



REPUBLIC OF KENYA



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In re Estate of Juma Nang'ombe Nandebekwa (Deceased) (Succession Cause 261 of 2012) [2023] KEHC 18055 (KLR) (2 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18055 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 261 OF 2012**

WM MUSYOKA, J

JUNE 2, 2023

IN THE MATTER OF THE ESTATE OF JUMA NANG'OMBE NANDEBEKWA (DECEASED)

RULING

1. I am called upon to determine an application for confirmation of grant. It is dated 20th November 2012, and brought at the instance of Mohammed Ambundo Nang'ombe. I shall refer to him as the applicant. He is the administrator of the estate, holding a grant of letters of administration intestate, made to him on 16th August 2012, and issued on 17th August 2012.
2. In the affidavit that he swore on 20th November 2012, he avers that the deceased died on 22nd July 1983. He is expressed to have been survived by 6 children, all sons, described as Mohammed Ambundo Nang'ombe, Naftali Lubisia Nang'ombe, Reuben Webo Nang'ombe, Peter Nang'ombe, Ismail Aruba Nang'ombe and Ibrahim Olunga Nang'ombe. He is said to have died possessed of 1 asset, Butso/Ingotse/109. It is proposed to be distributed unevenly between 5 of the sons, so that Mohammed Ambundo Nang'ombe gets 1.41 hectares, Naftali Lubisia Nang'ombe 0.44 hectare, Reuben Webo Nang'ombe 0.30 hectare, Peter Nang'ombe 0.21 hectare and Ismail Aruba Nang'ombe 0.22 hectare. Ibrahim Olunga Nang'ombe is not allocated a share. There is a consent in Form 37, filed under Rule 40(8) of the Probate and Administration Rules, signed by the 5 who are allocated shares. Ibrahim Olunga Nang'ombe did not sign it.
3. Ibrahim Olunga Nang'ombe filed an affidavit of protest, on 25th February 2013, sworn on even date. I shall refer to him as the protestor. He complains that the applicant had not distributed the estate before confirmation of grant, and urges the court to let the applicant do so, and then apply for confirmation of grant. He says that that way everyone would know their share on the ground.
4. That protest prompted a further affidavit from the applicant, sworn on 12th September 2013. He explains that the protestor had sold his share of the land to Feisal Mohammed, through a sale agreement, dated 8th March 2012, after which the said protestor shifted and bought land at Kitale where he currently lives. The family thereafter decided to buy back the portion sold, from Feisal Mohammed. It is asserted that the protestor is not entitled to a share in the estate. The sale agreement between the protestor and the said Feisal Mohammed is exhibited, dated 8th March 2012. There is also copy



- of a letter, dated 5th February 2013, addressed to Feisal Mohammed, by the applicant, through his Advocates, asking him to collect a refund of the money he had paid, from the Advocates.
5. The further affidavit by the applicant provoked a further affidavit by the protestor, sworn on 19th February 2014, where he does not address the issue of Feisal Mohammed, instead he asserts that he is entitled to a share in the estate, and that the estate ought to be shared equally, and that the third parties ought to be dealt with separately.
 6. On 29th July 2022, 2 daughters of the deceased, Florida Omusundi Obulemile and Susan Awinja Nanderekwa, filed separate affidavits, that they had sworn on 28th July 2022. They aver that the deceased had 7 daughters, and 5 had died, leaving the 2 of them. They state that they were aware of the succession proceedings, and that the deceased had shared out his property to his sons prior to his demise. They also state that the protestor had sold his share, but the administrator refunded the sale price to the buyer, and the family agreed that the share due to the protestor should go to the applicant, since he was the one who refunded the money. They submit that as daughters, they had no interest in the estate, as they were happily married, and had their own land. They state that it had been agreed that the share due to Peter Nang'ombe should vest in the applicant, who will later distribute it amongst his brothers.
 7. Directions were given on 10th June 2016, for viva voce evidence.
 8. The oral hearings commenced on 15th March 2016, with the protestor on the stand. He stated that he was a son of the deceased, and a resident of Elgeyo Marakwet. He said that the deceased had 7 sons and 9 daughters, and that his land measured 9.6 acres. He said that he was given his share in 1983 by elders, and each of the sons were allocated their shares, which were marked out on the ground, after the demise of the deceased. He said that he moved out of his own portion, and settled in Trans Nzoia, on his own land. He stated that he sold his 1 acre to Feisal Mohammed, asserting that he had a right to sell it. He said that it was the applicant who was using the 1 acre. He stated that Feisal Mohammed had not been refunded his money. He asked the court to give him the 1 acre, so that he can transfer it to Feisal Mohammed. He said that it was the elders who shared out the land, which he said belonged to his mother.
 9. At cross-examination, he stated that the deceased had 4 wives, and 2 parcels of land, being Butso/Ingotse/109, and another whose details he could not remember. He said that the other parcel was given to 6 children; while Butso/Ingotse/109 was meant for his mother. He said that his mother had 5 sons, being Mohammed Ambundo Nang'ombe, Zablon Nandebegwa Opanga, Peter Nang'ombe, Ismail Aruba Nang'ombe and Ibrahim Olunga Nang'ombe. He stated that Zablon Nandebegwa died in 2010/2011. He stated that Naphtali Lubisia and Reuben Webo were from the first house. He confirmed the sale agreement with Feisal Mohammed, dated 8th March 2012. He said that he had informed the applicant, before he entered into the sale agreement. He asserted that it was wrong for the family to refund the purchase price money to Feisal Mohammed. He stated that the property should be distributed as shared out in 1983.
 10. The applicant testified on 29th April 2022. He said that Peter Nang'ombe died in 2019, and was allocated a share, although he did not have a wife, or children. He said that the family had not yet agreed on how to deal with his share. He stated that the deceased had 9 daughters, and named 8 of them. He said that only 2 were alive, Susan Awinja and Repha Andabwa. He said all those who had died had families, except for 2. He stated that the daughters were all aware of the proceedings. He urged the court to distribute the estate as per his proposals.
 11. Naftali Lubisia Nang'ombe testified next. He supported the proposals by the applicant. He said that the protestor should not be allocated anything, for he sold his share and moved out, after which



- they refunded the money to the purchaser. Reuben Wepo Nang'ombe also supported the proposed distribution. Ismail Aruba Nang'ombe also supported the proposals made by the applicant.
12. At the close of the oral hearings, I was informed that the daughters had filed affidavits, and that Naftali Luvisia Nang'ombe had died on 16th November 2022, and his share ought to go to his widow, Sofa Were Luvisia, and his son, Edward Afwalava Luvisia. The parties did not submit.
 13. This is a fairly straightforward matter. The majority of the survivors support the proposals made by the applicant. The parties are largely agreed on the persons who survived the deceased, and on the property available for distribution. Except for the protestor. He says that the deceased had 2 wives, and Butso/ Ingotse/109 is meant for the 2nd house, for the 1st house was given its share of land elsewhere. He did not give details of that other land. None of the other witnesses made reference to that land. I shall, therefore, presume that the position articulated by the applicant is the correct position on survivors and the land to be distributed.
 14. I have a problem though with the rights of the daughters. I was told the deceased had 9 of them. 2 are said to be the only one surviving. They swore affidavits and renounced their shares. I was told that 7 of the daughters were married, but 2 did not marry. The 2 who did not marry were not identified. It was not disclosed whether they were alive or dead, or if dead, whether they had children. If the dead unmarried daughters of the deceased had children, then the said children had a right to inherit from their grandfather's estate, by dint of section 41 of the *Law of Succession Act*, Cap 160, Laws of Kenya. The fact that they died did not extinguish their right to inherit, for their share should devolve to their children, by dint of section 41. See *Martin Munguti Mwonga vs. Damaris Katumbi Mutuku* [2016] eKLR (Thande, J) and *In re Lenah Wanjiku Gathuri (Deceased)* [2021] eKLR (Odero, J).
 15. Section 41 provides:

“41. Property devolving upon child to be held in trust Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”
 16. There was some level of casualness with which the applicant dealt with the rights of the daughters of the deceased. The deceased herein died in 1983, after the *Law of Succession Act* had come into force on 1st July 1981. The *Law of Succession Act* is gender neutral. It ousted the application of customary law, by dint of section 2(1)(2). Reference to children in the Act means both male and female, son and daughter, married and unmarried. All must be provided for. For those who are dead, section 41 applies, as indicated above. The 2 who swore affidavits can only speak for themselves. They cannot speak for the other 7. The applicant should have made an effort to trace the survivors of the dead daughters, and either brought them to court to state their position, or got them to swear affidavits.
 17. Sections 2(1)(2) of the *Law of Succession Act* provides:

“2. Application of Act

 - (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession



to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

- (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

18. The applicant is under an obligation, by virtue of the proviso to section 71(2) of the [Law of Succession Act](#) and Rule 40(4) of the Probate and Administration Rules, to ascertain the persons beneficially entitled to a share in the estate of the deceased, and the shares due to them. He should ascertain both the sons and daughters of the deceased, and where dead, ascertain the individuals who survive them. The court has a duty to be satisfied that everyone has been ascertained. I am not satisfied that all the persons beneficially entitled were ascertained and provided for, for the applicant did not disclose all the 9 daughters of the deceased in his papers or filings, and for those that have since died, he has not ascertained and disclosed those who survived them. That is what the law requires, and there are no 2 ways about it. In *In the Matter of the Estate of Ephrahim Brian Kavai (Deceased)*, Kakamega High Court Succession Cause Number 249 of 1992 (Waweru, J) (unreported), it was stated that confirmation orders made where the proviso to section 71(2) of the [Law of Succession Act](#) and Rule 40(4) of the Probate and Administration Rules have not been complied with would be illegal. See also [In Re Njoroge Mbote](#) [2002] eKLR (Khamoni, J), [In re Estate of Gaitho Kimani \(Deceased\)](#) [2021] eKLR (Meoli, J) and [In Re Estate of Samson Amasini Adeya \(Deceased\)](#) [2022] KEHC 14839 (KLR) (Musyoka, J).
19. The proviso to section 71(2) of the [Law of Succession Act](#) and Rule 40(4) of the Probate and Administration Rules state as follows:
- “Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”
- “Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined”
20. More fundamentally, the failure to properly ascertain the daughters of the deceased, or their successors and survivors, would render whatever orders that the court makes on the distribution a nullity. The [Constitution](#) of Kenya, 2010, at Article 27, has outlawed discrimination based on gender, and declared that men and women are to be treated equally in all spheres of life. Article 27 should be read together with Article 2(4). Article 2(4) declares any law, including customary law, which is inconsistent with [the Constitution](#), null and void, to the extent of the inconsistency. A differential treatment of women, who include daughters, is inconsistent with Article 27 of [the Constitution](#), and if it is done on the basis of customary law, it should be understood that such customary law would be null and void. In any event, customary law is not even of application here, in view of section 2(1)(2) of the [Law of Succession Act](#).
21. The second component of Article 2(4) is equally relevant. It states that any act done by any person which contravenes or violates [the Constitution](#) is a nullity. Discriminating against daughters of the deceased, merely because they are women, or because they are married, contravenes or violates Article 27 of [the Constitution](#), and to that extent, and by virtue of Article 2(4), the said act is a nullity. In this case, the petition herein and the summons that I am determining, did not list the 9 daughters



of the deceased as survivors of the deceased, yet the Law of Succession Act applied, and commanded their disclosure. That act of filing papers in court, which discriminate against women, is an act which contravenes the Constitution, and the papers filed are nullities. Conducting proceedings based on such a nullity will produce an order which will itself be a nullity. Consequently, as the petition and the summons herein are not constitutionally compliant, they are nullities. See In re Estate of M'Itunga M'Imbutu (Deceased) [2018] eKLR (Gikonyo, J), In re Estate of Stanley Mugambi M'Muketha (Deceased) [2019] eKLR (Gikonyo, J) and Wanjiru & 4 others vs. Kimani & 3 others (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA).

22. The relevant portions of Articles 2 and 27 of the Constitution state as follows:

2. Supremacy of this Constitution

- (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
- (2) ...
- (3) ...
- (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
- (5) ...”

Equality and freedom from discrimination

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) ...”

23. So, what should I do? The obvious answer should be that the nullity ought to be struck out. That may be too drastic, but it is what one should get for contravening the Constitution. However, the applicant can still salvage the situation, by filing papers that comply with what the Constitution and the Law of Succession Act require. Let him file a further affidavit, where he should disclose the full family of the deceased. The number of wives that the deceased had married. The children that he had with such wives, be they male or female, or sons or daughters, married or unmarried. Disclose all those male and female children of the deceased who have died, and disclose the individuals who have survived them. I believe that way the applicant will have brought his application within the requirements of the proviso



to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, and Article 27 of the Constitution, to obviate striking out of the proceedings, under Article 2(4) of the Constitution.

24. Regarding the sale by the protestor to Feisal Mohammed of a portion of the estate asset, I always take a hard position with regard to such. The land in question did not belong to the protestor. It was estate property. It had not been distributed, whether inter vivos or in succession proceedings. The protestor held no title to it. He was not the administrator of the estate at the time he carried out the transaction. He did not have leave of court to sell. He had no authority to sell land belonging to a dead person. He had nothing to sell to Feisal Mohammed, and Feisal Mohammed bought nothing from him. The property, in that asset, did not pass, and could not pass, to Feisal Mohamed. The alleged sale was a nullity, and it amounted to intermeddling, under section 45 of the Law of Succession Act. Intermeddling is a criminal offence, and a transaction tainted with criminality cannot be basis for any form of legality or validity. See Benson Mutuma Muriungi vs. CEO Kenya Police Sacco & another [2016] eKLR (Gikonyo, J), Gladys Nkirote M'Itunga vs. Julius Majau M'Itunga & 3 others [2016] eKLR (Gikonyo, J) and In re Estate of Tsimango Akafwale (Deceased) [2021] eKLR (Musyoka, J).
25. Section 45 provides:

45. No intermeddling with property of deceased person

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall-
- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) ...”

26. The pending application should only be disposed of after there has been full compliance with the relevant provisions of the Law of Succession Act and the Constitution, in default, the entire petition ought to be struck out. A date for mention for compliance shall be given at the delivery of this ruling, and the remaining business shall be handled by my successors at Kakamega. 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. Atulo, instructed by ZJ Atulo & Company, Advocates for the applicant.

Ibrahim Olunga Nang'ombe, the protestor, in person.

