



**In re Estate of James Mutalimo Kisigwa alias James Mutalimu (Deceased)
(Succession Cause 146 of 1992) [2023] KEHC 18459 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 146 OF 1992
PJO OTIENO, J
MAY 12, 2023**

BETWEEN

**DIANA KHAVERE 1ST PETITIONER
BENARD SHIROTSI 2ND PETITIONER
BEATRICE MWANJE 3RD PETITIONER**

AND

**PAULO SHIMANGE MUSINDI 1ST RESPONDENT
MOSES AYILO MAPUMA 2ND RESPONDENT
FANUEL SIFUNA MUNGAI 3RD RESPONDENT
DAVID MUHEHE ONGONGO 4TH RESPONDENT
LUDOVICK SHIKOKOTI 5TH RESPONDENT
JOEL WARAMONDI SHIROTSI 6TH RESPONDENT
HILDAH JUMA RANDIGEAH 7TH RESPONDENT**

RULING

1. By summons dated the 4.10.2021, the petitioner prays to court for the orders that the court grants an order cancelling all title resulting from the subdivision of the estate land, Kakmega /shambarere/1464, being sub-titles Kakamega/shambarere/1843, 1844, 1845, 1992, 1993, 1994, 1607 and 1608 and that upon cancellation the proprietorship be reverted to the deceased's name.
2. The reasons advanced to support the application are that the subdivisions and transfer were conducted unlawfully and unprocedurally, by persons other than the administrators outside the due process of



the law, and thus leaving the estate with nothing to distribute to the beneficiaries upon confirmation. Those same facts were reiterated in the affidavit sworn by the 3rd petitioner.

3. When served, all the seven respondents swore separate and distinct Replying Affidavits all asserting rights of purchase of their portions of the land from different persons, went through the process of transfer and obtained valid titles which they consider to be beyond reproach. 1st respondent contends that he purchased a portion measuring 2.5 acres from the deceased. the summary of the contentions in the Affidavits is as below.

Party	Date of sale	Vendor	Date of transfer
First Respondent	20.3.1986	deceased	12.10.1992
2 nd Respondent	10.08.2006	Elikana Ashiundu	07.11.2013
3rd Respondent	04.01.1994	Benard Shilotsi James	12.09.1995
4th Respondent	09.12.2011	Benard shirutsi James	17.01. 2013
5 th Respondent			
6 th Respondent	15.05.1989	James Mutalio kisigwa	29 09.1993
7th Respondent	Not disclosed	deceased	29.12.1993

4. All, thus, contend that they are legally entitled to the possession of the respective titles on the basis that the sale was valid coupled with continuous occupation and user of the land.
5. The matter was directed to be canvassed by way of written submission pursuant to which direction, the administrators filed submissions dated November 28, 2022 while the respondents filed joint submissions dated December 9, 2022.
6. In their submissions the applicants/administrators contend that, the 2nd applicant as the petitioner, proceeded with the petition discretely and failed to include the 1st and 2nd applicants, being the widow and daughter of the deceased. For that reason, it is contended that the grant was obtained fraudulently and therefore affords to the persons dealing with the administrator no protection under section 93 of the act. It is then added that the respondents very well know the 1st and 3rd applicants and their relationship with the deceased and ought not to have dealt with the 2nd applicant without recourse to the two. *Re Estate of George Mukunzu Ndili, Deceased* (2021) eKLR was cited for the proposition of the law that section 93 of the Act only protects a transaction by a legal representative where he is entitled to the grant and never where the grant was obtained by fraud.
7. For the respondents, the joint submissions filed give the background of how each purchased their respective parcels at valuable consideration and that the titles were issued to them with the full participation of the administrator in applying for and obtaining the requisite consents of the land control board. That the respondents have been in continuous and peaceful occupation of their respective parcels was underscored. The 1st and 7th respondents are disclosed to have bought the land from the deceased, the 7th appear to have benefited by transmission, while the rest, save for the 5th and the 2nd respondents, bought from the 2nd applicant in his capacity as the administrator. While the



- 2nd respondent contend that he bought from one Elikana Shivoko Ashiundu, who was named in the petition as a beneficiary, there is no affidavit nor submission on how the 5th respondent acquired his title. What is not contested is that all the titles were issued long after the deceased had died.
8. Based on such position, the respondents contend that the court lacks jurisdiction to grant the orders sought on the basis that the parcels of land no longer belong to the estate. The decision *in The estate of Alice Mumbwa Wambwa* (2017) eKLR was cited on the jurisdiction of a probate court to be confined to the dispute between the personal representative of the deceased and the survivors, dependants and beneficiaries but not with strangers to the estate whose claims must be pursued out of the *law of succession Act*.
 9. It is the submission by the respondents that once a title issues, the land leaves the state and the dispute then is over land and not probate and therefore the High court is divested of jurisdiction pursuant to article 162(2) of *the Constitution*. The decisions *in Re Estate of P N N* (2017) eKLR and *Re Estate of Obedi Ndwiwa Rubarita* (2021) eKLR were cited to support that proposition.
 10. Having reviewed and eagerly perused the affidavits filed and the submissions, the only issue for determination is whether, the prayers for revocation of titles resulting from the subdivision of the state property is merited. However, that straight forward issue, must come subsequent to the determination of the all-important question whether the court is clothed with jurisdiction in the matter.
 11. Even though the respondents allege that the dispute is not fit as a succession one, the truth of the matter is that their titles were all issued with the blessing and participation of the 2nd applicant as the administrator. The grant issued to that applicant was indeed revoked on the 7.7.2021 and no challenge is pending over that revocation. It therefore stands that the estate is yet to be administered and wound up. When the estate is yet to be wound up, it is the probate court, and no other, that must undertake its mandate in determining what property makes the net estate with a view to collecting same for purposes of distributing it to the person entitled.
 12. The jurisdiction of this court on probate matters, in terms of section 47 as read with rule 73 of the *Probate and administration Rules*, is wide and unfettered and permits the court to entertain any application and dispute under the act, with the courts inherent power being reserved to facilitate the making of any order necessary to meet the ends of justice and prevent abuse of the court process The above stated provisions confers the High Court inherent powers to make appropriate orders in the interest of justice and for the preservation of the deceased's estate.
 13. It is the learning by this court that every court has the inherent power to revisit its orders every time it is disclosed that such an order was obtained by mistake, default, error, improperly or unlawfully. That is the foundation of section 76 of the act pursuant to which the grant herein was revoked. From the notes in the file, in the absence of a written reasoned decision, the grant was revoked for failure by the 2nd applicant to disclose that the deceased was survived by the 1st and 3rd applicants, being widow and daughter, as persons who stood in priority all else and equality with the 2nd applicant and whose consents were never sought and obtained. To this court, the grant was revoked for violating the mandatory provisions of section 66 and rule 7(7) of the Rules. It was obtained contra statute and it thus never vested upon the 2nd applicant, as the personal representative, the power to deal with the estate in a manner that merits protection under section 93 of the Act.
 14. It is therefore the finding of the court that, it has the requisite jurisdiction to determine how the estate property ended with the respondents and now that the grant upon which the transfers were effected has been annulled, for failure to bear fidelity to the law and due process, it would be unjust to let the impropriety of the 2nd applicant to stand to the detriment of the other beneficiaries to the estate. The



appropriate order that would serve the ends of justice is to declare the subdivisions and subsequent transfers invalid, revert the property to the estate so that all with claims over and against the estate may present such claims for determination.

15. In coming to this conclusion, the court is of the preliminary view that those who allegedly bought from the deceased may proceed as liabilities to the estate, if acknowledged by the petitioner, and short of that, they must prove their claim on title to land before the appropriate court. That however remains a preliminary view which must be delved into by a full analysis of evidence presented by parties at an appropriate time.
16. In conclusion, the application dated 4.10.2021 is allowed as prayed and the grant is revoked. In order that the estate ought not to remain without an administrator, it is directed that the two objectors and the petitioner be appointed joint administrators. In that capacity, as administrators, they shall jointly file an application for confirmation of grant within 60 days from today. If there be no consensus on the application and how to share the estate, let an application for confirmation be filed by any of them and served upon the others who shall be at liberty to protest.
17. This matter shall be mentioned on 20/09/2023 for further necessary orders. Each party shall bear own costs.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 12TH DAY OF MAY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:-

No appearance for Andia for the Applicants

Mr. Mbetera for Wilunda for the Respondents

Court Assistant: Polycap

