

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO 1189 OF 2012
IN THE MATTER OF THE ESTATE OF PAULO MAKABIRO WAKA alias
MAKABIRA WAKA (DECEASED)

DANIEL WESONGA-----PETITIONER/
RESPONDENT

VERSUS

JAMES WAKA OLOO

MONICA AMUKOYA-----OBJECTORS/APPLICANTS
ONDUNGA

JUDGMENT

1. The applicant filled summons for revocation and or Annulment of grant dates 1st July 2024 seeking the following orders;
 - a) *The grant of letters of administration intestate issued to the petitioner/ respondent and confirmed on 05/03/2015 be revoked and or annulled on the following grounds;*
 - i. *The grant was obtained fraudulently by the making of false statements and concealment from the court material particulars and heirs and or liabilities to the estate of the deceased.*
 - ii. *The proceedings to obtain the grant were improper, irregular and defective in substance.*
 - iii. *The petitioner/ respondent filed the petition secretly and without the knowledge and or consent of the objectors/applicants.*
 - iv. *The objectors/ Applicants were omitted from this succession cause, yet they are beneficiaries entitled to inherit and the aim of the petitioner/ Respondent is to defraud and disinherit the objectors and or enrich himself unjustifiably.*
2. The application was supported by the affidavit of Monica Onduga Amukoya one of the objectors who claimed that she was the

daughter of Francis Were Waka who was the brother to the deceased Paulo Makabiro waka.

3. She claimed that their grandfather was survived by three beneficiaries who were his sons namely, Paul Makabiro Waka(deceased), Samuel Oloo Waka (deceased and Francis Were Waka (deceased).
4. She stated that Paul Makabiro Waka was the 1st born of the grandfather and as such held their grandfather's property MARAMA/SHINAMWENYULI/438 in trust for his younger brothers SAMWEL OLOO WAKA and FRANCIS WERE WAKA.
5. She acknowledged that the late Paul Makabiro Waka had four children being;
David Athiambo Makabiro, Daniel Wesonga, Moses Were Makabiro, Miriam Okango Waka
6. Further that Samwel Oloo Waka (deceased) had 2 children namely: - James Waka Oloo and Meshack Were Oloo and one daughter Monica Ondunga Amukoya.
7. THAT unfortunately, SAMWEL OLOO WAKA (deceased) and FRANCIS WERE WAKA(deceased) died before PAUL MAKABIRO WAKA (deceased).
8. THAT PAUL MAKABIRO WAKA (deceased) subsequently died before his brothers had obtained their titles out of MIARAMA/SHINAMWENYULI/438.
9. According to the applicant, their grandfather's property was well demarcated among the three brothers.
10. She claimed that the son to the late Paul Makabiro applied for letters of administration and succession process without involving the other beneficiaries.
11. She avers that the court issued letters of administration to the petitioner which was confirmed on 5/03/2014 having concealed to the court material facts about the existence of the other heirs and or liabilities to the estate of the deceased.

12. She claimed that she only learnt about the succession process after a purported buyer came to cultivate their portion of the land who bought it from the petitioner Daniel Wesonga.
13. According to the applicant, they conducted a search of the land and discovered that Marama/Shina Mwenyuli /438 had already been sub-divided.
14. They now seek that the court revoke the grant and confirmation of the grant and allow the proper administration of the estate of the deceased so that the beneficiaries.
15. The second objector was son to one of the brothers deceased Samuel Oloo Waka who gave a sworn affidavit stating the same facts and information as 1st objector and seeking the revocation of the grant which was confirmed to be revoked and the other beneficiaries be included in the grant.
16. The respondent failed to enter appearance or file a response to the application.
17. The application was to be canvassed by way of written submissions however at the time of writing this judgment none of the parties had put their submissions on the court file or the CTS.

ANALYSIS AND DETERMINATION

Issues for Determination

18. The following issues arise for determination:
 - i. *Whether sufficient grounds have been established under section 76 of the Law of Succession Act (Cap 160) to warrant the revocation or annulment of the grant.*
 - ii. *Whether the applicants have proved their claim of concealment, fraud, and exclusion of lawful beneficiaries.*
 - iii. *What orders should issue as to administration of the estate and costs.*
19. Section 76 of the Law of Succession Act provides that a grant may be revoked or annulled if:

- a) It was obtained fraudulently by making of false statements or concealment of material facts;
 - b) The proceedings to obtain the grant were defective in substance;
 - c) The person to whom the grant was made has failed to apply for confirmation or to proceed diligently with the administration; or
 - d) The grant has become useless or inoperative.
20. The Court of Appeal in **Matheka & Another v Matheka [2005] eKLR** held that concealment of beneficiaries and failure to obtain their consent renders the process fraudulent and warrants revocation.
21. Similarly, in **In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR**, the court emphasized that the law obliges a petitioner to disclose all beneficiaries, whether or not they support the petition, to enable fair distribution.
22. **In the Matter of the Estate of L.A.K (Deceased) [2014] eKLR**, Musyoka J. reiterated that a grant obtained without disclosure of all beneficiaries is defective and subject to revocation under section 76.
23. Likewise, in **Albert Imbuga Kisigwa v Recho Kavai Kisigwa, Succession Cause No. 158 of 2000**, the High Court observed that fraud and concealment of material facts strike at the very root of the succession process, making the resultant grant liable to revocation.
24. In **Samuel Wafula Wasike v Hudson Simiyu Wafula [1993] eKLR**, the Court of Appeal annulled a grant where the administrator had concealed material facts and disinherited rightful heirs, stressing that section 76 is meant to protect the rights of all beneficiaries.
25. The principle is also anchored on Article 27 of the Constitution, which guarantees equality and freedom from

discrimination, including in matters of inheritance. Failure to involve all beneficiaries violates this principle.

26. It is not in dispute that the deceased, Paulo Makabiro Waka, was one of three brothers who inherited land from their father. The applicants contend that the land parcel Marama/Shinamwenyuli/438 was family land as it belonged to their late grandfather and that it was demarcated among the 3 brothers, but held in trust by Paulo who was the eldest son for his younger brothers.
27. The respondent, being a son of Paulo, petitioned for letters of administration without the consent or participation of the applicants, who are children of the other brothers. There is no evidence that he cited or disclosed them in the succession proceedings.
28. Section 51(2)(g) of the Law of Succession Act obliges a petitioner to disclose all surviving beneficiaries of equal or lesser degree. The respondent failed in this duty. The omission amounts to concealment of material facts and brings the case squarely under section 76(a).
29. The fact that the applicants only learnt of the succession when a purchaser attempted to access the land, coupled with the respondent's failure to file any response to the present application, strengthens the conclusion that the process was secretive and fraudulent.
30. The claim that the land was ancestral and held in trust is plausible and consistent with the customary principle that the eldest son may hold land in trust for the family as was seen in the case of **Kanyi v Muthiora [1984] KLR 712**, where the Court of Appeal upheld the existence of customary trust in land.
31. Applying the above authorities, I find that the applicants have demonstrated sufficient grounds for revocation of the grant within section 76(a) and (b) of the Act.
32. The proceedings were defective in substance as they excluded lawful heirs and failed to disclose all material facts.

33. Accordingly, I find that the summons dated 1st July 2024 have merit and thus succeeds. I make the following orders:
- i. The grant of letters of administration intestate issued to the respondent on 5th March 2015 and the confirmation thereof are hereby revoked and annulled.
 - ii. A fresh grant shall issue in the joint names of representatives from each house of the three sons of the late Francis Were Waka, namely: (i) the family of Paulo Makabiro Waka, (ii) the family of Samuel Oloo Waka, and (iii) the family of Francis Were Waka.
 - iii. The administrators shall within six (6) months apply for confirmation of the grant with a proposed mode of distribution reflecting all beneficiaries.
 - iv. In the meantime, no dealings shall take place over the land parcel Marama/Shinamwenyuli/438 or its subdivisions until final confirmation.
 - v. Each party shall bear their own costs given that this is a family dispute.
 - vi. Mention 22nd April, 2026 for directions.

DATED SIGNED, and DELIVERED in open court at KAKAMEGA THIS 1ST DAY OF OCTOBER, 2025.

S.N. MBUNGI

JUDGE

IN THE PRESENCE OF;

CA: Angong'a

Absence of the parties though aware of the Ruling date.