



**Nyaga v Nyaga (Succession Cause 258 of 2013)
[2024] KEHC 12877 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 258 OF 2013
LM NJUGUNA, J
OCTOBER 23, 2024
IN THE MATTER OF THE ESTATE OF JUSTUS NYAGA (DECEASED)**

BETWEEN

SUSAN IGOKI NYAGA PETITIONER

AND

ROBERT MUTIRIA NYAGA RESPONDENT

RULING

1. The applicant filed chamber summons dated 10th July 2024 seeking the following orders:
 - a. That an order do issue declaring that the transfer from the deceased to the respondent, of plot no. 8 Itugururu market is illegal hence null and void;
 - b. That an order do issue declaring any transfer and/or sale to a third party by the respondent, of plot no. 8 Itugururu market, is illegal and to be revoked as it is null and void;
 - c. That an order do issue requiring the respondent to account for all the rent collected from the shops developed on plot no. 8 Itugururu market starting from the year 2011 to July 2024, a sum of Kshs.1,200,000/=;
 - d. That an order do issue declaring all monies collected by the respondent from the shops on plot no. 8 Itugururu market be part of the deceased's property to be deposited in a joint account for distribution between the 2 wives;
 - e. That an order do issue to the respondent to produce the original title and deposit it with the Deputy Registrar pending hearing and determination of this application to enable subdivision of and distribution of land parcel number Magumoni/Itugururu/1728; and
 - f. That costs of this application be provided for.



2. The application is premised on the grounds set out on its face. It is the applicant's contention that plot no. 8 Itugururu market was part of the properties owned by the deceased at the time of his death and the court determined that it should be inherited by the 2 widows of the deceased in equal shares. That she is the 1st wife of the deceased but the respondent, who is the son of the 2nd wife has been collecting rent from the shops on the said plot alone and denying her the right to the property. That the respondent has gone further and transferred the said property to himself and then disposed it of to a third party. She stated that the respondent has no right to the property since he did not participate in developing it with the deceased yet he is the one who transferred it to himself so soon after the deceased's death. She stated that she will suffer great prejudice if the orders sought are not granted.
3. The respondent filed a replying affidavit stating that he has filed summons for revocation of the grant issued to the wives of the deceased on grounds that the same was obtained without the consent of all the beneficiaries. He stated that the property plot no. 8 Itugururu market did not belong to the deceased hence it was not available for distribution in his estate. That the deceased transferred the said plot to him on 03rd January 2011 before he died and the transfer was approved by the town planning and markets committee through county hall application no. 2787 by the deceased. That at the time of his death, the deceased had legally transferred the property which was partly developed, to him.
4. That he continued developing side B of the plot and he began collecting rent. That before his death, the deceased only collected rent from side A of the plot and after his death, his tenants vacated. He stated that he has since transferred the plot to one Kithinji Maragara (who is not a party to this suit) in 2013 and prior to this transfer, he had stopped collecting rent from the properties. That at the time of confirmation of the grant, the petitioners failed to verify whether the said property belonged to the estate of the deceased, thus misled the court into distributing it. That it is not true that the rent collected is Kshs.10,000/= and the applicant ought to prove this allegation, keeping in mind that the property was transferred to a third party.
5. He insisted that the deceased transferred the property to him before his death and if the applicant is in doubt, she should have initiated civil proceedings. It was his averment that the matters raised herein call for the input of the ELC and that this court lacks jurisdiction to determine them. That the deceased gave him the title document for parcel number Magumoni/Itugururu/1728 for him to subdivide according to his wishes but the applicant petitioned for a grant, thus hijacking the whole process.
6. The application was canvassed by way of written submissions.
7. The applicant submitted that the respondent's actions in the suit are engineered by his mother who has all intentions of wasting the court's time. That the respondent's mother ought to have settled on a separate piece of land in Tigania, Meru, where she lived with the deceased and that she only returned to the applicant's land when the deceased became sickly. That the respondent did not have legal capacity to sell the land and whatever transactions done were null and void.
8. She relied on the cases of Benson Mutuma Muriungi v C.E.O. Kenya Police Sacco & another (2016) eKLR and Re Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR and urged that the respondent should be held criminally liable for intermeddling in the estate of the deceased in light of section 45 of the *Law of Succession Act*. She relied on the case of *Lly Odhiambo Onyuka v Ayub Odhiambo Migwalla* [2005] eKLR and argued that the sale transaction initiated by the respondent should be held as null and void since he did not have authority to sell the land before a grant has been issued in the estate, but he sold the property for a value that was lower than the property's worth. She urged the court to allow the application.



9. The respondent submitted that the application was filed under provisions of the *Civil Procedure Act* and Rules that are not applicable in succession matters. That the process of transfer of the property from the deceased to the respondent began when the deceased was still alive but was concluded after his death. That by the time the applicant was petitioning for a grant, the property did not form part of the estate of the deceased and a search of the property would have revealed as much. He relied on the cases of *Re Estate of Njagi Njeru Alias Mbuchi Baragu (deceased) (2018) eKLR* and *Re Estate of Obedi Ndwiga RUBarita (deceased) (2021) eKLR* where the courts referred a similar matter to the ELC.
10. He stated that he has filed summons for revocation of grant pursuant to section 76 of the *Law of Succession Act* and the same ought to be allowed. Further reliance was placed on the case of David Oloo Onyango v Attorney-General (1987) eKLR and he argued that the third party who claimed interest in the land should be a party in the suit for the issues raised to be adjudicated, otherwise, the application lacks merit. He did not refuse being in custody of the title for parcel number Magumoni/Itugururu/1728 but he stated that he is not comfortable to release it since he has filed summons for revocation of grant. That he will release it to the court once the issues surrounding distribution are settled.
11. The issue for determination is whether the application has merit.
12. Regarding plot no. 8 Itugururu market, the applicant seeks her share of the proceeds from the rent since the death of the deceased to date. She also seeks to have the property included as part of the estate of the deceased, a fact that the respondent vehemently contests, stating that the property was transferred to him by the deceased prior to his death and that he has since transferred it to a third party. The respondent stated that the property was not part of the estate of the deceased at the time of petitioning for the grant.
13. A grant of letters of administration in the estate of the deceased was issued on 31st November 2011 to the applicant and Evangeline Nkirote Nyaga. The applicant filed summons for confirmation of grant and proposed distribution of the estate in the manner listed in the certificate of confirmation of grant issued on 05th March 2024 by this court. According to the summons for confirmation and the certificate of confirmation of grant, the estate of the deceased comprised of plot no. 8 Itugururu market and parcel number Magumoni/Itugururu/1728.
14. When the applicant filed the summons for confirmation, the respondent filed an affidavit of protest stating, inter alia, that the deceased had transferred plot no. 8 Itugururu market to him on 03rd January 2011 before he died, and he produced proof of this. He protested inclusion of the said property in the estate of the deceased that is available for distribution. The parties tried to settle the protest out of court but they failed to reach an agreement. The court ordered that the matter proceed viva voce but the parties urged the court to accord them more time to negotiate and, at some point, the matter was referred for mediation, which process did not bear fruit. The respondent is recorded to have lost touch with his advocate, who then applied to the court to cease acting on his behalf.
15. The matter came up for hearing of the summons for confirmation and the court ordered that all the beneficiaries be present at the hearing, which hearing ended up being adjourned severally for one reason or the other. The court's record shows that the respondent was not present during most of the days when the matter was mentioned and even when the court was ready to proceed with the hearing of the protest on 13th March 2023, none of the parties were present in court. On the next hearing date, the respondent was not present and the court allowed the summons for confirmation, noting that the respondent was duly served with the hearing notice and there was an affidavit of service on record. A certificate of confirmation was issued.



16. Prayers (a)-(d) sought herein demand that the court compels the respondent to surrender the rent proceeds from plot no. 8 Itugururu market to the estate for distribution. This court, through its order allowing the summons for confirmation of grant, recognized the said property as being part of the estate of the deceased. However, the respondent herein has raised the issue of ownership of the land and he claimed that the deceased transferred it to him prior to his death, thus it should not be included in the estate. Given the existing order of the court and the fact that the respondent did not prosecute his protest, it is too late in the day to protest inclusion of the property in the estate of the deceased.
17. The more glaring issue is that the respondent claims ownership of the property, which he has allegedly relinquished to a third party. Clearly, this is an issue to be placed before the Environment and Land Court (ELC) which bears jurisdiction to determine ownership and disposition of this land (see Article 162(2)(b) of *the Constitution* and section 13 of the *Environment and Land Court Act*). For the avoidance of doubt, in the eyes of a family court, which this one is, the property plot no. 8 Itugururu market is part of the estate of the deceased until such time as the order establishing this is set aside, if necessary. The issue of rent proceeds is however tied to ownership and disposition of the said property and this can only be determined by the ELC. Therefore, this court lacks jurisdiction to issue orders prayers (a)-(d) of the application.
18. As regards parcel number Magumoni/Itugururu/1728, the respondent does not deny that the title document is in his custody. He stated that he does not want to surrender the title document because he does not agree with the distribution of the estate. Parcel number Magumoni/Itugururu/1728 is part of the estate of the deceased, whose distribution was already determined. In any event, the respondent protested this distribution but he failed to prosecute his protest, despite being given numerous opportunities to do so. Therefore, there is no reason why the title document for parcel number Magumoni/Itugururu/1728 should be withheld from the beneficiaries.
19. Finally, the respondent severally indicated that he has filed summons for revocation of the grant issued to the applicant herein. From a perusal of the court's record, there is no such application pending before the court.
20. In the end, I find that the application herein partially succeeds with orders as follows:
 - a. An order is hereby issued compelling the respondent to surrender the original title for land parcel number Magumoni/Itugururu/1728 and deposit it with the Deputy Registrar of the High Court within 14 days of this ruling to enable subdivision of and distribution of land parcel number Magumoni/Itugururu/1728 according to the certificate of confirmation of grant; and
 - b. There shall be order as to costs.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the Petitioner/Applicant

..... for the Respondent/Protestor

