



**In re Estate of Rispah Ngaira Waiganagana alias Respah Waiganagana (Deceased)
(Succession Cause 18 of 2005) [2023] KEHC 21067 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 18 OF 2005**

WM MUSYOKA, J

AUGUST 1, 2023

**IN THE MATTER OF THE ESTATE OF RISPAH NGAIRA
WAIGANAGANA ALIAS RESPAH WAIGANAGANA (DECEASED)**

JUDGMENT

1. I am tasked with determining a summons for confirmation of grant, dated February 22, 2021, which is brought at the instance of Agnes Kendi Waiganagana. I shall refer to her hereafter as the applicant. She has sworn 2 supporting affidavits, both on February 22, 2021. In the first affidavit, she avers that the grant was made on November 6, 2019. She identifies the survivors of the deceased to be 1 daughter, that is to say herself, 1 son, that is to say Zebby Mumelo, and 7 grandchildren, being Iris Muyoma Khamalishi, Lynn Miroya Khamalishi, Daisy Khasoya Khamalishi, Vivian Ngaira Shimoli, Andy Waiganagana Shahonya and Alicia Kendy Waiganagana. She proposes distribution of Idakho/Iguhu/931, in 5 equal lots of 0.22 hectares, so that Agnes Kendi Waiganagana takes one lot; Zebby Mumelo the next lot; Iris Muyoma Khamalishi, Cyndicate Andeva Khamalishi and Lynn Miroya Khamalishi take the other lot; Daisy Khasoya Shimoli and Vivian Ngaira Shimoli take the next lot; and Andy Waiganagana Shahonyo and Alicia Kendy Waiganagana take the last lot.
2. In the second affidavit, she avers that the deceased had 6 children, being 5 sons and 1 daughter. The 5 sons are said to be Ongaya Waiganagana, Ronald Shaoyo Waiganagana, Patrick Shimoli Waiganagana, Julius Khamalishi Waiganagana and Zebby Mumelo; while the 1 daughter is Agnes Kendi Waiganagana. She avers that the estate available for distribution comprises of Idakho/Iguhu/931. She further avers that the grant made on November 6, 2019 appointed her, and Zebby Mumelo, Mike Waikanakana and Andrew Waikanakana as joint administrators. Mike Waikanakana and Andrew Waikanakana have since passed on, leaving her and Zebby Mumelo as the surviving administrators. She avers that the late Andrew Waikanakana was not survived by a child or widow; the late Julius Waikanakana was survived by 3 children, being Iris Muyoma Khamalishi, Cindycate Mideva Khamalishi and Lynn Miroya Khamalishi; the late Patrick Shimoli Waiganagana was survived by Daisy Khasoya Shimoli and Vivian Ngaira Shimoli; while the late Ronald Shahoyo Waiganagana was survived by Andy Waiganagana and Alicia Waiganagana. She avers that the late Ongaya Waiganagana was also a child of the deceased, but he died without survivors. She avers that Idakho/Iguhu/931 measured 1.1



- hectares or 2¼ acres, to be distributed in the manner proposed in the other affidavit. Although the son of Julius Khamalishi Waiganagana called Mike Waikanakana had passed on, it was not disclosed whether he was survived by offspring.
3. Benson Manuni Malinya filed a replying affidavit, which ideally should be an affidavit of protest, sworn on 7th July 2021. I shall refer to him as the protestor. He averred that he had bought Idakho/Iguhu/931, from the initial administrator, the late Julius Khamalishi Waiganagana, after he informed him that the deceased had other parcels of land, being Kakamega/Iguhu/866 and Kakamega/Shisejeri/1309, where he claimed the family resided. He avers that having bought Idakho/Iguhu/931, from the late administrator, his interest was protected under section 93 of the *Law of Succession Act*, Cap 160, Laws of Kenya. He avers further that the Zebby Mumelo was not a child of the deceased or her late husband, Andrew Waiganagana. He avers that Kakamega/Iguhu/866 belonged to Andrea Waiganagana, and was occupied by the family of the late Julius Kamalishi Waiganagana; while Kakamega/Shisejeri/1309 was property that Andrea Waiganagana had bought, but was yet to be transferred to his name, and was registered in the names of his brothers Shimoli Wikanakana, Anjimbi Wikanakana and Kamalishi Wikanakana, to hold in trust for the deceased herein and her children, and the family of the late Andrew Waiganagana all resided here. He identifies the children of the deceased as Patrick Shimoli, Ongaya, Julius, Ronald and Agnes Kendi. He states that Patrick, Ongaya and Ronald died without survivors. He asserts that it would be unjust for him to be deprived of Idakho/Iguhu/931. He has attached certificates of official searches for Kakamega/Iguhu/866, which is registered in the name of Andrew Waiganagana; and Kakamega/Shisejeri/1309 registered in the names of Shimoli Wikanakana, Anjimbi Wikanakana and Kamalishi Wikanakana.
 4. The matter was disposed of by way of viva voce evidence, following directions that had been given on July 12, 2021.
 5. The protestor was the first to testify, on November 9, 2021. He stated that he was opposed to the proposed distribution, as his name was left out, yet he had purchased Idakho/Iguhu/931, in 2005, from the late administrator. He said that the other children of the deceased were not involved in the sale, and he had left it to the late administrator to deal with them. He said that he bought the whole of the land. He stated that Zebby Mumelo was a son of the deceased, but not of her late husband, Andrew Waiganagana. He stated that he was aware of the cancellation of the registration of Idakho/Iguhu/931 in his favour, by the High Court. He appealed against the High Court decision, but his appeal was not successful.
 6. Alex Ambani Minishi testified next. He witnessed the sale agreement between the protestor, and the late administrator. To his understanding, the protestor bought a portion of the land. He said that apart from the late administrator, he did not know that the deceased had other children. Andrew Ayekha Muyembe testified next. He was also party to the sale agreement. He was a witness of the protestor for the purposes of the sale. He said he only knew the late administrator and another brother of his who died. He was not aware that the deceased had a daughter. Enos Musindia Shikokoti and Patrick Musitia Amukohe were also witnesses to that sale agreement.
 7. The case by the applicant opened on February 16, 2022. The applicant was the first to take the stand. She averred that the deceased was her mother, and that she had siblings. She averred that they were 5 in number, and the property, Idakho/Iguhu/931, should be shared equally between the 5 of them. She stated that she had not made provision for the protestor, as he was not a family member. She said she was unaware of the sale transaction between him and the late administrator. She asserted that she was the one using the land, and that sometimes her brother also used it. She said that if the late administrator entered into sale transactions over the land before it was divided, then that was fraudulent.



8. Zebby Mumelo, Daisy Dolly Khasoha, Alicia Kendi and Iris Muyoma followed. Their testimonies largely mirrored that given by the applicant.
9. Both sides filed written submissions, which I have read through, and noted the arguments made.
10. There is unanimity amongst the survivors of the deceased, on the survivors of the deceased, the asset available for distribution, and how the property is to be distributed. The proposals are fully compliant with the provisions in Part V of the Law of Succession Act, and specifically sections 38 and 41 thereof. The only issue for determination, therefore, is the interest allegedly acquired by the protestor.
11. Regarding the protest, I believe, with respect, that the protestor is flogging a dead horse. That issue was before Mrima J, who, in his ruling of 1st March 2015, found and held that the protestor was not protected by section 93(1) of the Law of Succession Act, for the person who had sold the property to him had obtained his grant fraudulently, and the court proceeded to revoke that grant, and annul the sale to the protestor. The protestor was unhappy with that, and placed that issue before the Court of Appeal, in Kisumu CACA No. 53 of 2015. The Court of Appeal, in its judgment of June 2, 2016, agreed with Mrima J, on the application of section 93(1) of the Law of Succession Act to the purported sale. The issue cannot be re-litigated here, once the Court of Appeal has pronounced itself on it. It is what is said to be res judicata. If the protestor did not agree or was dissatisfied with the decision of the Court of Appeal, he should have moved on to the Supreme Court. The issue is now water under the bridge. The protestor acquired no rights that this probate court can reckon, except for, perhaps, a refund of the purchase money, which he can only seek from the person who sold the land to him, and not from the estate herein. The protest is wholly misconceived and unfounded.
12. In the end, I make final orders as follows:
 - a. That the protest, dated July 7, 2021, is hereby dismissed;
 - b. That I allow the summons for confirmation of grant, dated February 22, 2021;
 - c. That I hereby order distribution of Idakho/Iguhu/931, as follows: Agnes Kendi Waigangana takes 0.22 hectare; Zebby Mumelo 0.22 hectare; the late Julius Kamalishi Waiganakana 0.22 hectare; the late Patrick Shimoli Waigangana 0.22 hectare; and the late Ronald Shahoyo Waiganagana 0.22 hectare;
 - d. That any share due to a dead child of the deceased shall devolve upon his estate, to be distributed in succession proceedings, to be mounted in the name of the dead child, to secure the interests of any creditors and other claimants;
 - e. That a certificate of confirmation of grant shall issue accordingly;
 - f. That the matter shall be mentioned after 6 months, to confirm transmission and completion of administration;
 - g. That each party shall bear their own costs; and
 - h. That there is leave of 30 days, for any aggrieved party, to move the Court of Appeal, appropriately.
13. It is so ordered.

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

WM MUSYOKA



JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. JJ Mukavale, Advocate for the applicant.

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

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