



REPUBLIC OF KENYA



In re Estate of Joseph Matumbai Wanyonyi (Deceased) (Succession Cause 515 of 2014) [2024] KEHC 3857 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 515 OF 2014**

DK KEMEL, J

APRIL 12, 2024

**IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH
MATUMBAI WANYONYI**

BETWEEN

KENNEDY MATUMBAI WANYONYI 1ST APPLICANT

JOHN KITUYI WANYONYI 2ND APPLICANT

JANE NEKESA MACHANJA 3RD APPLICANT

DAVID WANYAMA WANYONYI 4TH APPLICANT

AND

JOHN SITATI WANYONYI RESPONDENT

AND

**COUNTY LAND REGISTRAR BUNGOMA COUNTY 1ST PROPOSED
RESPONDENT**

DESMOND JUMA LUSWETI 2ND PROPOSED RESPONDENT

MOHAMED MUNIR K.ADAM 3RD PROPOSED RESPONDENT

WILLIAM WANJALA TOILI 4TH PROPOSED RESPONDENT

RULING

1. The Applicants herein filed the present application dated September 11, 2023 pursuant to sections 1A,1B, 3 and 3A of the [Civil Procedure Act](#), Order 1 Rule 10 and Order 40 and 51 of the [Civil Procedure Rules](#) and sections 45 and 70 of the [Law of Succession Act](#) seeking the following reliefs:



- i. Spent.
 - ii. Spent.
 - iii. That this court be pleased to grant leave to have the following parties joined as additional respondents and named as hereunder:-
 - a. District Land Registrar Bungoma ...2Nd Respondent
 - b. Desmond Juma Lusweti3Rd Respondent
 - c. Mohamed Munir K. Adam4Th Respondent
 - d. William Wanjala Toili5Th Respondent
 - (iv) That this court be pleased to order the proposed 2nd Respondent to revoke the following individual title numbers and any other property that was transferred during the pendency of the succession case and restore them to the estate of the deceased-
 - 1) E. Bukusu/S. Kanduyi/22342
 - 2) E. Bukusu/S. Kanduyi/21865
 - 3). E. Bukusu/Mukuyuni/1795
 - 4) Bokoli/Chwele/2
 - 5) Bokoli/Mukuyuni/462
 - 6) Bokoli/Mukuyuni/1767
 - 7) Bokoli/Mukuyuni/1974
 - 8) Bokoli/Chwele/3885
 - 9) Bokoli/Chwele/3887
 - 10) E.Bukusu/S.Kanduyi/429
 - iv. That this court be pleased to revoke the transfer of any other property of the subject estate not expressly mentioned herein.
 - (vii) That the costs of the application be provided
2. The application is supported by grounds set out on the face as well as by a supporting affidavit of Kennedy Matumbai Wanyonyi the 1st Applicant herein sworn on even date. The Applicants' gravamen is inter alia; that the Respondent herein is busy wasting the estate's property by subdividing and transferring to his name and/or has sold to the 3rd - 5th proposed respondents; that the purported transfers have been done by the Respondent working in cahoots with the 2nd proposed Respondent ; that the acts of the respondent and the proposed respondents are unlawful and amount to intermeddling of the estate which is yet to be distributed ; that the actions of the Respondent are aimed at negating/ defeating the substantive succession cause; that the title deeds issued unprocedurally by the proposed 2nd Respondent should be declared null and void and that the same should revert back to the name of the deceased to await distribution; that the beneficiaries of the estate are likely to inherit nothing from the estate at the conclusion of the matter.



3. The 3rd proposed Respondent filed a replying affidavit sworn on 13/11/2023 wherein he deponed inter alia; that he is not a beneficiary of the estate; that he bought parcel number E. Bukusu/S.Kanduyi/429 from the petitioner herein and then subdivided them into several portions and sold one of them to the proposed 4th respondent herein; that this court lacks jurisdiction to entertain the matter as the issue of revocation of title is a reserve for the environment and land court; that the issue of the Respondent's conduct in selling one of the assets in the estate has already been dealt with by this court vide its ruling dated 7.4.2016 pursuant to which the Respondent duly rendered the requisite statement of accounts; that the application is an afterthought as it has been filed after a period of seven years; that the application is an abuse of the court process and which should be dismissed with costs.
4. The Petitioner/Respondent did not file a response to the application and likewise the proposed 2nd, 4th and 5th Respondents.
5. The application was canvassed by way of written submissions. However, it is only the applicants and the proposed 3rd Respondent who filed and exchanged submissions. Their submissions are a reiteration of the averments in their respective rival affidavits. The Petitioner as well as the proposed 2nd, 4th and 5th Respondents did not file any submissions.
6. I have considered the rival affidavits as well as the submissions filed. It is not in dispute that this matter had been proceeding for hearing of summons for confirmation of grant and that nine beneficiaries had testified before the matter took a lull when the parties failed to come back to court to continue with the confirmation hearings and which compelled the court to close the file. It is also not in dispute that the matter was later reopened and fixed for further confirmation on 12.9.23 only for the present application to be lodged by the applicants herein. It is also not in dispute that the grant that had been issued to the petitioner herein has not been confirmed to date. It is not in dispute that the petitioner / Respondent herein has since transferred a bulk of the parcels of land belonging to the estate of the deceased to himself as well as third parties including the 3rd, 4th and 5th proposed respondents and that already titles are in their possession. It is not in dispute that no certificate of confirmation of grant has been issued by this court. It is also noted that the petitioner as well as the 2nd, 4th and 5th proposed Respondents have not filed responses to the applicants' application dated September 11, 2023. That being the position, I find the only issue for determination is whether the application has merit.
7. As noted above, this court has not yet confirmed the grant that had been issued to the Petitioner herein and that no certificate has been issued to the said petitioner to enable him distribute the estate of the deceased to his beneficiaries. It is not in dispute that the duty of the probate court is the distribution of estates of deceased persons. The court record reveals that the confirmation of grant hearing had been proceeding before the parties herein failed to attend court to conclude the same. It has now turned out that indeed the Petitioner had gone out of his way and purported to distribute the estate without the court's sanction. The procedure adopted by the Petitioner is completely against the *Law of Succession Act*. I do not understand why the Petitioner having presented the beneficiaries to court and having undertaken to avail remaining beneficiaries so that the grant could be confirmed, decided of his own design and volition purported to distribute the estate of the deceased without a confirmed grant and a certificate thereof. It is clear that the petitioner herein as gone against the law and hence I find that he together with others have committed acts of intermeddling with the estate of the deceased and which is forbidden by section 45 of the *Law of Succession Act* which is to the effect that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized by law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a serious view of intermeddling and makes it a criminal offence. Intermeddling in a deceased person's estate makes one guilty of a criminal offence



and liable to a fine not exceeding Kshs 10, 000/ or a jail term of not exceeding one year or both such fine and imprisonment. In the case of *re Estate of M' Ngarithi M' Miriti* [2017] eKLR the court held as follows:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue appropriate order(s) of protection of the estate against any person.”

It follows that any action taken by a person whose effect would be to interfere with the property of a deceased without any authority from the court will definitely amount to intermeddling with such estate under section 45 of the *Law of Succession Act*.

8. In the present case, it is apparent that the Petitioner has already gone ahead and purported to distribute the estate of the deceased without obtaining a confirmed grant and a certificate of confirmation of grant. The Petitioner had proceeded partly with confirmation of grant before he suddenly failed to turn up in court to conclude the confirmation hearing. A perusal of the copies of search certificates annexed to the supporting affidavit of the Applicants- clearly show that the Petitioner has had some of the properties registered in his names while others in the names of third parties who include the proposed 3rd, 4th and 5th Respondents. It is noted that the Petitioner has deliberately failed to file a response to the application. I find his failure to do so was deliberate in that he has been caught red handed by the Applicants since he has not availed the evidence of a confirmed grant or a certificate of confirmation of grant so as to authorize him to deal with the property under section 82 of the *Law of Succession Act*. The Petitioner has hidden himself behind the proposed 3rd Respondent who filed a response and sought to reject the Applicants request for joinder on grounds that the court lacks jurisdiction to deal with the matter and further that he is not a beneficiary. I am not persuaded by the said assertions since there is no confirmed grant in existence which could entitle the Petitioner to purport to distribute the estate of the deceased. The Petitioner has deliberately refused to render an explanation as to how he could distribute the estate without the grant being confirmed. Obviously, the Petitioner is aware that he has run afoul of the law and is thus an intermeddler in the estate together with the proposed respondents.
9. As regards the issue of jurisdiction, section 47 of the *Law of Succession Act* gives the probate court with the duty and power to handle succession matters and to distribute the estate of such deceased persons. Hence, I am not persuaded by the submissions of the proposed 3rd Respondent that this court lacks jurisdiction to entertain this matter on the ground that the properties have since changed hand and that it is only the ELC that can handle the dispute. It is instructive that this matter had been pending further confirmation of grant when the petitioner failed to turn up to conclude the process. This court had been waiting for the parties to turn up only to learn about the turn of events. This court being the succession court has the jurisdiction to handle the matter which is still pending determination. Further, this court has the requisite powers under Rule 73 of the *Probate and Administration Rules*



to make such orders as expedient to meet the ends of justice and prevent abuse of the court process. It has transpired that the petitioner has purported to distribute the estate without a confirmed grant and hence, all those unlawful processes must be revoked by this court. This court must now make a statement by pointing out to the Petitioner that acts of intermeddling with the estate of the deceased will not be tolerated at all. The petitioner must now fall with the proposed respondents due to the intermeddling aforesaid.

10. The proposed 3rd Respondent has opposed the Applicants request for a joinder on the basis that he is not a beneficiary of the estate. It is noted that the proposed 3rd, 4th and 5th Respondents are indeed not beneficiaries of the estate but that they purportedly acquired interest in some of the assets of the deceased before confirmation of grant and thus they are intermeddlers for all intents and purposes. As the titles stand to be revoked, the said proposed 3rd, 4th and 5th Respondents will have to seek remedies against the persons from whom they bought the said properties. The Applicants have not given sufficient reasons as to why they want the proposed respondents who are intermeddlers and not even beneficiaries. Their joinder will not serve any useful purpose but to convolute the proceedings. Suffice here to add that all except the proposed 3rd Respondent filed responses to the Applicants' application. Hence, the prayer for joinder (3) is found to lack merit.
11. The proposed 3rd Respondent in his replying affidavit dated November 13, 2023 has sought to explain that the court had earlier in its ruling called for a statement of accounts by the Petitioner who duly furnished them and that this court should absolve the Petitioner. It is instructive that the Petitioner herein has deliberately refused to file a response to the application and thus the claims by the proposed 3rd respondent must be treated as just that since it is the Petitioner who is the administrator of the estate to respond to any issues regarding the estate but not a third party who is not a beneficiary. Even if the court had made certain orders earlier in the proceedings, the confirmation of grant proceedings must be concluded before the Petitioner can then have authority to distribute the estate in accordance with the agreed schedule of distribution. In the premises, the proposed 3rd Respondent's submission that the application has been filed late in the day must be rejected as the confirmation of grant proceedings have yet to be concluded so that the court's duty of distributing the estate is finally performed.
12. Finally, the Applicants have in addition to seeking for revocation of the titles, have sought for an order for the revocation of transfer of other properties not yet identified. I find such a prayer to be ambiguous as the identity of those assets must be pleaded . The court cannot grant orders at large. Prayer (5) of the application thus must be declined.
13. In view of the foregoing observations, the Applicants' application dated 11.9.2023 succeeds only in terms of prayer No. 4 thereof regarding the titles listed therein. The Petitioner is ordered to set down the matter for further confirmation of the grant as a matter of priority. There will be no order as to costs.

DATED AND DELIVERED AT BUNGOMA THIS 12TH DAY OF APRIL 2024.

D.KEMEI

JUDGE

In the presence of:

Sabwami for Applicants

No appearance for 2nd proposed Respondent

Wekesa for 3rd proposed Respondent



No appearance 4th proposed Respondent

No appearance for 5th proposed Respondent

Kizito Court Assistant

