



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Ephraim Kawai (Deceased) (Succession Cause  
12 of 2022) [2023] KEHC 18389 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18389 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
SUCCESSION CAUSE 12 OF 2022  
WM MUSYOKA, J  
JUNE 2, 2023**

**RULING**

1. On August 6, 2021, I delivered a ruling herein, where I revoked a grant made to an administratrix, Ebby Kanguha Kawai, who had since died, and appointed fresh administrators, being Herbert Jumba Kawai and Zibby Lodenyi. I directed the new administrators to file for confirmation of their grant.
2. There was compliance. A summons for confirmation of grant, dated November 30, 2021, was filed herein on December 2, 2021, at the instance of Herbert Jumba Kawai, who I shall refer hereafter as the applicant. He mentions that he has 2 sisters, Rose Kiyunzi and Zipporah Lodenyi. He says that since they have not cooperated with him, they have technically renounced their shares in the estate. He implies that the entire estate, being North Maragoli/Gavudia/56 and 515, and Bungoma/Kamukoiwa/117, be devolved solely on him.
3. Zippy Lodenyi Kawai, the co-administratrix, filed an affidavit of protest, on May 17, 2022, sworn on May 15, 2022. I shall refer to her as the protestor. She expresses that she has the authority of Rose Oside Kiyunzu to make the affidavit. She avers that the deceased had been survived by 3 children, being herself, the applicant and Rose Oside Kiyunzu. She accuses the applicant of causing North Maragoli/Gavudia/56 and 515 to be transferred to his name, and thereafter subdivided North Maragoli/Gavudia/56 into North Maragoli/Gavudia/1268 and 1269. It is alleged that he also sold a portion of the estate without reference to the protestor and their sister. She proposes that North Maragoli/Gavudia/56 and 515 be devolved upon the applicant, and Bungoma/Kamukoiwa/117 to the protestor and Rose Oside Kiyunzi. She has attached search certificates to show that North Maragoli/Gavudia/56 and 515 were transferred to the name of the applicant in 1999, and that subsequently the register for North Maragoli/Gavudia/56 was closed in 2020, upon the subdivision of that title to North Maragoli/Gavudia/1268 and 1269. A search certificate for North Maragoli/Gavudia/1269 indicates that the same was registered in the name of Naphas Mulinya Asava in 2014, while North Maragoli/Gavudia/1268 was registered in the name of the applicant in 2010.
4. To that protest, the applicant filed a reply, vide an affidavit sworn on June 9, 2022. He confirms that registration of North Maragoli/Gavudia/56 and 515 is in his favour, but explains that it was done by the previous administratrix. He states that he sold North Maragoli/Gavudia/1269 to meet his



personal obligations, including paying school fees for his children. He further says that Bungoma/Kamukoiwa/117 had been given to him by the deceased during his lifetime. He avers that his clan had also given him Bungoma/Kamukoiwa/117 in meetings held in 1995 and 1996. He states that his sisters are well educated, employed and have homes of their own and have no need of land from the estate of the deceased.

5. Directions were given on June 20, 2022, for disposal of the application by way of viva voce evidence. The oral hearing happened on September 22, 2022, when both sides breathed life to their respective filings. Thereafter, the parties filed written submissions, which I have read through and noted the arguments made.
6. Confirmation of grants is provided for in section 71 of the *Law of Succession Act*, Cap 160, Laws of Kenya. Confirmation is about confirming the administrators to carry on to complete administration of the estate, and where found wanting, to revoke their grants and appoint other administrators for that purpose. The second objective is distribution of the estate.
7. On confirmation of administrators, the applicant and the protestor are the administrators. I appointed them on August 6, 2021, to take the place of the administratrix who had died. They do not appear to be working together, but given the diverse positions taken in this matter I shall retain them, as such. They shall have to work together to complete administration.
8. On distribution, 2 things have to be addressed. One, the persons beneficially entitled to the shares in the estate, and two, of the assets to be distributed. After the persons beneficially entitled and the property available for distribution have been identified or ascertained, the court then considers how the property identified is to be shared out between the persons ascertained as beneficially entitled to a share in the estate.
9. It is not in dispute that the deceased was survived by children only, the surviving widow having also died. The children are 3 in number, the applicant herein, the protestor and Rose Oside Kiyunzi. These are persons beneficially entitled to a share in the estate herein.
10. On the assets, the applicant has placed 3 on record for distribution, that is to say North Maragoli/Gavudia/56 and 515, and Bungoma/Kamukoiwa/117. He has not attached evidence to show whether these assets are available for distribution. The protestor, on her part, has placed material on record which indicates that North Maragoli/Gavudia/56 no longer exists, the register was closed after the land was subdivided into North Maragoli/Gavudia/1268 and 1269, one of which is registered in the name of the applicant, and the other in the name of a third party. The applicant has conceded to that. So, North Maragoli/Gavudia/56 does not exist, it is not available for distribution, and it was disingenuous of the applicant to place it before the court. It was dishonourable for the applicant to invite the court to distribute property which no longer exists. The protestor has also placed on record a certificate of official search for North Maragoli/Gavudia/515, which indicates that this property is not also available, for it was transferred to the name of the applicant in 1999. It was also, therefore, disingenuous and dishonourable for the applicant to be inviting the court to distribute a property which is no longer part of the estate. A certificate of official search has not been placed on record with respect to Bungoma/Kamukoiwa/117. I cannot tell whether the property is an asset in the estate, or whether it was transferred, and, therefore, ceased to be a part of the estate. It was the duty of the applicant to provide evidence that what he is inviting me to distribute is property that comprises the estate of the deceased. The court ought not proceed blindly, and make orders on distribution of assets, based on mere lists of assets, where no evidence has been provided on the existence of those assets.
11. I find it surprising that North Maragoli/Gavudia/56 and 515, and Bungoma/Kamukoiwa/117 are still not in the name of the deceased. That issue was before Waweru J, when he considered the summons



for revocation, dated March 9, 2000. Waweru J noted that North Maragoli/Gavudia/56 and 515 had been transferred to the name of the applicant herein, Herbert Jumba Kavai, in 1999, and Bungoma/Kamukoiwa/117 had been transferred to the name of the then administratrix, Ebby Kanguha Kavai. In his ruling, dated November 15, 2001, and delivered on November 16, 2001, Waweru J set aside the confirmation orders made on November 24, 1993, which were the basis on which North Maragoli/Gavudia/56 and 515, and Bungoma/Kamukoiwa/117 were transferred. Waweru J went on to order that the registration of North Maragoli/Gavudia/56 and 515, and Bungoma/Kamukoiwa/117, be reverted to the name of the deceased.

12. For avoidance of doubt, Waweru J, wrote, and I quote verbatim, from the final orders in the ruling of November 15, 2001:

' (a) The order of confirmation of grant dated November 24, 1993 is hereby set aside. The confirmed grant issued pursuant thereto is hereby cancelled.

(b) The three parcels of land registered under the registered *Land Act*, cap 300, shall immediately revert unto the name of the Deceased. That means that the registration of the Petitioner as the proprietor of LR Bungoma/Kamokoiwa/117 is hereby cancelled. The registrations of Herbert Jumba Kavai as proprietor fo LR North Maragoli/Gavudia/56 and 515 are also hereby cancelled.'

13. From the above orders, the registrations, of North Maragoli/Gavudia/56 and 515, and Bungoma/Kamukoiwa/117, in the names of the previous administratrix and the applicant, were cancelled, and the assets were reverted to the name of the deceased. That was apparently not done, going by the documents displayed by the protestor. A court order is not a proposition, it must be complied with. I am surprised that the applicant still perceives himself to be the proprietor of North Maragoli/Gavudia/56 and 515, despite the orders of November 15, 2001, which cancelled his registration and reverted the property to the estate. The order has not been complied with. The non-compliance means that the assets, that I am being asked to distribute, are not in the name of the estate, and, technically, they do not belong to the estate, and are not available for distribution. Orders were made to have them reverted to the estate, and reverted to the estate they must, before the court can make orders on their distribution. Let parties learn to take court orders seriously. We cannot possibly proceed as if Waweru J did not make the orders of November 15, 2001.

14. The applicant raised issues that touch on whether the daughters of the deceased should get a share in the estate. He says they were married, educated, employed and had their own assets. Well, those are non-issues. The law entitles them equal share in the estate of their father. That is in section 38 of *Law of Succession Act* and Article 27 of the *Constitution*. Article 2(4) of the *Constitution* renders any law, including customary law, which is inconsistent with the *Constitution*, null and void. Customary law discriminates against women on grounds of gender and marital status, and that is inconsistent with Article 27 of the *Constitution*, which renders that customary law position a nullity. Article 2(4) also renders any act, which is inconsistent or which amounts to a non-compliance with the *Constitution*, invalid. A proposal to distribute an estate in a manner that discriminates against women is an invalid act, and a court which makes an order based on such an invalid proposal would be making an invalid order.

15. The applicant is of the view that his sisters are not entitled to shares in the estate, because they have not cooperated or participated in administration, if I understood him correctly. Well, shares to an estate are allocated by the law, and do not depend on whether a beneficiary is active in the succession litigation or not. Non-participation or cooperation does not affect the entitlement. It does not diminish nor



extinguish nor amount to abandonment of the right. The beneficiary is entitled to the share as of right, regardless of everything else, unless he or she expressly renounces that right. I have no evidence before me of any renunciation of the right to a share in the estate by the 2 daughters of the deceased, to warrant their exclusion. It was said, in [\*Christine Wangari Gichigi vs Elizabeth Wanjira Evans & 11 others \[2014\] eKLR\*](#) (Emukule, J), that failure by daughters of the deceased to participate actively in the litigation should not be a disentitling consideration, in the absence of a renunciation by them. In [\*In re Estate of Joyce Kanjiru Njiru \(Deceased\) \[2017\] eKLR\*](#) (Gitari, J), the court allocated shares to 2 of the daughters of the deceased, although they were said to be not claiming a share in the estate, and not opposing the proposed distribution, and, therefore, not entitled to a share, hence they were not allocated a share in the application for confirmation of grant.

16. The other issue raised was that North Maragoli/Gavudia/56 and 515 had been given by the applicant by the deceased during his lifetime and the clan after his demise. This makes 2 points, that there was an inter vivos distribution of that property, and that the clan distributed the estate to him after the demise of the deceased.
17. What constitutes an inter vivos distribution was discussed in [\*In re Estate of Gedion Manthi Nzioka \(Deceased\) \[2015\] eKLR\*](#) (Nyamweya, J) and [\*In re Estate of Godana Songoro Guyo \(Deceased\) \[2020\] eKLR\*](#) (Nyakundi, J). The property would be transferred to the name of the beneficiary, and a title deed issued to him. That never happened here, for when the deceased died North Maragoli/Gavudia/56 and 515 was still registered in his name, hence these succession proceedings. If there was any inter vivos gifting, then these proceedings would be unnecessary, for the property would have moved from the deceased to the applicant. The fact that that did not happen means that there was no such gift. See [\*In re Estate of Muchai Gachuika \(Deceased\) \[2019\] eKLR\*](#) (Gikonyo, J). There is also no evidence that the deceased took some step towards effectuating such a gift, by, say, getting the consent of the relevant Land Control Board to allow such transfer, or executing a transfer form in favour of the beneficiary, but died before the transfer was registered. The courts have said that where such evidence exists, it would be presumed that such gift did in fact exist, but its completion was frustrated by the death, and, with such evidence, the court can presume the gift. See [\*In re Estate of Phylis Muthoni M'Inoti \(Deceased\) \(2019\) eKLR\*](#) (Gikonyo, J), [\*In re Estate of Nyachieo Osindi \(Deceased\) \[2019\] eKLR\*](#) (Ougo, J), and [\*Lucia Karimi Mwamba v Chomba Mwamba \[2020\] eKLR\*](#) (Gitari, J).
18. The other issue is about the clan giving the applicant land. There are 2 things there. The first is that clans administer customary law, yet customary law does not apply here, for the deceased herein died on June 18, 1992, and by then the application of customary law to intestate succession had been ousted by section 2 of the [\*Law of Succession Act\*](#), following the coming into force of that law in 1981. The purported sitting by the clan to apply customary law, had been overtaken by section 2 of the Act. See [\*Rono vs Rono & another \[2005\] 1 EA 363, \[2005\] eKLR\*](#) (Omolo, O'Kubasu & Waki, JJA), [\*In re Estate of Kiprono arap Ng'etich \[2016\] eKLR\*](#) (M Ngugi, J) and [\*Joseph Achichi Aburili v George Ochola Aburili \[2017\] eKLR\*](#) (Majanja, J). There is absolutely no place for customary law in this case, for although sections 32 and 33 of the [\*Law of Succession Act\*](#) allows application of customary law to estates of persons dying after 1981, in certain cases, such cases do not include lands situated within Vihiga and Bungoma Counties.
19. The second aspect is about clans intervening in succession matters. Under the [\*Law of Succession Act\*](#), distribution of estates is the sole responsibility of the court, other entities get involved only on the invitation of or by reference from the court. Intervening in estates of dead persons without leave of court would amount to intermeddling, which is outlawed by section 45 of the [\*Law of Succession Act\*](#), which makes it even a criminal offence to do so. In [\*In Re the Estate of Harrison Gachoki \(Deceased\) \[2005\] eKLR\*](#) (Okwengu, J), the court found that clan elders had no power to distribute, under



customary law, the estate of a person who died after the Law of Succession Act came into force on July 1, 1981. See also M'Muriithi M'Mugambi v Harriet Kinya [2007] eKLR (Ouko, J), In re Estate of Veronica Njoki Mungai (Deceased) [2017] eKLR (Musyoka, J), In re Estate of Zephania Aroni Onyoni (Deceased) [2021] eKLR (Ougo, J) and In re Estate of Manesse Otieno Eshitubi (Deceased) [2022] eKLR (Musyoka, J). The clan, in this case, had no business purporting to sit to distribute the estate herein, as it had no power whatsoever, and whatever it did was invalid, and amounted to criminal activity.

20. In the ruling of November 15, 2001, Waweru J addressed the issue of Plot No 70 Site & Service Scheme, Kakamega Municipality, which had been listed in the petition as an asset of the estate, and had been distributed in the confirmation orders of November 24, 1993. Waweru J noted that it was not clear whether it was still in the name of the deceased or had been transferred to the name of the then administratrix. The court did not go beyond that. In the confirmation application, dated November 30, 2022, the applicant ought to have given an account of what became of that property, seeing that it had been listed in the petition, and distributed on November 24, 1993.
21. As the assets, that I am being invited to distribute, are not within the estate of the deceased, the application, dated November 30, 2022, is premature. Let the assets be brought within the estate first, by way of compliance with the orders made by Waweru J, in the ruling of November 15, 2001, before the application can be considered for final orders. I shall postpone the said application, under section 71(2) of the Law of Succession Act, to allow for that compliance. The parties shall file further affidavits, after the compliance, to place, on the record, documents evidencing the compliance, and the matter shall be determined thereafter, by my successor or successors at Vihiga. The matter shall be mentioned before my successor, after 3 months, for compliance, and further directions. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 2ND DAY OF JUNE 2023**

**WM MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Appearances**

**Mr. Mukoya, instructed by RV Mukoya & Company, Advocates for the applicant.**

**Mr. Lugadiru, instructed by Lugadiru & Company, Advocates for the protestor.**

