



In re Estate of Patrick Martin Musungu Wanyama (Deceased) (Succession Cause 403 of 2013) [2024] KEHC 5370 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 403 OF 2013**

DK KEMEL, J

MAY 17, 2024

**IN THE MATTER OF THE ESTATE OF PATRICK
MARTIN MUSUNGU WANYAMA-DECEASED**

BETWEEN

JOHN KENNEDY WANYAMA 1ST PETITIONER

TERESA WANYAMA 2ND PETITIONER

AND

BABRA NANJALA SIKUKU OBJECTOR

JUDGMENT

1. The grant issued to the petitioners herein was confirmed by this court on 19th January, 2023 pursuant to the provisions of section 71 of the *Law of Succession Act*. The applicant filed summons for revocation dated 18th September, 2023 seeking orders that;
 - i. The grant of letters of administration issued to the petitioners herein on 19th January, 2023 and confirmed on 26th April, 2023 be revoked and or annulled.
 - ii. The objector/applicant be made an administrator of the estate of the deceased.
 - iii. Costs of the application be borne by the petitioners.
2. The summons is supported by the applicant's affidavit sworn on even date who deponed inter alia; that she is a daughter to one Elisha Sikuku Wanyama, (deceased), a son to the deceased herein and therefore ranks in the same degree as the petitioner herein; that since the grant was confirmed, neither she nor her sister Phoebe Nafula have been involved and therefore the petitioners have failed to administer the estate despite having sought audience with the administrators wo have failed to honour her demands; that the 1st petitioner has commenced the process of implementing the certificate of confirmation without involving her; that the 1st petitioner has allocated himself 3.5 acres and allocated her deceased



father 0.375 acres instead of 4.5 Acres; that the proceedings leading to the grant were defective in substance and fraudulent

3. The 1st petitioner filed a replying affidavit wherein he deposed that all the beneficiaries were involved in the process leading to the confirmation of grant. That on the day the grant was confirmed, all the beneficiaries attended court. That the deceased had sold a portion of the land and left 10.5 acres for distribution among the beneficiaries and that out of the portion of 8.5 acres allocated to himself, he is holding 7 acres in trust for his sisters. He deposes that out of his remaining 1.75 acres, he ceded 0.25 acres to the objector and her sister.
4. Thereafter, by directions of the court, parties filed their witness statements and adopted them during the viva voce hearing of the application.
5. OBW-1 Babra Nanjala Sikuku adopted her statement dated 30/2023 which was a reiteration of her supporting affidavit.

In cross examination, she stated that she indeed signed on the consent to confirmation and attended court on the day of confirmation but that she did not raise an issue as she thought they could come back to court. She confirmed that she is aware of the rectification of the grant. That according to the consent for summons for confirmation of grant, she is allocated 0.375 Acres. That she is aware that her father sold his piece of land to other people. That she wants to be allocated 4.5 acres then make provision for purchasers and remain with $\frac{3}{4}$ of an acre. She stated that she had not occupied her portion of land as the 1st petitioner's employee occupies her parents' land.

6. OBW-2 Phoebe Nafula Sikuku adopted her witness statement dated 30/10/2023 where she stated that the 1st petitioner is her uncle and that the deceased was her grandfather.

In cross examination, she stated that she signed the consent on the mode of distribution and attended court for confirmation of grant. That she didn't know the contents of the documents she signed but did not inquire from the petitioner what they were. That she was not forced to sign the document.

7. OBW-3 Juma Justin Sindani adopted his statement dated 30/10/2023 that he was a paternal cousin to the deceased herein.

Cross examined, he stated that the deceased had not sub-divided land among his children. That he does not live near the petitioners herein and had not seen the confirmed grant.

8. The 1st petitioner herein John Kennedy Wanyama (PET PW1) testified on his behalf and on behalf of the 2nd Petitioner. He adopted his witness statement dated 10.11.2023 as his evidence in chief.

In cross examination, he stated that he is a son to the deceased herein who had three wives. That the objector's father is the only child to the 1st wife who died when he was still young. That he is from the 2nd wife and that he is the only son but has four sisters from his mother. That the objectors are his nieces as they are daughters of his late step brother Elisha Sikuku who was the only son from the 1st house. That the three families occupied land parcel number E. BUKUSU/N.SANGALO/ 947. That the objector's father died in 1998 and their house burnt down in 2002. That the objector lived with her maternal grandmother while the sister lived with her mother who re-married in the area. That he distributed the estate equitably and had not placed the objectors in the category of buyers. That he did not witness the sale of a portion of the estate as he was still young. That the objectors' father sold 1.25 Acres leaving behind 0.5 acres for himself to which he ceded another 0.25 acres from his portion and allocated the purchasers their portions on presumption that they had cleared the purchase price. That the confirmed grant does not show that he is holding the 8.5 acres in trust for his sisters. That



he had transferred commercial plot no. 1163 to the 2nd petitioner and did not make provision for the objectors in the said plot.

9. PET. PW2 Catherine Ngaira stated that she is the 1st petitioner's sister and that as a family, they had discussed and agreed that out of the 1.5 acres she and each of her three sisters is entitled to their shares which should be held by the 1st petitioner in trust for them since they are married elsewhere. She confirmed that she signed on the consent accompanying the distribution.

In cross examination, she stated that the objectors' father was her step brother. She stated that the estate was shared out equitably. That though her name does not appear on the confirmed grant, they had agreed that the 1st petitioner holds the land in trust for them. That sisters from the 2nd house got 0.125 acres each.

10. PET.PW-3 Josephine Waswa Makokha stated that her late husband, Cephas Kanyanya bought 0.125 Acres from Agnes Nasike Oluta who had bought 0.3 acres from the objectors' father. That she had signed against her name in the consent to the mode of distribution and was satisfied with the manner in which the succession cause was being carried out.

In cross examination, she stated that she had not seen the deceased herein or the objectors' father and only claiming as a purchaser. That she did not witness the sale between Agnes Oluta and Elisha Sikuku. That she had been allocated her portion of the land.

11. PET PW-4 Anthony Wanjala Masinde stated that he bought 0.5 acres from Elisha Sikuku Wanyama and that he had been given his portion.

In cross examination, he disputed the fact that the said Elisha had no capacity to sell land. That nobody had laid claim over his land.

12. PET.PW-5, Wilfred Martin stated that he is a brother to the deceased herein. That upon his death, succession cause was instituted and on 9/11/2019, the 1st petitioner herein convened a family meeting to discuss the issue of succession and that the petitioners herein were confirmed as administrators. He vouched that the process has been overboard as every member of the family was involved.

In cross examination, he confirmed attending the family meeting of 9/11/2019 where the objector and her sister were in attendance and signed the minutes.

13. The parties also filed their respective submissions. The applicant identified for determination the issue whether the estate was fairly distributed and asserted that under Article 27 of *the Constitution* and Section 40 of the *Law of Succession Act*, all beneficiaries and the surviving widows are taken as a unit. She submits that the petitioner and herself each be given 5.25 Acres which will in the end reflect equal distribution because they have not been provided for in the commercial plot no. East Bukusu/South Kanduyi/1163.

14. On his part, the 1st petitioner submits that the objector and her sister got an extra 0.25 Acres ceded by the petitioner. That they were involved in the process all the way to confirmation of grant and voluntarily signed on the mode of distribution and attended court physically on 19/1/2023 for confirmation of grant.

15. He also disputes the marriage of the mother to Elisha Sikuku to the deceased herein. That assuming that Elisha Sikuku and the petitioner are the only beneficiaries of land parcel E.Bukusu/ N Sang'alo/947, the assertion that each is entitled to 5.25 acres is misleading since Catherine Wanyama, Everlyne Wanyama, Jackline Wanyama (deceased) and Inviolata Wanyama would be prejudiced. That land parcel No E. Bukusu/ N. Sang'alo/947 is not in dispute.



Analysis and determination.

16. Revocation of grant is governed by section 76 of the *Law of Succession Act* (hereinafter Cap 160) which provides;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
 - (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
 - (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
 - (e) that the grant has become useless and inoperative through subsequent circumstances.
17. In the summons before me, the applicant's main contention is that the 1st petitioner allocated himself 3.5 acres as opposed to their share which is 0.375 acres instead of 4.5 acres. In her testimony before court, she stated that she was aware that her late father sold part of his entitlement and that the distribution is unfair and not equitable in that the 1st petitioner allocated himself land meant for her late father.
18. In his response and testimony before the court, the 1st petitioner reiterates the fact that the objector's father sold part of his land, that he holds part of the estate in trust for his sisters, that the objectors signed on the consent accompanying summons for confirmation of grant and attended court for confirmation of grant and finally that he actually ceded part of his portion to the objector.
19. Starting with the issue of consent, there is contention by the objector that she did not consent to the mode of distribution, I have perused the summons for confirmation of grant and note that before confirmation, the petitioner herein filed into court on 9/11/2022 summons for the confirmation of grant and among the signatures therein are that of Phoebe Nafula Sikuku and Babra Nanjala Sikuku showing each of them is entitled to 0.375 Acres.



20. The court presided over by Hon. Wananda J duly confirmed the grant upon being satisfied that both the objector and her sister were in court after perusing the consent and finding that all the beneficiaries were in court.
21. The proviso to section 71(2) provides that;

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.
22. In this case, the petitioner prepared and filed the consent to the mode of distribution detailing each beneficiary's entitlement and indeed the beneficiaries attended court on the date of confirmation. It is not enough for the objector to allege that she believed she could return to court for her share to be confirmed. It is enough that she did not raise any objection to the confirmation when physically in court. She also out of her own volition signed on the consent.
23. Having said as much, i find that the objection herein does not fall within the grounds contemplated by section 76 of Cap 160 as the objector was involved in the process all the way to confirmation and therefore no material fact was concealed from her.
24. I also note that the objector acknowledges the sale of part of her late father's portion to third parties who were present in court on the date of confirmation. The fact that her father's allocation is smaller than the 1st petitioner's is explained by the fact of sale to several purchasers alluded to earlier.
25. In the end and for the foregoing reasons, i find no merit in the application dated 18th September, 2023 and proceed to dismiss it entirely for lacking in merit. This being a family matter, each party shall bear their own costs.

DELIVERED, DATED AND SIGNED AT BUNGOMA THIS 17TH DAY OF MAY 2024.

D.KEMEI

JUDGE

In the presence of;

Wekesa for Paul Juma for Objector

No appearance Kundu for Respondent

Kizito Court Assistant

