



In re Estate of Reuben Wanyama Mukaburu (Deceased) (Succession Cause E038 of 2022) [2024] KEHC 3359 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
SUCCESSION CAUSE E038 OF 2022
AC MRIMA, J
APRIL 11, 2024**

BETWEEN

ANNAH NABUKWANGWA WANYAMA 1ST PETITIONER

REBECCA NAFULA WANYAMA 2ND PETITIONER

AND

MUSA SIMIYU WANYAMA 1ST OBJECTOR

SAMUEL WANYONYI WANYAMA 2ND OBJECTOR

GIDEON WAFULA WANYAMA 3RD OBJECTOR

JACOB NYONGESA WANYAMA 4TH OBJECTOR

JUDGMENT

Background

1. Annah Nabukwangwa Wanyama and Rebecca Nafula Wanyama petitioned for the administration of the estate of the deceased herein one Reuben Wanyama Mukaburu. Both were the deceased's daughters.
2. A Grant of Letters of Administration Intestate was issued to the Petitioners on 20th January, 2023.
3. Later, Musa Simiyu Wanyama, Samuel Wanyonyi Wanyama, Gideon Wafula Wanyama and Jacob Nyongesa Wanyama, the Objectors herein and who were also some of the children of the deceased, filed for revocation of the grant vide a Summons dated 17th August, 2023.
4. On the consensus of the parties and upon being prompted by this Court, the objection was allowed to the extent that the Objectors were directed to appoint two of themselves to be Co-Administrators with the Petitioners. Therefore, the estate herein was to have four Administrators being the two Petitioners and the two Objectors.



5. The Objectors then settled for Musa Simiyu Wanyama and Samuel Wanyonyi Wanyama as the two other Co-Administrators. However, the Amended Grant of Letters of Administration Intestate is yet to be issued.
6. The Petitioners then filed a Summons for Confirmation dated 6th July, 2023. They rooted for equal distribution of the estate to the beneficiaries after settling the liabilities.
7. The Objectors filed their proposed mode of distribution dated 18th October, 2023. Their proposal was different from that of the Petitioners.
8. On the parties' proposal and upon the consensus of this Court, the dispute herein was heard by way of reliance on the pleadings and written submissions. Both parties duly filed their respective submissions.
9. Resulting therefrom is the instant judgment on how the estate herein should be dealt with.

Analysis:

10. Having carefully examined the record, the only issue for determination is the mode of distribution of the estate.
11. There are three other issues which are not in dispute. They are who the beneficiaries are; what comprises of the estate of the deceased herein and the liabilities to the estate.
12. It is on record that the estate is comprised of only one parcel of land. It is Sinyerere/Kipsaina Blk 1 Bistati/42 measuring about 12.5 Acres.
13. There is also consensus on the following beneficiaries to the estate herein: -
 - i. Musa Simiyu Wanyama - Son
 - ii. Samuel Wanyonyi Wanyama - Son
 - iii. Gideon Wafula Wanyama - Son
 - iv. Jacob Nyongesa Wanyama - Son
 - v. Annah Nabukwangwa Wanyama - Daughter
 - vi. Rebecca Nafula Wanyama - Daughter
 - vii. Damara Nasike - Daughter
 - viii. Leah Nasimiyu - Daughter
 - ix. Naomi Nangekhe - Daughter
 - x. Isaya Wekesa Wanyama - Son
14. The other undisputed issue is that there are other people who lawfully purchased parts of the estate property. However, there was no agreement on who the said purchasers were and the sizes of their respective portions.
15. On the basis of the foregoing, the Petitioners proposed that with an exception of Annah Nabukwangwa Wanyama and Isaya Wekesa Wanyama, the rest of the beneficiaries to get 1 [one] acre each. That, Annah Nabukwangwa Wanyama to get her 1 [one] acre and to hold 1.5 acres in trust of the purchasers. Isaya Wekesa Wanyama was to get 2 acres.
16. The Objectors had the following proposal on the mode of distribution:



1. Isaya Wekesa Wanyama 2.1 Acres
2. Musa Simiyu Wanyama 1.4515 Acres
3. Samuel Wanyama Wanyonyi 1.4515 Acres
4. Gideon Wafula 1.4515 Acres
5. Jacob Nyongesa 1.4515 Acres
6. Annah Nabukwangwa 0.2 Acres
7. Damara Nasike 0.2 Acres
8. Leah Nasimiyu 0.2 Acres
9. Naomi Nangekhe 0.2 Acres
10. Rebecca Nafula 0.2 Acres
11. Annah Nabukwangwa, Damara Nasike,
Leah Nasimiyu, Naomi Nangekhe &
Rebecca Nafula jointly (prime plot) 0.1 Acres
12. James Wafula (Purchaser From the deceased) 0.115 Acres
13. Sammy Maina (Purchaser from Selina
Namarome –deceased’s late wife) 0.1306 Acres
14. Kitale Kapenguria Highway
Major rough Road through the estate
Access roads
Easements (High Voltage Electricity line) 3.2484 Acres
17. According to the Objectors, the proposal by the Petitioners did not consider the area of about 3.2484 Acres which comprised of public utilities being the Kitale – Kapenguria Highway, a major rough road that passes through the property, access roads and Easements in respect of the High Voltage Electricity line.
18. The Objectors, who are the sons of the deceased, further alluded to the fact that they were long settled by the deceased on the land and have since developed their respective portions. As such, they contended, that their proposed mode of distribution took the said previous settlements into account and that it would be only fair that the prevailing status quo be maintained.
19. It was also posited by the Objectors that the Petitioners had, as well, been allotted their shares of the property and in turn they sold them to third parties and that, out of greed, they were now out to disinherit the Objectors.
20. This Court notes that the issues raised by the Objectors are serious. But, how were they brought to the fore? The Objectors neither filed any disposition on oath nor testified before Court. Instead, the issues were contained in their written submissions dated 6th February, 2024.
21. The parties herein, through Counsel, agreed to dispose of the issue of the mode of distribution by way of written submissions. With such serious issues at the back of their minds, the Objectors ought to



have taken a different trajectory. There was need for such issues to be deposed on oath so as to accord the Petitioners an opportunity to respond. That is a standing cardinal constitutional principle on fair hearing as enshrined in Article 50(1) of *the Constitution*. However, that did not happen.

22. The Objectors then pulled a fast move against the Petitioners at the tail-end of the proceedings and in their written submissions. What the Objectors actually did was to introduce new issues at the submissions stage which issues were not part of the pleadings.
23. Courts, as well as Legal Scholars, have severally upheld the position that parties are firmly bound by their pleadings. Just to mention a few; the Court of Appeal in Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation...

24. The Supreme Court of Kenya in its ruling on inter alia scrutiny of votes in an election dispute in Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

(52) Further, the Court went on and observed that: -

.... In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....

25. This discussion was taken up further in Kitale High Court Election Petition No. 1 of 2017 Robinson Simiyu Mwanga & Another vs. IEBC & 2 Others (2017) eKLR in Ruling No. 4 on scrutiny of votes. This is what the Court partly stated: -

77. But what if the issues although not pleaded came up during the cross-examination of the witnesses and are therefore part of the record? The answer is found in the above decisions of the Supreme Court and the Court of Appeal. Such evidence goes to no issue. That seems to be the position taken by the Scholar Hon. Justice (Prof.) Otieno-Odek in his article aforesaid where he stated that 'A party cannot be allowed to introduce, through cross-examination contests which were previously not specifically raised in the pleadings.....

26. Therefore, the prevailing position in an adversarial system of dispute resolution is that the issues which a Court is to determine in a matter must flow from the pleadings. Without such a basis, no new matter can be dealt with, unless the legally settled exceptions apply.



27. Superior Courts have also discussed the exceptions. The Court of Appeal for Eastern Africa in *Vyas Industries v Diocese of Meru* [1976] eKLR stated as follows: -

..... The circumstances in which an unpleaded issue can become an issue in a suit is a question which was considered in *Odd Jobs v Mubia* [1970] EA 476 in which it was held that: -

- a. a Court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the Court for decision;
- b) on the facts the issue had been left for decision by the court as the Advocate for the Appellant led evidence and addressed the Court on it.

28. In *Pacific Frontier Seas Ltd v Kyengo & another* [2022] KECA 396 (KLR), the Court of Appeal at Malindi in Civil Appeal No. 32 of 2018 held as follows: -

As regards unpleaded issues, the principle is well settled that a court, even when it has jurisdiction, will not base its decision on unpleaded issues because the issues determined by the court must flow from pleadings. It is the pleadings which guide the litigation and succinctly inform the parties and the court what is in dispute. However, where the parties lead evidence and address the unpleaded issues and from the cause adopted at trial it appears that the unpleaded issues have been left for the decision of the court, the court will validly determine the unpleaded issues. (See *Captain Harry Gandy v. Caspar Air Charters Ltd* [1956] 23 EACA 139; *Odd Jobs v. Mubea* [1970] EA 476, *D.E.N. v. P.N.N.* (supra), *Baber Alibhai Mawji v. Sultan Hashim Lalji & Another*, CA No 296 of 2001; and *Mapis Investment (K) Ltd v. Kenya Railways Corporation* (2005) 2 KLR 410). Nevertheless, we should add that parties cannot validly leave unpleaded issues over which the court has no jurisdiction for it to decide, simply because parties cannot by consent, confer jurisdiction to a court which in law it does not have.

29. The above position had been affirmed in *Justice Kalpana H. Rawal v Judicial Service Commission & 3 others* [2016] eKLR by the very Court of Appeal in Civil Appeal No. 1 of 2016 at Nairobi. The Court expressed itself thus: -

The principles of law on unpleaded issues, as stated by the appellant, are correct and not in dispute. A court will not determine or base its decision on unpleaded issues. Where however, evidence is led and it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court can validly determine the unpleaded issue. Accordingly, we need not belabour or restate the principles here in detail, save to mention but some decisions, which have crystallized those principles. These include *Captain Harry Gandy v. Caspar Air Charters Ltd* [1956] 23 EACA 139; *Odd Jobs v. Mubea* [1970] 476, *D.E.N. v. P.N.N.* (supra), *Baber Alibhai Mawji v. Sultan Hashim Lalji & Another*, CA No 296 of 2001; and *Mapis Investment (K) Ltd v. Kenya Railways Corporation* (2005) 2 KLR 410.

30. On the basis of the above discussion, this Court finds that the Objectors did not satisfy any of the exceptions to the general rule that the only issues for determination by a Court are those raised in the pleadings.

31. The result thereof is that the three contentions raised by the Objectors through their written submissions that is, first, that the Objectors were settled by the deceased before death, second, that the



Petitioners were also allotted their portions of the estate and sold them and, third, that part of the land that is not available for distribution on account of being public utilities, are not for determination in this decision.

32. Having said as much, since the deceased was survived by children without any spouse, then Section 38 of the *Law of Succession Act* (hereinafter referred to as 'the LSA') sets in. Suffice, however, to say that the said provision must be looked through the prism of *the Constitution*.
33. Section 38 of the LSA mainly roots for equal distribution of the estate among the children. Whereas such law is appropriate, a Court, before effecting the provision ought to consider whether there are other intervening circumstances that may reasonably tilt that legal position.
34. This Court, while considering the application of Section 40 of the LSA in Kitale High Court Succession Cause No. 35 of 2017 - In the Matter of The Estate of Muiruri Kamau Gichuri (Deceased) between Priscillah Wangechi & Another -vs- Anne Wambui Muna (unreported), had the following to render: -
 126. On the basis of the foregoing discussion, with the restraint at hand and in line with Section 7 of the Sixth Schedule to *the Constitution* which states that 'all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution', this Court, therefore, further finds and hold that Section 40 of the Succession Act should apply on a case-by-case basis and subject to considerations including whether the members of the family acted with Articles 53 and 57 of *the Constitution*, whether there are members of the family who are still minors, previous provisions by the deceased among other considerations.
35. This Court equally finds that the application of Section 38 of the LSA should be undertaken with such considerations.
36. Returning to the issue at hand, at the moment there are no any other considerations that may tilt the application of Section 38 of the LSA in this matter.
37. This Court is now persuaded that, in the unique circumstances of this case and in the interest of justice and fair play, the estate herein be distributed as proposed by the Petitioners. The Court further notes that all the parties agree that Isaya Wekesa Wanyama should get between 2 and 2.1 Acres of the estate.
38. With such a finding, the matter should now come to an end.

Disposition:

39. Deriving from the above, the estate of the deceased, being the parcel of land known as Sinyerere/ Kipsaina Blk 1 Bistati/42, shall devolve as follows: -
 - a. The parcel of land known as Sinyerere/Kipsaina Blk 1 Bistati/42 shall devolve upon the following persons: -
 - i. Musa Simiyu Wanyama - 1 Acre
 - ii. Samuel Wanyonyi Wanyama - 1 Acre
 - iii. Gideon Wafula Wanyama - 1 Acre
 - iv. Jacob Nyongesa Wanyama - 1 Acre
 - v. Annah Nabukwangwa Wanyama - 1 Acre



- vi. Rebecca Nafula Wanyama - 1 Acre
 - vii. Damara Nasike - 1 Acre
 - viii. Leah Nasimiyu - 1 Acre
 - ix. Naomi Nangekhe - 1 Acre
 - x. Isaya Wekesa Wanyama - 2 Acres
 - xi. Annah Nabukwangwa Wanyama
[to hold in trust of the purchasers]- 1.5 Acres.
- b. An Amended Grant of Letters of Administration Intestate shall issue in the names of Annah Nabukwangwa Wanyama, Rebecca Nafula Wanyama, Musa Simiyu Wanyama and Samuel Wanyonyi Wanyama.
 - c. The Amended Grant shall stand confirmed on issuance and a Certificate of Confirmation shall forthwith issue.
 - d. The Administrators shall endeavour to, without delay, distribute the property as decreed herein.
 - e. Any resultant costs thereof shall be equally borne by all of the beneficiaries.
 - f. In the unlikely event of any of the Administrators being unavailable and/or unwilling to execute the necessary documents, the Hon. Deputy Registrar of this Court shall execute any such documents on the part of that Administrator[s].
 - g. In the further unlikely event that any of the beneficiaries is unavailable and/or unwilling to contribute towards the sub-division of the property herein, the rest of the beneficiaries shall proceed on and the share of the cost by such an unwilling beneficiary shall be summarily recovered by way of execution in this matter.
 - h. In case of need, the OCS Kachibora Police Station shall provide security during the time of the sub-division of the land in issue.
 - i. Parties shall bear their respective costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 11TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for Mukabane, Learned Counsel for the Petitioners.

Miss. Mukanda for Mr. Nakitare, Learned Counsel for the Objectors.

Chemosop/Duke – Court Assistants.

