



In re Estate of the Late Munyendo Son of Musebe (Deceased) (Succession Cause 448 of 2014) [2024] KEHC 7650 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 448 OF 2014**

SC CHIRCHIR, J

JUNE 20, 2024

**IN THE MATTER OF THE ESTATE OF THE LATE
MUNYENDO SON OF MUSEBE (DECEASED)**

BETWEEN

CLAYSTONE OKEMBA KWEYU PETITIONER

AND

JULIUS MANGETI MUNYENDO PROTESTOR

JUDGMENT

1. What is coming up for determination is the Summons for confirmation of Grant dated 4. 9.2015 , by the Claystone Okemba Kweyu, the Administrator of the Estate (The petitioner).
2. The petitioner has listed the deceased's children as Bonventure Omusebe Kweyu, Peter Ochido and Claystone Okemba Kwetu. The only property of the estate as Land parcel No. E. wanga/Malaha/ 232 . measuring about 26.4 hectares. He proposes that a portion of 13.2 ha goes to him and the remaining 13.2 to be shared equally between Bonventure Omusebe and peter Ochido.
3. The petitioner further states that there is no provision for dependants pending.
4. On 27th October 2016 , Asha Nawade Munyendo filed summons for revocation of grant, and on 16th November 2016 the protestor herein, Julius Mangeti Munyendo , who described himself as the son of the deceased filed the protest dated 15.11.2016
5. On 23. 2. 2022 the summons for revocation of grant was withdrawn by the counsel of the objector
6. In his affidavit of protest, the protestor he states that he is a child of the deceased , and that the Applicant herein was his cousin(the son to the deceased's brother); that the deceased had other dependants consisting of 4 wives and 25 children. He has listed the deceased's wives as Leah Mukolwe who had 5



children, Teresa wesonga with 4 children Eunice Nekunda Munyendo with with 7 children and Asha Nawate Munyendo with with 9 children.

7. The protestor further stated that the petitioner is not is not entitled to any portion of land as they were not dependants of the deceased; that he was aware that his late father had given a portion of 5 acres from parcel No. E. Wanga / malaha / 232 to his uncle late Simon Kweyu Musebe and this act was one of mercy from his father . That the petitioner's father sold his own land which was in Marachi , and that his family is willing to have simon's family retain the 5 acres. He insists that the family of the said Simon are not entitled to anything above 5 acres as that was the portion his father had given to the family of simon. He proposes that from the remaining portion his sisters should be given an acre each and the balance to be shared equally between his brothers.
8. On 23.2. 2022 the court directed that the summons and the protest be heard by way of *viva voce* evidence.

The Evidence

9. PW1 was Asha Nawale, who identified herself as the widow of the deceased. She told the court that the deceased had 4 wives and she proceeded to name them as : Teresa Wesonga Munyendo Asha Nawate Munyendo (self) Eunice Nekunda Munyendo (deceased) and Leah Mukolwe Munyendo. (deceased)
10. She further stated that the Applicant Clayton Okemba Kweyu was the son to Simon Kweyu Musebe and not a son of the deceased. That Claystone should not get a share of the deceased's land.
11. On cross- examination, she stated that the deceased and Simon Kweyu Musebe were brothers and that their father was one Musebe Mang'eti Musebe . The older Musebe had two parcels of land, one at wanga Mukulu which was given to his first wife and one at Marachi Mauko which was left to the 2nd wife.
12. On re-examination she stated that Simon K. Musebe and one George Mangeti left Marachi and came to wanga and the deceased gave them land to settle ; that since then the two have never gone back to Marachi . She further stated that the petitioner's father was buried in wanga. It was further her testimony that the petitioner's father was born in Marachi and got children while there. She denied the suggestion that the deceased was not holding the land in trust for the petitioner's father. She further stated that the petitioner's father sold the land in marachi and came to wanga on allegation that they had been chased . Consequently the deceased gave him land to settle. She further sated that that the petitioner's father was given land by the deceased, while George (PW2) was given by Ibrahim Mangeti. She insisted that the Applicant should not get half of the deceased's land as his land was in Marachi.
13. DW1 was the petitioner, Claytone Okwemba relied on his sworn affidavit dated 15/11/2016. He told the court that the deceased was his uncle and PW1 was the wife of the deceased. He stated that his father Simon Kweyu and the deceased were sons to Musebe Mang'eti Musebe.
14. He stated that he lives in the same land as PW1; that the land measures 26.4 acres. He stated that he has lived in the land since he was born and his late father Simon Kweyu ,who died in 1978. He admitted that the land is registered in the name of the deceased. He further stated that his family occupy half of the land while the deceased's family occupies the other half . He denied that his father had another parcel of land at Marachi.
15. During cross examination he told the court that he was born in 1976 while his father passed away in 1978, when he was only 2 years old, while his grandfather died in 1948. He admitted that he was not born when his grandfather divided the land between his father and the deceased herein.



16. He further told the court that he was the Administrator of his Father's Estate though he did not have any document to prove it. He filed the present succession cause following a citation order duly issued by court. He denied that he made any misrepresentation when he petitioned for the grant herein
17. Dw2 was Gregory Musebe . He told the court that he was a brother to the deceased. He adopted his sworn statement dated 15/7/2019. In his written statement he stated that his father had four sons, being himself, Ibrahim Mageti , simon Musebe(the petitioner's father) and the deceased. That his elder brothers consisting of Ibrahim and the deceased, allocated themselves their father's land when he and the petitioner's father were still young; That it was later agreed that he will share the land with Ibrahim, while the deceased was to share with the petitioner's father; that Ibrahim gave him a portion of the land but the petitioner's father died before he could get a share of the land from the deceased .
18. On cross -examination, he told the court that the petitioner's father r the suit property and the deceased was holding the land in trust for the petitioner's father. He admitted that the petitioner's father was occupying 5 acres of the suit property up to the time he died and it is this portion that he left to his family when he died.
19. Dw3 relied on his statement dated 15/7/2019 which he adopted as his evidence in chief. In his written statement , he stated that he was a cousin to the deceased; that while his father was given land at Marachi, the deceased's father was given the land in Wangi. He further stated that the land in wangi was therefore supposed to be shared by the deceased and his three brothers including the petitioner's father.

Submissions

20. The parties filed their submissions but I notice that the submissions are pegged on the objection proceedings which had been withdrawn. The same are therefore not considered for purposes of this Ruling.

Determination

21. I have considered the pleadings, the witnesses testimonies and perused the various documents submitted in trial. The following issues arise for determination
 - a). Whether the suit property was being held in trust by the deceased
 - b). What is the appropriate mode of distribution.

Whether the suit property was being held in trust.

22. It is not disputed that the petitioner is not a child of the deceased. It also emerged from the testimonies of all the witnesses that the petitioner is a child of the brother to the deceased, one Simon Kweyu Muebe. It is also common ground that the petitioner's family and the Family of the deceased are in occupation of the suit property measuring about 26. 4 Hectares. It is not also in dispute that the suit property is registered in the name of the Deceased.
23. The Petitioner's case is that the deceased was holding the suit property in trust for his father, and the Land should therefore be divided equally between the two families.
24. I have seen a certified copy of the register of the suit property. The land was registered to the deceased on 16/11/1966. It was a first registration. On 19/9/1974 the petitioner's father registered a caution against the title, claiming an unspecified interest on the suit property. Thereafter there were no further entries made against the Title.



25. The protestor denied that the property was held in trust, that the deceased had only given a portion of the land to the petitioner's father as an act of grace
26. From the register, there is no indication that the property was being held in trust. There is a caution placed against the title in 1974, but the said Simon did not apparently take any further action, until he died in 1978.
27. DW1 told the court that, the deceased had 2 parcels of land, one in Marachi and the one in Wanga (the suit property). He further told the court that the petitioner had his land in Marachi, but he sold it. After selling their land they came to Wanga, and the deceased gave the petitioners land to settle. She insisted that the petitioners should not get any portion of the suit property , as he has his own land in Marachi.
28. The petitioners had insisted on 50/50 sharing portion based on the fact that the property was allegedly held in trust. However there is no evidence that the suit property was held in trust.
29. I have taken note of the petitioner's evidence on how his grandfather's land was to be shared. However he admitted whatever he testified about was hearsay ,as he was 2 years old when his father died in 1978, while the grandfather who allegedly divided the family land died way back in 1948.
30. I have also considered the testimony of DW2. He told the court that the petitioner's father was occupying 5 acres from the suit property, and that at the time of his demise , he was still occupying the same portion . This piece of evidence tallies with paragraph 12 of the protestor's affidavit where he stated that the deceased had allowed the petitioner's father to occupy a portion of about 5 acres of the suit property. The onus was on the petitioner to prove that the suit property was held in trust, and having failed to prove it , there is no basis upon which the court can make a finding on equal sharing of the said property.

What is the appropriate mode of distribution?

31. PW1 insisted that the petitioner should not get any portion from the suit property. However despite this insistence , the protester in paragraph 12 and 13 has stated that his family is willing to allow the petitioner's family to keep the 5 acres they are occupying.
32. At this point it is important to recall that PW1 withdrew her objection proceedings and her testimony was simply in support of the protest. Pw1's assertion that the petitioner should not get any portion contradicts the averments by the protestor. It is trite law that parties are bound by their pleadings.
33. The petitioner told the court that he was claiming the land on behalf of his father; that he was an Administrator of his father's estate, but he had no Grant of representation to prove it. In the circumstances , the 5 acres offered will go , not to the petitioner ,but to the estate of his late father , Simon Kweyu Musebe.
34. The deceased was a polygamous man of 4 wives and 25 children. PW1 told the court that 2 of the wives, namely Leah Mukolwe and Eunice Nekunda have since died.
35. The children of the deceased are listed under paragraph 7 of the Affidavit of protest as follows:
 1. The house of Leah Mukolwe (Deceased)Benson IndusweJosephine Simba MunyedoWanga MunyendoNerima MunyendoGrace Munyendo
 2. The house of Teresa WesongaEdwin Okemba MunyendoBonventure Ilaria MunyendoMutimba Munyendocatherine Masakwe Munyendo



3. The house of Eunice Nekunda Munyendo (Deceased)Richard Induswe MunyendoJames Buhuru MunyendoWilson Munyendo Mang’etiDavid Nambale OlibeTruphena Masakwe MunyendoPriscilla Simba MunyendoRael Munyendo
 4. The house of Ashah Nawate MunyendoJosephat Tom MunyendoBenson Masoso MunyendoJulius Mang’eti MunyendoDaniel Opang’a MunyendoRoselyne Nerima MunyendoMargaret Masakwe MunyendoMwaro Munyendo JaneJacklyne Weta MunyendoHellen Munyendo.
36. Section 40 of the *law of succession Act (The Act)* stipulate the mode of distribution where an intestate was polygamous. The section provides as follows
- ”40
- (1) Where the intestate has married more than once under any system of law permitting polygamy,, his personal and household effects and the residue of the net estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
 - (2) The distribution of the personal and household effects and the residue of the net Estate within each house shall then be in accordance with the rules set out in sections 35 to 38”
5. The protester has proposed that his sisters should get one share each and the rest be shared equally between him and his brothers. However section 38 of the *Act* sets out the principle of equal distribution of the net Estate to the children of the deceased, irrespective of gender or marital status. In any event such discrimination will go against Article 27 sub- Articles 1,2,3 and 4 of the *constitution* , which directly prohibits discrimination on interalia, sex or marital status.
37. According to the certificate of official search, the suit property is 26.4 hectares (approx. 65.2 Acres). The 5 acres will go the Estate of Simon Kweyu Musebe, as aforesaid. The remaining 60.2 Acres will be divided between the deceased’s heirs, in accordance with section 40 of the Act.
38. In the end the suit property will be distributed as follows:
- a). The Estate of Simon Kweyu Musebe- 5 acres.
 - b). The house of Leah MukolweBenson Induswe-2.4 acresJosephine Simba Munyedo-2.4 acresWanga Munyendo-2.4acresNerima Munyendo-2.4acresGrace Munyendo – 2.4 acres
 - c). The house of Teresa WesongaEdwin Okemba Munyendo-2.4acresBonventure Ilaria Munyendo-2.4acresMutimba Munyendo-2.4acresCatherine Masakwe Munyendo – 2,4 acres
Teresa Wesonga will hold a life interest over the total acreage due to her children and will be divided aforesaid upon her re- marriage or demise
 - d). The house of Eunice Mekunda Munyendo (Deceased)Richard Induswe Munyendo-2.4 acresWilson Munyendo Mang’eti- 2.4 acresJames Buhuru Munyendo-2.4acresDavid Nambale Olibe-2.4acresTruphena Masakwe Munyendo-2.4 acresPriscilla Simba Munyendo-2.4 acresRael Munyendo – Each 2.4 acres.



6. The house of Ashah Nawate Munyendo Josephat Tom Munyendo-2.4 acres Benson Masoso Munyendo- 2.4 acres Julius Mangeti Munyendo-2.4 acres David Opang'a Munyendo-2.4 acres Roselyne Nerima Munyendo-2.4 acres Margaret Masakwe Munyendo-2.4 acres Mwaro Munyendo Jane-2.4 acres Jacklyne Weta Munyendo- 2.4 Hellen Munyendo – Each 2.4 Acres.

Asha Nawate Munyendo will hold a life interest over the total acreage due to her children and will be divided as aforesaid upon her re-marriage or demise.

39. Each party to meet their costs.

40. Right of Appeal 28 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF JUNE, 2024

S. CHIRCHIR

JUDGE .

In the presence of:

Godwin -Court Assistant

Claystone Okemba Kweyu – petitioner

Mr Mondia for Objector/Applicant.

