



In re Estate of Akalanga Namakoto Eshikwe (Deceased) (Succession Cause 224 of 1985) [2023] KEHC 23865 (KLR) (13 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 224 OF 1985**

PJO OTIENO, J

OCTOBER 13, 2023

IN RE ESTATE OF AKALANGA NAMAKOTO ESHIKWE (DECEASED)

BETWEEN

AGNES MUKOLWE KHAYINGA OBJECTOR

AND

ALEXANDER OKACHI PETITIONER

JUDGMENT

1. Before this Court is the Objector's Summons for Revocation of a Grant application dated 4th March, 2019 brought pursuant to Section 76 of the *Law of Succession Act*, Rules 44 and 73 of the *Probate & Administration Rules* and section 60 of the *Land Act*, 2021 seeking orders that; the Grant of Letters of Administration Intestate herein together with all consequential orders be revoked and a fresh grant be issued to the Objector and confirmed. It was also prayed that the Court provides for the costs of the application. The sole reason proffered to ground the application were given to be that the Objector is a purchaser of the estate land whose boundaries are well demarcated a fact that was never disclosed to the Court.
2. The application was supported by the Affidavit of Agnes Mukolwe Khayinga sworn on 4th March 2019 in which she avers that she is the widow of the late David Livingstone Khayinga who had bought a portion of land parcel number Butsoso/Bukura/750 (the estate of Akalanga Namakoto Eshikhwe "deceased"- the suit property) where he established a home and settled and left her and their children living thereon. She claims that the Petitioner/Respondent concealed this material fact to the Court when obtaining the Grant.

Response to the Application

3. In response to the application, the Respondent has filed an Affidavit sworn on 17th December, 2019 in which he avers that the application lacks merit since the Objector's husband participated in these



succession proceedings which began in the year 1985 and that her husband secretly filed another Succession Cause in Nairobi High Court Succession Cause No. 2667 of 2002 excluding all other beneficiaries and fraudulently obtained title to LR No. Butsoso/Bukura/750 which transfer was revoked by the Court and the property ordered to revert back to the deceased's estate. He added that the Applicant's late husband has his own ancestral land parcel No. Butsoso/Bukura/704 and that the Applicant forcefully buried his late husband in the suit property following his death on 29/6/2015 during which time a Confirmed Grant had already been issued and further argues that this application is res judicata by virtue of objection proceedings conducted by the Applicant's late husband in this cause. That Affidavit then exhibited a Judgment of the High Court in Kakamega Civil Appeal No. 76 of 2007 in which the Objector's husband's appeal was dismissed and the property ordered to revert to the deceased.

Evidence

4. This Court took viva voce evidence from both sides. For the Objector, Agnes Mukolwe Khayinga, adopted her statement dated 6th November, 2020 in which she stated that her late husband, David Khayinga bought 1.5 acre of the suit property at a sum of Kshs. 67,000/- and established a home and settled on the land leaving her and their children living thereon. She claimed that the Petitioner herein has been harassing and threatening to evict her but that he has even tampered with her boundary.
5. On cross-examination she stated that they occupied a portion of the suit property in 1991 and at the time she found Benson Muhala and James Herbert there and that they purchased their share the same time as Julius Bwibo and Samson Muhangi Joash. She further stated that they purchased their portion from the deceased's wife and that there had been suits decided between her husband and the deceased even though she did not know the outcome.
6. For the Petitioners, three witnesses were called. PW1, Alexander Akach Okumu testified that the deceased was his paternal uncle. He adopted his statement dated 17th December, 2019 in which he reiterated his averments as contained in the response to the subject application as captured hereinabove.
7. During cross-examination he stated that he initiated this Succession Cause and not the widow to the deceased. He detailed that the Objector lived in the suit property though he was not aware when she started living there as he was working outside and that he is not in occupation of the suit property but just a beneficiary. He further claimed he did not agree with the decision of the Court in HCC 76/2007 directing that Purchasers of the suit property be given their shares therein. In re-examination he stated that when the deceased died the Objector was on the land.
8. PW2, Herbert Musonga testified that he bought land from the deceased in 1977 measuring 1.41Ha. and built a home there and that when the deceased died in 1981 he began succession proceedings with the deceased's wife.
9. On cross-examination he stated that at the time of the deceased's wife death on 28/5/1995, the Objector and her husband were living on the same land but not the same portion. He claimed that when he bought his portion boundaries were established by the Chief but the Objector's husband destroyed the boundaries. In re-examination he stated that the Objector entered his portion of land on 27/6/2009 and continues to live there to date.
10. PW3 was Julius Jonathan Alubili aka Bwibo testified that he was a nephew of the deceased and that he had bought ½ an acre from the deceased and continue to occupy and use same. On cross-examination he stated that he bought his portion in the year 1971 before the Objector and her husband came and that he has been living there since.



11. The objection was directed to be canvassed by way of written Submissions pursuant to which order only the Objector filed Submissions and on a date set both sides addressed the Court orally and asked the Court to render itself based on such Submissions.
12. For the Objector, it was submitted that her family took possession of a portion of the suit property during the lifetime of the initial Administrator who never objected whatsoever and that the decision in Kakamega HCCA No. 76 of 2007 had determined that the husband was a Purchaser. It was stressed that the Petitioners had conceded that the Objector is in occupation of the property.
13. The Petitioner submitted orally saying that the Objector should not get land because she did not complete payment and the deceased died while demanding to be paid.

Issues, Analysis and Determination

14. From the subject application, the response thereto, the oral evidence taken and the Submissions by the parties, the only issue that arises for determination by this Court is whether the Objector is entitled to inherit in the estate to merit the application for revocation being granted.
15. In this matter, as said before, the ground upon which revocation is sought is that the Objector claims as a buyer not a beneficiary as known in law. The mandate of a Succession Court is to resolve inheritance disputes between those entitled to inherit as well as those liabilities which are admitted as such but never to determine commercial transactions over the estate property. Where one seeks to revoke a Grant on the grounds of non-disclosure of material facts, like in this case, being the interests of a person entitled to be notified or consent sought, such must be a person anticipated by sections 66 as read with rule 7(7) of the Probate and Administration Rules. The Court entertains not the slightest doubt that the claim by the Objector does not qualify him as a beneficiary. The Court is inclined to retain its position and learning expressed in the case of *re Estate of Andrew Adhiambo Obonyo (Deceased)* (Succession Cause 03 of 2021) [2022] KEHC 13343 (KLR) (27 September 2022) (Judgment) that: -

“Section 29 of the *Law of Succession Act* sets out exclusively the dependants to an estate. That list excludes a claim by a purchaser. Accordingly, any claim by such purchaser does not rank in any level with those of beneficiaries. For the rights of a purchaser to be declared a claim against the estate, in the absence of acknowledgement by the dependants, such claim must be proved by a separate suit. Like in the instant case, there being a claim to land, the claim needs to be proved in the appropriate court, being Environment and Land court. It is a claim that is clearly not suited and cannot be forced to be suited into a succession court. I say it is not suited because it appears from the resistance to the application for revocation that the administrator was not only questioning the existence of any agreement with the deceased but additionally the legality hereof on the basis of the provisions of the *Land Control Act*, making consent to transfer mandatory as well as the defence of limitation. Those are questions that if raised and sought to be determined in the family court, would convolute the dispute and stretch it beyond the jurisdiction of the court”.

16. Even reliance in the Judgment of the Court in Kakamega HC Civil Appeal No. 76 of 2007 *David Livingstone Khayinga v Benson Mukala & 5 others*, which established and found that the Objector’s husband was a purchaser of a portion of the estate of the deceased does not make the case better. I have perused the Judgment which was an appeal from the decision of Western Province Land Appeal revoking the transfer and registration of the suit property in the name of the late David Livingstone Khayinga solely to the exclusion of other Purchasers of the suit property. The decision that the title reverts back to the name of the deceased was upheld by the High court in HC Civil Appeal No. 76 of



2007. The Court agreed with the decision of the Tribunal that the Appellant, the Objector's husband, was a Purchaser of a portion of the suit property, but not the whole as he purported to have done fraudulently. The Judgment in HC Civil Appeal No. 76 of 2007 reads in part;

“The tribunal evaluated the inheritance agreement dated 20th August, 1981 and noted that it indicated a purchase price of Kshs. 67,000 and a payment of Kshs. 9,600/- was made to Eliakawa Keya Akalanga, the wife to the original owner on 12/12/1991, the Tribunal further noted from the agreement that the appellant was buying a plot (shamba) from plot number Butso/Busotso/Bukura/750...

...I do find that the appellant fraudulently had himself registered as owner of the owner of plot No. Busotso/Bukura/750. There is no evidence that the land was given to him as inheritance and the purported succession cause number 2667 of 2002 was part of the fraudulent scheme...

...the respondent and the appellants are advised to pursue the real relatives of the owner...”

17. Where there is an allusion to an agreement for sale in a Judgment of the Court, and even if there was a definite finding of such sale, it would establish a cause for right to occupy or claim to land but not a claim in inheritance.
18. The dispute as presented by the parties appears to be whether the sale of a portion of the suit property in favour of David Livingstone Khayinga, Objector's husband, was completed. Another issue that seems to arise is if at all the transaction was completed, what should be the rightful boundaries. Determination of such disputes is a preserve of the Environment and Land Court as set out in section 13 of the *Environment and Land Court Act*, No. 19 of 2011, a statute enacted pursuant to article 162(3) of the *Constitution*.
19. It is the finding of the Court that the Objector is not a beneficiary and that the determination of her disputes relating to land ownership falls before the Environment and Land Court and thus this Court lacks jurisdiction to entertain and determine same. See *Re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR.
20. In conclusion and flowing from for the reasons set out above, I find the Objectors application for revocation of Grant to lack merit on the basis that it is not an inheritance claim. The application is dismissed with costs because it ought not to have been filed here at all.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 13TH DAY OF OCTOBER 2023.

PATRICK J. O. OTIENO

JUDGE

