

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 6 OF 2005

IN THE MATTER OF THE ESTATE OF THE LATE LUKA MUYUMBU DECEASED

RULING

1. The cause herein relates to the estate of the deceased herein who died on 9th April 1998. A letter from the Chief of Bunyala West Location, dated 10th May 2004, implies that the deceased was survived by two individuals named as Elijah Wekesa Muyumbu and Norah Nawoba Muyumbu, who are said to have been allotted shares in the deceased's land known as Bunyala/Navakholo/419. Representation to the estate was sought in this cause by Elijah Wekesa Muyumbu based on that letter. He listed himself and Norah Nawoba Muyumbu, as the survivors of the deceased. The assets that allegedly made up the estate are not listed in the petition. Letters of administration intestate was made on 16th May 2005 to the petitioner, and a grant was accordingly issued on 27th May 2005.

2. Predictably a summons for the revocation of the grant was filed on 11th July 2005, by Mahavini Cleophas Wawire, founded on the principal ground that the petitioner had suppressed information from the court, the fact that the deceased had been survived by other persons, being Japheth Wechuli Muyumbu, Jackson Wakhanu, Yonah Muyumbu, James Muyumbu and Peter Wawire. It was alleged that the persons that the deceased had allocated Bunyala/Navakholo/419 to were Kennedy Wawire, Muhavini Cleophas Wawire and Nora Nawoba. The application was heard by Sitati J. and a judgment was delivered thereon on 23rd June 2016. The Judge was satisfied that there was concealment and misrepresentation of facts and revoked the grant of 16th May 2005, and made a fresh grant to Elijah Wekesa Muyumbu, Norah Nawoba Muyumbu and Muhavini Cleophas Wawire.

3. The application for determination is dated 19th January 2018. It seeks confirmation of the grant of 23rd June 2016. It is brought at the instance of Muhavini Cleophas Wawire. He has identified seven individuals as the children of the deceased. Five of them are dead. Only Elijah Wekesa and Norah Nawoba are alive among them. The applicant's father is among the dead sons of the deceased. He identifies the deceased as having died possessed of only one asset, being Bunyala/Sidikho/419. He proposes that the said property be distributed between him and Norah Nawoba, with him taking seven acres of the land and Norah Nawoba the remaining two acres.

4. A protest affidavit has been filed against the said application. It is sworn by Elijah Wekesa Muyumbu, one of the other administrators. He claims that the subject land had been given to him and Norah Nawoba by the deceased, and that the applicant was not entitled to it. He asserts that the applicant had been given another parcel of land known as Bunyala/Sidikho/417.

5. The parties agreed on 28th June 2018 to have the application disposed of by way of written submissions. There has been compliance. I have read through the written submissions and noted the arguments advanced.

6. From the material before me it is clear that the deceased had made *inter vivos* transfers of some of his assets to some of his children. Bunyala/Sidikho/416 was given to Yona Luka, Bunyala/Sidikho/417 to Peter Wawire Muyumbu and Bunyala/Sidikho/418 to Elijah Wekesa. It is also plain that Bunyala/Sidikho/419 remained in the name of the deceased. The protestor alleges that the same was to be shared out between himself and Norah Nawoba, while the applicant claims that the land was to go to him and Norah Nawoba. At the oral hearing of the revocation application, the protestor confirmed that the deceased had directed that Bunyala/Sidikho/419 would go to the family of Peter Wawire and Norah Nawoba, and conceded that the family of Peter Wawire had built on the land. He said that the deceased had later changed his mind and gave the land to him. His witness, Bernard Wechuli Wawire, did not breathe a word about Bunyala/Sidikho/419. Norah Nawoba's evidence was that Bunyala/Sidikho/419 was to be shared out between her and the late Peter Wawire, where she would take two acres and Peter Wawire seven acres.

7. The overwhelming evidence appears to be that the deceased had distributed his property prior to his death. He effected *inter vivos* transfers to his sons, save for Bunyala/Sidikho/419, which remained in his name. His desire was that Bunyala/Sidikho/419 would devolve upon Peter Wawire and Norah Nawoba upon his death. That position is confirmed by the protestor, although he avers that there had been a change of mind by the deceased. I find that there is insufficient evidence to support the alleged change of mind. I am persuaded that Bunyala/Sidikho/419 should devolve in the manner proposed in the confirmation application.

8. I shall accordingly dispose of the confirmation application in the following terms: -

- a. That the application dated 19th January 2018 is hereby allowed and the protest to it is hereby dismissed with costs;**
- b. That the grant made herein on 23rd June 2016 is hereby confirmed; and**
- c. That the estate shall devolve in the terms proposed in the said application.**

9. It is so ordered.

DATED, SIGNED and DELIVERED at KAKAMEGA this 3RD DAY OF DECEMBER, 2018

W. MUSYOKA

JUDGE