



REPUBLIC OF KENYA



**In re Estate of the Late Manoah Lumasayi (Deceased) (Probate & Administration Appeal 5 of 2021) [2024] KEHC 14409 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14409 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
PROBATE & ADMINISTRATION APPEAL 5 OF 2021**

**S MBUNGI, J**

**NOVEMBER 13, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE MANOAH LUMASAYI(DECEASED)**

**BETWEEN**

**NANCY NAFUNA ..... APPELLANT**

**AND**

**AYUB SABET WEKESA ..... RESPONDENT**

*(Being an appeal arising from the judgment of the Honorable B. Ochieng CM delivered on 7th May 2020 at Kakamega in Succession Cause No. 247 of 2017)*

**JUDGMENT**

**Brief background of the case.**

1. The appellant herein filed a petition in the estate of Manoah Lumasayi and she had a grant issued on 01.08.2017 and land parcel No. Kakamega/ Shamberere/758 was consequently transferred into her name.
2. The respondent herein applied for revocation of the said grant via summons for revocation and/or annulment of grant and cross application for grant dated 21.02.2018 on grounds that the property allegedly comprising the estate (the land parcel No. Kakamega/ Shamberere/758) was not owned by the deceased Manoah Lumasayi Mumanini alias Manda Omumanani who was her son but it was owned by Ayub Manda Omumanani who was her husband.
3. Further, she averred that her daughter Jully Muchina Mungonji (now deceased) she had petitioned for letters of administration in respect to the estate of her late husband Ayub Manda Omumanani alias Manda Omumanani vide Kakamega CMSUCC CAUSE No. 216 of 2016.
4. The summons for revocation/annulment/cross petition were heard and the lower court after considering the evidence tendered before it, found in favor of the respondent that land parcel No.



Kakamega/ Shamberere/758 was indeed the property of her husband but no the property of her son and gave the following orders:

- a. The registration of land parcel No. Kakamega/Shamberere/758 in the name of Nancy Nafuna Manda as an administrator is hereby nullified and the same be restored into the name of Manda Omumanani (deceased)
  - b. The grant of letters of administration to Nancy Nafuna Manda made on 1.8.2017 be and is hereby revoked and/or annulled and the same issued to the objector/applicant - Ayubo Sabet Nekesa.
  - c. The estate of the deceased Ayub Manda Omumanani be distributed in equal share to Ayub Sabet Nekesa (widow/administrator) who gets life interest; the family of Manoha Lumasayi Mumanini (son); and the family of Jully Muchina Mungonji (daughter). The church to get portion of land which they have been using since 1994.
  - d. Each party to bear its own costs.
5. The appellant herein, having been dissatisfied with the ruling, lodged an appeal vide a memorandum of appeal dated 16.03.2021 on the following grounds: -
- a. That the tanned trial magistrate erred in law and in fact in holding that the estate herein belonged to the late husband of the Respondent contrary to the evidence on record.
  - b. That the learned trial magistrate erred in law in failing to find that the Respondent having gotten married after the death of her husband and left her matrimonial home could not be the administrator of the estate herein.
  - c. That the learned trial magistrate erred in law in fact in including persons not entitled to the estate as beneficiaries thereof.
  - d. That the learned trial magistrate erred in law in holding that the estate herein belonged to one AYUB MANDA MUMANANI who passed away in 1969 when the only property of the estate was registered in 1975 long after the death of the said AYUB MANDA MUMANANI.
  - e. That the learned trial magistrate erred in law and in fact in failing to find that he had no jurisdiction in a succession cause to determine issues of ownership of land.
6. The appeal was canvassed by way of written submissions.

#### **Appellant's case.**

7. It was the appellant's submission that the respondent's husband, who was her father-in-law, died in 1969 before the creation of the title in 1975 as shown from the search certificate.
8. The appellant submitted that the death certificate issued to the appellant shows that her husband was known as Manoah Lumasayi Mumanani, while her father in law (husband to the respondent) was known as Ayub Manda Mumanani.
9. Regarding the property distribution, the appellant submitted that the respondent is entitled to a portion of the estate as a dependent of the deceased's son. She further averred that the distribution of the estate to the family of Jully should be revoked since her beneficial interest to the estate terminated with her death.



10. Further, she stated that the children of July have their ancestry elsewhere and ought not to be considered as beneficiaries in the estate, drawing reference to article 159(3) which shows that repugnant traditions are outlawed.

### **Respondent's case**

11. Vide his submissions, the respondent opposed the appeal, stating that the suit land was originally in the names Ayub Manda Omumanani alias Manda Omumanani who was the husband to the respondent; as opposed to the appellant's submission that the land belonged to her deceased husband Manoah Lumasayi Mumanani also known as Manda Omumanani.
12. It was the respondent's submission that during the land adjudication process the said Ayub Manda Omumanani alias Manda Omumanani was alive and his name had been submitted for his land to be registered in his name and hence it matters not that the register indicates that he was first registered in 1975 long after his demise.
13. The respondent submitted that it was the appellant's intention to disinherit the respondent, who lives on the land, her rightful share since the appellant has sold the land, moved away and gotten married.
14. Lastly, the respondent submitted that from the death certificate, Manoah Lumasayi died on 20.05.2006 aged 39 years, hence at the time of land registration he was about 8 years old, a minor who could not be considered to be registered as a proprietor of the estate land.

### **Analysis.**

15. This being a first appeal, this Court has the duty to analyse and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

16. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated as follows:-

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

17. I have looked at the memorandum of appeal, the trial court proceedings and judgment, and the submissions by both parties.
18. The main issue before the lower court was whether the deceased Manoah Lumasayi Mumanani alias Manda Omumanani was the same person as Manda Omumanani, named as the registered owner of land parcel No. Kakamega/ Shamberere/758 (see certified copy of the register dated 30.05.2018) as submitted by the appellant but denied by the respondent.



19. In answering this question, the learned trial magistrate rendered himself as follows:

“...The objector produced certified copy of the register for the suit property confirming that one Manda Omumanani was the registered proprietor thereof. He was registered on 16.7.1975. She also produced a copy of her late husband's certificate of death indicating that his name was Ayub Manda Omumanani, which correspond with the name in the register save for the first name Ayub which is missing. She also produced a copy of her son's death certificate indicating that his name was Manoha Lumasayi Mumanini which does not correspond with the name appearing in the copy of register and indeed no evidence was led by the petitioner to demonstrate that her late husband was also known by the alias "Manda Omumanani".

With regards to the death certificate of the petitioner's late husband, it in indicated that at the time of death on 20.5.2006 he was aged 39 years old and therefore in 1975 when the suit property was registered he was approximately 8 years old and obviously too young at the time of registration to be considered proprietor of the suit property as he had no capacity being a minor. And indeed this proposition is fortified by the chief's resolution in a clan meeting he chaired on 29.8.2016 to discuss the dispute between the petitioner and objector over the suit property (minutes produced as Pexhibit 2(c) where he resolved that the suit property belonged to Omumanani, the objector's husband. It is common ground that at the time of the objector's husband's death in 1969 the objector and her husband were already staying on the suit property together with their children including the petitioner's husband who was then only 8 years old. The inevitable conclusion to be drawn from the fact so far presented to court is that the name Manda Omumanani captured in the land register referred to the objector's late husband Ayub Manda Omumanani. I therefore find and hold that the suit property, land parcel No.758 is part of the estate of Ayub Manda Omumanani, the objector's husband....”

20. After finding that the suit property belonged to the estate of Ayub Manda Omumanani, the learned magistrate proceeded and appointed the respondent as an administratrix of the estate of Ayub Manda Omumanani after taking into consideration the provisions of section 66 of the laws of Succession Act which provides:

“66 When a deceased has died intestate, the court shall, save as otherwise expressly provide, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interest as provided by part V;
- (c) the Public Trustee; and
- (d) creditors”



21. On distribution, the learned magistrate made a finding that the estate of Ayub Manda Omumanani should devolve upon the widow and the children equally, their marital status or gender notwithstanding.

#### **Determination.**

22. In her grounds of appeal, the appellant raised the issue of whether the trial court had jurisdiction to determine the issue of ownership of land.
23. The law on the question of jurisdiction was enunciated in the case of Owners of the Motor Vessel “Lilian S” vs Caltex Kenya Limited [1989] KLR where the court held: -

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

24. Where there is a dispute as to the ownership of land, the matter is first settled before the Environment and Lands Court, then a judgment or a court decree is brought to the succession court for the mandate of a succession court is to distribute free property of a deceased person. There are various authorities which buttress this. In RE ESTATE OF KIOKO KITUVYA MAIL (DECEASED) (2019) eKLR his Lordship Justice C Kariuki sitting at MAKUENI on 24.01.2019 had the following wise words to say:

“.....if there's any dispute as to the ownership of the property title Makueni/Kakusi/1091, this court lacks the proper jurisdiction to adjudicate that dispute. In the case of Re Estate of Mbai Wainaina (Deceased) [2015] eKLR, Musyoka J stated that: "Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court". Consequently, and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust. In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court. The validity of the title subject can only be impeached in the proceedings in Environment and Land Court as this Court has no jurisdiction to determine the issue as to ownership of the land under art. 165 of the Constitution. Thus the protests herein succeeds to that extent. The Petitioners will be at liberty to impeach title subject herein in ELC court.

25. IN RE ESTATE OF ALICE MUMBUA MUTUA (DECEASED) [2017] eKLR his Lordship Justice W MUSYOKA sitting at NAIROBI on 20th January 2017 in his wisdom had this to say:

“...the Court held that when disputes arise after the confirmation of the grant, the same ought to be determined outside the probate court. The court in the case stated as follows:



- The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41 (3). Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above..."

26. From the above, the trial court clearly had no jurisdiction proceed with the succession cause. Only after the question of ownership of the land parcel No. Kakamega/ Shamberere/758 is resolved, shall the deceased's estate be free for distribution.
27. Furthermore, the question raised as to whether Manoah Lumasayi Mumanini was also called Manda Omumanini, or whether Ayub Manda Omumanani was also known as Manda Omumanini poses an issue on the true identity of the owner of the title deed of land parcel No. Kakamega/ Shamberere/758.
28. The true identity of the real owner of the land parcel No. Kakamega/ Shamberere/758 can only be ascertained after going through the particulars of the person like National Identity Card, postal address etc. registered as the proprietor held in the relevant land registry.
29. I have also noted that the trial magistrate upon revocation of the grant, appointed the respondent Ayub Sabet Nekesa as the administrator of the estate of Ayub Manda Omumanani and ordered that the estate of Ayub Manda Omumanani be shared equally by the respondent who gets life interest, the family of Manoah Lumasayi Mumanini, the family of Jully Muchina Mungonji and the church to get a portion of the land that they have been using since 1994.
30. I have looked at the record; I have not seen any order consolidating this petition and petition No. CMSUCC CAUSE No. 216 of 2016 which related to the estate of Ayub Manda Omumanani where Jully Muchina Mungonji was the petitioner.
31. To me, the correct position should be the respondent Ayub Sabet Nekesa Should seek to replace Jully Muchina Mungonji who has since passed on as the administrator of Ayub Manda Omumanani's estate.
32. The upshot of the above is that the appeal has merit to the extent that the learned magistrate had no jurisdiction. I therefore set aside the judgment and give the following orders that:
  - i. The proceedings in this petition be stayed until the Environment and Land Court resolves the issue of ownership of the land parcel No. Kakamega/ Shamberere/758.
  - ii. Either the appellant or the respondent or any interested party can move the Environment and Land Court appropriately.
  - iii. In order to preserve the estate of whoever will be found the rightful owner of land parcel No. Kakamega/ Shamberere/758, an inhibition order do issue restraining the parties herein or anyone from disposing the said parcel of land.



iv. Each party to bear its own costs of the appeal for they are family members.

33. Right of appeal 30 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**S.N MBUNGI**

**JUDGE**

In the presence of:

Mr. Munyendo for the appellant present online

Mr. Getanda for the respondent present online

Court Assistant – Fred Owegi

