



In re Estate of Margaret Mulama alias Margaret Anyanga (Deceased) (Succession Cause 169 of 2013) [2024] KEHC 14439 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 169 OF 2013**

SC CHIRCHIR, J

NOVEMBER 14, 2024

**IN THE MATTER OF THE ESTATE OF MARGARET
MULAMA ALIAS MARGARET ANYANGA- (DECEASED)**

BETWEEN

GEORGE BOB WILLIAM OTANGA 1ST ADMINISTRATOR

MARK MTIUMBA OTANGA 2ND ADMINISTRATOR

AND

PRISCILLAH SALOME OMAKOBE WABUTI OBJECTOR

RULING

1. The Applicant's summons dated 13th April 2023, seeks for the following orders;
 - a. (spent)
 - b. A preservatory order be issued to preserve the landed estate number North/Wanga/Kholera/972 and or any other estate of the deceased and restrain the 1st and the 2nd Administrators, their agent and or any other person acting on their behalf from making any dispositions in the said landed estate of the deceased pending the inter parties hearing and determination of the application herein
 - c. A preservatory order be issued to preserve the landed estate number North/Wanga/Kholera/972 and or any other estate of the deceased and restrain the 1st and the 2nd Administrators, their agent and or any other person acting on their behalf from making any dispositions in the said landed estate of the deceased pending the final hearing and determination of the application herein.
 - d. The registration of the 1st and 2nd administrators as the proprietors of the landed estate North/Wanga/ Kholera/972 and or any other estates of the deceased herein be cancelled and the land



registrar at the Kakamega county land registry be directed to amend and or update the register to the landed estate North/Wanga/Kholera/972 and or other landed estates of the deceased by removing the names of the 1st and 2nd administrators to revert back to the name of the deceased to pave way for filling of summons for confirmation of grant, distribution and transmission.

- e. The order made by this court on 17/2/2022 appointing the 1st and the 2nd Administrators as joint administrators in the estate be set aside and or reviewed.
- f. The grant of letters of administration intestate made on 17th February 2022 appointing the 1st and the 2nd administrators be revoked and or rectified.
- g. A fresh grant and or amended grant be made to include the name of the objector as a second or third administratrix and a joint grant be issued accordingly.
- h. Upon appointing the objector as third administrator, the objector be granted priority to file and serve summons for confirmation of the grant in the estate.
- i. An order be issued restraining the 1st and the 2nd administrators from destroying the existing boundaries of the landed estate, North/Wanga/Kholera/927 intermeddling in the estate, evicting the Objector from the deceased's estate and or interfering in any manner whatsoever with the objector's use and or occupation of the deceased's dwelling house on the estate.
- j. The 1st and the 2nd administrators to pay the costs of the application herein.

The Applicant's case

2. It is the Applicant's case that the deceased was her grandfather , the 1st Administrator is her uncle and the 2nd Administrator is her cousin. The 1st and 2nd Administrator s are father and son respectively and she is apprehensive that the two are in a collusion to disinherit her.
3. It is further stated that there existed two grants in respect of the same Estate , that is Bungoma CMSC NO. 352 OF 2017 and Kakamega HC SCC NO. 169 OF 2018. She further informs the court that the two causes were consolidated and the Administrators in the respective causes were to be appointed as joint Administrators. However during consolidation, the court made an error by appointing the respondents solely as Administrators, while excluding her.
4. She argues that having been an Administrator in Kakamega succession cause No. 169, it follows that she ought to have been a joint Administrator when the two causes were consolidated; that therefore the issuance of the grant in the sole names of the petitioners in Bungoma CMSC NO. 352 was an Apparent error in the face of the record.
5. The Applicant further states that the respondents have taken advantage of the said error to solely carry out the Administration of the Estate to the exclusion of her .
6. She further avers that it has come to her attention that the only Estate property being Land parcel No. North Wanga/ Kholera / 972 was distributed before the confirmation of grant.

The Respondent's case

7. The respondents state that the applicant had failed to meet the conditions for setting aside a consent order and/ or reviewing the consent order entered to on 17/2/2022 as well as the conditions for revocation of the grant under section 76 of the [Law of succession Act](#). It is further stated that the Applicant has never been in occupation of the land, and the question of her purported eviction does not arise.



8. It is further stated that there was no explanation for the delay occasioned in the filing of the present Application, considering that the order in question was issued 1 ½ years ago.
9. Finally the respondents argue that the objector fully participated in the order issued on 17/2/2022 and is thus not entitled to the equitable remedy sought in the summons.

Applicant's Submissions

10. The Applicant has given the background to the present Application and submits that there was an error on the face of the record of the order issued on 11th April 2023 (sic),in that there was failure to include her name as an administrator on the grant. That the order was based on an apparent misconception that the 1st and the 2nd Administrators were holding parallel grants as at 17/2/2022 when the joint grant was made, yet that was not the case.
11. While relying on the case of Paul Mwaniki vs. National Hospital Insurance Fund Board of Management (2020) eKLR she ,further submits that the court can correct such errors
12. It is the Applicant's further submission that the administrators took advantage of the error and sought the confirmation of the grant without notifying her ; that they proceeded to sub- divide the property and have now threatened her and her sibling with eviction from the said land.
13. The Applicant further submits that she and her siblings are direct heirs to her grandfather's estate upon the passing on of their father, Stephen Wabuti who was the son of the deceased. In this regard the case of Re estate of Florence Mukami Kinyua (deceased) (2018) eKLR has been relied on.
14. It is further her submissions that she has demonstrated that the suit property is at the risk of being alienated, and that damages would not be an adequate remedy. She contends that in terms of section 47 of the Law of succession Act and Rule 73 of the probate and succession Rules, this court does have the jurisdiction to issue preservatory orders;
15. The Applicant further argues that ,she has therefore established a prima facie case that meet the standard set out in the case Giella vs Cassman Brown (1973) E.A 358
16. On the third issue of whether the registration of the 1st and the 2nd administrators as proprietors of the suit land should be cancelled, the Applicant submits that the respondent s took advantage of the error on the order to exclude them from all the subsequent proceedings and on the distribution of the Estate.

Respondents' Submissions

17. It is the respondents' submission that the Applicant has failed to meet the conditions for setting aside a consent order. That being in the nature of a contract, a consent can only be set aside by consent of the parties or upon such other grounds as would qualify for setting aside a contract. In this regard the Respondents have relied on the following past decisions: Flora Wasike vs. Destino Wamboko (1982-1988), Brooke Bond Liebig vs. Mallya 1975 E.A 266 , Hirani Vs. Kassam (1952) 19 EACA 131 , the court of appeal in the case of Kenya Commercial Bank Limited vs. specialized Engineering Co. Limited (1982) KLR p.485.
18. On the prayer for revocation of grant, it is submitted that the objector has failed to prove that there exists conditions necessary to revoke a grant as set under section 76 of the law of succession Act and hence she is not entitled to the prayers sought.
19. The Respondents further point out that the Applicant has failed to give reasons for the delay of 1 ½ in seeking the orders for review .



20. On whether the court had jurisdiction to cancel title deed for the land parcel number North/Wanga/Kholera/972, the respondent contends that pursuant to Article 162 (2) (b) as read with Article 165 (5) (b) of *the constitution*, the court lacked the statutory jurisdiction to cancel title deeds, which jurisdiction belongs exclusively to the Environment and Land court.

Analysis and Determination

21. Issues for determination:
- a. whether there was an error on the face of the record
 - b. Whether a preservatory order should be issued
 - c. Whether the grant should be revoked

Whether there was an error on the face of the record.

22. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

“ Any person considering himself aggrieved-

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

23. The above order was imported into the *law of succession Act* through Rule 63 of the probate and Administration Rules.

24. A background to the present Application is necessary;

- a). The Applicant herein petitioned for Grant of letters of Administration intestate under this cause, following citation proceedings which gave her the green light to petition for the Grant.
- b). On the other hand the respondents filed succession cause No. 352 of 2017 at the chief Magistrate’s court in Bungoma.
- c). On 16/9/2021 the parties’ Advocates brought to the attention of the court the existence of Bungoma cause, and this court(Musyoka J) then directed the Deputy registrar to avail the Bungoma File .
- d). On 17/ 2/ 2022 the two causes were consolidated and the court made further orders which now form the subject matter of the present Application. that have given rise to the present Application.



25. For purposes of clarity I will reproduce the proceedings of 17/2/2022

“Mr. Mwebi: Bungoma file is now available. I propose a new grant should issue in the joint names of the two Administrators in the two causes. We will follow up with the summons for confirmation.

Mr. Manyoni: we can have joint Administrators.

Court:

1. The causes in kakamega HCSC No. 169 of 2013 and Bungoma CMCSNo. 352 of 2017 relate to the Estate of one person
2. The two causes are hereby consolidated with Kakamega HCSC No. 169 of 2013 being the lead file
3. The grants in the two causes are hereby revoked , and I hereby appoint George Bob William Otanga and Mark Mtiumba Otanga Administrators of the estate herein and a joint grant of letters of Administration intestate shall issue to the two out of kakamega HCSC No. 169 of 2013
4. The New Administrators shall have 30days to file summons for confirmation of grant.
5. Mention on 23/5/2022 for compliance and for directions on the disposal of the said summons”

26. A perusal of the two grants that were revoked to give way to the present grant showed that in Bungoma cause No. 352 the Administrators were the George Bob William Otanga and Mark Mtima Otanga , the respondents herein while in Kakamega cause No. 169 of 2013 the grant was issued to Priscilla Salome Amakobe Wabuti ,the Applicant herein.

27. Thus in the light of Mr. Mwebi’s submission as shown above and Mr. Manyoni’s concurrence , it follows that the new grant was to be issued in the names of the Administrators in each of the two, then subsisting grants . The error then occurred when the court listed the co- administrators in Bungoma cause as the new and only Administrators, instead of appointing the two in Bungoma 352 of 2017 plus the one in cause No. Bungoma 169 of 2013, who is the Applicant herein.

28. Without belabouring this point, that was an inadvertent error on the face of the record by the court, and is legible for review.

Whether a preservatory order should issue.

29. When it comes to preservatory orders, the court in re Estate of Simon Kimendero (Deceased)[2020] eKLR stated as follows;

“....Of specific significance to preservatory order in respect of estate property is that:

- a. The applicant has an arguable case;
- b. The property is estate property; and
- c. The property is likely to be dissipated or wasted away...”



30. The subject properties herein is the property of the deceased being North/Wanga/Kholera/972. The deceased died on 5th September 2013. On record is a certificate of search for the suit property showing that as at 13th march 2013, the property was in the name of the deceased. However as at the time filing this Application it had new owners, namely the Respondents herein. This is as per the search dated 23/ 3/2023 and marked as annexure PC5 to the Applicant's affidavit. The Applicant has further told the court that she has faced threats of eviction.
31. There is sufficient evidence showing that the said property is in danger of being alienated or wasted, and the prayer of a preservative order is warranted.
32. The Applicant has further stated that she and her siblings are heirs of the deceased , by virtue of being the children of the deceased's son. This fact has not been contested .
33. In the case of re Estate of Wahome Njoki Wakagoto (2013) eKLR the court held: -

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”
34. In the light of the above decision, I have no hesitation in holding that the Applicant and her siblings do have a valid claim to their deceased grandfather's Estate
35. Am therefore satisfied that he Applicant has established a prima facie case as to the preservation of the suit property.

Whether the registration of the respondents as proprietors of the suit property should be cancelled and the property to revert back to the deceased

36. The respondents have argued that this court has no jurisdiction to cancel the title. To this I would say , this is not strictly speaking a dispute about land ownership . It is rather the administration of the estate of a deceased person which falls squarely on the family court. The issues coming up are issues that came up during the current litigation before this family court.
37. According to annexure PC5 referred to above the respondents became registered proprietors of the deceased's property on 23/ 9/ 2021. It is not expressed to have been by way of a vesting order . The pertinent question is; how did the respondents took over the ownership of the property of the deceased and sub- divided it when the grant had not been confirmed.
38. Indeed the record shows that despite the court order of 17/2/2022 directing the respondents to file summons for confirmation of Grant , no such summons have been filed. It is either that the respondents feared that their attempted concealment of the error referred to herein would come out during confirmation proceedings or because they knew that they had already transferred the deceased's property illegally. The respondents have intermeddled in the deceased's estate. There having been an illegality in the transfer of the property, the prayer for cancellation of the sub- titles is equally warranted.
39. On the final issue of whether the court should revoke the grant and the applicant be included as an administrator, In my view the issue is not about revocation of the grant. It is rather correcting an error



which occurred. The error in issuance is rooted on the error made by the Judge. I will therefore order that the grant be amended to reflect the intention of the parties as expressed to the court on 17/2/2022.

40. The Respondent has submitted that there are no grounds for setting aside what was otherwise a consent order. To this I would say there was nothing wrong with the consent per se and as expressed by the parties. The error occurred in the recording of the parties' intention as expressed in their submissions to the court. Thus the issue of a consent does not arise in these proceedings.
41. In the end the Application succeeds and I hereby proceed to make the following orders:
- a). The registration of the 1st and 2nd respondents as the proprietors of the landed estate North/Wanga/ Kholera/972 is cancelled and the land registrar at the Kakamega county land registry is hereby directed to remove the names of the 1st and 2nd respondents and to revert the ownership of the property to the deceased.
 - b). A preservative is hereby issued preserving the landed estate number North/Wanga/ Kholera/972 and of the deceased and the 1st and the 2nd Respondents , their agent and or any other person acting on their behalf from making any dispositions in the said landed estate of the deceased are hereby restrained from selling, sub- dividing charging or in any way interfering or intermeddling with land parcel No. North/Wanga/Kholera/972 .
 - c). Priscilla Salome Amakobe Wabuti , George Bob William Otanga and Mark Mtiumba Otanga are hereby appointed as the Administrators of the deceased's estate.
 - d). An amended Grant of letters of Administration to issue forthwith
 - e) All or any of the Administrators to Apply for summons for confirmation for grant within 45 days from today's date mention on

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF NOVEMBER 2024.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant

Mr. Isiaho for Mr. Mukavale .K for the Applicant

