



REPUBLIC OF KENYA



**In re Estate of Dominick Nandi Ernest (Deceased) (Succession Appeal E004 of 2021) [2023] KEHC 2074 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2074 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION APPEAL E004 OF 2021**

**DK KEMEL, J**

**MARCH 16, 2023**

**IN THE MATTER OF THE ESTATE OF DOMINICK NANDI ERNEST (DECEASED)**

**BETWEEN**

**GLASUS AMUCKO NANDI ..... 1<sup>ST</sup> APPELLANT**

**GLASUS AMUCKO NANDI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DAVID NANDI OTIENO ..... 1<sup>ST</sup> RESPONDENT**

**DAVID NANDI OTIENO ..... 2<sup>ND</sup> RESPONDENT**

**ELISHA ELPHAS NANDI ..... 3<sup>RD</sup> RESPONDENT**

**ELISHA ELPHAS NANDI ..... 4<sup>TH</sup> RESPONDENT**

*(An appeal from the ruling of Hon Munyekenye, SPM in  
Webuye Succession Cause No 45 of 2019 dated October 6, 2021.)*

**JUDGMENT**

1. The Appellant herein filed a Memorandum of Appeal herein dated October 22, 2021, seeking to set aside the ruling of Hon Senior Principal Magistrate Munyekenye made on October 6, 2021 in Webuye Succession Cause No 45 of 2019 and that the Appellant's summons for revocation of grant dated May 26, 2021 be allowed as prayed.
2. A perusal of the lower Court record reveals that the Appellant had filed summons for revocation of grant dated May 26, 2021 wherein he had sought for an order to revoke and/or annul the grant of letters of administration issued to the Respondents and to review and/or rectify the confirmed grant and re-distribute the estate of the deceased herein to include the Appellant, brother to the deceased, apportioning him land measuring 0.809ha(2 acres) and develop the same. When the application



came up for hearing on July 7, 2021 where it was established that none of the parties would call any witnesses, directions were taken to the effect that the said application be canvassed by way of written submissions. The learned trial magistrate vide her ruling dated October 6, 2021 dismissed the Appellant's application hence this appeal.

3. The Appellant's Memorandum of appeal raises the following grounds: -
  - i. The trial magistrate erred in law and fact by failing to make a finding that the objector did not consent to issuing of grant filed by the Respondents on March 10, 2019 showing that he Appellant was not involved by the Respondents whether as a beneficiary or a creditor to the deceased's estate.
  - ii. The magistrate misapprehended the law by holding that the Appellant's claim should be included in the succession process and be given 2 acres was not proved on a balance of probability.
  - iii. The trial magistrate made a mistake by failing to consider that the Respondents did not produce any evidence to prove that the Appellant was entitled to one acre and not two acres but opined that the Appellant did not meet the threshold on a balance of probability.
  - iv. The trial magistrate made a mistake by making a finding that the Appellant's claim to be included in the succession process was not proven on a balance of probability considering that the Respondents in their affidavit in response to the summons for revocation of grant admitted to owing the Appellant a parcel of land as was the deceased's wish.
  - v. The learned trial magistrate erred in law by failing to take into account the saving provisions of section 51 (2) (g) of the *Law of Succession Act*.
  - vi. The learned trial magistrate erred in law by failing to take into account the saving provisions of section 71 (2) (g) of the *Law of Succession Act* with regard to the list of beneficiaries and mode of distribution of shares to the Estate of the deceased on which the Appellant is not included yet the whole parcel had been shared out.
  - vii. The trial magistrate made a mistake by failing to notice that the Respondents list on mode of distribution exceeds the size of the land as indicated on the official search.
  - viii. The trial magistrate made a mistake by failing to notice that the Respondents have sought confirmation of grant of letters of administration on parcel number Kakamega/Lugari/344 measuring 5.0Ha whilst the Appellant sought inclusion on Kakamega/Mautuma/344 measuring 6.70Ha and that Kakamega/Lugari/344 measuring 5.0Ha belongs to a different person.
  - ix. The learned trial magistrate erred in law by not basing the Court's ruling on any point of law.
4. The Appeal was canvassed by way of written submissions. Both parties filed and exchanged submissions.
5. It was the submissions of the Appellant that the deceased herein was his elder brother from a family of five sons and six daughters. Their father the late Ernest O Nandi prior to his demise, allocated two parcels of land to the eldest and 2<sup>nd</sup> son as their inheritance with the deceased herein receiving parcel measuring 6.7Ha in Mautuma Plot 344, Kakamega. After bequeathing money from the sale of another property, the Sango parcel, to the other sons respectively, the Appellant remained without any inheritance prompting his late father to purchase, Bikeke parcel 527 from the sum that was meant for



- him from the sale of the Sango parcel so as to stay with him. It was submitted that his deceased father warned his brothers not to interfere with the same parcel as it belonged to him alone.
6. He submitted that when the deceased had no money to send the 1<sup>st</sup> Respondent herein to secondary school, he sold two acres off Mautuma 344 to Mrs Dorcas Bunyoli who was a primary school teacher. The deceased requested him to let Madam Bunyoli move from Mautuma 344 to occupy Bikeke 527 prompting him and his late parents to shift to occupy two acres of Mautuma 344 in exchange. On August 5, 1992, the deceased proceeded to change the ownership of Bikeke 527 from his late father's name, Ernest O Nandi to Dorcas Bunyoli changing its number to Bikeke-793. At this point, their father was already dead as he died on July 5, 1992.
  7. He submitted that when he and his mother requested the deceased to let surveyors come on Mautuma 344 to partition his parcel of two acres as he had done for Bikeke for transaction, the deceased only drew some maps and put landmarks for him to use until when he would bring surveyors to partition the whole plot including his sons' allocations starting with his two acres.
  8. He submitted that the 1<sup>st</sup> Respondent started to threaten him and claiming that he would refund the buyer who bought the parcel Bikeke-793 by all means and refund the same amount to him. On his mother's demise on February 15, 2022 and the entire family included all his brothers, aunties and uncles concluded that the two parcels on Mautuma 344 parcel ought to be registered in his name but the deceased in collusion with his sons planned on how to frustrate him of the same prompting the involvement of the area senior chief who wrote to the District Land Control Board to transfer the two parcels of Mautuma 344 to him.
  9. He submitted that it was now 38 years since his allocation to stay at Mautuma 344 and fails to understand why he could not be included in the succession as a beneficiary. His brothers, aunties, and uncles were present during the meeting where the deceased committed to transfer the two acres as initially agreed. He urged this Court to grant him justice with costs after years of intimidation and denial.
  10. In opposition to the appeal, the Respondents submitted that the exclusion of the Appellant from the succession was not a material issue in the process as the deceased herein in the year 2006 changed his mind about giving the Appellant the one acre he had given him and that the actions of the deceased were as per his last wishes.
  11. It was submitted that subject to section 66 and 39(1) of the Law of Succession Act, the Court's final discretion as to the persons to whom grant letters of administration shall be issued and in this instance the trial Court saw it best that the Respondents should be the ones to take up letters of grant of administration.
  12. It was submitted that on the case on a balance of probability the Respondents proved that the Appellant was the brother of the deceased and not the step-son as indicated by the Appellant and further relied on an agreement made between the deceased herein and his late father Ernest Nandi giving him land and that between the deceased and the Appellant as the Appellant was only a witness.
  13. It was submitted that the decision to grant the Appellant two acres of land out of parcel No Kakamega/Mautuma/344 was that of other people and not of the deceased.
  14. It was submitted that the deceased out of humanity and love for his younger brother gave him one acre out of the land parcel No Kakamega/Mautuma/344 as he understood he had nowhere else to go and that the deceased did not give him a right as a beneficiary of the estate of the deceased.



15. It was submitted that the Appellant being homeless, the deceased gave him one acre and gave his parents one acre out of the land parcel No Kakamega/Mautuma/344 which he had purchased from another person.
16. It was submitted that the grant is yet to be confirmed for land parcel No. Kakamega/Mautuma/344 which belonged to the deceased and that the trial Court ruled that the Petitioners to include the objector when fixing for confirmation of grant and allocate him one acre. They urged this Court to dismiss the appeal with costs.
17. Section 66 of Cap 160 provides the court with final discretion as to the person or persons to whom a grant of letters of administration is made in the best interest of all concerned. Section 66 provides as follows: -

“66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;”

18. The Law of Succession Act provides for revocation of grants under section 76, which states as follows:

“76. 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) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
  - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
  - (ii) to proceed diligently with the administration of the estate; or



(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

19. In the case *In Re Estate of Magangi Obuki (Deceased)* (2020) eKLR the court considered the circumstances under which a grant can be revoked and stated: -

“In the case of *Jamlek Maina Njoroge V Mary Wanjiru Mwangi* (2015) eKLR the court discussed circumstances when a grant can be revoked. The court observed:

“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

20. Justice Mwita in the case *Albert Imbuga Kisigwa vs Recho Karai Kisigwa* (2016) eKLR stated: -

“(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

21. It is clear that the Appellant has vested interests in these proceedings. As a sibling of the deceased who alleges that his father sold his inheritance on the agreement that his brother, the deceased, would cede two acres of his land in land parcel No Kakamega/Mautuma/344. It is the allegations of the Respondents that the deceased only out of his benevolence and desire not to see his younger brother homeless decided to give him only one acre. The Respondents insisted that the agreement of sale of land was between the deceased and his father the late Ernest O Nandi.

22. Upon perusal of the lower Court record and the annexures availed by each party, I do recognize that the Appellant has raised issues of ownership with regard to the contentious two acres of land on the Kakamega/Mautuma/344. I find it to be in the best interests of the Appellant to pursue a course of action in the relevant Environment and Land Court which has the requisite jurisdiction. The Environment and Land Court has jurisdiction to determine ownership of land but where such ownership results in the implementation or interpretation of a grant and which have now spilled in a subsequent succession which involves a sub-division of parcel of the mother land in the grant, such issue cannot be determined in the ELC court. The role of this Court is strictly limited to the estate of the deceased which indicates that the contentious land in question belonged to the late Dominick



Nandi Ernest. If the appellant has an interest on the deceased's land then he can contest the same in the succession cause now pending in the lower court.

23. I am cognizant of the fact that the Appellant resided on the said parcel for 38 years and which was not disputed by the Respondents. The Appellant should wait for the summons for confirmation of grant to be served upon him after which he can then file an affidavit of protest in which the trial court will give directions on its disposal as well as the summons for confirmation of grant. The appellant's attempt to revoke the grant was premature and hence the trial court was right to reject the same and direct him to await the confirmation of grant process when he can present his protest if any.
24. In view of the foregoing observations, it is my finding that the appeal herein is devoid of any merit. The same is dismissed with costs.

It is hereby ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 16<sup>TH</sup> DAY OF MARCH 2023**

**D KEMEI**

**JUDGE**

**In the presence of:**

Glasus A Nandi - Objector /Appellant

Waswa for Gatimbi for Petitioners/Respondents

**Kizito - Court Assistant**

