



**In re Estate of James Alukoye Were (Succession Cause 1356 of 2012)  
[2024] KEHC 13004 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13004 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 1356 OF 2012  
SC CHIRCHIR, J  
OCTOBER 17, 2024  
IN THE ESTATE OF JAMES ALUKOYE WERE**

**BETWEEN**

**AUGUSTINE WERE ALUKOYE ..... ADMINISTRATOR**

**AND**

**BENEDICT ANDEYI MAINA ..... OBJECTOR**

**AND**

**LIVINGSTONE ANDEI ..... RESPONDENT**

**JAMES ANDEI ..... RESPONDENT**

**DAVID CALISTO ANDEI ..... RESPONDENT**

**JUDGMENT**

1. There are two Applications coming up for determination. The 1<sup>st</sup> is the summons for confirmation of grant dated 1372021 filed by Augustine Were Alukoye ( the Administrator ). The 2<sup>nd</sup> one is also by the Administrator in which he seeks injunctive orders and an order of eviction against the protestor and the respondents
2. The summons for confirmation attracted a protest by one Benedict Andeyi Maina ( The Protester).
3. Directions were given for the two Applications to be heard together and the hearing to proceed by way of Affidavits and oral evidence.

**Protestor's case**

4. PW1 was the protestor. For his evidence -in- chief, he relied on his affidavit of protest dated 1992021.



5. In the affidavit, he states that he purchased parcel No. Butsoeso Esumaiya677 (The suit property) from the deceased in the years 1970 and 1980; that he took vacant possession in 1980 and since then his children have been residing on the land; that the deceased however died before he could transfer the land to him. He further states that the Administrator is aware about his occupation of the suit property and that indeed the Administrator's family had agreed to surrender his portion of the land to him. He has attached two agreements, signed in 1971 and 1981 respectively.
6. In cross- examination, he stated that he bought 2 acres first in 1970, then followed by another two in the year 1980. He admitted that he was aware of a 1985 case in which it was decided in favor of the deceased. He admitted that no documents of transfer were signed between him and the deceased. He denied the suggestion that there was an agreement signed in 1999 in which he agreed to vacate the land upon harvesting a sugar crop he had planted on the disputed land. He insisted that he still stays in the land with his sons.
7. On re-examination he stated that he had a case with the deceased in which the Land disputes Tribunal returned a verdict in his favour, and the deceased was ordered to transfer the land to him. He denied that he signed the letter dated 2981999 in which he had allegedly agreed to vacate the land upon the harvest of his sugarcane.
8. PW2, was the son of PW1. He swore an affidavit dated 1052021. The said Affidavit was adopted as his evidence- in- chief. He states that his family has been in occupation of a portion of 4 acres of the suit property. He referred to an agreement entered into on 19102016 in which the Administrator had agreed to have the survey done with a view to ascertaining the portion due to the protestor.
9. On Cross-Examination, he admitted that he had not been born in the year 1970 when the Agreement was entered into. He stated that his family started occupying the suit property in the year 1998. He further stated that his father bought land from the deceased. His father was now 90 years old and was forgetful.

### **Administrator's Case**

10. DW1 was the Administrator herein. He told the court that the deceased was his father. He proposed that the distribution be done as per his proposal contained in the affidavit sworn on 1372021. He further stated that the proposed mode of distribution has been agreed by all the survivors of the deceased.
11. He also asks the court to grant the prayers as per Application dated 2622021 seeking to bar the protestor from intermeddling with the deceased's estate.
12. He further stated that the protestor wrote a letter on 2981999, in which the protestor agreed to vacate the land ( The letter was marked as ( D Exb 1). As for the agreements of 1970 and 1980 he told the court that the deceased never signed them. He also denied that he signed the agreement dated 19102016 in which he purported to agree on the survey of the suit property. He told the court that the finger- print imposed on the letter is not his as he writes as opposed to thumb printing his documents. Lastly he testified that he does not finger- print documents as he is capable of signing. He further stated that the protestor entered the land in 2018 and not 1998 as alleged and that the protestor has not carried out any construction on the land.
13. On cross-examination, he told the court that he was born in 1991 . He also admitted that the protestor's children live on the 4 acre portion of the property.
14. The parties thereafter filed submissions which I have read and considered.



## Analysis and Determination

15. I have considered the pleadings, the witness testimonies and the various documents produced in this matter.
16. I have identified the following issues for determination:-
  - i. Whether the protestor is a liability to the estate.
  - ii. Whether the protestor has intermeddled with the estate.
  - iii. Whether the grant should be confirmed and if in the affirmative what is the approximate mode of distribution.
  - iv. Whether the protestor should vacate the suit property.

### Whether the protestor is a liability to the estate

17. Section 62 of the *Law of Succession Act*, places a duty on an Administrator of an Estate to settle any debts or transactions that was entered into by the deceased during his lifetime, before distributing the Estate.
18. The liabilities which an Administrator is under an obligation to settle are only those which had crystallized by the time of the deceased's demise. In the case of *Alexander Mbakaya versus Royford Muriuki Rauni and 7 other* (2016) eKLR the court had this to say about the liabilities that an administrator of an Estate is under an obligation to settle "it is only where one has an established claim against the Estate that has crystalized that he can litigate it before a family court. The claim is to be covered as a liability to the estate. This court in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right he has not yet crystalized. The right must be shown to have crystalized before the family court can entertain it....".
19. It is the duty of this court therefore to ascertain whether the protestor's right, if any, in the suit property, had crystalized by the time of the deceased's demise.
20. Witnesses from both side testified to the fact that there was a dispute that existed between the deceased and protestor over the 4 acres portion of the suit property. That dispute became a subject of determination before Lurambi Division Land Disputes Tribunal under "case No. 30" The case ended up in the high court at kakamega under Civil Miscellaneous Application No. 88 of 2015. The High Court quashed the decision by the tribunal .
21. I have perused the proceedings of both the tribunal and the high court aforesaid and noted that the Sale Agreements of 1970 and 1980 were the subject of determination before the Land's dispute tribunal, which proceedings were later quashed by the high court as aforesaid.
22. For this court to revisit these agreements would be, to seek to make a determination on issues that have already been adjudicated upon. This court has no jurisdiction to do that, as that would be violating the doctrine of *res judicata*.
23. The Lurambi Land disputes Tribunal had directed the deceased to surrender 4 acres of the suit property to the protestor. Those orders were overturned by the high court. There is further no evidence that there was an Appeal against the High Court decision.
24. In the circumstances, the protestor has failed to prove that he had a right that had crystalized against the deceased's Estate.



### **Whether the protestor is an intermeddler on the Deceased Estate.**

25. It is only a duly appointed Administrator of an Estate who can exercise certain rights, albeit limited, over the deceased's Estate. Section 45 (1) of the *Law of Succession Act* provides as follows:- Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”
26. In the case of *Benson Mutumamuriungi v C.E.O. kenya police Sacco & Ano* [2016] eKLR cited in the case of *Re Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased)* (Succession Cause 108 of 2014) [2017] KEHC 7904 (KLR) the court observed :
- “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 the deceased 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 any appropriate order(s) of protection of the estate against any person.”
27. Witnesses from both sides testified that the protestor's family are residing on a portion of the suit property. Having found that the protestors have no valid claim over the deceased's estate , then their occupation of the deceased's property is a case of intermeddling.

### **Should the Grant be confirmed.**

28. In paragraph 5 of the Affidavit in support of the summons the Administrator has prosed to distribute the Land Parcel No. ButsoesoEsumeiya677 as follows:
- a. Anna Masakwe Aseke, Fridah Khasandi Litali, George Aseka Mwanje – 2.5 Acres jointly.
  - b. Christine Aliano Omende ( to hold in trust for Benson Mukaya Alukoye ) – 2 Acres.
  - c. Augustine Were Alukoye – 2 Acres
  - d. Dennis Mwange – 2 Acres
  - e. Davis Mulongo – 2 Acres
  - f. Naom Ongweso Boyani Damaris Muyanzi Onyengo – 2 Acres jointly in equal shares.
29. On 28/4/2022 the rest of the beneficiaries appeared in court and informed the court that they were in agreement with the said mode of distribution.
30. In conclusion, I hereby proceed to make the following orders:-
- a. The Protestor's protest is hereby dismissed.



- b. The Protestor and Respondents are hereby declared as intermeddlers on the Land Parcel No. ButsoesoEsumeywa677.
- c. The protestor and the respondents are hereby ordered to demolish any temporary structures constructed on LandParcel No. ButsoesoEsumeywa 677, and in default the Administrator is at Liberty carry out the demolition.
- d. The respondents, their families, Agents or anyone claiming under them are hereby barred from further occupation, cultivation of the Land parcel No. ButsoesoEsumeywa 677 or dealing with the said property in any manner.
- e. The Grant herein is hereby confirmed and the distribution of the Estate will be as per paragraph 28 of this Judgment.
- f. Each party to meet their own costs.
- g. Right of Appeal -28 days.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**S. CHIRCHIR**

**JUDGE**

In Presence of:-

Godwin Luyundi- Court assistant

Ms. Chesire for Mr. Adeka for the protestor

Mr. Indimuli for the Administrator.

