



**In re Estate of Reuben Ndayala Ndolo (Deceased) (Succession Cause
13 of 2019) [2024] KEHC 1523 (KLR) (19 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 13 OF 2019
PJO OTIENO, J
FEBRUARY 19, 2024**

IN THE MATTER OF THE ESTATE OF REUBEN NDAYALA NDOLO (DECEASED)

BETWEEN

**DUNCAN KIHAMBA NDAYALA 1ST PETITIONER
DUNCAN KIHAMBA NDAYALA 2ND PETITIONER
JOYCE ASEYO KIHAMBA 3RD PETITIONER**

AND

**PAMELA VUGUTSA MWIGAI 1ST OBJECTOR
MILLY ALADWA 2ND OBJECTOR
JOSEPHINE VOYORE ANZUGIRA 3RD OBJECTOR
WYCLIFFE NDOLO 4TH OBJECTOR
OLIVER KEGONDI KIHAMBA 5TH OBJECTOR**

AND

**KENNEDY SUSU ILAYIOGA INTERESTED PARTY
BENARD ONZERE INDAGULA INTERESTED PARTY
DANSON MUNGERESA KEKENA INTERESTED PARTY**

JUDGMENT

1. Pursuant to the Judgment of the Court delivered on the 31.5.2021, the Public Trustee was appointed the administrator with directions to take steps to ensure the grant is confirmed expeditiously.



2. In compliance with the directions by the Court, a Summons for Confirmation of grant was filed on the 14.4.2024 identifying eight (8) heirs to the estate. The Summons equally identified the estate to comprise five (5) landed properties. Having identified the free property and the heirs, without any contestation, the application equally exhibited a consent to confirmation of grant giving the proposal in sharing as follows: -
 1. Kakamega/Kegoye/1016 – 0.32 Ha.
To Susan Kageha (to hold in trust for children of the late Raphael Gadiru)
 2. Kakamega/Kegoye/1039 – 0.5 Ha.
To Josephine Voyore Anzugira (to hold in trust for children of the late Elkanah Mutsasi)
 3. Kakamega/Lugovo/29 – 0.46 Ha.
To be shared equally by: Charles Mutange Ndayala, Pamellah Vugutsa Mwigai and Margaret Mugula Muhonja
 4. Kisumu/kanyakwar 'A'/159 – 0.05 Ha.
To be shared equally by all the beneficiaries of the deceased.
 5. Bungoma/Ndalu/105 – 37.3 Ha.
To be shared by the family of the late Duncan Kihamba Ndayala and the late George Ndayala Osango equally (family of Duncan not agreeing the sharing)
 6. Bungoma/Ndalu/105 – 1.2 Ha.
To be the purchasers;
 - i. Tom Kisali Jusa
 - ii. Ifrahim Ilazia Jusa
 - iii. Nebert MwangiIn equal shares
3. Of note is that the consent was duly signed by five of the six persons identified and intended to sign same. The one person who did not sign the consent is Joyce Aseyo Kihamba.
4. The application was supported by the Affidavit, Mr. James Kiprono Kenduiywoh, the Assistant Public Trustee, which exhibited certificates of official searches of land parcels No. Bungoma / Ndalu/105, Kakamega / Kegoye /1016, Kakamega / Kegoye /1039, Kakamega / Lugovo/29 and Kisumu / Kanyakwar 'A'/159. For the five parcels of land all have been transferred into names of beneficiaries to the estate save for Ndalu/105 which is said to have a charge by the Settlement Fund Trustees although the debt is paid in full.
5. To the Summons, one Joyce Aseyo Kihamba, a widow to the Petitioner, filed what she called Supporting statement and verified by a verifying Affidavit. Both documents have no dates at the jurat but the same were filed in Court on the 20.9.2023. Earlier on, on the 19.5.2023 filed a letter referenced Request of setting aside a Judgment delivered on 31.5.2021 together with an Affidavit in support of the said request. Both sets of documents challenged the Judgment of the Court on the main ground that the author was not aware of the proceedings in the Court after the file was transferred from Kitale because, she was allegedly misled by an imposter for an advocate who kept her in the dark and coned her money. She equally accused the two Objectors, Margaret Ndayala and Charles Mutange for having



- lied to Court that their signatures were forged by a Petitioner and pointed out that the two got half and one acre respectively from Kegoye/1039 and Ndalul Scheme. She denied any wrongdoing by her husband, the Petitioner, while insisting that the course was pursued with the consent and concurrence of all the family members and that most of the family members had sold their shares to other parties with nothing remaining to be distributed. The deponent then rendered an apology for the steps she took in the cause after the death of her husband, attributing same to wrong advice, then concurred with the Court for having revoked the grant but pleaded that the distribution undertaken under the revoked grant be sustained.
6. The Protestor then exhibited documents of transfer by the Petitioner to; George Osongo Ndayala - Kisumu/Kanyakwa "A"/159, and 46.5 acres out of Ndalul Scheme/105, 2 ½ acres out of Maragoli/1039 and Margaret Muhonja, one (1) acre out of Ndalul Scheme/105. She additionally exhibited agreements for sale by which heirs to the estate sold several portions of the estate comprised in Ndalul Scheme/105 to third parties.
 7. To those documents contesting the proposed distribution, the other heirs to the estate; Pamela Vugutsa Mwigala and Margaret Muhonja daughters to the deceased and their brother, Charles Mutange, as well as widows of the deceased sons filed a document they called response to protest. In that document the authors challenge the allegations of Joyce of having been misled by Ondego & Co. Advocates while insisting that throughout the life of the cause, Joyce had always been represented by one John Barorio & Co. Advocates.
 8. The authors then added that it is the duty of every person seeking to engage an advocate to carry out due diligence on who they deal with on matters of representation and that failure to do that is a matter that falls outside the Court's mandate but the litigant so affected has her remedy against the imposter through the police and other avenues.
 9. The authors further fault Joyce for misleading the Court by alleging that the cause concerns her husband's estate while the truth is that the deceased was her father-in-law not husband.
 10. They stress the fact that the grant was presented and pursued by acts of fraud by both the Petitioner and his widow, Joyce, and that fact has been determined by the Court in the decision of 31.5.2021.

Analysis and Determination

11. Even though the papers filed by Joyce Kahimba in person are inelegantly done, they suggest that she seeks to set aside the decision of the Court dated 31.5.2021. The Court has studied all papers filed and note that Joyce did acknowledge an impropriety in being appointed the administrator for which he has apologized. With that apology, the grant issued and confirmed in her favour avails itself for revocation *ex debito justitiae* because she stood on a lesser priority to those who sought to revoke the grant. Once the grant issued to her is revoked, and with the death of her husband as the sole administrator, even the grant to her late husband becomes inoperative and equally invites being revoked even at the suo moto action by the Court.
12. In those circumstances, no just purpose would be served by setting aside the orders of 31.5.2021 and reinstating a grant and certificate of confirmation which have become inoperative. For that reason, even though the Court would be inclined to shun the formal procedures demanded by the [Law of Succession Act](#) on how to seek revocation of grant, and to deal with the letter headed "Request for setting aside" as a summons for setting aside, the Court determines that no justice would be served by adopting such a position.



13. To the Court, the documents filed by Joyce when read in a holistic manner also -reveal a protest at the mode of distribution proposed by the administrators. The Court has anxiously read the Protestors' proposal and considers the same to run affront the principle of equal sharing for she insists on getting ten (10) acres out of Bungoma/Ndalu/105 without any justification. That she lives on the land and could have had portions of it sold affords her no better rights than the other beneficiaries. That the proposal would perpetuate the actions by the Petitioner which have been found as unjust by the decision of 31.5.2021.
14. To the contrary, the Court views the consensual proposal by the other members of the family to be not only just but equally fair.
15. The Court thus orders that the estate be distributed as in the document of consent dated 14.4.2023 and filed in Court on 17.4.2023. The estate is thus distributed as follows: -
 1. Kakamega/Kegoye/1016 – 0.32 Ha.
To Susan Kageha (to hold in trust for children of the late Raphael Gadiru)
 2. Kakamega/Kegoye/1039 – 0.5 Ha.
To Josephine Voyore Anzugira (to hold in trust for children of the late Elkanah Mutsasi)
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 6. Bungoma/Ndalu/105 – 1.2 Ha.
To be the purchasers;
 - iv. Tom Kisali Jusa
 - v. Ifrahim Ilazia Jusa
 - vi. Nebert MwangiIn equal shares
16. Having done so, it is noted that the children of Raphael Gadiru, Elkana Mutsasi and the family members of Duncan Kihamba Ndayala and George Ndayala Osango have not been disclosed. Let Mr. Kiprono file an Affidavit giving such details so that the Certificate of Confirmation of grant is issued with precision. It is equally desirable that copies of Identity Cards for those to get shares be availed to Court to obviate spelling and typing errors.
17. Let the Certificate of Confirmation of grant be issued forthwith to enable the administrators transmit the estate within ninety (90) days from today. Each party shall bear own costs of the application.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF FEBRUARY, 2024.



PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Kiprono for the Administrator

Ms. Joyce Aseyo Kihamba Petitioner present

Mr. Christopher Kihamba and Mr. Michael Kihamba beneficiaries present

Court Assistant: Polycap Mukabwa

