



**In re Estate of Estate of Olive Watetu Samwel (Deceased) (Succession Cause 41 of 2023) [2024] KEHC 11947 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11947 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 41 OF 2023**

**DK KEMEL, J**

**OCTOBER 8, 2024**

**IN THE MATTER OF THE ESTATE OF OLIVE WATETU SAMWEL (DECEASED)**

**BETWEEN**

**JANE WAMBOI NJARAMBA ..... PETITIONER**

**AND**

**SAMWEL MULATI LUKORITO ..... 1<sup>ST</sup> OBJECTOR**

**BETTY KASOHA LUKORITO ..... 2<sup>ND</sup> OBJECTOR**

**MARTIN MBAUNI LUKORITO ..... 3<sup>RD</sup> OBJECTOR**

**JUDGMENT**

1. This cause relates to the Estate of the late Olive Watetu Samwel who died intestate on 6<sup>th</sup> November 2003. She was survived by three children (two daughters and one son) and that her estate comprised on parcel of land known as Bungoma/Kabuyefwe/26. A grant of representation in the said estate was issued on 8<sup>th</sup> November 2003 after the Court revoked the grant issued to the 1<sup>st</sup> and 2<sup>nd</sup> Objectors on 19<sup>th</sup> January 2004 and confirmed on 11<sup>th</sup> December 2008.
2. Pursuant to Section 71 of the [Laws of Succession Act](#), Cap 160, the Petitioner herein vide summons for confirmation of grant dated 14<sup>th</sup> November 2018, and filed in Court on 28<sup>th</sup> November 2018 seeks that the grant of letters of administration Intestate made to her on 8<sup>th</sup> November 2018, be confirmed and the costs be in the cause.
3. The summons for confirmation of grant were supported by an affidavit sworn on even date by the Petitioner herein. She averred that on 18<sup>th</sup> November 2018, this Court delivered a Judgement appointing her as an Administrator of the estate of the deceased herein and from thereon she was granted 30 days to ensure that she filed the respective summons for confirmation of grant. According to her, the deceased herein was survived by two daughters and one son and that the estate of the deceased



- comprised of land parcel Bungoma/Kabuyefwe/26 which she averred was to be wholly registered in her name in trust for the entire family as per the consent duly executed by herself, Patrick Ndahi and Margret Wanjiku Lukorito.
4. Opposing the summons for confirmation of grant, the 2<sup>nd</sup> Objector herein filed her affidavit in Protest sworn on 20<sup>th</sup> November 2020, wherein she averred that she is a beneficiary to the estate of the deceased as she was her step daughter and that the deceased took care of her ever since she was three years old.
  5. According to her, she used to reside on parcel Bungoma/Kabuyefwe/26 prior to her eviction by the Petitioner herein and her siblings and that she has no other land to stay in or means to support herself. She averred that by the dint of Section 29 of the Law of Succession Act, she is a dependant of the estate of the deceased and thus entitled to a share.
  6. She averred that prior to the demise of the deceased, she was the registered owner of parcel Bungoma/Kabuyefwe/26 which was initially registered in the name of her late father, Samuel Mulati Lukorito and that the same had been purchased by her father in the year 1980.
  7. She contended that the deceased was not survived by only three children as alleged by the Petitioner and that the deceased was survived by five dependants.
  8. She averred that the deceased herein died on 6<sup>th</sup> November 2002 before her father who died on 7<sup>th</sup> October 2009 and at the point of her death, her late father became entitled to her estate by operation of the law.
  9. She contended that they have not agreed on the mode of distribution of parcels Bungoma/Kabuyefwe/26 and Keringet/Mnangei/55 and that her name was intentionally omitted from the filed consent despite her being a beneficiary to the estate of the deceased.
  10. She contended that the dependants of the estate of the deceased are as follows:
    - a. Betty Khasoa Lukorito
    - b. Jane Wambui Nyaramba
    - c. Margret Wanjiku Lukorito
    - d. Martin Mbauni Lukorito
    - e. Patrick Ndahi
  11. Finally, she proposed that she be given a bigger share since Jane Wambui Nyaramba and Margret Wanjiku Lukorito were given land parcel Keringet/Mnangei/55 and that everybody should register their own shares as they are all mature.
  12. Vide Court directions issued on 19<sup>th</sup> March 2024, the Court directed the parties to canvass the summons for confirmation of grant and protest via viva voce evidence.
  13. PET-PW1, Jane Wambui Nyaramba, testified that she is the Petitioner herein and a teacher by profession. At her request, this Court adopted her recorded statement dated 4<sup>th</sup> April 2024 and her list of documents dated 4<sup>th</sup> April 2024 as her evidence in chief.
  14. According to her, land parcel West Pokot/Keringet/ “ A”/55 is registered under the name of Selina Cheboghiso Pufia and that the same is not available for distribution as it was sold. She availed a copy of Search Certificate in Court marked at PET.EXH.1.



15. The Petitioner further testified that she did not know any Betty Khasoa Lukorito and that she only showed up at her mother's funeral alleging to be the daughter of the 1<sup>st</sup> Objector herein. She told the Court that she lived with her mother from birth to her mature age and that her estranged father resided in Sirende area with his wife Elizabeth Lukorito,
16. She testified that according to the availed recorded statement of Martin Mbauni dated 12<sup>th</sup> November 2015, Martin states that he does not know one Betty Khasoa but she claims land ought to be subdivided to her. She produced in Court a statement of Martin Mbauni dated 12<sup>th</sup> November 2015 marked as PET.EXH.2.
17. She also testified that she is against the proposed mode of distribution as fronted by the 2<sup>nd</sup> Objector herein and that the land Bungoma/Kabuyefwe/26 measures 2.7 acres yet the 2<sup>nd</sup> Objector speaks of four acres thus making it unreasonable. She told the Court that her mother had indicated that the land should not be sold and urged this Court to adopt her mode of distribution.
18. At the close of the Petitioner's case, this Court noted that despite several summons to attend Court, the Objectors and their Advocate were a no show. This Court proceeded to order the Objectors case closed
19. At the close of the oral hearings, this Court directed the parties to proceed to file and serve their respective written submissions. Only the submissions by the Petitioner are on record and which submissions are mere recitations of the evidence on record. There is no citation of either statutory provisions on case law in those submissions.
20. The main issue arising for determination is whether the grant issued on 8<sup>th</sup> November 2003 should be confirmed.
21. The deceased died in 2002, after the Law of Succession Act, cap 160, Laws of Kenya, had come into force in 1981. By dint of Section 2(1), the law to apply to the distribution of the estate is the Law of Succession Act. For avoidance of doubt, Section 2(1) of the Laws of Succession Act provides as follows; -

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.”
22. The discretion to confirm grants is provided for under Section 71 of the Law of Succession Act. The Court confirms the administrators of the estate, if they were properly appointed and had properly administered the estate and would properly administer the estate thereafter. The Court also confirms the distribution proposed, or orders distribution in accordance with the law. However, the proviso to Section 71(2) of the Law of Succession Act, as read with Rule 40(4) of the Probate and Administration Rules, is explicit that Court should approach the process of confirmation with some degree of caution, for it has to be satisfied that the administrator applying for confirmation of his grant has properly ascertained the persons who are beneficially entitled to a share in the estate, and has also ascertained their respective shares. The two provisions create a duty for the administrator to satisfy the court of such ascertainment. There is a converse duty to the Court to satisfy itself, from the material on record, and from the parties, that all those beneficially entitled have been ascertained, and the shares due to them from the estate have been duly assigned to them. The proviso to section 71(2) of the Act and Rule 40(4) states as follows;

“71(2) ... 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 the grant shall specify all such persons and their respective shares.”

40(4). Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.”

23. The first question then is whether the persons entitled to a share in the estate of the deceased have been ascertained. Who are those persons? There are three categories – creditors, survivors and dependants. Creditors are those persons to whom the estate owes a debt of some kind or other. Survivors would be the immediate members of the family of the deceased, as set out in Section 35, 36, 38 and 39 of the Law of Succession Act, being spouses, children, parents, siblings, and others up to the 6th degree of consanguinity. Dependants would be the individuals named in Sections 29 of the Law of Succession Act, who have made applications under section 26, and have been adjudged to be dependants, and provision is ordered for them out of the estate. The relevant provisions in sections 26, 29, 35, 36, 38 and 39 provide as follows ;-

“26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

29 For the purposes of this Part, “dependant” means—

- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- b. such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

24. Upon a critical perusal of the Court record, the beneficiaries to the estate of the deceased herein are Jane Wambui Njaramba, Patrick Ndahi and Margret Wanjiku Lukorito. Further, the property comprising the estate of the deceased was Land parcel number Bungoma/Kabuyefwe/26 as the land parcel number West Pokot/Kiringet “A”/55 was sold to one Selina C. Pufia as the deceased had sold it.

25. It is clear that the 3<sup>rd</sup> Objector herein is the son to the late Margret Wanjiku Lukorito, who according to the Petitioner consented to her proposed mode of distribution by appending her signature on the consent form.

26. It was the evidence of the Petitioner that she did not know any Betty Khasoa Lukorito and that she only showed up at her mother’s funeral alleging to be the daughter of the 1<sup>st</sup> Objector herein. She told the



Court that she lived with her mother from birth to her mature age and that her estranged father resided in Sirende area with his wife Elizabeth Lukorito. The 3<sup>rd</sup> Objector in his recorded statement stated that during his stay with his grandmother, the deceased herein, he only knew she had three children namely: Jane Wambui Njaramba, Patrick Ndahi and Margret Wanjiku Lukorito. He also stated that the 1<sup>st</sup> Objector only visited the deceased as they did not live together. He stated that he has never heard of the 2<sup>nd</sup> Objector.

27. The judgment in *Randall v Randall* {2016} EWCA Civ 494 makes it clear that the Courts will adopt a very broad approach in assessing whether a person claiming interest has an interest in a deceased's estate, particularly where the person may have no other form of recourse to explore. It is a common law requirement for persons claiming interest to show they have an interest in the deceased's estate, an interest that is capable of being recognized by the law or an interest that gives them legal standing to bring the probate claim.
28. The law is that whoever desires any Court to give judgement as to any legal right or liability, dependant on the existence of facts which he/she asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person. The standard of proof determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In *Miller v Minister of Pensions*, {1947} 2ALL ER 372. Lord Denning said  

“The ...standard of proof...is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.”
29. The reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a Court before a fact can be said to exist or not exist.
30. From the above, the lesson that comes out is that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined. Guided by the above tests of credibility, reliability and probability, i find and hold that the testimony tendered by Petitioner does meet the required standard on a balance of probabilities. On the contrary, the Objectors more particularly the 2<sup>nd</sup> Objector failed to avail any evidence or witnesses to prove that she was a dependent of the estate of the deceased and to dispute the averments by the Petitioner that she was a stranger to her and only showed her face during the burial of her late mother.
31. The 2<sup>nd</sup> Objector was a daughter of the 1<sup>st</sup> Objector and deceased herein died prior to the demise of her husband. Subject to the availed title deed record it shows that the land parcel Bungoma/Kabuyefwe/26 was registered in the name of the deceased herein prior to her demise. This simply means that the assertions by the 2<sup>nd</sup> Objector that the said parcel belonged to her father, 1<sup>st</sup> Objector, as she is entitled to a portion of it is far-fetched and must be motivated by greed.
32. In my view, the Objectors have not challenged the evidence as tendered by the Petitioner, beneficiaries who survived the deceased. Given that the property comprising the estate of the deceased is also not in dispute, iam of the view that the deceased's estate should be distributed as proposed by the Petitioner.



33. In view of the foregoing observations, it is my finding that the Objectors protest lacks merit and is dismissed. The Petitioner's summons for confirmation of grant dated 14<sup>th</sup> November, 2018 has merit and is allowed. The Grant of letters of Administration granted to the Petitioner on 8<sup>th</sup> November 2003 are hereby confirmed and that the estate of the deceased will be distributed as proposed by the petitioner.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 8<sup>TH</sup> DAY OF OCTOBER 2024.**

**D. KEMEI**

**JUDGE**

In the presence of :

Miss Omar for Petitioner

No appearance Kerongo for Objectors

Kizito Court Assistant

