



**Wesonga v Bukoma (Civil Appeal E044 of 2022)  
[2024] KEHC 7220 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 7220 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E044 OF 2022**

**REA OUGO, J**

**MAY 23, 2024**

**BETWEEN**

**GEORGE J SIFUNA WESONGA ..... APPELLANT**

**AND**

**GERISHOM SAURER BUKOMA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. A. Odawo (SRM)  
delivered on 25th April 2022 arising from Bungoma CM P&A No 814 of 2018)*

**JUDGMENT**

1. This appeal relates to the succession cause of Fredrick Wetala Bukoma (deceased) filed at the subordinate court. The deceased's widow and son, Joyce Ndala Bukoma and Gerishom Bukoma petitioned for the grant of letters of administration intestate. The deceased died leaving the following properties in his name:
  - a. Land Certificate Title No. E. Bukusu/N. Kanduyi/1579
  - b. Title No. E. Bukusu/S. Kanduyi/2672
  - c. Title No. E. Bukusu/N. Sang'alo/1950
  - d. Title No. Ndivisi/Khalumuli/1316
  - e. Title No. W. Bukusu/N. Sang'alo/1923
2. The deceased's dependents were identified as his widow and 10 children. Joyce Ndala Bukoma and Gerishom Bukoma were appointed administrators on the 30<sup>th</sup> January 2008 and on 17<sup>th</sup> September 2019 the certificate of grant was confirmed.



3. The appellant filed an application seeking to have the letters of administration issued on 30/1/2008 and the certificate of grant confirmed on 17/9/2019 recalled, annulled, and or revoked. His application was on the grounds that he is a liability in the deceased's estate and that L.R No W Bukusu/N. Mateka/1548 was not included as the deceased's asset in the P&A form 5. He also purchased part of LR No Bukusu/S. Kanduyi/2676 where he put up several rental units. The application for succession was filed without his knowledge and the administrator threatened to evict him from the property. After conducting a hearing, the trial magistrate ordered that the administrator should transfer L.R. No. W. Bukusu/ N. Mateka/ 1548 to the appellant. The trial court refrained from making any orders with respect to E.Bukusu/South Kanduyi/3129 and 2672.
4. The appellant has filed his memorandum of appeal premised on the following grounds:
  1. The trial magistrate erred in law and fact in holding that the appellant did not prove that he bought part of the land from the deceased in LR NO. E.Bukusu/S.Kanduyi/2672.
  2. The trial magistrate erred in law and fact in holding that the respondent do transfer L.R. No. W. Bukusu/N. Mateka/1548 without first directing that the certificate of confirmation of grant be rectified to include L.R NO. N.Bukusu/W.Mateka/1548 on the certificate of confirmation.
  3. That the trial magistrate erred in law and fact in devolving in unnecessary issues when her duty was to find out whether the appellant was a liability in the estate of the deceased to the extent of L.R. NO E.Bukusu/S. Kanduyi/2672 and LR No. W. Bukusu/n. Mateka/1548 hence arriving at a wrong decision.
  4. The trial magistrate erred in law and in fact in deliberating land issues when her duty was limited to succession matter before her.
  5. The trial magistrate erred in law and in fact in holding that the appellant had not paid the consideration of L.R No. E Bukusu/S. Kanduyi/2672 against the overwhelming evidence on record.
  6. The trial magistrate erred in law and fact in failing to appreciate the ingredients of a liability in the estate of the deceased as provided under *Law of Succession Act* and Rules.
  7. The trial magistrate erred in law and fact by not holding that the respondent withheld material facts to the extent that the appellant was not a liability in the estate of the deceased herein.
  8. The trial magistrate erred in law and fact by not framing issues for determination hence arriving at a wrong decision.
5. Parties filed their respective submissions on appeal.
6. The appellant submits that in his supporting affidavit on page 8 of the record of appeal, it is clear that he bought the suit land from the deceased. He paid the entire consideration and the sale agreement proves that the appellant bought part of the land. The respondent's father sued the appellant in court vide Bungoma CMCC No. 670 of 1999 where he was seeking payment of the outstanding balance and advocate Khakula acknowledged that the appellant did not owe money to the deceased (see pages 28-36 of the record of appeal). The trial court failed to provide reasons why she refused to make orders in respect of LR No. E.Bukusu/S. Kanduyi/2672. He maintains that he was a liability hence the certificate of confirmation of grant was supposed to be revoked and or amended. They relied on the case of *Ansazigambo Tinga & Another v Nicholas Patrice Tabuche [2019] eKLR*.



7. The appellant further submitted that the trial court erred in not holding that the respondent withheld material facts by concealing that the appellant was a liability in the estate of the deceased. The appellant tabled cogent evidence to prove that he bought land from the deceased. Reliance was made on the case of *Musa Nyaribari Gekone & 2 others c Peter Miyienda & Another* (2015) eKLR the court held
8. The respondent on its part, in his submissions dated 2/11/2023, argues that the appellant failed to honor the agreement he had with the deceased. The appellant attempted to dispose off the land without the consent of the deceased and in the judgment entered in Civil Suit No 670 of 1999. He claims that if the appellant had any issues in regard to parcel No. E. Bukusu/S. Kanduyi/2672 then a suit should be lodged at the Environment and Land Court. Regarding parcel No. W/Bukusu/N.Mateka 1548, the appellant accepted the transfer of said land to the respondent so long as he met the costs of the process.

### **Analysis And Determination**

9. As a first appellate court, I shall re-evaluate the evidence and arguments presented during the trial. (see the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123). It is the appellant's case that he bought part of LR East Bukusu/South Kanduyi/2692. The appellant was sued by the deceased on grounds that he owed him Kshs 90,000/-.
10. George Julius Wesonga Sifuna (Pw1) testified that the deceased was the owner of parcel No. E. Bukusu/S. Kanduyi/2672. He lives on parcel 1548 which he purchased in 1990. He seeks that the confirmation of the grant be annulled and that he should be declared a liability to the estate. On cross-examination, he testified that he agreed to purchase parcel no. 1547 for Kshs 60,000/-. He testified that he had agreed to exchange his land 3129 with that of the deceased but the deceased changed his mind and he sold land parcel No 3129. He testified that he finished paying for the parcel in 2021.
11. Grishom S. Bukoma (Dw1), conceded that the appellant purchased parcel No. 1548 from his father. He testified at the time of filing the succession cause the land was not in the name of the deceased and they did not have the title deed. Currently, the land is in the name of the deceased. The objector has a house on the parcel and has paid the outstanding loan. After the death of the deceased, they asked the appellant for documents to show that he cleared the payment of the consideration and the appellant made a payment of Kshs 14,000/- in 2021. Dw1 explained that Kshs 14,000/- in 2004 was not the same value in 2021.
12. The appeal revolves around L.R. NO E.Bukusu/S. Kanduyi/2672 and LR No. W. Bukusu/n. Mateka/1548. The application before the subordinate court was on rectification or annulment of the grant. Section 76 of the [Law of Succession Act](#) provides as follows:
 

“Revocation or annulment of grant

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) ...
  - (b) That the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case

...”
13. The appellant's application at the lower court was made because the respondent had concealed material facts as he failed to disclose to the court that the appellant was a liability. However, the respondent testified that he did not know about parcel 1548 at the time the succession cause was filled. He later



received a sale agreement in respect to the same from his stepmother. Therefore, the appellant failed to prove that the respondent had concealed the information from the court. In re estate of Charles Kibe Karanja (deceased) [2015] eKLR the court had this to say pertaining assets that had not been discovered at the time of distribution:

“If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant. Such changes are fundamental, not superficial. They go to the core of the distribution. They cannot be affected without touching the orders made by the Court at the distribution of the estate. Consequently, such changes cannot and should not be effected through a mere amendment of the certificate of confirmation of grant. The proper approach ought to be an application for review of the orders made at the confirmation of the grant. The remedy of review of Court orders is not directly provided for in the Law of Succession Act and the Probate and Administration Rules, but it is imported into probate practice by Rule 63 of Probate and Administration Rules, which has adopted a number of procedures from the Civil Procedure Rules.....

Where known assets are omitted from the schedule of the property to be distributed or the name of a known beneficiary or heir is inadvertently left out of the confirmation application, an application ought to be made for review of the confirmation orders to accommodate the said assets or beneficiaries on the basis that the said assets or heirs were left out by mistake or error. Where assets are discovered after the Court has confirmed the grant or a heir or survivor of the deceased who had previously been unheard of materializes after distribution, the Court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.....

New assets cannot be introduced and distributed by merely rectifying the certificate of confirmation of the grant. That calls for going back to the distribution orders, so as to have them altered or revised. The applicant ought to have sought a review of the orders of 7th November, 2006 so as to include the discovered assets and to distribute them. It is only after review or revision of the said orders that an altered certificate of confirmation of grant can issue.”

14. The evidence tendered at the lower court does not satisfy the conditions for the revocation of the grant. The appellant’s only recourse would be to apply for a review of the orders of confirmation more so, of land parcel no. 1548.
15. The appellant claims to have bought part of L.R. NO E.Bukusu/S. Kanduyi/2672 and therefore he should be added as a liability to the estate. However, there is evidence that although the appellant agreed to the sale of the parcel, he did not finish making payments while the deceased was still alive. Pw1 testified that he made the final payment in 2021. On the other hand, Dw1 took issue with the payment, claiming that the value of Kshs 14,000/- in 2021 and at the time of the contract cannot be compared. There is a need to examine whether the parties met their obligations as per the contract to determine the legal owner of the land of part of L.R. NO E.Bukusu/S. Kanduyi/2672 measuring 86 ft x 83 ft x 80 ft. The court with the requisite jurisdiction to do so is the Environment and Land Court.
16. Consequently, I find that the appeal lacks merit and is hereby dismissed. This being a family matter, there shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF MAY 2024**



**R.E. OUGO**

**JUDGE**

In the presence of:

Mr. Robert Wamalwa For the Appellant

Respondent – Absent

Wilkister/ Diana -C/A

