



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Juma Wangwe (Deceased) (Succession Cause
90 of 2005) [2023] KEHC 18390 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 90 OF 2005**

WM MUSYOKA, J

JUNE 2, 2023

IN THE MATTER OF THE ESTATE OF JUMA WANGWE (DECEASED)

RULING

1. The deceased herein died on February 2, 1986. The letter from the Chief, dated February 14, 2005, is not helpful at all, for it does not set out the individuals who survived the deceased.
2. Representation to the intestate estate was sought, *vide* a petition filed herein on March 2, 2005, by Martin Shikuku Juma, in his purported capacity as son of the deceased. He listed himself as the sole survivor of the deceased, who had allegedly died possessed of Kakamega/Luandeti/37. Letters of administration were made to the petitioner, on June 6, 2005, and a grant was duly issued, dated June 8, 2005. I shall refer to Martin Shikuku Juma, hereafter, as the administrator. He obtained confirmation of that grant on November 26, 2013, *vide* an application, dated November 11, 2013, and a certificate of confirmation of grant was duly issued, dated December 5, 2013. The property, Kakamega/Luandeti/37, was shared, unevenly, between the administrator and Aggrey Bitonye Nyongesa.
3. On October 8, 2015, a summons for revocation of grant, of even date, was filed herein, by Konzefita Nalika Tali Wangwe, who I shall refer hereafter as the applicant. She avers that the deceased was her step-brother, and the administrator, her nephew. She explains that Kakamega/Luandeti/37 belonged to their late father, Wangwe Werunga. She states that their late father presented the name of the deceased during land adjudication, and, as a consequence, the deceased was registered as proprietor of the property. Their said father was said to have had 3 wives, and that the deceased was from the 1st house. It is asserted that Kakamega/Luandeti/37 was meant for the sisters of the deceased, and that the deceased held the property in trust for them. The applicant states that it is her and her sisters who occupy and utilize the property. She states that the administrator had failed to disclose them as survivors of the deceased.
4. The administrator responded to that application, *vide* an affidavit sworn on March 3, 2016. He asserts that the deceased had not allocated any land to the applicant as alleged. He says that his uncle, Joseph Wanjala Wangwe, was given his own land, being Kakamega/Luandeti/36. He asserts that Kakamega/Luandeti/37 was given to the deceased by his late father before the latter died in 1966, and by the time



the said father of the deceased died, land registration had not been done. He asserts that the applicant never used Kakamega/Luandeti/37, and that she got married and was never allocated or given any land by her father. He advances the same arguments, with respect to the sisters of the applicant, namely Rosemary Nanjala, Eunice Peter and Mary Nasimiyu. He attaches to his affidavit, copy of a certificate of official search for Kakamega/Luandeti/36, showing that it was registered in the name of Joseph Wanjala Wangwe, on January 11, 1994.

5. Joseph Wanjala Wangwe filed an affidavit herein on April 3, 2019, sworn on February 2, 2019. He is a brother of the deceased herein. He avers that the deceased died in 1976, and was survived by a widow, Esther Chesang, 2 sons, Martin Shikuku Juma and Wangwe Juma, and 2 daughters, Nechesa Juma and Nanjala Juma. Except for the administrator, Martin Shikuku Juma, all the other children are dead, while the widow remarried. He states that the applicant was his sister. He names the other sisters of the deceased as Eunice Peter and Mary Nasimiyu. He states further that their father was Wangwe Mwivanda, who died in 1963, before land adjudication was done. He says that the land their late father owned was registered under separate titles to Alpy Ayuku Wangwe, Julius Wechijusi Wangwe, the late Patrick Juma Wangwe, Nalinya Wangwe Muwande and Joseph Wanjala Wangwe. He states that the daughters of the deceased were not given any land, during land adjudication, as they were married, and those who were not married, continued to use portions of the land as licencees. He states that the applicant married, and remarried after her first husband died, and she had bought her own land. Rosemary, Eunice and Mary were all married, and occupied land belonging to their husbands. He states that the deceased was not registered as proprietor of Kakamega/Luandeti/37 as trustee for anyone.
6. The application was canvassed orally, as per the directions given on February 24, 2016.
7. The oral hearing happened on November 8, 2021. The applicant was the first to take to the witness box. She stated that the deceased was her brother. Their father had 3 wives, and that she and the deceased came from the 1st house. She stated that the 1st house had 12 children, being 10 daughters and 2 sons. She said that their father shared out the land to the children according to the houses. Their brother, Julius Wangwe, was given land in Trans Nzoia, while the deceased was given Kakamega/Luandeti/37. She explained that the 2nd house had only 1 child, a son, Elphas Ayuku, who sold his entitlement, and bought land elsewhere. The 3rd house had 5 children, being 3 daughters and 2 sons. Their father died in 1963, and by then, he had shared out his land. She said that of the 10 daughters in the 1st house only 4 are alive, they are married and have land of their own.
8. Ezekiel Injendi Mwanja followed. He was a relative of the parties. He stated that Joseph Wangwe was a half-brother of the deceased, and had been given his own land, which he sold and bought land elsewhere. He said that the deceased had been given land together with his sisters. He said that the administrator was born outside wedlock, to the deceased, and was the sole surviving child of the deceased. He said that the deceased did not have a wife, at the time of his death, and that it was his sisters who brought the administrator home. John Makokha Lutali testified next. He was a clansman of the parties. He testified largely along the same lines as Ezekiel Injendi Mwanja.
9. The administrator testified on July 19, 2022. He described himself as the sole survivor of the deceased. He said that the land in question belonged to the deceased. He said that the applicant and her sisters did not live on the land, and that he could only consider sharing the land with them, if they had lived there. He denied that it was them who brought him into the land, saying he used to live there with the deceased. He said that he had sold a portion of the land to Aggrey Mitoi.
10. Joseph Wanjala Wangwe followed. He testified that the deceased had other children, who all died, leaving the administrator. He stated that their father had died in 1963, before land adjudication, but had shared out his land amongst his sons. He said that Kakamega/Luandeti/37 belonged to the



- deceased, and not their father, although it was originally his. He said that the mother of the deceased and the applicant was not given Kakamega/Luandeti/37, for the same was meant for the deceased.
11. Both sides have filed written submissions. I have read through the same, and noted the arguments made.
 12. Revocation of grants is provided for under section 76 of the [Law of Succession Act](#), Cap 160, Laws of Kenya. Revocation may be done on the basis of 3 general grounds: where the process of obtaining the grant was fraught with difficulties, revolving around defects in the process, fraud, misrepresentation and concealment of matter from the court; failure of administration, on account of failing to apply for confirmation of grant, lack of diligence, and failure to account; and change of circumstances causing the grant to become useless or inoperative, for such reasons as the sole administrator dying, or losing capacity one way or the other.
 13. The applicant grounds her case on the first general ground, of problems with the process of obtaining the grant. She appears to point at defects in the process, on account of non-disclosure, which also has something to do with fraud, misrepresentation or concealment of information.
 14. Does the material on record establish a case for revocation of grant? I do not think so. The deceased herein was the father of the administrator, and a brother of the applicant. Going by section 66, the administrator had prior right to administration of his father's estate, and he was not obliged to obtain the consent or renunciation of the applicant, or to cause citations to issue to her, or to file an affidavit to explain why she had not petitioned or consented or renounced, going by Rules 7(7) and 26 of the [Probate and Administration Rules](#). In terms of distribution, the deceased died in 1986, according to the certificate of death on record. By then the [Law of Succession Act](#) had come into force. That meant that the estate was available for distribution in accordance with Part V of the [Act](#). Under Part V, other relatives of a deceased person are only entitled where the deceased was not survived by a spouse or a child. In this case, the deceased was survived by a child, and so any other relative, including siblings, would have no right. That made the administrator the sole survivor and beneficiary of the estate, who was not entitled to share it with anyone else, and for which reason, he was under no obligation to involve anyone else in the process. Consequently, the administrator did not exercise any fraud or misrepresentation or the like, for the applicant and her sisters were not entitled to the estate of their brother, when he had been survived by child.
 15. On the issue of there being a resulting trust in favour of the applicant and her sisters, I have very closely looked at the material placed before me, both orally and in writing, and I see nothing which establishes that the deceased herein held the property in question for the applicant and her sisters. In any case, the courts have held that the issue of trust should not be for litigation in succession proceedings, and particularly in applications for revocation of grant. See *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim J) and *In re Estate of Mwangi Gikonyo (Deceased)* [2017] eKLR (Waweru J). The mandate of the probate court is to distribute uncontested assets of the deceased. Where contestations arise on ownership of the land or where the land is alleged to be subject to trusts in favour of the claimants, the probate court should not venture. That is the spirit of Rule 41(3) of the [Probate and Administration Rules](#). The probate court is not a land court, where land rights are agitated and established. The applicant should have mounted her case elsewhere. See *in re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR (Gikonyo J).
 16. It is also apparent that the applicant is agitating rights with respect to the estate of her late father with the deceased. If she was strongly of the persuasion that the deceased held the land in trust, then she should have not have waited until this cause was initiated in 2005. The land was registered in the name of the deceased in 1975, and he died in 1986. She should have squared the issue with him before 1986. Alternatively, if she felt the land emanated from the estate of her late father, then she



should have sought to administer that estate before 1975, or even sued the deceased or his estate, after obtaining representation to her father's estate, to have the property revert to the estate of her father for distribution.

17. Overall, I am not persuaded that a case has been made out for revocation of the grant herein. Consequently, I will disallow the application dated, October 8, 2015, and I hereby accordingly dismiss it. Each party shall bear their own costs. There is leave, of 30 days, to challenge this decision, at the Court of Appeal.

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

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Momanyi, instructed by Momanyi Manyoni & Company, Advocates for the administrator.

Ms. Andia, instructed by Andia & Company, Advocates for the applicant.

