



**In re Estate of Joshua Juma Manda (Deceased) (Succession Cause
924 of 2007) [2023] KEHC 21021 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21021 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 924 OF 2007
WM MUSYOKA, J
AUGUST 1, 2023**

JUDGMENT

1. I am called upon to determine, simultaneously, 2 summonses, dated June 21, 2008 and November 25, 2020.
2. The deceased herein died on September 23, 1975. A letter from the Assistant Chief of Matawa/Lureko Sub-Location, dated November 6, 2007, indicates that he was survived by 5 individuals, being 3 widows and 2 sons, who are named as the late Dorica Ajuangi Juma, the late Mary Mateba Juma, Agneta Atsieno Chuma, John Manda Juma and Gabriel Manda Chuma. The deceased was shown as having died possessed of South Wanga/Lureko/457. Representation was sought by John Manda and Gabriel Manda, in their capacities as sons of the deceased. They listed themselves as the survivors of the deceased. South Wanga/Lureko/457 was listed as the property that the deceased died possessed of. Letters of administration intestate were made to John Manda Juma and Gabriel Manda Chuma on March 20, 2008, and a grant was duly issued, dated April 24, 2008. I shall refer to John Manda Juma and Gabriel Manda Chuma, corporately, hereafter, as the administrators.
3. The application, dated June 21, 2008, is at the instance of Mary Amukowa and Fridah Ashioya Ywaya. They would like the grant to be either revoked or they be co-opted as co-administrators of the estate. They claim to be bona fide beneficiaries of the estate who were left out, when representation was sought secretly by the administrators. In their joint affidavit, sworn on June 27, 2008, they aver to be nieces of the deceased, who was a blood brother of their father, the late Shem Watako Manda. They aver that their father was entitled to 2 acres in South Wanga/Lureko/457, where he died and his remains were buried. They state that the deceased herein died in 1975, while their father died in 1997. They further state that the deceased had not, during his lifetime, transferred to their father the portion of South Wanga/Lureko/457 that was due to him. They further state that their father had not conducted succession to the estate of the deceased. They complain that the administrators came to court secretly, without informing or involving them. They aver that they only stumbled upon the matter after it was filed in court. They complain that the administrators are taking advantage of the situation, after all their parents have died. They aver to have been born and raised on South Wanga/Lureko/457, and state that they stand to lose, should the estate be distributed without involving them.



4. The application, dated April 24, 2008, was determined by Kimaru J, in a ruling that was delivered on March 21, 2012. The grant made to John Manda Juma and Gabriel Manda Chuma on March 20, 2008 was revoked, and fresh appointments of administrators to John Manda Juma, Gabriel Manda Chuma, Mary Amukowa Watako and Fridah Ashioya Ywaya were made. The court also directed that South Wanga/Lureko/457 be shared out equally between the 2 families, so that John Manda Juma and Gabriel Manda Chuma get 2.2 acres, while Mary Amukowa Watako and Fridah Ashioya Ywaya get 2.0 acres. The court then granted the parties liberty to file an application for confirmation of grant. A grant of letters of administration intestate was issued, on April 10, 2012, in the names of John Manda Juma, Gabriel Manda Chuma, Mary Amukowa Watako and Fridah Ashioya Ywaya. An application for confirmation of grant was then filed, dated August 30, 2012, by Mary Amukowa Watako and Fridah Ashioya Ywaya, seeking to have South Wanga/Lureko/457 shared out in the manner set out in the ruling of Kimaru J of March 21, 2012. Apparently, John Manda Juma and Gabriel Manda Chuma did not reply to that application.
5. John Manda Juma and Gabriel Manda Chuma then filed a Motion, dated September 14, 2013, seeking to have the proceedings, that preceded the ruling of March 21, 2012, set aside, and the orders made in that ruling vacated. They sought to be given time to respond to the revocation application. They argued that their Advocates let them down, for they did not file their affidavits, nor alert them of the hearing date. They asserted that the father of Mary Amukowa Watako and Fridah Ashioya Ywaya had his own land, being Marama/Shinamwenyuli/806, which they say the 2 did not disclose to the court, and allowing the orders to stay would amount to the 2 getting double inheritance. They aver that the property of their grandfather had been distributed, and each of the 6 sons, including the late Shem Watako Manda, were given land and issued with title deeds. They asserted that the land given to the late Shem Watako Manda was 6 acres, and, therefore, he got a larger share than their father, the deceased herein, whose South Wanga/Lureko/457, was smaller. They attached the title deeds meant for the 6 sons of their grandfather. That for Marama/Shinamwenyuli/806 was registered in the name of Watako Manda in 1964, and measured 6 acres; while South Wanga/Lureko/457 was registered in the name of the deceased herein, in 1967, and measured 4.2 acres. The application, dated September 16, 2013, was handled by C. Kariuki J, who allowed it in a ruling delivered on October 12, 2016. John Manda Juma and Gabriel Manda Chuma were allowed to file responses to the revocation application. The effect of the orders by C. Kariuki J was that the orders made by Kimaru J on March 21, 2012 were set aside, the appointment of Mary Amukowa Watako and Fridah Ashioya Ywaya as co-administratrices was vacated and the resultant grant of letters of administration cancelled, the appointment of John Manda Juma and Gabriel Manda Chuma as administrators, of March 20, 2008, was restored, and the summons for confirmation of grant of August 30, 2012 was rendered impotent.
6. Subsequently, the administrators, referring to John Manda Juma and Gabriel Manda Chuma, filed an affidavit to respond to the application dated April 24, 2008, along the lines of the facts deposed in their affidavit sworn on September 16, 2013, in support of their Motion, of even date, which I have recited above, which obviates the need to recite the contents of the replying affidavit sworn on October 21, 2016, in reply to the application dated April 24, 2008.
7. It was against the above background that I gave directions on November 2, 2020, to the effect that the application, dated April 24, 2008, was to be disposed of simultaneously with a summons for confirmation of grant, that was to be filed by the administrators, with leave, to Mary Amukowa Watako and Fridah Ashioya Ywaya, to file affidavits of protest.
8. That summons for confirmation of grant was filed on December 3, 2020, by John Manda Juma and Gabriel Manda Chuma, dated November 25, 2020. They identified the survivors of the deceased as themselves, and Teresina Auma Nyangule and Sellah Wanga Ekombe. They identified 1 asset as



available for distribution: South Wanga/Lureko/457. They proposed that the said property be shared out between the 2 of them equally, with the 2 daughters, Teresina Auma Nyangule and Sellah Wanga Ekombe, getting nothing. They asserted that Mary Amukowa Watako and Fridah Ashioya Ywaya were not children of the deceased, but of the brother of the deceased, known as Shem Watako Manda, who had his own property, whose title document they attached.

9. Fridah Ashioya Ywaya filed an affidavit of protest, sworn on May 22, 2021. She averred that it was true that she and her sister were not children of the deceased, for the deceased was a brother of their father. They averred that the estate asset belonged to their grandfather, and was adjudicated and registered in the name of the deceased, during the absence of their father, who was in Uganda, and that the deceased held it in trust for their father. She averred that they were born and raised on the land, and there were marked boundaries on the ground. She stated that both of their parents were buried on the land. She asserted that Marama/Shinamwenyuli/806 was not ancestral land. She averred that their grandfather had 4 wives, and the sons and grandsons listed in the administrators' papers. They state that their grandfather had no land in Butere, where Marama/Shinamwenyuli/806 is situated, but in Wanga, Mumias, Matungu Sub-County, where the property registered in the names of the deceased and his brothers was situated. I shall refer to Fridah Ashioya Ywaya, hereafter, as the protestor.
10. Teresina Auma Nyangule and Sellah Wanga Ekombe swore an affidavit, on March 10, 2022. They confirmed that the deceased had the 4 children mentioned by the administrators. They stated that the deceased was the absolute proprietor of South Wanga/Lureko/457. They went on to renounce their interests in the land. They revealed that Mary Amukowa Watako had died, and asserted that she and the protestor were not entitled to a share in South Wanga/Lureko/457, as they were not children of the deceased, and their father had his own land, Marama/Shinamwenyuli/806, to which the protestor was entitled.
11. The matter was disposed of by way of viva voce evidence.
12. The protestor was the first to testify, on February 23, 2022. She testified that her father and the deceased were blood siblings, sons of Manda Washika, who had 6 sons, from different mothers. She named the 6 as Shem Watako, Joshua Juma, Musebe Manda, Shikuku Manda, Oduori Makomere and Boniface Manda. She stated that each son was given land by her grandfather, except her father, so that Joshua Juma got South Wanga/Lureko/457, Musebe Manda got South Wanga/Lureko/451, Shikuku Manda got South Wanga/Lureko/453, Oduori Makomere got South Wanga/Lureko/453 and Boniface Manda got South Wanga/Lureko/454. She conceded that her father got Marama/Shinamwenyuli/806, but argued that it was not from her grandfather, but it was a gift to him from his uncle, Ezekiel Mukaende. She said that she did not know whether Marama/Shinamwenyuli/806 was registered property. She said that she did not know how her father got registered as proprietor of Marama/Shinamwenyuli/806. She said that she was only laying claim to South Wanga/Lureko/457, because the deceased had been given the land to hold in trust for her father, and because her father was in occupation of the land. She asserted that the land was divided on the ground, and that only issuance of a title deed that was outstanding. She stated that the deceased was not given land by his uncles. She said that her father died in 1996, and was buried on South Wanga/Lureko/457.
13. Omuyei Omukeyeti Josephat testified next. He stated that the deceased and the father of the protestor had different mothers. Their father died before the witness was born, after he had given each of his sons land. He said that Marama/Shinamwenyuli/806 initially belonged to his own father, who gifted it to the father of the protestor, who was his nephew. He said that her father gave land to the father of the protestor since he did not have land. He said that the father of the protestor had asked for a cow, but was given land instead. He said that the father of the protestor was then living in the same land with



- the deceased. He said that the deceased was supposed to give him a portion of the land. He said that the gift made to the father of the protestor was from a person known as Ezekiel Mukaende Shirumba.
14. The case by the administrators opened on June 16, 2022. John Manda Juma was the first to take the stand. He stated that he had filed green cards of the land owned by the deceased and his brothers, and invited the court to look at them. He asserted that the father of the protestor had his own land, Marama/Shinamwenyuli/806, and was not entitled to South Wanga/Lureko/457, which belonged to the deceased. He said that their cousins from the other uncles were not laying any claim on South Wanga/Lureko/457. He said that their grandfather had land at Butere, where he lived with one of his wives. He said that the father of the protestor was buried on South Wanga/Lureko/457 by force. He said that the father of the protestor had his own land, which he sold, and was then allowed to stay and farm on South Wanga/Lureko/457. He said that Josephat Mukuyenzi was not a member of their family.
 15. Gabriel Manda followed. His testimony largely mirrored that given by his co-administrator. Teresina Auma Nyangule and Sellah Wanga Ekombe followed. They renounced their entitlement.
 16. Both sides filed written submissions, which I have read through, and noted the arguments made.
 17. The only critical issue for determination is whether the father of the protestor was entitled to a share in South Wanga/Lureko/457. The protestor did not lead any evidence on the circumstances under which the deceased came to be registered in trust for her father. She argued that her father had no land, and that was why his uncle gifted him with Marama/Shinamwenyuli/806. However, Marama/Shinamwenyuli/806 was registered in the name of her father in 1964, while South Wanga/Lureko/457 was registered in the name of the deceased in 1967. It cannot possibly be that her father was landless, when he got land registered in his name in 1964, when the deceased was yet to have any registered in his name. I note that her father and the deceased had different mothers, I wonder why the deceased would, under those circumstances, be holding land in trust for him, and why not his other half-brothers. He who alleges must prove. The protestor was obliged to place evidence on the demarcation and adjudication process, which provided the background to the registration in 1967, which would have shed light on the circumstances of that registration. The registration happened in 1967, the deceased died in 1975, one would wonder what stopped her father from pursuing the matter with the deceased prior to his death in 1975. Her father died in 1997, before initiating succession proceedings in the estate of the deceased, or bringing proceedings against the estate of the deceased to recover what was alleged to be his share. The protestor did not explain why she had to wait until succession had been mounted into the estate of the deceased, in respect of a claim to land that was registered in 1967. There are limitation of actions issues that ought to come into play. I got the impression that her witness, Omuyei Omukeyeti Josephat, testified on matters that he could only have heard of, for he stated that the grandfather of the protestor and the administrators died before he was born. How would he then have known about how the said grandfather shared out his land amongst his sons? I equally doubt that he knew anything about how the father of the protestor came to be registered as proprietor of Marama/Shinamwenyuli/806. I believe that he was too young to be privy to any of the matters that he testified on.
 18. The protestor admitted that the deceased was not her father. That would mean that she has no claim to his estate in succession and inheritance. The land is registered. Her claim must be founded on land rights. Such rights are not asserted in succession proceedings, but are to be agitated in land cases. The High Court is not the proper place to claim that, for the High Court has no jurisdiction to delve into such matters, in view of the provisions in articles 162(2) and 165(5) of *the Constitution*, sections 2 and 101 of the *Land Registration Act*, No. 3 of 2012, and sections 2 and 150 of the *Land Act*, No. 6 of 2012. Rule 41(3) of the *Probate and Administration Rules* gives discretion to the probate court to postpone confirmation proceedings, to allow for litigation in separate proceedings, on such a question as that



raised by the protestor. Should I invoke Rule 41(3), to allow for such proceedings? I do not think I should, for the reasons that I have highlighted in the foregoing paragraph 18, hereabove.

19. In view of what I have stated above, it is my finding that there is no merit whatsoever in the protest. Similarly, there is no foundation for the revocation application, dated April 24, 2008.
20. On distribution, there is unanimity that the deceased had 4 children, 2 sons and 2 daughters. The 2 daughters renounced their entitlement, in their joint affidavit, and orally in open court. The 2 sons have agreed on equal distribution.
21. I have no difficulty in dismissing the revocation application, dated April 24, 2008, and the protest, and allowing the summons for confirmation of grant, dated November 25, 2020. The estate shall be distributed in the manner proposed in the supporting affidavit, at paragraph 3. A certificate of confirmation of grant shall issue accordingly. The matter shall be mentioned after 6 months, to confirm transmission and completion of administration. Each party to bear their own costs. There is leave of 30 days, for any aggrieved party, to move the Court of Appeal, appropriately. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 1ST DAY OF AUGUST 2023

W.M. MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Akwala, instructed by Akwala & Company, Advocates for the administrators.

Mr. Munyendo, instructed by Namatsi & Company, Advocates for the protestor.

