



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 21 OF 1988

IN THE MATTER OF THE ESTATE OF LIGABO INYAMA LUSALA (DECEASED)

RULING

1. The application dated 5th October 2020 principally seeks determination of questions about administration of the estate of a beneficiary who happens to die before transmission of his share to his name, and whether this court can grant the orders sought by the applicants in the said application.
2. The share of a deceased beneficiary ought to vest in his or her estate. The survivors of a deceased beneficiary or the persons beneficially entitled to shares in his estate should initiate separate succession proceedings within which the share of the beneficiary's estate shall be distributed amongst his survivors or the persons beneficially entitled to shares in his estate. Such survivors should not go back to the principal estate, from which the beneficiary had inherited and have his share distributed in that cause. That would amount to conducting a succession within another succession, which is not permissible. It is so because it has the potential of disinheriting or disadvantaging individuals who are not privy to the principal succession cause.
3. With regard to that, the court in *In Re Estate of Tuaruchiu Marete (Deceased)* [2019] eKLR (Gikonyo J), stated:

“Share of deceased beneficiary

[14] The elephant in the room is that he replaced his father as the sole beneficiary of his share. Whereas a child of the deceased may take the share of his deceased parent directly, but this should be done in clear cases and with much circumspection. Trouble may come when one of the children of the deceased beneficiary takes the whole of the estate of the deceased beneficiary. This is fraught with many dangers. Consider these dilemmas; (1) you may disinherit other dependants of the deceased; (2) the court may not be in a position to identify the rightful beneficiaries of the estate of the deceased beneficiary; (3) the cause does not relate to the deceased beneficiary, thus, the safeguards in law say gazetting of the cause to invite objections may not be available in that kind of transmissions; (4) in case of disputes amongst the beneficiaries of the deceased beneficiary, those may not be resolved in the original cause. I have seen in my practice as a judge, many causes being unduly delayed by wrangles amongst the beneficiaries of the estate of deceased beneficiary. Of significance to note is that the share of the deceased beneficiary belongs to his estate and therefore, to all the beneficiaries of the deceased beneficiary. A more creative way which is supported by law is to indicate that the share shall go to the estate of the deceased to be shared equally by all his children. Such share is held in trust by the administrators of the original cause for transmission to the estate of the deceased beneficiary. ...

[15] Consequently, I direct that the share of the deceased beneficiary, the father of the 1st administrator shall revert back to his estate to devolve to all the beneficiaries of his estate in equal shares. The certificate of confirmation herein shall be so amended. Meanwhile, my understanding of the law is that the said share shall be held by the administrators herein in trust for the benefit of his estate. The name of the 1st administrator as a beneficiary shall be removed forthwith. However, he remains an administrator of the estate as his father's share is at stake. There is absolutely no ground for or point in revoking the grant. It is so ordered.”

4. The court in *In Re Estate of Tuaruchiu Marete (Deceased)* [2019] eKLR (Gikonyo J), cited *Kambora Mamau vs Esther Nyambura Kirima* [2002] eKLR (Khamoni J), where it had been said:

“As I said in this court's Succession Cause No 1086 of 1995, in the matter of the estate of Ndungu Kariuki (unreported); a certificate of confirmation of grant confers upon a beneficiary under it a beneficial interest. I stated:

“As a certificate of confirmation of grant, also referred to as a certificate of confirmation, confers upon a beneficiary under it a beneficial interest in the estate of the deceased person, where such a beneficiary subsequently dies before the executor or administrator of the estate for which the certificate of confirmation was issued transfers the resultant legal interest or title to the aforesaid beneficiary, it is not proper and lawful to proceed under rectification of that certificate of confirmation to replace the deceased beneficiary with a person other than a confirmed executor or administrator of the estate of the deceased beneficiary.”

...To get to be a confirmed executor or administrator of the estate of a deceased beneficiary, the proper procedure would be for the person aspiring to replace the deceased beneficiary to start the ball rolling in separate proceedings being a petition for the grant of probate or letters of administration in the estate of the deceased beneficiary. The aspirant will start those proceedings either as a petitioner as well as a beneficiary or as a purely beneficiary influencing others interested to have the petition filed.”

5. It follows, therefore, that the share of Charles Luchidia Ligabo, in the estate of the deceased herein, forms part of the estate of the said Charles Luchidia Ligabo, and should not be reverted to the estate of the deceased herein, Ligabo Inyama Lusala, deceased, for distribution, within this cause. What the survivor of Charles Luchidia Ligabo or the persons beneficially entitled to a share in his estate, ought to do is to initiate succession proceedings in his estate for administration and distribution of the share that has devolve to that estate from the estate of Ligabo Inyama Lusala, deceased.

6. I next consider whether I should make the orders that are sought in the application, dated 5th October 2020. Is there jurisdiction? Do the orders sought fall within the jurisdiction of the High Court? These are the questions that I am asking myself. The orders sought by the applicants relate to cancellation of title and registration of a new title.

7. The jurisdiction of this court in land matters was addressed in *Munyasya Mulili & 3 others vs. Sammy Muteti Mulili* [2017] eKLR (Nyamweya J), where the court said:

“In Salome Wambui Njau (suing as the Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v. Caroline Wangui Kiguru, Nairobi ELC Suit No. (2013) eKLR, which was relied upon by the Petitioners, I held that in matters of succession disputes touching on land, the Environment and Land Court pursuant to Article 162 (2) of the Constitution and the High Court as the Succession Court under section 47 of the Law of Succession Act would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which Court is best suited to hear and determine the dispute.”

8. In *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] KLR (Musyoka J) said as follows on the same:

“...The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

29. 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.”

9. Cancellation and issuance of titles falls within the jurisdiction of the Environment and Land Court, Section 13 of Environment and Land Court Act, No. 19 of 2011, reads:

“13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

10. It should, therefore, be clear beyond peradventure that the legal infrastructure for cancellation and registration of titles is the preserve of the Environment and Land Court. However, there is also contrary opinion, expressed in such cases as *In re Estate of Kimson Njoroge Kagunyo (Deceased)* [2018] eKLR (Bwonong’ a J), where it was said:

“9. The upshot of the foregoing is that confirmed grant in favour of the respondent is hereby revoked. It also follows that the registration of the respondent as the owner of the parcel of land is also hereby revoked. It is hereby directed that the applicant be registered as the owner of the suit land.”

11. In the end, I find and hold that there is no merit in the application dated 5th October 2020, and I hereby dismiss the same. Any party aggrieved with this order has leave of twenty-eight days to challenge the same at the Court of Appeal. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 10th DAY OF DECEMBER, 2021

W. MUSYOKA

JUDGE