protestor also deponed that he was aware that there existed a high court case whose details he did not give between the deceased and one Benard Wesonga Sawinja who is currently in occupation of approximately 2.5 acres of L.R No. EAST/WANGA/MALAHHA/X2 and it was not known where the subdivision of the land had placed the said occupant. According to the 1st Protestor, the said Nicholas has secretly and unilaterally purported to enter onto a consent with Benard Wesonga Sawinja enabling the latter to retain the two and-a-half-acre portion and this needed to be considered before the estate of the deceased could be distributed.
7. It was the Protestor's deposition that the fact that this succession cause as it respect of only two parcels of land is a clear indication that the petitioner and Nicholas Wamukoya had deliberately conspired to have the two remaining portions meant for the 1st and 3rd houses respectively reduced further to accommodate Benard Wesonga Sawinja.
8. The 1st Protestor averred that the proposed mode of distribution is intended to disinherit some of the beneficiaries.
9. In rejoinder, the Petitioner averred that there was extensive consultation prior to the filing of the petition both as the family level and at the office of the Assistant County Commissioner (then referred to as the District Officer). She reiterated that the original title number LR. No. EAST/WANGA/MALAHHA/X2 was extinguished upon subdivision on 12th April by the deceased who then gave he of his four wives Robai Wanguta Wamukoya and her children LR. No. EAST/WANGA/MALAHHA/2XX1. She pleaded ignorance of the alleged land case between the deceased and Benard Wesonga Sawinja and denied conspiring with Nicholas Wamukoya. She stood her ground that what her father had distributed in his lifetime should not be disturbed and proposed that the remainder of the land should be equitably distributed between the remaining beneficiaries.
10. On the date scheduled for hearing, despite being served, neither the Protestors nor their Advocate were present and the court directed that the parties do file written submissions to enable the court make its ruling.
11. The Petitioner submits that there are issued for determination: -
 - a. Whether the Land Parcel No. EAST/WANGA/MALAHHA/2XX2 is subject to this succession cause.



- b. Whether Benard Wesonga Sawinja is entitled to a portion of land out of the estate of the deceased.
12. On the first issue, the Petitioner merely submits that the deceased subdivided his land before his demise and allocated parcel No. EAST/WANGA/MALAHHA/2XX1 to his wife Robai Wanguta Wamukoya and her children leaving the remaining two parcels and LR. No. EAST/WANGA/MALAHHA/2XX1 is not available for distribution as it is no longer part of the estate of the deceased.
13. On the second issue, the Petitioner submits that the Protestor did not furnish the particulars of the case number allegedly between the deceased and Benard Wesonga nor did he prove that the said Benard Wesonga is a liability to the estate entitled to a portion thereof.
14. The Protestors did not file any submissions.
15. From the protest, the first issue for determination is whether the deceased had subdivided his land into three prior his death. The deceased died on 7th May 2000 according to death Certificate NO 534198 issued on 23rd November 2000. There was no dispute on the date of death.
16. In support of the petition, the Petitioner attached two certificates of official searches dated 8th April 2013 reflecting the deceased as the registered owner of 3.53 hectares comprised on LR. No. EAST/WANGA/MALAHHA/2XX2 and 3.6 hectares comprised in LR. No. EAST/WANGA/MALAHHA/2XX3 on 12th April 2020. The searches further indicate that the two parcels of land are portions excised from LR. No. EAST/WANGA/MALAHHA/X2. Subsequent certificates of official search dated 15th April 2015 by the Petitioners as annexures to her affidavit in support of Summons for Confirmation of Grant confirm that the subdivision were registered on 12th April 2000 by which date the deceased was still alive.
17. LR. No. EAST/WANGA/MALAHHA/2XX1 which was purportedly transferred by the deceased to his wife could not have been transferred by the deceased since the deceased died in May while registration of Robai as proprietor was done in June 2000.
18. No evidence was led by the Petitioner to prove that the deceased had allocated parcel No. EAST/WANGA/MALAHHA/2XX1 to Robai and her children. The deceased had a large family who all resided in one parcel of land. Any survey and subdivision of his land would have been done with the knowledge of his three houses since it appears as if he intended to allocate the land in which were resultant from subdivision of LR. No. EAST/WANGA/MALAHHA/X2 were registered in the name of the deceased on 12th April 2000. However, LR. No. EAST/WANGA/MALAHHA/2XX1 was registered in the name of Robai Wanguta Wamukoya on 2nd June 2000 and a title deed issued to her on 7th January 2001. The Protestor did not produce a certified copy of the register which would have given the court a complete history of the transactions involving LR. No. EAST/WANGA/MALAHHA/X2 or the resultant titles but a perusal of the Registry Index Map which was produced as PNW.3 reveals that on 17th June 2000, amendments to the Map were made to reflect the subdivision of L.R No. EAST/WANGA/MALAHHA/X2 three parcels comprised in LR. No. EAST/WANGA/MALAHHA/2XX1, 2XX2 and 2XX3 respectively.
19. I have carefully analyzed the evidence on record and I have come to the conclusion that prior to his death, the deceased caused a subdivision approximately equal portions to his land. This subdivision resulted in three separate titles being parcels No. EAST/WANGA/MALAHHA/2XX1, 2XX2 and 2XX3. The three titles remained in the deceased's name as reflected in the entries made on 12/4/2020 from PNW.2. Parcel No. EAST/WANGA/MALAHHA/2XX1 was registered in the name of Robai Wanguta Wamukoya on 2/6/2000 which almost a month after the deceased had passed on.



20. At the time Parcel NO. EAST/WANGA/MALAHHA/2XX1 was being transferred, succession proceedings had not been initiated to facilitate the transmission of the property.
21. Rule 55 of the Land Registration General Regulations 2017 provides as follows:-
- “Unless otherwise provided by any written law no transfer of an interest in land of a deceased proprietor shall be registered until after the confirmation of the grant of letters of administration or the grant of probate as the case may be.”
22. Apart from a casual claim that the deceased had allocated LR No. EAST/WANGA/MALAHHA/2XX1 to Robai and her children, the petitions did not adduce any evidence to fortify her assertion. She did not produce mutation forms, consent to transfer from the Land Control Board, nor the duly executed Transfer forms. She did not also adduce any evidence that the house of Robai was settled on the parcel of land not known as LR. No. EAST/WANGA/MALAHHA/2XX1 by the deceased. From the subdivision of his land into three parcels of approximately equal area, it is apparent that the deceased may have intended to allocate each house its distinct portion. However, its intention was not realized as it seems that the cruel hand of death cut short his intention. Nevertheless, any evidence as to which house was settled on which portion, the court cannot conclude that Parcel No. EAST/WANGA/MALAHHA/2XX1 was definitely allocated to Robai’s house.
23. Under section 26 of the [Land Registration Act](#), a certificate of title, duly issued deemed to be conclusive evidence of propiously. However, such title can be challenged on the grounds that it was obtained through fraud, illegally and or procedurally. Section 26(1) of the Act stipulates:-
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedural or through a corrupt scheme.”
24. In this case, there is no evidence whatsoever, that the deceased transferred parcel No. EAST/WANGA/MALAHHA/2XX1 to Robai in his lifetime. Despite the attempts by the petitioners of create an impression that the deceased had passed the said land to Robai and her children as a gift inter vivos, the gift did not vest during the lifetime of the deceased and therefore the transfer subsequent to his death sans certificate of Confirmation of Grant was unprocedural.
25. In the case of *Joseph Ondu Nyangiri v Monicah Auma & another* [2021] eKLR, the court held that:-
- “A succession cause was pending and had not been finalized. The suit land therefore still forms part of the deceased estate and the same should be reverted back to the deceased.”
26. The issue of registration of land after the demise of the registered one was also considered in the case of *Mary Watiri Mwangi (suing as representative of the Estate of Kiburio Kamutu) v Timothy Kimani Kiburio & 3 others* [2018] eKLR where the court found that the registration of the land barely two months after the deceased had passed on without authority in form of a succession cause vitiated the title. The court invalidated the transfer.



27. Having thoroughly considered the evidence and the parties' submissions, I find that the title to L.R No. EAST/WANGA/MALAHHA/2XX1 was irregularly transferred to the Robai Wanguta Wamukoya. It is therefore invalid and should revert to the name of the deceased so that it forms part of the estate of the deceased that is available for distribution.
28. Regarding the question whether one Benard Wesonga is a beneficiary to the estate of the deceased, the court finds that there was insufficient evidence adduced by other party to enable an informed decision on the same.
29. Back to the proposal by the petitioner that each of the units of the two houses of Agnes Nakhola Wamukoya and Rosa Atsieno Wamukoya, the widows being inclusive, be given equal shares of 1.4 acres from the two parcels of land being LR. No. EAST/WANGA/MALAHHA/2XX2 and 2XX3, I am guided by the actions of the deceased on the month preceding his death. There appears to have been some intention to allocate specific portions to each house. To assist the court in its determination, it is imperative that it is established to exactitude, where in the three parcels of land each house is settled, and whether Benard Wesonga is in occupation of any part of the three parcels.
30. In the end, I hereby make the following orders:-
 - (a) That the title in respect to LR. No. EAST/WANGA/MALAHHA/2XX1 revoked and the same reverts to the name of the deceased.
 - (b) That the County Surveyor do visit the three parcels of land, being LR. No. EAST/WANGA/MALAHHA/2XX1, 2XX2 and 2XX3 for purposes of ascertaining who the ground occupants are.
 - a. That each house shall contribute equally towards the Surveyor's fees.
 - b. That the Surveyor does file his report within ninety (90) days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 11TH DAY OF JUNE 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Juma for the Petitioner

Mr. Elungata for the Protestors

Court Assistant: Polycap

