



**In re Estate of Musa Omwanda Sunduli (Deceased) (Succession Cause
14 of 2021) [2023] KEHC 17879 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17879 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 14 OF 2021
SC CHIRCHIR, J
MAY 17, 2023**

IN THE MATTER OF THE ESTATE OF MUSA OMWANDA SUNDULI – DECEASED)

BETWEEN

JOSPHAT AKHOLI OMWANDA 1ST APPELLANT

ZAITUNI NAMACHA 2ND APPELLANT

AND

MIKAEL SUNDULI NANADWA RESPONDENT

(Being an appeal from the ruling of the Senior Principal Magistrate’s Court in Mumias delivered on 21st September 2012 by Hon. T.A ODERA SPM ,in succession cause no. 476 of 2018)

JUDGMENT

1. This appeal arises out of the ruling of the Chief Magistrate’s Court in Mumias in succession cause No 476 of 2018

Background.

2. On 20th May 2016, the Respondent , Mikael Sunduli Nandwa petitioned for letters of administration in respect of the Estate of Musa Omwanda Sunduli (Deceased) in Mumias chief magistrate’s court succession cause No 476 of 2018. He was issued with the Grant on 15th April, 2016.
3. The petition was based on a citation order issued by this court (Hon. Sitati J) in citation cause No 586/2014. The Respondent took out the Grant in the capacity of being a paternal uncle to the deceased. Thereafter he applied for the confirmation of grant. The Deceased only asset was described as East Wanga/ Mung’ang’a/1160 (suit property)
4. On 28.8.2019, the Appellant herein filed an affidavit of protest against the confirmation of Grant and upon hearing the parties, the trial court delivered a ruling on 21.9.2021. In her Ruling, the Magistrate



allocated a portion of 5 acres of the suit property to the Respondent herein. Aggrieved by the decision, the Appellant proffered this Appeal.

Grounds of appeal:

- i. The Appellant has set out the following grounds of appeal:-
 - a). That the learned trial magistrate erred in law and fact when she awarded 5 acres out of the suit property to the respondent who was not a child to the deceased herein as defined under section 38 of the *Succession act*.
 - b) That the learned trial magistrate erred in law and fact by distributing the estate herein equally to the widows (houses) without considering the number of children for each widow (house) and thus violated section 40(1) of the *Law of Succession Act*.
 - c). That the learned trial magistrate erred in law and fact by presuming the deceased herein held 5 acres out of estate herein in trust for the father of the respondent when evidence on record shows the contrary.
 - d) that the Trial magistrate erred in law and in particular violated sections 71(2) and 82(a) of the *Succession Act* when she granted the respondent 5 acres yet the said Respondent lacked capacity to receive the said portion on behalf of his deceased father's Estate .
 - e) That the learned trial Magistrate erred in law by relying on an award which was given by the Land disputes tribunal which award was illegal in law as Tribunal had no jurisdiction to make the award.
 - f) That the learned trial magistrate erred in law and fact when she granted the respondent 5 acres out of the estate on the basis that the estate herein held the said portion in trust to the estate of Petro Nandwa Sunduli yet issues of trusts are not determined in succession causes but are within the province of the Environment and land Court.
 - g) That the learned trial Magistrate failed to appreciate the fact that the Estate herein was free property as defined under section 3(1) of Succession Act and as such , was available for distribution to only the widows and children of deceased as provided under section 40(1) of Succession Act.

Appellant's submissions

5. It is the Appellant's submission that the Respondent was not a child of the deceased and hence the award of 5 acres to the respondent was erroneous and a violation of the provisions of section 38 and 40 of the *Law of Succession Act*.
6. It is further submitted that the trial court erred in giving Authority to the widows of the Deceased to hold the property in trust for the children yet the said children were all adults and therefore the trial magistrate ought to have allocated a share to each beneficiary.
7. The appellant further contents that the trial court had no jurisdiction to determine the beneficial rights of parties who are not heirs to the estate, as such jurisdiction is exclusive to the Environment and Land Court.
8. The Appellant further submits that the respondent herein had no locus standi to bring the claim on behalf of his deceased's father's estate, one Petro Nandwa Sunduli, as there was no evidence that he was the dully appointed Administrator of his father's estate.



9. It is finally submitted that the trial court's reliance on the decision of Land disputes tribunal to award the respondent 5 acres was erroneous, as the said tribunal had not jurisdiction to determine issues of land ownership.
10. The Respondent had not filed submissions by the time of writing this judgment.

Summary of the Evidence at the Trial court

11. PW1 was the 1st Appellant herein. His evidence in chief is contained in the affidavit of protest dated 28.8.2019. In the said affidavit, he deponed that the Deceased owned land parcel No E. Wanga/ Mung'ang'a/11609 (Suit property).
12. That he left behind 3 wives namely Sarah Amunga Omwanda, Refah Namibia Omwanda and Zaituna Namacha Omwanda. He also left behind 17 children and one daughter-in-law. The children are listed as follows:
 - a. Justus Injenje Omwanda
 - b. Joshat Akholi Omwanda
 - c. Duncan Many Omwanda
 - d. Issa Matseshe Omwanda
 - e. Ismael Indumuli Omwanda
 - f. Benson Sheunda Omwanda
 - g. Ramadhann Osundwa Omwanda
 - h. Umar Sunduli Omwanda
 - i. Metrine Namakhula Omwanda
 - j. Belinda Panyako
 - k. Harriet Nyongesa
 - l. Everlyne Angara Omwanda
 - m. Jane Adhiambo Omwanda
 - n. Hawa Ayoyi Omwanda
 - o. Sheila Atoy Omwanda
 - p. Jamila Alwanga Omwanda Pamela Omwanda
 - q. Elizabeth Omwanda
13. That the respondent was a nephew to the deceased, the son of Peter Nandwa Sunduli, who was an elder brother of the deceased. That the respondent had never resided in the suit property and finally that the respondent was neither a beneficiary nor a son of the deceased.
14. In cross examination, he told the court that his grandfather had 2 wives. That the 2nd wife, one Rose Ayoyi was the mother of the Deceased and the Deceased was his father. That the Deceased was a step brother to Petro Nandwa Sunduli and the said Petro had his own land which had been hived off from the suit property.



15. He further stated that the Respondent herein is the son of Petro Nandwa Sunduli, the Deceased's brother as aforesaid. That his grandfather, Jacob Sunduli Manga owned parcel No E/Wanga/Mung'ang'a 91 and 92 and that E/Wanga/Mung'ang'a/1160 was hived off from of parcel No 91. He further stated that Parcels Nos. 1160,1161 and 1165 came out of the said sub-division. He admitted that the sub division was meant to defeat the claim of Petro Nandwa Sunduli.
16. The witness further testified that the Respondent resides in parcel No 953. He told the court that the deceased and the respondent's father were brothers. He admitted that the two brothers had the right to inherit property from Jacob Sunduli Manga his grandfather.
17. PW2 was the 2nd Appellant herein. She adopted her affidavit of protest dated 28.8.2019 as her evidence in chief. In the said affidavit she stated that the deceased was the registered proprietor of the suit property. That he left behind heirs, as listed by PW1. That the respondent was the son of Peter Nandwa Sunduli, an elder brother to the deceased.
18. She stated that neither the Respondent nor his father ever resided in the suit property and that the respondent's father was buried in another land.
19. At cross examination, she stated that she was the wife of the deceased. That she never met the deceased's father as he had died by the time she married to the family. Her late husband had 4 brothers whose names she did not know.
20. The Respondent herein was the 1st witness on the side of the defence, and the petitioner for the Grant. He told the court that Jacob Sunduli Manya was his grandfather. That the grandfather had 2 wives, Jane Lubanga and Rose Ayoi Sunduli. The first wife, Jane gave birth to Petro Nandwa Sunduli and Joshua Sunduli. Rose gave birth to Wepo Sunduli and the Deceased. He further stated that was the son of Petro Nandwa Sunduli. That the deceased had over 5 wives, some of whom went away. That he filed a citation in which he cited the Appellants herein but the Appellants never came forward to petition for the Grant.
21. He further testified that his grandfather had 35 acres which had not been registered. On cross examination he told the court that his grandfather died in 1964. At the time, the land had not been registered; that he resides in parcel No 953 and that the said parcel was hived off from parcel No 92. He produced a green card (DEXB 2) showing that land parcel 91 was registered in 1966 when his Grandfather had passed on. It was registered in the name of the Deceased herein. That his father sued the deceased at Kakamega High Court 168/1990 in respect to the ownership of East wanga/ muganga / 91 and 92 and the case was decided in favour of his father. He did not have the decree in respect to Kakamega 168/1990. That his father also sued the Deceased in the Land Disputes tribunal in respect to the same land and an award was made in favour of his father,(DEX4). He further told the court that the order from the tribunal had not been enforced when his father passed on. That the deceased was his paternal uncle. He was seeking 5 acres on behalf of his father's estate. He said he had letters of administration ad litem in respect of his father's Estate
22. DW2 stated that he was an uncle to the Manga family. He adopted his affidavit sworn on 24.2.2001 as his evidence in chief. He stated that the Deceased's father had 2 wives and 4 sons. The 1st wife Jane Lubanga was the mother to Petro Nandwa and Joshua Shiteswa, while Rose Ayoyi was the mother to Wepo and the Deceased
23. That the Respondent's father had sued the deceased claiming half share of Parcel No 91 on grounds that the deceased held it in trust for the two sons. The court awarded the Respondent's father a share of 5 acres from 91 and 4 acres from 92 but that the Respondent,s father died before his share could be hived off . He asserts that the Respondent is entitled to the 5 acres from parcel No 91



24. On cross examination, he denied that he was in court to protect his brother's interest who had purchased the land from the Respondent. He did not know the land on which the Respondent's father was buried. That he did not hear of any debt being mentioned during his uncle's burial. That Joshua, the brother to Petrol had his own land, he does not know how the land was shared. He doesn't know why Mikael wants the suit property. That the family of the deceased had resided in the land since the year 1960. He does not know who lives on which parcel of land; that both parties in this contest had the right to inherit the land from their grandfather.

Determination

25. I have perused the lower court record, considered the evidence tendered and parties' submission. As the first appellate court, this court is mandated to relook at the evidence presented in trial, re-evaluate it and arrive at its own conclusion. (See *Oneko v Republic* (1972)EA 132) and *Kiilu & another v Republic*(2005) 1 KLR)
26. In my view the following issues arise for determination:
- a. Did a portion of 5 acres from all the whole of that property known as East Wanga/ Mun'ang'a/1160 form part of the deceased's estate? (grounds 1,3,5,6,7)
 - b. Did the respondent have the legal capacity to bring a claim against the deceased' estate
 - c. Should the deceased's estate be distributed to each of his dependants?

Did the portion of 5 acres claimed by the respondent form part of the deceased's estate.

27. The contest revolves around land parcel going by Title No East Wanga/Mung'ang'a/1160 left behind by Deceased. A certificate of official search on the Title , accompanying the application for Grant of letters of administration dated 25.4.2016 shows that the said property was a sub-division of parcel No 91. It is also evident from the witnesses testimonies that there is no dispute that the suit property was a sub-division of East Wanga/Mung'ang'a/91 .
28. From the proceedings of the Land Disputes tribunal it emerged that the Respondent's father was claiming a portion of 5 acres from parcel No 91. The tribunal heard the parties and returned a verdict in favour of the respondent' father. The award was adopted as a judgment of the court at the chief Magistrate's Court at Kakamega in Misc. Award No 167 of 2008.
29. The appellant as argued that the land disputes tribunal award was illegal as the tribunal lacked the jurisdiction to determine land ownership. The award was however adopted as judgment of the court as aforesaid. And there was no appeal, against the award and therefore it remains a valid Judgment of the court.
30. In the said judgment, the court directed, inter alia, that a portion of 5 acres from parcel No 91 be hived off and transferred to the Respondent's father Peter Nandwa Sunduli.
31. Thus at the time of the filing of these succession proceedings, it had already been established and decreed by the court, which decree has not been challenged to date, that a portion of 5 acres of the deceased's estate belonged to Peter/Petro Nandwa Sunduli, the Respondent's father. Looking at the judgment of the trial court, it is on the basis of the court's judgment in Misc. Award No 167/2005 that the trial court held that the land belonged to the respondent's father and upheld the respondent's stake in it on behalf of his father's Estate. This award, unless and until challenged on appeal and reversed, remained a valid judgment. I have no reason to fault the trial court in this regard, limited to the extent that the suit property was being held in trust for the respondent's father.



32. The appellant has also faulted the trial court for awarding the 5 acres to the respondent yet, he was not a child of the deceased. But a perusal of the judgment clearly shows that that was not the basis of the trial's court finding.
33. The Appellant has further faulted the trial court for holding that the suit property was being held in trust when trust had not been proved and that such determination should have been left to the Environment and Land Court. whereas this is true that issues of trusteeship falls within the purview of the Environment and Land court this was a trust that had already been decreed by a court of law. The trial court was simply giving effect to the decree of another court. I dismiss the appellants complain in this regard.

It is my finding that the 5 acres did not form part of the Deceased Estate.

Whether the respondent had the locus standi to bring the claim on behalf of the his father's Estate

34. In his application for the Grant, the respondent described himself as the paternal uncle of the deceased but from the proceedings, it emerged that he was actually a nephew to the deceased. He listed himself as the only survivor of the Deceased estate. In the summons for confirmation of grant however, he described himself as a son of the deceased and listed the survivors as
- a). Mikale Sidnuli Nandwa (himself)- son
 - b). Sarah Omwanda – widow
 - c). Josephat Akholi Omwanda – son
 - d). Justus Omwands - son
 - e). Zaituni Omwanda – widow
35. Thus from the pleadings, the Respondent put forth his case as a beneficiary of the deceased's estate. At some point during the hearing, he stated that he brought the case on behalf of his own late father's estate, who was a brother to the Deceased herein. At cross examination he stated that he was seeking 5 acres on behalf of Petro Nandwa.
- He claimed that he had grant *ad litem* but none was produced before court.
36. In the absence of a grant of letters of administration or a limited grant, *ad litem*, could the respondent validly bring a claim on behalf of his father's estate. I think not.
37. However despite his apparent admission during cross examination that he was standing in on behalf of his father's estate, his pleadings suggest otherwise. In his rather lengthy affidavit in reply, his case is that he is claiming as a beneficiary of the portion of the land belonging to his father (paragraph 4 and 19 of his replying affidavit sworn on 24th September, 2019). As often stated, a party's case is in the pleadings
38. Am of the view that the issues of *locus standi* would only arise if he was pursuing this portion on behalf of his father's estate and hence the need for a grant of letters of administration or Grant *ad litem*. Locus standi is clearly set out under section 29 of the [Law of Succession Act](#). An Administrator ca not bring any action as an Administrator before he has taken out letters of Administration or limited Grant (see [Otieno v Ouga](#)(1986-1989) EALR 468. In this case the Respondent was not bringing this claim on a representative capacity.



Was he then entitled to stake his claim as a beneficiary?

39. To answer this question, there are certain facts which have hardly been disputed in this case. The 1st Appellant and the Respondent share a paternal grandfather, one Jacob Sunduli Many. It has not been disputed that the grand father owned land parcels No 91 and 92 which portions were transferred wholly to the deceased, triggering a dispute between the Deceased and Respondent's father. The dispute was resolved in favour of the Respondent's father in Misc. Award No 167 of 2005. The respondent's claim is based on the right of inheritance of the portion that belonged to his father. The portion of 5 acres had been ascertained but was yet to be hived off from as parcel No 91 when the Deceased died .Consequently, the parcel as a whole was still registered in the name of the Deceased.
40. Issues a kin to the present case arose in the case of *Ibrahim v Hassan and Charles Kimenyi Macharia* (2019) eKLR, where the question arose as to whether the applicant had the *locus standi* to make a stake on the deceased estate and the court stated as follows. "the evidence on record suggest that the Applicant herein brought these proceedings on behalf of his father Ibrahim Hassan (deceased) who was the beneficiary to his father's estate. The applicant's interest emanates from the fact that his father was a beneficiary to the suit property, thus the applicant being dependant to his father Abdi Ibrahim's estate within the provisions of section 29 of the *Law of Succession Act*, he acquires an interest in his grandfather's estate, the suit property by virtue of his father's share". The respondent was entitled to his portion on the basis of being a beneficiary to his father's estate. It is my finding therefore that the trial court erred in determining that the 5 acres was being awarded to the Respondent on behalf of his father's Estate. There was no evidence that the Respondent came to court in that representative capacity.

Should the remaining estate be distributed to the Deceased's heirs.

41. The appellants in their objection proceedings listed 21 dependents but did not propose a mode of distribution . The trial court directed that the remaining 11 acres be held by the deceased's 3 widows in trust for the children. The appellant has taken issue with this finding, arguing that the court has authority to distribute notwithstanding the lack of proposal . The appellant also takes issue with the placement of properties in trust yet all the beneficiaries are allegedly Adults.
42. It is the appellant's contention that the said mode of distribution went against the provisions of section 40 of the *Law of Succession Act* as it will disadvantage some of the heirs.
43. The debates around section 40 of the *Law of Succession Act* are many. But I will adopt the court's decision in *Re the estate of John Musambayi Katumanga* (2014) eKLR where Justice Musyoka opined "the spirit of part VI especially sections 35, 38, and 40 is equal distribution of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in section 35(5) and 38 is "equally" as opposed to "equitably" This is the plain language of the provision. This provisions is mandatory in terms – the property "shall"... be equally divided among the surviving children equal distribution is envisaged regardless of the age, gender and financial status of the children".
44. The appellant did not indicate, which child/children is from which house but this does not mean that equality cannot be attained. In the spirit of section 40, section 35(5) and 38, it is my finding that the apportionment of the acreage of 11 acres equally between the deceased's wives was erroneous. It would mean that equality between the children will then not be achieved. I have reason to interfere with the judgment of the court in this regard.



45. In conclusion I make the following orders:

- a). The Appeal herein partially succeeds
- b). Title No East Wanga/Mung'ang'a be distributed as follows:
 - (i) Mikael Sunduli Nandwa -5 acres
 - (ii) The Deceased widows and heirs as per paragraph 12 of this Judgment- 11 acres to be shared equally
- c). Each party to meet their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGATHIS 17TH DAY OF MAY 2023.

S. CHIRCHIR

JUDGE

In the presence of :

Erick- Court Assisstant

No appearance by the parties.

