



In re Estate of Edward Okumu Wesa alias Edward Okumu (Deceased) (Succession Cause 306 of 2015) [2023] KEHC 20344 (KLR) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 306 OF 2015
WM MUSYOKA, J
JULY 21, 2023**

RULING

1. The deceased herein died on November 28, 1982. There is a letter from the Chief of Eshikalame Location, dated January 22, 2013, which indicates that the deceased was survived by a brother, Fanuel Ocheso Wesa, and 4 sons, Benard Oruko Okumu, Bonface Emitati Okumu, James Makokha Okumu and Henry Amulundu Okumu. He was said to have died possessed of South Wanga/Eshikalame/1245.
2. Representation to the intestate estate was sought by Fanuel Ocheso Wesa, in his capacity as a brother of the deceased, through a petition filed in Butere PMSC No 10 of 2013, on January 25, 2013. He listed himself and the 4 sons of the deceased, as the sole survivors, and South Wanga/Eshikalame/1245 as the asset that the deceased died possessed of. Letters of administration intestate were made to him on April 10, 2013, and a grant was duly issued. I shall refer to him as the administrator. The matter was thereafter transferred to the High Court, on account of jurisdiction, by an order made on March 12, 2015, whereupon it became Kakamega HCSC No 306 of 2015. The grant was confirmed on November 8, 2017, on an application dated February 4, 2016. The estate was devolved, unevenly, between the 5 individuals listed in the Chief's letter of January 2, 2013 and the petition herein. A certificate of confirmation of grant was duly issued, dated November 21, 2017.
3. I am called upon to determine a summons for revocation of grant, dated December 16, 2019, brought at the instance of Grace Wetende and Sarah Agunda Okumu. I shall refer to them as the applicants. They aver that the grant was obtained through a defective process, where facts were concealed and distorted, as the deceased had 2 daughters, who were not disclosed, and whose consent was not obtained at the point representation was sought. They assert that the administrator was not an immediate survivor of the deceased, and was not entitled to a share in the estate.
4. The administrator replied to the application, vide an affidavit that he swore on October 21, 2020. He avers to be a brother of the deceased. He said that their father had 2 wives, and their mother's house inherited South Wanga/Eshikalame/1245, measuring 8.5 acres, which was shared out, so that the deceased got 5.4 acres and the administrator 3.1 acres. He says that the portion for the deceased was inherited by his sons, and it was from that portion that the applicants should claim. He says that the land was demarcated on the ground. He said that he obtained a letter from the Chief before filing



- the petition. He asserts that the deceased held the land for him in trust, and land adjudication and registration was done when he was a minor.
5. The application was disposed of orally. Grace Rukia Watende Kweyu was the first to testify. She stated that the deceased was her biological father, who had 6 children. She described the administrator as her uncle. She accused him of filing the succession cause, and leaving out the daughters. She asserted her entitlement on grounds that she was a daughter of the deceased. She claimed that she was misled to sign a document, dated January 24, 2020, where she renounced her share. She confirmed that their grandfather had 2 wives, and his land was shared out between the 2 houses, where their grandmother got South Wanga/Eshikalame/1245 measuring 8.5 acres, and their step grandmother got the other piece, measuring 10 acres. She asserted that South Wanga/Eshikalame/1245 wholly belonged to the deceased, as the administrator had his own land, at Bukura, which he had bought.
 6. Peter Maloba followed. He was a step uncle of the applicants, and a step brother of the deceased. He explained that their father had 4 pieces of land. He said that the house of the deceased and the administrator was given 2 parcels, being South Wanga/Eshikalame/1245 for the deceased and South Wanga/Eshikalame/1114 for the administrator. The house to which the witness belonged was given South Wanga/Eshikalame/7 and 105. He shared South Wanga/Eshikalame/7 with his own blood brother. He stated that he had no interest in South Wanga/Eshikalame/1245, as it was for the deceased. He said that the administrator sold his share, South Wanga/Eshikalame/1114. He said that the distribution and registration was done in 1966, when the administrator was 19 years old. He said that each son was given their distinct share. He asserted that the deceased was not holding South Wanga/Eshikalame/1245 in trust for anyone, and if the administrator gets a share out of South Wanga/Eshikalame/1245 he would be getting a double portion. He said that the administrator moved out in 1978, before the deceased died. He said that the administrator came back to South Wanga/Eshikalame/1245 after the deceased died. He gave the acreages of the 4 parcels of land as follows: South Wanga/Eshikalame/1245 – 8.5 acres, South Wanga/Eshikalame/7 – 10.5 acres, South Wanga/Eshikalame/1114 – 1.5 acres and South Wanga/Eshikalame/105 – 0.9 acre. He said that the Bukura land was 5 acres, where the administrator moved to, and that he was assisted by the deceased to acquire the same. He said that South Wanga/Eshikalame/1114 was in the name of a Flora, who bought it from the deceased. He denied signing the guarantee form, filed in the succession cause, saying that his signature was forged.
 7. Sarah Beatrice Agunda Okumu followed. She identified Grace Wetende as her sister, and the administrator as her uncle. She said she was not aware that the administrator had petitioned for representation to her father's estate. She stated that her name and that of her sister were not listed in the Chief's letter, the petition and certificate of confirmation of grant. She asserted that the administrator had his own land, South Wanga/Eshikalame/1114, and that South Wanga/Eshikalame/1245 belonged exclusively to the deceased. She denied that South Wanga/Eshikalame/1245 was held in trust for the administrator, saying that each of the 4 sons of their grandfather were given each a parcel of land. She referred to a green card for South Wanga/Eshikalame/1114, showing the registration of the administrator as proprietor of that land, effective from November 28, 1966, after which he sold it to Flora Manyo on November 9, 2004. She asserted that the 3.1 acres taken by the administrator in South Wanga/Eshikalame/1245, was her share with her sister. She said South Wanga/Eshikalame/1114 was 1.5 acres. She said that she and her sister were not approached when the administrator and their brothers went to the Chief to get the introduction letter.
 8. The administrator followed. He stated that the deceased had land measuring 18.5 acres, which he shared out, so that their house got 8.5 acres, and the house got 10 acres. He said that his share was in the 8.5 acres, out of which the deceased was to get 5.4 acres, and he 3.1 acres. He said that the 5.4 acres



- were taken by the 4 sons of the deceased. He conceded that the Chief's letter only listed the sons of the deceased. He explained that the daughters were omitted because they did not want to inherit. He said that South Wanga/Eshikalame/1114 was not from his father, but that he got it directly from his grandfather. He said that there was nothing wrong with daughters getting a share of their father's land. He said that he was 7 years old when registration was done, while the deceased was 18 years old.
9. Hannington Wangayah Apolo was next. he was a cousin of the deceased and the administrator, as their father was a brother of his own father. He said that the deceased held South Wanga/Eshikalame/1245 in trust for his younger siblings. He said the same was a subdivision from South Wanga/Eshikalame/7. He said that he did not know about South Wanga/Eshikalame/1114. He said that there was no problem with daughters inheriting.
 10. At the close of the oral hearings, the applicant filed written submissions, and cited [*In re Santaiya Ntutu \(Deceased\) \[2016\] eKLR*](#) (Musyoka, J) and [*In Re Estate of Kapoya Mosiro \(Deceased\) \[2022\] eKLR*](#) (Odero, J).
 11. Revocation of grants is provided for under section 76 of the [*Law of Succession Act*](#), Cap 160, Laws of Kenya. A grant may be revoked on 3 general grounds. The first focuses on the process of obtaining the grant. The grant will be revoked if the process was defective, in terms of some step not being taken, or some rule not being complied with, or incompetent documents being placed on record, among others. It would also be revoked where the court is misled to make the grant through statements being placed before the court, which are misleading, on account of facts being concealed from the court, or misrepresented, or distorted. The second general ground focuses on the administration process, where the grant had been obtained properly or regularly, but difficulties attended the administration process on account of either failure to apply for confirmation of grant within the timelines set by the law, or where the administrator has failed to diligently administer the estate, or where the administrator has failed to render accounts as and when required of him. The second general ground is generally about failure of administration. The third general ground relates to the grant becoming useless or inoperative, on account of certain circumstances, such as where the sole administrator dies, or is rendered mentally or physically infirm to the extent of being unable to discharge his duties, or is adjudged bankrupt robbing him of capacity to hold an office of trust.
 12. The application before me is founded on the first general ground, as it touches on matters relating to the process of obtaining the grant. It is about the court being misled to make a grant to the administrator, based on information which was misleading, to wit that the deceased did not have daughters, and was survived by sons only, meaning that there was concealment of the existence of the daughters, the applicants. There is also the issue of the process being defective, as the applicants, being daughters of the deceased, had superior right over the administrator to petition for representation, and their consent ought to have been obtained.
 13. Non-disclosure of survivors of the deceased is a fertile ground for revocation of a grant. Distribution of an estate in intestate is based on the persons who survived the deceased, and how they were related to him. Section 35 of the [*Law of Succession Act*](#) provides for distribution of an estate between a surviving spouse and surviving children. Section 36 provides for distribution of an estate where the deceased was survived only by a spouse. Section 38 distributes the estate between the surviving children, where there is no surviving spouse. Section 39 distributes the estate amongst other relatives of the deceased, where there are no surviving spouses and no surviving children. The non-disclosure of any person in any of these categories, would mean there would be distortion in the distribution. The property would be distributed in a way that leaves out the undisclosed family member, in effect disinheriting that person. Inheritance is a right given by the law, and disinheritance is not countenanced. All the persons beneficially entitled must be involved in the process, so that they can take up their right or



entitlement, unless they renounce it themselves. Disinheriting survivors through rigging the process, by simply not disclosing them, should automatically result in the nullification of the process.

14. The deceased herein had more than 4 children. The non-disclosure of the daughters meant that the process was distorted. The resulting distribution left out those who were not disclosed, and their rights were trashed. The property was also devolved to a brother of the deceased. The daughters of the deceased were disadvantaged, and no one has any right to disadvantage anyone else. Section 51(2)(g) of the [Law of Succession Act](#) is clear that all the children of the deceased, inclusive of daughters, ought to be disclosed. Section 52 criminalizes misrepresentation of facts. A process tainted by the criminality of fraud, non-disclosure and misrepresentation cannot produce a valid outcome.
15. Non-compliance with section 51(2)(g) of the [Law of Succession Act](#) also amounts to a defect in the process. That provision, read with Rule 7 of the [Probate and Administration Rules](#), sets out the process, in terms of what ought to be filed in court. Non-compliance would mean the process was defective. The consequence of such defects is exclusion of persons who are entitled to a share in the estate, which the law cannot countenance. The administrator had a lesser right to administration, going by the hierarchy set out in section 66 of the [Law of Succession Act](#). Rule 7(7) of the Probate and Administration Rules requires that such a person with a lesser right to apply, should obtain the consent of those with prior right, or issue citations to them, or get them to renounce their right to apply. The administrator did none of those. Rule 26 of the Probate and Administration Rules is also relevant. It requires that persons with prior right to administration ought to be notified of the process. In addition to being notified, they ought to execute consents allowing the person with a lesser right to go ahead and petition, or to execute a renunciation denouncing their right to apply. I have not seen any such consents or renunciations by the daughters of the deceased. The process of obtaining the grant herein was defective in that respect. The outcome of the non-disclosure of the daughters is that they were disinherited, as the estate was distributed in a manner which excluded them. They got nothing from the estate of their late father. The law does not tolerate that.
16. The way the applicants, being daughters, were treated smacked of discrimination based on their gender. They were left out or excluded because they were women, and the presumption was that as women they were not entitled to a share in their father's estate. Well, that belongs to a bygone era. Under section 38 of the [Law of Succession Act](#), where an intestate is survived by children only, that is where there is no surviving spouse, but there are surviving children, the property is shared equally. The [Law of Succession Act](#) is gender neutral, and reference to children includes both male and female, sons and daughters, married and unmarried. Add to that Article 27 of the [Constitution](#) of Kenya 2010, which outlaws discrimination based on gender, and declares that women are to be treated equally with men in all spheres of life, including in succession and inheritance. Finally, there is Article 2(4) of the same Constitution. It makes 2 critical points, which are relevant to this discussion. One, that any law, including customary law, that is inconsistent with the [Constitution](#), is void to the extent of the inconsistency. Customary law discriminates against daughters, to the extent that it holds that they are not entitled to inherit because they are women, or because they are women who are married. Two, any act or omission which contravenes the [Constitution](#) is invalid. The act or omission of not disclosing daughters of the deceased in this case, because they are women, violated the [Constitution](#), and it rendered the Chief's letter, the petition and the confirmation proceedings, which carried those omissions, invalid, and it rendered the outcomes based on them invalid, that is to say the grant of letters of administration dated January 25, 2013, the confirmation orders made on November 8, 2017 and the certificate of confirmation of grant dated November 21, 2017.
17. The issue of the administrator being a brother of the deceased arose, as to whether he was entitled to get a share out of the estate. He asserted, on his part, that although the estate land was registered in



the name of the deceased, it was ancestral land, to which he was entitled to a share, for the deceased held it in trust for him. I do not want to venture into that issue at this stage, for it should come up at distribution. For now, the issue is whether the grant herein was obtained regularly, and I have found and held that it was not.

18. I am satisfied, therefore, from this material, that the applicants herein have made out a case for revocation of the grant herein. Consequently, the orders that I shall make are as follows:
- a. That the grant made in Butere PMCSC No 10 of 2013, on January 25, 2013, to Fanuel Ochesa Wesa, is hereby revoked;
 - b. That, as a consequence of (a), above, the orders made herein on November 8, 2017, confirming the grant of January 25, 2013, are hereby vacated, and the certificate of confirmation of grant, dated November 21, 2017, is hereby cancelled;
 - c. That, as a consequence of (b), above, any and all transactions carried out on the basis or strength of the certificate of confirmation of grant, dated November 21, 2017, are hereby cancelled, and the Land Registrar, responsible for Kakamega County, is hereby directed to cancel any transactions relating to South Wanga/Eshikalame/1245, including its transfer or transmission to the named beneficiaries, and to revert the property back to the name of the deceased herein;
 - d. That I hereby appoint Fanuel Ochesa Wesa and Grace Rukia Watende Kweyu administrators of the estate of the deceased herein, and I direct that a grant of letters of administration intestate be issued to them out of this cause, that is to say Kakamega HCSC No 306 of 2015;
 - e. That the new administrators, Fanuel Ochesa Wesa and Grace Rukia Watende Kweyu, shall apply for confirmation of their grant in the next 45 days, and the matter shall be mentioned thereafter for compliance and directions; and
 - f. That any party aggrieved by these orders has leave of 30 days to appeal against the same, at the Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 21ST DAY OF JULY 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Nafuye, instructed by KN Wesutsa & Company, Advocates for the applicants.

Mr. Munyendo, instructed by Oscar Wachilonga & Associates, Advocates for the administrator.

